MEG AGM Speech

Introduction

1. I am a solicitor with a Master Degree in Urban planning and I'm a qualified mediator. I come from a Residents Group background. Years ago I tutored in Planning Law at Melbourne University.
2. Over 20 years appearing at VCAT (since it began in 1998) – work split between acting for objectors and acting for developers.
3. I've seen the best and the worst in VCAT – from both developers and objectors.

Avoid VCAT if possible

1. At the Council stage, when notified of a development application:
    a. **If your property abuts the development** – seek advice from a Town Planner and have him/her prepare your objection – after all, to most people their home is their major asset.
    b. **If your property is in the neighbourhood** – you can submit an objection based on broad neighbourhood character, streetscape character, loss of landscaping, etc.

    What are not planning grounds:
        i. **Loss of property value**
        ii. **Noise from residential use**

    Other grounds that have no planning merit
        1. **Car parking if the proposal meets the statutory requirement** (viz. 1 car space for each 1 or 2 bedroom dwelling, and 2 car spaces for each 3+ bedroom dwelling)**.**
        2. **Overlooking, if the distance is greater than 9m.**
        3. **Increased traffic in streets that can handle that volume.**
2. **Lobby your Council (all Councillors)** if the application is going up to the full Council. It is better to have Council and objectors fight a development at VCAT than objectors fight both Council and the developer. It also avoids the objectors having to pay to lodge their application to VCAT ($974.50 or $1150.70 for multi-dwellings, depending on development costs) compared to $20.70 to be an objector party if the permit applicant makes the VCAT application.

3. **If you are the sole objector DO NOT agree to withdraw your objection on the basis of an agreement with the applicant re amended plans.** I get at least one call a year to give advice to an objector who has withdrawn his/her objection on the basis of amendments to the plans …. only to have the developer amend the plans back to the original plans after they have the Planning Permit. As the person is no longer an objector, they have lost all their objector's planning rights. Their remedy against the developer is only in contract…..and the developer's response to an action in Contract is that he/she has a Planning Permit.

If you are in VCAT

If the developer makes an application to VCAT, or if Council issues a NOD to Grant a Permit and objectors make an application to VCAT:

1. If there are a number of objectors, work towards lodging a **joint** application or joint Statement of Grounds. Not only will the costs be shared, but it will give you an opportunity to engage either a town planner or planning solicitor to appear for you at the VCAT hearing.

   I know that there are VCAT decisions where the objectors have succeeded in getting a refusal of a planning permit without representation where Council had issued a NOD to Grant …. but these are extremely few.

2. If the application is appalling and there are a number of objectors, have a professional planner prepare the group's Statement of Grounds. You are tied to those grounds at the VCAT hearing. This means that you will have to act quickly.

   If you don't have time to engage a professional to prepare your grounds, and Council has issued a Notice of Refusal, please include Council's grounds of refusal and then (if necessary) add more grounds.

   There is nothing worse further down the track in being engaged to act for objectors who have not included all the grounds that they should have.

3. If Council has issues a NOD to Grant a Permit, and therefore the objectors do not have Council's grounds of refusal, it is even more important that objectors get professional assistance in preparing their grounds (or if they have engaged a planner to prepare their objection that they include all of their grounds of objection in their Statement of Grounds to VCAT).

4. If you are the only objector and your main grounds of objection can be addressed by amendment (e.g. overlooking, proposed building proximate to a tree on your property, overshadowing) lodge into VCAT and try to reach a consent agreement with the applicant.

   If you are a neighbouring objector and your grounds can be addressed by amendment to the plans (e.g. increased setback, more screening), my advice would be to lodge a Statement of Grounds into VCAT on your own (i.e. don't be part of a joint application) and work with the developer to have the plans amended to address your concerns. In my experience most developers will amend the plans (provided the demands aren't unreasonable) to satisfy an objector party.

5. **If you are representing yourself at VCAT**, make sure you have read the VCAT Practice Notes (on the VCAT website) and are familiar with the VCAT process. I have seen countless objectors present their own submission, and these are some of the things you should do:

   i. **Make sure that you have 6 copies of your submission** (there is nothing worse than VCAT having to stand down the matter whilst the Tribunal member photocopies the objector's submission for other parties).

   ii. **Take photographs of your site (if you abut the site) and the neighbourhood if you are arguing neighbourhood character**.

   iii. **You will receive the developer's expert reports 2 weeks before the hearing**. Make sure you have read them thoroughly and have prepared your questions to ask the expert BEFORE the hearing.

   Prepare questions for the expert, and DO NOT make statements.

   If you've read the Practice Note on Expert Evidence, you will realize that the expert's duty is to the Tribunal. Therefore, do not make personal statements questioning the independence of the expert.

   If Council is on the same side as you or there is another objector party who is represented **do not ask the same questions of the expert as questions already asked**. The expert would have had time to reconsider his/her response if he/she had been 'caught

out' by being cross-examined by a barrister/solicitor/planner … and therefore you will be giving them the opportunity to try to fix the answer to the same question.

