Malvern East Group

MEG Supports *PLANNING BACKLASH*

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SUBMISSION re VCAT REVIEW...JUNE 2009

Preliminary Statement

This submission is made both on my own behalf and on behalf of MEG (Malvern East Group.)

Previous to the establishment of MEG some 4 years ago I lived in the western part of Stonnington and was, for a time, President of the Toorak South Yarra (TkSY) Group. In that position I submitted several times at VCAT hearings and though I now live in Malvern East I still have a great interest in the western area of Stonnington. My visits to VCAT are not confined to hearings re Malvern East.

MEG does not submit to VCAT for a variety of reasons but when members request assistance with submissions considerable time is given in assisting them in the preparation of those submissions. MEG's main role with regard to planning is to inform members re issues, to advise on process and to listen to stories regarding the utter helplessness residents experience in coping with this process and how disadvantaged they feel and a major area of that disadvantage is experienced at VCAT hearings.

Key Issues...access to justice and delivering equitable outcomes.

Our Comments

The process does not provide equitable outcomes. It is heavily skewed in favour of applicants. This has become even more evident since the Minister has decided to intervene directly in VCAT cases by having a taxpayer-funded Q.C. to argue the case for the developer, adding yet another Q.C. to the clutter of highly-paid developer-paid Q.C.s and expert witnesses occupying most of the space at the table, while residents are relegated to the outer circle, not quite "in the gods" but near enough.

In not so important cases...i.e. the ones that involve somewhat 'lesser' developers whose proposals impact severely on the neighbourhood there may sometimes be 'room at the table' for residents.

The important person in the whole VCAT process is the applicant and residents are left in no doubt about that.

> "The intent of VCAT being an informal court where anyone can present their case has been all but lost. VCAT has become a court where lay people who are not experts in planning or law are potentially at a major disadvantage, due to their lack of experience with the nuances of the industry,

not to mention that they are at times overwhelmed and intimidated by the sheer number of witnesses and the manner in which some cases are conducted."

(From Stonnington Council's Submission re VCAT President's Review.)

Instances of Inequitable Outcomes

1. Some time ago at a Directions Hearing re substitution of plans I was representing the TkSY Group and supporting members of that group. One of these was a County Court judge. We opposed the substitution, stating that the new plans proposed a 'transformation' and, as such, there should be a new application to the R.A. During the hearing the judge wanted to bring up a matter of law with regard to the questionable process followed by the applicant and the Member leant forward, looked him in the eye and said,

"**Judge.....**, **the law does not apply here.** (The applicant won.)

She was right. The law does not apply and nor does justice...certainly not natural justice.

2. A more recent hearing where I was an observer, the resident objector had received some adverse (and quite erroneous) publicity and the application has divided Council in the most acrimonious way. Clearly the Member had knowledge of that publicity. and it was equally clear from the beginning that the Member favoured the expensive representation of the applicant. (The Member even wanted an explanation of my presence. When I declined to answer the person representing the resident said that I was "an interested party." Why my presence was queried remains a mystery.) The case for Council and the residents was lost before it started. The decision was neither fair nor equitable. It summarily dismissed the case put forward by Council, dismissed the case for the residents, ignored a previous VCAT decision for the site, ignored the skyline controls, a well-established component of the Stonnington Planning Scheme and it ignored the Minister's D.D.O.on the Yarra Environs.

(The applicant won.)

3. At a recent 3 day hearing (which morphed into 5 days) for a fast food premises I noted the following:
The members allowed the bullying tactics of one of the Q.C.s for the applicant to proceed unchecked. An expert witness for Council was being interrogated. The Q.C. asked the same question 3 times. It was efficiently answered the first time and subsequently he was told, "I've already answered that.". After the third time he said, "Well, we'll leave that for the moment. We'll come back to it later." All of that was said in the most aggressive manner. It was time-consuming, unnecessary and NOTHING was done about it. (These bullying tactics are commonly used by applicants' representatives.)
Resident objectors had employed a Planning Solicitor to represent them in this case. When the applicant used the contents of the Contract of Sale to add weight to the proposal, solicitor for the residents asked for a legal opinion from VCAT re the use of the contract in the case. This was refused.

Quite obviously, if VCAT wants justice at the very least to be seen to be done the Members should have acceded to the request and sought legal opinion.
A resident objector attended each day of the 5 day hearing and he has reported to me that he was quite shocked to observe the bullying tactics of the applicant's representative and utterly bewildered to note that absolutely no action was taken to curb the aggression.

Needless to say the applicant won.

