



# Affordable Housing Agreements: Advice for local government and community housing organisations

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March 2020

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This document was prepared by Hornsby & Co. for CHIA Vic and MAV. Legal advice provided by Russell Kennedy Lawyers.

Community Housing Industry Association Victoria (CHIA Vic) and Municipal Association of Victoria (MAV) received funding for this project from Department of Health and Human Services (DHHS) and Department of Environment, Land, Water and Planning (DELWP). A steering group was convened to provide input and was made up of representatives from CHIA Vic, MAV, community housing organisations, local government, DHHS, DELWP, and RMIT University.



## Glossary

<b><i>Affordable Home Ownership</i></b>	Affordable Housing where the eligible household purchases the dwellings.
<b><i>Affordable Housing</i></b>	Defined in the <i>Planning and Environment Act 1987</i> – housing, including social housing, that is appropriate for the housing needs of very low, low and moderate-income households.
<b><i>Affordable Housing Agreement</i></b>	The parameters agreed between a council and a developer through the planning system to deliver an Affordable Housing contribution.
<b><i>Affordable Housing Contribution</i></b>	A contribution from a landowner (developer) of land, cash, and/or dwellings, negotiated through the planning system. It should not be confused with development contributions required under a Development Contribution Plan or Incorporated Contributions Plan Overlay.
<b><i>Affordable Rental Housing</i></b>	Rental accommodation that is Affordable Housing and – for the purposes of this report – is distinguished from social housing. The rent is usually set at a discount from market rent (often 75-80% of market rent). More likely to be accessed by moderate income rather than very low and low income households.
<b><i>Community Care Accommodation</i></b>	A term used in the Victorian Planning Provisions (see Clause 52.22) and defined as land used to provide accommodation and care services. It includes permanent, temporary and emergency accommodation. It may include supervisory staff and support services for residents and visitors.
<b><i>Community Housing</i></b>	Affordable Housing managed by not-for-profit organisations.
<b><i>Community Housing Organisations (CHOs)</i></b>	Not-for-profit organisations that manage Affordable Housing, predominantly social housing. This includes but is not limited to registered housing agencies.
<b><i>Commonwealth Rental Assistance (CRA)</i></b>	A non-taxable income supplement payable to eligible people who rent in the private rental market or community housing.
<b><i>Co-operative Housing</i></b>	Long-term rental accommodation that gives tenant members the opportunity to participate in the running of the co-operative.
<b><i>Crisis Accommodation</i></b>	Short-term housing managed by not-for-profit organisations.
<b><i>Eligible Household</i></b>	A household that meets the income threshold set out in the Governor in Council Order (for Affordable Housing) or as set by the Director of Housing (for social housing) and meets other eligibility requirements (residency, assets threshold).
<b><i>Housing Affordability</i></b>	The relationship between the cost of housing (mortgage or rental payments) and household income.
<b><i>Housing Association</i></b>	A registered housing agency that owns and manages community housing and has the capacity to develop properties at scale.
<b><i>Housing Provider</i></b>	A registered housing agency that owns and/or manages community housing. Generally smaller in scale than a Housing Association.
<b><i>Memorandum of Understanding (MoU)</i></b>	A document that describes the broad outlines of an agreement that two or more parties have reached.
<b><i>Planning Authority</i></b>	A Minister or public body that is authorised under Section 9 of the <i>Planning and Environment Act 1987</i> to prepare an amendment to a planning scheme.

<b>Planning Permit</b>	A legal document that allows a certain use and/or development on land. It normally contains a written document with conditions that must be met and a set of plans. Most applications for a planning permit will be made to the local council, but some are made to the Minister for Planning.
<b>Public Housing</b>	Social housing that is owned and/or managed by the Victorian Government.
<b>Registered Housing Agency</b>	A rental housing agency, registered under Part VIII of the <i>Housing Act 1983</i> and subject to regulation overseen by the Victorian Housing Registrar.
<b>Rental Housing Agency</b>	A non-profit body that provides or is established to provide rental housing.
<b>Residual Land Value</b>	A method for calculating the value of development land. This is done by subtracting all costs associated with the development, including profit but excluding the cost of the land from the total value of the development.
<b>Responsible Authority</b>	The organisation who is responsible for the administration and enforcement of a planning scheme including deciding on planning permit applications. It may be the municipal council (most frequently), the Minister (sometimes) or another specified person (uncommon).
<b>Rezoning</b>	The process of changing the zone of a parcel of land through a planning scheme amendment.
<b>Rooming House</b>	Accommodation where residents may share a bedroom and facilities. A rooming house may be managed by a community housing organisation in which case it meets the definition of Affordable Housing. Privately-run rooming houses do not have the safeguards in place (e.g. allocation and affordability) to be considered Affordable Housing. Planners note Clause 52.23 of the Victorian Planning Provisions.
<b>Section 173 Agreement</b>	A legally binding agreement between council and a landowner. The agreement remains with the land, regardless of change of ownership.
<b>Social Housing</b>	Public housing and housing owned, controlled or managed by a participating registered agency. Defined in the <i>Housing Act 1983</i> .
<b>Specialist Disability Accommodation (SDA)</b>	A market-based system that has been created under the National Disability Insurance Scheme (NDIS) to provide housing for people with very high support needs. SDA payments are made by the National Disability Insurance Agency to a person with SDA funding allocated in their NDIS plan. The funding is used to cover the cost of capital to build specialised housing.
<b>Supported Housing</b>	A type of housing that provides higher-level care and support for people with particular needs.
<b>Tenure Blind</b>	When homes built for private sale and rent, and those built for affordable housing are purposefully designed to be similar to each other to mask the tenure, assisting better social integration.
<b>Transitional Housing</b>	A supported short-term accommodation program designed to help people move to more permanent housing in public housing, community housing, or the private rental market.
<b>Value Sharing</b>	When part of the increase in value of a site, created by a planning mechanism or government investment, is shared with the community by requiring the landowner to contribute to public works or services.

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# Foreword

The lack of Affordable Housing is one of the most critical and vexing issues facing Victoria. We have the lowest proportion of social housing in the country at 3.2% of dwellings; well below the national average of 4.5%. With record population growth the problem will only get worse unless action is taken on a number of fronts.

*Homes for Victorians* and *Plan Melbourne 2017-2050* both recognise the need to increase the supply of Affordable Housing. Both policies suggest that the planning system has an important role to play in increasing supply but acknowledge that it cannot do it alone.

In 2018 amendments were made to the *Planning and Environment Act 1987* to facilitate the voluntary provision of Affordable Housing. Until this time there were no guidelines to assist local government, community housing and developers to negotiate Affordable Housing outcomes.

The Community Housing Industry Association Victoria (CHIA Vic) and the Municipal Association of Victoria (MAV) have come together to commission this report and resources to address the practicalities of implementing these new provisions. Our aim is to provide a smoother pathway through the complexity of housing provision for all stakeholders. The report specifically emphasises the parameters on the roles of the players within an Affordable Housing negotiation in the belief that increased understanding of each other's legislative and operating requirements will produce better outcomes. Ideally negotiations will produce surety of the affordable housing provision but flexibility in the way it can be delivered.

We would like to thank the Department of Health and Human Services (DHHS) and the Department of Environment, Land, Water and Planning (DELWP) for funding this work; and the reference group members for ensuring that we captured the diversity of views. This is the first time that our sectors have come together to undertake such a project and we hope to continue this productive working relationship going forward, as we see many opportunities for local government and the community sector to work together in addressing Victoria's Affordable Housing shortfall.



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## How to use this document

### This report has three key sections:

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- The **Overview** section sets the scene for the report, explains what Affordable Housing is, and provides a description of the key players in Affordable Housing in Victoria. Whether you are a local government or community housing practitioner, this section will help make sure everyone understands the terms and context for Affordable Housing in Victoria.
- The **For Local Government** section provides information to help local government staff and Councillors gain a better understanding of the constraints, needs, and strengths of community housing organisations.
- The **For Community Housing** section provides information to help community housing staff and board members gain a better understanding of the constraints, needs, and strengths of local government.

Throughout the text, words in **bold** are described in the glossary on pages 4-5.

It is noted that this report and its associated resources are not designed for people in local government to become experts in community housing or vice versa. Both sectors are complex and nuanced and the amount of detail required to become an expert would fill many volumes. This guide enables each sector to gain enough knowledge and understanding so they can avoid unintended impacts on each other, and can maximise efficiencies and effectiveness when delivering Affordable Housing.

### Other resources

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This document is supported by a suite of resources that enable you to apply its guidance in a practical and pragmatic way. The resources include a toolkit for planners and a series of fact sheets for people in the local government, community housing, and development sectors.



# Overview



# 1.0 Overview

## 1.1 Background

This report was commissioned by the Community Housing Industry Association Victoria (CHIA Vic) and Municipal Association of Victoria (MAV) to assist the local government and community housing sectors when facilitating the provision of Affordable Housing.

*Homes for Victorians: Affordability, access and choice* (Victorian Government, 2017) and *Plan Melbourne 2017-2050* (Victorian Government, 2017) recognise the critical need to increase the supply of Affordable Housing. Both strategies found that while the planning system alone could not address all of the issues related to the provision of social and Affordable Housing – it is important for the planning system to play its role.

In 2018 amendments to the *Planning and Environment Act 1987* came into effect to facilitate the provision of Affordable Housing came into effect. To support the amendments the Department of Environment, Land, Water and Planning (DELWP) released guidance including an example Affordable Housing Agreement, guidance on the negotiation of agreements for different parties and guidance on the context for their application. This can be found at [planning.vic.gov.au/policy-and-strategy/affordable-housing](https://planning.vic.gov.au/policy-and-strategy/affordable-housing)

This report provides more detailed advice and explores the practicalities of implementing the legislation. It is based on the experience of local government and community housing practitioners who have been working through Affordable Housing negotiations as part of the development process.

This report identifies the key issues facing the community housing and local government sectors when facilitating Affordable Housing through the development process and explores the options for brokering Affordable Housing outcomes. The report sets out how local government and community housing sectors can work together in the current policy environment and is supported by a suite of resources.

## 1.2 Relevant legislation

There are several Acts which are relevant to Affordable Housing in Victoria. The most relevant Acts are:

- the *Local Government Act 1989* (LG Act);
- the *Planning and Environment Act 1987* (PE Act); and
- the *Housing Act 1983* (Housing Act).

The legal advice in Appendix 1 sets out how and why these Acts apply. There is a summary of how and why these acts apply below, and specific elements are expanded in sections 2 and 3 of this report. In relation to tenancy and property management, the *Residential Tenancies Act 1997* applies.

### ***The Local Government Act 1989 (LG Act)***

The LG Act provides the legal framework in which Victorian municipal councils operate. The LG Act controls the sale and leasing of council-owned land, procurement of goods and services by a council, the administration of public open space, and governance and probity requirements for councils.

## The Planning and Environment Act 1987 (PE Act)

The PE Act provides a framework for the administration of the use and development of land. The PE Act has an objective (Section 4):

*1(fa) to facilitate the provision of Affordable Housing in Victoria*

With the function of controlling the use and development of land, the PE Act provides councils with a means of facilitating Affordable Housing through the development process. Note this is a voluntary process and requires agreement from landowners who are seeking to obtain a planning scheme amendment or a **planning permit**.

## The Housing Act 1983 (Housing Act)

The Housing Act has the broad objective – among other things – of ensuring every person in Victoria has adequate and appropriate housing at a price within his or her means. The Housing Act, together with the Office of the Housing Registrar, provides the framework for the establishment, compliance and recognition of registered housing agencies – the registered not-for-profit organisations that manage housing for **eligible households**. There are also not-for-profit organisations who manage housing but who are not registered.

## 1.3 What is Affordable Housing?

The PE Act (Section 3AA) defines Affordable Housing as:

- (2) ... housing, including social housing, that is appropriate for the housing needs of any of the following—
- (a) very low income households;
  - (b) low income households;
  - (c) moderate income households.

To support that definition there is a Governor in Council Order (Appendix 2) which sets out the income ranges for very low, low, and moderate-income households (Victorian Government, 2019h). If a household falls within the gazetted income ranges, they are an **eligible household**. The Order in Council is updated periodically and is found at [planning.vic.gov.au/policy-and-strategy/affordable-housing/resources](https://planning.vic.gov.au/policy-and-strategy/affordable-housing/resources) 

The Minister has specified matters that practitioners must have regard to when determining if housing meets the definition of Affordable Housing. The Ministerial Notice (Appendix 3), sets out the following matters:

- allocation
- affordability
- longevity, in terms of public benefit of the provision
- tenure
- type of housing, in terms of form and quality
- location, in term of site location and proximity to amenities, employment and transport
- integration, in terms of physical build and local community
- official estimates of housing need.

A key element of whether housing is considered appropriate for eligible households is the presence of an allocation and eligibility process, and the level at which the rent or mortgage repayments are set.



## The difference between housing affordability and Affordable Housing

### Housing affordability

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**Housing affordability** is the relationship between expenditure on housing (prices, mortgage payments or rents) and household incomes, regardless of whether the housing is Affordable Housing or market housing.

Housing affordability is a significant issue across Australia as the increasing cost of housing outpaces relatively fixed household income. People are spending more on housing both in absolute terms and as a proportion of household income.

### Affordable Housing

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**Affordable Housing** is housing that meets the definition in the PE Act. It has an eligibility requirement and generally there are allocation processes in place to make sure it is made available to very low, low, and moderate-income households.

The term 'Affordable Housing' is often incorrectly used to describe lower-cost market housing which can be purchased or rented within the financial means of a greater range of people. However, unless there is also an eligibility requirement or allocation process for that housing, it will not necessarily go to an eligible household and so would not be Affordable Housing (as defined in the PE Act). To avoid confusion, that housing should be referred to as 'lower-cost housing', not Affordable Housing.

To help make and reinforce the distinction between housing affordability and Affordable Housing, in this report, we have capitalised the term Affordable Housing.

### 1.3.1 Some terms used to describe Affordable Housing

Under the PE Act, Affordable Housing is one of three types of housing:

- public housing
- housing provided by an agency regulated by the Victorian Housing Registrar under the *Housing Act 1983*
- a broad range of other possible housing types that are not public housing or provided by a regulated agency but are ‘appropriate to the needs’ of very low, low and moderate-income households including clear eligibility and allocation processes to ensure an affordable housing outcome is achieved.

It should be noted that the terms ‘**social housing**’ and ‘**Affordable Housing**’ both have colloquial meanings in policy discussions and legal meanings in the PE Act and Housing Act.

In the colloquial sense, **social housing** is often understood to be a synonym for rental housing generally provided to very low-income households, either by a not-for-profit organisation (**community housing**) or by the government (**public housing**). It is commonly assumed that **social housing** is restricted to very low-income households because moderate-income households are not eligible, which is not the case.

A moderate-income household comprising a couple and three dependent children on an annual income of \$126,000 is eligible for social housing. However, very few if any of these households apply for social housing and fewer still are allocated social housing due to people with greater need applying.

By definition, all **Affordable Housing** is for people within the **eligible household** income ranges, and there should be an eligibility test and allocation process. Within the sector, there are different terms to describe Affordable Housing, reflecting different rent-setting models, funding models, or the specific needs of residents. The discussion below relates to the type of housing or program. For discussion on how the community housing sector delivers that housing see sections 1.5 and 1.6.2.

In Victoria, **social housing** makes up the largest component of the Affordable Housing sector. Rents in social housing are set as a proportion of household income (usually between 25-30 per cent of income). The DHHS Annual Report showed there were 85,626 social housing dwellings in Victoria in 2018/19 (Victorian Government, 2019c).

