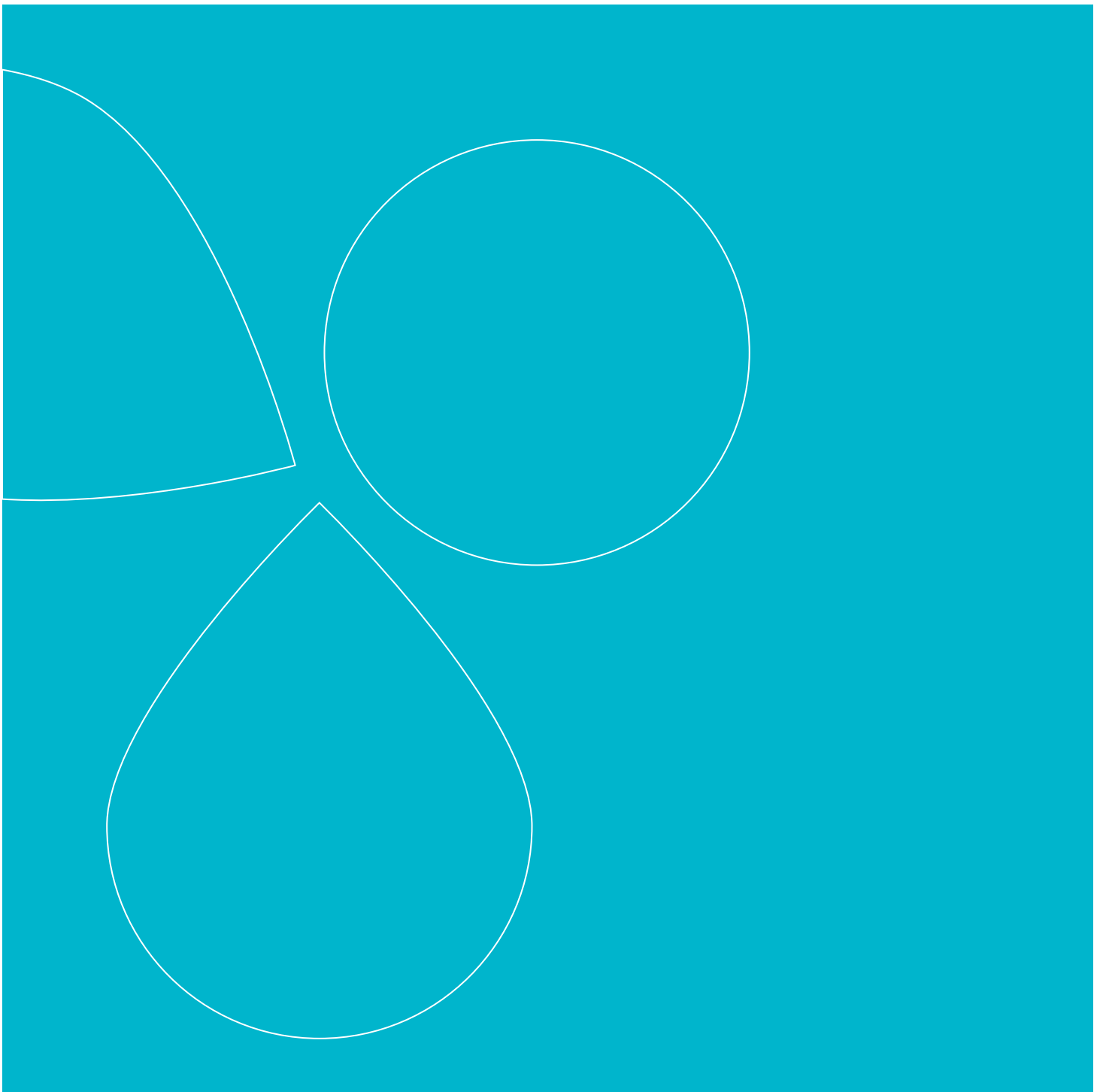


Appeals Kit



Appeals Kit

A guide to running a case in the Planning and Environment List of the Victorian Civil and Administrative Tribunal

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre practising public interest planning and environment law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

For further information contact:

Environment Defenders Office (Vic) Ltd

Phone: 03 8341 3100 (Melbourne metropolitan area)
1300 EDOVIC (1300 336842) (Local call cost for callers outside Melbourne metropolitan area)
Fax: 03 8341 3111
E-mail: edovic@edo.org.au
Website: www.edo.org.au/edovic
Post: PO Box 12123, A'Beckett Street PO, Melbourne VIC 8006
Address: Level 3, the 60L Green Building, 60 Leicester Street, Carlton

SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.

Produced & published by Environment Defenders Office (Victoria) Ltd

ABN 74 052 124 375

Publication date: July 2007

© This kit cannot be reproduced without consent of author

Contents

SECTION ONE MAKING AN APPLICATION	6
1.0 Victorian Civil and Administrative Tribunal	7
1.1 <i>What is VCAT?</i>	7
1.2 <i>What is the Planning and Environment List of VCAT?</i>	7
1.3 <i>What can VCAT do?</i>	7
1.4 <i>What can I do?</i>	8
1.5 <i>Conclusion</i>	8
2.0 General matters	9
2.1 <i>What are the usual steps in a VCAT application for review?</i>	9
2.2 <i>Warning</i>	9
2.3 <i>Useful terms and websites</i>	10
3.0 Lodging an application for review	11
3.1 <i>Can I lodge an application for review?</i>	11
3.2 <i>Can we lodge an application as a group?</i>	11
3.3 <i>How do I make an application for review?</i>	11
3.4 <i>What do I have to do if I was not an objector to the original permit application?</i>	12
3.5 <i>What are the Grounds of Application?</i>	13
3.6 <i>Can I change my Grounds of Application?</i>	14
3.7 <i>Is there a filing fee?</i>	14
3.8 <i>What if I can't afford the filing fee?</i>	14
3.9 <i>How is my application served?</i>	15
3.10 <i>How do I notify the other parties of my application?</i>	15
4.0 Opposing an Application for Review	16
4.1 <i>How do I oppose an application for review by a permit applicant if I was an objector to the original planning application?</i>	16
4.2 <i>What if I was not an objector to the original planning application?</i>	16
5.0 Communication with VCAT and other parties	17
5.1 <i>How do I communicate with VCAT?</i>	17
5.2 <i>What about the other parties?</i>	17
SECTION TWO PRE-HEARING PROCEDURES	18
6.0 Request for directions and urgent or prompt hearings	19
6.1 <i>What is a directions hearing?</i>	19
6.2 <i>How do I request a directions hearing?</i>	19
6.3 <i>Why might I request a directions hearing?</i>	19
6.4 <i>How do I request an urgent final hearing?</i>	21
6.5 <i>What if the final hearing of the application will not take long?</i>	21
6.6 <i>How do I apply for a prompt hearing?</i>	21
7.0 Adjournments of hearings	22
7.1 <i>What is an adjournment?</i>	22
7.2 <i>Can I request an adjournment?</i>	22
7.3 <i>How do I request an adjournment?</i>	22
7.4 <i>Do the other parties have to consent to the adjournment?</i>	22
7.5 <i>Will there be a directions hearing?</i>	23
7.6 <i>What if I need an adjournment at short notice?</i>	23
7.7 <i>Who must I notify of the adjournment?</i>	23
8.0 Withdrawal from VCAT proceeding	24
8.1 <i>Can I withdraw my opposition to an application?</i>	24

