C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON THE ENVIRONMENT AND PLANNING

Subcommittee

Inquiry into the Planning and Environment Amendment (Recognising Objectors) Bill 2015

Melbourne — 10 July 2015

Members

Mr David Davis — Chair

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Witnesses

Ms Christine Wyatt (sworn), deputy secretary, planning,

Mr John Ginivan (sworn), executive director, planning and building systems, and

Ms Paula O'Byrne (sworn), principal policy adviser, legislation, Department of Environment, Land, Water and Planning.

The CHAIR — I declare open the public hearing of the Legislative Council's environment and planning committee, which means all mobile phones and so forth are now to be turned off. Welcome. Today's hearings are being undertaken by a subcommittee of myself, Colleen Hartland and Simon Ramsay, who will be with us quite shortly. We are receiving evidence about the Planning and Environment Amendment (Recognising Objectors) Bill.

First of all I will have Keir swear in Christine Wyatt, John Ginivan and Paula O'Byrne. Thank you for making yourselves available on relatively short notice. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comments you repeat outside the hearing may not be protected. All evidence is being recorded. You will be provided with proof versions of the transcript in the next couple of days. We have allowed a reasonable period of time for this session to ensure that there is an opportunity not only for your evidence but also for some questions.

We have about 45 minutes for this session, so we will begin by asking you to give a presentation. The inquiry is seeking to obtain evidence in relation to the Planning and Environment Amendment (Recognising Objectors) Bill that is currently before the Parliament. Christine, are you leading off?

Ms WYATT — Yes. Thank you, Chair. I have a short set of notes that I will read out, if I may. It will not take long.

By way of introduction, the Planning and Environment (Recognising Objectors) Bill is important within the context in which the planning system operates, the growth pressures currently being experienced in Victoria, how this impacts on communities and the integral role that third-party participation plays in ensuring better planning outcomes are achieved for all Victorians. I will take you through each one of those little topics.

First of all, what does the bill do? To recap, the bill inserts a new decision-making consideration into the Planning and Environment Act. The act currently requires a responsible authority to consider any significant social effects and economic effects that a proposed development may have when determining an application for a planning permit. That is in section 60(1)(f) of the Planning and Environment Act. I will refer to the act as the act unless I refer to any others.

The Victorian Civil and Administrative Tribunal, or VCAT, must have regard to any matter considered by the responsible authority in making its decision, and that is in section 84B(1) of the act. The bill amends section 60(1A) and section 84B(2) of the act so that both the responsible authority and VCAT must have regard to the number of objections to a permit application in considering whether the proposal may have a significant social effect.

If I can just come back to the four points that I raised before, I will quickly touch on each one. First of all, it is important for the context of the planning system, because each state in Australia is different, so for once we can say we are all unique. The Victorian planning system is Victorian based and designed to facilitate development. The system has a number of key components: a strong focus on strategic planning and policy; a set of land use zones with broad discretion, and the types of proposals that can be considered in zones has generally been broad, and over the years that has had various considerations and been broadened through planning scheme amendments; the planning permit as the preferred form of development, which allows the merits of individual proposals to be tested through the permit process; and we have third-party participation or review through amendments to planning schemes and decisions on planning permits. Because discretion in planning zones is wide rather than narrow, strategies and policies play an important role in influencing how growth is managed, and the community's view offers valuable insights into potential effects of a proposal.

If I can touch on planning permits, planning permits are often the final point of focus when competing objectives come to the fore and tensions arise between competing interests. Based on *Planning Permit Activity Annual Report: 2013–14*, over 56 400 planning permit applications were made in Victoria. This number is up 9 per cent from the previous year and reflects growth in Victoria's population and the economy.

I will have to do a few facts and figures. Of that 56 400, 40 per cent — or 22 560 — of those applications were advertised to third parties, consistent with the statistics for previous years. Of the 56 400 applications received, only 3 per cent — 1626 — were subject to review at VCAT. For a system where there is a large number of applications advertised to third parties, only a small percentage are appealed to VCAT. To go a little further

with statistics, of the appeals to VCAT, a smaller proportion is known as objector appeals. Of that 1626, 488 were objector appeals, so about 25 per cent, and that was in the year 2013–14. All those statistics happened in 2013–14. That would say the majority of appeals — the 75 per cent of appeals — are by a proponent either against a decision by the council to refuse a permit or against conditions posed by the council on a permit or in some cases by other responsible authorities such as the Minister for Planning.