Social housing includes public housing – owned and usually managed by the Victorian Government – and community housing – owned and/or managed by **community housing organisations** (CHOs).

Public housing provides long-term rental accommodation and currently makes up approximately three-quarters of all social housing stock in Victoria.

Community housing is an integral part of the housing system that aims to provide a housing option that is affordable, secure, responds to local community needs and supports tenant participation.



Figure 1. Affordable Housing in Victoria.

The majority of **social housing** is provided as long-term rental accommodation, but the sector also offers the following housing programs:

**Crisis accommodation** is for people at risk of homelessness. Accommodation may be provided for only one night at a time or for up to six weeks.

**Transitional housing** is supported short-term accommodation designed to help people move to more permanent housing in public housing, community housing, or the private rental market. People using this type of housing have often experienced a significant change in circumstances. People in transitional housing are provided with further advice and planning as they actively work with a support provider to apply for long-term housing.

**Co-operative housing** offers long-term rental accommodation that gives tenant members the opportunity to participate in the running of the co-operative. Depending on the co-operative, this could include the day-to-day running of the co-operative or could be more focused on strategic issues such as prioritisation of maintenance and tenant selection.

**Rooming houses** are often the only accommodation that many vulnerable or disadvantaged singles can access due to the demand for Affordable Housing far exceeding the supply. The community housing sector offers rooms targeted at singles with access to shared facilities as well as self-contained rooms which have a bathroom and kitchenette.

The above list illustrates the breadth of provision of social housing. The sector is complex with different funding streams and mechanisms for sourcing the housing. This snapshot cannot reflect all of that complexity.

It is noted that private rooming houses also operate across Victoria, and have no eligibility or allocation process. For the reasons illustrated in this report, private rooming houses are not considered Affordable Housing as they do not adequately respond to the matters in the Ministerial Notice.

It should also be noted that in addition to the terms used within the sector, the Victorian Planning Provisions also have specific definitions for rooming house and **community care accommodation** that are relevant for planners assessing planning permits (see glossary on pages 4-5).

While social housing makes up the majority of Affordable Housing in Victoria, there is also **affordable rental** and **affordable home ownership**.

**Affordable rental housing** is provided by not-for-profit organisations and also through the private providers, who receive some form of concession in return, such as was the case for the National Rental Affordability Scheme (NRAS). For affordable rental housing, the rent is generally set at a discount from market rent (for example rent is set at 75-80 percent of market rent) and is generally targeted at moderate-income households.

The NRAS is an example of affordable rental housing where the government provided a subsidy for landlords to rent their property to eligible households at discounted rent. The subsidy was available for 10 years only, after which time the property can revert to market housing. Rent must not exceed 80 percent of market rent to retain the NRAS subsidy.

**Affordable home ownership** (delivered with or without an external subsidy) may be through the allocation and sale of low-cost housing to **eligible households** or opportunities for shared-equity home ownership. Shared-equity is when a person owns part of a dwelling, and the other part is owned by a second party (for example government or a community housing organisation). Shared equity enables a household to buy a property that they otherwise could not afford, helping them step onto the path of home ownership.

Due to the higher rents or mortgage payments, affordable rentals and affordable home ownership are usually out of the financial reach of very low and low-income households. It is generally only a viable option for moderate-income households.



## Specialist Disability Accommodation

Under the National Disability Insurance Scheme (NDIS), there is a stream of funding available for the delivery of **Specialist Disability Accommodation** (SDA).

It is estimated that only about 6 per cent of people on the NDIS will be eligible for SDA funding, which is reserved for people with the highest disability-related needs. The funding model and performance framework for SDA is separate and different from the Victorian Housing Registrar regulatory framework for community housing.

There are many people living with disability who are eligible for Affordable Housing and many people living in Affordable Housing (particularly social housing) who are living with disability. Developing housing that meets the needs of people living with disability is not necessarily SDA, but it can be Affordable Housing.

For more information on SDA see [ndis.gov.au](https://www.ndis.gov.au) 

## 1.4 The planning framework and development process

To understand the opportunities and constraints of negotiating Affordable Housing through the planning system, it is necessary to understand the planning framework and the development process. The planning framework is underpinned by legislation and regulation and has objectives relating to outcomes for communities and the environment. The development process is driven and underpinned by economic considerations, including the viability of individual projects and the ongoing viability of development businesses.

### 1.4.1 The planning framework

The PE Act sets the legal framework for the planning system. Developers are required to work within that system. Each municipality in Victoria is covered by a planning scheme that regulates the use, development and protection of the land. Planning schemes set out the planning rules – the state and local policies, zones, overlays and provisions about specific land uses that inform planning decisions.

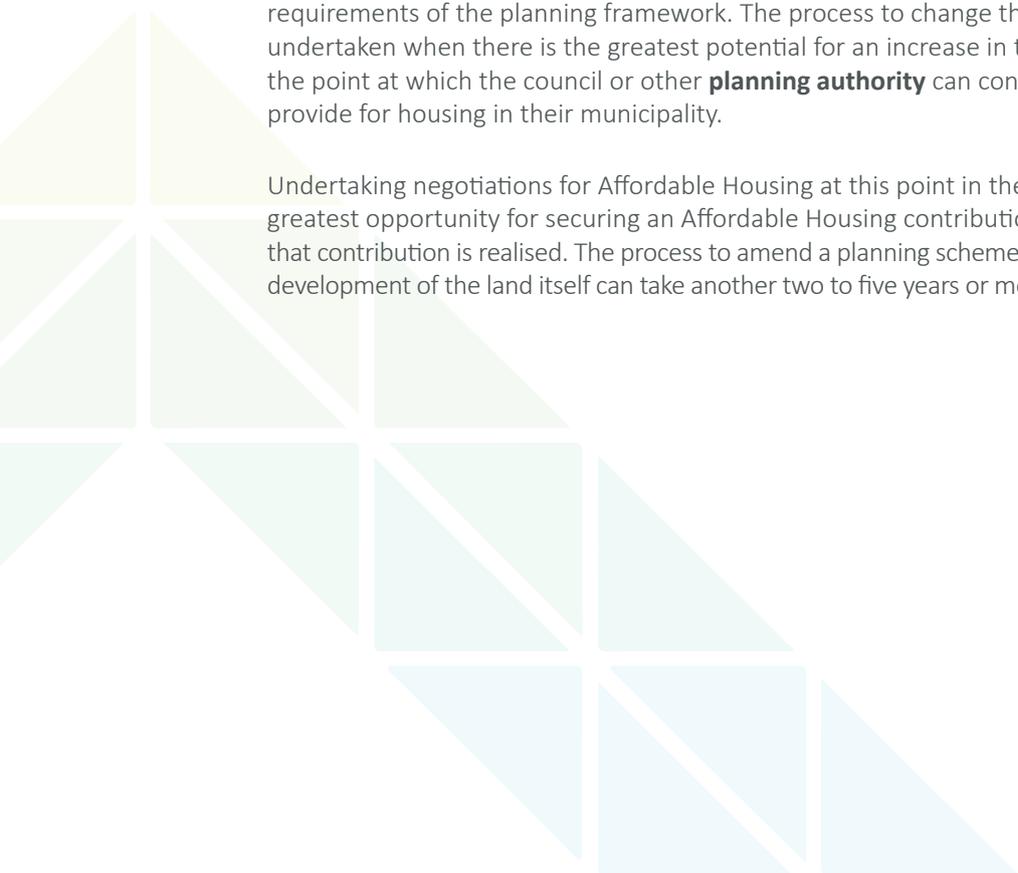
Planning schemes are the primary tool to enable state and local government land use planning policies to be implemented. The efficiency and effectiveness of planning schemes is important to Victoria's economy and liveability. Each year the planning system processes around 55,000 planning permit applications, which represents around \$30 billion of future investment in Victoria (Victorian Government, 2019a).

Zones are the primary tool for guiding the fair and orderly use and development of land. A zone sets expectations about what land use and development activity is or may be acceptable. Each zone broadly deals with a particular predominant land use theme, such as residential, commercial, industrial or public land uses (Victorian Government, 2019a). The zoning of land may be changed through a formal planning scheme amendment process – a process which may be led by a council or by a proponent (usually the landowner).

A useful summary of the Planning Framework is *Planning on a Page* is at Appendix 4.

Opportunities to negotiate **Affordable Housing contributions** are created by and must occur within the requirements of the planning framework. The process to change the zoning for a piece of land is generally undertaken when there is the greatest potential for an increase in the value of the property. It is also the point at which the council or other **planning authority** can consider and decide how and where to provide for housing in their municipality.

Undertaking negotiations for Affordable Housing at this point in the planning system provides the greatest opportunity for securing an Affordable Housing contribution, but it may be many years before that contribution is realised. The process to amend a planning scheme can take two years or more, and the development of the land itself can take another two to five years or more depending on market forces.



## 1.4.2 The planning permit process

The use and development of land is controlled by the provisions of its zone. Those provisions set out whether a **planning permit** is required and the matters that the **Responsible Authority** will consider when deciding to grant or refuse a permit. Decisions about planning permit applications must be consistent with the planning scheme.

If a permit for the use or development of land is required, a project cannot progress until a permit has been obtained from the Responsible Authority (usually the local council). The planning permit (also called development assessment) process follows the steps below (Victorian Government, 2019a):

- the applicant gathers data before preparing an application
- the applicant prepares and submits an application
- the council checks the application
- the council advertises the application
- the council assesses the application
- the council decides on the application
- the Victorian Civil and Administrative Tribunal (VCAT) reviews the decision (if applied for).

The application and the time to reach a decision can vary depending on:

- the planning provisions for the site
- the proposed use or development
- if objections are received
- if the matter goes to the Victorian and Civil Administrative Tribunal (VCAT).

There are several useful guides to the planning permit process including:

- DELWP's overview of the planning permit process  
[planning.vic.gov.au/permits-and-applications/do-i-need-a-permit](https://planning.vic.gov.au/permits-and-applications/do-i-need-a-permit)
- resources prepared by councils for example:
  - Kingston Council's overview of the planning permit process  
[kingston.vic.gov.au/Property-and-Development/Planning/Planning-Permit-Process](https://kingston.vic.gov.au/Property-and-Development/Planning/Planning-Permit-Process)
  - City of Yarra's how to apply for a planning permit  
[yarracity.vic.gov.au/services/planning-and-development/planning-applications/guides-and-factsheets](https://yarracity.vic.gov.au/services/planning-and-development/planning-applications/guides-and-factsheets)
  - Bayside Council's video guide to the planning permit process  
[bayside.vic.gov.au/what-planning-permit-process](https://bayside.vic.gov.au/what-planning-permit-process)

The permit process provides an opportunity to negotiate for an **Affordable Housing contribution**. The increase in value created by issuing a permit is generally not as large as the increase in value created by a **rezoning**. You may not be able to secure an Affordable Housing contribution through a planning permit process to the extent of an Affordable Housing contribution obtained from a rezoning, but the development (and associated Affordable Housing contribution) may be delivered in a shorter timeframe than a rezoning.

For both the rezoning process and the planning permit process, the matter of Affordable Housing is only one of many matters that a planner must consider and weigh up. In addition to this complexity, the drivers and limitation for the developer may contrast with the drivers and limitations for the council. This is discussed in more detail in section 1.6.4 below.

### 1.4.3 The development process

The development process does not start and finish with the planning process. It involves many players from financiers to property agents, consultants, engineers, construction crews, and sales staff. Development may be large-scale where hundreds of dwellings are built at a time, or small-scale developments where two or three dwellings are constructed on a site.

The image below tries to capture some of that complexity.

#### Residential development process

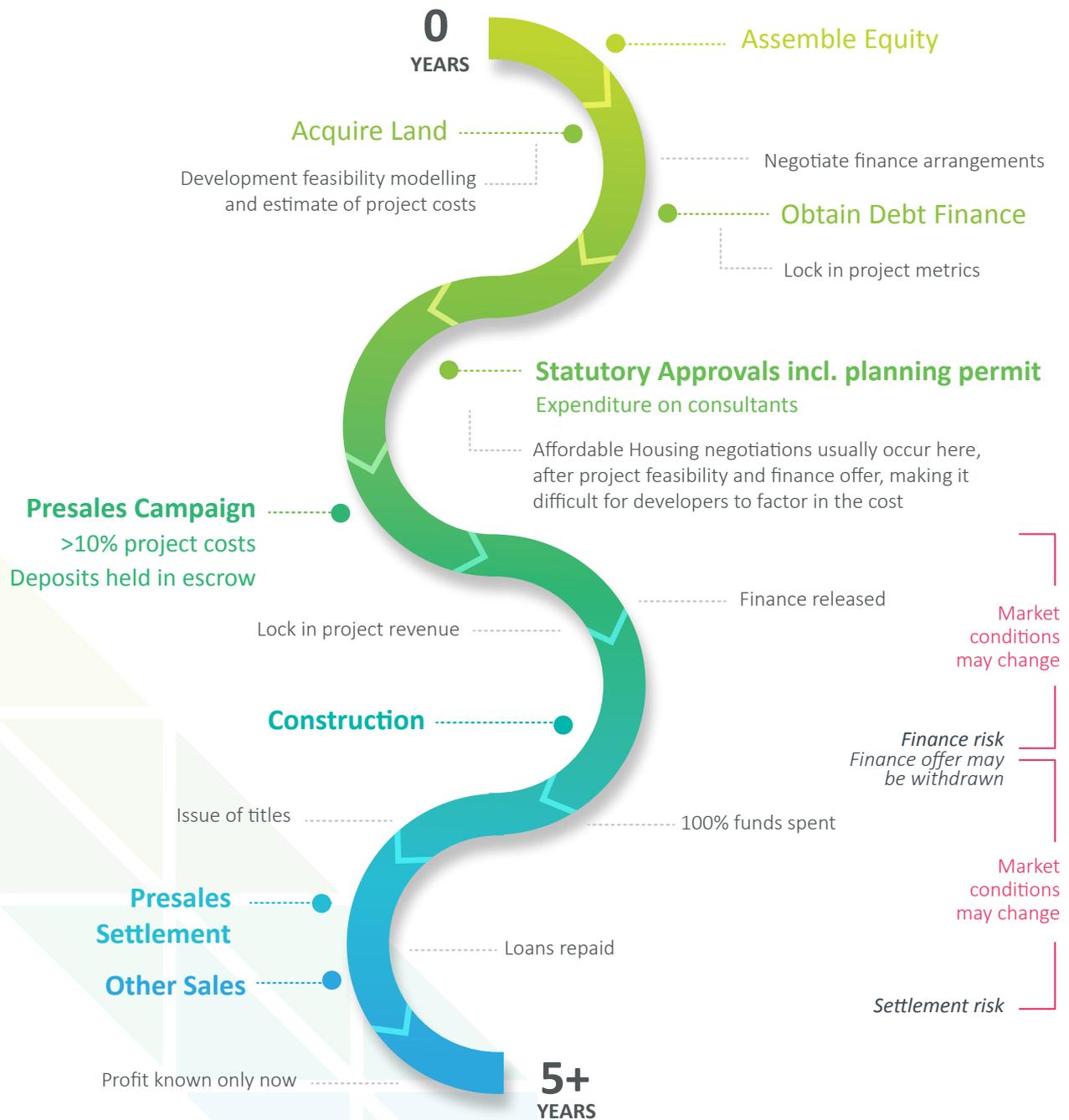


Figure 2. The development process based on diagram from Dr Tom Alves and Dr Andrea Sharam, RMIT University, 2019.

