VCAT and Bayside: A study of 2005/2006 Cases

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Focus of paper

The focus of this paper is upon proceedings before the Victorian Civil and Administrative Tribunal ("VCAT") where a permit applicant has sought to review a decision of the Bayside Council to *refuse* to grant a permit. The Bayside Council has expressed concern about the outcomes in these type of proceedings. In particular, the council has raised the concern that local policies of the council are being overridden by the State Government's policy *Melbourne 2030*.

Background

Victoria's planning system vests considerable power and responsibility in local councils. For example, councils act as planning authorities pursuant to the *Planning and Environment Act* 1987 and, with the approval of the Minister for Planning, can amend planning schemes to permit, regulate or prohibit the development or use of land. A local council also acts as a "responsible authority" pursuant to the Act; and in this role the council makes decisions on permit applications, as well as enforcing the provisions of the planning scheme.

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.

Since 1968 Victoria has had an independent tribunal with the responsibility of determining planning appeals – that is, review on the merits. Similar systems operate in all other Australian states. A planning appeals system provides a number of benefits. It enables stake holders to a planning dispute to be heard in full, and for their concerns to be considered in a measured and impartial way. It promotes the application of planning expertise to decision making. It emphasises that planning decisions must be made according to law. Because reasons are routinely provided for appeal decisions (but not for council decisions), it raises the standard of decision making. By taking the politics out of ultimate planning decisions, it promotes integrity in local government. Further, a State based planning appeals system gives proper recognition to the State's interests in planning outcomes.

The City of Bayside

One council which has been promoting a change to the mechanisms for the review of planning decisions has been the Bayside City Council. The City of Bayside, which has a population of about 89,000, straddles Port Phillip Bay and is located to the south-east of the centre of Melbourne. It includes the suburbs of Brighton, Sandringham and Beaumaris. Bayside contains many high quality residential areas; and councillors and local residents are, quite naturally, proud of their municipality.

The mayor of the Bayside City Council, Councillor Derek Wilson, has expressed the opinion that the State Government's policy *Melbourne 2030* is "the biggest threat to the character and amenity of our Bayside suburbs". Councillor Wilson was recently quoted as stating that Bayside Council was overruled by VCAT more often than most other councils. He has also called for reform of VCAT. I have accepted an invitation to meet with the Bayside council in October this year to discuss these questions.

The present study is designed to promote informed discussion. The study examines all decisions made by VCAT between 1 July 2005 and 31 August 2006 that have involved the City of Bayside.

Study method

VCAT routinely publishes information about the outcomes of proceedings in its Planning and Environment List. These statistics have been based upon the tribunal's case management data base and have not involved any analysis of individual decisions or the reasons for those decisions. Although the outcomes data provides a general overview of the List, there is no substitute for a close analysis of individual decisions. Hence, for the purpose of the present study, I have examined each of the decisions made since 1 July 2005 in relation to the Bayside. In some instances I have also examined the proceeding files of the tribunal to examine the reports prepared by council officers.

Types of proceedings

Table 1 sets out the different types of Bayside proceedings which were decided by the tribunal over the last 14 months. Of the 119 proceedings, 98 were reviews that resulted from permit applications. This should be seen in the context that Bayside processes about 800 applications each year.

Table 1
Bayside 2005-06
Types of Proceedings

Type of Proceeding	Number
Review of conditions	16
Review of decision to grant	19
Review of failure to grant	15
Review of refusal to grant	47
Application for enforcement order	9
Other	13
Total	**119**

Permit applicants initiate proceedings to review conditions, to review a failure to grant a permit and to review a refusal to grant a permit. Objectors initiate proceedings to review a decision to grant a permit. Applications for an enforcement order are sometimes initiated by the responsible authority, but may also be initiated by adjoining or nearby neighbours to the subject land. The category "Other" includes reviews of secondary consents (for example whether modified plans ought be approved), applications to cancel or amend a permit, and applications to extend time.

Review of conditions

Table 2 sets out the outcomes for cases where the Tribunal was asked to review *conditions* on a permit.