8.2	<i>Can I withdraw my application for review?</i>	24
8.3	<i>What if the other parties consent to the withdrawal of my application?</i>	24
8.4	<i>What if the other parties do not consent or object to the withdrawal of my application?</i>	24
8.5	<i>What if my application to withdraw is opposed?</i>	25
8.6	<i>What if leave to withdraw is not granted by the actual hearing date?</i>	25
9.0	Mediation	26
9.1	<i>What is mediation?</i>	26
9.2	<i>Who conducts mediation?</i>	26
9.3	<i>When is mediation ordered?</i>	26
9.4	<i>Can I request mediation?</i>	26
9.5	<i>Who attends mediation?</i>	27
9.6	<i>Can I be represented at mediation?</i>	27
9.7	<i>What if another party has a lawyer at the mediation and I do not?</i>	27
9.8	<i>What happens at mediation?</i>	27
9.9	<i>Is what is said at mediation confidential?</i>	27
9.10	<i>What happens if mediation is successful?</i>	28
9.11	<i>What happens if mediation is unsuccessful?</i>	28
10.0	Settlement prior to hearing	29
10.1	<i>What happens if the matter settles prior to hearing?</i>	29
10.2	<i>What orders can VCAT make?</i>	29
10.3	<i>Will there be a directions hearing?</i>	29
11.0	Amendment of plans before hearing	30
11.1	<i>Can a permit applicant amend plans before hearing?</i>	30
11.2	<i>Will I be notified of a plan amendment application?</i>	30
11.3	<i>What should I receive with the notification?</i>	30
11.4	<i>Where are amended plans located?</i>	30
11.5	<i>What do I do next?</i>	31
11.6	<i>What if I need more time to consider the plans?</i>	31
11.7	<i>What orders can VCAT make?</i>	31
SECTION THREE PREPARATION FOR HEARING		32
12.0	Research	33
12.1	<i>Introduction</i>	33
12.2	<i>Planning Schemes</i>	33
12.3	<i>Council file</i>	33
12.4	<i>VCAT file</i>	33
12.5	<i>VCAT guidelines and practice notes</i>	34
12.6	<i>VCAT and Supreme Court decisions</i>	34
12.7	<i>Other resources</i>	34
13.0	Expert evidence	35
13.1	<i>What is expert evidence?</i>	35
13.2	<i>Do I need to call expert evidence?</i>	35
13.3	<i>Who does an expert witness assist?</i>	35
13.4	<i>What is an expert's report?</i>	35
13.5	<i>When do I file and serve the expert's report?</i>	35
13.6	<i>What if my expert changes their mind or opinion about a matter?</i>	35
14.0	Submissions	36
14.1	<i>What kind of submissions can I make?</i>	36
14.2	<i>What kinds of submissions are preferred?</i>	36
14.3	<i>What should my submissions include?</i>	36
14.4	<i>What should my submission look like?</i>	37
14.5	<i>How many copies do I need?</i>	37
14.6	<i>Do I need photographs?</i>	37

14.7	<i>More information</i>	37
SECTION FOUR THE HEARING AND BEYOND		38
15.0	VCAT Hearing	39
15.1	<i>What is the nature of a VCAT hearing?</i>	39
15.2	<i>Who attends the hearing?</i>	39
15.3	<i>Where are the hearings held?</i>	39
15.4	<i>How do I find out where the hearing will be?</i>	39
15.5	<i>How do I address VCAT members?</i>	39
15.6	<i>What happens at the start of the hearing?</i>	40
15.7	<i>In what order do the parties speak?</i>	40
15.8	<i>What happens when a witness is called?</i>	40
15.9	<i>Will VCAT visit the site?</i>	40
15.10	<i>Things to remember about the hearing.</i>	41
15.11	<i>Can I make further submissions after the hearing?</i>	41
15.12	<i>When will VCAT hand down a decision?</i>	41
15.13	<i>What orders can VCAT make?</i>	41
15.14	<i>If VCAT orders that a permit be issued, when must this be done?</i>	41
16.0	Costs	42
16.1	<i>Who pays the costs of the hearing?</i>	42
16.2	<i>When does VCAT award costs?</i>	42
17.0	Appeal from VCAT decision	43
17.1	<i>Can I appeal a VCAT decision?</i>	43
17.2	<i>What time limits apply?</i>	43
17.3	<i>On what grounds can I appeal?</i>	43
17.4	<i>What orders can the Supreme Court make?</i>	43
17.5	<i>General.</i>	44

SECTION ONE

MAKING AN APPLICATION

1.0 Victorian Civil and Administrative Tribunal

1.1 What is VCAT? The Victorian Civil and Administrative Tribunal (**VCAT**) was established in 1998 by the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)* to deal with a range of disputes.

VCAT is divided into two divisions, the Administrative and the Civil Divisions. Each division contains a number of lists which specialise in particular types of cases.

1.2 What is the Planning and Environment List of VCAT? The Planning and Environment List is one of the lists in the Administrative Division of VCAT.

It is made up of a number of members. The President of the list is a judge of the Supreme Court of Victoria and the other members include lawyers and people with special expertise, such as planners or engineers. One or more members may conduct a hearing, depending upon the nature of the application and the complexity of the issues.

1.3 What can VCAT do? The Planning and Environment List is empowered to resolve disputes arising under a number of different Victorian Acts. In relation to the *Planning and Environment Act 1987 (PE Act)*, the Planning and Environment List is empowered to resolve the following applications:

- applications for review of decisions by a Responsible Authority (being a council or other body empowered to make decisions in relation to planning matters);
- applications to cancel or amend planning permits;
- applications for enforcement orders concerning breaches of the PE Act; and
- applications for declarations.

This kit is concerned solely with applications for review of decisions by a Responsible Authority in respect of planning permit applications.¹

The Planning and Environment List can review:

- decisions made by a Responsible Authority (usually the local council) to grant or refuse a planning permit; or
- the failure of a Responsible Authority to deal with a planning permit within the required time.

These are called 'applications for review' and are rehearings. VCAT has the power to make a new decision or to confirm, change or overturn any decision being reviewed.

¹ For information on VCAT's powers in respect of other applications under the PE Act, please refer to the EDO Enforcement Kit.

1.4 What can I do? If you objected to the original planning permit application, you can:

- apply for a review against a decision of the Responsible Authority to grant a permit (section 82 PE Act);² or
- oppose any application for review made by the permit applicant.

If you did not object to the original planning permit application, but are affected by the decision to grant a permit, you can only lodge an application for review against the decision if:

- there was at least one written objection to the original permit application; and
- VCAT permits you to apply.

(section 82B PE Act)

See also Section 2.0 below - Lodging or opposing an application for review.

1.5 Conclusion There are two ways that an objector (or a non-objector with VCAT's permission) may become involved in a VCAT planning review:

- as an applicant for review of a decision to grant a permit; or
- by opposing an application for review by a permit applicant.

² For more information on objections to planning permit applications, please see the EDO Objections Kit and the EDO Fact Sheet – Planning and Development series.

2.0 General matters

2.1 *What are the usual steps in a VCAT application for review?*

When you make an application for VCAT to review, the usual process is:

1. The application for review is lodged and served (see Section 3.0 below).
2. The Statement of Grounds opposing application for review is lodged and served (see Section 4.0 below).
3. There is a directions hearing to determine the timetable for other steps, including setting a date for the application to be heard (see Section 6.0 below).
4. Other hearings may be held, such as applications for adjournments, leave to withdraw an application for review or for amendments to plans (see Sections 7.0, 8.0 and 11.0 below).
5. The parties attend mediation (see Section 9.0 below).
6. Ten business days prior to the hearing (or in accordance with any direction or order of VCAT), any expert witness statements must be filed with VCAT and circulated to all parties (see Clause 4.2, *VCAT Practice Note No. 1 – Planning and Environment List (General Procedures)* and *VCAT General Practice Note No. 2 (Expert Evidence)*).
7. One week before the hearing, the Responsible Authority will circulate the draft permit conditions which it will recommend in the event that the Tribunal decides that a planning permit should be issued.
8. The final hearing of the application takes place (see Section 15.0 below).

