

Spinning the Wheel: examining decision making process and outcomes in development assessment

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Abstract: An increased emphasis on consolidated city policies has heightened development pressure on existing urban areas. This has occurred alongside increased resident resistance to development. The development assessment process, culminating in the issuing or refusal of planning permits, seeks to mediate this tension. A frequently voiced concern of developer and resident groups alike is the extent of disagreement between decisions makers involved in the assessment process – planning officers, elected representatives and appeal bodies – on the merits of a development proposal. This resulting uncertainty is perceived to hamper investment decisions, increase developer costs and unsettle local communities.

This paper examines in detail the determinations of decision makers in the development assessment process. The case study is based on an examination of the 2011 calendar year of planning permit applications determined across all 31 local government areas in Melbourne, Victoria. Drawing together planning permit data, Council meeting minutes and Victorian Civil and Administrative Tribunal (VCAT) decisions, we compare the determinations of planning officers, elected officials and the appeal tribunal. The data reveals that in a significant number of cases there is disagreement in decision maker determinations. While we find that the majority of applications were ultimately granted planning approval, there is little consistency between the determinations of each party, with a range of factors influencing decision making during each stage of the process.

Introduction

The development of higher density housing in existing areas of Australian capital cities has gathered pace in recent years, responding to market demand and several decades of planning policy in support of consolidated cities. This development places increased pressure on development assessment processes to mediate conflict between developers, local government, residents and central government in order to facilitate urban consolidation. Planning permit decisions have a significant impact on immediate residents' experience of home and neighbourhood and have economic consequences for developers. While each decision on a proposed development may be insignificant on a metropolitan scale, the cumulative impact of these decisions and resultant development determines much of the change in cities over time.

Development assessment typically begins with a proponent proposing a new development and seeking planning permission to proceed. Assessment of permit applications is conducted in a context of a body of state and local planning policies and controls. In Victoria, where this research takes place, the State Government Minister for Planning is the authority on development approvals. However, in nearly all circumstances this authority is delegated to local governments to administer local planning schemes. In each local government the elected Council is the delegated authority. The elected Council in turn delegates the majority of decision determinations to the Council's planning department. Thus, assessment of planning applications and most decisions on development applications are made by local government planning officers. Along with developers and government decisions makers, there are third parties interested in the outcome of development assessment, typically local residents who are frequently opposed to increased development intensity.

With the involvement of developers, resident, local and state government there are several points of tension to note. First, there is tension between the developer (or proponent) and decision makers, as the nature of acceptable development is negotiated against planning policy. Developers frequently view the planning process as a necessary hurdle and look for a pathway through this process that give most certainly and least cost (Ruming 2010; Cook et al 2012). Second, there is tension between residents and decision makers, with residents typically seeking protection of the status quo. Residents express concerns for issues such as preserving neighbourhood character and community; preserving house value; and concern for local amenity impacts such as parking pressure, overshadowing and privacy (Valance et al 2005; Woodcock et al 2011; Cook et al 2012). Third, there is often tension between regional government policy objectives and local interpretation, with central policy perceived as overriding important local considerations (Cook et al 2012). Fourth, there can be tension within local government, between the merits based assessment of planning officers and the more politically

informed assessment of elected Council. While all planning systems operate within a political realm, those characterised by a more prominent role for elected Councillors are subject to greater direct political influence (Willey 2006).

In many jurisdictions there is a formal process allowing for planning permit decisions to be appealed to a court or tribunal. In Victoria this is the Victorian Civil and Administrative Tribunal (VCAT), which provides a second merits based review of development proposals. Appeals to VCAT can be taken by proponents or third parties (typically objecting residents). Therefore the final tension to note is that between local decision determination and that of appeal hearings. These tensions between key actors are accentuated by the discretionary nature of most development assessment processes, which allow differing interpretation of policy intent (Claydon 1998; Tait and Campbell 2000).

