

## **Knowing the social in Planning Law Decision Making**

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The proposed paper reflects an interest in how policy and law are used to develop models for more just and equitable city planning. The paper draws on socio-legal scholarship and urban studies to consider knowledge formats for planning law decision makers (PLDM) in relation to social impacts for proposals for significant land use and development. Of interest is how planning law decision makers in the State of Victoria, Australia, know about social impacts and what role their own social capital plays in regard to this knowledge. The place for urban social tools such as social impact assessment, surveys, witness statements, plans and maps as a legal actors and knowledge instruments in the planning decision making process in Courts and Planning tribunals is considered.

'The process of impact assessment is at the heart of planning practice' (Ziller, 2009, p.14)

## ***Introduction***

Everyone enjoys a David vs Goliath story, a narrative which proves the activist can take on the big corporation or Government department and succeed. Though this story is not as romantic as that, it still may have its merits.

The research project behind this narrative lies in my exploration on how Planning Law Decision Makers (PLDM) rely on tools such as social impact assessment, plans, maps, expert witnesses, planning legislation and related policy and regulatory instruments, to gain knowledge on social impacts for significant land use and development. It is positioned on the proposition that all of these, including PLDM themselves, are actors in the planning system.

Planning Law Decision Makers (PLDM) in this study are defined as decision makers in the context of planning in the State of Victoria, Australia who make decisions on land use and development proposals. These include planning officers and managers at Councils, elected Councillors, members of the planning tribunal (Victorian Civil and Administrative Tribunal), Judges in superior courts who have jurisdiction to deal with planning matters and the State Minister for Planning. For the sake of this study, it also includes Planning Panel Members<sup>1</sup>.

The paper explores the context of knowing about the social in law, then moves to consider the social in planning and how planning law decision makers can know about the social in planning. The feel good story comes into play with the realisation that a small Victorian municipality in implementing a social policy, may be an actor in a proposed change to Victorian planning legislation - but more of this later in the paper.

## ***Knowing the social in law***

Law has become an arena where people either seek the truth or comment on the truth-seeking endeavours of others (Valverde, 2003). Lawyers, and legal actors, from municipal planning officers to judges, make explicit and implicit assumptions and claims about truth. In fact, in many respects, law operates in a taken-for-granted universe. Studies of the workings of law in the everyday context of minor lawsuits, traffic tickets, and petty crime (cited in Valverde, 2003, pp. 4-5) suggest that while truth seeking is an important aspect of law, this is not always or even most of the time the motivation of law. Minor crimes, more common than thrilling high profile matters, are often plea-bargained and often people in small matters do not turn up to court. The rules of evidence operate so that the final determination of the truth may in fact pan out so that legal decisions, including those such as imprisoning and deportation, are taken without full knowledge.

A central concern of law-and-society scholarship has been to map how extralegal knowledge claims about social relations are introduced into legal processes, either as expert evidence or through other routes, and to document how courts and legislatures then do or don't use these facts and claims. These studies often focus on the content of the knowledge claims that are either accepted or rejected by various legal actors. They raise questions such as the following: Are legal processes increasingly influenced by technical expertise even as some forms of high science lose prestige (Cole, 2001; Jasanoff, 1995)? What makes certain courts sympathetic or hostile to sociological and cultural evidence (Valverde, 1996, 2003, 2005a)? And at a more theoretical level, debates have taken place about whether law in general is increasingly governing through extralegal norms, including scientific knowledge and statistics (Ewald, 1991; Hunt & Wickham, 1978).

Valverde (2003; 2005a;2005b) is interested in how actors pick through documents or discourses and cobble together new governing machines that recycle old bits in new ways. Valverde believes that much can be learned or adapted from studies located at the intersection of science studies and "actor-network" analysis (e.g., Latour & Woolgar, 1979; Latour, 1987). Valverde (2005b), takes the view that whilst neither the findings nor the methods of Actor Network Theory (ANT) may be able to be directly applied to legal contexts, by borrowing from these resources, it may reveal processes obscured in more static--and more humanist--analyses of knowledge in law.

