Future Melbourne Committee **Agenda item 7.1**

21 July 2020

Notice of Motion, Cr Leppert: Regulation of building works nuisances

Motion

That the Future Melbourne Committee:

1. Notes that the *Local Government Act 2020*, like the *Local Government Act 1989*, limits the penalty able to be applied by Councils for breaches of local laws, and that this limit is 20 penalty units, currently $2,000.
2. Notes that the 20 penalty units limit on breaches of the local law in relation to building works nuisances such as out-of-hours construction is too low to be a meaningful deterrent for larger projects and that the cost of breaching the local law is increasingly being built into the cost of doing business, and that the current regulatory framework for building works nuisance abatement is therefore inadequate especially in high density mixed use areas such as central Melbourne.
3. Notes that the Legislative Council of Victoria did not agree to amend the Bill that led to the *Local Government Act 2020* to increase penalties for breaches of local laws in relation to construction activity, and that the Local Government Minister's rationale on behalf of the Government for opposing the amendment was that "we believe that penalties of this scale are more appropriately made through primary legislation and therefore through the Parliament of Victoria, so we do not consider it to be appropriate for penalties above 20 penalty points to be issued through regulations or local laws."
4. Resolves therefore to request that the State Government identify which primary legislation should be amended to allow for an enforceable statutory framework and permitting regime to regulate building works nuisance abatement.
5. Requests that the Chief Executive Officer write to the Premier, Minister for Planning and Minister for Local Government, and relevant Departmental Secretaries, to formally make the request, attaching a copy of the resolution, the notice and its attachment.

Background

This motion does not consider, or have any impact on, the default construction hours permitted under Council Local Laws, and the issuing of out-of-hours permits. It does not seek to inhibit construction activity or change the currently accepted default hours of accepted construction activity; it concerns only the enforcement and penalties for breaches of permitted construction times and other building works nuisances.

The City of Melbourne's local laws officers struggle to enforce construction times for large construction projects, and the low penalty maximum is regularly cited as being an insufficient deterrent. The maximum penalty can be effective in addressing smaller scale building works, but the gap in the enforcement regime is clearly with larger construction projects where fines for breaches of the Local Law can be easily built into the cost of construction.

This motion commences an important discussion with the State Government about how this gap in building regulation and enforcement can be addressed.

References for the paragraphs in the motion are as follows:

1. The upper limit on financial penalties able to be applied for breaches of local laws is set out in Section 79 of the *Local Government Act 2020*. Link. The amount of a penalty unit is set out in section 110 of the *Sentencing Act 1991* and for a local law offence is $100. The maximum penalty therefore for a breach of a local law made under the *Local Government Act 1989* is $2,000. Under the *Local Government Act 2020*, it is also currently $2,000. Once clause 90 of Schedule 1 of the *Local Government Act 2020* is proclaimed, a local law penalty unit will no longer be determined under section 110(2) of the *Sentencing Act 1991* but instead under section 110(1) which will then set the penalty unit as the amount determined by section 5(3) of the *Monetary Units Act 2004* which in turn is the amount fixed by the Treasurer as published from time to time in the Government Gazette – at present $165.22. The maximum penalty under local laws may therefore then rise to $3,304.40.

3. The amendment to the Local Government Bill 2019 was moved and debated on Thursday 5 March 2020 and a record of the debate can be found on page 890 of the Hansard of the Legislative Council for the 59th Parliament. Link. The amendment by Dr Ratnam MLC sought to increase the maximum penalty

able to be applied for nuisance associated with building construction for projects with gross floor area exceeding 2,000sqm to 200 penalty units, up from 20 penalty units.

An account of potential Acts that could be amended to allow for a workable enforcement regime for building works nuisance abatement is found at the attachment to the notice.