Table 2
Bayside 2005-06
Outcomes for Review of Conditions

Outcome	Number
Withdrawn	3
Consent order	2
Varied	11
Disallowed	Nil
Total	**16**

One of the two consent orders made upon a conditions review was made following a mediation conducted by the tribunal. The cases where a permit condition was varied involved permits for or concerning a dwelling (4), a multi dwelling development (2), an open space levy upon a subdivision (3), and a condition in relation to whether a medical centre could have one or two practitioners (1). None of these cases appeared to involve any major issue of policy or could be said to have had any major impact upon the residential character of Bayside. For example, Appeal P1175/2006 involved whether or not a carport should be allowed at the front of a building.

Review of decisions to grant

Table 3 sets out details of cases brought by objectors against a decision of the Bayside Council to *grant* a permit.

Table 3
Bayside 2005-06
Outcomes of Reviews of Decisions to Grant

Outcome	Number
Withdrawn	5
Consent order	6
Allowed	1
Varied	3
Disallowed	4
Total	**19**

Five of the applications lodged by objectors were withdrawn. It is possible that some of these proceedings might have been withdrawn because the permit applicant had made some concession in favour of an objector. Six of these proceedings were the subject of consent orders, in each case after a mediation conducted by the tribunal. As a general practice, the tribunal directs this type of proceeding to a mediation as it commonly produces a win-win outcome for the parties. (In the last financial year the

tribunal finalised a total of 239 cases in its Planning and Environment List by mediation, the success rate being 75%.) Typically a mediation will produce a compromise, where the permit applicant makes further concessions than those required by the council. Thus in these six cases objectors have achieved a better outcome than they would have achieved if they had simply accepted the decision of the responsible authority. In relation to the remaining cases: in one the objector won outright, in that a council decision to grant a permit was overturned and no permit issued; in another three cases the council decision was varied in favour of the objector; and four were disallowed. Thus in only four of the 19 applications lodged by objectors was the application for review disallowed by the tribunal.

Applications for enforcement order

Table 4 sets out outcomes in relation to applications for an *enforcement* order.

Table 4
Bayside 2005-06
Outcomes in Applications for Enforcement Order

Outcomes	Number
Consent order	3
Granted	4
Refused	2
Total	**9**

The circumstances in which a consent order was made usually involved the respondent agreeing to take a certain course to comply with the planning scheme. Hence most applications for an enforcement order were successful in the sense of bringing about compliance with the planning scheme.

Miscellaneous proceedings

Table 5 sets out outcomes in relation to *miscellaneous* proceedings, such as applications pursuant to section 149 of the Act (secondary consents), applications under section 87 of the Act (amendment or cancellation of a permit) and applications to refuse to extend time.

Table 5
Bayside 2005-06
Outcomes in Miscellaneous Proceedings

Outcomes	Number
Withdrawn	2
Consent order	2
Allowed	5
Disallowed	4
Total	**13**

Review of failure to decide

Table 6 sets out outcomes in proceedings where a permit applicant sought to review the *failure* of the Bayside Council to grant a permit.

Table 6
Bayside 2005-06
Outcomes in Review of Failure to Grant

Outcomes	Number
Withdrawn	1
Consent order	1
Allowed	8
Disallowed	5
Total	**15**

In two of the cases where the application for review was allowed, the tribunal's decision was in accord with the recommendation of the relevant planning officer of the responsible authority. In another case (P3557/2004), council's submission was substantially adopted. In two other cases the tribunal required significant changes to the development plans before granting approval. None of these cases involved the overturning of a council decision, as such, as they were reviews against the failure of the council to determine the application.

Review of refusal to grant

Table 7 sets out outcomes in relation to the cases where a permit applicant sought to review the *refusal* of Bayside Council to grant a permit.

Table 7
Bayside 2005-06
Outcomes of Reviews of Refusal to Grant

Outcomes	Number
Withdrawn	2
Allowed	32
Disallowed	13
Total	**47**

Of this type of proceeding that went to a decision (that is, after deducting the two proceedings that were withdrawn) permit applicants succeeded in 68%, which is typical of the comparable success rate of permit applicants for the State as a whole (70%).

Council officer recommendations

It is usual for a council to make its decisions on planning permit applications after receiving a detailed report and recommendation from its own professional planning staff. Bayside is no exception. Table 8 focuses on the 32 cases in the period under study where VCAT allowed a permit applicant's review of a council decision to

refuse a permit. The table sets out the outcomes based on whether VCAT's decision was in accord (or substantially in accord) with the recommendation of the Bayside professional planning officers.