She notes further (2005b), that one cannot always pose the question of knowledge in an either-or fashion. She observes, for instance, that judicial review of municipal ordinances setting out special zoning requirements for sexual businesses can nowadays include planners' or sociologists' studies of property values, crime, traffic, and so on, and sometimes such studies are mandatory: but that does not mean that a scientific logic is driving out moral logics. In some areas of law, science may well drive out other types of claims: but in at least some areas of law, knowledge is not a zero-sum game.

In the urban law network, largely textual entities move along networks but change their character even when they are not excerpted or otherwise manipulated. For instance, for consultants who produce them, studies of urban problems produced to justify zoning ordinances are money-making commodities; for the city council that uses them, they are legal capital; for the appellate courts, they are mainly procedural entities. Valverde (2005b) sees experts such as sociologists in court cases as actors in different networks that overlap into the legal network. She sees articles she writes as another actor, mainly located in the law-and-society scholarly network, but overlapping with real-life networks. She points out that while some ANT scholars write as if

their own accounts are non-networked and are above the fray, she feels that it is more consistent to regard scholarly work as overlapping with the networks one studies, not in some superior epistemological realm.

Smart (1989) posits that in law, non-legal knowledge is seen to be suspect and/or secondary. There is an assumption that scientific evidence is better placed in the search for the truth. Use of social evidence in decision making is a curious and uncertain endeavour in Australian courts with little research to date (Mullane,1998; Burns, 2004). Research by Jasanoff (1995), a leading US scholar of scientific knowledges in law, points out that even in 'toxic' tort lawsuits, in which science is unusually influential, courts tend to favour the evidence of general practitioners who have seen the plaintiff to the more causally relevant evidence of epidemiologists.

Zizek (1994, p.11) reminds us in regard to the catchcry 'the facts speak for themselves' that rather, 'facts never speak for themselves but are always made to speak by a network of discursive devices' (original emphasis). Wittgenstein urged that meaning does not inhere in words but rather slips into existence within the particular social context in which words are used. Seeking truth in law is, of course, further complicated by the strict rules of evidence. Given the dearth in the use of social let alone cultural evidence in Australian trials, particularly in regard to significant land use and development for city proposals, there is scope for further research on the weight such evidence can play in the planning process from proposal to appeal.

### ***The social in planning***

Howard (2004, p.16) reminds us that in dealing with social issues in planning, there is often much frustration as there are no quick neat answers for social matters for a particular locality. A social impact assessment is a tool that can provide rigorous, evidence based analysis and can engage with constituencies in a responsible and meaningful manner (Becker & Vanclay, 2003; Howard, 2004). Consideration of social effects supports planning for people and building equitable communities. Over time, there has been a shift from consideration of only environmental impacts to a more holistic approach and as part of this integration, social, economic and cultural impacts may need to be considered for a significant land use and development proposal. For Howard (2004, p.17), the social domain sits alongside traffic analysis, urban design, economic development, market research, architecture and cultural and environmental planning with each discipline adding value to and informing the other. Howard (2004, p.17) adds the caveat that to be properly informed, planners need to understand the ways in which localities differ and the influence this has on current and future needs and appropriate responses to community priorities. Cramphorn and Davies (2004, p.46) point out that it is important to have an understanding of the local community

for the whole structure of a small community and the way it functions can be affected if the social affects are not adequately explored.

Understanding social effects for proposals may be related to an understanding of the social capital for a particular community and social environment. Planning land use and development is not an isolated endeavour. The old catchcry 'planning for people' is as relevant today as it was for Howard and Mumford.

Cramphorn and Davies (2004, p. 47) argue that if the impacts on social capital were to be given greater weight, the planning process would need to take a whole of community approach. Speaking specifically about transport planning, but equally relevant to all significant land use and development, Cramphorn and Davies (2004) see an advantage to a whole of government approach to assisting communities during planning processes so that social capital is strengthened rather than damaged. In the long term, such intervention could enable communities to better deal with the real changes associated with change and they view such intervention better at an early stage of the planning process.