This paper examines in detail the determinations of decision makers in the development assessment process. Tensions between key actors, along with the discretionary nature of development assessment, causes uncertainty for all parties, significant economic and time costs for developers and resident objectors, and reputational costs for government (Gurran et al 2009; Kelly et al 2011; Cook et al 2012). There are also implications for policy implementation. In Australia there has been an appetite to reform development assessment (Productivity Commission 2011), which in Victoria is seeing significant changes being made to land-use zones (DTPLI 2013a) and development assessment process (DTPLI 2013b). However, such reform is proceeding with a limited evidence base. There exists little empirical investigation into the way the tensions between key actors play out in the development assessment process. In particular, there is a lack of quantitative evidence surrounding the decision making process in development assessment. This research examines the decision making processes of development assessment to better understand how and why stakeholder and decision maker roles play out. The research is based on an examination of the 2011 calendar year of planning permit applications determined across all 31 local government areas in Melbourne, Victoria. The method used to compile and analyse this data is outlined in the next section of the paper. We then report on the data analysis, providing a detailed characterisation of decision determination on contested development applications in Victoria. We conclude with a discussion of the implications of this analysis for planning policy and process.

Research Approach

In this research we have conducted a quantitative assessment of development applications to examine how they were assessed by different decision makers within Melbourne's planning approval systems. The first phase of the research involved reviewing all new residential permit applications determined by the elected Council rather than planning officers, at all 31 metropolitan Melbourne local governments, across the 2011 calendar year. We focused on new residential applications as these were the best to highlight decisions in the context of urban consolidation policy. Applications for mixed use developments were considered provided they contained at least one dwelling; however applications for endorsed plans and amendments to existing permits were excluded as the decision to grant a permit had already been issued. This created a comprehensive data set of contentious applications that allowed analysis of (among other things) the degree to which Council adopted planning officer recommendations when making decisions and the factors influencing decision making, including the location, delegation practices and public objection levels raised against applications.

The primary data source used to extract information about each application was the meeting minutes of Council meetings where planning decisions were determined. Analysing the content of the minutes was the most appropriate method of obtaining data for the project, as the information required regarding the intricacies of development applications are not captured within secondary sources¹. To ensure a comprehensive data set was produced the research examined every Council meeting held within the 2011 calendar year. As a result, every application determined by Council that fit the project scope was included within the final data set. Over 500 meeting minutes were analysed and coded. Upon completion, the details of 759 individual development applications had been recorded. Coding of the meeting minutes captured key application characteristics, the recommendations of planning officers and the decision of the elected Council².

¹ We attempted to cross tabulate the cases extracted from the meeting minutes with the Victorian governments Planning Permit Activity Reporting System (PPARs) to streamline the data capture. However, limitations to the PPARs data set meant that all information was extracted from meeting minutes to ensure accuracy.

² Coding schedule based on DPCD style guide for planning permit activity reporting (see DPCD 2009).

The second phase of the research sought to determine how many of the 759 applications had some form of application for review lodged with VCAT, and to examine the nature of these reviews. This subset of applications was developed in July 2013, allowing for at least an additional 18 month period following the initial application to Council to identify an appeal to VCAT. The primary data source for examining appeals to VCAT was the Australasian Legal Information Institute (AustLII) database as it contains detailed case summaries in an accessible format that could be suitably coded. In coding VCAT cases it became clear that not all cases lodged at VCAT appear on AustLII. Therefore, we arranged for our dataset to be examined by VCAT’s support analysts to determine if an application for review had been lodged with VCAT directly against their internal records. The final result identified that 390 of the 759 cases has some form of appeal lodged with VCAT. Upon completion approximately 280 of these were coded from AustLii data, with the remaining cases coded based on data provided by VCAT³.

Analysis

The objective of this research is to chart contested development applications through the decision determination process, and in doing so compare the differing treatment of applications by different decisions makers. This section examines the decision making process based on the data set. It begins by examining the local level decision characteristics. It then moves on to examine the cases that proceed to VCAT focusing on the relationship between VCAT determinations and local level decisions.

