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MUNICIPAL MATTERS

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In this edition of VPELA Revue, the writer comments on an interesting session at the VPELA conference held in Lorne in August 2015; the on-going attempts to vary or discharge single dwelling restrictive covenants; mandatory v discretionary height limits as considered in Amendment C240; and the difficult problem of short stay letting in apartment buildings.

Mandatory v Discretionary height limits

Amendment C240 to the Melbourne Planning Scheme (Bourke Hill, including the Windsor Hotel) considered argument from all sides with respect to the appropriateness of mandatory height controls, the role of PPN 59, the findings of other review bodies and the nature of the VPP.

PPN 59 – "The role of Mandatory provisions in Planning Schemes" establishes the premise that mandatory provisions in the VPP are the exception – discretion can be exercised when applications are tested against the objectives and performance outcomes. However, in some cases mandatory provisions will provide certainty and may be useful in areas of high heritage value, strong and consistent character themes, or sensitive environmental locations. The Planning Practice Note suggests that mandatory provisions will only be considered in circumstances where it can be clearly demonstrated that discretionary provisions are insufficient to achieve desired outcomes.

And so it was in C240. At page 96 the Panel considered PPN59 and referred to the review of findings in the Bayside Panel (Bayside C113, C114 and C115) and that Panel's view that the prevailing 'state of play' includes:

- Mandatory provisions should be applied in exceptional circumstances and only where justified and necessary
- A mandatory maximum height should not be applied where approved or existing buildings already exceed that height

The C240 Panel applied those findings, in that ‘exceptional circumstances’ were at play in the Bourke Hill Precinct; and that unique characteristics existed there.

> “We have been persuaded that it is the only low scale precinct in the CBD where nineteenth century buildings from the pre-boom period make a major contribution to streetscape and heritage values.”

The Panel supported the introduction of a “like for like” replacement building clause which would allow redevelopment of those sites with buildings that already exceeded the incoming height controls to be replaced to the same, existing height, notwithstanding the new controls. (p. 97).

The Panel considered whether mandatory height controls restricted site responsive design. Whilst acknowledging the desirability of the site responsive design approach, the Panel considered that:

> “where an absolute height is strategically justified and applied, that height limit is capable of being viewed as another site constraint to be taken into account by a designer”. (p.98)

Apartment buildings and the short-stay party problem

In June 2015 an Independent panel delivered its findings on short-stay accommodation in CBD apartment buildings, a cause of concern for many residents of apartment buildings not just in the CBD. Under the headline “Apartment towers turned into ‘shoddy’ hotels” with photographs to match, The Age (15 August 2015) estimated that there are 3315 rooms in Melbourne being hired

out in buildings not designed to be hotels. Issues such as dropping items off balconies, urinating, vomiting and being naked in common areas were identified.

The "Independent panel on short-stay accommodation in CBD apartment buildings" published the results of its report in June 2015. The panel was appointed to recommend ways to improve the regulation of CBD residential buildings, so that property is protected from unruly 'short-stay' parties.

The panel were divided on the most appropriate way to deal with the issue. The majority considered that the appropriate regulatory approach is to:

- Make providers of short-stay accommodation responsible, to a limited extent, for such parties in the apartments they let, and
- Empower owners corporations to deal with the problem using existing powers, prescriptions and processes under the Owners Corporations Act.

Recommendations set out on p. 3 of the Report were:

- Owners corporations be empowered to serve a 'notice to rectify breach' on providers of short-stay accommodation whether the owner of the apartment, or their lessee or agent regarding breaches of the owners corporation rules by their short-stay occupants, and
- The orders that VCAT can make in determining disputes based on such breach notices should include an order prohibiting the use of the relevant apartment for short-stay accommodation for a specified period or until the apartment is sold to someone unconnected to the provider.

VCAT considered this problem in Owners Corporation PS501391P v Balcombe (Owners Corporations [2015] VCAT 956). In that case numerous complaints were made about a short-term letting business being carried out in the Watergate building at Docklands. Permanent occupants of the building experienced disruptive and unpleasant behaviours from short term stays, but ultimately were unable to stop the use of the building for that purpose.

Prior to the determination of the VCAT application, the Owners Corporation had brought Supreme Court proceedings to establish whether short-term letting was permitted by the relevant occupancy permit under the Building Code of Australia. The classification of the Watergate building as Class 2 was unsuccessfully challenged in the case of short-term rental accommodation. Therefore :

> "short term letting is permitted, or at least not prohibited, by the occupancy permit….. or the planning permit and planning scheme. No planning permit is required to let out apartments as short-term rental accommodation." [23]

The Tribunal was asked to enforce Additional rule 34 of the Owners Corporations Rules. The rule purported to prohibit the "use of a Lot or Common Property for any trade, profession or business (other than letting the Lot for residential accommodation t the same party for periods in excess of one month) …..".