2.2 *Warning*

If you are involved in an Application for Review and you:

- fail to comply with an order or direction of VCAT without reasonable excuse;
- fail to comply with the VCAT Act or the PE Act;
- seek adjournments without appropriate reasons; or
- fail to attend mediation;

VCAT may determine that you are conducting the proceedings in a way that unnecessarily disadvantages another party, particularly if you repeatedly engage in such conduct (section 78(1) VCAT Act). In those circumstances, VCAT may (depending on whether you are the applicant for review or the respondent):

- order that the proceeding be struck out (which means VCAT will refuse to proceed and you must make a fresh application if you wish to pursue the matter further);
- decide the proceeding in favour of the applicant;
- order that you be removed from the proceeding; and/or
- order that you pay costs wasted by other parties.

2.3 Useful terms and websites

PE Act	<i>Planning and Environment Act 1987 (Vic)</i>
Statement of Service	From time to time you may need to prove that you have sent certain documents to other parties to a proceeding. You do this by filing a Statement of Service (available from the VCAT website) with VCAT setting out each party you have served and how they were served, attaching copies of the documents you served.
VCAT Act	<i>Victorian and Administrative Tribunal Act 1998 (Vic)</i>
VCAT website	www.vcat.vic.gov.au

3.0 Lodging an application for review

3.1 Can I lodge an application for review? You may lodge an application for review with VCAT if you were:

- the permit applicant;
- an objector to the planning permit application; or
- an affected person (with leave or permission of VCAT).

3.2 Can we lodge an application as a group? If your group wants to lodge or oppose an application for review as an 'association', then the association must be incorporated.

(See *Associations Incorporation Act 1981* (Vic))

Otherwise, VCAT may permit a member or representative of an unincorporated association to make submissions at the hearing (section 61 VCAT Act).

Multiple individuals can lodge a joint application for review with VCAT (section 67 VCAT Act). You must attach to the application a list of the joint objectors' names, addresses and signatures or written authorisations.

You should nominate one person as a representative and use their address for service to receive correspondence on behalf of the joint applicants. That person will be responsible for keeping the others informed of all developments.

See VCAT Guidelines for making joint applications at:

[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/miscellaneous_pdfs/\\$file/guidelines-joint_applications.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/miscellaneous_pdfs/$file/guidelines-joint_applications.pdf)

Tip

Often a joint application is a good idea, because on appeal VCAT prefers to avoid hearing multiple submissions covering the same issues. Having one objector representative may help you to coordinate your case, save time and money, and make its presentation more effective.

3.3 How do I make an application for review? You make an application for review by lodging the appropriate form with VCAT.

An application for review form is available from the VCAT Registry or from the VCAT website. A copy of the application form for objectors can be downloaded from:

[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/planning_list/\\$file/application_for_review-objector.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/planning_list/$file/application_for_review-objector.pdf)

A copy of VCAT's guidelines for objectors applying for review can be found at:

[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/planning_list/\\$file/guide_for_objectors.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/planning_list/$file/guide_for_objectors.pdf)

You should read the guidelines carefully. On the form, you must fill out the following details:

- your name and address (and of other joint applicants);
- your interest in the permit application, e.g. that you were an objector;
- the address of the relevant land;
- the use and/or development for which the permit was sought;
- type of decision being reviewed;
- Grounds of Application (see 3.5 below);
- whether you want a mediation; and
- an estimate of how long it will take you to present your case. To do this, think about how many witnesses you will call, how long it will take you to ask them questions and how long the presentation of your argument will take. Remember, this is only an estimate and is likely to change as the proceeding develops.

If you have not already done so, you should obtain copies of the following documents from the Responsible Authority's file to assist you:

- original permit application;
- notice of decision to grant a permit (or otherwise);
- any objections previously lodged with the Responsible Authority; and
- any Referral Authority comments.³

3.4 What do I have to do if I was not an objector to the original permit application?

You must lodge an application for review with VCAT in the appropriate form (see 3.3 above).

VCAT will acknowledge receipt of the application and request that you seek the consent of the permit applicant and the Responsible Authority to your application, before you will be allowed to proceed.

If the permit applicant consents, your application for review will proceed.

If the permit applicant does not consent:

- VCAT will list the matter for a directions hearing (see section 6.1 below);
- VCAT will hear arguments by you, the permit applicant and the Responsible Authority about whether you should be allowed to apply for the original decision to be reviewed; and then
- VCAT will decide whether your application for review can proceed or not. It will do so if it believes it would be just and fair in the circumstances to do so.

(Section 82B, PE Act)

³ For further information on Referral Authorities, please see EDO Fact Sheet 2.2 – Permits and EDO Objections Kit, Section 1.4

3.5 ***What are the Grounds of Application?***

The Grounds of Application are the reasons why the decision of the Responsible Authority should be reviewed. They are aimed at the merits (or lack of merit) of the particular proposal.

The Grounds can be quite broad. However, they must be specific enough to enable the other parties to understand the case they must answer.

The issues that VCAT must consider include:

- any issues the Responsible Authority did consider or was required to consider in making its decision under section 60 of the PE Act;
- relevant planning schemes (and in particular the objectives and decision guidelines of the zone, overlay or other provision of the planning scheme under which the permit(s) is/are required);
- Victorian planning objectives
- relevant Victorian environment protection policies;
- any significant effects the proposal may have on the environment, or that the environment may have on the proposal;

Where relevant, the Tribunal must also consider:

- any significant social and economic effects of the proposed use or development;
- any relevant State Environment Protection Policy in force pursuant to section 16 of the *Environment Protection Act 1970* (note that VCAT **must** give effect to these policies, where relevant);
- strategic plans, policy statements, codes or guidelines that have been adopted by a Minister, government department, public authority or local council;
- any amendment to the planning scheme which has been adopted by a planning authority;
- any agreements between the Responsible Authority and the land owner which affect the land under section 173.

(Section 84B PE Act)

Your grounds should **not** deal with the following:

- the personality or character of any relevant persons;
- the political behaviour of Council;
- moral objections to uses such as brothels;
- economic competition between individually competing businesses;
- loss of property values; and
- issues unrelated to the specific planning control (for example, building height is not relevant when a permit is only required to reduce car parking). (See VCAT Brochure, *Submissions in the Planning List*, available on the VCAT website.)

An example

In relation to an appeal against a decision to grant a permit for an intensive chicken farm, you may wish to say that:

- the proposal is contrary to good and proper planning;
- the proposal will have a detrimental impact on neighbouring amenity;
- the proposal will have a detrimental impact on the environment;
- the proposal will result in loss of native vegetation; or
- the proposal will generate a detrimental amount of traffic.

3.6 Can I change my Grounds of Application?

You rely upon your Grounds of Application at the VCAT hearing.

However, you are not restricted to these grounds and you may rely upon new grounds at any time before or during the hearing (section 84A PE Act). If you wish to rely upon new grounds, ensure that you advise all other parties as soon as possible, so they have time to prepare a response.

If you raise new grounds on the day of the hearing, the other parties may request an adjournment and orders that you pay costs that have been wasted because of the adjournment.

3.7 Is there a filing fee?

You must pay a fee when you lodge the application form. The filing fee is not refundable.

For details of the fee, see the VCAT website or telephone the VCAT Registry, as it changes from time to time.

Fees can be paid in cash, by cheque, money order or credit card. Cheques and money orders should be made payable to the 'Registrar, Victorian Civil and Administrative Tribunal'.