Local Determination

The majority of planning permit applications in Victoria are determined by local government planning officers. However, for contentious or significant proposals, decisions are typically made by the elected Council. As Council are the formal decision making body at the local government level they can choose to deliberate on any permit application. Most local authorities have a number of practical triggers for withdrawing a permit from planning officers, most commonly based on either development size or an established number of objections. However, there is no consistency across local government areas on these triggers.

In cases where an application is determined by Council, planning officers are still instructed to prepare an ‘officer’s report’, which generally contains an assessment of the application and a recommendation of what the Council determination should be. An application determined at a Council meeting will be discussed and voted on by the Councillors present, with the majority vote determining the outcome. There is no legislated requirement for Council to respond to the recommendations of planners, or provide justification if they reject the recommendation. However, the data analysed indicates that the majority of Councils framed their decision as a response to the planner’s recommendation, so there is some evidence that recommendations are seriously considered.

Table 1 and Table 2 provide a comparison of planning officer recommendation and elected Council determination for all applications in the data set. Table 1 shows that the vast majority of planning officer recommendations on applications ultimately determined by Council are to grant a permit (87%). Therefore, based on the assessment of planning officers, 87% of the applications complied with the relevant planning controls⁴. Table 2 shows that for the very same set of applications, Council issued planning permits to approximately two thirds of all applications (67%). Council thus refused a planning permit more frequently than was recommended by planning officers (33% compared with 13%).

Table 1: Planning Officer Recommendation

Recommendation	Number of Applications	Percent
Grant Permit	660	87
Refuse Permit	99	13
Total	759	100

³ The data provided by VCAT did not include the level of detail contained in the AustLII records. As such this has provided some limitation in the analysis, which is discussed in the paper where relevant.

⁴ As noted above, there is discretion in development assessment. We have not attempted to evaluate the recommendations of planning officers on specific applications against the policy controls. It is likely that many of the applications in the dataset are pushing the boundaries of what is allowable within the policy controls, and are thus ending up at Council for determination

Table 2: Elected Council Decision

Decision	Number of Applications	Percent
Grant Permit	505	67
Refuse Permit	254	33
Total	759	100

Table 3 examines the direct relationship between planning officer recommendation and Council decisions. It shows that Council adopted the decision recommended by the planning officer in 78% of applications, thus rejecting the recommendation in 22% of applications. In the 167 applications where Council did not adopt the planning officer's recommendation, this was almost exclusively to overturn a recommendation to grant a permit. In only 6 applications over the 12 month period did a Council disregard a recommendation to refuse a planning permit and determine to issue one. It is clear that when rejecting planning officer recommendations, Councils are acting almost exclusively in a protectionist manner to refuse permit applications.

Table 3: Degree to which Council adopted Planning Officer recommendation

Decision	Number of Applications	%	Scenario	Number of Applications	%
Adopted Recommendation	592	78	Planner recommends grant of permit, Council adopts recommendation	499	66
			Planner recommends refusal of permit, Council adopts recommendation	93	12
Did Not Adopt Recommendation	167	22	Planner recommends grant of permit, Council refuses permit	161	21
			Planner recommend refusal of permit, Council grants permit	6	<1
Total	759	100		759	100

Cases Proceeding to VCAT

Various sources have reported that approximately seven and eight percent of planning permit applications for residential development in Victoria proceed to VCAT (Productivity Commission 2011; Cook et al 2012). Table 4 shows the number of cases in our dataset that proceed to VCAT, showing that for applications determined by Council, over half had an application for review lodged (51%). Looking specifically at the 254 permit applications that were refused by Council, 88% went on to an appeal at VCAT. As such, when an application for new residential development is determined by Council (as opposed to under delegation by a planning officer), a 'second round' merits review at VCAT is more likely to occur than not; and where Council determines to refuse a permit a VCAT hearing will nearly always follow..