If I can touch on the context of growth for some of the increasing development applications and the context for that range of statistics we have seen, at present Victoria is the no. 1 growth destination nationally. There are 100 000 new residents a year establishing in the state, and the population is driven by Melbourne's recent and continuing popularity as a place to live, work and raise a family. This has resulted in growth in residential building and an unprecedented shift in the types of dwellings being built. The Housing Industry Association, in a forecast of dwelling commencements released in May this year, anticipates that the figures for Victoria over 2014–15 will be nearly 60 000 housing starts, compared to around 20 000 in New South Wales.

During the past five years apartments have been quite a big growth story in Victoria's building industry, especially high-rise apartments in Melbourne. This aspect of dwellings represents between 30 and 35 per cent of all new dwellings constructed across the state. This has created a tension in the planning system that we have experienced, and it has influenced how local communities participate in shaping an appropriate level of change in their built environments because, as industry commentary will indicate, that is quite a significant shift in our stock of housing from what we are used to. Currently this is evidenced by the debate around the size, amenity and livability of apartments and what sort of legacy we are creating for the city, and by recent high-profile appeals regarding committee opposition to proposals.

If I can touch on the role of third-party participation, overall the planning system works relatively well, with a low level of disputes taken to VCAT if you look at those statistics of planning applications overall. Since the inception of the Town and Country Planning Act 1961, Victoria has had a strong culture of third-party involvement in the planning system, and in successive reviews of the system this has been widely acknowledged as one of its strengths. For example, in 2011 the Victorian Planning System Ministerial Advisory Committee concluded that third-party involvement is an important component of Victoria's planning system.

Recently we have seen a number of high-profile VCAT cases where the issue of community opposition and its role in permit decision-making has been commented on. When the then president of VCAT, former Justice Stuart Morris, QC, presented a paper, in 2005 he set out three advantages of the existence of third-party participation. These were that, one, it tends to improve the quality of governance. By 'governance' he referred to the process of making decisions, not just the end results. Two, it leads to better planning decisions. It is comparatively rare for an objector to completely succeed in overturning a decision but their involvement leads to a better planning decision. And three, it discourages corrupt behaviour between developers and local government by providing opportunities for third parties to scrutinise and challenge decision-making, thus keeping decision-makers accountable.

Finally, if I can just go to the role of the decision-maker, decision-makers are required to have regard to the planning scheme, the requirements of the act and the salient facts and impacts of a proposal in making their decision. Broadly, this already includes consideration of environmental, economic and social impacts. Objectors to a permit application must also demonstrate how they would be affected by a proposal. In a number of cases where there has been strong community opposition, VCAT has said that the number of objections is not relevant in deciding whether or not a permit should be granted. I am just going to touch on a couple of notable decisions in this regard, so I will read them out slowly as I do that so they can be recorded.

The first one is the notable decision of *Lend Lease Apartments (Armadale) Pty Ltd v. Stonnington City Council* [2012] VCAT 906. This case was an appeal against the council's refusal to grant a permit for a significant residential development in Orrong Road, Armadale. Approximately 600 people objected to that application, and VCAT said:

> We must not have regard to irrelevant considerations. The extent of resident opposition per se is one of these.

That proceeded to the Supreme Court in *Stonnington City Council v. Lend Lease Apartments (Armadale) Pty Ltd* [2013] VSC 505. On appeal to the Supreme Court in this case, VCAT's decision was affirmed. While the court found that the number of objections was not relevant in that case, it did not rule out the possibility that the extent of residential opposition could be a relevant planning consideration. The court said:

> It may be relevant as a salient fact giving shape to a significant social effect in some circumstances but its status as such must be established in each case.

Further cases include *McDonald's Pty Ltd v. Yarra Ranges Shire Council* [2012] VCAT 1539. This case was an appeal against the council's refusal to grant a development at a site in Tecoma's main street for a convenience restaurant. Over 1300 people objected. In that case VCAT said:

> … planning decisions are not to be based on the numbers of objections. Our decision must be based on the planning merits of the planning arguments and the evidence for and against this proposal.

A further example is *Minawood Pty Ltd v. Bayside City Council* [2009] VCAT 440. This case was an appeal against council's refusal to amend an existing permit for the partial redevelopment of a hotel in Brighton. The amendment sought to demolish the remaining portion of a hotel and replace it with five dwellings. Over 4300 people objected. In that case VCAT said:

> … numbers for or against a proposal are not relevant per se in administrative decision-making. Rather, it is the substance or merits of the views expressed … that must guide the decision-maker.

However, VCAT also said:

> … we consider that the number of objections and the consistency of their message about the significance of Khyat's Hotel within the local community is evidence of the cultural significance of Khyat's Hotel.