3.8 What if I can't afford the filing fee?

If payment of the fee would cause you financial hardship, you can apply for it to be waived. The application form is available on the VCAT website.

VCAT has the discretion to waive fees in certain circumstances. As a guide, VCAT may waive the fee for a person who:

- has no partner or children, is not in the workforce, has an after tax income of below \$258 per week and has cash assets below \$3,000; **or**
- has a partner, but neither partner is in the workforce, has two children, has an after tax income is \$538 per week, and has cash assets of below \$5,000.

If your income is above these levels, the fee may still be waived where there are exceptional circumstances.

Where there are joint applicants, the fee will only be waived if all applicants meet the above requirements.

3.9 How is my application served?

Recently, VCAT announced that it would see to service of copies of applications for review on behalf of objectors. However, we recommend that you check with the VCAT Registry staff at the time you make your application.

Once you have filed your application for review, VCAT will write to you and advise you whether you need to provide a copy of your application to anyone else.⁴

3.10 How do I notify the other parties of my application?

If you objected to the original permit application and apply for a review of a decision to grant a permit, VCAT will:

- send a letter to you acknowledging receipt of the application; and
- send copies of the application to the other parties.

In the case of other types of applications, VCAT will give you specific instructions about how to serve the application on the other parties.

⁴ Where a member of the public makes application to cancel or amend a permit, or for enforcement orders or declaratory relief, different requirements may apply. As procedures may change over time, you should always confirm what is required with the VCAT Registry at the time of making an application.

4.0 Opposing an Application for Review

4.1 *How do I oppose an application for review by a permit applicant if I was an objector to the original planning application?*

If you were an objector to the original planning application, you are entitled to notice of any application for review by the permit applicant.

You have the right to oppose an application for review. You do this by lodging a 'Statement of Grounds' with VCAT, within 14 days after you receive a copy of the application.

If the Statement of Grounds is not lodged within 14 days, VCAT will not allow you to contest the application until it has considered the views of the applicant and the Responsible Authority. You will need to explain why you failed to respond within the 14 day period.

The Statement of Grounds is similar to the Grounds of Application (see 3.5 above). There is no prescribed form for the Statement of Grounds; it can simply be set out in a letter to VCAT.

You must also send copies of your Statement of Grounds to the other parties to the application.

Tip

Keep your Statement of Grounds to the point. Try to explain each ground in one sentence. You can elaborate on each ground at the hearing.

Identify each ground using numbers or headings.

Focus on your strongest arguments. VCAT decisions usually focus on 3-4 key issues at most.

List the most important arguments first.

If you believe there are issues which can be addressed by permit conditions, say so. This will help to ensure that the Tribunal is focused on your key points.

Avoid irrelevant arguments concerning the behaviour of the permit applicant and focus on the flaws of the proposal.

Frame your grounds based on the matters that VCAT must consider under section 84B of the PE Act (see section 3.5 above).

Where possible, refer to the key objectives and decisions guidelines of the planning scheme under which a permit(s) is required.

4.2 *What if I was not an objector to the original planning application?*

You can ask VCAT to allow you to participate in the proceeding by completing a Practice Day Request (see 6.2 below) stating that you seek orders that:

- (a) you be joined to the application under section 60 of the VCAT Act; or
- (b) you have leave to make submissions to VCAT as a non-party under section 98(1)(c) of the VCAT Act.

5.0 Communication with VCAT and other parties

5.1 *How do I communicate with VCAT?*

Any communication with VCAT must be through the Registry. Do not try to contact a member of VCAT directly about the proceeding.

When writing to VCAT:

- address all correspondence to the Principal Registrar; and
- quote the application number given by the Tribunal in the proceeding.

(Clause 1, *Practice Note Planning and Environment List (No 1)*)

5.2 *What about the other parties?*

If you write to VCAT you must at the same time:

- serve a copy of the letter on all other parties; and
- notify VCAT that you have done so. You may simply indicate at the end of your letter to VCAT that a copy of the letter has been sent to the other parties, e.g. cc copies.

(Clause 1, *Practice Note Planning and Environment List (No 1)*)

SECTION TWO

PRE-HEARING PROCEDURES

6.0 Request for directions and urgent or prompt hearings

6.1 *What is a directions hearing?*

For most proceedings at VCAT a directions hearing will be held. A directions hearing is a (usually) brief hearing in which VCAT gives directions about the future conduct of the application in general, e.g. when documents should be filed.

VCAT can set a matter down for a directions hearing on its own initiative or a party to the application can request a directions hearing (section 80 VCAT Act).

Directions hearings are held in the Planning and Environment List on Practice Days every Friday.

6.2 *How do I request a directions hearing?*

If you are seeking directions, or wish to apply to be joined to or heard in the proceeding, you must:

- file a Practice Day Request at least 8 days before the Practice Day (i.e. before noon on the preceding Thursday);
- lodge all supporting documents including affidavits and exhibits or submissions at the same time as filing the Request; and
- serve copies of the request and any other documents on all other parties.

If VCAT takes the view that the matter may take longer than an hour, it will treat the Practice Day hearing as a directions hearing and fix another date for the hearing of the matter.

Copies of the approved Practice Day Request form are available from the VCAT website at:

[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/VCAT_Practice_Notes/\\$file/practice_note_planning_6.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/VCAT_Practice_Notes/$file/practice_note_planning_6.pdf)

If you want to seek urgent interim orders, such as an injunction or directions, you can follow the above steps at any time and request that the matter be listed on the next Practice Day.

6.3 *Why might I request a directions hearing?*

A directions hearing should be approached as an opportunity to gather information, clarify aspects of the other parties' arguments, and make arrangements to ensure that the hearing will proceed in a manner that is convenient for the parties and their witnesses.

A party may request directions in order to:

- request an adjournment;
- clarify the nature of the application for review;
- seek clarification where a party has failed to provide a Statement of Grounds that clearly explains the arguments that party intends to rely on;
- make arrangements for hearing dates;

- request Tribunal Members with particular expertise hear the appeal;
- consider a question of law that needs to be resolved prior to the hearing;
- ask for a party to produce documents relevant to the proceeding;
- ask that a hearing room equipped with facilities to enable witnesses to provide evidence by telephone or video conference be available.

Tip

Consider what needs to be done before you present your case.

Ask your witnesses about their availability.

Write down the directions you require.

Ask all of the parties for consent for the written directions you seek before requesting a directions hearing.

6.4 How do I request an urgent final hearing?

(Note: prompt hearings are usually requested by the permit applicant)

A party seeking an urgent hearing must follow the following procedure:

File a written request with VCAT.

Specify in the request:

- when the hearing is sought; and
- the reasons for the request.

Serve a copy of the request on all other parties and ask whether they consent to the request

Deliver to VCAT a copy of any written consents obtained from other parties to the urgent hearing, as soon as possible after receiving it.

Deliver to VCAT a Statement of Service of the request on all other parties.

(Clause 5.1, *Practice Note Planning and Environment List (No 1)*)

If VCAT considers that a directions hearing is necessary to consider a request for an urgent hearing, it will advise the parties of a hearing date.

(Clause 5.2, *Practice Note Planning and Environment List (No 1)*)

6.5 What if the final hearing of the application will not take long?

If an application involves only a few parties and its final hearing will take less than an hour, it may be suitable for a prompt hearing.

To check whether the matter is a type of proceeding which can be dealt with at a prompt hearing, see the Table to *Practice Note Planning and Environment List (No 7)*.

6.6 How do I apply for a prompt hearing?

Make a Practice Day Request (see 6.2 above) and state that you seek a prompt final hearing. VCAT will consider the request once it has:

- A Statement of Service that all parties entitled to receive notice of the application have been served; and
- The Responsible Authority has provided all information it is required to file.

