

IN THE FAST LANE: BYPASSING THIRD PARTY OBJECTIONS AND APPEALS IN PLANNING APPROVAL PROCESSES

Joe Hurley¹, Elizabeth Taylor², Nicole Cook¹, Val Colic-Peisker²

¹*School of Global Studies, Social Science and Planning, RMIT University, Melbourne, Victoria, Australia,* ²*AHURI-RMIT Research Centre, Melbourne, Victoria, Australia*

INTRODUCTION

There is a broad assumption in Australia that planning processes should facilitate efficient land and housing markets. However, the planning drive towards medium density housing (MDH) has triggered widespread local resistance. This has led to new scrutiny of mechanisms for public participation in planning and efficiency of third party objection and appeal rights (TPOAR). This paper focuses on the latter. Policy debate around TPOAR often focuses on whether and how TPOAR distort housing markets. There are also concerns around how residents' opposition to MDH affects, and potentially inhibits, the achievement of compact city and social housing objectives. On the other hand, TPOAR are seen as an important mechanism to facilitate community engagement in planning systems, and to provide greater accountability in development approval processes.

These debates have intensified in Australia in recent years. A Productivity Commission Inquiry into development approval processes has argued for reforms to TPOAR (Productivity Commission, 2011). Through the Council of Australian Governments, all States and Territories are currently exploring more streamlined development approval processes that will limit the application of TPOAR in housing development. The Federal Government has already worked with State and Territory Planning authorities to remove TPOAR in the roll-out of its 5 billion dollar Social Housing Initiative. Despite this, there is little data documenting the extent to which TPOAR inhibits housing supply and whether these rights are accessed evenly across the population. While the idea that objections and appeals by resident groups in inner suburbs are inhibiting the development of MDH is a powerful narrative in Australian cities, there is still no city-wide evidence of the extent to which third party appeals are causing delays.

In this paper we show that this appetite for policy reform has so far, preceded the evidence base. The impacts on accountability and participatory planning aims are also uncertain. The paper first sets out the tensions between compact city policies and resident perceptions of MDH. Second, the paper defines TPOAR and situates these rights within the wider planning process. While permit applicants (first parties) can also appeal planning decisions, this research is concerned with third parties only. While TPOAR are traditionally associated with participatory planning aims, this section shows TPOAR are positioned ambiguously in terms of greater public participation. The third section shows that in spite of these uncertainties, enthusiasm to limit TPOAR on the grounds of enabling housing supply has characterised policy reform in Australia and elsewhere.

RESISTANCE TO COMPACT CITIES AND SOCIAL HOUSING INITIATIVES

Australian cities are increasing in density and this includes established suburbs. Urban consolidation policies have been pursued – at least in principle – in most Australian cities since the early 1980s (Yates 2001; Searle 2004; Randolph 2006; Hamnett and Kellett 2007; Searle 2007). Urban consolidation policies seek to redirect urban growth away from the traditional suburban, low-density urban fringe and towards existing urban areas. While the environmental and social benefits of medium density housing compared to the traditional 'quarter-acre block' remain contested (Troy 1996; Randolph 2004; Searle 2004; Birrell et al. 2005; Mees 2010) consolidation policies have been widely adopted with the aim of achieving three interconnected objectives: containing urban sprawl and limiting environmental footprint; ensuring the supply of affordable and social housing in well-located areas with access to services, jobs and public transport; and ensuring ongoing housing supply against demographic change, including population growth and changes in household size and composition (Newman and Kenworthy 1999; Low 2002; Goodman and Moloney 2004; Buxton and Scheurer 2005).

While the implementation of consolidation policies has been mixed (Yates 2001; Downs 2005; Gurran and Phibbs 2008; O'Connell 2009), the timely and efficient supply of MDH play a key role in achievement of more compact city form (Hamnett and Kellett 2007). Given that MDH has potential to maximise benefits of local services and employment, it has also become a preferred social housing dwelling type.

However, pressure to accommodate MDH and, potentially, lower-cost housing and lower-income households, is likely to be perceived negatively by existing residents (Voith and Crawford 2004). The development of affordable housing and services for low and moderate income households has been plagued by local opposition, commonly referred to as the not-in-my-back-yard or 'NIMBY' syndrome, for decades (Iglesias 2003). Historically, the placement of social housing has been highly controversial (von Hoffman 2009). In the USA, legislation such as the Fair Share (New Jersey) and Anti-Snob (Massachusetts) acts arose in the 1970s and 1980s in response to the effects of traditional suburban zoning on affordable housing provision. While the bills allow local objection to be bypassed, they have experienced consistent efforts at delay and litigation (Flint 2004; McKim 2009).

MDH and inclusionary zoning are key strategies proposed by urban consolidation to offset housing affordability impacts of containment. The fact that they often conflict with the interests of homeowners is important to understanding urban consolidation policies and their potential housing market impacts. Bunker et al. (2002:143) note with reference to Australian city planning as a whole that "the reaction and response of local government authorities and communities [to urban consolidation] has been mixed and increasingly hostile". The implementation of urban consolidation in Australian cities has also been characterised by political conflict, with owner groups and developers aligned against different aspects of containment and densification (Bunker et al. 2002; Bunker et al. 2005; Randolph 2006). Searle (2007:1) reviewed Sydney experience and "the way in which planning power, political power and market power have been used to make urban consolidation happen in the face of community opposition". He highlights that consolidation has, from the outset, been opposed at the local level in Australian cities, including resistance by local government and resident objection. Therefore, conflict with and resistance from property owner groups may mean that the housing affordability goals of urban containment are not met (Carlson and Mathur 2004; Nelson et al. 2004; Whitehead 2007).