Table 8
Bayside 2005-06
Refusal Appeals Allowed and Officer Recommendations

Officer Recommendation	Number
In favour	20
Against	12
Total	**32**

It is significant that in 20 of the 32 cases where the tribunal allowed a review against Bayside's decision to refuse to grant a permit the tribunal decision was in accord with the recommendation of the relevant professional officer of Bayside Council. It may be presumed to be unlikely that the relevant Bayside Council officer would have recommended the grant of a permit if this was contrary to relevant policies, including local policies. It is appropriate to provide some examples of cases where VCAT agreed with the council officers, but not the council. In P2814/2004 the council officer had recommended that council grant a permit for 5 apartments in Beach Road, Black Rock, stating the (revised) proposal "generally complies with the provisions of the Bayside Planning Scheme". And in P483/2006 the council officer had supported the construction of three dwellings in Grandview Avenue, Beaumaris, stating that the development is considered "to be appropriate for the site and will not detract from the existing streetscape and the neighbourhood character".

Another example of a case where the council officer recommended that a permit be granted - and a subsequent council decision to refuse was overturned by VCAT – was P3423/2005, which concerned four double story dwellings in North Road, Brighton. The officer had advised council that the proposal "generally complies with the provisions of the Bayside Planning Scheme" and would not unreasonably impact on the amenity of adjacent properties and will not detract from the neighbourhood character of the area, subject to appropriate conditions. The tribunal agreed with this assessment.

A further example of a case where the council did not support its own officer's recommendation is P823/2005, which involved a four storey building, with ground level shops, three upper levels of dwellings and a basement carpark, on land in the Sandringham activity centre. The site contained the former Sandringham post office and was located within an area known as the "Sandringham Urban Village". The land was zoned Business 1 under the Bayside Planning Scheme and was subject to a local policy known as the "Sandringham Urban Village Policy". The tribunal concluded that there was a strong level of strategic policy support for the proposal. Although the member referred to *Melbourne 2030*, greater reliance was in fact placed upon the Sandringham Urban Village Policy. This policy encouraged the development of Sandringham shopping centre as a commercial and housing node, and specifically provided that in the retail core area (where the site was located) a fourth storey could be permitted on a site such as the subject land. Indeed the relevant council officer's

report to council had stated that the development "is consistent with the Sandringham Urban Village Policy and Strategy and will result in a significant improvement to the key location within the Sandringham Shopping Centre."

VCAT decisions contrary to council officer recommendations

What emerges from this study is that, since 1 July 2005, there have been only 12 cases where VCAT has determined to allow an application for review of a decision of the Bayside Council to refuse a permit where the council decision was supported by council's own professional officers. These 12 cases ought be seen in the light of the fact that there are about 800 applications for permits in the City of Bayside in a typical year. Hence the number of cases in this category is about 1.5% of the total number of applications considered by Bayside Council in a year.

Types of cases

It is valuable to give further consideration to the 12 cases where VCAT has overturned a decision of the Bayside Council to refuse a permit, where a refusal was recommended by council's officers. Four of these cases were about a single dwelling, either the erection of a dwelling or the making of alterations to a dwelling: for example, one case was about an attic extension; and another was about the conversion of a double garage into a single garage and a studio. One case was about a pole sign; another was about whether a three lot subdivision need be accompanied by a development plan (the subdivision as such was not opposed); one was about a covenant; and one proceeding was about a warehouse development. The remaining four cases were about the erection of more than one dwelling on land; but only two of these (P470/2005 and P241/2006) involved major development. The other two multi dwelling cases involved two units in each case.

Melbourne 2030

In 9 of the 12 cases presently under consideration the tribunal did not mention the policy *Melbourne 2030* in its reasons for decision; and it is apparent that the policy played no role whatsoever in the decision. This is not surprising as the decisions were about single dwellings, signs and other modest developments. In one (P1489/2005) of the 12 cases, *Melbourne 2030* was mentioned but did not play a substantial role. In only two cases (P470/2005 and P241/2006) did *Melbourne 2030* play a central and important role. These two cases are discussed at greater length below.

Tribunal modifications to reduce intensity of development

Another feature worth commenting on is that in three of the 12 cases presently under consideration the tribunal's decision to allow the application for review was predicated upon changes to the application plans, designed to reduce the intensity of the development.