Table 4: Application for Review sought

Application for Review lodged with VCAT	Number of Applications	Percent
Yes	390	51
No	369	49
Total	759	100

While just over half of all cases went on to lodge an application for review with VCAT, Table 5 shows that around 10% of these did not proceed to a full hearing. This is predominately due to applications being withdrawn. A total of 354 cases proceeded to have the planning permit outcome determined by a full VCAT hearing (46% of total data set). While mediation services are offered by VCAT and encouraged within Victorian planning policy, it is clear that mediation is either rarely occurring, or is ineffective at resolving cases prior to a hearing. If an application for review is lodged, it is likely to go the distance and have a full review undertaken with the outcome determined by a Tribunal member.

Table 5: VCAT Assessment Scenario

VCAT Assessment Scenario	Number of Applications	Percent
Proceed to Full hearing	354	91
Withdrawn by Applicant	29	7
Not Accepted by VCAT	4	1
Resolved through Consent Order	3	<1
Total	390	100

Appeals to VCAT can be lodged either by the proponent (first party) or by a third party, typically local residents. The *Planning and Environment Act 1987* allows an appeal to be lodged by the first party against a refusal decision (Section 77) or the against the conditions placed on a permit (Section 80), or by a third party against a decision to grant a permit (Section 82). In some instances VCAT can hear Section 80 and Section 82 reviews at the same hearing, as the outcome of each appeal would directly affect the other. Of the 390 applications for review lodged with VCAT in the dataset, we can say with certainty who lodged the review in 305 cases, as most of these were coded directly from AustLII records. The majority of data provided by VCAT did not identify who lodged the review. Table 6 shows the distribution of appeal types across these 305 cases. First party reviews appeals against Council's refusal to grant a permit are the most common at 68%, with third party appeals making up 20% of the cases.

Table 6: Application for Review Type (Confirmed cases)

Type of Application for Review	Number of Applications	Percent
Section 77 (1st party against refusal)	207	68
Section 80 (1st party against conditions)	20	7
Section 82 (3rd party against grant)	62	20
Section 80 and Section 82	16	5
Total	305	100

VCAT Determination

Depending on the type of appeal lodged, a VCAT hearing will generally involve the permit applicant, the relevant Council (referred to as the responsible authority) and any third party joined to the proceeding. The hearing is overseen by one or more VCAT members, with each party provided the opportunity to present their argument as to their preferred outcome⁵. Following the hearing, the member(s) will make a determination that instructs whether the Council's decision has been 'affirmed', 'varied' or 'set aside'. For the purpose of this research, applications where VCAT 'varied' the decision are considered to be 'affirmed', as in these instances the issuing of a permit has been upheld. A planning permit is then either granted or refused accordingly. Table 7 shows the outcome of whether a permit was granted or not granted for the 354 cases that proceeded to a full VCAT hearing. In seven cases it was not clear what the outcome was, as the data provided by VCAT indicated a decision had been made, but did not report what the decision was. The table shows that VCAT is more likely to determine that a permit be granted than refused, with the majority of cases having a planning permit issued at the conclusion of the hearing.

⁵ Parties may also call additional persons to present specialised evidence relating to the application, such as the views of a traffic consultant or heritage advisor, subject to VCAT procedural guidelines.

Table 7: VCAT Outcome

Decision	Number of Applications	Percent
Permit granted	270	76
No permit granted	77	22
Unknown/unclear outcome	7	2
Total	354	100

The permit outcome at VCAT can be reached by either affirming or setting aside the local Council determination. Table 8 shows the breakdown of VCAT’s decision in relation to that of the local Council. It shows that VCAT are clearly prepared to overturn Council decisions, setting aside the Council ruling in just under 50% of applications (170 of the 347 cases). That is, for one in two cases VCAT finds that a Council decision was appropriate to overturn. The table also shows that VCAT is significantly more likely to overturn local Council by granting a permit (in response to a first party appeal) than by rejecting a permit (in response to a third party appeal). Of the 270 decisions to grant a permit, 149 (or 55%) are reached by overturning local Council. Of the 77 decisions to refuse a permit, only 21 (or 27%) are reached by overturning local Council.

