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

Ms Colleen Hartland

Mr Simon Ramsay

Staff

Secretary: Mr Keir Delaney

Research officer: Mr Anthony Walsh

Witnesses

Ms Jennifer Cunich (sworn), executive director, Property Council of Australia;

Mr Brendan Rogers (sworn), director, Urbis;

Ms Amanda Johns (sworn), partner, planning and environment, Thomson Geer Lawyers;

Ms Danni Addison (affirmed), chief executive officer,

Mr John Cicero (sworn), chairman, planning committee, and

Mr John Casey (sworn), policy advisor, Urban Development Institute of Australia (Victoria).

The CHAIR — I declare open this public hearing of the Legislative Council environment and planning committee. All mobile phones should be turned off or on silent. Today's hearing is being undertaken by a subcommittee of myself, Colleen Hartland, and Simon Ramsay, who will be here shortly. The committee is receiving evidence about the Planning and Environment Amendment (Recognising Objectors) Bill.

I welcome witnesses Danni Addison, John Cicero, John Casey, Jennifer Cunich, Brendan Rogers and Amanda Johns, and thank you for making yourselves available at short notice. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comment repeated outside this hearing may not be protected. All evidence is being recorded. You will be provided with proof copies of the transcript in the next couple of days. We have got 45 minutes for the session, and I will ask for some opening submissions to be followed by questions from myself and Colleen.

Finally, I remind you that the inquiry is to obtain evidence in relation to the Planning and Environment Amendment (Recognising Objectors) Bill 2015 that is currently before the Parliament. If you could give your name and address, that would be helpful.

Ms JOHNS — Amanda Johns, level 20, 385 Bourke Street, Melbourne.

Mr ROGERS — Brendan Rogers, level 12, 120 Collins Street, Melbourne.

Ms CUNICH — Jennifer Cunich, level 7, 136 Exhibition Street, Melbourne.

Ms ADDISON — Danni Addison, level 4, 437 St Kilda Road.

Mr CICERO — John Cicero, level 9, 451 Bourke Street.

Mr CASEY — John Casey, level 4, 437 St Kilda Road.

The CHAIR — Who wants to open the batting?

Ms ADDISON — I will let Jennifer open. Then I will say a couple of things and then we will allow our experts to take the floor.

Ms CUNICH — The property council is opposed to this amendment. It does not change the status quo under the act, and the current act deals with this issue. The property council believes it will not assist in better decision-making and it will not result in better planning in Victoria. In fact it will create unrealistic expectations within the community, confusion and additional administrative burdens, and hence additional costs.

The act requires currently that responsible authorities, being councils and VCAT, must consider any significant social effects of a proposal in making a planning permit decision, This is under section 60(1)(f) of the Planning and Environment Act. Just one objection raising a valid detrimental social effect is sufficient for the decision-maker to give some weight to it. The act also provides that decisions must take into account net community benefit and consider proposals in the context of current and future communities. Any person who may be affected by a planning proposal is entitled to lodge an objection and may raise social effects, which if significant must be taken into account by the councils and by VCAT.

As far as we are concerned, and our industry believes, this amendment really is aimed at fixing something that is not broken.

Ms ADDISON — The Urban Development Institute of Australia in Victoria echoes the views of the property council. I add to that just in a more detailed way that our view of this bill is that it will allow potentially frivolous objections to be increased within the planning system and to be given consideration in decision-making, which would likely result in an increase in litigation and legal costs to relevant planning authorities throughout the process. The bill may unintentionally give weight to localised objections to the detriment of wider economic and social benefits for other communities and for the state as a whole. Our concern greatly relies on the absence of a voice for those who would be benefitted by a development proposal or whatever else is going through the planning system at that time in the interests of a loud minority who are given more influence over planning outcomes than the silent majority of Victorians who benefit down the track.

We also agree that the Planning and Environment Act currently deals with the social and economic effects of planning proposals and planning scheme amendments and that this is just politics in planning once again.

