

9.3 RESPONSE TO NOTICE OF MOTION NO. 949 - ADVERTISING OF PLANNING MATTERS GUIDELINES

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File No: GV/10/024

Attachments: 1. Advertising Planning Applications Guideline

SUMMARY

This report provides an update on the actions that have been taken to address Notice of Motion No. 949 relating to the advertising of planning matters in Mitchell Shire.

RECOMMENDATION

THAT Council:

1. receives and notes the information contained in this report, and
2. endorses the draft Guidelines for Advertising Planning Applications for the purposes of providing direction to applicants and officer's in implementing Section 52 of the *Planning and Environment Act 1987*.

BACKGROUND

At the ordinary Council meeting of 20 August 2018, a Notice of Motion was moved and resolved as follows:

THAT officers prepare a draft 'Guidelines for Advertising Planning Applications' for the October 2018 Council meeting for the purposes of providing direction to Officers in the exercise of their discretion. That draft guidelines include reference to:

- *Circumstances by which 'material detriment' would be addressed*
- *The method and circumstance by which notification should occur including, but not limited to sign on land, notification by mail, advertising in locally circulating newspapers.*

In response officers have reviewed industry best practices and drafted a guideline that aims to ensure consistency and transparency around the formal advertising of planning permit applications.

The guideline is intended to be included on Council's website and made available at customer service centres. The guideline will also be distributed to planning officers for use when making decisions on the advertising of planning applications.

ISSUES AND DISCUSSION

Legislative Requirements

The advertising of planning permit applications is governed by Section 52 of the *Planning & Environment Act 1987* (Act). This section of the Act prescribes that the responsible authority must give notice of an application unless it is determined that

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material detriment will not be caused to any person or if a proposal is exempt from advertising under the planning scheme. When it is determined that notice must be given it must be in one or all of the following three ways:

- (i) by placing a sign on the land concerned;
- (ii) by publishing a notice in newspapers generally circulating in the area in which the land is situated;
- (iii) by giving the notice personally or sending it by post.

Current Practice and Application of Legislation

Each planning application is judged on its own individual merits as to the manner in which it is advertised. These decisions are based upon a considered merits-based judgment of the potential impact of the application on adjoining and surrounding owners and occupiers. Depending on the assessed impact by the officer, advertising is then carried out in one, two or all of the above mechanisms available.

This process satisfies Councils obligations and responsibilities under the Act however from time to time public complaints are received concerning the limited nature of advertising of applications, particularly those applications that may have a broader, community wide impact.

Officers make every effort, particularly when a proposal may be controversial, to go above and beyond the basic requirements to notify as many affected persons as possible. However, Council must also carefully consider the reasonableness of extensive notice requirements as the applicant can apply for a review of an unreasonable requirement. It has been acknowledged in the past by VCAT that Councils do not have the capability to notify all sectors but that the process of notification is successful if there is general knowledge of a proposal.

Material Detriment

Prior to a decision being made on how an application is advertised, it must be established if there will be material detriment created as a result of the proposal.

There is no single definition in Victorian Planning Law of what is material detriment, instead it is necessary to examine case law on the subject to establish its meaning. VCAT considers "material detriment" to be a *real and identifiable detriment*. It is not enough to consider that there might be some potential for an unspecified material detriment.

The definition (included below) is extracted in part from *McBride v Stonnington CC* (2005) [VCAT 2321], which provided that the detriment does not need to be substantial, it must be real as distinct from being fanciful but it may be in fact only minor. This case also provides that it is appropriate for Councils to be conservative in determining the likelihood of a material detriment being caused.

Material Detriment is detriment that is real, not trivial or imaginary, not subjective to the mind of a particular person(s) but which is detriment in an objective and reasonable sense. Material Detriment may be minor, so long as it is not fanciful.

In general, the interpretation the Tribunal will provide to material detriment will be wide and not restrictive. Therefore, providing a definition for material detriment is

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understandably difficult as it will depend on the circumstances of the application under consideration.

The assessing officer must be conservative when assessing if detriment exists as has been established in previous VCAT decisions. Should the potential detriment considered by Council to a person or persons meet the definition listed above notice of the application must be given to that person or persons pursuant to Section 52(1)(d) of the Act.

Once it has been established that notice must be given, the mechanism by which it is given must be decided. This will include one or all of the mechanisms outlined above. The decision of the planning officer will be peer reviewed by a supervising officer and signed off as part of the process.