Maintaining housing supply against rising demand for affordable housing within existing cities has led to increased scrutiny of planning approval processes in facilitating MDH. Given the public backlash around social and MDH, it is perhaps not surprising that some of this attention has focused on those planning mechanisms that enable public participation in planning, including TPOAR. It has been argued, for instance, that existing TPOAR mechanisms add time, uncertainty and holding costs to approval processes and thus have implications for development pipelines (Simonson 1996; Productivity Council of Australia 2002, quoted in Willey 2006). There has therefore been increasing focus on attempts to 'streamline' planning approval processes (Department of Planning and Community Development 2006; Victorian Competition and Efficiency Commission 2010; Productivity Commission 2011).

In addition, several recent initiatives of the federal government have focused on increasing supply, and the efficiency of supply, or affordable housing (see Federal Government Social Housing Initiative; Housing Affordability Fund, Housing Supply Council; and COAG Housing Supply and Affordability Reform Agenda). Finally, in order to offset housing impacts of containment, planning policies include inclusionary zoning mechanisms to provide affordable subsidised housing in high-demand locations (Beer et al. 2007; Gurran 2008). While these mechanisms are justified on the grounds of enabling housing supply, they raise questions around the openness and accountability of compact city planning. Before exploring the nature, implications and gaps in the evidence underpinning current debates and reforms of TPOAR, the paper situates TPOAR within the wider planning framework and the communicative planning paradigm.

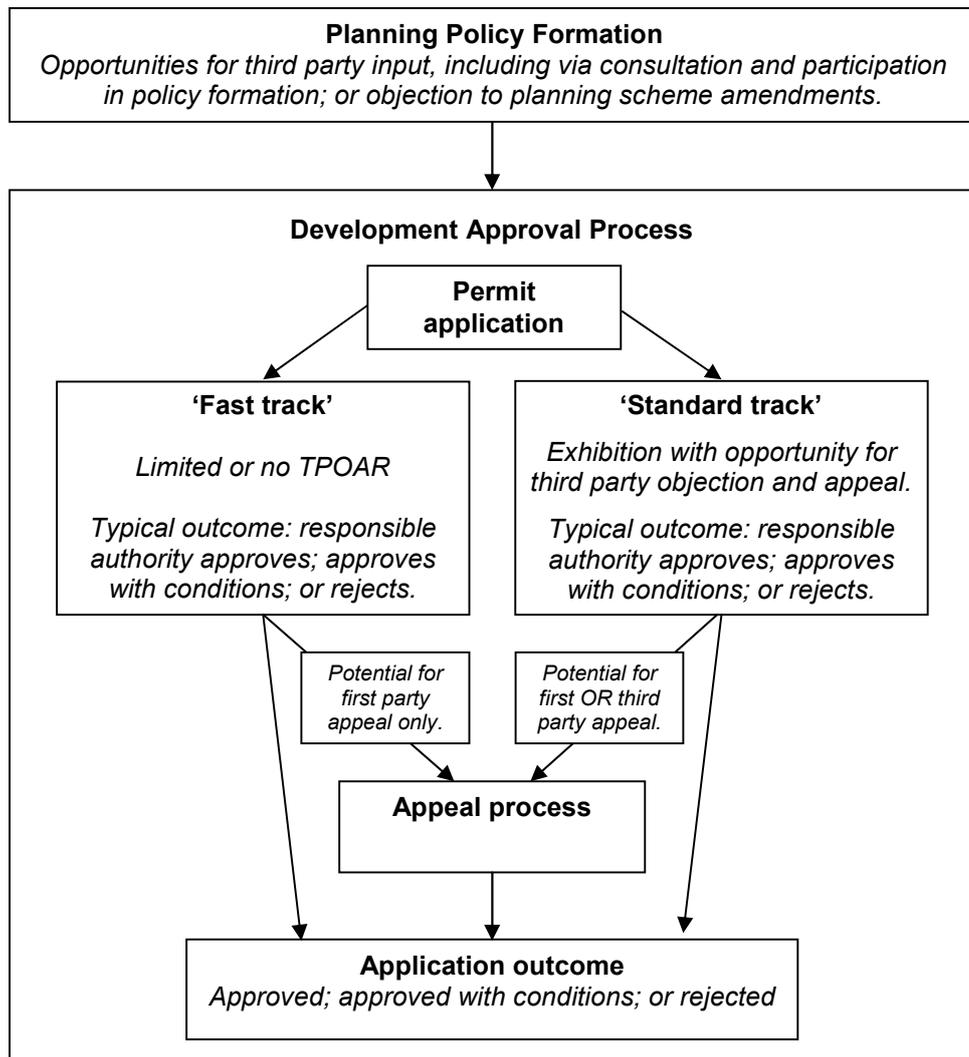
THIRD PARTY OBJECTION AND APPEAL RIGHTS

Third party objection and appeal rights (TPOAR) form a part of development approval processes in many Australian and overseas jurisdictions. Development approval processes are themselves only part of broader planning policy frameworks of legislation and strategic planning policy documents. As will be discussed, rights to objection and appeal are sometimes contrasted with more proactive, higher-order forms of community engagement with planning.