The CHAIR — Thank you. I note the points that have been made. Essentially if I summarise, the argument is that this does not change the act fundamentally but may raise expectations and cause confusion, adding to administrative and legal burdens. In that context I ask about the definition of the word 'significant' and the word 'social'. There is some VCAT decision-making around that. That is not necessarily binding on other VCAT decisions, but it seems to me that there is a risk that both of those words will be heavily contested by legal support for both objectors and proponents, and they are likely to become points of significant contest.

Mr CICERO — I can add to that as a lawyer, and quite cynically I welcome the bill because it will be a feast for lawyers. There is no definition of what a social impact is. There is no definition of what is significant, and what it will do is create the opportunity for debate over the meaning of those words, particularly in the early days, until it settles down — until we get some authoritative decisions, potentially from the Supreme Court.

The CHAIR — Are there decisions currently on those words or similar words from the Supreme Court?

Mr CICERO — There are decisions which talk about the considerations relevant to the inquiry before the tribunal, and the tribunal has noted and the decision-maker — let us leave aside just the tribunal; all decision-makers in the planning jurisdiction need to take into account social effects. There is some guidance as to what those effects might be, but I think we can test this bill by reference to its genesis. Its genesis was the Lend Lease decision, which concerned, basically, a proposal to construct apartments in an area designated for substantial change. There was wide community opposition to it, and the Supreme Court ultimately held, in line with authority that has been around for a long time — and good authority, we think — that the number of objectors is not relevant; it is the substance of the objections.

The expectation out there is quite clearly — as a practitioner who appears daily at VCAT, the expectation is that if there is an apartment building and there is a significant number of objectors, that of itself will be evidence of a significant social effect. If you read the Lend Lease decision, the sort of social effects it talked about were not social effects that could be said to arise out of a proposal to construct an apartment building in an area designated for change. I think the problem we are all going to face as decision-makers if this bill is introduced is that it will be used in circumstances where it was not contemplated, I think, to be used. Until that settles down there will be much disputation, much work for lawyers and planners and much angst for all involved in the planning process to make sense of what is an unnecessary piece of legislation.

Ms JOHNS — If I could add to that, there is lack of clarity about what those words mean, and there will be diversions of opinion, depending on what side of the fence you sit, as to what they mean. There was a recent VCAT decision that gave some guidance in relation to what social effects are and what significant social effects might be. It was a case in relation to a proposed mosque in Hume, and this case has been followed by other divisions of the tribunal since then. It said that what is significant must be objectively ascertained, must have a causal connection to the proposal, must affect the community at large and must be based on a proper, evidentiary basis or empirical analysis, preferably through a formal social impact or social-economic assessment. It should not be based on philosophical or moral or religious values, and the effect must be sufficiently probable to be significant. If a significant adverse social effect is found, it must be balanced with any other significant social and economic effects.

I do not think that is what the community will understand as a relevant social effect. That will cause problems because the tribunal will, if it continues to follow that line of authority — —

The CHAIR — Just on the precedent rules at VCAT, one VCAT tribunal is not necessarily bound by another decision?

Ms JOHNS — No, you are not necessarily bound.

The CHAIR — But they would be bound by a decision of the Supreme Court where there had been an appeal at some point?

Mr CICERO — Yes.

Ms JOHNS — That is correct. But they do tend to follow each other unless there is some reason to set something apart. The tendency is to follow each other. Can I just add that we have some — —

The CHAIR — I will let Ms Hartland follow up.

Ms HARTLAND — I am a member for the western suburbs, so the planning issues around mosques are something that come up quite regularly. I have seen it used very detrimentally by opponents, not just opponents who actually live in the area but opponents to Islam across the state and sometimes across the country. How do you think this clause would assist those who just are anti-Islamic and will not tolerate any kind of community centre, mosque or education centre?

Ms JOHNS — I think the result would be that you will see more objections of that kind, people believing that the number of objections will increase the likelihood of their success in having the proposal rejected. However, I do not think when it gets to a tribunal hearing, for example, that will add extra weight to a case, because the tribunal will test what a social effect is in a much narrower way than the community expectation.