In 2009, the Planning Institute of Australia (PIA) issued a position statement on Social Impact Assessment.

The position statement derives from work undertaken since 2005 by PIA to construct a comprehensive position on social impact assessment, an area growing in importance. PIA's position comes from viewing impact assessment as a method for predicting and assessing the consequences of a proposed action or initiative before a decision is made. For PIA, impact assessment allows for better decision making processes and better outcomes from decisions. They view social impact assessment as part of suite of impact assessment which includes economic and environmental impact assessment.

A social impact assessment for PIA is an assessment of the social consequences of a proposed decision or action, namely the impacts on affected groups of people and on their way of life, life chances, health, culture and capacity to sustain these. A mature triple bottom line approach to planning decisions needs to include social impact assessment in impact assessment processes. Much planning practice to date has given less attention to social impact assessment than to environmental and economic impact assessment. Many impact assessments omit social issues altogether while others consider too narrow a range of issues. PIA notes further, that it is common to find that demographic profiling and community consultation have been substituted for social science research findings and that the impact statement is based on speculation rather than assessment. There is a widespread failure to apply the core sustainability principle of intra-generational equity to impact assessment. PIA is concerned that actions have sometimes been

taken, and decisions made, on an ill-informed basis and which did not foresee some serious social consequences before they eventuated.

The PIA position statement supports consideration of social effects for:

- larger developments, including: major retail, sports or social infrastructure proposals
- a significant change of land use, including: new highways, loss of agricultural land
- sale or rezoning of publicly owned land
- new planning policies and plans and amendments to them, and/or
- controversial impact assessment uses or increases in intensity (eg brothels or gun shops, or of gaming or liquor outlets).

Social impact assessment of a high academic standard, draw on different disciplines. This is founded upon a reliance on hybrid knowledge formats (Valverde, 2003;2005b) and the position of the in-between. Such in-between space may undo identities (Grosz, 2001 p. 92) but it could also create the new, a fresh utopian urge to strive for the more complete. To assist in the provision of such knowledge to PLDM, a social impact assessment prepared by an expert, may be of benefit. Such an expert should have the knowledge base to prepare a report which is of high academic qualitative and quantitative standard. Such efforts should strive for social sustainability, justice in planning (Campbell 2006) and generally, to support just cities (Fainstein 2005).

Ziller (2009) posits that in adopting the social impact assessment policy, the Planning Institute of Australia has raised the bar and established a national yardstick for good practice.

## ***Project methodology***

Ten PLDM were interviewed for the study. Three of these ten PLDM were interviewed in a more informal manner as part of a pilot study. Their responses helped to shape the structured interview questions for the remaining seven PLDM. Five social impact assessment reports from the case study municipality, City of Maribyrnong, were analysed and these also assisted in crafting the interview questions and the general structure of the research project. The use of social impact assessment for significant residential projects in Maribyrnong has been a local municipal policy position since 2002.

Discourse analysis (Jacobs, 2006; Fairclough, 1989, 1992, 1995) was used to analyse fifteen Victorian planning law judgements from the planning tribunal (Victorian Civil and Administrative Tribunal) and the Victorian Supreme Court. Two Victorian Planning Panel cases were analysed as well as four planning law judgments from Ontario, Canada.

The principle question for the study is: *how do PLDM gain knowledge on social impacts for proposals for significant land use and development?* This foundation question then relies upon ten

further questions which were put to interview respondents. These ten questions were also influenced by my reading widely on the areas of decision making, urban history, critical geography, actor network theory and planning law. The existing literature was also important in shaping discussions with respondents in the pilot study. An important side issue to emerge from the research project is whether ethics and values of PLDM play a role in their decision-making. Planning judgments, such as *Romsey Hotel Pty Ltd v Macedon Ranges Shire* [2005] VCAT 951, inform us that moral views and values should play no role in planning decisions (this matter is not discussed further in this paper).