Figure 1 indicates typical opportunities for third party engagement in planning processes in Australia. As shown in the top section, the formulation and modification of policy affords the first opportunity for broader community engagement in planning. These planning policies then typically determine whether or not a proposed use or development will require development approval. Dependent on the applicable policy framework and on the nature of the proposed development, permit application will then follow one of two broad 'tracks'. In the 'fast track', there is limited or no provision for third party involvement in the determination of the development application. While in the 'standard track' some provision is made for third party involvement.

Within the development approval process, there are then two distinct phases of potential third party involvement. These comprise objections during the planning permit application process; and appeals to the planning permit decision. If a planning authority refuses a planning permission or places conditions upon it, an applicant typically has the right to appeal (first party appeal rights). If an authority grants a planning permission, third parties (typically objectors) may have the right to appeal the decision. The links between rights of objection and rights of appeal vary. In some jurisdictions there is a right to objection but not to appeal. In others, the right of appeal is limited to third parties who have lodged an initial objection. There is also variation in how 'third-party' is defined across jurisdictions. For example in Victoria anyone can appeal a permit decision; while in others (NSW, SA) appellants must have a 'relevant interest' in the proposed development, with interest typically determined by either their proximity to the proposed development, or via a hearing to determine relevance (Trenorden 2009). Either way, appeals on merit are carried out in "formal or quasi-formal legal settings", such as the Victorian Civil and Administrative Tribunal or the Land and Environment Court in NSW (Willey 2005:268).

Figure 1 – Development Approval Processes and Public Engagement: typical Australian model



While first party rights of appeal were enshrined in many planning frameworks at their inception during the mid twentieth century, TPOAR emerged in the context of social and political changes of the 1960s and 1970s. Increasing criticism of planning in the rational comprehensive model, and a move to more participative planning, saw opportunities for citizen engagement in planning extended in many areas, including via TPOAR. Key arguments for TPOAR are based on their potential to increase avenues for public engagement with planning, and ultimately to deliver better planning decisions. The argument is that when planning is considered as a communicative process (after Healey 1997); an empowered public, with increased opportunities for participation, can result in improved planning outcomes (Willey 2006). Therefore, the combination of a broader base of input (beyond just elected officials and appointed 'experts'), increased

debate on planning issues and the mechanisms for 'local knowledge' to inform planning approvals that TPOAR affords can be expected to lead to improved 'public good' outcomes (Willey 2006). Although these are the potential benefits of TPOAR in terms of accountability in planning, the wider debates question the democratic qualities of TPOAR. These debates are characterised by four key themes: equity; hierarchies of participation; political transparency and efficiency. These are discussed below.

TPOAR and Equity

Advocates of TPOAR argue that they provide equity of process (H Ellis 2000; Purdue 2001; G Ellis 2006; Willey 2006). Ellis (2006:334, original emphasis) argues that first party (applicant) rights of appeal provide a challenge only to "weak *refusals*" of permits. Third party appeal rights are required to balance this with the ability to challenge "weak *permissions*". Therefore, if an applicant has right of appeal, then a third party must also have right of appeal to maintain equity. Developers wield considerable political and economic power, and are prepared to contest permit decisions. As Willey (2006:384) argues, "if one accepts that the function of planning appeals is not confined to protecting a dogmatic property rights regime, then the argument that participants other than developers need to be able to access the appeals system starts to hold more weight."

However, despite support for TPOAR within collaborative planning frameworks (Healy 1997), there is clear tension between the idea of communicative rationality underpinning the collaborative planning model and the adversarial engagement of formal appeal processes (Trenorden 2009). The notion that third party rights improve decision making is also questioned, particularly in light of the substantial time and cost impacts it can have on development, discussed below (Whelan 2006). However, Ellis (2000:214) notes that it is "curious" to require that third party rights improve decision-making to be legitimate, when "we do not expect the rights currently afforded to property interests to necessarily improve decision-making".

Given that equity of access to planning decisions is a common justification for TPOAR, a significant limitation is the relative lack of equity in its engagement of citizens. Supporters of TPOAR acknowledge that the majority of people lodging third party appeals come from an educated, well resourced minority, which raises questions about the extent to which objections are representative of community interests (Finkler 2006; Ellis 2002; Willey 2006). Further, Finkler (2006) highlights the potentially discriminatory nature of TPOAR, with a bias in notifications of development to landlords over tenants; and examples of the deliberate use of third party appeal to exclude unwanted residents. An implication is that, if unchecked, TPOAR can effectively "become a tool to be exploited by elitist and capitalist interests at the expense of the vulnerable" (Willey 2006:380).