7.0 Adjourning of hearings

7.1 What is an adjournment? An adjournment of a hearing means that the hearing has been postponed until a future time or date.

7.2 Can I request an adjournment? Any party can request an adjournment. However, it is vital to have a good reason for postponing the hearing. Grounds for adjournments can include:

- you are unable to attend for good reason;
- another party has not complied with previous orders for directions; or
- an expert witness is not available on the hearing date.

Mere lack of preparation, holidays or business meetings usually are not sufficient reasons for an adjournment.

7.3 How do I request an adjournment? A party requesting an adjournment of a hearing must comply with the following procedures:

- Write to the other parties and ask if they consent to an adjournment. Your letter should explain why the adjournment is necessary and offer alternative times for the hearing.
- File a written request with VCAT. This can simply be in the form of a letter to VCAT. It should specify:
 - the minimum period for which the adjournment is sought;
 - the reasons for the request; and
 - whether the other parties have consented, refused to consent or have not responded to your original letter. Attach copies of their responses.
- Serve a copy of the request on all other parties and ask again whether they consent to the adjournment, if they have not already agreed.
- Deliver to VCAT a copy of any written consents to the adjournment obtained from any other party, as soon as possible after receipt.
- Deliver to VCAT a Statement of Service of the request on all other parties.

(Clause 6.1, *Practice Note Planning and Environment List (No 1)*)

7.4 Do the other parties have to consent to the adjournment? VCAT may grant a request for an adjournment even if the other parties do not consent.

If all other parties consent or no party objects to the adjournment, VCAT will normally grant a request for adjournment.

However, regardless of whether parties consent, VCAT may refuse an adjournment if it considers that it is not justified.

(Clause 6.2, *Practice Note Planning and Environment List (No 1)*)

7.5 Will there be a directions hearing? If VCAT considers that a directions hearing is necessary to consider a request for an adjournment, it will advise the parties of a directions hearing date. For example, a directions hearing may be necessary if other parties oppose the adjournment.

(Clause 6.3, *Practice Note Planning and Environment List No 1*)

7.6 What if I need an adjournment at short notice? If the adjournment request is made close to the hearing date and not all parties consent to the adjournment, VCAT may direct that the request be considered at the commencement of the actual hearing of the matter.

(Clause 6.4, *Practice Note Planning and Environment List (No 1)*)

Note

If you do not request an adjournment until just before the hearing and the adjournment is granted, VCAT may order that you pay the costs of the other parties who have attended the hearing.

7.7 Who must I notify of the adjournment? If an adjournment is granted, the party applying for the adjournment, or any other party as VCAT directs, must immediately notify all other parties of the adjournment, unless the other parties were present or represented at the hearing at which the adjournment was granted.

(Clause 6.5 *Practice Note Planning and Environment List (No1)*)

8.0 Withdrawal from VCAT proceeding

- 8.1 Can I withdraw my opposition to an application?** You can withdraw your opposition to an application for review at any time. To do this, you must immediately inform all other parties and VCAT in writing.
(Clause 7.2, *Practice Note Planning and Environment List (No 1)*).

You will then be removed from the VCAT file and you will receive no further correspondence relating to the proceeding.

- 8.2 Can I withdraw my application for review?** You may only withdraw an application for review with the leave (or permission) of VCAT (section 74 VCAT Act).

To obtain leave, you must comply with the following:

- Make a written application to VCAT for leave to withdraw the application at least 10 business days before any listed hearing date. (Clause 7.3, *Practice Note Planning and Environment List (No 1)*)
- Serve a copy of the application for leave on all other parties with a covering letter which states:
 - notice of any objection to the withdrawal should be given to you and filed with VCAT no later than the day before any listed hearing date.
 - if the parties consent (or agree) to this withdrawal, they should advise you in writing no later than the day before any listed hearing date.
- Deliver to VCAT a copy of any written consent to the withdrawal as soon as possible after receiving it, and no later than the day before any listed hearing date.
- Deliver to VCAT a Statement of Service of the application for leave to withdraw on all other parties.

(Clause 7.1, *Practice Note Planning and Environment List (No 1)*)

- 8.3 What if the other parties consent to the withdrawal of my application?** If all parties consent in writing to an application for leave to withdraw, VCAT will normally grant the request without a hearing.
(Clause 7.4, *Practice Note Planning and Environment List (No 1)*)

- 8.4 What if the other parties do not consent or object to the withdrawal of my application?** If no objections to the withdrawal are received by the day before the hearing date, VCAT will normally grant leave to withdraw.
In such cases, VCAT will reserve the question of costs, which means it will not immediately decide who should pay the costs of the application. Instead, VCAT will grant leave to any party to apply for a costs order. Any such application should be made within 10 business days of service of the VCAT order.

(Clause 7.5, *Practice Note Planning and Environment List (No 1)*)

8.5 What if my application to withdraw is opposed? VCAT may consider that a directions hearing is necessary before the hearing date to consider an application for leave to withdraw. If it does, it will advise the parties of a directions hearing date

(Clause 7.6, *Practice Note Planning and Environment List (No 1)*)

8.6 What if leave to withdraw is not granted by the actual hearing date? If an application for leave to withdraw either:

- has not been determined by the day before the application for review is due to be heard; or
- is made on notice shorter than 10 business days before the application for review is due to be heard;

then the applicant must:

- immediately ask VCAT to advise whether any party should appear on the hearing date for the application for review; and
- immediately notify the other parties of VCAT's response to that request.

(Clause 7.7, *Practice Note Planning and Environment List (No 1)*)

9.0 Mediation

9.1 *What is mediation?*

Mediation is a process by which an independent third party tries to facilitate an agreement between disputing parties.

It is an opportunity for parties to a proceeding to resolve their dispute, without the need for a hearing. Solutions agreed on at mediation may be more creative than the types of orders that VCAT may make after a hearing. However, this usually requires a level of compromise by the parties.

The parties are not obliged to settle the dispute at mediation. Any party or the mediator may terminate the mediation at any time.

See generally *VCAT Mediation Code of Conduct (Code of Conduct)*.

VCAT and the Victorian Law Foundation have produced a video entitled 'Working it out – through mediation'. To purchase a Mediation Resource Package containing the video, a booklet and training notes, phone the Victoria Law Foundation on 9604 8100 or go to <http://www.victorialaw.org.au/bookshop.asp> to order online. Alternatively, you can view the video on the VCAT website.

9.2 *Who conducts mediation?*

Mediation is conducted by a VCAT-appointed mediator. The mediator will not make any decisions and is there only to facilitate discussion between the parties.

It is not the role of a mediator to provide legal advice as to the merits of a party's arguments.

9.3 *When is mediation ordered?*

VCAT can refer a matter for mediation:

- upon request by a party to the proceeding (Clause 9.2, *Practice Note Planning and Environment List (No 1)*); or
- on its own initiative, with or without the consent of the parties (section 88 VCAT Act).

9.4 *Can I request mediation?*

If you are the applicant for review and you filed your application after 1 July 2006, you may have already indicated whether you wish to proceed to mediation.

Otherwise, you may make a written request to VCAT to refer a matter to mediation. Such a request must be accompanied by:

- the written consent of any other parties; or
- if all other parties have not consented to the mediation, a statement of reasons as to why mediation is likely to be successful in resolving the dispute.

(Clause 9.2, *Practice Note Planning and Environment List (No 1)*)

You should serve a copy of this on all other parties.

You can obtain a Planning and Environment List Mediation Application Form from the VCAT website or by contacting VCAT directly.