The pilot study was undertaken in mid 2007 and interviews were conducted from late 2007 to early 2008. The analysis of the case study social impact assessment reports and six judgments for the pilot study took place from January 2007-June 2007.<sup>ii</sup>

The project relied upon a qualitative methods approach. There are different perspectives on how to use qualitative research methods (Denzin and Lincoln, 2005). It has taken some time for a qualitative research approach to be appreciated in planning and urban policy research (Maginn, 2006; Thompson, 2006). Qualitative research is interested in the investigation of causes and effects and can provide rich text and narrative. Sandercock (2003) sees great value in storytelling in planning.

### ***The social in Victorian local Planning law as an influence on State law?***

Planning regulation in Victoria is situated whereby the *Planning and Environment Act 1987* provides the heads of power for the planning system. The planning system flows on from this essential piece of legislation via a series of subordinate instruments including the State Planning Policy Framework (SPPF) and the Victorian Planning Provisions (VPP). The State's seventy nine municipalities implement the SPPF and the VPP into their municipal planning frameworks establishing individual municipal planning schemes.

Section 4(2) of the Victorian *Planning and Environment Act 1987* provides that one of the objectives of the planning framework is 'to ensure that the effects of the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land.'

The practical application of this objective occurs in the preparation or amendment of a planning scheme under section 12(2)(b) and (c) of the Act, and in the matters that a responsible authority (or the planning tribunal on appeal) considers when deciding on an application for a permit under section 60(1) and (1A).

These sections provide that significant environmental effects must be considered, and that significant social and economic effects may be considered by the relevant authority. This has caused debate about whether the affect of this differentiation results in different weight being applied to environmental, social and economic factors. Currently, the Act does not align with Clause 11.02 of the State Planning Policy Framework that seeks to ensure that the objectives of planning in Victoria are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.

Clause 52.27 of the State Planning Policy Framework is a good example of the shift in thinking about the consideration of social effects in land use. Clause 52.27 is a statewide provision that has existed in Victorian planning schemes for some time, dealing specifically with licensed premises. However, Clause 52.27 was significantly amended by Amendment VC47 in 2008 to include an additional purpose – to ensure that the impact of the licensed premises on the amenity of the surrounding area is considered – and to introduce specific decision guidelines being:

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The impact of the sale or consumption of liquor permitted by the liquor licence on the amenity of the surrounding area.
- The impact of the hours of operation of on the amenity of the surrounding area.
- The impact of the number of patrons on the amenity of the surrounding area.
- The cumulative impact of any existing and the proposed liquor licence, the hours of operation and number of patrons, on the amenity of the area.

Law permeates all of our lives regardless of whether we reside or work in metropolitan or regional areas. Over time, law has become more specialised with legal practitioners offering their advice in areas such as family law, medical negligence, criminal law and taxation law. Planning law in Australia is a young area of legal specialisation even though, as Frug (1999) reminds us, everyday on our way to work or in attending to our private lives, we cross into numerous municipalities each placing upon us similar, yet distinct, legal responsibilities.

The *Planning and Environment Act* was introduced into the Victorian Parliament in 1987 by the Minister for Planning and Environment, for administration by the Ministry for Planning and Environment. The principle that planning schemes took account of matters concerning the natural (or biophysical) environment was well established by the 1944 and 1961 Victorian Town and Country Planning Acts, and was continued into the new 1987 Act. While it is possible to understand the environment as including the social environment and economic environment as well as the biophysical environment, this is not always the way the term is understood. The innovation which needed to be specifically stated in the Act in 1987 was the explicit provision that in regulating land use and development, schemes (and decisions under schemes) could take account of social and economic matters.

That there may be consideration of social effects in the *Planning and Environment Act* is found in sections 4, 12 and 60(1A). Amendments to the Act in 2004 moved the discretionary consideration for significant social and economic effects from section 60 to section 60(1A).

