KELLEHERS
AUSTRALIA

"I'm late! I'm late! For a very important date!"

Is it time to reconsider Councils requirement to give notice of its decisions to objectors?

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Objector rights are a fundamental part of the Victorian Planning System. However, recent amendments to the *Planning and Environment Regulations* 2015 highlight possible gaps in the system leaving Objector rights vulnerable. We consider these changes and identify a number of possible solutions to enhance the system and protect the important role Objectors have in our planning system.

Former Justice of the Victorian Supreme Court and former VCAT President, Stuart Morris QC, expressed three broad policy reasons for the existence and retention of Objector rights, including that they discourage corrupt behaviour between developers and local government, improve the quality of governance and lead to better planning decisions.[1]

Also, community participation, and in particular an objectors' right to seek review of a Councils decision at VCAT, help minimise 'top-down' systems of decision-making such as *DAD ('decide, announce, defend')*" [2,] which have the potential to lead to poorer planning outcomes.

Known also as 'third party rights', Objectors' rights trigger at three interconnected stages of a planning permit process – notice, objection and review:

1. Notice
   The Responsible Authority (usually Council) and/or Permit Applicants required, unless exempted, must notify adjoining landowners and any other persons who may suffer material detriment by the granting of a permit. Notice is required again after Council makes its decision.
2. Objection
   Once notified, affected third parties, unless excluded, may object or make a submission to the proposal. A valid third party objection must be considered by the Council in making its decision.
3. Review
   If a party who made an objection or submission is dissatisfied with the Responsible Authority's decision, they may seek independent review at VCAT.

[1] Morris, S 'Third Party Participation in the Planning Permit Process' (Paper presented at 'Environmental Sustainability, the Community and legal Advocacy' Conference, Victoria University, 4 March 2005) 6.
[2] Vanclay, F., Esteves, A.M., Aucamp, I. & Franks, D. 2015 *Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*. Fargo ND: International Association for Impact Assessment. page 20-21 see - *IAP2's Public Participation Spectrum*, International Association for Public Participation, AP2 International Federation 2014.

These triggers are interconnected, over various timelines, with each integral to the other.

A recent amendment to the *Planning and Environment Regulations* 2015 (PER) alters the time within which objectors must apply for review to VCAT from 21 days to 28 days. Importantly the amendment changed the time 'the clock starts running'. The 28 days does not run from the day the Notice is 'given' but instead the date of the Notice itself, regardless of when, whether or how Notice is given. This is an important amendment. It reads:

> *"An application under section 82(1) of the Act for review of a decision by the responsible authority must be made within 28 days after the date of notice of that decision."*

Thus, as soon as Council dates and signs off on its Notice of Decision, 'the clock is ticking' for the Objectors, irrespective of whether they actually know of the existence of the Notice.

The amendment to r35 arose from previous uncertainty as to the exact date of when a Notice was 'given'. In *Hoxha v Cardinia SC* [2016] VCAT 2179 Deputy President Gibson found the word 'given' 'unworkable and unfair' because it created a variable closing date, particularly as between a Notice posted and or a Notice emailed. The Deputy President indicated her intention to write to the Planning Minister with a recommendation that the regulation be amended, and a proposed rewording as follows:

> *An application for review under section 82 of the Act must be made within 21 days* ***after the date of a notice of decision to grant a permit, which is given by the responsible authority*** *to the objector under section 64 of the Act.*[3]

S64 *Planning and Environment Act* 1987 (PEA) requires Council to give notice to each person who objected. The Notice must set out any conditions to which the permit will be subject. The PEA stipulates that where a Notice is required to be given, served or published,[4] it need not been given personally[5] and it '*may give or serve the document personally, by post or in any other prescribed way'*[6]. R53 PER sets out 'other prescribed way[s]', which include via document exchange, facsimile machine, a weblink or similar link to a cloud/dropbox folder[7], or other electronic communication[8]. However before giving notice via one of these methods there is an important precondition being:

> *"the person required to give or serve the notice or document has taken reasonable steps to ensure that the person to be served with notice or document has suitable arrangements for its receipt."*[9]

[3] *Hoxha v Cardinia SC* [2016] VCAT 2179 para [28]
[4] s147(a)
[5] s147(b)
[6] s147(c)
[7] r53(c)
[8] r53(a)-(c)
[9] r53(b)

The Deputy President's suggested wording in *Hoxha,* for r35, included the important reference back to the responsible authority's obligation to notify objectors.

