



Council Alliance for a
Sustainable Built Environment

CASBE PLANNING *Information Sheet 4*

Version 1—November 2016

Equitable Development at VCAT

The following cases are instructive of VCAT's most recent positions on equitable development.

Aitken Properties Pty Ltd v Hobsons Bay CC [2016] VCAT 1484

TAB Developments Pty Ltd v Port Phillip CC [2016] VCAT 1469

Samal Pty Ltd v Bayside CC [2016] VCAT 1143

Marshwell Pty Ltd v Moreland CC [2016] VCAT 1068

Crete Developments Pty Ltd v Darebin CC [2016] VCAT 1044

Tierney Properties Pty Ltd v Melbourne CC [2016] VCAT 1008

Jinshan Investment Group Pty Ltd v Melbourne CC [2016] VCAT 626

Lifestyle Living Pty Ltd v Knox CC [2016] VCAT 446

Jezmac Pty Ltd v Glen Eira CC [2015] VCAT 1074

Gesher Pty Ltd v Yarra CC [2015] VCAT 506

Highbury Venture Pty Ltd v Melbourne CC [2013] VCAT 2094

Equitable development is concerned with retaining reasonable opportunities for future development on adjacent sites. This is increasingly important as housing strategies focus more on intensification and infill as opposed to greenfield development. The concept of reasonable expectations of development is a critical one and is discussed below.

There are two central considerations for equitable development:

Does the proposal restrict the ability of a reasonable future adjacent development to achieve adequate amenity?

Does the proposal achieve adequate amenity in a way which is vulnerable to a reasonable future adjacent development?

Reasonable Future Development

In *Gesher* the tribunal stated that "In the absence of a specific proposal for an adjoining property, development should not have to satisfy a speculative or hypothetical worst case scenario on an adjoining property." There have however been cases prior to and since then in which the tribunal has asserted the nature of equitable development requires speculation on the part of the responsible authority. This should be based on what the reasonable expectations of development on adjacent sites are, including recent applications and development, as well as the strategic context of the area (*Highbury Venture, Jezmac*).

Existing Buildings

On numerous occasions (*Tierney Properties, Marshwell, TAB Developments*) the tribunal has made the point that equitable development must be forward rather than backward looking. That the review site may have been encroached upon by inequitable development in the past should not be taken into account when considering equitable development in the future. This highlights the importance of properly assessing the equitable development implications of every development as it occurs.





Council Alliance for a
Sustainable Built Environment

Blank Walls

In some situations a blank wall as a site interface may be a suitable response to equitable development concerns, as articulated in *Lifestyle Living*. A blank wall means that future development will not have to protect daylight access or outlook to that interface. This is particularly relevant for areas where neighbouring sites would find it hard to source adequate daylight for inboard dwellings, such as the narrow lots covered in *Samal* and *Crete Developments*. In some cases windows may be built to these interfaces under a Section 173 agreement which would see them filled in to create a blank wall at the time of neighbouring development, as was implemented in *Jinshan Investment Group*.

Transition to Better Apartments

The Victorian Government has released the *Better Apartments Draft Design Standards*, with the aim to introduce them in late 2016. The standards seek to replace the existing *Guidelines for Higher Density Residential Development* in guiding design for apartments within the state.

Explicit support for equitable development is found in Objective 2.6 of the *Guidelines for Higher Density Residential Development* which reads “To ensure areas can develop with an equitable access to outlook and sunlight.”

This is potentially important, in *Highbury Venture* the tribunal stated that equitable development was a relevant matter due to support found in both local policy and the guidelines.

In contrast, equitable development is not mentioned specifically in the *Better Apartments Draft Design Standards*, and there is no reference to either future or potential development.

Better Apartments does include standards for light wells, which the existing guidelines do not. They state that adjacent land should not be used in calculating the area of light wells, and also that light wells should not be the primary source of light for living areas.

An explicit focus on setbacks to achieve primary amenity for daylight and outlook may result in acceptable development outcomes. Whether they do, and whether compromises on setbacks should be granted, should be assessed on a case by case basis.

Where equitable development principles are not met there is still potential precedent to push for them without explicit policy support. In *Aitken Properties* the tribunal found equitable development was a valid consideration due to the strategic context of the site, even in the absence of explicit policy support for equitable development when considering proposals of less than five storeys.

Principles of Equitable Development

In *Gesher*, the tribunal summarized existing positions on the principles of equitable development. While cases presented elsewhere in this document are more recent (with the exception of *Highbury Venture*), and thus potentially more relevant in the case of contradictions, it is worthwhile repeating those principles as a convenient starting point.

1. *Equitable does not mean equal.*
2. *Development should not be too dependent on borrowing from neighbouring sites for its amenity.*
3. *Development should not unreasonably fetter redevelopment opportunities on adjoining sites.*
4. *The site size, proportion and context will influence how amenity can be equitably shared between adjoining sites.*
5. *In the absence of a specific proposal for an adjoining property, development should not have to satisfy a speculative or hypothetical worst case scenario on an adjoining property.*

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