- 9.5 Who attends mediation?** If ordered by VCAT, a party must attend mediation either personally or through a representative who has written authority to settle the proceeding on their behalf.
- (Section 89 VCAT Act)
- 9.6 Can I be represented at mediation?** It is not a requirement that you be represented by a lawyer or other professional at the mediation. However, advocates, professional advisors and/or 'support people' may attend mediation, unless the mediator believes their presence would make mediation unfair.
- (Clause 5.3, *Code of Conduct*).
- 9.7 What if another party has a lawyer at the mediation and I do not?** If you are unrepresented at mediation, it is considered reasonable to refuse to continue mediation where another party is represented. However, you must give the mediator an opportunity to resolve this issue.
- (Clause 5.3, *Code of Conduct*)
- 9.8 What happens at mediation?** Generally, the mediator decides upon the mediation procedure (section 88(7) VCAT Act). However, the mediator must give each party the opportunity to speak and, as far as possible, ensure that the other parties listen.
- VCAT may order that each party commence mediation with a short written statement that briefly describes the proceedings and sets out the issues in dispute. You can obtain a copy of the form '*Opening Statement at Mediation*' from the VCAT website or by contacting VCAT directly;
- Throughout the mediation, the mediator:
- may meet with the parties together (joint sessions) or separately (private sessions);
 - may ask the parties questions in joint and/or private sessions to assist the parties to gain an understanding of whether they may be successful at a hearing;
 - may help develop options and approaches for settling disputes; but
 - must not give legal or other advice to the parties.
- Mediations at VCAT generally take about two hours. However, more time may be available and mediation can be adjourned (or postponed) to a later date.
- 9.9 Is what is said at mediation confidential?** Nothing said or done in mediation is admissible as evidence in any further VCAT hearing, unless all parties agree. (Section 92 VCAT Act).
- Further, the mediator must not reveal anything you tell them in a private session to another party without your express permission.
- (Clause 7.2, *Code of Conduct*).

9.10 What happens if mediation is successful?

Where mediation is successful:

- A written record of any settlement you reach (usually called Terms of Settlement) will generally be prepared. The mediator may make precedent agreements available to assist this process (Clause 8.1, *Code of Conduct*);
- The mediator must notify VCAT that the parties have agreed to settle (Section 90 VCAT Act); and
- VCAT may make any orders necessary to give effect to the settlement (Section 93 VCAT Act).

Tip

In resolving a proceeding, you should always try to ensure that the agreement is enforceable at VCAT, which is a lot less expensive than trying to enforce an agreement in the courts.

You should try to convince the other party to agree that the terms of settlement should be reflected in orders of the Tribunal. Further, if it is agreed that a planning permit is to issue, you should agree as to any conditions to be imposed as part of the settlement.

9.11 What happens if mediation is unsuccessful?

In the event that mediation is unsuccessful:

- the mediator must notify VCAT (section 91 VCAT Act);
- the parties may be required to attend a hearing or directions hearing. This can sometimes be immediately after the mediation. (Clause 4.2, *Code of Conduct*)

10.0 Settlement prior to hearing

10.1 What happens if the matter settles prior to hearing? If all the parties to an application reach a settlement agreement before the hearing, whether at mediation or not, they must immediately advise VCAT:

- that the matter has settled; and
- the terms of the orders they seek from VCAT.

(Clause 8.1, *Practice Note Planning and Environment List (No 1)*)

10.2 What orders can VCAT make? VCAT can make any orders necessary to give effect to the settlement (section 93 VCAT Act). VCAT may make these orders without a hearing, in the terms sought by the parties.

(Clause 8.2, *Practice Note Planning and Environment List (No 1)*).

10.3 Will there be a directions hearing? VCAT may require a directions hearing to consider a settlement if:

- the terms of the order sought are not to its satisfaction; or
- if it otherwise considers a directions hearing necessary.

(Clause 8.3, *Practice Note Planning and Environment List (No 1)*)

11.0 Amendment of plans before hearing

- 11.1 Can a permit applicant amend plans before hearing?** VCAT has the power to amend the plans which supported the original permit application at any time prior to or during the hearing.
- If a permit applicant wishes to amend plans prior to hearing, they should comply with Clause 11, *Practice Note Planning and Environment List (No 1)*, which outlines the notification procedures for serving amended plans on VCAT, parties to the proceeding and any objectors.

Generally, an application to substitute amended plans should occur at least 20 business days before the hearing. However, where this requirement is not met, the Tribunal will exercise its discretion based on the significance of the changes and the extent to which it would prejudice a fair hearing to allow the plans to be substituted less than 20 days before the hearing.

- 11.2 Will I be notified of a plan amendment application?** A permit applicant must notify you of any application to amend plans if you:
- are a party to the VCAT application;
 - were an objector to the original planning permit application; or
 - were notified of the original planning permit application, even if you did not lodge an objection.

- 11.3 What should I receive with the notification?** The permit applicant should provide you with:
- a Notice of Application to Amend Plans;
 - a clearly readable, scaled copy of the amended plans;
 - a written statement describing the changes from the previous plans; and
 - if you are not an existing party to the VCAT application, an Application to be Joined as a Party and Statement of Grounds form (see Section 4.1 above).

Copies of these forms are available from the VCAT website and by contacting VCAT directly.

- 11.4 Where are amended plans located?** Amended plans may be inspected at council offices and at VCAT. You may also request copies of amended plans from the permit applicant. These must be clearly readable, scaled copies, and must be provided within 7 days of the request being received.

(Clause 11.2, *Practice Note Planning and Environment List (No 1)*)

11.5 What do I do next?

Within 10 business days after receipt of notice of the plan amendment application:

- if you are an existing party to the proceeding, you can lodge with VCAT a written objection to the amendments; or
- if you are not a party to the proceeding, you can:
 - file a written application to be joined to the proceeding;
 - lodge a Statement of Grounds (see Section 4.1 above); and
 - lodge a written objection to the amended plans.

The permit applicant should provide you with the relevant forms to do this. If not, the forms are available from VCAT, either by phone or on the internet.

Copies of all documents you file with VCAT should also be served on the permit applicant and the Council. A statement of service of these documents must be filed promptly after service.

(Clause 11.3, Practice Note Planning and Environment List (No 1))

11.6 What if I need more time to consider the plans?

You may write to VCAT requesting an adjournment (or postponement) of any hearing listed.

See Section 7.0 above for more information about adjournments.

11.7 What orders can VCAT make?

Following a plan amendment application, VCAT may, either on its own initiative or on application by any person, do any of the following:

- adjourn any listed hearing to enable any objection, request or application to be dealt with;
- fix a date for a hearing to consider the application to amend plans;
- join any objector or person notified of the permit application as a party;
- direct that the application to amend plans be dealt with at the commencement of the hearing of the proceeding; or
- make any other order as it thinks fit.

(Clause 11.6, Practice Note Planning and Environment List (No 1))

SECTION THREE

PREPARATION FOR HEARING

12.0 Research

12.1 Introduction Before preparing your submissions, you should gather as much relevant information as possible. In particular, you should consider the sources of information outlined below.

12.2 Planning Schemes Planning schemes contain policies and requirements in relation to the usage, development and protection of land. The Council must consider these documents when making a planning permit decision. They include maps, plans and other documents.⁵

You can inspect a copy of the relevant planning scheme at:

- the offices of your local council;
- the Planning Information Centre at the Department of Sustainability and Environment; or
- online at 'Planning Schemes Online' on the Department of Sustainability and Environment website at: www.dse.vic.gov.au/planningschemes (for all Victorian planning schemes, including maps).

12.3 Council file If you haven't already done so, you should obtain copies of:

- the Council Officer's Report, which is a report about the planning permit application prepared by the Council's planning officer;
- the relevant planning permit application;
- any associated plans; and
- any submissions and objections relating to the proposal.