It should be noted that some types of planning permit applications are exempt from the requirement to advertise. These exemptions are generally established in the Mitchell Planning Scheme. At times officers will 'informally' advertise applications where there might be a community benefit in notifying surrounding residents and considering their input. In these situations, it is noted that no formal appeal rights will exist for those who make submissions.

Towards a more consistent and transparent approach to advertising

In an effort to provide increased clarity and transparency as to how Council deals with all planning permit applications a draft guideline has been developed that will guide applicants, potentially affected community members and Council in how applications will be advertised in the future. The guideline is included as an attachment to this report.

The purpose of the guideline is to set out Council's commitment to our obligations under Section 52 of the Act relating to the advertising of planning permit applications. The guidelines will also serve to reduce the organisational and reputational risk of misapplication of this important part of the Act.

The guideline seeks to provide for a consistent interpretation and implementation of this part of the Act. Further it will ensure that any persons who may be affected by a proposal:

- Are aware of the proposal,
- Have the opportunity to learn more about the proposal, and
- Have the opportunity to make a submission about or object to the proposal.

Review Period

It is proposed that the guidelines be reviewed annually to ensure intended outcomes are being achieved and any necessary changes are made.

CONSULTATION

Consultation has been undertaken with the Statutory Planning Unit and others who deal with the planning permit process.

FINANCIAL, RESOURCE AND ASSET MANAGEMENT IMPLICATIONS

The cost of advertising planning permit applications is born by the permit applicant.

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POLICY AND LEGISLATIVE IMPLICATIONS

The relevant policy and legislations in this subject would include:

- The Planning and Environment Act 1987 and related regulations, and
- The Mitchell Shire Planning Scheme.

SUSTAINABILITY IMPLICATIONS (SOCIAL AND ENVIRONMENTAL)

The implementation of the policy would be considered to have positive social impacts in that they seek to ensure that any persons who may be affected by a proposal are:

- Aware of the proposal,
- Have the opportunity to learn more about the proposal, and
- Have the opportunity to make a submission about or object to the proposal.

CHARTER OF HUMAN RIGHTS IMPLICATIONS

The rights protected in the *Charter of Human Rights and Responsibilities Act 2006* were considered in preparing this report and it's determined that the subject matter does not raise any human rights issues.

OFFICER DECLARATION OF CONFLICT OF INTEREST

No officers involved in the preparation of this report have any direct or indirect interest in this matter.

CONCLUSION

It is submitted that use of the attached guideline will lead to greater certainty in the application of the requirement to notify planning permit applications and greater consistency in the manner in which it is undertaken to the benefit to all involved in the planning process.

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(CONT.)

MITCHELL SHIRE COUNCIL

Council Meeting Attachment

DEVELOPMENT AND INFRASTRUCTURE

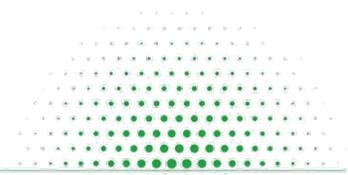
17 DECEMBER 2018

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**RESPONSE TO NOTICE OF MOTION NO. 949 -
ADVERTISING OF PLANNING MATTERS
GUIDELINES**

Attachment No: 1

Advertising Planning Applications Guideline



Advertising Planning Applications Guidelines

Guide Owner	Statutory Planning Coordinator Development Approvals
Creation Date	17/12/2018
Revision Date	17/12/2019

Please check Council's Intranet to ensure this is the latest Revision

Contact us:
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Purpose

This guideline sets out Council's commitment to our obligations under Section 52 of the *Planning and Environment Act 1987* (Act) relating to the advertising of planning permit applications.

The purpose of the guideline is to provide for consistent interpretation and implementation of this part of the Act. Further the purpose is to ensure that any persons who may be affected by a land use or development proposal:

- Are aware of the proposal,
- Have the opportunity to learn more about the proposal, and
- Have the opportunity to make a submission about or object to the proposal.

Scope

The guideline applies to members of the Statutory Planning Unit and all those involved in the processing of planning permit applications.

Procedure

Under Section 52 of the *Planning and Environment Act 1987*, planning applications are advertised where a proposal may cause *Material Detriment*. Advertising a planning permit application is often referred to as 'giving notice'.

What is Material Detriment?

Whilst no single definition exists for *material detriment*, principles can be extracted from case law. VCAT considers *material detriment* to be a *real and identifiable detriment*. It is not enough to consider that there might be some potential for an unspecified material detriment.