The Tribunal considered the test of whether a rule was within power (established in Williams v City of Melbourne [1933] HCA 3). "A rule to be within power must be made with respect to a general

function or power of the body corporate, a specific function or duty, a duty of an owner or occupier under the act or regulations or a matter governed by the standard rules." [45]

The Standard Rule pursuant to which Additional Rule 34 was purported to be made prohibited the making of undue noise or causing a nuisance or hazard. The legal and practical effect of Additional Rule 34 was to regulate any trade, profession or business in residential lots and to ban short-term letting altogether. There was no specific function or power conferred on bodies corporate to regulate the use of a private Lot. The Tribunal considered that Rule 34 was a rule with respect to the permitted use of a Lot, not a rule with respect to preventing nuisance, hazard or noise. Additional Rule 34 had the flavour of a planning regulation. [47].

The distinction between regulating and prohibiting was also considered. Additional Rule 34 did not seek to regulate the use of a Lot to prevent nuisance, but to prohibit certain types of uses altogether. In that respect, the Tribunal referred to Swan Hill Corporation v Bradbury ([1937] HCA 746 at p 762) as the starting point on whether a rule which prohibits an activity is a valid rule. There it was said that a power to make by-laws regulating a subject matter did not extend to prohibiting it altogether. [48]

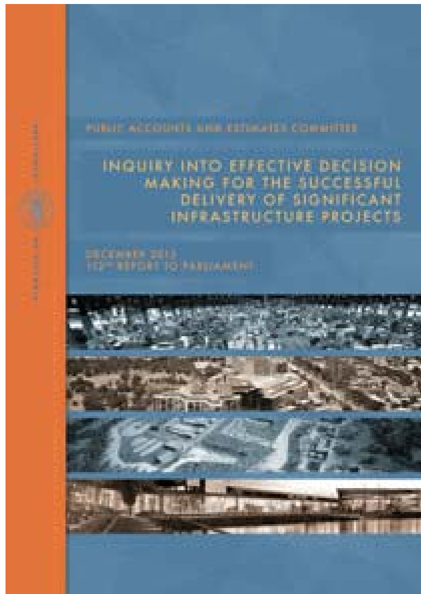
So the problem remains. Legislative intervention was not supported by the independent panel. The Tribunal in the VCAT case referred to noted (par 24) that:

> "In New South Wales, Queensland and Western Australia, local councils regulate short-term letting through their respective planning schemes, which typically require an owner to obtain a development or planning permit ….. In Victoria, local councils have not sought to control short-term letting or visitor accommodation through local planning schemes".

Good planning and Bipartisan politics

A recurring theme at this year's Victorian Planning Conference (Utopia & Beyond) at Lorne, and one certainly not new to VPELA conferences, seminars and discussions was the importance of providing adequate infrastructure at the beginning, rather than at the end (if ever) of the development cycle.

The delivery of major infrastructure projects was the subject of a little known inquiry of the Liberal Government undertaken over 2011/2012. The bipartisan Public Accounts and Estimates Committee considered whether the Government's delivery of major infrastructure projects was managed in the most efficient and cost effective way, harnessing the skills and experience of the public sector whilst maximising transparency and accountability ("Inquiry into Effective Decision Making for the Successful Delivery of Significant Infrastructure Projects"). David O'Brien speaking at the Conference in the session "Is bipartisan politics the key to realising good planning?" referred the audience to the Committee report. The Committee was comprised of seven members of Parliament drawn from both Houses of Parliament (two Liberal, three ALP and one National). The report of the Committee highlights the importance of bipartisan consideration of matters of State significance.



The Chairman's Foreword identified the two main aims for the Inquiry:

- To explore innovative strategies for identifying and harnessing infrastructure competencies and skills; and
- To promote best practices and continuous improvement in the planning, management and delivery of significant infrastructure projects.

The major changes recommended by the Committee included:

- A new advisory body to recommend priorities for infrastructure investment in Victoria (the Victorian Infrastructure Council);
- A new body to be a centre of excellence for project development and delivery with overall responsibility for ensuring that Victoria has the necessary expertise and capability to deliver major infrastructure projects successfully (the Victorian Infrastructure and Skills Authority)
- A strengthening of the oversight and accountability mechanisms, especially around the delivery of significant infrastructure projects.

The Committee concluded that Major Projects Victoria's functions should be incorporated into a new Victorian Infrastructure and Skills Authority. It also identified initiatives in the Canadian provinces of British Columbia and Ontario (Partnerships British Columbia and Infrastructure Ontario respectively); a Major Projects authority established in the United Kingdom, and the creation in New South Wales of Infrastructure NSW in July 2011. The committee noted:

> The Committee was informed that a key reason for these reforms has been experiences in those jurisdictions with projects coming in over budget, beyond set timeframes or not delivering expected benefits to the community. The reforms have been prompted by resultant reputational damage, deep-seated community and industry criticisms and an awareness of the impact of poor infrastructure performance on the economic standing of the jurisdictions.

> A common feature of these reforms has been the centralisation of key infrastructure planning procurement functions. Dedicated bodies have been established at arm's length to departmental structures, including central treasury agencies.

The recommendations appear to have found traction. In Victoria, the State Government has recently announced the introduction of legislation to create Infrastructure Victoria, which is said to align with a recent trend in other Australian jurisdictions to create bodies to advise governments on long-term strategic infrastructure planning (such as those referred to by the PAEC Inquiry).

