P & E Amendment (Recognising Objectors) Bill 2015

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To the Victorian Parliamentary Environment and Planning Committee

By Ian Wood, President, Save Our Suburbs Inc.

(A) SUMMARY

This Bill represents the implementation of an ALP election promise to *'give the community a voice*'. Honoring election promises and giving the community a better say are both principles we wholeheartedly support.

The proposed Bill will allegedly improve decision-making and planning outcomes, and increase community and stakeholder confidence in the planning system.

However, while it appears to be a significant improvement for objectors, the Bill is unlikely to achieve these outcomes, for the reasons outlined below (part B).

Lawyers seem to agree (part C), although the developer lobby group Urban Taskforce complained about the Bill that "*Existing communities may now be within their rights to stop new development that upsets local social cohesion".* Apparently developers think they should be free to damage social cohesion within existing communities!

If the amendment is going to achieve the significant benefits claimed above, four changes would need to be made:

(1) The requirement to consider the number of objectors should be mandatory.

(2) The amendment should define the number of objectors as quantification of the democratic right of a community to refuse developments that would deleteriously effect their well-being and amenity, both individually and as a community (analogous to s3.3.7 in the Gambling and Regulation Act 2003).

(3) The amendment would thus also need to define community well-being and deleterious social impact, and mandate the consideration of any evidence of such impact likely to be experienced by the local community.

(4) The significance of the number of objectors under s84B(2)(f) of the Act as interpreted by the Supreme Court in the Orrong Towers case needs to be clarified in parallel with evidence of defined social impact (see part B below).

Reasons for the above conclusions are explained below.

Note that a much more effective and less convoluted change to achieve the aims of the amendment stated above would be to make most built form controls mandatory – ie, for Rescode, zone and overlay requirements. This would ensure that basic planning guidelines had more teeth and were less open to interpretation – in turn, improving the certainty and efficiency of planning schemes, resulting in time and cost savings for all parties and better and more consistent built form outcomes.

(B) Flaws in the proposed "R.O." amendment Bill

New RO controls won't apply to all types of permit applications

Under s6(2)(kcb) & (kda) some classes of permit applications are already exempt from being considered by councils under s60(1) and (1A) or by VCAT under s84B(2). The new RO controls [s60(1B) and s84B(2)(jb)] will also be subject to these exemptions.

New RO controls only apply at council or VCAT discretion

Concerning social & economic impacts, a council [s60(1B)] and VCAT [s84B(2)(jb)] must only have regard to the number of objectors where they think it's appropriate – so again subject to the discretion of the decision-maker.

"Significant social effects" remain undefined and un-quantified, and are subject to the "net community benefit" test, the definition of which also needs amending

Section 60(1)(f) already requires councils to consider any significant social effects and economic effects (if they think the development may have any), for types of developments that are not exempt. However, "significant social and economic effects" remain undefined and un-quantified and still subject to the discretion of the decision-maker as to their nature and extent.

Rectifying this may involve both a definition of "well-being" and application of a test (analogous to the "no net detriment test" in s3.3.7(1)(c) of the Gambling Regulation Act) to consider the likely social impacts of approval and the net effect of those impacts on the well-being of the relevant community. For more case discussion, see:
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2013/505.html [35-47]
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/2275.html [366-437]

"Well-being" is defined in various dictionaries as:
- a state characterized by health, happiness, and prosperity
- the condition of being contented, healthy, or successful; welfare
- being comfortable, healthy and happy (including mental and emotional health)

A happy, healthy thriving local community is also characterized by individuals having a sense of relatedness and being engaged with other people, and feeling competent and autonomous – overall best described as social well-being and social cohesion.

Under Clause 10.4, planning schemes should aim to address aspects of economic, environmental and social well-being affected by land use and development, and in doing so, balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. How these issues are weighed up needs to be addressed and defined – social and psychological health at least as important as economic health.

Typically, large numbers of objectors respond to development proposals which are both large and uncharacteristic in terms of local built form and amenity values. Such proposals can represent a threat to the cohesive community values described above, as experienced by the objecting community. But under the amendment at present, without adequate definition and evidence of negative impact on well-being, the number of objectors alone will be as irrelevant as it is now.

While there is a growing body of research on the health and environmental effects of high-density urban development, most of this has not been reflected in amendment of the planning act.

Nor have state or local government entities done any significant Post-Occupancy Evaluation surveys of occupiers and owners of modern "medium density" and "higher density" housing. It is extraordinary that 20 years after the introduction of aggressive urban consolidation policy that has strongly fostered these types of developments, no follow-up research has yet been conducted to directly determine individual and collective community responses to these "new" forms of urban development.

New RO controls don't adequately address the interpretation in the "Orrong Towers" case of the significance of the number of objectors

In the Orrong Towers Supreme Court case, Stonnington Council argued that consideration was required not only of the substance of the objections, but also the number of objections. Section 84B(2)(f) of the Act states that the extent to which local residents were able to and in fact did object must be taken into account by VCAT (but only "where appropriate", so again subject to the discretion of the decision-maker).