The key driver for a development company (as for any for-profit business) is to provide a return to shareholders or the business owner. That return must be balanced against the risk to achieve the return. The greater the risk, the greater the return needs to be to justify taking that risk. If a development is high-risk and low-return, the financiers of the development will not be willing to lend money or invest equity, and the development will not proceed.

The requirements of the financiers drive the required rate of return for developers. Developers calculate this rate by working out how much it will cost to complete a development and how much income they will generate from the development (rental income or sales income). This process of working out all the costs, the cashflow, and the income is called a 'development feasibility'.

A change in costs for a project (for example, the cost of concrete goes up, interest rates go up or the council asks for an Affordable Housing contribution) or a change in the return (for example, the value of houses goes up or down, or there is a change to potential yield of the site) impacts on the development feasibility and on the rate of return for investors and financiers.

The development feasibility process is also used by developers to work out the maximum amount they can afford to pay for a piece of land while still achieving the required rate of return. The residual land value is a method for calculating the value of land. This is done by subtracting all costs associated with the development (including profit but excluding the cost of the land) from the total value of a development.

If a developer knows that they will be required to make an Affordable Housing contribution, and how much that contribution is, they can factor this into their development feasibility and the **residual land value**. But if they have already purchased the land or are unable to factor in the cost of an Affordable Housing contribution, the additional cost of an Affordable Housing contribution can affect the viability of their project.

For this reason, the earlier in the development process that the cost of an Affordable Housing contribution can be factored in, the greater likelihood of a successful Affordable Housing negotiation.

## 1.5 Understanding the community housing sector

**Community housing organisations** are mission-driven, not-for-profit organisations that own, develop and maintain rental housing for people on low incomes.

The **registered** community housing sector is an established and highly-regulated complement to **public housing** in Victoria. It owns and manages over 20,000 housing units, receives more than \$137.9 million in rent annually, and has assets worth \$3.5 billion (Housing Registrar Sector Performance Report 2017-18).

### A diverse sector

Housing is not a one-size fits all. Community housing organisations (CHOs) provide a range of specialised options to meet tenants' specific needs and aspirations, from co-operatives and rooming houses to medium-density developments and homes with modifications.

Reflecting this diversity, the community housing sector is made of 39 **registered housing associations** and **registered housing providers**, as well as community housing organisations that provide affordable rentals to low-income Victorians but are not registered with the Housing Registrar. Non-registered CHOs may be regulated under other systems but the registered community housing sector has been established as a key partner of government in increasing the supply of affordable rental housing for disadvantaged Victorians.

The registered community housing sector has been the recipient of government investment and as of 2018 has access to dedicated government funding through a range of initiatives under *Homes for Victorians: Affordability, access and choice* (Victorian Government, 2017). Regulation under the Housing Act forms a key part of the accountability framework, to guarantee that the significant government and other investment into the registered community housing sector is retained for future generations.

### The community housing operating model

The mission of community housing organisations is to provide safe, secure, affordable and appropriate housing for low-income Victorians.

Community housing is offered to eligible low-income Victorians on the shared **social housing** waiting list, the Victorian Housing Register. In their long-term rental housing programs, CHOs offer tenants security of tenure so long as tenancy conditions are met, providing long-term housing for households that would otherwise struggle in the private rental market. CHOs also offer short-term accommodation such as crisis accommodation and shorter-term housing programs – usually combined with support – to assist clients in transitioning into long-term housing.

Community housing organisations can either own their properties or manage them on behalf of the owner. Many of the properties being managed by the sector are leased from the Director of Housing.

Community housing organisations have a strong track record in tailoring housing and services to tenants' needs and involving tenants in decisions that affect them. They establish strong links with local service providers to ensure their tenants have access to supports when they need them and assist them in sustaining their tenancies. CHOs work to integrate their housing within the local community.

The mission of community housing organisations – along with contractual and regulatory obligations – means that for most CHOs their rents are capped at 25-30% of household incomes. In some cases, however, CHOs operate affordable housing programs targeted at moderate income households (eg. National Rental Affordability Scheme) where rents are set as a discount to market, typically 75% of market rent. Although currently a small part of the registered sector's portfolio, this is a growing area and particularly relevant to Affordable Housing Agreements.

The following table highlights the maximum rent that could be charged for single person if a maximum of 30 percent of income is paid in rent (based on 2019 figures):

Income (single person)	Maximum weekly rent paid (social housing)	Maximum annual rent received by CHO
Newstart	\$149	\$7,748
Aged pension	\$201	\$10,452
Very low income	\$145	\$7,540
Low income	\$233	\$12,116
Moderate income	\$349	\$18,148

Just as councils operate in an environment of capped rates, CHO's rental revenue is capped by the lack of growth in statutory incomes. Additionally, registered CHOs are required by the regulator to remain financially viable. In this context, keeping costs low and ensuring that acquisitions are viable to operate is of critical importance to community housing organisations.

Historically the only government funding available to registered CHOs has been in the form of capital grants to support the construction of new social housing, and these were not consistently available. Although the Victorian Government has recently introduced a few programs that include a subsidy over time – in general – community housing organisations must cover all their operating costs out of the rents paid by tenants. This includes debt repayments where CHOs have financed part of the purchase of new stock. CHOs are efficient, lean, not-for-profit organisations delivering **Affordable Housing outcomes** to the community.

Annual operating costs can range from \$8,000-\$10,000 per property. Key elements in new developments that can impact on the operating costs – and therefore viability – of a dwelling include:

- owners corporation fees
- maintenance of fittings and fixtures

To keep operating costs low, CHOs have a preference for low owners corporation fees and durable, low-maintenance fittings and fixtures within properties.

Although some CHOs are unable to take on any debt to develop new properties because their tenant profile does not provide the rental income to repay the debt, some agencies have increasingly been able to utilise their balance sheet to secure borrowings and in turn, finance new projects. Potential sources of funds and value for an agency to access and leverage include:

- rental income (typically below market) unless vacant
- borrowings (private finance) serviced by rental income
- government grants and philanthropic donations
- taking on risk and capturing the developer margin
- developing agency-owned land
- revenue through shared equity sales or market sales.

Regardless of which approach a CHO takes, it remains their responsibility to ensure the overall viability of their business.

## A regulated sector

Part VIII of the Housing Act established the regulatory framework under which the registered community housing sector operates. This includes:

- a clear process and set of criteria for agencies wishing to become registered
- a Registrar of Housing Agencies (which sits within the Department of Treasury and Finance)
- performance standards for regulated agencies that come with annual reporting requirements
- a complaints process for tenants (or prospective tenants)
- powers of investigation and intervention for the Registrar to deal with agencies in breach of the legislation or failing to meet performance standards.

Four key objectives drive the regulation of registered housing agencies:

- ensuring that all Housing Agencies are viable, well governed and properly managed
- protecting and ensuring accountable use of government assets managed by the Affordable Housing sector
- building confidence in the public and private sector to invest in and grow Affordable Housing
- ensuring quality and continuous improvement in service delivery and outcomes for tenants.

The regulatory framework ensures registered agencies are held accountable to government and other investors, tenants and the community (Housing Registrar, 2016, *Our Regulatory Framework*), promotes best practice and gives government the tools to address poor performance by registered agencies.

There are two categories of registration: **housing associations** and **housing providers**.

**Housing associations** are:

- larger, more complex businesses with the skills, expertise and resources to manage, maintain and grow a viable social housing portfolio
- organisations that expand new housing through construction, purchase or acquisition that is funded using a mix of government funds, borrowings and private sector investment
- organisations that manage housing properties that they own or lease from other parties, such as the Director of Housing.

**Housing providers:**

- range in size
- primarily manage rental housing portfolios for other parties, such as the Director of Housing
- some providers own properties, however, their growth is small in scale compared to that of **housing associations**
- often specialise in particular client groups, for example, people with a disability, the aged, or youth.

No matter whether they are registered as a housing provider or a housing association, all registered housing agencies must adhere to published performance standards. These cover the full range of an agency's business and fall into the following seven areas:

- **tenant and housing services**  
The registered agency is fair, transparent and responsive in delivering housing assistance to tenants, residents and other clients.
- **housing assets**  
The registered agency manages its assets in a manner that ensures suitable properties are available now and into the future.
- **community engagement**  
The registered agency works in partnership with relevant organisations to promote community housing and to contribute to socially inclusive communities.
- **governance**  
The registered agency is well-governed to support the aims and intended outcomes of its business.
- **probity**  
The registered agency maintains high standards of probity relating to the business of the provider.
- **management**  
The registered agency manages its resources to achieve the intended outcomes of its business in a cost-effective manner.
- **financial viability**  
The registered agency must be financially viable at all times.

#### **Additional resources on the community housing sector**

A good starting point to learn more about the community housing sector is the sector's peak body, the Community Housing Industry Association Victoria (CHIA Vic). There are a range of resources on their website, [chiavic.com.au](https://chiavic.com.au) that provide an overview of the sector as well as give additional information on how to work with the community housing sector to develop more social housing.

More information on the regulatory system for community housing in Victoria, including data on sector performance and the details of each performance measure can be found on the website of the Housing Registrar

[housingregistrar.vic.gov.au](https://housingregistrar.vic.gov.au)

## 1.6 The complexities of delivering Affordable Housing through the planning system

The funding, delivery and management of Affordable Housing involves multiple players who work within different operating contexts – including different legislative and regulatory frameworks, funding arrangements, corporate structures, economic influences, and competitive environments. Add to that the voluntary nature of Affordable Housing negotiations, and the need for ongoing management of affordable housing outcomes, and it becomes clear why facilitating the delivery of Affordable Housing through the planning system is complex.

Understanding the operating context of all parties involved is critical to effective negotiations and the successful delivery of Affordable Housing for the community. The PE Act does not say that Affordable Housing must be owned or managed by the community housing sector, but they are the sector with the greatest experience. With that in mind, the three main players involved in negotiating, securing and delivering Affordable Housing through the planning system are:

1. local government
2. the community housing sector
3. the development sector.

The Australian Government and Victorian Government have key roles in setting policy and providing funding. The Victorian Government manages thousands of public housing dwellings. Federal and state governments are not usually involved in the voluntary negotiation process between council and landowners through the planning system.

### 1.6.1 The role of local government

There are 79 councils in Victoria. Each council plans and delivers services in health, planning and building control, business and economic development, waste and environmental management, and human and community services. Councils must balance competing demands for their community, operating in a financially constrained environment where rates (their main source of revenue) have been capped (known as ‘rate capping’).

Councils influence housing outcomes for their residents through their planning powers as a **Responsible Authority**, and by developing policy frameworks to address housing issues in their municipality. Councils have an active role to play in facilitating the provision of Affordable Housing through the planning system.

A council has to discharge its responsibilities not just in relation to the PE Act, but also in relation to the LG Act. In some cases, the Acts have conflicting objectives. This is explored in more detail in the section 2.5.1 and more information on the needs and constraints of local government is provided in section 2.

### 1.6.2 The role of the community housing organisations

Community housing organisations (CHOs) are not-for-profit organisations that deliver Affordable Housing services. They may own or operate the Affordable Housing, or manage it on a fee-for-service basis. There exists a diversity of CHOs, delivering a wide range of Affordable Housing programs. Some CHOs manage hundreds of housing tenancies, and others operate just a handful.

The Housing Act uses the term ‘**rental housing agency**’ to describe not-for-profit organisations that are established to provide rental housing. However, within the community housing sector, the term ‘community housing organisation (CHO)’ is more commonly used to describe rental housing agencies.

The term 'CHO' encompasses non-registered also registered housing agencies. A **registered housing agency** is a not-for-profit rental agency registered by the Victorian Housing Registrar. The registration process, and ongoing performance management and oversight by the Office of the Housing Registrar provides a greater level of assurance than for organisations that are not registered.

Throughout this report the term 'CHO' is used to describe registered and non-registered rental agencies, but due to the benefits inherent in registered housing agencies, the focus of the advice is most often on organisations that have been through the registration process.

Registered housing agencies are further classed as registered housing associations and registered housing providers depending on their scale and capacity.

The key elements of the CHOs role in Affordable Housing are:

- developing housing – building new Affordable Housing
- tenancy management – providing services including processes to monitor eligibility and allocation and to sustain tenancies
- property and asset management – undertaking property repair, maintenance, renewal and redevelopment
- fundraising – securing funds through grant applications, philanthropy and social enterprise
- advocacy – to state and federal government for funding of Affordable Housing and to the development sector to identify ways of delivering Affordable Housing.

Individual CHOs may undertake some or all of these roles depending on their focus and capacity. Their main source of revenue is the rent they collect from tenants. Unlike private-market landlords, CHOs are restricted to setting their rents based on a percentage of household income or a discount from market rent. Because the households they house have very low and low-incomes, the rent collected is low and significantly less than market rent. This is explored in more detail in section 1.5.

All CHOs need to maintain positive cash flow business models for the development and long-term operation of the housing they own and manage, with ongoing maintenance and operational costs and no ongoing external funding. This is extremely challenging, given the low levels of rental income that CHOs receive and the mandatory rent-setting requirements they must follow. Where a CHO undertakes Affordable Housing developments, external funding is almost always required to meet the cost of construction (including the cost of land, materials and labour, and financing costs).

In addition to the rent revenue from the properties they manage, CHOs may receive funding from government, philanthropy or social enterprises. These opportunities may be uncertain, available only for a short period, and will usually only cover a proportion of the cost of a project. The funding opportunities almost always result in CHOs competing with each other for the funding. This lack of certainty makes it difficult to create a pipeline of new developments.

The planning system can also provide a source of funding (through cash contributions) and/or provide opportunities for CHOs to purchase or be gifted Affordable Housing dwellings. There are also local and state government land assets that may be available to use for Affordable Housing. The implications of these different opportunities, plus the needs and constraints of the community housing sector are explored in section 3.

### 1.6.3 The role of the development sector

Residential developers and builders deliver new housing. They operate within a competitive environment and use a range of financing arrangements. Development businesses are sensitive to economic shifts, operate within tight deadlines, and need to deliver financially viable projects.

Responding to market demand, developers seek to drive changes in land use and create opportunities for construction (and associated revenue from sales or leasing) through planning scheme amendments or planning permit processes within the planning system. Developers operate in the private market and generally do not see their role as subsidising the Affordable Housing sector.

Councils may request that developers provide Affordable Housing as part of a project. When weighing up whether to agree to that request, developers need to balance a reasonable return on capital and risk, against the additional cost of providing Affordable Housing. Councils must try to balance the incentives that would convince a developer to include Affordable Housing (eg. additional building height) against the potential to reduce residential amenity and building performance or impacting on saleability (Melbourne University, Melbourne School of Design- Transforming Housing, 2016).

Developers may seek to offset the costs or loss associated with providing Affordable Housing through a number of mechanisms including government gifting of land, heavily subsidised land, or value uplift and sharing as a result of a rezoning or utilising floor mechanisms (Raynor, 2017). They may also seek concessions, incentives, or trade-offs through the planning process – for example reduced parking requirements. This is explored in more detail in section 2.

Some developers have existing relationships with CHOs, while others do not. Much like with other parts of a project, developers may seek arrangements with CHOs (including sale or gifting of properties) through competitive procurement processes.

### 1.6.4 Each sector has different drivers and expectations

Looking at the different roles of local government, community housing, and development sectors, we can start to see the competing priorities and tensions that can arise. These are explored in depth in sections 2 and 3 and a snapshot is provided below.