Table 8: VCAT Outcome Scenarios

VCAT Outcome:	Number of Applications	Scenario	Number of Applications	Percent
Permit granted	270	VCAT determination made by affirming Council decision	121	34.87
		VCAT determination made by setting aside Council decision	149	42.94
No permit granted	77	VCAT determination made by affirming Council decision	56	16.14
		VCAT determination made by setting aside Council decision	21	6.05
Total	347		347	100

The data collected through both phases of research allows us to further analyse the pathway of permit applications from planning officer assessment, through Council decision and on to VCAT review. Table 9 presents the pathways of the 347 cases that went on to have a determination made by the Tribunal. The first two lines of the table show cases where the elected Council has granted a permit, adopting the planning officer recommendation. These cases represent third party appeals against a permit being granted. VCAT affirms the decision in 85% of these cases and sets aside the decision in 15% of these cases. Therefore, when there is agreement at the local level to grant a permit, VCAT rarely overturn to refuse a permit.

Table 9: VCAT Outcome Scenarios

Planning officer	Determinations		End Outcome	Number of Applications
	Councillors	VCAT		
Recommends grant	Grant permit	Sets aside decision	No Permit	21
Recommends grant	Grant permit	Affirms decision	Permit	121
Recommends grant	Refuse permit	Set asides decision	Permit	104
Recommends grant	Refuse permit	Affirms decision	No Permit	32
Recommends refusal	Refuse permit	Set asides decision	Permit	45
Recommends refusal	Refuse permit	Affirms decision	No Permit	24
Total				347

*Note that the scenario of the elected Council overturning a planning officer’s recommendation to refuse an application and granting a permit is not represented as none of the six cases where this occurred went on to be appealed at VCAT.

The second two lines of Table 9 show cases where the elected Council has refused a permit, against the recommendation of the planning officer. These cases represent first party appeals against a permit being refused. In these cases, VCAT affirms the decision of Council only 24% of the time, setting aside the other 76% of cases. Therefore, where there is disagreement at the local level, VCAT is likely to overturn the decision of Council and grant permit. This suggests that VCAT is aligning with the merits based review of the local government planning officer. However, as the last two lines of Table 9 show, VCAT is still likely to overturn a decision in cases where the Council has refused a permit, adopting the planning officer recommendation. These again represent first party appeals. In these cases, VCAT affirms the decision of Council 35% of the time, setting aside the other 65% of cases. Despite agreement at the local level, when a developer appeals to VCAT they are likely to get the local decision overturned. Therefore, even when a planning officer's technical assessment recommends refusing a permit (which is rare, occurring in just 13% of all applications in the dataset), VCAT went on to grant 65% of these cases a planning permit. In summary, what the data shows is that VCAT outcomes strongly favour first party appeals, with VCAT supporting Council when permits are granted, and overturning Council when permits are refused.

Discussion

This research presents a quantitative analysis of development decision determinations via a case study of Melbourne, Victoria. We have produced a unique data set of contentious planning permit applications based on those applications determined at local Council meetings. By compiling details on the recommendation of planning officers, the decision of the elected Council, and where relevant the determination of VCAT, we are able to illuminate the decision making process and not just the final outcome. This allows analysis of the decisions of key actors and sheds new light on the way permit assessment processes play out in practice. There are several significant findings from the analysis of permit deliberation data, and although specific to Victoria, there are implications for development assessment processes in other jurisdictions. In presenting these findings it is important to note that the cases in the data set are all applications for residential development *that are determined at a Council meeting* (as opposed to under delegation).