If the council will not produce the file or allow you to make copies of these documents, please ring the EDO for assistance.

The Council is also required to produce some of this information to VCAT to be put on the VCAT file (see Section 12.4 below).

12.4 VCAT file You can inspect the VCAT file relating to the proceeding. It will have copies of:

- the application for review;
- relevant information about the permit application and planning controls provided by Council; and
- other correspondence relevant to the proceeding.

You should phone VCAT beforehand to ensure that the file is available.

⁵ For a more detailed overview of the contents of planning schemes, see *EDO Fact Sheet 2.1 – Planning and Development Law: Introduction*.

12.5 VCAT guidelines and practice notes These are available from the VCAT website and the Department of Environment and Sustainability website (www.dse.vic.gov.au) and are an important source of information about VCAT procedures.

12.6 VCAT and Supreme Court decisions A useful resource for VCAT decisions is the 'Austlii' website: <http://austlii.edu.au>.

At this site you can find many previous VCAT decisions and decisions of the Supreme Court of Victoria. These will help you to find out the way decisions have been made in similar matters.

12.7 Other resources Other resources include:

- the EDO book entitled *An Introduction to Victoria's Environment and Planning Law*;
- EDO Fact Sheets;
- Department of Sustainability and Environment's '*The Planning System*' (www.dse.vic.gov.au).

13.0 Expert evidence

13.1 What is expert evidence? Expert evidence is given by a witness who has professional and/or academic expertise which can assist VCAT. They usually give evidence about matters which fall within that expertise.

13.2 Do I need to call expert evidence? While some residents have successfully organised their own surveys for matters such as traffic, generally expert evidence will need to be given by people with academic or professional expertise.

However, you do not need to be an expert to give evidence about local events. For example, it may be useful to call as a witness someone who witnessed a flood if you are opposing development on a flood plain.

If you decide to call an expert witness, you should comply with:

- *Practice Note VCAT 2 – Expert Evidence*; and
- Clause 4.2, *Practice Note Planning and Environment List (No 1)*.

See the VCAT website for more information.

13.3 Who does an expert witness assist? An expert witness has an overriding duty to assist VCAT on matters relevant to the expert's expertise. An expert is not an advocate for a particular party to the proceeding, despite generally being called by one particular party.

(Clause 2, *Practice Note VCAT 2*)

13.4 What is an expert's report? An expert's report contains the expert evidence upon which a party intends to rely at the hearing.

Clause 3, *Practice Note VCAT 2* sets out what must be included in an expert's report, for example:

- a statement of the expert's qualifications and expertise;
- the instructions, facts, matters and all assumptions upon which the report proceeds; and
- a summary of the expert's opinion(s).

You should make your expert aware of these requirements at the time of engaging their services (Clause 6, *Practice Note VCAT 2*). The best way to do this is to provide the expert with a copy of the relevant practice note.

13.5 When do I file and serve the expert's report? The expert's report must be filed with VCAT and served on the other parties no later than 10 business days prior to the hearing.

(Clause 4.2, *Practice Note Planning and Environment List (No 1)*)

13.6 What if my expert changes their mind or opinion about a matter? The expert must communicate any change to his or her opinion in writing to you and must specify why his or her opinion has changed. You must then file a notice of such change of opinion with VCAT.

(Clause 4, *Practice Note VCAT 2 – Expert Evidence*)

14.0 Submissions

14.1 *What kind of submissions can I make?*

As VCAT hearings are less formal than court hearings, there is flexibility as to the type of submissions made during a hearing. Submissions may be oral, or written; brief, or detailed.

Your decision as to the nature and extent of your submissions may depend upon the complexity of the matter and your own confidence in effectively presenting your case.

14.2 *What kinds of submissions are preferred?*

Written submissions are the most common and preferred form of submissions for the following reasons:

- writing your submissions will allow you to clarify your case in your own mind;
- during the hearing, you can simply read from your written submissions; and
- written submissions are helpful to VCAT, especially as it may be making and writing its decision some time after the hearing.

14.3 *What should my submissions include?*

Your submission is not limited to the issues raised in your Grounds for Application or Statement of Grounds. However, you must ensure that all other parties involved in the application are advised of any new issue in time for them to prepare submissions in response.

Section 84B of the PE Act and the planning schemes define the issues that VCAT can consider. Your submissions should be limited to these issues and should not deal with the following:

- the personality or character of any relevant persons;
- the political behaviour of Council;
- moral objections to uses such as brothels;
- economic competition between individually competing businesses;
- loss of property values; and
- issues unrelated to the specific planning control (for example, building height is not relevant when a permit is only required to reduce car parking).

(See VCAT Brochure, *Submissions in the Planning List* available on the VCAT website).

14.4 What should my submission look like? VCAT has a suggested outline for written submissions, depending upon the level of detail required (see VCAT Brochure, *Submissions in the Planning List* available on the VCAT website).

For example, an outline of more detailed submissions may include the following sections:

- Introduction;
- Subject site and locality;
- The proposal;
- Planning schemes and policies;
- A statement of the issues;
- Main submissions; and
- Conclusions.

As an objector, we recommend that your submission be focussed on the issues identified in your Statement of Grounds, or grounds of review. You should not spend too much time analysing policies which you do not seek to rely on as the main part of your argument. The Council's submission will usually explain the policy background.

A well-organised, succinct submission is usually more effective than a wordy submission that lacks structure.

Depending upon the length of the submission, you should also number the pages, sections and paragraphs for ease of reference.

14.5 How many copies do I need? You will need enough copies of your submissions to provide to each VCAT member and all other parties. Generally, you should make six copies, although this may vary depending upon the number of parties.

You are not required to serve a copy of your submissions on the other parties before the hearing. You need only bring your copies to the hearing and distribute them before you start talking.

Note

If you have changed your grounds as per Section 14.3 above, you must remember to notify all other parties before the hearing.

14.6 Do I need photographs? You can take photographs to document your case and include them in your submission. If you take videos, keep them brief, but cover as much material as will be relevant.

Videos are useful but need to be of a high standard to clearly and quickly communicate an issue.

14.7 More information For more information generally about submissions, see VCAT Brochure, *Submissions in the Planning List* available on the VCAT website.

SECTION FOUR

THE HEARING AND BEYOND

15.0 VCAT Hearing

15.1 *What is the nature of a VCAT hearing?*

VCAT hearings are generally informal (section 98(1)(a) VCAT Act) and are usually held in public (section 101 VCAT Act).

VCAT must act fairly and according to the substantial merits of the case (section 97 VCAT Act). However, VCAT is not bound by the rules of evidence and may inform itself on any matter as it sees fit (section 98(1)(b) VCAT).

15.2 *Who attends the hearing?*

A party may:

- appear in person; or
- be represented by another person, such as a planning consultant, a lawyer or even a friend.

Unincorporated associations may not be a party to the proceedings (section 61 VCAT Act). However, VCAT may grant leave to a member of the association to make a submission in its behalf (section 98(1)(c) VCAT Act).

15.3 *Where are the hearings held?*

VCAT hearings are mainly held on the 5th Floor, 55 King Street, Melbourne. For most VCAT hearings, the room number corresponds to its location, e.g. room G.6 would be on the ground floor, room 6.

VCAT often travels or goes 'on circuit'. If your dispute is in a rural area, VCAT may come to you and sit at your local council offices. VCAT is more likely to do this if there are a number of locals either interested in the hearing, or taking part in it.

15.4 *How do I find out where the hearing will be?*

VCAT will notify all parties in writing of the date, time and location of the hearing.