Further, in *Rutherford & Ors v. Hume City Council* [2014] VCAT 786 the tribunal set out a number of principles for assessing significant social effects. The effects to be considered are those the decision-maker considers to be significant. The significant effect must have a causal connection to the use or development proposed. The effects are those that affect the community at large or an identifiable section of the community. The assessment should be based on proper evidentiary basis or empirical analysis, preferably through a formal social impact assessment, and the social effect must be sufficiently probable to be significant.

Previous VCAT and court decisions therefore suggest that the number of objectors is likely to be most relevant where the impact assessment requires some understanding of community perception and values, such as whether a place has a social value or whether there is a specific social need or consequence in the community.

What is the response? In a performance-based planning system the choices available to recognise the number of objectors in a measured way are fairly limited. Previous court and VCAT decisions have told us that the extent of community opposition may be a relevant factor in assessing a proposal but ultimately the final decision needs to be based on a proper weighing up of all the planning merits of the proposal. Recognising local interests by moving back to highly prescriptive and codified planning requirements would be a retrograde step. It would return Victoria to a more cumbersome planning system that lacks the flexibility to deliver the innovation and good design that the community currently demands.

Conversely, mandating that the number of objections is to be considered in all circumstances without proper consideration of what the number of objections tells you about the impacts potentially bogs down the planning system in disputes based on numbers rather than merits.

We know from the statistics that the community is fair and reasonably minded in exercising its rights to object and consequently appeal in the current system. Generally citizens or communities only engage where they truly believe that the proposal at foot has a significant and real impact to the future planning and development of their area.

Whilst it might be easy to quantify traffic impacts or other tangible factors, the assessment of social impact is always more qualitative and highly value driven. It can be informed by analysing objections and considering the extent to which communities are sufficiently concerned about or are able to articulate the consequences that a proposal will have on them. When decision-makers need to exercise judgement, considering the extent of community views about a proposal is important to the overall outcomes.

Just to round out what the bill does in response to all of that, the bill seeks to amend the Planning and Environment Act to insert a new decision-making consideration so that both the responsible authority and VCAT have regard to the number of objectors to a permit application in considering whether the proposal may

have a significant social effect. The act does not define a 'significant social effect', nor does the bill amend the act to do so. What is significant will always depend on the particular facts and circumstances.

The bill does not direct the responsible authority or VCAT to consider the number of objectors in every case; that is, it does not make it mandatory for the number of objectors to be considered. The bill leaves it to the discretion of the responsible authority and VCAT. Mandating is not considered appropriate because: firstly, each situation is different and must be considered individually; and, secondly, it would not be appropriate to direct how something must be considered — only what. In arriving at the recommended changes, it is important to note that section 60(1)(c) of the act already requires VCAT to consider the issues raised in all valid objections when a matter is brought before it for review.

This bill builds on the strengths of the current performance-based planning system by making it clear that the number of objectors, where relevant and appropriate, is a factor that must be taken into account when considering whether there may be a significant social effect of a proposal requiring a permit. Thank you.

The CHAIR — Christine, thank you. Paula and John, do you want to add something to that before we proceed? No. I have a number of questions. The first is the definition of 'social'. I wonder if you have a working definition; is it one based on previous VCAT rulings or the common definition of 'social'?

Ms WYATT — There is not a definition of 'social', and in each case it will be different. Social generally is akin to community or community effects. I suppose in a general sense we tend to think of natural, built and social: the physical land use in the natural environment; environmental impacts about what we might do to land, air, water; and social is generally considered people and community.

The CHAIR — So it is a very wide definition.

Ms WYATT — Correct.

The CHAIR — I note a couple of comments you made in your presentation: that the significant point will derive from facts and specific circumstances, and the social impact is qualitative and more value driven. In those circumstances it seems to me that the whole definition of social and related matters is going to become a point of significant contest. There is obviously a more circumscribed power there now, but this seems to open up a broader impact in terms of social impacts as expressed through a large number of submitters, potentially, and that this is likely to be a point of significant legal contest by both proponents and objectors.

Ms WYATT — In response to that I would say that that already exists in the majority of the cases that go before VCAT and panel hearings — decisions by responsible authorities. Those matters are already in existence as to: just because you have a lot of objectors, does that mean there is a social impact? I think what this will do is put a stronger onus on objectors to demonstrate some effect, so that the decision-maker can discern whether numbers translate to social effect. So it is not trying to take away from the ability for a lot of people to be involved. I think what you will see contested is: just because you have numbers, is there merit in that social impact?