TPOAR and Hierarchies of Participation

A common counter argument to the existence of TPOAR is that they detract from proactive public engagement and participation in policy formation and strategic planning. As indicated in Figure 1, the planning approval process is informed by a wider framework of policy-making. It is argued that a focus on proactive, higher order engagement leads to better policy and greater certainty in processes. The recent Productivity Commission (2011) inquiry into planning and development approvals, for example, identified the need for planning policy outcomes to be dictated higher up the chain in the planning-to-approval process, combined with early community engagement as being highly desirable. Where effective early public engagement is provided it is argued that TPOAR result in unnecessary duplication of existing merits based review (Whelan 2006). They can also encourage reactive rather than proactive strategic planning, countering the objectives of collaborative planning (Whelan 2006).

However, others dispute the argument that TPOAR and strong collaborative planning are in opposition (Ellis 2000; Willey 2006; Trenorden 2009). Trenorden (2009) highlights weaknesses in the argument that higher order engagement absolves the needs for TPOAR, arguing that citizens can not be expected to understand the full implications of planning policy, and therefore should have the right to appeal discrete decisions. Further, she argues that in practice planning policy does not provide for clear and prescriptive development outcomes and that development approval is in part discretionary. As such, TPOAR are important to ensure community expectations established in policy are carried through to planning approval decisions. Rather than undermining collaborative planning it is argued that "...the very existence of TPOAR compels developers to engage more fully, sincerely and legitimately with the community" (Willey 2006:376).

Framing debates about the procedural merits of different development approval systems are the cultural and ideological arguments about the role of individual property rights on the one hand versus the right of community participation in decision making on the other (Willey 2006); and the role of the state in providing for or impinging upon these rights. Appeal rights were originally enshrined in planning systems as a measure of protection for landholders against excessive government interventions and not necessarily as a means to

facilitate citizens' engagement in planning, with public accountability instead catered for by elected representatives (Ellis 2000; Purdue 2001). Commonly third party appeal rights were not initially conceived of as an important part of planning approval processes, and many see a move to greater third party rights as infringing on the common law property rights that first party appeal was established to protect (Moran 2006).

TPOAR and Political Transparency

Given the discretionary, often contested, and ultimately political nature of development approvals, TPOAR have been put forward as an important component of good governance (Morris 2005; Willey 2006). TPOAR can provide public scrutiny and contestation of government decisions, bringing transparency and accountability to the exchanges between developers and the planning approval authority. This in turn counters opportunities for corruption, and perception of corruption, by the general public (Productivity Commission 2011). For merits based planning approval systems to work, they must have the confidence of the general public. Morris (2005), for example, cites the contrast between NSW, where very limited third party appeal rights exist, and Victoria, where comprehensive such rights exist. He notes the string of findings from ICAC (New South Wales Independent Commission Against Corruption) of bribes to local government officials and representatives in NSW, compared with little evidence of such practice in Victoria. For Purdue (2001:87-88), the case for TPOAR is clear:

There can be little doubt that, where a local planning authority is granting planning permission, it cannot be regarded as an independent and impartial tribunal ... it is not a question of whether third party rights of appeal need to be introduced [in England] but rather how they should be introduced.

Countering this, appeals processes (which typically are centrally administered), can shift the ultimate approval of development applications away from local government and therefore away from local representation, so it arguably goes against the principle of subsidiarity (Willey 2006). It can also lead to perverse outcomes, in particular by effectively absolving local government of a degree of responsibility in making tough or unpopular decisions, resulting in a "less responsible attitude" in light of the appeals safety net (Ellis 2002:459). As Willey (2006) documents, there is a clear potential for local councils to make a politically motivated decision in sensitive cases, knowing that there will be a second round merits based evaluation (at appeal) which will relieve them of the responsibility to make difficult decisions (see also Finkler 2006). For example, regarding a proposed development of 20 apartments in the inner Melbourne suburb of Northcote that received objections from residents, Darebin Council avoided making a decision within the statutory timeframe. Responsibility for the decision was thereby passed to the VCAT tribunal. The council however publically "resolved to inform the tribunal that it did not support the development" (Northcote Leader, July 2011).

TPOAR and Efficiency

Contention surrounding TPOAR is regularly expressed as calls for procedural efficiency in planning approval processes. TPOAR, it is argued, slow down planning approval processes, and thus create inefficiency, uncertainty, increased costs, and ultimately act as a break on investment and economic growth (Property Council of Australia (WA Division) 2001; Whelan 2006; Productivity Commission 2011). Concern in particular focuses on the potential for frivolous or vexatious claims (Productivity Commission 2011). Against this, advocates of TPOAR highlight that calls for greater 'speed' frequently ignore or dismiss the associated impacts on decision quality (Ellis 2006). Indeed Ellis contends that in practice frivolous claims are rare, and that the characterisation of third party appeals as being representative of only narrow self-interest is an oversimplification not supported by empirical evidence. Further, he suggests such arguments are more often representative of efforts to marginalise participation in planning that frustrates or hinders government or developer objectives.

Reducing formal appeal rights may be seen to impinge on participatory democratic ideals, and can also introduce new uncertainties, including informal opposition and litigation. Studies from NSW LGAs Penrith and Canada Bay (Cook 2006; Cook and Ruming 2008) and high-profile conflicts, notably the Camberwell Station case in Melbourne, show attempts to reduce consultative measures for large projects can result in politicisation and further delays. This point was explored by the Productivity Commission (2011) in its discussion of community interaction and the repercussions of not involving the community in planning decisions.