Unfortunately, the gazetted form of amended r35 omitted this important anchoring reference. As a consequence, the appeal time trigger is now totally disconnected from the important precursory obligation to give the Notice to objectors.

Such an outcome appears to create inconsistency with the Objectives of Planning [s4(2)(i) PEA] and the operation of s64 PEA, which clearly connects the decision, Notice of that decision, right to review and permit issue. Importantly, PEA only allows the issue of a permit at the expiry of the period in which an objector can exercise their right to review.

This amendment, now leaves objectors extremely vulnerable and creates a system in which objectors may be unknowingly denied their review rights.

A recent VCAT case considering amended r35 concerned an objector who did not become aware of notice until after expiry of the review period. Although his Objection clearly specified email and postal addresses and extensive email exchanges occurred throughout consideration of the permit application (between Council's planning officer and the Objector's solicitor), the Notice was not sent to the postal address or email on the Objection, or to the lawyer's email. Instead Council emailed it to a receptionist's email that, along with posting the Objection, had been used (many months earlier) to email the Objection. This email was not used for any exchange period in which the permit application was considered and, during this period the receptionist's email was closed with diversions in place.

The case highlights flaws in the 'address for service' arrangements for giving notice to objectors. As such, there is no requirement for a Responsible Authority to notify an objector using either the postal or email address shown on the Objection. There is no requirement to give the Notice via the lawyer with whom it corresponds. Indeed, there is now no obligation to actually give the Notice at all, or within the appeal period or to any particular address. It seems that choice of the mode of service also rests with the Responsible Authority ie the choice of mail, email, cloud, fax etc. The amended legislative framework no longer provides objectors with confidence that they will be given Notice or how.

In this case, by the time the Notice was 'discovered', Council had issued the permit. Thus, the Objector's only option was to commence an application to cancel or amend the permit pursuant to s87. VCAT struck out this application, accepting submissions from the Council and the Permit Applicant that Notice to an email other than as shown on the Objection or to the lawyer handling the matter was satisfactory. A formal written decision is expected to follow.

Kellehers considers this outcome to be unsatisfactory. It could be resolved in a variety of methods, whether through VCAT recommending that Council's must specify more clearly their processes for giving Notice, including asking Objectors to clearly specify how they wish to be given Notice and/or

simply communicating to Objectors where and how they will be given Notice. Alternatively, amendment to r35 PER or s64 PEA could ensure notice is given within a set number of days of the making of the decision.

Kellehers considers that urgent attention is needed to amend R35 to ensure that, at least, it accords with the Deputy President's recommendation. There may be need or benefit in requiring Councils, after receipt of an Objection, to take reasonable steps [as required by r53(b)] to confirm the address for service if that is unclear. So severe are the consequences for an Objector who remains unaware of a Notice within 28 days that, in our view, a Responsible Authority ought be held to account to properly 'give' the Notice.

Some modification of the Address for Service provisions used in higher jurisdictions (such as those set out in the *Supreme Court (General Civil Procedure) Rules* 2015) could assist. Without any clear requirement to give, or properly give, a Notice, there is a serious weakening of the fundamental protections to affected third parties to seek independent review of a Councils decision.

It leaves open the door for a Responsible Authority to entirely fail to 'give' Notice and/or to 'give' it close to the appeal deadline or, in this case, to an incorrect email other than as specified in the Objection.

Whilst this gap remains, Objectors and affected parties must be extremely vigilant to monitor Council's actions following the closure of the objection period, to ensure they do not lose their review rights.

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