Mr CICERO — I think there is an expectation by some members of the community that the number of objections of itself is evidence of significant social impact. That has to be dispelled. If this bill is going to get up — and let us hope it does not, but if it is going to get up — that should be dispelled as quickly as possible, because I can tell you that there is already that sense that if I can get a substantial number of objectors, that of itself will be evidence of significant social impact.

Ms ADDISON — Also at the council decision-making level as well, it is one thing to ask VCAT to make consideration within the context of precedents and the rest, but before it gets to that point, we have council officers and councillors who are looking at these applications and being required to make decisions on them, often without the rigour of the legal system behind them. Whether or not that translates at that level — I do not think it will. I think there will be a lot more pressure on local government officers and councillors to take the more superficial route of, 'Yes, maybe the number of objections does determine the social impact in our decision-making process', which is an outcome that just could not be tolerated.

The CHAIR — Can I just pursue for a second this point of the actual number of objectors in and of itself, notwithstanding the VCAT case you have quoted? It seems to me that a very effective lawyer may be able to mount a case that a large number of people actually could be evidence in of and itself of a community social concern.

Mr CICERO — There is no doubt, in my opinion, that the number of objectors is a relevant consideration in determining whether or not there is significant social impact. But, of itself, the number is not evidence of that. It is a factor, no doubt, that the tribunal or a decision-maker will need to take into account in determining whether or not there is a significant social impact.

The CHAIR — Under this proposal, once it gets over that trip-wire, as it were, that there is a social impact — —

Mr CICERO — But it has to be a significant social impact.

Ms CUNICH — Which is not defined.

The CHAIR — A significant social impact, then the number of objectors becomes significant.

Mr CICERO — Becomes indeed relevant.

Mr ROGERS — One of the concerns that we have is that when you are looking at planning — and the point was raised earlier about implementing policy change — there is no clarity here about how this will be applied. Planning is not just for the present population; it is for the future population, and planning policy looks at how areas will evolve. Some members of the community do not want to see evolution; they like it as it is. But the reality is that we need to be able to manage change. Planning is all about managing change. If you put an expectation in the community that the number of submissions from the current population, with a current view about what should be the case, that is not balancing out, in their minds, against what the future plans are for the benefit of Victorians going forward. That is a really important consideration. If there is any chance that a change

like this blurs that line and gives greater weight to the views of the minority today against a policy that is trying to deliver a better Victoria tomorrow, that is a bad change.

Ms HARTLAND — It is somewhat outside the scope of this, but I have been a local government member. I live in West Footscray, which is undergoing rapid change. I have been involved in a number of major planning issues in the western suburbs. I actually do not feel like residents get any say in the planning process, and I am not sure that this is going to help. How do we actually give residents a real say in planning, because I do not think they have it now? Councils will object and say they will not issue the planning permit. It goes to VCAT; it will always be overturned.

Mr CICERO — That is wrong. That is just a wrong statement, with all due respect.

Ms HARTLAND — It is actually not my experience.

Mr CICERO — Those of us who regularly appear before VCAT have been on the losing side, so I think it is wrong to say that it will always be overturned. That is far from the position. If you look at the statistics, you will see that that statement is just not borne out.

Ms HARTLAND — All right. Could you give me the statistics about how often, when councils have refused a permit, it is not overturned?

Mr CICERO — If the tribunal will make those statistics available, we will get them to you.

Ms HARTLAND — Thank you.

Mr CICERO — But I can only speak from personal experience; I do not always win when I go to VCAT.

Mr ROGERS — I think the other issue with those statistics is that the important statistics to look at are the council officer recommendations versus the council decisions, because the officer recommendations are largely based on policy, and often councillor decisions will have a political aspect to them. They are a very important consideration.

Ms HARTLAND — I totally agree.