Even though TPOAR are seen as mechanisms ensuring transparency and oversight in land use decisions, the discussion above of key themes shows TPOAR have also been criticised on a number of grounds: as the instruments of elites; as encouraging adversarial rather than collaborative debate; and as a process likely to reduce the autonomy and accountability of local government while shifting planning control away from

elected representatives. These debates challenge the idea of TPOAR as a mechanism of planning accountability and transparency. They also raise questions around what style of TPOAR (if any) is best suited to the achievement compact city policy.

CURRENT POLICY: DIFFERENCES AND TRENDS

Policy Differences

A notable feature of TPOAR is the extent to which they – and the policy assumptions underlying them – differ. Provisions for appeal rights vary substantially between jurisdictions and have undergone reforms in different directions at different times. In terms of historical differences, Trenorden (2009) provides a summary of early legislation to introduce TPOAR in Australia. Provisions for TPOAR were introduced in 1961 in Victoria (via the Town and Country Planning Act), 1966 in Queensland, 1970 in New South Wales (via section 342ZA of the Local Government Act) 1972 in South Australia and 1974 in Tasmania (via section 734 of the Local Government Act). These provisions, however, have since followed diverging histories of limitations and renegotiations. TPOAR in Australia have always been applied unevenly, and only ever to certain land uses.

The 2011 Productivity Commission report found that there were significant differences between the provisions made for planning appeals across Australian States and Territories. Victoria and Tasmania now have the broadest access to TPOAR, with Victoria identified as being unusually strong in comparison to international examples (Willey 2006). Western Australia, by contrast, does not allow third party appeals, although this prospect was debated in the early 2000s (Trenorden 2009; Property Council of Australia, WA Division 2001). In NSW and SA appeal rights are limited and only available for certain types of developments. Queensland and the ACT follow the model established by the Development Assessment Forum (DAF), a federal government advisory body. The DAF model sets out ‘tracks’ for different development assessment processes, of which some allow limited TPOAR. Table 1 compares TPOAR in Australian States and Territories. It also notes some international examples. England and Scotland have experienced significant recent policy debate on the inclusion of TPOAR, however, appeal rights remain available only to the applicant (Conservatives 2010). In the Republic of Ireland, by contrast, broad TPOAR have been established since 1963 (Ellis 2002). Likewise, Ontario, Canada, has broad TPOAR.

Table 1 – Variations in Provisions for TPOAR

Location	Third Party Objection and Appeal Rights
Australia	
NSW	Limited to uses such as polluting industries
Victoria	Broad
Queensland	Limited. DAF based - limited to ‘code assessable’ developments
WA	None
SA	Limited to ‘category 3’ developments
Tasmania	Broad
ACT	Limited. DAF based - limited to ‘merit based assessments’
NT	Limited to developments in residential zones, in limited circumstances.
International Examples	
Republic of Ireland	Broad
Scotland	None
England	None
Ontario	Broad

Source: Productivity Commission (2011); Trenorden (2009); Ellis (2002); Clinch (2006)

Policy Trends

Although there is variation in the coverage and style of TPOAR across national and international jurisdictions, there is little doubt that recent policy debate, and in some cases reform, has also questioned or limited the coverage or nature of TPOAR. Three key policy intersections around TPOAR can be identified in contemporary policy debates.

First is the pressure to improve the public accountability and transparency of planning decisions. Planning and public participation models exist in a politicised context; one in which there is often intense scrutiny and of controversial decisions. Along with the defence of existing TPOAR in planning systems discussed previously, there are moves in some jurisdictions toward providing – or at least, being seen as providing – more opportunities for local engagement to increase confidence of the general public in planning (McLaren 2005; Conservatives 2010).

Secondly, there is the counter trend toward the minimisation and reduction of opportunities for objection and appeal. All States and Territories have recently undertaken or are proposing to undertake planning system reforms (Productivity Commission 2011). The intention of planning ministers to 'streamline' TPOAR is evident in their support for the DAF model of appeal. The DAF has developed a 'leading practice model' tied to the track-based system of development approvals, as follows:

Opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests. Opportunities for third-party appeals may be provided in limited other cases. Where provided, a review of a decision should only be against the same policies and objective rules and tests as the first assessment (Productivity Commission 2011:80).

Indeed 'streamlining' or 'fast tracking' is a key part of policy debate around TPOAR. In contexts where appeal rights exist in principle, they may still be excluded or 'tracked', as the DAF model proposes, for particular types of developments. A true fast tracking mechanism is where a particular circumstance triggers a particular process with regards to provisions for objection and appeal. Third party appeals are most commonly excluded where developments are very minor; or at the other end of the scale, for major or 'state significant' developments (Productivity Commission 2011).

Recent inquiries into development approval processes, such as the 2010 Victorian Competition and Efficiency Commission Inquiry into Streamlining Local Government Regulation, have flagged potential reforms to TPOAR. Although having broad TPOAR, Victoria has introduced policies (e.g. 'Better Decisions Faster' and 'Cutting Red Tape in Planning') to fast-track or use ministerial call-in powers to allow certain developments to bypass local objection rights. Other reforms include curtailment of appeal rights in the ACT and the expansion of state-level planning decisions in Western Australia.