In discharging their responsibilities councils need to consider how to:

- balance the potential to offer incentives to encourage Affordable Housing (changes to land use, greater height or density within a development), against the potential impact on the amenity and liveability of a neighbourhood
- retain within their community and for their residents the benefit created by Affordable Housing negotiations, particularly where the council has provided some trade-offs or incentives that affect the amenity of the area
- work within the existing legislation, processes and systems, and not create additional drain on council resources in terms of monitoring, compliance and enforcement
- acknowledge the roles of other levels of government and operate appropriately within a rate-capped environment
- use its assets to provide the greatest benefit to its community, taking into account the 100+ services they offer.

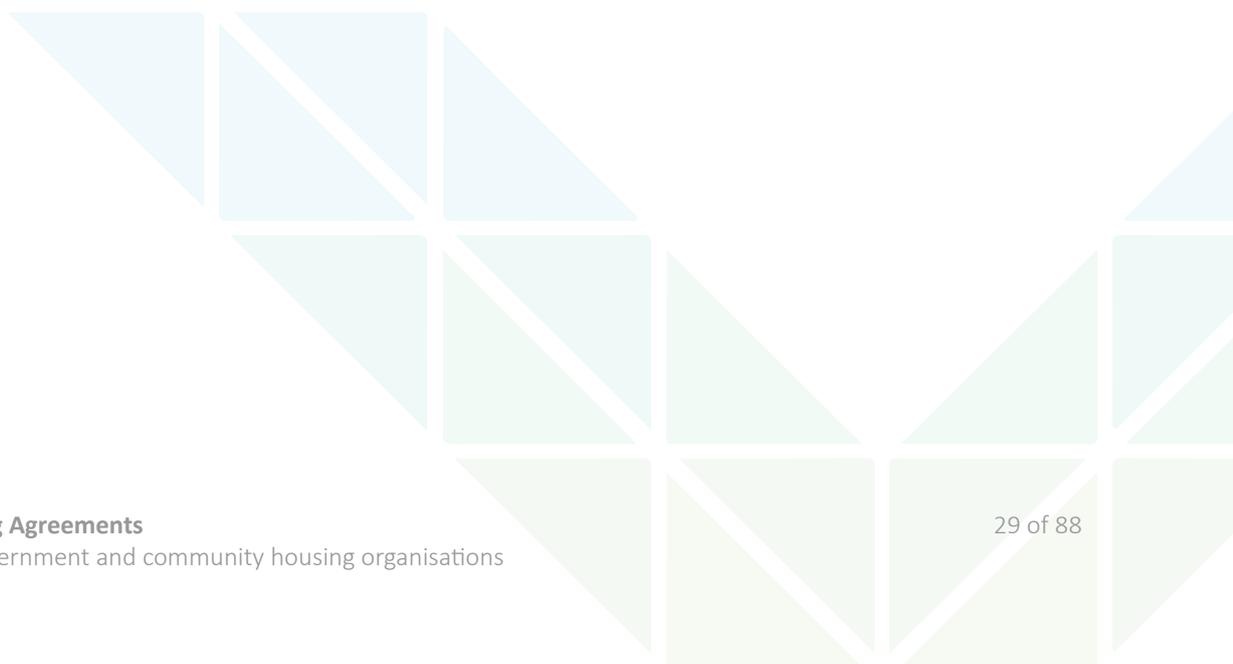
To participate in creating Affordable Housing opportunities through the planning system, CHOs need opportunities that:

- are financially viable, taking into account the very-low rent revenue they receive, the low level of financing that revenue can support, and the uncertainty of external funding
- do not create a drain on future cash flows due to high maintenance or operating costs – preferably the opportunity would allow them to design the dwellings and/or specify fittings and fixtures for a property
- allow them the flexibility to manage their property portfolios (asset disposal and acquisition) and their tenancies (tenant selection and allocation) within the existing (and extensive) regulatory framework
- do not create unnecessary double-ups on administration, reporting or compliance
- provide certainty of outcome – CHOs are lean organisations that don't have the resources to invest in projects for which there is no Affordable Housing outcome.

In creating new development opportunities, either through planning scheme amendment proposals or planning permit applications, large and medium-scale residential developers are looking for:

- projects that are economically viable – taking into account the profit margins that are required by financiers who will not lend money if there is an insufficient rate of return (profit)
- the certainty of process and outcome – the more uncertainty, the greater the risk, the larger the profit margin required to compensate for that risk
- a streamlined process – delays may be costly and create greater uncertainty and risk
- efficiencies in the construction of the project – bespoke elements, fittings, or fixtures for a small number of Affordable Housing dwellings can reduce procurement and construction efficiencies
- a highly saleable product, or a highly rentable product if their development model is to build and hold onto the stock.

While the three sectors approach Affordable Housing from different angles, building awareness of each other's preferences, challenges and operating context can help foster a greater capacity to deliver Affordable Housing outcomes that meet the needs of all sectors and the community.





## What you need to know

Within the complexity and competing demands of the local government, community housing, and development sectors (outlined above), the key things to know are:

- Affordable Housing is just one matter amongst many in the planning system, and is also just one aspect of community wellbeing within the 100+ services that councils deliver to their communities.
- Registered housing agencies are the obvious partner to help councils and developers create Affordable Housing outcomes – they have the purpose, experience, capacity, and regulatory environment in place.
- Affordable Housing agreements negotiated through the planning system need to be financially viable and practicable for all parties – developers, CHOs and councils.



For Local Government



## 2.0 For local government

The opportunity to facilitate the provision of Affordable Housing may seem daunting and complex for people in local government, whether they are strategic or statutory planners, property officers, members of an executive team or elected representatives.

This section of the report is written to help people in local government step-through the key elements to consider when facilitating the provision of Affordable Housing through the planning system. It also provides people in local government with an insight into the needs and limitations of **CHOs** so that they can negotiate agreements that are feasible.

This section reflects the current policy environment and focuses on how local government can undertake due diligence to ensure that **Affordable Housing contributions** negotiated through the planning system produce Affordable Housing outcomes for the community.

### 2.1 What is (and isn't) Affordable Housing

Before you begin discussions within your council, or negotiations with a developer, make sure you are clear about what is and isn't Affordable Housing (please see page 13). Many people within the local government and development sectors are more familiar with the issue of **housing affordability** and less familiar with the matters that you must consider when determining if housing meets the definition of **Affordable Housing**.

Remember that Affordable Housing is for low, very low and moderate-income households with income ranges gazetted through a Governor in Council (see Appendix 2). The Order in Council is updated annually and can be found at [planning.vic.gov.au/policy-and-strategy/affordable-housing/resources](https://planning.vic.gov.au/policy-and-strategy/affordable-housing/resources) 

In addition to the income requirements, the Ministerial Notice (Appendix 3) stipulates that you must have regard to:

- allocation
- affordability
- longevity, in terms of public benefit of the provision
- tenure
- type of housing, in terms of form and quality
- location, in term of site location and proximity to amenities, employment, and transport
- integration, in terms of physical build and local community
- official estimates of housing need.

The Ministerial Notice and the PE Act do not say that you have to meet a minimum or maximum threshold for each of these matters that you have regard to. This allows local government and developers the flexibility to come up with different responses that would still fall within the definition of Affordable Housing. However, it also makes it difficult to clearly put forward to a developer what they need to do to respond to a request to include Affordable Housing in a project. The matters in the Ministerial Notice are discussed in more detail in section 2.3.



## Clarifying what is and isn't Affordable Housing

The PE Act is not prescriptive in relation to what is and isn't Affordable Housing. While this flexibility leaves room for innovative responses, it makes it difficult for councils to provide developers with clear requirements. There are matters you must have regard to, but no hard and fast rules about what that regard means.

To help address this, councils can:

- develop policies that set out what their position is for each of the matters in the Ministerial Notice
- allow the developer to come up with a proposed Affordable Housing offer and then determine whether council is happy with it
- take a hybrid approach, setting a policy position for some elements, and being policy-neutral for others
- encourage developers to rely on the regulatory framework, skills and experience of the registered housing agencies to respond to the matters in the Ministerial Notice.

Whatever approach a council takes in relation to other matters in the Ministerial Notice, it can be argued that an adequate allocation process is essential, as without this council is just facilitating market-housing.

It is also essential that councils recognise the impact of any policy position they form. The decisions they make can affect the viability of a project for the developer and the financial viability of a CHO, and can prevent the delivery of both the market-housing and the Affordable Housing.

## 2.2 Engaging with the community housing sector

The community housing sector has a wealth of knowledge and experience in relation to the delivery and management of Affordable Housing. Many councils are keen to draw on that knowledge and experience, and CHOs are keen to help.

However, CHOs' commitment to helping vulnerable people results in a tenant cohort with low incomes. This – together with the regulatory requirements – creates an environment of very low revenue for CHOs. This ultimately has implications for the sector's capacity to take up opportunities through the planning system if those opportunities require the CHO to contribute significant resources (money or staff time).

Councils should familiarise themselves with the constraints and requirements of the community housing sector if they want CHOs to be able to participate in Affordable Housing negotiations and delivery through the planning system. It will also provide them with a good foundation when they begin their engagement with CHOs.

Councils may benefit from engaging with CHOs to test whether an Affordable Housing proposal from a developer is reasonable, realistic and able to be delivered by a CHO. Many CHOs have development managers on staff who understand the likely costs and returns for a development and may be able to help provide the planners with an insight into the development feasibility (resources permitting). CHOs are also best placed to provide advice on whether the proposal is likely to encourage or discourage participation from the community housing sector.

In deciding when and how to engage with the community housing sector you should remember that:

- CHOs are lean organisations and do not have spare resources to continually respond to every potential policy development, planning scheme amendment, or project.
- The negotiations for an Affordable Housing contribution occur long before the delivery of the dwelling – often up to five years in advance. Due to the changing nature of funding and development opportunities, a CHO may not be able to say whether they will or won't be able to participate in the opportunity until closer to the completion date.
- Without some community housing engagement, or an understanding of CHO requirements, a council and developer may come up with an agreement that is not viable for a CHO to purchase or operate.
- Councils have strict procurement guidelines – in the same way they are not allowed to recommend a planning consultancy, they need to be cautious about recommending one CHO over another.

To respond to these issues, councils can:

- Develop a partnership approach with one or more CHOs that operate in their community to better understand the CHOs requirements. Care needs to be taken that procurement processes are adhered to, and consideration is given to not put further burden on the already constrained CHO time and resources, as they may invest in the relationship with no certainty of an outcome or opportunity.
- Encourage developers to have a partnership approach with a CHO as developers don't have the same procurement requirements as local government. Note this is the approach that some large developers have taken who have created a preferred Affordable Housing supplier approach in each state.
- Write conditions or requirements around the need to use a **registered housing agency** rather than on the need to use a specific CHO.
- Make developers aware of any CHO constraints and requirements as part of the negotiation.
- Build in certainty of **Affordable Housing contribution** but allow flexibility around how that contribution is delivered to maximise opportunities for delivery by the community housing sector.

## 2.3 Matters in the Ministerial Notice

There are eight matters that you must have regard to when deciding whether proposed housing is appropriate for very low, low, and moderate-income households and thereby whether the housing is Affordable Housing as defined in the PE Act.

The eight matters in the Ministerial Notice are discussed below. *Official estimates of housing need* is the last point listed in the Ministerial Notice but we will discuss it first, as it is one of the first matters your council is likely to have regard to. The other matters in the Ministerial Notice are then discussed in order.

### 2.3.1 Establish a strategic basis with your council

To instigate meaningful and productive discussions on Affordable Housing within your municipality, it helps to establish a strategic basis for your council's involvement and response.

You can use official estimates of housing need to identify the need for Affordable Housing in your municipality and to develop your council's proposed response. Creating a strong framework from which to negotiate Affordable Housing as part of planning scheme amendment proposals and planning permit applications helps increase the chance of success.

Before you begin that work, it is important to identify and understand the appetite within the organisation. If there is a reference to Affordable Housing in your Council Plan or Municipal Health and Wellbeing Plan, there is a stronger support for developing a specific Affordable Housing policy development. There is no legislative requirement for a council to develop an Affordable Housing policy. If it is not a priority for your council this year, you may need to wait until it is likely to gain the support of the decision-makers.

Many councils have (or are in the process of preparing) Affordable Housing strategies, policies and action plans. The policy development process provides an opportunity to build the capacity of the community, Councillors, and staff in relation to the issues and options for Affordable Housing. If Councillors do not fully understand the implications of Affordable Housing negotiations, the viability of those negotiations can be undermined.

To understand the demand for Affordable Housing in your municipality and to develop a strategic basis for your Council's response you can use demographic information like population, socio-economic factors, cohorts in the community (eg. ageing populations, singles and families) as well as projected changes in the community, like economic shifts and population growth or decline.

There is solid evidence of the need for Affordable Housing across Victoria which your council can draw on (see [ahuri.edu.au](http://ahuri.edu.au) also [abs.gov.au](http://abs.gov.au)). If you undertake further and localised work, you may identify demand for specific types of housing or higher needs from certain cohorts which could provide a rationale for focusing your Council's response to Affordable Housing to that need. However, given the vast demand for Affordable Housing, and the need to allow developers and CHOs the flexibility to respond, it is suggested you avoid restricting your response to specific cohorts.

To support a strategic basis for using the planning system to facilitate Affordable Housing, you can also refer to the Victorian Government policy documents:

- [\*Homes for Victorians: Affordability, access and choice\*](#) (Victorian Government, 2017); and
- [\*Plan Melbourne 2017-2050\*](#) (Victorian Government, 2017).

Both documents recognise the critical need to increase the supply of Affordable Housing. Councils may consider additional references and evidence to support for Affordable Housing in their planning schemes. This should be discussed with DELWP officers. Councils should avoid setting mandatory Affordable Housing targets as the current planning framework for Affordable Housing is based on voluntary mechanisms.

Ideally, a strategic basis for Affordable Housing should be established before Affordable Housing negotiations, but due to community need and the volume of applications, these two processes may run concurrently. The strategy or policy may set out the parameters for negotiation, including any incentives the council can offer.



## Other options for facilitating Affordable Housing

If you are developing a strategic or policy document for your Council, you will need to consider the PE Act as well as the LG Act.

Section 3C of the LG Act sets out the objectives of a council:

*(1) The primary objective of a council is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions.*

This, together with the objective in the PE Act, provides a basis for councils to facilitate the provision of Affordable Housing more broadly than just through the planning system. It is up to each council to determine the extent to which it wants to facilitate Affordable Housing and the way it will do so. There are different ways a council can facilitate the provision of Affordable Housing:

- advocacy – to state and federal government for funding of Affordable Housing and to the development sector to identify ways of delivering Affordable Housing
- encouragement – small opportunities within council to encourage the Affordable Housing sector, for example reduction or waiving of rates
- planning mechanisms – negotiating Affordable Housing as part of a planning scheme amendment or planning permit
- investment – providing free or discounted council land for – or direct investment into – Affordable Housing
- partnership – developing partnerships with health and community service providers that can add value to social housing developments by ensuring that residents have the necessary local supports in place.

A council may choose to adopt some, all, or none of these options. Where a council brings land or funds to a project, there is a greater likelihood of delivering an increase in Affordable Housing for the municipality. The planning system provides some opportunity to increase the amount of Affordable Housing. While advocacy is important, the outcomes are less certain.

Whatever approach a council decides on it should be reflected in the council's Affordable Housing strategy, policy, or action plan. More information on these options is provided in the Toolkit for council planners.

### 2.3.2 Allocation

The first matter listed in the Ministerial Notice is allocation. Allocation is the process by which Affordable Housing is made available to very low, low, and moderate income households. Without an allocation process it is difficult to know whether the Affordable Housing is being bought or rented by **eligible households**, and there would be nothing to stop investors or existing homeowners from buying or renting the property.