Mr ROGERS — The objective in planning for the community to have their say is as part of the strategic process. It is reliant on getting those policies right. That is the piece where it is important. If it is in line with policy, and there are objections because a proposal goes beyond that, then that has to be taken into consideration. That is why we have VCAT, because if a council makes a decision that is not in line with policy, someone has the opportunity to challenge that and say, 'Here is the strategic plan for the area. Here is the guidance'. VCAT is the independent arbitrator to say, 'Did that responsible authority make a responsible decision or not?'. That is exactly why we have the process and exactly why they have to look at it in a balanced way, considering all the relevant considerations.

If there is an expectation from the community that in fact numbers count, I actually think they will feel more disenfranchised. They will say, 'We had the numbers, and we were still not listened to'. In fact it is creating an expectation amongst the community that may not be real, and that will bring further problems, and there will be administrative problems as well. It will create additional red tape that in fact governments are trying to reduce. We are trying to simplify it so that the community understands where there are areas of change and where there are areas of no change. In fact some of the things that have been done in recent times in regard to residential zones and in regard to focusing on urban renewal areas is trying to get that clarity. I think this change is actually going to be an adverse step in muddying the waters.

Ms JOHNS — Going to back to your question in relation to participation by the community, the community has an opportunity to participate at the planning scheme amendment stage. I am talking about local policy rather than state policy. When a council wants to introduce new local policy, the community has an opportunity to participate at that stage. There is a planning scheme amendment process with public hearings and an opportunity to make submissions. That is an opportunity for the community to say to their local council what they want to see in the future for their municipality. I think there is a lack of understanding of that in the community. The community comes in a later stage, when the policy has been implemented and people are

seeking permission based on that policy after that date. Perhaps there needs to be more education of the community in relation to the role that they should take or the interest they should take in the policy making.

Ms CUNICH — That is right — engagement right at the beginning of the process.

Ms HARTLAND — I understand that completely from being both a councillor and someone who has been involved in neighbourhood planning disputes. I totally acknowledge that.

The property council made a public statement that this would drive up house prices and unit prices. Can there be some explanation about how that would occur? This was in an article in the *Herald Sun* suggesting that the bill will drive up house prices.

Ms CUNICH — By putting more pressure and — the planning process is already quite complex, so if you are adding in additional layers and complexity, it delays the process as well. If you are going back to VCAT, if you are ending up back in court, it is just going to continue to add the additional costs of lawyers you have to bring in to put forward your position. All of these things just continue to add to the cost of developing housing and apartments.

Ms HARTLAND — Have you got a figure of what you think it will increase **by**?

Ms CUNICH — No. Actually that is an interesting question, because we have constantly been trying to do work on all of the different levies and different imposts that are imposed on the development process, and it is a moving feast to actually try to nail a figure, because there are always additional levies, charges, taxes and timing that come into the process, but we could perhaps do some modelling and show you, around a particular development, what would happen if it was delayed by a period of time.

Ms HARTLAND — That would be helpful.

Mr CASEY — I think it is also on point to think of it as risk. If you increase the cost of development, you increase the risk. If you increase the risk, you increase the required rate of return, which in the end flows down to the consumer. Creating some uncertainty about how councils are going to make decisions and increasing the costs of providing development are in the end going to affect housing prices.

Mr CICERO — I want to put a different perspective on this. I think this bill is going to be socially divisive. Let me explain why. At the moment one of the fundamental problems with our planning legislation, which we have raised in the past with the previous government and the government before that, is that we think it starts off on the wrong foot. When you give notice to the community, it says, 'You may be affected, and you should object', or, 'You have the entitlement or the right to object', rather than just inviting submissions from interested parties, whether they are in favour or against.

I have a client who rang me and said, 'Listen, I've got a lot of people who are in fact supportive of my three-storey development in Boroondara. Should I go out and canvass support for it and get them to actually write to me saying that they support it?'. The hearing is yet to start, and I am going to be faced with a situation where I am going to have on the one hand a number of objectors and on the other hand a number of supporters, who unfortunately at the moment do not have any statutory right to be heard, because the act is skewed towards 'You may be detrimentally affected, and therefore consider objecting'. We have asked for that provision to be changed so it starts on a positive note rather than a negative note.