Given the public backlash around social housing and medium density housing, it is perhaps not surprising that the recent social housing initiative was formed with careful consideration of whether or not planning appeal would be possible. In Australia, affordable housing has effectively been fast tracked through the recent use of Ministerial call-in powers for social housing projects under the 2008 Nation Building Economic Stimulus Plan. Even though local opposition was reported in response to a number of these public housing projects (Dowling 2009), they show an enthusiasm for limiting TPOAR on the grounds of social and environmentally sustainable urban form.

Overseas, TPOAR policy issues are also contentious. Clinch (2006), for example, contrasts Ireland, where TPOAR exist but are being curtailed, with Britain, where there are no TPOAR despite significant pressure for their establishment. Debate continues in England and Scotland about the prospect of introducing TPOAR, and increasing local input into development applications. Recently the conservative coalition government flagged the introduction of TPOAR via its policy green paper, Open Source Planning (Conservatives 2010). In June 2011, the third party appeal rights clause of the associated "Localism" bill had, however, been withdrawn from Parliament (Baron 2011). The withdrawal of the bill reflected concerns from housing groups (Orme 2010). In the Republic of Ireland, on the other hand, policy debates "have centred on whether the country's existing TPOAR should be limited to enable more rapid decision making" (Clinch 2006:327). Where provisions exist for third party appeal rights, these are typically "placed under substantial pressure for reform or abolition", and in 2006 the introduction of the Irish Strategic Infrastructure Bill enabled the fast tracking of major projects (Ellis 2006: 331). Concurrently, planning systems are often under pressure to involve the community in development decisions to improve transparency and reduce political backlash. In Scotland, no provision for TPOAR exists. The prospect was debated but rejected in 2003 (McLaren 2005). The above discussion of debates around TPOAR is summarised in Table 2.

Table 2 – Example Debates and Reforms to TPOAR

Location	Recent TPOAR Debates and Reforms
Victoria	Controversy over ministerial call-ins/fast-tracking.
WA	Proposed introduction of TPOAR in early 2000s.
ACT	Curtailment via DAF model.
Republic of Ireland	Pressure for reform to 'streamline'. Use of Irish Strategic Infrastructure Bill.
Scotland	Possible introduction debated but rejected, mid 2000s
England	Possible introduction via the "Localism" bill in 2011.
Ontario	Possible removal in 2005.

A third major policy issue concerns the intersection of TPOAR and housing supply. Maintaining housing supply in the face of rising demand in Australian cities (NHSC 2010), and in particular the need for more

affordable housing within existing urban areas, is a prominent policy issue in Australia. Many of the changes outlined above reflect new concerns around the efficiency of planning approval processes in facilitating housing supply. Recent initiatives of the federal government have focused on increasing supply and the efficiency of supply of affordable housing (see Federal Government Social Housing Initiative; Housing Affordability Fund, Housing Supply Council; and COAG Housing Supply and Affordability Reform Agenda). Recent high profile reports in Australia have suggested that there are increased developer risks, and greater construction costs, associated with higher density housing in existing urban areas (Productivity Commission 2011; Kelly et al 2011). The recent Grattan Institute report specifically identified TPOAR as a factor impeding housing supply in existing urban areas (Kelly et al 2011). Thus housing supply objectives are an important policy pressure on TPOAR. It is often argued that mechanisms for TPOAR add time, uncertainty and holding costs to approval processes and thus have implications for housing development pipelines (Productivity Council of Australia 2002, quoted in Willey 2006; Simonson 1996).

Despite these trends, there has been no city-wide analysis of the impact of TPOAR on housing supply. Ball et al (2009) suggest that planning delays often involve 'protracted negotiations' that lead to uncertainty of both process and outcome and that this area of the planning process has therefore attracted limited research. While a number of qualitative studies have pointed to public and resident dissatisfaction with MDH in Australia (Huxley 2002; Searle 2007), these rarely focus on appeal specifically. Research that does consider appeals data have been geographically limited, focusing on a handful of largely inner-urban localities (Woodcock et al 2011). To these ends, the appetite towards limiting or streamlining opportunities for objection and appeal appears to precede the evidence base.

CONCLUSIONS

Medium density housing has moved centre-stage in compact city and social housing policies. But the roll out of MDH in Australian cities has come face to face with widespread public resistance. This paper has argued that the potential for resident opposition to distort the supply of MDH has placed mechanisms for public participation in planning, specifically TPOAR, under intense scrutiny. While debates around the efficacy of TPOAR are traditionally framed around a long-standing opposition between economic efficiency and the 'public interest', our paper highlights the pressure that compact city and affordable housing policy places on TPOAR, with the increasing use of 'fast-tracking' mechanisms to enable development approval.

While on the one hand, this approach to streamlining public rights in relation to planning appeal is at odds with the participatory impulse of TPOAR, it is also true that TPOAR have been criticised on numerous grounds, including as a set of rights predominantly accessed by a set of elites. As a result, it is by no means clear how Australian states can deliver key policy aims for cities around social housing and MDH, while at the same time making allowance for the reasonable rights of residents to influence development outcomes. Our paper has argued that the current appetite for streamlining TPOAR has progressed significantly ahead of the evidence base.