The CHAIR — So you see that it will certainly be a point of legal contest, and planning lawyers will seek to in some cases widen and in other cases narrow the appropriate definitions or impacts in an attempt to have the decision-maker, whether that is VCAT or a responsible authority, make a decision as to what is a significant impact.

Ms WYATT — I think they currently do that now. I think what they will do in this case is tie that to the degree to which those submissions need to be given weight.

The CHAIR — If a decision-maker decides it is significant, so it is like a trip-wire, in effect, the large number of objectors then become an aspect that has to be taken into account.

Ms WYATT — That is what this bill will do, so that will be in place. I think the contestability will be for the decision-makers to consider the merit of that large number of submissions and whether it has merit for a social effect, as opposed to the case in relation to Stonnington, where VCAT decided that the large number and the content of those submissions were, 'I just don't like it', but that did not equal a social effect.

The CHAIR — Does the department have modelling or estimates about whether this will generate more legal activity and more legal contest around particular — —

Ms WYATT — No, we do not.

The CHAIR — All right. You say it has to be established in each case. I just wonder whether this is in effect a ruse or a layer of giving the appearance of a different power or different head of capacity for communities to object, but that it may not fundamentally change the decisions that the relevant authority — the responsible authority or VCAT — actually has to make.

Ms WYATT — You can already do that now under the current provisions. So whether or not by just having more lodge grounds — it still comes back to the merit, because there is the ability for this to be done right now — for this to be taken into consideration in each case.

The CHAIR — So it is a bit of window-dressing?

Ms WYATT — I think what it does is put that ability for the tribunal and the decision-maker to consider the number of objectors and to direct them to have a look to see whether there is a social effect, because that was contested by both the VCAT case and the Supreme Court case, in effect.

The CHAIR — As you say, they could already do that now.

Ms WYATT — They could, but they are not required to really, which is the contestability. It is obvious in a couple of cases that the large number of submissions was an indication of a social effect.

The CHAIR — One case you quoted was the Tecoma case. It seems to me that that was squarely within the planning zonings and arrangements and that, despite the many sincere objectors, the responsible authority or VCAT would not have been able to come to any decision that was different, other than that there were lots of objectors but it was squarely within the zoning that was available.

Ms WYATT — Again, I cannot comment on that. I have not looked at it to that degree on that question. But I think the matter is that the merits of the objectors' case needs to be considered by the responsible authority, and obviously that is what was done.

The CHAIR — So it would not have changed anything there?

Ms WYATT — But they obviously came to the conclusion in that case — I am just second-guessing because I would have to refer to it and read it. The decision would have been that the responsible authority and subsequently VCAT took into account the nature of the submissions and the volume and came to a decision under the requirements of the matters that are required under the act.

The CHAIR — Just to get this clear in my head, you could have 10 000 submissions over here and the planning scheme is quite clear that a use is allowed and the responsible authority either gives a permit or does not and then there is an appeal by one party or another, but where it is squarely within the right to give that permit the 10 000 objections over here would actually have no particular impact.

Ms WYATT — If those 10 000 objections did not raise a matter of merit, correct.

Ms HARTLAND — I want to follow this line a little bit. If I can just give a scenario. I am a member in the western suburbs. I have experienced a number of Islamic groups putting forward either a school or an Islamic centre or a mosque. They have done their due diligence very well because they know there will be objections on social issues rather than on planning. How would this part of the bill assist where it is purely a planning issue — it has all been ticked off as far as planning is concerned — but there are 5000 objectors, often from across the state and around the country because it is an Islamic centre? How would VCAT take that into consideration?

Ms WYATT — I cannot answer for VCAT on how they would do that. Again, I would imagine that they work their way through the policy and requirements under the act to be taken into account. They would look at all the things that the act requires them to do. If it comes down to religious or philosophical differences — as indicated in the case that is quoted in the Supreme Court ruling on Stonnington, that actually goes to that

matter — there would have to be some social evidence put forward to the tribunal that would show a cause and effect of significant social effect on the receiving community of having that proposition.

Ms HARTLAND — If for those 5000 objectors it was all on whatever theory they had about the centre rather than planning, it would not be counted.

Ms WYATT — It depends on the nature of the requirement for the permit. If it was a permit that was allowed as its use, then the zone contemplates a whole range of activities and that use might be one of them. If the permit is just for the built form, then regardless of your philosophical views of whatever shape or form, if it is not a matter in relation to the requirement for a permit trigger, it is irrelevant.

Ms HARTLAND — And it would be irrelevant under this amendment?

Ms WYATT — Correct.

The CHAIR — Thank you for your presentation, Christine. It was a very comprehensive one. I thank both Paula and John for appearing as well.

Witnesses withdrew.