The CHAIR — Or at least a neutral note.

Mr CICERO — Or at least a neutral note. What do we do now? We are going to have the prospect of a hearing before a decision-maker with 100 people for and 101 against; who wins — or 104 and 99 against? Is it really a numbers game like that? This bill could be very socially divisive.

Ms ADDISON — It brings us to the point as well of what policy problem are we trying to solve, and that is what we have not been able to answer in looking at what the bill puts forward. We acknowledge that the Planning and Environment Act already deals with social effects of developments in various ways — that responsible authorities already need to take those things into account. The only answer we have been able to obtain from the government is that this was an election promise, but again without the substance of an answer to what policy problem are we trying to solve. It goes further to John's point: we are moving more and more away

from a neutral starting point where we are having a discussion about Victoria's growth and the positives and benefits of that as a whole and moving even more towards a no-change agenda and a no-benefit-to-the-community agenda.

The CHAIR — This brings me back in a sense to the question of from whence this comes and so forth. The two cases — the three that we were made aware of that have been important in the development of this — one is the Armadale group, which is mentioned in the second reading and so forth, but also the Tecoma case. What I would be interested in, having two lawyers in the room — in this context — is understanding whether in the case of the tower in South Yarra it would have actually changed the outcome. We have obviously the Supreme Court's commentary on that. Then the second case is the Tecoma case. We heard testimony from the department just a few minutes ago that suggests that there may not be any impact there. It seems that in the Tecoma case the land use was squarely within the actual legal provisions, and if you had 1000, 2000 or 5000 objections, it does not seem to me that that actually gets it over the initial hurdle. I would be interested in commentary on those points.

Ms JOHNS — I do not know if John was involved in the Tecoma case — —

Mr CICERO — No, but I know about it — it was the McDonald's store in Tecoma.

Ms JOHNS — I was not involved in the Tecoma case, but I know enough about it to comment on it. That was a case where the use of the land for that purpose was allowed as of right, so you can object is much as you like to that use, but it had no bearing on the case because the application for the permit was actually for the building and works. McDonald's could go there; the application was actually about what they could build and the form that it was going to take. So the number of objections in relation to the use was irrelevant.

Mr ROGERS — The very point that that case has been flagged as one of the reasons for this is exactly the point we are making about the expectation of the community. If the expectation is, 'Tecoma would have been different because we had 1000 objections', it would not have been different because the issue that they were objecting to was not building a building that you could put a restaurant in or a takeaway or a crossover; it was the fact that it was a McDonald's and they did not want McDonald's in Tecoma. That was not on the table for change. That really does amplify one of the concerns we have with this change.

Mr CICERO — And in relation to Land Lease again, if this bill was law, in my opinion it would have made no difference at all to the outcome of that case, even if there were 1500 objectors and not 627 or whatever the number was. That is the problem. The problem is that this bill is seeking to address expectations that arise out of Tecoma and Lend Lease when it would not — certainly in my opinion — have made any difference to the outcome of those two cases. Going back to the point that Jennifer made, what are we trying to fix here? What is it that is broken that we are trying to fix?

The CHAIR — So the conclusion from those two cases, as it were, case studies, is that it would have made no difference to the outcome, but with this law in place there would have been an apparent incentive for the community to collect large numbers of submissions, to go to enormous community effort and to see then the proponent hire additional support and legal backing and so forth, and then there would be costs generated there —

Ms ADDISON — Time, costs, uncertainty, risk.

The CHAIR — and time, but no actual finality that would make the objectives — —

Mr CICERO — No net community benefit.

Ms JOHNS — And administrative burden on the council.

The CHAIR — You are absolutely right, the council — —

Ms JOHNS — The cost for the council to have to deal with all those objections, and then at VCAT to deal with all the people who lodged statements of grounds, it will be enormous if people just continue to lodge many, many objections in the expectation that that will make a difference.