To these ends, we point to three key gaps in the evidence base required to inform the reassessment, and in some cases reform, of TPOAR in Australia and elsewhere. First to what extent is access to TPOAR distributed across the metropolitan area; and to what extent is it being used to resist MDH? The answers to this would provide a more detailed and precise account of the extent to which 'resident action' is targeting medium density and or social housing, and from this, provide a precise indication of whether changes to TPOAR are likely to have a significant impact. Second, what are the impacts of the exercise of TPOAR to resist MDH on housing supply; and how does this compare to the impacts if the project is 'fast tracked'? Here, the assumption that 'fast track' development approval processes results in faster housing supply pipelines can be more carefully scrutinised. Third, to what extent does the removal of TPOAR encourage new forms of resistance; what form might they take; and how might these responses feed back into the planning process? The answers to these questions form the basis of our and others' ongoing work.

REFERENCES

- Ball, N. Allmendinger, P. and Hughes, C. (2009) Housing Supply and Planning delay in the South of England, *Journal of European Real Estate Research*, 2(2), 151-169.
- Baron, J. (2011), MPs, councillors and residents express concerns over planning and localism, The Northern Blog, *The Guardian*, June 14, <http://www.guardian.co.uk/uk/the-northerner/2011/jun/06/mps-councillors-and-residents-express-concerns-over-planning-and-localism>
- Beer, A., Kearins, B. and Peiters, H. (2007), Housing Affordability and Planning in Australia: The Challenge of Policy Under Neo-Liberalism, *Housing Studies*, 22(1), 11-24.
- Birrell, B., O'Connor, K., Rapson, V., and Healy, E. (2005), Melbourne 2030 - Planning Rhetoric versus Urban Reality, Monash University ePress, Clayton.
- Bunker, R., Gleeson, B.J., Holloway, D. And Randolph, B. (2002), The local impacts of urban consolidation in Sydney, *Urban Policy and Research*, 20(2), 143-167.
- Bunker, R., Holloway, D. and Randolph, B. (2005), The expansion of urban consolidation in Sydney: social impacts and implications, *Australian Planner*, 42(3), 16-25.
- Buxton, M. and Scheurer, Y. (2005), The Expanding Urban Frontier: Urban Form in Melbourne's Growth Corridors, RMIT University, Melbourne.
- Carlson, D. and S. Mathur (2004), Does Growth Management Aid or Thwart the Provision of Affordable Housing? In A. Downs, Growth Management and Affordable Housing: Do they Conflict?, Brookings Institution Press, Washington, D.C.
- Clinch, J.P. (2006), Third Party Rights of Appeal: Enhancing Democracy or Hindering Progress?, *Planning Theory & Practice*, 7(3), 327-330.
- Conservatives (2010), Open Source Planning – Policy Green Paper No.14, February 22 2010, <http://www.conservatives.com/~media/Files/Green%20Papers/planning-green-paper.ashx>
- Cook, N. (2006), Conflict and consensus in the redevelopment of de-industrialised property in Sydney, unpublished PhD thesis, Department of Human Geography, Macquarie University, Australia.
- Cook, N. and Ruming, K. (2008), On the Fringe of Neoliberalism: residential development in outer suburban Sydney, *Australian Geographer*, 39(2), 211-228.
- Department of Planning and Community Development (2006), Cutting Red Tape in Planning: 15 Recommendations for a better Victorian planning system, Department of Planning and Community Development, Melbourne.
- Dowling, J. (2009), A Stigma That Hits Home, *The Age*, October 6, Melbourne.
- Downs, A. (2005), Smart Growth: Why We Discuss It More Than We Do It, *Journal of the American Planning Association*, 71(4), 367-380
- Ellis, G. (2002), Third party rights of appeal in planning: Reflecting on the Experience of the Republic of Ireland, *The Town Planning Review*, 73(4), 437-466
- Ellis, G. (2006), Third Party Appeals: Pragmatism and Principle, *Planning Theory & Practice*, 7(3), 330-340.
- Ellis, H. (2000), Planning and Public Empowerment: Third Party Rights in Development Control, *Planning Theory & Practice*, 1(2), 203-217.
- Finkler, L. (2006), Third Party Planning Appeals: The Situation in Ontario, *Planning Theory & Practice*, 7(3), 348-350.
- Flint, A. (2004), Massachusetts Law Still Evolving, *Planning*, 70(10), 28-29.
- Goodman, R. and Moloney, S. (2004), Activity centre planning in Melbourne revisited, *Australian Planner*, 41(2), 47-54.
- Gurran, N. (2008), Affordable Housing: A Dilemma for Metropolitan Planning?, *Urban Policy and Research*, 26(1), 101-110.
- Gurran, N. and Phibbs, P. (2008), Planning for sustainable change: a review of Australian local planning schemes, in Gilmour, T. and Blakely, E. (eds) Dialogues in Urban Planning: Towards Sustainable Regions, Sydney University Press, Sydney, Chapter 6.
- Hamnett, S. and Kellett, J. (2007), Onward, Outward, Upward? A Review of Contemporary Australian Metropolitan Growth Policies, In *State of Australian Cities Conference*, 28-30 November, 2007 (pp. 270-208), University of South Australia, Adelaide.
- Healey, P. (1997), Collaborative Planning: Shaping Places in Fragmented Societies, Macmillan, Hampshire.
- Huxley, M. (2002), This Suburb is of Value to the Whole of Melbourne: Save our Suburbs and the Struggle Against Inappropriate Development, Institution for Social Research, Swinburne University, Melbourne.
- Iglesias, T. (2003), Managing Local Opposition to Affordable Housing: A New Approach to NIMBY, Bazelon Center for Mental Health Law, Washington, D.C.
- Kelly, J.F., Weidmann, B., and Walsh, M. (2011), The Housing We'd Choose, The Grattan Institute, Melbourne
- Low, N. (2002), Melbourne 2030: from MOTLUC to Active City, *Planning News*, 28(11), 4-6.
- McKim, J. (2009), Affordable housing law faces new challenge: Activist says 40B foes are more frustrated and more organized, *Boston Globe*, August 19, Boston.