For the purpose of this guideline a definition (below) is extracted in part from *McBride v Stonnington CC* (2005) [VCAT 2321], which provided that the detriment does not need to be substantial, it must be real as distinct from being fanciful but it may be in fact only minor. This case also provides that it is appropriate for Councils to be conservative in determining the likelihood of a material detriment being caused.

Should the potential detriment considered by Council to a person or persons meet the definition listed below, and described in the foregoing, notice of the application must be given to that person or persons pursuant to Section 52(1)(d) of the Act.

Are there any exceptions?

A planning scheme may exempt any class or classes of application from some or all of the notice requirements that may otherwise apply under section 52(1) of the Act. In these cases, there is no opportunity for other people to formally make submissions or objections in relation to the application.

However, in such circumstances, Council will often provide 'informal notice' to seek the opinion of nearby or adjoining residents and provide them the opportunity to have input into the assessment of the application by Council. These submitters will not have any formal appeal rights if they are dissatisfied with the decision.

What Form will the Notice Take?

An application can be advertised using one or more of the following methods, depending on the proposal:

- notice of planning permit application mailed directly to owners/occupiers of adjoining properties (or wider as dictated by the possible impact of a proposal),
- erecting a sign on-site (or multiple signs) sized A3,
- notice of planning permit application in a locally circulating newspaper.

Any material submitted with a planning permit application, including plans and personal information, may be advertised, in accordance with the Act.

In determining which form the notice shall take officers will consider matters such as:

- The scale of development
- The type of land use proposed
- Hours of operation and types of activity
- The sensitivity of surrounding land uses and the local context
- The potential for amenity impact upon existing residents or property owners

Officers will be required to justify their choice of form of advertising through the preparation of an assessment report. At a minimum notice will be mailed to adjoining properties and where practical a sign erected on the site. Where a site is large or has multiple road frontages a sign may be erected on each frontage.

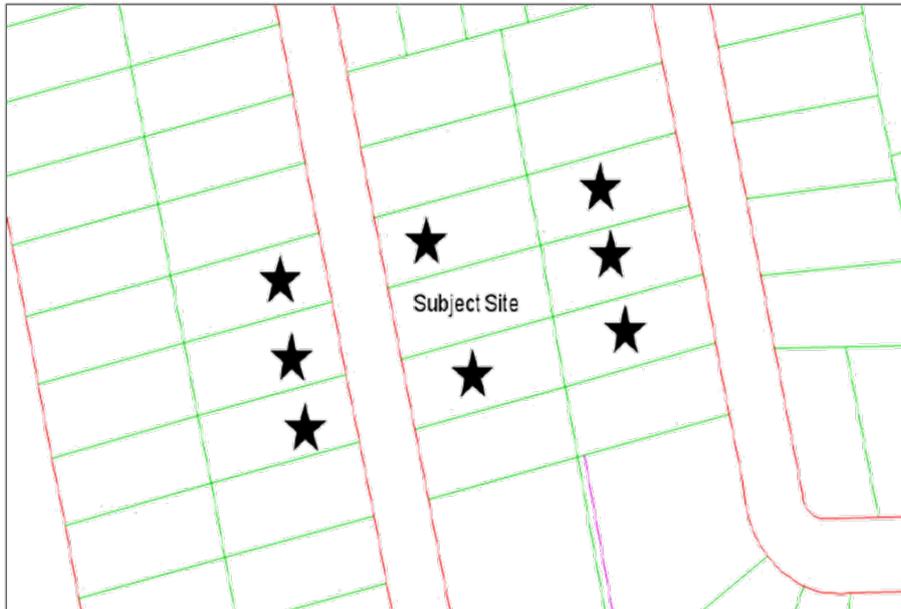
In circumstances where a proposal has a wider potential impact, (e.g. music event, landfill, quarry or other such potential amenity impacting uses) a much wider net will be cast in notices posted to owners and occupiers in surrounding areas based upon the potential for a wider impact. In these circumstances consideration will be given to use of a notice in a locally circulating newspaper.

In any larger or potentially amenity impacting proposals, application material will be included on Council's website and social media.

Council need to avoid under notification by narrowly interpreting the notice requirements. This is because a person who believes they should have received notice but did not, can seek cancellation or amendment of the permit.

Conversely, the responsible authority must carefully consider the reasonableness of extensive notice requirements as the applicant can apply for a review of an unreasonable requirement.