Highett case

As previously mentioned, of the 12 cases under consideration there were only 2 which involved substantial development, in terms of having a significant impact on the character of the municipality, and in which *Melbourne 2030* played a significant role. The first such case (P470/2005) involved a proposal for a four storey mixed use development located in the Highett shopping centre. The Highett train station was just to the north-east of the site and a bus stop was located outside the site. The

council had refused to grant a permit for a proposal that involved the construction of 151 apartments. Although the council officers had recommended the refusal of the application on the ground of excessive building bulk, they told council that the proposal was "generally compliant with policy". When the matter came before the tribunal amended plans were substituted, by consent, which reduced the intensity of the development to 118 apartments. The proposal also involved a full line supermarket and 22 retail shops, as well as an area proposed for office use. The land was located in a Business 2 zone under the Bayside Planning Scheme, although there was a planning scheme amendment on foot which sought to rezone the land to Business 1.

At the hearing before the tribunal, the council did not seek to contest the desirability or appropriateness of the land uses as such. The tribunal allowed the application for review – although it required further modifications to the design of the development – and concluded that the proposal was supported by policy. The tribunal referred to the metropolitan strategy outlined in *Melbourne 2030*, the basic principles of which are now set out in statutory form in clause 12 of the Bayside Planning Scheme. Interestingly, the tribunal observed that the local planning policy framework in the Bayside Planning Scheme echoed a similar sentiment for development in activity centres as did the State policies. For example, the local policy in clause 21.05 of the scheme identified that one of the strategies to be adopted to accommodate increases in residential population levels in Bayside was to "encourage higher density housing principally in activity centres … particularly those with good access to public transport networks". The Highett shopping centre was a nominated activity centre in the local policy provisions of the planning scheme. The tribunal observed:

> "The State and local planning policies are unanimous and unambiguous about encouraging higher density housing and economic activities associated with an activity centre to achieve the containment of urban growth and efficient use of resources."

Thus, even in this case, where *Melbourne 2030* was a major element in the decision, the tribunal formed the view that the development was in accord with the local policies which formed part of the planning scheme at the date of the decision.

The Bay Street case

The second major case (P241/2006) involved a proposal to construct a four storey apartment building on a large site in the Bay Street major activity centre in Brighton, in close proximity to a railway station. The council officers had written a report concluding that the site "is an ideal candidate to respond to the strategic directions for urban consolidation espoused by *Melbourne 2030*", but thought that the urban design quality of the proposal was inadequate. The tribunal concluded that, if modified, the proposal was satisfactory and would give effect to planning policies and strategies.

The requirements of the law

It needs to be stressed that both a responsible authority and the tribunal are bound to determine planning permit applications according to law. It is not open for a council to determine a permit application by reference to an irrelevant consideration or for an ulterior motive. For example, the law requires that particular types of applications be determined by reference to prescribed criteria. In proceeding P2588/2005, a case that

involved a dwelling in a heritage overlay area, the council decision was refused on overlooking grounds, even though this is not a relevant consideration when the only control is a heritage overlay control. In another case (P255/2006) the tribunal was told that the council had made a decision to refuse a permit for a dwelling – in the face of an officer recommendation to the contrary – because the proposal failed to meet one of the quantitative requirements of clause 55 of the Bayside Planning Scheme. However, the law does not require compliance with the quantitative requirements of clause 55; it is sufficient if a development complies with the objectives set out in the clause.

Timeliness

Table 9 sets out details about the timeliness of VCAT decision making, in terms of the median number of weeks between the lodgement of an application and the determination of the application.

Table 9
Bayside 2005-06
Timeliness of Decision Making

Type of Proceeding	Weeks
Review of conditions	13.5
Review of decision to grant	12.0
Review of failure to grant	21.6
Review of refusal to grant	18.1
Application for enforcement order	12.0
Other	13.9
All proceedings	**16.4**

In overall terms, the median time taken for VCAT decisions in relation to the City of Bayside is 16.4 weeks, which is close to the State median of 16 weeks. This is a significant improvement from the position three years ago, when the State median time was 22 weeks. The timeliness of VCAT decision making compares very well with other states.

Conclusion

Decisions about Bayside matters during the period since 1 July 2005 were made by tribunals consisting of more than 25 different members. Notwithstanding this, there is a strong consistency of approach in the manner in which the tribunal has applied the provisions of the planning scheme. If any overall trend is to be identified, it is that there is a strong correlation between tribunal decisions and the professional advice of Bayside's planning staff.