The Infrastructure Victoria Bill 2015 has been introduced into Parliament, seeking to establish a statutory authority that will provide independent and expert advice to the Government about Victoria's infrastructure needs and priorities; and establish a new strategic infrastructure planning process in Victoria, encompassing the release of a 30-year infrastructure strategy following public consultation, amongst other things. It is said that this initiative will take short term politics out of infrastructure planning.

The Melbourne Underground Rail Authority and the Melbourne Level Crossing Removal Authority will sit outside Infrastructure Victoria.   It may be that in the longer term, there are benefits to those two authorities being brought under the umbrella of Infrastructure Victoria.

Restrictive Covenant update

The market in "desirable" suburbs for multi unit development on single dwelling allotments remains strong. But buyer beware the single dwelling covenant. Covenants can be worded in a multiplicity of ways, even to the extent that within the same subdivision, the wording can vary.

Readers may be familiar with section 84 of the Property Law Act which empowers the Court (inter alia) to discharge or modify a restriction if it is satisfied that the restriction ought to be deemed obsolete or that its continuing existence would impede the reasonable user of the land without securing practical benefits; or that its discharge or modification would not substantially injure the beneficiaries.

In Rosenwald v Hogg (2015 VSC 199) the covenant provided that the purchaser not "erect more than one building including outbuildings on the said lot hereby transferred and such building shall be a private dwelling ….". The Plaintiff sought to construct one building of three storeys containing 13 or so dwellings.

Relying on previous decisions that have interpreted the term "a dwelling" to mean that more than one dwelling can be constructed, as long as the building is not something other than a dwelling (see Tonks v Tonks (2003) 11 VR 1244), the recent purchaser sought a declaration that the covenant did not prevent the construction of a single building containing a number of residential apartments. The defendant argued the contrary, insisting that the number of dwellings in the building be restricted to one.

The Court disposed of the argument succinctly at [12] "It is my view that the natural and ordinary meaning of the words as they appear in the covenant in this case is that they prohibit construction on the land of more than one building containing more than one dwelling". …. [14] … the composite and sequential prescription of the 'one building' to be 'a private dwelling' is not merely intended to prescribe a residential use of the one building, it is also intended to limit the number of households to be accommodated in that building to one".

The area under consideration was predominantly single dwellings with a fair smattering of multi-dwelling developments. Older style single dwellings had been demolished and replaced with modern single dwellings occupying greater land area and of at least two storeys (a very common sight in older subdivisions). The Court acknowledged that the use of the land for non-residential

purposes was possible (for example, as a medical practice or place of worship, or with a permit for a café or function centre or a range of other trading uses).

The Court also recognised that a proposal to construct one building "A large two storey residence with reasonably generous setbacks from the street front and side may be one thing; a three storey building necessary to accommodate 13 individual dwellings, with resultant loss of open land area due to the need for a larger building envelope and common access to a large basement car park, is another. One is more closely aligned to the mass and appearance of a single-dwelling building; the other is hard to disguise as a multi-dwelling apartment block. " [45] However, it was "also true that, consistently with the zoning permissions applicable to land on Hawthorn Road, a single-dwelling could, in theory, be constructed with such large proportions that it might resemble a set of apartments containing 13 or so separate dwellings."

On the question of obsolescence the Court found that the covenant was not obsolete with respect to maintaining residential use of the land. As for "substantial injury", the Court considered the question to be "what modification would not substantially injure the beneficiaries" [49].   The answer posited by the Judge was "A modification so crafted that the resulting development would continue to contribute to the visual perception of a predominantly single-dwelling" [49].

As to whether the covenant should be discharged altogether, it is useful to note that the Court adopted the summary in <u>Vrakas v Registrar of Titles</u> [2008] VSC 281) of the principles governing an application under s 84 (1) of the Property Law Act pursuant to which the application in the case under discussion had been made.

> [20]When considering the 'obsolete' ground sub-paragraph (a), his Honour summarised the principles this way (*excluding the case references*):
>
> - What is the "neighbourhood is a question of fact and must be determined as at the date of the hearing rather than the date of the covenant
> - A covenant is "obsolete" if it can no longer achieve or fulfil any of its original objects or purposes or has become "futile or useless"
> - A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent. Also a covenant is not obsolete even if the purpose for which it was designed has become wholly obsolete, provided that it conferred a continuing benefit on persons by maintaining a restriction on the user of land.
> - The test is whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or had become of no value.
> - If a covenant continues to have any value for the persons entitled to the benefit of it, then it will rarely, if ever, be obsolete.
> - Strictly speaking, the inquiry is as to whether the restriction of user created by the covenant is obsolete, rather than as to whether the covenant itself is obsolete.

The application to modify the covenant was declined. The Court reiterated that a compromise result may have been achieved between the parties, which had not eventuated. Although the tests and hurdles to be overcome in the Supreme Court provide some room to move (unlike the "will be unlikely to suffer any detriment of any kind including any perceived detriment" test at VCAT

under the Planning and Environment Act), care must still be taken in drafting the application to the Court and preparing the case for hearing.

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