Therefore, if the question has already been asked, cross it off your list of questions. If it leaves you with few or no questions, so be it. As I regularly act for objectors, there is nothing I fear more than an objector who is going to cross-examine after me.

iv. **Right of reply**. The permit applicant submits last, and if **new** matters are introduced in their submission (i.e. things that have not been covered in their Statement of Grounds, or suggestions as to certain concerns can be addressed) you will have a right to respond when they have finished their submission. This is not an opportunity to rehash your submission (and it really annoys the Tribunal when objectors try to do this in their right of reply). If the permit applicant has raised new things, respond to these only.

v. **Draft conditions** will be circulated by Council a week before the hearing and discussed by all parties at the end of the hearing. If you want changes to the plans to address your concerns, make sure that you have these ready to request additional conditions. These need to be specific (e.g. side setback of the kitchen increased to xxx metres; kitchen wall raked to reduce the boundary wall height; the south-facing kitchen window screened to 1.7m above FFL, etc.).

6. **If you are going to engage a planner/lawyer/barrister to represent you at the hearing,** please ask around before engaging them. Ask your local residents' group; ask someone else who has been in VCAT on a planning matter (objectors and developers); and then research the www.austlii.edu.au website and do a search for the practitioners who are recommended.

   Get at least two quotes, and ask if he/she will do the submission on their own or if you will have to engage a planning expert.

   Every few years I have a matter in VCAT where objectors have engaged a barrister who has put "planning" as one of their areas of expertise. It is obvious to every other practitioner at the VCAT table (and the Tribunal

member) that the barrister does not have the familiarity with planning as practitioners who regularly appear in the Planning jurisdiction of VCAT. The barrister drones on for ages, quoting irrelevant decision after irrelevant decision, and the objector(s) who have engage him appear happy that he is doing a good job…..when, in reality, this is far from the case. So … do your homework before engaging someone … and make sure that the person's expertise is in 'planning' and not just 'tacked on' to a raft of purported skills.

7. **Etiquette at the Tribunal**. You wouldn't think that I would have to address this, but I have seen it all.

    i. Stand when the Tribunal member enters and departs.

    ii. Don't talk/groan/loudly sigh during the hearing.

    iii. Leave babies and small children at home.

    iv. Don't interrupt when other parties are making their submission. If you want something that has been said clarified, say *"Through you Mr. Chairman/Madam Chair"* and then ask the question. Never direct your question at the person making the submission – go through the Chair.

    v. If you have a practitioner representing you, don't ask to cross-examine an expert witness when they have finished.

    vi. Do not make personal attacks on the applicant (or the plans) in your submission. (e.g. One objector in a hearing I was involved in googled the developer's name and made a series of personal statements with respect to his interests; another described the plans as being akin to slum development). This type of personal attack is counter-productive when you are trying to persuade the Tribunal member of your grounds of objection.

    vii. Don't argue with an expert when they have given you an answer to your question. Ask another question, or move on. (e.g. last year I had an objector argue with John Patrick (who is a leading landscape expert) that a particular tree was just impacted by sea breezes and not almost dead … and she wouldn't accept his answer no matter how many times he said it was almost dead and it would be completely dead within 2 years). I felt as if I was watching a re-run of the 'dead bird' skit in Monty Python.

viii. If the Tribunal asks you to move on to another point in your submission, do so. Don't argue that you think that this is important.

ix. Don't walk out and slam the door of the Tribunal when the applicant is presenting their submission. I have seen this done (usually with expletives), and it does not do any good for the objectors' arguments.

8. **Much is planning in Victoria is non-prescriptive (unless it is a mandatory requirement)** so the advocate's job is to persuade the Tribunal of their position. Never lose sight of this or do anything to detract from trying to persuade the Tribunal.

9. And lastly, if a development application is really appalling and Council determines to issue a NOD to Grant with conditions and the objectors do not think the conditions address their major concerns …. PLEASE make an application to VCAT. Don't be like a group of objectors in Elsternwick who didn't pursue their objection to a 14 storey proposal. Council's planner recommended a NOD to Grant; Councillors determined to grant a permit with 6 storeys removed; the applicant challenged this and other conditions at VCAT; VCAT stated that if Council had refused VCAT "*would have readily supported that decision that no permit be granted*". However, as a planning permit had already issued, all VCAT could do was agree with Council's decision to remove 6 storeys.

In *Auyin Property Development Pty Ltd v Glen Eira CC* [2019] VCAT 1614 (15 October 2019) – the former Daily Planet site in Horne St Elsternwick - the Tribunal (Members Deidun and Nervena) considered a conditions' appeal by the permit applicant and made the following statement at [51]:

> *"51 We choose to observe that, if the Council had determined to refuse to grant a permit for the proposed development, rather than condition a reduction in height by six storeys, we would have readily supported that decision that no permit be granted. We agree with the submissions of nearby residents, lead by Mr Jones and Ms Smith, that the proposed building results in a range of built form impacts, that will even be considerable with a reduction in height to 8 storeys. Unfortunately, we find ourselves in a position where a permit has been granted, and we are left to determine particular contested conditions, which only influence particular elements of the overall proposal. Having regard to the various considerations that we need to balance in our decision making task, we consider that the fairest outcome we can offer to all parties, is to support the Council's position in relation to building height."*