Mover: Cr Rohan Leppert

Seconder: Cr Nicholas Reece

Attachments:

1. Overview: Which primary legislation should be amended to provide an effective penalty and enforcement regime for building works nuisance abatement? (Page 3 of 4)

***Overview*: Which primary legislation should be amended to provide an effective penalty and enforcement regime for building works nuisance abatement?**

Construction is currently directly or indirectly legislated for under the following Acts of Parliament:

- The ***Building Act 1993*** has as its purpose, among other things, to regulate building work and building standards. It sets out the framework for the regulation of building construction, building standards and the maintenance of specific building safety features. Subordinate legislation under this Act, particularly the *Building Regulations 2018*, harmonise the National Construction Code with other jurisdictions and set out requirements for building permits, building inspections, occupancy permits, enforcement, and maintenance of buildings. Many provisions in the Act are enforced by Councils, primarily by the Municipal Building Surveyor and delegates. Neither the Act nor its subordinate legislation provides limitations on *when* construction activity should occur; the Act is limited in its concern for external amenity impacts of construction, however there are already some provisions in the Act and subordinate legislation that deal with the physical protection of adjoining property during construction.
- The ***Local Government Act 2020*** has as its purpose to give Councils the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of municipalities. The Act allows for the creation of local laws, which must not be inconsistent with any other Act or regulations and must not exceed the powers conferred by the Act. Councils regularly seek to complement the provisions of the *Building Act 1993* with local law provisions that regulate amenity by preventing nuisances caused by building works. The City of Melbourne does so in Part 9 of its *Activities Local Law 2019*. While this Act could be a suitable candidate for a stronger statutory framework for the enforcement of construction activity and amenity impacts, through the local law provisions, the State Government has opposed amending this Act for this purpose.
- The ***Planning and Environment Act 1987*** has as its purpose to establish a framework for planning the use, development and protection of land in Victoria. It is possible to apply conditions to planning permits for the use or development of land that require the submission of a Construction Management Plan to the satisfaction of the responsible authority, however the enforcement of construction activity is undertaken by council enforcement officers with powers delegated under the *Building Act 1993* or the *Local Government Act 1989/2020*; the breach of the terms of a Construction Management Plan is not generally able to be enforced as a breach of a condition of the planning permit – the condition requires the lodgement of the plan not the adherence to its terms. The *Planning and Environment Act 1987* is therefore inappropriate as a candidate for a statutory framework for the enforcement of construction activity and amenity impacts.
- The ***Public Health and Wellbeing Act 2008*** has as its purpose to promote and protect public health and wellbeing in Victoria. Regulatory frameworks enabled by this Act are broad; they only apply to construction noise and amenity if an ongoing and sustained nuisance can be proven, and that a detrimental health impact on an individual can be directly linked to the activity. Proving a health impact is thus a slow and labour-intensive activity with a heavy burden on the person impacted.
- The ***Environment Protection Act 1970*** (EPA) has as its purpose the protection of the environment in Victoria. The Act allows for the creation of State environment protection policies, including two on noise: Control of Noise from Commerce, Industry and Trade (SEPP N-1) and Control of Music Noise from Public Premises (SEPP N-2). The Act allows for the regulation and permitting of activities to ensure consistency with the policies, but there is no enforcement regime associated with each SEPP per se; SEPPN-2 might be referred to in applying conditions to planning permits, for example, or might be used as a source of objectivity when deciding whether or not a nuisance has occurred pursuant to the *Public Health and Wellbeing Act 2008*. EPA Officers can enforce noise policies through pollution abatement notices, but the resources involved, and the onus on all parties to engage, are high; Councils have long called for greater resourcing for EPA Officers to investigate and assist Councils with noise-related pollution. EPA Officers are also entirely separate to building teams in Councils, and the creation of new SEPPs that deal with construction noise specifically would still need a clear enforcement regime associated with it; if that enforcement regime falls to EPA Officers with a statewide remit, unconnected to the work of Councils' building teams, it is highly unlikely that enforcement will be efficient or effective.

Given that:

1. the State Government has opposed amending the *Local Government Act 2020*,
2. the *Planning and Environment Act 1987* or *Public Health and Wellbeing Act 2008* are generally unsuitable for the direct and swift enforcement regime being sought and so would require extraordinary amendments that would be far-reaching, and
3. the onus of enforcement on the State rather than Council should the *Environment Protection Act 1970* be the Act that is amended,

it is considered that the *Building Act 1993* may be the most suitable primary legislation for an expanded regulatory framework to allow for the meaningful enforcement of construction activity as it relates to nuisance abatement.

The responsible Minister is the Minister for Planning.