However, the Supreme Court interpreted the rather convoluted s84B(2)(f) to mean that VCAT only needed to consider the effectiveness of notice and objection procedures, not the actual number of residents who objected. It concluded that numbers of objections may be relevant only when the "ability of third parties to participate" is an issue: *Stonnington City Council v Lend Lease Apartments (Armadale) Pty Ltd [2013] VSC 505 (19 September 2013):* [63 – 65] http://www.austlii.edu.au/au/cases/vic/VSC/2013/505.html

In other words, "where appropriate" was interpreted to mean where, for example, inadequate notice had been given to those likely to be affected. In "Orrong Towers", notice was clearly adequate and it was deemed irrelevant to consider the actual number of objectors as giving weight to their arguments against the proposed development.

Consequently, future legal decisions would give weight to the Orrong interpretation, so that even where the number of objectors was considered, it would only carry weight in relation to the efficacy of notice procedures, not to the substance of the objections.

So instead of adding s84B(2)(jb) and failing to clarify s84B(2)(f), an **amended version of s84B(2)(f)** could provide more clarity and certainty:

> **"The Tribunal must take account of both the extent to which persons residing or owning land in the vicinity of the subject land were adequately notified of the permit application by the responsible authority, as well as the number of persons who subsequently formally objected to the application".**

The Amendment is populist and not evidence-based planning

The populist nature of the proposed amendments and lack of definition of "social effects" raises concerns about the possible undue influence of mass objections not based on local amenity or other evidence of genuine social impact, or even grounds of objection that may be in conflict with the Victorian Charter of Human Rights.

Too much uncertainty and discretion, not enough prescriptive control

As noted above, each part of the relevant legislation – both existing and proposed - is undermined and weakened by the inclusion of discretion, often with scant specific decision guidelines. Victorian statutory planning legislation is nearly all subject to the exercise of discretion, sometimes without recourse, and this current Bill is further evidence that more prescriptive measures are long overdue in statutory planning legislation and planning schemes generally.

More "band-aiding" - more complexity, inconsistency and uncertainty

Furthermore, in failing to clarify or rectify relevant parts of the existing legislation when proposing the new changes, the proposed Bill also illustrates the continuing trend of legislators to "band-aid" planning rules with qualifying clauses which often add further complexity, inconsistency and uncertainty instead of making the rules clearer and more concise (which ironically is what all parties claim to want). This is yet another reason why a major overhaul of the Planning & Environment Act is long overdue, and must involve a substantial degree of deliberative community consultation.

(C) Comment by other organisations on the Bill

The Planning Dept says "Significant Social Effects" can include impacts on:

. the demand for or use of community facilities and services;
. access to social and community facilities;
. choice in housing, shopping, recreational and leisure services;
. community safety and amenity; and/or
. the needs of particular groups in the community, such as the aged.

http://www.dtpli.vic.gov.au/planning/news-and-events/feature-news/recognising-objectors-bill-introduced-to-give-communities-a-fair-go

However, this functional list of infrastructure and services fails to include other concepts vital to a healthy community, such as community cohesion and physical, mental, emotional, social, aesthetic and financial well-being. Humans are territorial and large developments usually negatively transform the form, function and aesthetics of the wider local area occupied by a community.

But planning outcomes aren't likely to change much with the present wording of the Bill. As Maddocks Lawyers concluded after the Bill was introduced to Parliament on 26 May:

"As presently worded, we doubt that these amendments will have a material effect on the approach to objections in the Victorian planning jurisdiction. The Bill can be seen as codifying the existing approach recognised by the Supreme Court".
(https://www.maddocks.com.au/reading-room/ealert-planning-environment-recognising-objectors-bill-2015-major-change-codification-existing-law/)

Allens Lawyers concur:

"*In our view, the number of objections is something that, in relevant circumstances, is already taken into account appropriately. So it is arguable that the Bill does not really change the status quo to any significant extent*".

Illustrating how new amendments usually make legislation more convoluted and time-consuming to follow in practice ("band-aiding"), Allens added that:

** If the Planning & Environment Amendment (Recognising Objectors) Bill 2015 is passed, responsible authorities will need to take account of the number of objections made to a proposal when considering its likely social, economic or environmental effects.*
** The decision maker will be required to determine whether it is 'appropriate' to consider the number of objections received in a particular case.*
** It is likely that objector groups will seek to generate multiple standard form objections to boost the total number of objections at the application stage. Responsible authorities will need to use judgment to determine whether this is indicative of a genuine social effect.*
(http://www.allens.com.au/pubs/env/foenv29may15.htm#Background)

Property development industry group Urban Taskforce responded:
"C*ommunity involvement is best done at the strategic planning end rather than at the determination end when it should be clear how a project fits with the rules*"…
(http://www.urbanalyst.com/in-the-news/victoria/3371-victorian-government-introduces-recognising-objectors-bill-2015-to-parliament.html)

Most would agree – except that this statement ignores two facts. Firstly, strategic planning controls are typically quite non-specific, so clarity of fit is hard to gauge and often open to further amendment.

Secondly and most importantly, "the rules" aren't mandatory rules at all but just discretionary guidelines which, not being prescriptive, encourage ambit claims and speculative development at the expense of the productivity of the planning system overall.

As far as objectors and the community goes, the angst generated by the town planning system is largely due to precisely this point – that the lack of prescriptive controls creates a moving target that not only makes compliance difficult to agree on but also often requires planning and/or legal expertise to resolve. This has created a very inefficient and unfair system, especially with the huge VCAT fee rises introduced in 2013 by the previous State government.

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If the committee has any queries I am more than happy to provide further information and examples.

Ian Wood,
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