Influential to all was the 1990 Victorian Ministry for Planning and Environment 'Social, Economic and Environmental Effect: Guidelines for Dealing with Planning Permits and Amendments'. Social effects to be considered included whether proposals (VMPE Guidelines, 1990, clause 4):

- Generate demand for increased community facilities and services
- Provide adequate facilities and services
- Meet needs for facilities and services already known to be deficient
- Improve or reduce accessibility to social and community facilities
- Provide greater or lesser choice in housing, shopping, recreational and leisure services
- Improve or reduce safety for clients and residents
- Meet the needs of targeted groups, eg. Aboriginal communities, youth, unemployed, aged, disabled
- Are substantially detrimental to existing residential amenity

The guidelines point out that 'in considering social effects, it is necessary to establish a connection between the social effects and the use or development of land. This requires considering whether a proposed use or development would interact unfavourably with the use of neighbouring land' (Clause 4.2).

That the *Planning and Environment Act* allows for the consideration of social and economic impacts in planning matters is important as space is required for PLDM to draw on as many impact

variables as possible to ensure PLDM are able to make more informed decisions (Alexander, 2006). Cost constraints, however, often dictate the reality to this utopian position.

The Victorian municipality of Maribyrnong was the first Victorian council to implement a local social policy which encouraged the use of social impact assessment. This was important for Maribyrnong was traditionally a heavy industrial locality which is undergoing substantial change and gentrification. Since 2002, guidelines have specified that social impact assessment may be required for the following proposals within the City of Maribyrnong (Maribyrnong, 2002):

- Major residential projects which will have significant population increase (as determined by Council)
- Multi-storey residential developments
- Where there is a change in land use to facilitate residential development
- Rezoning from industrial use to residential use
- Rezoning of public open space

Since commencement of this research study some three years ago, the consideration of social impacts for significant land use and development has become more important as Victoria moves to modernise its planning legislation. Analysis of the 21 legal judgements for this research study sees PLDM making more detailed consideration of social impacts. Since Maribyrnong introduced its policy and guidelines on the use of social impact assessment, other municipalities, such as City of Frankston, have also implemented similar policy positions on the requirement for social impact assessment (Frankston, 2006).

As part of the 2009 modernisation of the Victorian Planning and Environment Act review process, the Department of Planning and Community Development released five response papers in August 2009. Response Paper 1: *The Objectives of Planning* raises the proposal that it is intended for the Objectives of the Act to be amended to require the balancing of environmental, social and economic considerations in decisions about the use and development of land. There is also a proposal to mandate the consideration of significant social and economic effects in the use or development of land and in the amendment of planning schemes process.

These proposed changes reinforce Clause 11.02 of the Victorian State Planning Policy Framework that '*seeks to ensure that the objectives of planning in Victoria are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.*'

## ***Conclusion***

Has the City of Maribyrnong, a medium sized council west of Melbourne, directly influenced State policy and will it have a direct impact on State legislative changes which propose to mandate consideration of social impacts for significant land use and development? This may be a little ambitious to answer in this paper, but what can be said is that the consideration of social impacts continues to gain currency in Australia and Maribyrnong was well ahead of its time in 2002 by introducing its social impact assessment policy. It is only in 2009 that the Planning Institute of Australia has issued its national policy statement on social impact assessment. Other Australian jurisdictions such as NSW have already mandated consideration of social impacts for significant land use and development. It is anticipated that the research being undertaken for this project can add to the body of knowledge on the use of social impact assessment and more particularly, contribute towards an understanding about how planning law decision makers gain knowledge on social impacts for significant land use and development.

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<sup>i</sup> Generally speaking, such panel members only make high level recommendations for planning matters and the Minister for Planning in this context, is the ultimate decision maker.<sup>i</sup>

<sup>ii</sup> These six judgements form part of the 21 legal cases analysed for this research project.