In deciding whether the proposed allocation process is acceptable, you need to consider how you will monitor and enforce that process. In some cases, developers have suggested that they will ask potential tenants or purchasers to sign a statutory declaration confirming that they are within the household income thresholds. This does not provide council with any certainty around checks and balances and, if it forms part of a permit condition or **Section 173 Agreement**, it puts the council in the position of having to monitor and enforce elements far beyond the control and experience of planning staff.

The most reliable and efficient way to ensure that Affordable Housing is allocated to eligible households is for a **registered housing agency** to be responsible for the allocation and ongoing eligibility process. Registered housing agencies already have the necessary processes and systems in place, plus have staff skilled at assessing the eligibility of a potential tenant. If the Affordable Housing is to be made available for purchase by an eligible household, several registered housing agencies have a private real estate social enterprise that could deliver that service.

#### How community housing organisations allocate

A core component of the business of CHOs is in the allocation of Affordable Housing. CHOs have well-established and robust processes when it comes to allocation, which include:

- referrals from the Victorian Housing Register (VHR) (formerly public housing waiting list)
- real estate listings
- nomination rights – arrangements with support providers for housing and support arrangements
- allocations policies which govern a fair and transparent approach
- the percentage of people who are considered as high priority on the VHR that the CHO has agreed to house
- in some larger multi-unit developments, a blend of households is considered to create mixed communities
- in some cases, people's connection to the local community.



## Avoiding issues with the allocation of Affordable Housing

A council may have a policy position (usually based on their Municipal Health and Wellbeing Plan or similar) that Affordable Housing delivered through the planning system should be for a particular cohort (eg. key workers, older women, young people).

A council may also want the Affordable Housing to be allocated to existing residents or people with a connection to the area. This may be particularly important for a council if there has been an impact on the surrounding amenity to obtain an Affordable Housing contribution.

The more a council gets involved in the ongoing allocation process, the more it creates an administrative and compliance burden on itself and the manager of the Affordable Housing. The greater the restrictions, the more difficult it will be for the manager of the Affordable Housing to:

- quickly fill a vacancy
- respond to changing need in that location
- balance their rental income stream between households with different income levels (for example Newstart vs. Aged Pension recipients).

Developers may also underestimate the potential delays caused by wanting to control the allocation process, not least of all because a council is likely to require any process to be 'to the satisfaction of the Responsible Authority' which creates an additional assessment and sign-off step.

Rather than becoming involved in the initial and ongoing allocation of Affordable Housing, a council may wish to specify that the housing be managed by a **registered housing agency**, as they have an existing regulatory framework and allocation processes in place.

### 2.3.3 Affordability

Another key matter in the Ministerial Notice is affordability. Affordability relates to the household income and the rent or mortgage repayments that the household has to make. It is generally accepted that a very low and low-income household is in housing stress if their rent or mortgage repayments exceed 30 per cent of gross household income. The Ministerial Notice does not provide a hard and fast cut off, but the '30 per cent of household income' is a useful rule of thumb for councils.

An exception to this could be if a developer demonstrates that having rent or mortgage repayments exceeding 30 per cent of household income would not place households in housing stress. They may demonstrate that this is because the cost of ongoing expenses (such as water, power, internet) was significantly reduced through interventions such as solar power, infrastructure efficiencies or bulk purchasing.

Registered housing agencies are well placed to ensure that the Affordable Housing they manage meets the affordability consideration. However, the low rental revenue received has wide financial implications to CHOs in sustaining their operations, as outlined in section 1.5.

### 2.3.4 Longevity

The Ministerial Notice says you must have regard to longevity, in terms of public benefit of the provision and tenure. Longevity is a measure of how long the benefit provided by the Affordable Housing continues.

Councils seek to secure the best outcomes for their community and may think that the best way to do this is to require the Affordable Housing delivered through the planning system to remain as Affordable Housing in perpetuity. However, there are challenges with that approach.

CHOs need the flexibility to manage their property portfolio and respond to changing demographics and demand – it is impractical and can be financially unviable for them to guarantee that a particular dwelling will be used for Affordable Housing. The level of subsidy provided through the negotiations and the planning process may not be sufficient to fund long-term affordable outcomes, especially if there is an expectation that the housing be targeted to very low-income households.

Developers who want to retain the development and rent out the dwellings (for example Build-to-Rent) need certainty about how long they will be providing Affordable Housing so they can factor that into their development and operational feasibility modelling (as do CHOs). A requirement to retain the property in perpetuity makes it difficult to factor it into their business model.

There are also significant financial implications for the owner or manager of the Affordable Housing if a dwelling must remain as Affordable Housing forever. Any asset owner, but particularly a not-for-profit community housing owner, must be able to take a strategic approach to asset maintenance, renewal, and redevelopment including having the flexibility to recycle (dispose of) assets if need be. This is the approach that councils adopt with their own assets.

When negotiating Affordable Housing contributions, it is important to understand the needs of CHOs and the financial constraints that they operate within. If your council is concerned about securing the community benefit, you can build in a mechanism that helps retain the benefit within the municipality or region, without requiring a specific dwelling to be Affordable Housing in perpetuity.



## The issues when considering longevity for Affordable Housing

Councils generally want to retain and maintain the benefit of **Affordable Housing** within and for their community for as long as possible, particularly where incentives or trade-offs have been provided to facilitate an **Affordable Housing contribution**.

It is important for councils to consider the impact of a policy position that requires an Affordable Housing contribution to remain as Affordable Housing in perpetuity, or for a long period of time (say greater than 10 years). Placing such requirements on a property can:

- Make purchasing a property, even at a discount, unviable for CHOs. This means that an Affordable Housing agreement even with the enthusiastic support of a developer is unable to be fulfilled.
- Create an ongoing monitoring and reporting burden for the Council and Affordable Housing manager in addition to existing monitoring and reporting requirements.
- Burden the Affordable Housing owner/manager with growing maintenance, repair, and renewal costs – which are difficult to fund given the very low rental revenue they collect.

In addition to these considerations, there is a question of reasonableness about balancing the benefit of Affordable Housing created through the planning system through incentives or trade-offs against the ongoing requirement to retain and maintain the resulting Affordable Housing. This is discussed in more detail in the box on page 46.



### 2.3.5 Tenure

The Ministerial Notice also says you must have regard to tenure. Tenure refers to the conditions under which land or buildings are held or occupied. The two primary forms of tenure for an Affordable Housing resident are rental and ownership. The majority of Affordable Housing residents have rental tenure. However, there are some limited opportunities for Affordable Housing home ownership, particularly through shared equity schemes.

A council may develop a policy position that they prefer one type of tenure over another or may consider it on a case by case basis, including consideration that:

- The benefit of facilitating Affordable Housing with rental tenure is that it can provide Affordable Housing outcomes for very low, low and moderate-income households.
- The benefit of facilitating Affordable Housing with ownership tenure is that it gives people previously priced out of home ownership the opportunity to own their own home and build their financial and housing security through this significant asset. It must be noted that this opportunity is largely restricted to moderate-income households.

When having regard to the matter of tenure, councils should consider how the proposed tenure may impact on the retention or loss of the Affordable Housing benefit in the future. For example, an Affordable Housing agreement that provides the opportunity for people to buy a home at a discounted rate provides an immediate benefit to that individual or household. However, the benefit to the broader community may be lost if there are insufficient requirements in place for that benefit to be recycled within the Affordable Housing stock. Essentially, it could deliver a windfall to the first purchaser of the housing, but then the benefit to the community provided by way of Affordable Housing may be lost.

The advantage of using a **registered housing agency** to own or manage Affordable Housing delivered through the planning system is that the benefit is retained and recycled. By growing their asset base, CHOs can leverage the asset or use the income from fee-for-service management to support the ongoing development and growth of their organisation and provision of further Affordable Housing.

Councils should also note that there are few **affordable home ownership** schemes in operation in Victoria and there has not been the same level of investment and experience in affordable home ownership as there has been in Affordable Housing that delivers long-term rental housing.

### 2.3.6 Form and quality of housing, location, and integration

The final three matters in the Ministerial Notice are form and quality of housing, location, and integration. These matters are generally addressed through standard planning mechanisms that already assess the design and location of any type of housing.

Regardless of whether the Affordable Housing provided through the planning system is social housing, affordable rental, or affordable ownership, the dwellings should be constructed and managed so that tenure of the property is indistinguishable from the surrounding market housing – that is it should be **'tenure blind'**.

While there is an appetite in the community housing sector for lower cost owners corporation fees, and for finishes and fixtures that are hard wearing and affordable to maintain, Affordable Housing is not simply low-quality housing. It should still be required to meet ResCode requirements and applicable design guidelines. Similarly, while it is reasonable for developers to earmark their least profitable dwellings for Affordable Housing, councils need to be wary if poor quality outcomes are incentivised under the guise of Affordable Housing.

In some instances, Affordable Housing dwellings may have specific design requirements to meet the needs of tenants (eg. people living with a disability or designing for different sized households). However, where the Affordable Housing is delivered as part of a larger development, it may be inefficient for the developer to make specific design changes to a small number of dwellings.

Councils can encourage developers to involve CHOs prior to design, planning permit, or construction phase to facilitate modifications or enable the proposed Affordable Housing manager to specify the fit out. However, councils should be cautious about requiring the developer to make changes to specifications to meet the needs of the Affordable Housing manager as any reduction in efficiency results may dissuade the developer from providing an Affordable Housing contribution.

The Affordable Housing should be located in close proximity, or with easy access to amenities, employment and transport. This can be a challenge in growth areas and rural/regional areas where services may be limited.

There is a growing need for Affordable Housing in regional cities and growth areas – and lack of current infrastructure and amenities should not preclude a negotiation about Affordable Housing. There are planning processes that inform urban structure and guide development for a regional city and growth areas. Affordable Housing can be considered in the context of a precinct structure plan, housing strategy, or urban renewal structure plan.

As with any new development, Affordable Housing should be integrated into the local community and the existing environment.

It is worth noting that in some cases, the form of a proposed development may result in costs to the Affordable Housing owner that makes it unviable for CHOs to participate. Developments with high owners corporation fees, high maintenance costs, or high operating costs for heating and cooling may not be suitable for Affordable Housing. In such cases, land or cash contributions may deliver more sustainable Affordable Housing outcomes in the long run.





## How to have regard to the matters in the Ministerial Notice

- ✔ use official estimates of housing need to establish your Council's strategic basis and approach
- ✔ use a registered CHO to operate or manage the Affordable Housing – they have existing allocation processes in place and rent-setting mechanisms to ensure affordability
- ✔ strike a balance between the desire for longevity of the benefit of Affordable Housing and the operating requirements of CHOs
- ✔ accept different tenure arrangements provided it meets the definition of Affordable Housing (and is not just low-cost market housing)
- ✔ require Affordable Housing to be tenure blind and designed so it is integrated into the local community.
- ✔ make sure Affordable Housing meets the built form and quality requirements in the planning scheme
- ✔ recognise the importance of site location and proximity to amenities, employment and transport for Affordable Housing, and consider cash contributions where a proposed development cannot deliver on this element.

### 2.4 Let landowners and developers know your requirements

In addition to having regard to the matters in the Ministerial Notice, if your council wants to facilitate the provision of Affordable Housing through the planning system, it is important to let landowners and developers know early on in the process that council will be seeking an **Affordable Housing contribution**. Provide applicants/proponents with details of the parameters and process for the Affordable Housing negotiation and where and how that process fits in with other aspects of the planning system.

A successful negotiation is most likely when you are clear about what aspects are fixed (eg. the result must be genuine Affordable Housing) and where there is room for negotiation (eg. the quantum of the Affordable Housing contribution). A developer will be more willing to enter into a negotiation if you can quickly and confidently respond to Affordable Housing matters without causing a delay to the planning process.



## What is an Affordable Housing contribution?

An Affordable Housing contribution is a contribution from the landowner (developer) as part of an Affordable Housing negotiation through the planning system. It should not be confused with development contributions required under a Development Contribution Plan Overlay.

An Affordable Housing contribution is to be used to provide housing for **eligible households** and may be in the form of:

- dwellings: gifted, or offered for sale (potentially at a discount from market value)
- land: gifted, or offered for sale (potentially at a discount from market value)
- tenancies: dwellings made available as rentals (potentially at a discount from market value)
- cash
- or a combination of the above.

It is essential to ensure that the Affordable Housing contribution actually delivers **Affordable Housing outcomes** and is not simply low-cost market housing. The Affordable Housing outcome is the nexus between an Affordable Housing contribution, and eligible households housed affordably.

## 2.5 Negotiating an Affordable Housing agreement

Council planning staff are responsible for negotiating **Affordable Housing agreements** through the planning system. It may be as part of a proposal to rezone land, or as part of a planning permit application (see legal advice in Appendix 1). In either case, it is important to remember that a council cannot compel a developer to enter into negotiations or to agree to an Affordable Housing contribution – it must be agreed on a voluntary basis.

The negotiations may centre around value-sharing, or incentives, or both. In a value-sharing approach, the council recognises the value created through the planning process and seeks to share some of that value with the community by way of an Affordable Housing contribution. Value is created for the landowner when land is rezoned through a planning scheme amendment and/or when a planning permit is issued. The planning scheme amendment process results in the greatest uplift in land value and provides the greatest opportunity to seek to share that value, but a value-share approach can also be adopted in a planning permit process.

Because the provision of an Affordable Housing contribution is voluntary, it is difficult for a landowner/developer to know exactly how much it will cost them to make that contribution. This is why it is important to let developers know as early in the process (preferable before the land is purchased) that Council will be seeking an Affordable Housing contribution.

Usually, a developer will calculate all the costs and likely profit for a project and that feasibility modelling will help them determine what they are willing to pay for a site. If their costs are higher and the profit margin falls below the rate that financiers require, they will need to offer less for the land. Because developers are competing with each other to purchase a site, a developer that factors in the cost of an Affordable Housing contribution may be outbid by a developer who decides not to factor in the cost of an Affordable Housing contribution.

### 2.5.1 Planning incentives

Incentives may be offered by a council to help a developer off-set the cost of an Affordable Housing contribution. There may be some overlap with the concept of value-sharing, but incentives are more likely to be where a council makes a concession or an exception in order to facilitate an Affordable Housing contribution.

Incentives may take the form of an increased yield of development, a reduction in car parking requirements, a trade-off with a requirement to provide public infrastructure, implementing a priority process, or other incentives that translate to monetary value to the developer.

Council staff will need to carefully weigh up and balance the other objectives of the planning scheme so that the provision of Affordable Housing does not sacrifice the amenity and liveability of the neighbourhood, or breach any legislative requirements or mandatory provisions.

An Affordable Housing negotiation is likely to be an iterative process and may require several meetings, discussions, and a review of Affordable Housing information provided by the applicant/proponent. It is important to document the outcomes of negotiations to ensure there is a record of what has been agreed upon. This end point of negotiations forms the Affordable Housing agreement, can then be secured by way of **Section 173 Agreement**, and/or included in planning permit conditions or provisions as part of a Planning Scheme Amendment.

To aid in negotiations, council may choose to engage an Affordable Housing expert and may also need property, housing and legal experts that have experience working across local government, community housing and the development sectors to find mutually agreeable outcomes.

Seeking independent advice can help staff build their capacity and also bolster the confidence of Councillors about the validity of the outcome of the negotiations and lead to fewer amendments in the chamber. If Councillors do not fully understand the implications of changing a position agreed through negotiation, the viability of an Affordable Housing agreement can be undermined.