Mr ROGERS — It is not just the administrative burden of the actual case. When you get controversial matters, the extra strain that puts on the officers and the councillors having to deal with all of that is very significant. When you talk to officers who are having to deal with something as controversial and there is that angst in the community, it is problematic and, as John said, it is divisive. So we should not underestimate the social impact of this change and the expectation that it will raise on a broad scale. I think it is a really important point that the government needs to think about.

Ms HARTLAND — John, I just want to come back to your point about the objectors and those who actually support. There have been over the years a number of fairly vicious campaigns run against social housing and public housing. They never seemed to me to be on planning grounds — mainly on property values and, 'I don't want to live next to those kinds of people', and having grown up in a housing commission house, I find it quite offensive.

Mr CICERO — Agreed.

Ms HARTLAND — How would your idea of bringing in the supporters improve the planning system?

Mr CICERO — No, it is not my idea.

Ms HARTLAND — No, I am just — —

Mr CICERO — I am saying that there is a danger that if this bill became law, you would get to that point, where you would have supporters — you would bring in supporters or try and lead evidence about a significant part of the community actually supporting the proposal.

Ms HARTLAND — Yes, okay.

Mr CICERO — Because if the numbers are relevant, surely the numbers are relevant for and against, not just against, and that is the point. It should not be a numbers game. That has been settled law for many, many years, and why we would want to overturn that, I do not know. It will not fix Tecoma, it will not fix the Lend Lease, so what is it that we are trying to fix that is broken? That was my point.

Ms JOHNS — You also have to remember that the social effect, if there is a social effect, is only one of the considerations that a decision-maker has to take into account.

The CHAIR — So even if you get over the trip-wire for that, that is still one effect?

Ms JOHNS — Yes, it is only one.

The CHAIR — It has to be balanced amongst the others.

Ms JOHNS — Yes, there are economic effects — there is a myriad of things that a decision-maker needs to take into account, including policy. Even if you had a significant social effect, it does not mean it will be refused.

Mr CASEY — Using that as an example, as someone who at some point in their life also lived in housing commission, if I was all of a sudden villainised by a certain community group who had been incentivised to write a significant amount of submissions saying that they 'don't like these types of people in our neighbourhood; we don't want them here', that would actually have a social impact in itself. I think we need to be very cautious in actually incentivising some of these groups to be able to spread those kinds of views.

Ms CUNICH — I think also, Colleen, just going back to your concerns around your experience in West Footscray and the community, it goes back to our conversation earlier about the engagement at the very, very beginning of the community working with the councils to decide, 'What is it that we want?'. But at a higher level it is about government also saying, 'If we're an inclusive society, that means we are inclusive across the state. We are not inclusive in some areas where people will accept either social housing or mosques'. It is not up to some areas to say, 'Well, actually we don't want those types of people living here', and I think the state government has a responsibility to say, 'This is for all of Melbourne and regional Victoria'. They have to set the policy and then give guidance to councils, and communities should absolutely be engaged in those very early stages so both the community and the development community understand what the rules are.

Mr CICERO — That is a very good point. That was in fact the point made by the Supreme Court in the Lend Lease case, that in looking at the issue, it is not just a localised issue. There is a broader issue about —

The CHAIR — Statewide planning provisions.

Mr CICERO — statewide planning provisions and also a combination of new housing in Melbourne and where it should go, that if you made a decision in isolation — in the Lend Lease — without understanding the impacts that that would have on a more city-wide basis. I think that is a very good point that Jennifer made.

Ms ADDISON — Absolutely, yes.

Mr CICERO — Invariably it is not just a localised issue; it has wider ramifications beyond South Yarra or beyond Tecoma.

The CHAIR — Is there anything else anyone wants to add? That has been very helpful indeed, and I thank you for your submissions.

Mr CICERO — Thank you for the opportunity.

Witnesses withdrew.