Adjoining Properties



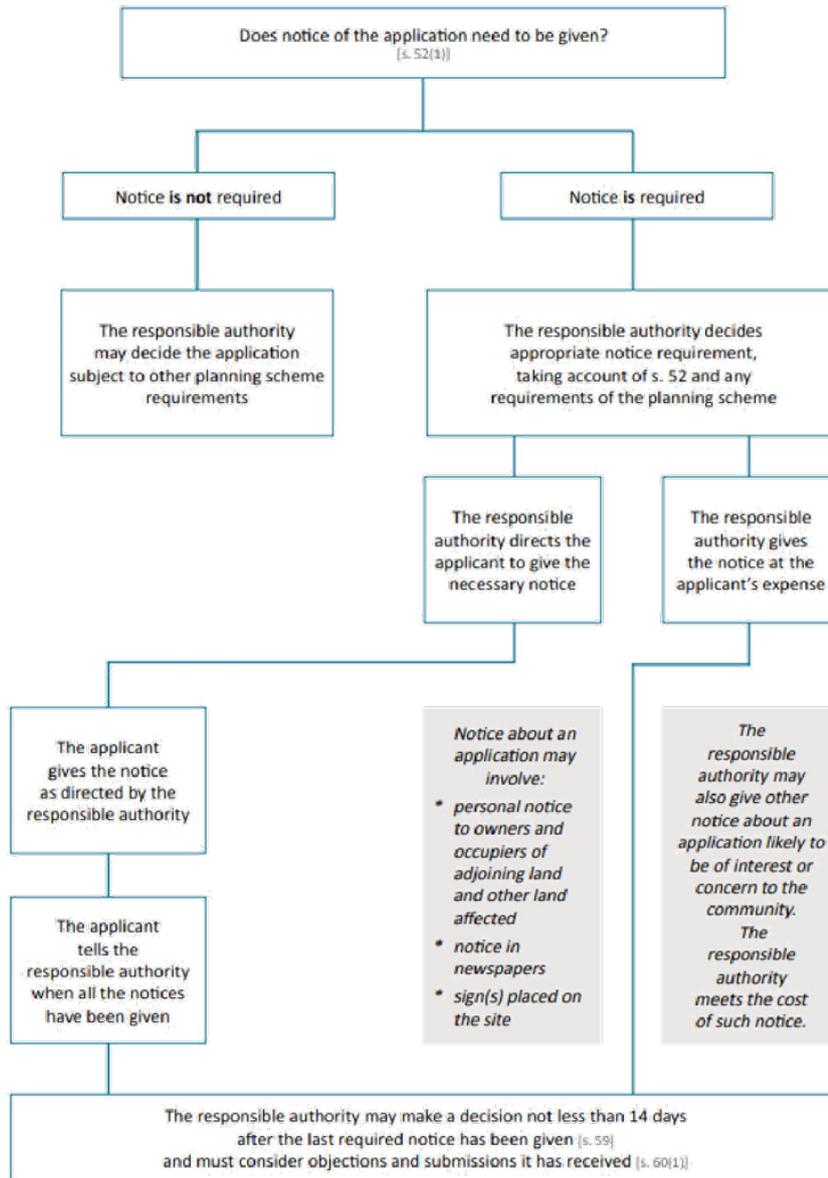
“Adjoining” includes all properties only separated by a road (ie directly opposite), as demonstrated in the diagram above. All ‘adjoining’ properties have been identified with a star. Note this is the minimum number of properties which would be notified and in most cases notice will be provided wider than the above diagram.

Other circumstances

In the event where an adjoining property is identified as public land, notice shall also be sent to any authority or committee responsible for the running or maintenance of that space.

In the event where an application property adjoins a municipal property notice shall be given to the neighbouring Council and a list of affected properties within that municipality sought so that notice can be appropriately given to all affected nearby residents and landowners.

Process Flow



* Process diagram extracted from DELWP guidelines on using Victoria's Planning System

Definitions

Material Detriment

Material Detriment is detriment that is real, not trivial or imaginary, not subjective to the mind of a particular person(s) but which is detriment in an objective and reasonable sense. Material Detriment may be minor, so long as it is not fanciful.

Responsibilities

The Development Approvals Department are responsible for maintaining and implementing this guideline.

Related Documents

Mitchell Planning Scheme
Planning and Environment Act 1987 & related regulations