

Sustainable Design Assessment in the Planning Process (SDAPP) at VCAT

In 2016, CASBE reviewed all hearings before VCAT relevant to SDAPP between 2003 and 2016. Presented here are some of the broader findings from that review. This is the first in a series of information sheets which will cover individual topics in more detail.

Generally, there have been three overarching themes to the challenges which SDAPP faces at VCAT. The first challenge involves establishing that there is a valid role at all for sustainability within the sphere of planning. The second challenge is centred on the level of policy support found in planning schemes. The third challenge is justifying measures based on the characteristics of a specific proposal. In order to successfully implement SDAPP all three of these challenges must be met, as they have all been used as reasons to avoid or reduce sustainability requirements on a proposal. While there is a logical progression to the three challenges, this has not necessarily been observed chronologically through VCAT. Although VCAT has a tendency to be consistent with previous rulings it is not bound to do so, and thus there are cases of an issue being decided in contradicting ways within short periods of time, or an argument being supported which was thought settled previously. This presents both the opportunity to forge new ground with strong arguments in a previously contested area, as well as the challenge to defend the gains which have been made.

Challenge One: The Validity of Sustainability in Planning

Initial attempts at assessing the sustainable qualities of a proposal through planning were met with strong opposition, the central claim being that sustainability was a matter for the building code. A number of arguments were used in favour of this claim: Regulation was being duplicated across two systems; Sustainability was based on elements of detail not available at the planning stage; and that as some developments do not require planning permits, an issue such as sustainability which should be applied to all developments is not suitable for planning to consider.

With the approval of amendments across multiple planning schemes which explicitly call for sustainability measures, this question has largely been answered. There is a legitimate and necessary role for planning in ensuring sustainability.

Overview

In total CASBE reviewed 1715 VCAT decisions to June 2016. This list was built both from speaking to practitioners about cases they thought significant, and using numerous search terms to identify hearings of potential interest through the Australasian Legal Information Institute (AustLII).

Covering multiple planning schemes makes it difficult both to form a cohesive timeline for the attitudes of VCAT, as well as identifying where decisions have only local implications, or wider ones.

There was a great deal of variation and inconsistency in terminology used both by VCAT and councils.

One area identified as particularly relevant was the standing of ESD reports as a requirement at VCAT:

- *51 hearings covered the applicant challenging the need for an ESD report.*
- *33 of these resulted in VCAT removing the requirement, while in 18 hearings the requirement was retained. Since the beginning of 2011, the results are 7 removals and 13 retentions.*
- *A clear trend has emerged at VCAT over time, reinforcing the legitimate role of SDAPP.*



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Challenge Two: Local Policy Support

This challenge addresses whether there is sufficient support found in local policy to justify the sustainability measures proposed. There is significant overlap with the first challenge, particularly over arguments of fairness about applying additional sustainability requirements to only a subset of developments with no justification as to why this is a good approach. A key response to this criticism has been the development of triggers for requirements. Having policy which states that developments of particular sizes should be subject to higher standards of sustainability assessment means that the selection of which developments are subject to assessment is no longer arbitrary.

Challenge Three: Site Specific Considerations

Where it has been established that there is both a valid role for SDAPP and that local policy supports it, attempts to avoid or reduce sustainability requirements have turned to whether they are justified for the specific proposal. There have been a number of approaches to this.

Historically the most prevalent argument has been that the requirements sought are disproportionate to the scale of the proposal. The central claim in this approach is that the requirements would impose a burden which the applicant can't reasonably bear. This has been addressed systematically in two ways. Firstly, a number of councils have formalised the requirements for sustainability assessment at various sizes of development. Secondly, tools such as the Built Environment Sustainability Scorecard have been developed to make the documentation requirements simpler to meet, reducing the financial burden of doing so. This has also been incorporated into the size triggers, with many councils requiring a self-assessment using recommended tools for smaller developments, rather than the employment of an ESD consultant.

Vagueness of conditions has also been a factor in VCAT removing the sustainability requirements sought by council, particularly in removing the requirement for an ESD report. This can be and is being addressed by improving the consistency of wording both within and across councils, as well as providing supplementary information to applicants clarifying the requirements council expects to be met.

National Trust Principle

One particular case not relating to ESD nonetheless emerges as potentially relevant. In *Boroondara CC v 1045 Burke Road* ([2015] VSCA 27), the Court of Appeal presented a significant reinterpretation of the National Trust Principle. The National Trust principle was a long held understanding that within the Victorian planning system, a decision-maker is limited to considering matters directly related to the need for a planning permit. This was previously interpreted to mean for example that if a proposal needs planning permission only due to a heritage overlay, non-heritage considerations are irrelevant to the decision making process.

In this case, the Court ruled that while the principle stands, it has been misinterpreted. The decision maker must be guided by only those matters presented in the clause for which a permit is required, but triggering clauses often contain broad areas for consideration. Heritage Overlays for example include as relevant considerations the implementation of state and local planning policies. Due to this any permit application, even if required solely on heritage grounds, must respond to among other things the policies found in the Local Planning Policy Framework.

This significantly increases the scope of applications which may potentially be required to address sustainability, but it falls to council officers to make the argument that such requirements are suitable to individual proposals.

CASBE
casbe@mav.asn.au
+61 3 9667 5555
Level 12, 60 Collins St
Melbourne Vic 3000