At the local government level we find that planning officers are more likely to recommend a permit be granted than the elected Council. Across the data set, planning officers recommended a permit be granted in 87% of cases, and refused in 13% of cases. For the same set of applications, the elected Councils granted a permit in 67% of cases, and refused in 33% of cases. When we look at the degree to which planning officers and elected Councils agree, Councils overturn the recommendation of planning officers in 22% of cases. Therefore, while the two agree in most cases, in a significant minority of cases Council overturns the planning officer recommendation. Importantly, when Council overturns a planning officer's recommendation it is almost exclusively to refuse a permit. Elected Councils are thus acting in a preservationist manner. This suggests that Councils respond, at least in the development approval context, to resident opposition and not to developer pressure.

In Victoria, VCAT is the body that is tasked with resolving administrative disputes, including planning disputes. At approximately 7%, a small but significant fraction of residential planning permit applications end up at VCAT. These are brought by developers (first parties) and objectors (third parties) where they are unsatisfied with the determination of the local planning assessment process. In our dataset, the majority of appeals to VCAT come from first parties against refusal (approximately three quarters), with approximately one quarter from third parties. What our research demonstrates is that when you consider the sub-set of planning applications that are determined by elected Councils (as opposed to under delegation by planning officers), the proportion of cases proceeding to VCAT is 51%. Further, in cases where the elected Council refused a permit, 88% went to VCAT for appeal. VCAT is therefore playing a significant role in determining the outcome of these cases.

For cases that proceed to VCAT we find that a permit is granted in 76% of cases, and refused in 22%. This is similar to results at the local level, but should not be directly compared, as it is based only on those cases which are contested at VCAT. What is more enlightening is to examine the relationship between VCAT determinations and local level decisions. In making its decision, VCAT sets aside the local Council determination 49% of the time. That is, for one in two cases VCAT finds that a Council decision was incorrect and appropriate to overturn. This shows a substantial difference between local Council and VCAT interpretations of applications and policy intent.

In setting aside council decisions, VCAT significantly favour first party appeals. VCAT affirms Council decisions to grant a permit 83% of the time. However, where Council refuses, VCAT overturns 73% of the time. We might expect Councils to differ from VCAT, given the representative role of local Councils

compared with the merits based review of VCAT. Yet surprisingly, the rate at which VCAT overturns Council decisions to refuse where the planning officer also recommends refusal is 65%. While both planning officers and VCAT assess applications on their merits against planning policy, it would seem that they frequently disagree on the appropriate outcome for these contentious cases.

Our analysis suggests that in contentious planning cases VCAT has become an entrenched part of the permit application process. In nearly all cases where Council refuses a permit it is VCAT, not the local Council, who ultimately determine the application outcome. Further, half of all local Council determinations are set aside at VCAT. It would seem that for developers, and to a lesser extent residents, Council determination of planning applications is no longer seen as the end of the decision making process. Going to VCAT is increasingly an expected part of the development assessment process. Our analysis demonstrates that for developers in particular, VCAT offers 'another spin of the wheel', and at attractive odds, with 73% of cases in our dataset that were refused by elected Councils being overturned by VCAT. However, for third parties the chances of successful appeal are slight, with only 15% of cases in our dataset that were granted by Council being overturned at VCAT. It is important to note here that even where a permit is granted, third parties may be achieving modified outcomes, and will certainly delay the project. Given costs are not awarded to either party there is limited disincentive not to appeal; and for developers, significant economic gains to be made if the decision is altered.

In Victoria, the current system of planning permit appeal is no longer acting as an avenue to resolve a small portion of intractable disputes. Rather, in cases determined at Council meetings, it would seem that VCAT is providing a default 'second round' hearing, with significantly different outcomes to local Councils. This raises questions about the role of planning officers, elected officials, and VCAT in the assessment of development applications. VCAT is clearly not acting merely to correct 'mistakes' made at the local level. Further, given propensity at which planning officer recommendations are overturned, VCAT is going beyond providing oversight on the political influence of councillors. With developers seeking the least cost and risk in development assessment, they are now increasingly factoring in an appeal to VCAT. This undermines the role of local government planning officers and elected Councils in mediating the development assessment process, which in turn limits the potential for locally situated development outcomes. As a result, VCAT is becoming the default planning assessment forum for significant development in existing urban areas.

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