## Balancing incentives and trade-offs

There are four key issues when considering incentives and trade-offs to facilitate the provision of Affordable Housing. They are:

- some incentives have very little value to a developer and so do not ultimately provide a meaningful incentive
- the incentives with the largest value to the developer (increased height and density) may be counter to community expectations and council policy in relation to preferred building height, neighbourhood character and amenity
- trading-off an existing council requirement (eg. public works) for the provision of Affordable Housing, may leave a shortfall in the provision of other services (parks, roads, drainage, community centres etc.)
- there can be a mismatch between the value of an incentive, the impact of that incentive, and the expected retention of the Affordable Housing contribution within the municipality.

Considering the value and impact of an incentive can be a helpful way to establish the size of discount requested or how long the council will seek to retain the benefit created by the Affordable Housing. For an incentive that has a higher impact on the surrounding community, it may be more appropriate to consider a larger discount or a longer period for which the benefit is retained.

For example, allowing additional height (over and above the preferred height set out in the Planning Scheme) for a development may provide significant value to a developer, but may also have an ongoing impact on the amenity of the neighbourhood. In such cases, requiring a larger discount from the purchase price for the Affordable Housing is more appropriate than in cases where the incentive has little value to the developer or little negative impact on the community.

Whatever approach the council adopts, they need to keep in mind the impacts on the financial viability of the Affordable Housing owner, particularly if that owner is a registered housing agency (see section 1.5 and 2.3.4).

Incentives and trade-offs are discussed in more detail in the Toolkit for planners.

## 2.6 What to include in an Affordable Housing agreement

An Affordable Housing agreement needs to make it clear who will pay for the Affordable Housing either by way of subsidy (from the developer) and/or by way of purchase (for a community housing organisation or another owner of Affordable Housing).

Drafting permit conditions or a Section 173 Agreement that use the phrase 'provide Affordable Housing' without setting out exactly how it will be provided (for free, at a discount, at cost price or purchased at full market value) will result in an agreement that is unenforceable and does not ultimately deliver Affordable Housing.

The agreement should provide certainty of the quantum of the **Affordable Housing contribution**, but flexibility for how that contribution is delivered.

As a minimum, the agreement should set out the formula by which the Affordable Housing contribution will be calculated and options to address non-compliance. A formula (rather than a fixed dollar amount) allows for changes to costs and value that will occur over time.

The formula should set out the:

- the quantum of Affordable Housing, for example a number or percentage of dwellings or a percentage of floor space
- the discount that has been agreed (if any)
- and the period of time that the property will remain Affordable Housing (if the property title is not to be transferred to a CHO by gift or by sale).

This formula provides a value that can then be translated into an Affordable Housing contribution by way of gifted or discounted dwellings, gifted or discounted land, or a cash contribution.

As already discussed, CHOs operate within significant financial constraints. Having an agreement that requires a developer to offer one or more dwellings for sale to the community housing sector, even at a moderate discount from market rate, may place the opportunity out of the reach of many CHOs.

There needs to be a significant discount from market rate (potentially in the order of 75 per cent discount) to remove all barriers for CHOs to purchase the dwelling. However, if a CHO has cash reserves or can access other funding streams, they may be able to leverage those reserves to purchase more dwellings at a smaller discount.

When an agreement requires the gifting of a dwelling or requires a significant discount to market, it is important to keep in mind that it is the developer who is funding the Affordable Housing contribution. Where a developer has not factored in this cost, the requirement may make their project less feasible or unviable.

This is why councils may need to identify incentives and trade-offs to help balance this new cost to developers. It is also why a council needs to let landowners and developers know their expectations as early as possible in the land purchase and development process.

## 2.7 Calculating the value of an Affordable Housing contribution

Being able to calculate the value of an Affordable Housing contribution is important because:

- developers need to know the cost of an Affordable Housing contribution so they can use that cost in their development feasibility models early in the development process
- future owners of Affordable Housing need to know the cost of the dwellings they have the opportunity to purchase, to determine if it is feasible for them to do so
- councils need to know the value of an Affordable Housing contribution so they can consider whether it is a fair contribution, particularly when incentives or trade-offs facilitate the contribution.

In addition:

- all parties need certainty about the cost and the value of the Affordable Housing contribution
- all parties need some flexibility in the delivery of an Affordable Housing contribution to respond to a changing economic environment.

All of these elements can be addressed by having a consistent approach to calculating the value of the Affordable Housing contribution, and by allowing flexibility on how that value is delivered.

When determining the value of an Affordable Housing contribution, it helps to provide clarity for council planners and the developer if the value is calculated based on the discounted or gifted component. This avoids the potential for miscommunication that can arise when planning scheme provisions or permit conditions do not differentiate between potential Affordable Housing outcomes (for example 5 per cent of all dwellings), and the value of the contribution (for example 5 per cent of dwelling offered for sale at a 50 per cent discount from market value).

Knowing the value of the contribution makes it clear about the remaining cost that needs to be met by the purchaser of the Affordable Housing. Having different options (but of equal value) allows the developer time to consider which of the options can be met by a CHO.

For example, if an agreement says the developer will offer one dwelling (market value \$800,000) for sale to a registered housing agency at a 25 per cent discount, then the value of the Affordable Housing contribution is equivalent to \$200,000 or a quarter of a dwelling, rather than one whole dwelling.

If there is a change to the proposed form of the development after the permit has been issued (for example a change from townhouses to apartments) the total value of the Affordable Housing contribution has already been agreed and can be delivered in a different way, for example, offering two apartment dwellings (valued at \$400,00 each) for sale at 25 per cent discount. The value of the Affordable Housing remains fixed but the way it is delivered can respond to a changing environment.

Specifying the value but allowing some flexibility around how that value is delivered enables developers and community housing organisations to respond to funding opportunities and changing demand. A CHO may prefer to buy fewer dwellings at a greater discount or more dwellings at a smaller discount depending on their cash reserves or funding opportunities.



## How to calculate the value of an Affordable Housing contribution

The value of an Affordable Housing contribution can be calculated by:

*Affordable Housing contribution = amount of housing (number) x \$ value of discount provided*

Or where the developer holds onto the dwellings (eg. for affordable rental housing)

*Affordable Housing contribution = Amount of housing (number) x \$ value of discount provided x period of time*

### Example for dwellings that will be sold at a discount to a community housing organisation

A 100 dwelling apartment development is proposed. The sale price of each apartment is estimated to be \$500,000.

A 6 per cent contribution would be 6 dwellings. A 20 per cent discount from the market sale price equates to a \$100,000 contribution per apartment.

The overall value of the Affordable Housing contribution would be  $(6 \times \$100,000) = \$600,000$ .

### Example for dwellings that will be held by the developer (or investor) and rented out at a discount

A 100 dwelling apartment development is proposed. The rental revenue of each apartment is estimated to be \$350 per week or \$18,200 a year. A 6 per cent contribution would be 6 dwellings. A 20 per cent discount on the market rent equates to a \$3,640 contribution per apartment per year.

If the dwellings remain Affordable Housing for a period of 20 years the overall value of the Affordable Housing contribution would be  $(6 \times \$3,640 \times 20) = \$436,800^*$ .

*\*Note this does not account for the future rent increases or the future value of money.*

## 2.8 Securing the Affordable Housing contribution

The negotiation to agree an Affordable Housing contribution is undertaken on a voluntary basis. Once an Affordable Housing contribution is agreed, the council will likely want to put in place a way to secure that negotiated outcome.

There is benefit in separating out the agreement that secures the Affordable Housing contribution from an agreement that deals with the ongoing management of the Affordable Housing (if one is required). That is explained in more detail in section 2.9.

When a council seeks to secure an **Affordable Housing contribution** by way of an **Affordable Housing agreement** all parties should keep in mind that:

- given the time and resources required to negotiate an Affordable Housing agreement, councils generally want to secure that agreement through a mechanism that is legally binding and enforceable
- landowners/developers that have agreed to an Affordable Housing contribution will not want that agreement to cause any delays to the planning process
- CHOs would prefer not to have any encumbrances on the housing assets that they own as it makes it more difficult to raise finance and does not allow the flexibility required to manage a property portfolio
- all parties can get tripped up if there is too much or not enough detail in the agreement that secures the Affordable Housing contribution.

The options to secure an Affordable Housing contribution are:

- provisions as part of a planning scheme amendment (rezoning)
- planning permit condition/s
- an agreement under Section 173 of the PE Act (a Section 173 Agreement).

The challenge with using planning provisions or a permit condition to secure an agreed Affordable Housing contribution are two-fold. First, there is potential for the provisions/conditions to be considered by a Planning Panel or VCAT as 'not voluntary' and therefore not in accordance with the government policy position. Second, the process of finalising a planning scheme amendment or planning permit does not place council as the final decision-maker and the provision/permit condition could be changed by the Planning Panel/Minister or by VCAT (see legal advice in Appendix 1).

However, it is standard practice to include conditions on a **planning permit** requiring a landowner to enter into a **Section 173 Agreement** for a range of matters and the potential to also do that for Affordable Housing contribution is discussed below.

### 2.8.1 Section 173 Agreement

The PE Act (Section 173) sets out that a **Responsible Authority** may enter into an agreement with an owner of land in relation to Affordable Housing. Although a Section 173 Agreement is enforceable by a council, or any other person, a land owner cannot ordinarily be compelled to enter a Section 173 Agreement in relation to the provision of Affordable Housing (see legal advice Appendix 1).

Government guidance is that reaching an Affordable Housing agreement and securing it through a Section 173 Agreement should be done on voluntary basis. This essentially rules out the option of including provisions in a planning scheme amendment or conditions on a planning permit that set out the requirements for an Affordable Housing agreement (even if that contribution has been agreed on a voluntary basis). For further discussion and a summary table of the implications see the legal advice in Appendix 1.

At the time of publication, this aspect is yet to be tested in the Victorian Civil and Administrative Tribunal (VCAT) or at Planning Panel. VCAT has removed permit conditions requiring an Affordable Housing contribution, where the conditions had not been agreed to by the applicant (see *Panorama Investment (Box Hill) Pty Ltd v Whitehorse CC [2018] VCAT 1490, 2018*) but there is no case law where an agreement was reached and reflected in provisions or conditions.

In practice, and in the interests of transparency, councils are likely to seek to include provisions or conditions that reflect an Affordable Housing negotiation, including where that agreement is intended to be secured by way of a Section 173 Agreement. A model Section 173 Agreement is available at [planning.vic.gov.au/policy-and-strategy/affordable-housing/example-agreement](https://planning.vic.gov.au/policy-and-strategy/affordable-housing/example-agreement) 

Some CHOs have found banks to be reluctant to lend for social housing when a lengthy Section 173 Agreement is in place, as there may be no secondary market for the dwellings. If a CHO had to sell the properties, then other CHOs or DHHS would be the only allowable buyers, lowering the value of the stock and significantly limiting the bank's ability to recoup any outstanding financing.

It is possible to seek to include a CHO as a party to a Section 173 Agreement. While this does provide some certainty for council and the developer about the commitment from the CHO to purchase/ manage Affordable Housing dwellings/land/cash it can:

- add an administrative burden to council
- lock the developer into a procurement arrangement with an organisation potentially years in advance of when the development will be delivered
- significantly constrain the CHO from participating in other (live) opportunities to purchase Affordable Housing.

Note that even if a CHO is not party to the Affordable Housing agreement, the council still needs to ensure the Affordable Housing agreement is feasible for CHOs, if the expectation is they will buy/ manage the Affordable Housing. See also the discussion in section 3.5 on CHOs involvement in negotiations.

## 2.9 Securing the ongoing management of Affordable Housing

Once a council has negotiated and agreed an **Affordable Housing contribution** with a developer and secured that contribution by way of an **Affordable Housing agreement**, they may want to put something in place in relation to the ongoing use or management of the Affordable Housing.

Separating out the process or document that secures the Affordable Housing contribution from any requirements in relation to the ongoing management of the Affordable Housing, enables the Section 173 Agreement to be drafted in such a way that it ends once the dwelling titles are transferred to a CHO.

Rather than using a new Section 173 Agreement, if a council has a particular requirement around the ongoing management of Affordable Housing delivered through the planning system, the council and the manager of the Affordable Housing could enter into a **Memorandum of Understanding (MoU)**.

### 2.9.1 Memorandum of Understanding (MoU)

An MoU is a formal way of recording agreement between parties. It is particularly useful where a council wants to have visibility of the tenant cohort, cycling of the community benefit provided by the Affordable Housing back into the local community, or an ongoing relationship with the manager of the Affordable Housing, but does not want to encumber the property with an ongoing Section 173 Agreement.

An important aspect of an MoU is that although it may be reasonably detailed and formal in nature, it is not binding on the parties. The non-binding aspect of an MoU is one of its attractions in relation to the early stages of negotiating and developing a project as it allows parties to agree to an intention to move towards a certain goal.

Although an MoU is not legally binding on the parties, if a government department or municipal council enters an MoU, it arguably creates a moral or social obligation to behave consistently with the matters they have agreed to in the MoU. This is more so the case than it would be with a private developer. As such, an MoU may also be the preferred approach where government is the landowner and where a community housing organisation is the manager of the Affordable Housing.

## 2.10 Housing trusts, companies and other options

A council may negotiate a voluntary cash contribution from a developer to be used to provide Affordable Housing. The collection, holding and administration of any such contributions should not pose any particular issue for a council (see legal advice Appendix 1).

The administration of any such funds would be subject to a council's existing governance, probity, and accounting obligations under the LG Act. The council may enter into a partnership with one or more CHO for the distribution and use of those funds (similar to a grant arrangement) which may be more efficient than establishing a separate entity to distribute the funds.

There would arguably be an expectation from the contributor and from the community more widely that any such funds collected for the purpose of Affordable Housing should be used for that purpose. This would also likely be a requirement of the Section 173 Agreement. It would be appropriate for any such funds collected to be done so pursuant to an agreement. Such an agreement could outline how, in a broad sense, the contribution will be administered and used. It could also provide a level of protection to the council with regard to any potential subsequent claim from the developer with regard to the contribution.

It should be noted that funds held internally by a council may be subject to changes in the policy of the council.

### 2.10.1 Housing trusts

There are other options for a council to hold and administer voluntary contributions. A charitable trust could be established into which money could be contributed by council to facilitate or deliver Affordable Housing. There are costs associated with the establishment and ongoing operation of a trust.

An example of this model is the City of Port Phillip, who established the Port Phillip Housing Trust in 2005. Council supported the Trust through transferring the ownership of 12 community housing projects that council owned (valued at \$36 million in 2006) as well as its role as a developer of community housing to Port Phillip Housing Association (PPHA) as Trustee of the Port Phillip Housing Trust. That Trust has been through several changes as it strengthened and grew, and HousingFirst is now the trading name of Port Phillip Housing Association.

A council may create a trust to hold funds and provide Affordable Housing to the community. Such a trust would be a perpetual charitable trust, which could permanently protect an Affordable Housing fund. A council may appoint the trustee of the trust under Section 193 of the LG Act. The trustee could be the council or a trustee company.

A trust deed could be drafted to ensure that the purpose of the trust and any funds or assets provided to it were perpetually committed to the provision of Affordable Housing. This would effectively protect the funds should there be a change in council policy or strategy.

A charitable trust is regulated by the Attorney-General, Supreme Court of Victoria and the Australian Charities and Not-for-profits Commission.

Some councils are working through the administrative and governance elements of establishing housing trusts. The key benefit is it protects Affordable Housing contributions (dwellings/land/cash) from future changes in council policy and can secure and retain Affordable Housing within the municipal boundaries.