On the day of the hearing, you can find out which room your hearing will be in by:

- looking at the Law List in The Age;
- reading the Hearing Lists on the ground floor or 5th Floor, 55 King Street, Melbourne; or
- checking the VCAT website.

15.5 *How do I address VCAT members?*

Where there is only one member hearing the application, you can address that member (as appropriate):

- Madam Chair;
- Chairman;
- by her or his name, for example Ms Smith.

Where there is more than one member, collectively address them as 'Members of the Tribunal' and address the Presiding Member as 'Madam Chair' or 'Chairman'.

- 15.6 What happens at the start of the hearing?** Planning hearings usually take place around a large table. The Tribunal will sit on one side, the parties will sit opposite and witnesses will sit at the end of the table.
- When you arrive, fill in the 'appearance sheet', which will be on the table and then take a seat at the table. If there are a large number of people who wish to make submissions, it may not be possible to seat everyone around the table.
- VCAT members will enter through a rear door. When they do, you should stand and remain standing until the member(s) invite(s) you to be seated.
- 15.7 In what order do the parties speak?** The parties will be called to present their submissions and call any witnesses in the following order:
- Council;
 - third parties and/or objectors;
 - the permit applicant.
- You will rarely be allowed to make a second or closing submission. However, you may be permitted to respond to any new matters raised by the other parties.
- 15.8 What happens when a witness is called?** Expert or other witnesses may be called to give supporting evidence. They are not required to swear an oath (as in a court proceeding).
- Witnesses may be questioned by the parties or members of VCAT. These questions take the following forms:
- Examination-in-chief** – questions asked by the person who called the witness;
- Cross-examination** – questions asked by the other parties, about any matters generally relevant to the application;
- The golden rule is not to ask too many questions during cross-examination. Work out the precise matters you want to establish and then see if you can get the witness to agree with them.
- Try to note each witness' oral evidence in chief and check for any inconsistencies or new matters raised. Keep a note of questions and answers given during cross-examination.
- Re-examination** – further questions asked by the person who called the witness to clarify issues arising from cross-examination.
- 15.9 Will VCAT visit the site?** The chairperson may decide to inspect the property concerned before they hand down their decision. Ordinarily, the site inspection is not ordinarily an occasion for you to continue your case. Your job is to ensure that the site inspection is organised efficiently.
- Be sensible about using VCAT's time, but insist that every important site is visited.

15.10 Things to remember about the hearing

If you are a party, you are entitled to see any documents used or referred to during the hearing. If you are not being shown documents or photographs, politely insist that you are entitled to see them.

Don't underestimate public pressure on your opponent. If the case is a noteworthy one, make sure you notify one or two journalists before the hearing.

You may be able to turn a bad development into an acceptable development by suggesting the imposition of certain permit conditions. This can be a very useful negotiating tool when you are opposed by both Council and the permit applicant.

Above all, be polite and reasonable.

15.11 Can I make further submissions after the hearing?

Generally, once the hearing is completed, VCAT will not accept or consider any further submissions.

However, if you believe there is a change of circumstances or a significant event that VCAT should be made aware of, you may advise VCAT in writing. You must send copies of this letter to the other parties.

Depending on the nature of the changed circumstances, VCAT may call the parties to a reconvened hearing.

15.12 When will VCAT hand down a decision?

Occasionally, VCAT will give a decision on the day of the hearing. However, usually it will need to prepare a written order. This may take several weeks, depending upon the complexity of the case. VCAT tries to ensure that all decisions are made within 4 - 8 weeks of a hearing.

All parties are sent a copy of the final written order. However, only those persons who appeared at the hearing will receive a full of copy of VCAT's reasons.

15.13 What orders can VCAT make?

VCAT may:

- order that a permit must not be granted;
- grant a permit and direct that the Responsible Authority issue it;
- grant a permit subject to conditions and direct that the Responsible Authority issue it;
- direct that a permit must or must not contain any specified condition(s); or
- cancel a permit (in limited circumstances).

(Section 85 PE Act)

15.14 If VCAT orders that a permit be issued, when must this be done?

If VCAT directs the Responsible Authority to issue a permit, the Responsible Authority must do so within 3 working days of its first ordinary meeting after it receives a copy of the order.

(Section 86 PE Act).

16.0 Costs

16.1 Who pays the costs of the hearing? Generally each party bears its own costs incurred in preparation and representation in a proceeding.

(Section 109(1) VCAT Act)

16.2 When does VCAT award costs? VCAT may order that a party pay all or part of another party's costs if satisfied that it is fair to do so, after considering:

- the conduct of the parties;
- the relative strengths of the claims made;
- the nature and complexity of proceedings; and
- any other matter the Tribunal considers relevant.

(Section 109(3) and (4) VCAT Act)

In addition, where VCAT is satisfied that the proceedings have been brought vexatiously or frivolously, or primarily to secure or maintain a direct or indirect commercial advantage, VCAT may order that the person who brought the proceedings pay compensation and an amount for costs to any person who suffered loss and damage as a result. (Section 150 PE Act)

Failure to comply with a VCAT Practice Note may also result in an order for costs. (Clause 10, *Practice Note Planning and Environment List (No 1)*)

You should ensure that you have at least an arguable case (usually by obtaining legal advice) before taking proceedings to VCAT. It is also important that you conduct your case in an efficient manner. If not, you put yourself at risk of being ordered to pay the other party's costs.

17.0 Appeal from VCAT decision

17.1 Can I appeal a VCAT decision? A party to a proceeding may seek leave to appeal to the Supreme Court (or Court of Appeal if the Tribunal included the President or Vice President) on a question of law (section 148(1) VCAT Act).

This avenue is very limited and you should obtain legal advice about your prospects of success as soon as you receive an order from VCAT.

17.2 What time limits apply? An application for leave to appeal must be made no later than 28 days after the day of the VCAT order (section 148(2) VCAT Act).

If leave is granted, the appeal must be instituted within 14 days after such leave is granted (section 148(3) VCAT Act).

17.3 On what grounds can I appeal?

Question of Law

This phrase is interpreted narrowly. For example, the Supreme Court is unlikely to challenge VCAT's conclusions about the meaning words such as 'amenity'.

However, the Supreme Court may be prepared to entertain an appeal if you are challenging the application of legal concepts such as 'nuisance' or the validity of laws or regulations.

Denial of Procedural Fairness

A right to a fair hearing includes being given adequate notice of the matters raised in the hearing and being able to put your case with as much detail as is reasonable in the circumstances.

The key question turns on the concept of prejudice. For example:

- were you prejudiced by VCAT denying you the opportunity to ask questions of a witness?
- were you prejudiced by a witness ambushing you with new evidence at the hearing without being given an adequate opportunity to test that evidence?

17.4 What orders can the Supreme Court make?

The Supreme Court may:

- affirm, vary or set aside the VCAT order;
- make any order that VCAT could have made;
- remit the proceeding to be heard and decided again by VCAT; or
- make any other order it thinks appropriate.

17.5 General

Appealing to the Supreme Court is expensive and difficult. A successful appeal may simply mean that the original matter is sent back to VCAT. Therefore, it may only buy you time and perhaps a second chance.

If your appeal does not succeed, the Supreme Court has the discretion to order you to pay the costs of the other parties. These can add up to thousands of dollars.

Even before the appeal is heard if you do not have substantial financial resources, the other parties may seek an order that you provide security for their costs in case the appeal fails. If the court orders that you provide security, the appeal will be stayed or frozen until you provide the security ordered. Again, this could be thousands of dollars.

For these reasons, you may want to treat VCAT as your final stand. However, VCAT is aware that the appeal system exists and therefore every effort is made to ensure that its decisions are accurate.