- McLaren, D., (2006), Third Party Rights of Appeal in Scotland: Something Rotten? *Planning Theory & Practice*, 7(3), 346-348.
- Mees, P. (2010), *Transport for Suburbia - Beyond the Automobile Age*, Earthscan, London.
- Moran, A., (2006), *The Tragedy of Planning: Losing the Great Australian Dream*, Institute of Public Affairs, Melbourne.
- Morris, S. (2005), Third Party Participation in the Planning Permit Process, Victorian Civil and Administrative Tribunal, Melbourne, <http://www.austlii.edu.au/au/journals/VicJSchol/2005/5.pdf>.
- Nelson, A.C., Pendall, R., Dawkins, C.J. and Knaap, G.J. (2004) The Link Between Growth Management and Housing Affordability: The Academic Evidence, in A. Downs, *Growth Management and Affordable Housing: Do they Conflict?*, Brookings Institution Press, Washington, D.C.
- Newman, P. and Kenworthy, J. (1999), *Sustainability and Cities – Overcoming Automobile Dependence*, Island Press, Washington D.C.
- NHSC (National Housing Supply Council) (2010), *State of Supply Report 2010*, National Housing Supply Council, Canberra.
- Northcote Leader (2011), VCAT to decide on Victoria Rd multi-storey development, 17 July.
- O'Connell, L. (2009), The Impact of Local Supporters on Smart Growth Policy Adoption, *Journal of the American Planning Association*, 75(3), 281-291.
- Orme, J. (2010), Why are some campaigners calling the Localism Bill a Nimby's charter?, *The Independent* December 17, London.
- Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Australian Government, Canberra.
- Property Council of Australia (WA Division) (2001), *Third Party Appeals—The Need for Proper Investigation*, Property Council of Australia, Perth.
- Purdue, M. (2001), The case for third party planning appeals: the origins of the present position, *Environmental Law Review*, 3, 83-89.
- Randolph, B. (2004) The changing Australian city: new patterns, new policies and new research needs, *Urban Policy and Research*, 22(4), 481-493.
- Randolph, B. (2006) Delivering the compact city in Australia: current trends and future implications, *Urban Policy and Research*, 24(4), 473-490.
- Searle, G. (2004), Planning Discourses and Sydney's Recent Metropolitan Strategies, *Urban Policy and Research*, 22(4), 367-391.
- Searle, G. (2007), *Sydney's Urban Consolidation Experience: Power, Politics and Community*, Griffith University Research Papers, Brisbane.
- Simonson, R. (1996), The cost to development of community opposition, *Real Estate Review*, 25(4), 66-69.
- Trenorden, C. (2009), Third-Party Appeal Rights: Past and Future, Town Planning Law Conference 2009, Perth, http://www.sat.justice.wa.gov.au/files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf
- Troy, P. N. (1996), *The Perils of Urban Consolidation*, The Federation Press, Sydney.
- Victorian Competition and Efficiency Commission (2010), *Inquiry into Streamlining Local Government Regulation*, Draft Report April 2010, State Government of Victoria, Melbourne.
- Voith, R.P. and Crawford D.L. (2004). Smart Growth and Affordable Housing. *Growth Management and Affordable Housing: Do They Conflict?* In A. Downs, *Growth Management and Affordable Housing: Do they Conflict?*, Brookings Institution Press, Washington, D.C.
- Von Hoffman, A. (2009), Housing and Planning: A Century of Social Reform and Local Power, *Journal of the American Planning Association*, 75(2), 231-244.
- Whelan, M. (2006), Third Party Appeal Rights and the Efficiency of the Planning System, *Planning Theory & Practice*, 7(3), 340-343.
- Whitehead, C.M.E. (2007), Planning Policies and Affordable Housing: England as a Successful Case Study?, *Housing Studies*, 22(1), 25-44.
- Willey, S. (2005), Are planning appeal rights necessary? A comparative study of Australia, England and Vancouver BC, *Progress in Planning*, 63, 265-320.
- Willey, S. (2006), Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia, *Urban Policy and Research*, 24(3), 369–389.
- Woodcock, I., Dovey, K., Wollan, S., and Robertson, I., (2011), Speculation and Resistance: Constraints on Compact City Policy Implementation in Melbourne, *Urban Policy and Research*, iFirst article 1-20, 2011.
- Yates, J. (2001), The rhetoric and reality of housing choice: the role of urban consolidation, *Urban Policy and Research*, 19(4), 491-527.