However, the housing trusts do not yet have the experience or scale of existing CHOs and may not be the most efficient mechanism to leverage Affordable Housing contributions secured through the planning system.

### 2.10.2 Other options

Another option councils could consider is to establish a company, which may operate either as a 'for-profit' or 'not-for-profit' company. It can sometimes be referred to as a 'Special Purpose Vehicle'. There are many different models for this.

The benefit of establishing a company rather than a trust is that there may be lower establishment costs and allows a broader scope for the company to form partnerships and establish partnership agreements.

The City of Moreland recently adopted this approach and established Moreland Affordable Housing Ltd. Moreland Affordable Housing Ltd (MAH) is a company established to address the lack of secure and Affordable Housing options available to residents across Moreland. The constitution of MAH was approved by council in November 2017. In May 2018 the Minister for Local Government approved the formation of the company under Section 193 of the LG Act.

MAH will participate in innovative development and financing models, and work with stakeholders, including the state and federal government and agencies related to Affordable Housing development (see: [moreland.vic.gov.au/planning-building/strategic-plans/housing/moreland-affordable-housing-ltd/](https://moreland.vic.gov.au/planning-building/strategic-plans/housing/moreland-affordable-housing-ltd/)).

## 2.11 Monitoring and enforcing an Affordable Housing agreement

Councils have an obligation to monitor and enforce the Affordable Housing agreements they reach with landowners. Care should be taken when negotiating and documenting Affordable Housing agreements that the council does not commit itself to monitoring and enforcing in a manner that does not have the in-house skills, experience, and/or resources to undertake. For example, councils should avoid agreements that require tenant selection to be 'to the satisfaction of the Responsible Authority' or council staff would have to vet each tenant every time there is a vacancy.

To help provide assurance that the **Affordable Housing contribution** is actually delivering **Affordable Housing outcomes** to the benefit of the local community, a council can require the Affordable Housing to be owned or managed by a registered CHO.

CHOs are not-for-profit organisations, established with the express purpose of providing housing for **eligible households**. These organisations have the scale, experience, and knowledge to sustain tenancies and ensure appropriate allocation and affordability (two key matters for consideration in the Ministerial Notice).

Registered CHOs also already have a compliance framework in place to ensure they are meeting their obligations and there is monitoring by the Office of the Housing Registrar. For these reasons, registered CHOs are best placed to successfully manage and monitor Affordable Housing outcomes delivered through the planning systems. For further information, see section 1.6.2.





## Why you can rely on a registered CHO for ongoing management and monitoring of Affordable Housing

Registered CHOs are regulated in a way that makes them accountable to government, investors, tenants and the community. Regulation is designed to ensure that the substantial government investment in community housing is protected for the benefit of current tenants, future generations, and the community.

Registered Housing Agencies must meet the performance standards for registration (available at [housingregistrar.vic.gov.au/Publications/Performance-standards-and-evidence-guidelines](https://housingregistrar.vic.gov.au/Publications/Performance-standards-and-evidence-guidelines) ).

The standards for tenancy and housing services include requirements around:

- determining and managing eligibility, allocation, and termination of housing assistance
- determining and managing rents
- setting and meeting relevant housing service standards
- supporting tenant and resident engagement
- facilitating access to support for social housing applicants and tenants with complex needs
- managing and addressing complaints and appeals relating to the provision of housing services
- maintaining satisfaction with the overall quality of housing services.

In addition, a registered CHO must also meet performance standards relating to:

- housing assets
- community engagement
- governance
- probity
- management
- financial viability.

Regulation through the Registrar ensures that assets owned by registered housing agencies are dedicated for use as Affordable Housing, are well managed. For these reasons, local government and developers are encouraged to rely on registered CHOs for management and monitoring of Affordable Housing delivered through the planning system.

To find out if an organisation is registered, see [housingregistrar.vic.gov.au/who-we-regulate](https://housingregistrar.vic.gov.au/who-we-regulate) .

## 2.12 When a CHO is the planning permit applicant

Affordable Housing is a type of residential use and there is no requirement when making a planning permit application to distinguish it from market-housing. However, through the application process the council planners and the community will usually become aware that the proposal is being made by a CHO. More often than not, the fact that the proposal is for Affordable Housing is highlighted in the planning permit application as a benefit to the local community.

With a private developer, an **Affordable Housing contribution** is best secured by way of a **Section 173 Agreement** as there is no financial or other imperative on the developer to actually deliver the Affordable Housing contribution, even if they have agreed to do so through a voluntary negotiation process. However, where a CHO is the applicant for a planning permit, and they are proposing to build Affordable Housing, a Section 173 Agreement is unnecessary. Through its constitution, purpose/mission, and its registration both as a housing agency and as a charitable organisation, you can be assured that a CHO will build and manage the development as Affordable Housing.

The exception, and when a Section 173 Agreement may be appropriate, is where the CHO is seeking significant concessions (eg. density/height) justified on the basis that they are delivering Affordable Housing. In such cases it is appropriate for the council to secure a benefit to the local community (for example requiring the dwellings to be used as Affordable Housing for a period of time) to offset the impact of the development on the amenity of the local community.

In either case, councils can support the provision of Affordable Housing by working closely with the CHO to highlight and resolve any planning issues as quickly as possible. Some councils may also put in place a priority process for applications from CHOs.

## 2.13 When Council is the landowner

Some councils seek to facilitate the provision of Affordable Housing by making council land available for sale or lease to CHOs to develop and operate as Affordable Housing. Whether the proposal is to lease or sell the land, the council will need to meet the requirements of the LG Act, including Sections 186, 189, and 223.

The processes associated with these sections of the LG Act can take a considerable amount of time. They are public processes, requiring consultation with the community, and they establish a competitive tendering process. Councils have to be careful not to be perceived as pre-determining the outcome of one process based on another statutory process. For this reason, it is usually necessary for council to run the disposal/use of council land process (LG Act) before it considers a planning permit application for the project (PE Act).

Council officers should be upfront with CHOs when inviting them to participate in the process to use or buy council land, remembering that CHOs have limited resources for staff to provide input into the process. When developing expression of interest documentation, keep in mind the parameters and limitations of the community housing sector.

The expression of interest may need to make provision for CHOs to be able to first secure the land before securing funding from other sources for the development of the land. Council officers should keep in mind information already reported to the Housing Registrar when designing tender documents to minimise unnecessary duplication.



### Understanding more about community housing

Take the opportunity to read through the information and advice for community housing (section 3) to gain an in-depth understanding of the challenges facing CHOs.

For Community Housing



## 3.0 For Community Housing

There have been increasing demands on the time of community housing practitioners from councils and developers who are negotiating Affordable Housing through the planning system. This includes demands on development managers, business development officers, and an organisation's executive team or board.

This section of the report helps community housing practitioners step-through the key elements to maximise the relationship with councils. It also provides an insight into the needs and limitations of local governments to take into account when working on a project.

This section reflects the current policy environment and focuses on how the community housing sector can support local government to ensure that the Affordable Housing contributions negotiated through the planning system deliver Affordable Housing outcomes for the community.

### 3.1 Consider your organisation's strategic objectives and constraints

Having Affordable Housing as an objective in the PE Act has introduced a new opportunity to facilitate the provision of Affordable Housing through the planning system. To make the most of the opportunity, CHOs are encouraged to explore and decide how and when they would like to participate in the process.

As part of your usual strategic planning, you may wish to answer the following questions in relation to opportunities through the planning system:

- are there particular cohorts you will focus on?
- are there locations where you will/won't invest?
- do you have specific requirements around built form, fittings and fixtures?
- will you focus on rental management or purchase of Affordable Housing or both?
- have you established the financial parameters for your involvement?
- do you have a preferred point (eg. beginning of process or once a development is underway) at which you want to engage?
- do you want to engage directly with the landowner/developer or with the council, or both?
- how will you communicate your requirements to councils and landowners?

CHOs play a vital role in maximising **Affordable Housing outcomes** for the community, not just the **Affordable Housing contribution**. It is essential to ensure that the Affordable Housing contribution actually delivers Affordable Housing outcomes and is not simply low-cost market housing. The Affordable Housing outcome is the nexus between an Affordable Housing contribution, and **eligible households** housed affordably.

CHOs can also play a role as an honest broker between landowner and a council helping make sure that in an Affordable Housing negotiation that the developer does not play CHOs off against each other or tries to avoid making an Affordable Housing contribution where the project viability would actually enable them to. The CHO must be able to commit in good faith to delivery of any Affordable Housing agreement they become a party to, and are well placed to ensure the proposal is feasible and appropriate.

## 3.2 Consider local government constraints

When working with the planning and other staff in local government, it is easy to forget the complex environment in which they operate. The following section provides you with that context so that your expectations of councils can be tempered by an understanding of the requirements on them.

Councils deliver over a hundred different services ranging from libraries to waste collection and many things in between. Rates are the primary source of revenue for councils. Under legislation, the rates have been capped meaning council are trying to deliver their services in a financially constrained environment.

Local government practitioners and Councillors are required to discharge their obligations set out in both the LG Act and PE Act (see legal advice in Appendix 1). Sometimes this legislation has competing objectives and council officers and elected representatives will need to balance the competing demands and objectives (see section 3.3 below).

The legislation can also have parallel or overlapping processes. Council officers and elected representatives are obliged to undertake the process of each piece of legislation – they cannot simply opt-in or opt-out of a process from one piece of legislation based on another piece of legislation. For people outside the local government sector, this doubling up or overlapping of processes may seem inefficient and can cause frustration.

Council staff operate under a changing group of elected representatives. Councillors reflect a diverse range of opinions and views on all policy matters, including Affordable Housing. Among elected representatives, there is a varying level of awareness and understanding of Affordable Housing. While council staff can prepare and present their best advice on Affordable Housing – including the negotiations and agreed Affordable Housing contributions – it is the Councillors that make the final decision on policy or large planning permit applications (depending on the policy of the council).

## 3.3 Understanding the competing demands of council

Councils deliver services in health, planning and building control, business and economic development, waste and environmental management, and human and community.

Councils adopt strategic four-year plans to help guide the direction of their organisation's operations. These high-level plans set out a council's objectives in themes, usually around community health, liveability, physical environment, economic prosperity and good governance. From these themes, objectives are identified and reported annually.

While a council's strategic objectives are generally well-articulated and documented, the operational priorities of the organisation can be fluid and are contingent on factors including:

- the priorities of elected officials
- changing community needs and expectations
- state and federal policy changes
- issues that are particularly contentious or high profile for a local community at a point in time.

Further, councils must balance competing demands for their community, operating in an environment where rates (their primary source of revenue) have been capped. Money spent on one service (roads, sportsgrounds etc.) usually means less money is available for other services (libraries, drainage etc.).

Section 3C of the LG Act sets out the objectives of a council:

*(1) The primary objective of a council is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions.*

This, together with the objective in the PE Act, provides a basis for councils to facilitate the provision of **Affordable Housing**. It is up to each council to determine the extent to which it wants to facilitate Affordable Housing and the way it will do so.

Facilitating Affordable Housing is a key example where there are likely to be competing considerations for council staff and councillors. To incentivise a developer to provide Affordable Housing, a council may be able to:

- reduce or waive the requirements to provide on-site car parking
- allow additional height or density for the development of a site to make the provision of an Affordable Housing contribution viable for the developer
- trade-off the provision of public infrastructure for the provision of an Affordable Housing contribution.

While this would help council meet their objectives around facilitating Affordable Housing in their municipality it is likely to conflict with:

- the traffic engineer's advice and specifications for on-site parking
- the community's concerns about an increasing amount of traffic and on-street parking, making it more difficult to park near their own home
- existing community expectations and planning policy around preferred building height and density, and protection of neighbourhood amenity from 'over development'
- the provision of infrastructure and the important role that plays in the functionality of public places.

Councils try to balance these competing demands and are accountable through the legislative requirements and the democratic process. Under the LG Act a council is required to achieve the best outcome for the *local community* which is why they are often focused on retaining the benefit of an Affordable Housing negotiation within their own municipality.

## 3.4 Affordable Housing delivered through the planning system

Councils have responsibility for controlling the use and development of land. The PE Act provides councils with a role in facilitating Affordable Housing through the development process. Note this is a voluntary process and requires agreement from landowners who are seeking to obtain a planning scheme amendment or a **planning permit**.

Under the PE Act, councils can seek to negotiate with landowners for Affordable Housing contributions to be provided as part of a planning scheme amendment proposal or planning permit application. As part of those negotiations, the council and/or developers may seek to engage directly with **community housing organisations**, or they may develop agreements that rely on CHOs purchasing or managing the new Affordable Housing.

Council planning staff are getting better at understanding the operating context and constraints of the community housing sector and are applying that knowledge of Affordable Housing agreements. However, community housing practitioners can take the opportunity to support and upskill local government practitioners if they are invited to participate in the negotiations. Remember that council staff may be new to the terminology you take for granted, and that for them, Affordable Housing is just one of the many matters they have to assess through the planning system.

To get a good understanding of the demand and complexity for local government practitioners in seeking to negotiate Affordable Housing contributions read the whole of section 2, and try to imagine it if you had previously had no exposure to Affordable Housing or the community housing sector.

## 3.5 Getting involved in local government negotiations

Community housing practitioners may be approached by developers who are in the early stages of preparing a planning scheme amendment to rezone land or who are preparing a planning permit application. They may also be approached by councils to provide input or advice at the early-stage in planning processes.

As the planning process progresses, a CHO may be invited to be part of the negotiations between council and the developer or asked to provide letters of support, an indication of intent to purchase, or some other evidence that they can help deliver on an Affordable Housing agreement.

Councils can encourage developers to involve CHOs prior to design, planning permit or construction to facilitate modifications or enable the proposed Affordable Housing manager to specify the fit out. However, CHOs are advised to be cautious about requiring the developer to make changes to specifications to meet the needs of the Affordable Housing managers as any reduction in construction efficiency that results may dissuade the developer from providing an Affordable Housing contribution.

Before committing too many resources to the Affordable Housing negotiations as part of the planning process, community housing practitioners should be aware that planning process takes time – it may take more than six or 12 months for a planning permit application to be decided, or two or three years for a rezoning to be approved. It can then take another two to five years for the development to be constructed and become available.

The extent to which a CHO wants to allocate resources to engage on development proposals is up to each organisation. Instead, it may be more efficient to prepare standard requirements (design, finance etc.) to support multiple negotiations with councils and the developer rather than being involved in each individual negotiation.

You may also wish to focus your resources on winning the opportunity to purchase or take on the management of the Affordable Housing closer to the completion date. Many developers will go through a competitive process to either select one or two CHOs to be their preferred partner or a competitive process to sell or gift the Affordable Housing contribution once it has been agreed.



## How you can support a council in their Affordable Housing negotiations with developers

The negotiation process to agree to an Affordable Housing contribution is between council and the developer. However, there are ways you can support that negotiation to ensure a successful and viable result. You can:

- determine where and how you want to engage with local government
- provide council staff with the key parameters for your organisation, and for the community housing sector so council does not spend time pursuing unworkable options
- if resources permit, offer to review an Affordable Housing proposal from a developer to provide a reality check of the development feasibility and proposed arrangements
- be realistic about the long timeframes and iterative processes that come with the planning system and recognise that the Affordable Housing contribution may take several years to be realised (if at all)
- help make sure the agreement does not encourage “race to the bottom” or pit CHOs against each other.

### 3.6 Section 173 Agreements

As part of Affordable Housing negotiations, a Council or developer may approach a CHO about being party to a **Section 173 Agreement**. This section explains what you should consider when responding to that request.