4. A classic example of the lack of checks and balances in the system was a recent hearing for three 2 storey dwellings on a single lot. At the request of the applicant this case had been adjourned 3 times, prolonging the agony of the residents. When it was finally heard, it was allotted a half-day hearing and at the end of the hearing the Member made a decision to Grant a Permit...a done deal!
Clearly the pros and cons of the case were not given due consideration. Residents were not even given the satisfaction of feeling that their case had even been heard and certainly not as if they had been given a "fair go."

General Comments

If VCAT's role is truly that of an authority which reviews decisions, then amendments to plans should be limited to minor changes to proposals. If 'transformations' are submitted at the hearing and the case proceeds on the basis of what is virtually a new proposal then VCAT exceeds its authority as a body of review and assumes the role of the Responsible Authority. In other words it becomes a de facto planning authority.

VCAT decisions are not consistent. The discretion allowed re the Standards in Rescode is interpreted differently by different Members and the discretion exercised is invariably in favour of the applicants. The discretion in M2030 is, again, used as a tool for the developer. Directions in this document contain contradictory statements and the ones that seek , for example, to protect Neighbourhood Character are overlooked in favour of 'A Compact City.'
There is a lack of checks and balances re the exercise of discretionary powers. The Building Commission has 3 Members hearing every case and the issues that come before them are entirely prescriptive. VCAT has one Member (occasionally two) hearing all cases which require the exercise of quite extraordinary discretionary powers. It is our contention that unless two Members hear a case there cannot be an adequate weighing of the "pros and cons" of the case. It ends up being a matter of whim to which 'bit(s)' of the Local and/or State Government Planning Schemes are the most significant to a Member in each case. Personal bias rules. We know that this occurs even with 2 Members hearing a case but we would like to believe that there is some lessening of personal bias. We realise that providing more staff for each case would add to costs but where so much discretion is required surely this could be justified. It would lessen the number of breaches of the VCAT Act which requires the application of the principles of natural justice.

VCAT is unelected, unaccountable and untouchable. I have made enquiries at the Ombudsman's office re an investigation into the behaviour of certain members and have been told, as you are well aware, that no action can be taken by the Ombudsman.

In fact, no action can be taken by anyone.

Some Suggestions re Improvement to the System

1. Some cosmetic changes could be made. For example the applicants' representatives could be seated in the body of the "court" as Council and residents present their case. Psychologically, this would give residents the impression (even if it's only an impression) that they are not totally disadvantaged.

2. The order of presentation could be varied. The applicant could present first. This would give residents a clear idea of what they are up against and allow an opportunity for them to include 'ad lib' comments in their presentations.

3. If the order is not altered, those opposing the Granting of a Permit should be allowed a brief 'summing up' at the end of the hearing (particularly lengthy hearings). At present the case for Council and residents is lost in the welter of Q.C'.s and expert witness statements presented by the applicant.

4. Two members hearing each case might ensure that some checks and balances worm their way into the system.
As previously stated cases at the Building Commission are heard by 3 members. There is no discretion in those cases. The rules are prescriptive. This is not so in planning cases where there is so much discretionary power can be exercised.

5. Members should control the bullying tactics used by the applicant's representatives. I have never seen Council or residents even attempting to use bullying tactics but I have seen it on many occasions with applicants' representatives and I have never seen it stopped.

6. There is another tactic used by applicants which is designed to skew the case in their favour from the start and that is the practice of persuading Council and the Member to allow them to have their architect or urban designer to "run through" the proposal first. They are not there as expert witnesses so are not subject to cross-examination. They are just there to "help" the member obtain a clear idea from the beginning what their case is about and how good it is. This gives the applicant "two bites of the cherry"...one at the beginning and one at the end. This request is always granted and it is another grossly unfair practice which should be stopped.

7. All members should explain the process prior to the beginning of the hearing. Some do this now but not all. It must never be forgotten that the majority of residents have never been to VCAT and often are quite terrified.

8. Parties to a hearing should be permitted to hear the recording of a case. At present, edited transcripts can be ordered at considerable cost Very few residents can afford a transcript. and as faith in this deeply flawed system is practically non-existent the Member's editing is not universally trusted.

9. VCAT must find a way of giving more weight to Local Policy. These policies have been developed in consultation with the community. "People having a say" and being heard in a fair and just manner is called "democracy."

10. We suggest that the system should revert to being an informal court where anyone can present their case without fear or prejudice. The 'take-over' of the system by highly-paid experts has left the amateur at major disadvantage, often overwhelmed and intimidated by the sheer number of experts and the manner in which many cases are conducted.

Ann Reid (MEG Convenor)