Section 173 of the Planning and Environment Act says:

- (1) *A responsible authority may enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority.*
- (1A) *Without limiting subsection (1), a responsible authority may enter into an agreement with an owner of land for the development or provision of land in relation to Affordable Housing.*
- (2) *A responsible authority may enter into the agreement on its own behalf or jointly with any other person or body.*

Referred to as a Section 173 Agreement, these agreements are legally binding and run with the land even if the land changes ownership. It is common for councils to use a Section 173 Agreement as part of a planning process – often to secure an undertaking that particular works (roads, drains, playgrounds etc.) will be delivered in a timely manner and to the satisfaction of the council. Without a Section 173 Agreement in place it is difficult for the council to enforce the requirements even if there is a planning permit condition, particularly where there is a change of ownership.

### 3.6.1 How councils use Section 173 Agreements

A council may use a Section 173 Agreement to secure the delivery of an **Affordable Housing contribution** and potentially to secure the ongoing benefit of that contribution for a period of time.

Generally, Section 173 Agreements are an effective tool for securing the initial delivery of an Affordable Housing contribution, but are less effective in managing outcomes over time. CHOs should carefully consider the potential implications of any ongoing requirements for the CHO proposed in a Section 173 Agreement.

A Section 173 Agreement can involve more than just the landowner and the council. A CHO could be a party to a Section 173 Agreement. The Section 173 Agreement does provide you with surety that you will be the party involved in owning/managing the Affordable Housing negotiated through the planning system. This surety allows you to raise funds and maybe even to be involved in aspects of the design or construction.

There may be other ways to formalise the intent of a CHOs involvement in delivering an Affordable Housing contribution. A **Memorandum of Understanding (MoU)** with the council may be a more flexible way to set out how the CHO will work with council over time and to clarify what circumstances would be an acceptable rationale for changing the initial delivery approach at a later point.

Before your CHO decides to be part of a Section 173 Agreement you should be aware that:

- the document is legally binding – if there is a change of circumstances in funding streams or projects you have committed to, you are unable to change the agreement without approval of the council and the landowner
- there is a cost in establishing or modifying a Section 173 Agreement and you may be asked to share that cost
- developers will be looking for a fast, efficient process – they may not provide you with adequate time to negotiate the detail of the Agreement and they may have already reached agreement on the key details with the council before approaching you.

## 3.7 What to do when you are the applicant

If you are preparing a **planning permit** application for an Affordable Housing development, it is worth remembering that local government planners are required to discharge their obligations under the PE Act. Before lodging your application it is worthwhile to arrange a pre-application meeting to discuss your plans.

Planners deal with a high volume of applications, and the planning process takes time. Regardless of the community benefit that a proposal may present, the planner must still operate within the PE Act and the requirements of the planning scheme. The planner cannot simply choose to bypass critical planning stages such as public exhibition periods and community consultation.

To ensure a smooth planning process and avoid delays, you can design your project within the requirements of the planning scheme. You can also ensure that your application contains all the information that the council needs to make a decision so that the planner does not need to make a request for further information.

You can remind the planner that, due to the purpose and mission of CHOs, an **Affordable Housing agreement** is not required and doesn't need to be secured by way of a Section 173 Agreement. But keep in mind that if you seek additional height, density or other significant concessions on the basis that you are delivering community benefit through delivering Affordable Housing, the council may reasonably seek to secure that benefit to the local community for a period of time to offset the impact of the development on the amenity of the local community. They may seek to do that through a Section 173 Agreement.

## 3.8 When you have an opportunity to use council land

If there is an opportunity to use council land for Affordable Housing, you should be aware that the requirements of the LG Act in relation to the lease or sale of council land takes time. There are provisions that require consultation with the community and the requirement to establish a competitive tendering process. The processes associated with these sections of the LG Act can take a considerable amount of time.

In most cases, councils will need to advertise the process which will allow other organisations (usually just CHOs, but in some cases private developers) to put in a submission for the project.

Even once council has discharged its obligations under the LG Act, it is still required to discharge its obligations under the PE Act. It may take six months for council to go through the process to decide to dispose of (sell or lease) council land, six months to determine who the successful tenderer is to buy or lease the land, and six months to determine a planning permit application for a development on the site. Responsibility for these different steps sits within different council departments which can make continuity difficult.

Councils have to be careful not to be perceived as pre-determining the outcome of one process based on another statutory process. For this reason, it is usually necessary for council to run the disposal/use of council land process (LG Act) before it considers a planning permit application for the project (PE Act).

Council land is a valuable resource to the council and the community. Where council decides to use the land for Affordable Housing it can potentially become a valuable resource for a CHO, provided you are clear on the process and timeframes involved.



### Understanding more about local government

Take the opportunity to read through the information and advice for local government (Section 2) to gain an in-depth understanding of the constraints and considerations for local government.

## 4.0 Where to from here

This report is supported by a suite of resources that may be added to and updated periodically.

For local government	For community housing
<ul style="list-style-type: none"><li> read section 3.0 of this report</li><li> read our 'Affordable Housing Agreements: A guide for local government' fact sheet at <a href="http://chiavic.com.au/affordable-housing-toolkit">chiavic.com.au/affordable-housing-toolkit</a></li><li> read our 'Affordable Housing Agreements: Understanding the Community Housing Sector' fact sheet at <a href="http://chiavic.com.au/affordable-housing-toolkit">chiavic.com.au/affordable-housing-toolkit</a></li><li> read our 'Affordable Housing Toolkit – a guide for land use planners' at <a href="http://chiavic.com.au/affordable-housing-toolkit">chiavic.com.au/affordable-housing-toolkit</a></li><li> see <a href="http://chiavic.com.au/affordable-housing-toolkit">chiavic.com.au/affordable-housing-toolkit</a> to understand the constraints and considerations for community housing</li></ul>	<ul style="list-style-type: none"><li> read section 4.0 of this report</li><li> read section 3.0 of this report to understand the constraints and considerations for local government</li><li> see <a href="http://chiavic.com.au/affordable-housing-toolkit">chiavic.com.au/affordable-housing-toolkit</a> for guidance and support</li></ul>

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# Appendices



# Appendix 1: Affordable Housing agreements legal advice

Note that this legal advice was provided to CHIA Vic/MAV as an input to the development of this report. While it is a useful resource for councils and CHOs to highlight specific legal elements and issues, it should not be relied on in place of your own legal advice.



**Our Ref:** IDP 310147-00001

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12 September 2019

Rachel Hornsby  
Hornsby & Co.

**BY EMAIL:** [rachel@hornsbyco.com.au](mailto:rachel@hornsbyco.com.au)

Dear Rachel

## **AFFORDABLE HOUSING CONTRIBUTIONS PROJECT – LEGAL MATTERS**

We refer to your instructions to provide advice in relation to certain legal matters associated with the Affordable Housing Contributions Project (**Project**) as outlined in your instructions by email of 14 August 2019.

### **1. OVERVIEW AND LEGAL CONTEXT**

- 1.1. There are a number of Acts which are relevant to affordable housing in Victoria, although the most relevant Acts for the purpose of this advice are, the *Local Government Act 1989* (**LG Act**), the *Planning and Environment Act 1987* (**PE Act**) and the *Housing Act 1983* (**Housing Act**).
- 1.2. The LG Act provides the legal framework in which Victorian municipal councils operate.
- 1.3. Relevant matters controlled by the LG Act include the sale and leasing of council owned land, procurement of goods and services by a council, the administration of certain public open space and governance and probity requirements for councils.
- 1.4. The PE Act provides a framework for the administration of the use and development of land within a council's municipal district.
- 1.5. Given its function of controlling the use and development of land, the PE Act arguably provides a particularly powerful and practical means of imposing obligations on developers of land with regard to affordable housing.
- 1.6. The legal mechanisms under the PE Act that regulate the use and development of land include, planning schemes, planning permits and agreements under section 173 of the PE Act (**173 Agreement**).
- 1.7. The Housing Act has the broad object, amongst other things, of ensuring every person in Victoria has adequate and appropriate housing at price within his or her means.

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- 1.8. Registered housing agencies, in terms of the Housing Act, are the entities that commonly own and manage affordable housing.
- 1.9. In circumstances where a developer has agreed to provide affordable housing, or has an binding obligation to provide affordable housing, it would typically be provided to a registered housing agency.

## 2. PLANNING SCHEMES

- 2.1. Planning schemes are the primary legal mechanism for regulating the use and development of land within a council municipal district.
- 2.2. Each council has its own planning scheme that it administers.
- 2.3. With regard to the planning scheme for its municipality, a council has three roles, being:
  - 2.3.1. the responsible authority, in relation to the administration and enforcement of the planning scheme. This includes the issue of planning permits and enforcement of compliance with the planning scheme;
  - 2.3.2. the planning authority in relation to amendments to the planning scheme; and
  - 2.3.3. as the municipal council, having regard to its roles and functions as a municipal council under the LG Act.
- 2.4. All Victorian planning schemes are based upon the Victorian Planning Provisions (VPPs) which provides a standardised structure. The VPPs include state based provisions, regionally based provisions and local provision templates. The local provisions allow a council to include content that are unique to its municipality.
- 2.5. An individual council is typically the planning authority for local provisions, and is not the planning authority for state and regional provisions.
- 2.6. The local provisions include the relevant council's municipal strategic statement, local policy and schedules to zones, overlays and particular provisions that may include local content.
- 2.7. Affordable housing related matters are already specifically identified in various state planning policy provisions, including:
  - 2.7.1. clause 11.03-2S Growth Areas. This includes a strategy that precinct structure plans are to create housing choice, diversity and affordable places to live;
  - 2.7.2. clause 16 Housing. This includes that planning for housing should include the provision of land for affordable housing; and
  - 2.7.3. clause 16.01-4S Housing affordability. This clause has the objective of delivering more affordable housing closer to jobs, transport and services. It includes four strategies to improve housing affordability and two means of increasing the supply of well-located affordable housing.
- 2.8. There is scope within clause 21 Municipal Strategic Statement and clause 22 Local Policy for a council to include local policy that supports and encourages the provision of affordable housing within its municipality.

- 2.9. Relevant areas of local policy for which affordable housing policy may be relevant include:
  - 2.9.1. housing;
  - 2.9.2. economic development;
  - 2.9.3. community development; and
  - 2.9.4. spatial and precinct specific local policy.
- 2.10. Certain zone provisions include schedules in which matters relating to affordable housing may be included. As may be relevant, these include the following zones:
  - 2.10.1. Comprehensive Development Zone;
  - 2.10.2. Special Use Zone;
  - 2.10.3. Urban Growth Zone; and
  - 2.10.4. Activity Centre Zone.
- 2.11. The schedules to the Development Plan Overlay (**DPO**) and Incorporated Plan Overlay (**IPO**) controls include scope for the inclusion of affordable housing targets and desired outcomes in relation to development proposals. Affordable housing outcomes, however, cannot generally be mandated by way of the DPO or IPO.
- 2.12. Provisions relating to affordable housing in a planning scheme are currently limited to being of a policy nature or as a decision guideline and cannot mandate the provision of affordable housing.
- 2.13. Given the broad state based policy supporting the provision of affordable housing, there is a broad strategic planning basis to include affordable housing matters in local policy and in the local content of schedules to relevant zones, as well as the DPO and IPO where applicable.
- 2.14. Amongst other things, an amendment to a planning scheme to include local provisions concerning affordable housing policy would need to address the relevant matters identified in the “Strategic Assessment Guidelines for preparing and evaluating planning scheme amendments” published by DELWP as Planning Practice Note 46 (May 2017).
- 2.15. The Strategic Assessment Guidelines in essence require the identification of the need that an amendment seeks to address and seeks consistency with the objectives of planning pursuant to section 4 of the PE Act, consistency with State planning policy and consistency with local planning policy to the extent relevant.
- 2.16. In other words, it is necessary to provide a strategic planning basis to a proposed amendment, in the context of the PE Act and the relevant planning scheme.
- 2.17. In the case of affordable housing, this may entail a strategy for the municipality that has measurable outcomes, has been subject to community consultation and has been costed.
- 2.18. The assessment of an amendment to a planning scheme also includes confirmation that the proposed amendment utilises appropriate provisions within the VPPs and accords with the required structure and operation of the VPPs.

### 3. PLANNING PERMITS

- 3.1. Although there may not be a direct specific mandatory requirement to make provision for affordable housing in a planning scheme, the approval of a proposal by way of a planning permit may require the provision of affordable housing.
- 3.2. The provision of affordable housing by way of a permit condition, for example, may be on the basis of having regard to relevant state and local planning policy in the planning scheme and having regard to relevant decision guidelines and considerations in an approved DPO or approved IPO.
- 3.3. In other words, the planning merits of a particular proposal, having regard to relevant matters in the planning scheme, may warrant the developer providing affordable housing in order for the proposal to be acceptable in planning terms.
- 3.4. In such a case a condition requiring affordable housing would be enforceable, however, it would only apply to the specific proposal allowed by the relevant planning permit and may not be appropriate in other cases.
- 3.5. There are a number of examples of where developers have agreed to provide affordable housing as a percentage of an uplift in the number of storeys, an uplift in residential density, reduced set-backs or the like that goes beyond a level generally preferred in a planning scheme.
- 3.6. This type of arrangement may apply in relation to a planning permit application or the amendment of a planning scheme.
- 3.7. The applicability of any such arrangement would generally need to be on a case by case basis in terms of its planning merit and be commercially attractive to the developer.
- 3.8. Any such arrangement is further limited to it being legitimate in terms of the relevant planning context and considerations.

### 4. USE OF THE DEVELOPMENT CONTRIBUTION OVERLAY

- 4.1. The Development Contribution Plan Overlay (**DCPO**) is a planning control that is used, amongst other things, to raise funds necessary to provide civil and community infrastructure that is needed to support new residential development.
- 4.2. The DCPO allows funds to be raised for both civil and community infrastructure that is needed as result of residential development, for which the provision of the infrastructure cannot be imposed on a single developer by way of a planning permit alone.
- 4.3. The PE Act and caselaw limit the ability to impose infrastructure provision requirements on a single developer where the need for that infrastructure arises more broadly and where it is appropriate that more than one developer within an identifiable catchment contribute to the infrastructure.
- 4.4. Once a development contributions plan (**DCP**) has been approved by way of incorporation into a planning scheme, the payment of contributions pursuant to the DCPO and DCP are mandatory.
- 4.5. It should be noted that a DCP is only effective where new development will occur.

- 4.6. A DCP may have an operational period of between 10 and 30 years, amongst other things, depending upon the nature of the infrastructure being funded and the expected rate of payment of the levy.
- 4.7. Any proportion of the use of the infrastructure that is not attributable to the area being levied must be funded by sources other than the DCP.
- 4.8. Under the PE Act there are two types of contributions identified that may be required under an approved development contributions plan.
- 4.9. The first is a development infrastructure levy pursuant to section 46J(a) of the PE Act. This is primarily used for civil infrastructure and capital works and is considered to have little or no application with regard to affordable housing in the context of this advice.
- 4.10. The development infrastructure levy is typically used to fund civil infrastructure projects such as larger capacity drainage systems, road widening, upgraded intersections, bridges and the like.
- 4.11. A development infrastructure levy can be used to fund community infrastructure such as community centre buildings and the like, however it cannot readily be used to funds services and matters that do not entail specific civil works.
- 4.12. The second type of contribution is a community infrastructure levy, pursuant to section 46J(b) of the PE Act.
- 4.13. The community infrastructure levy is available for community and social infrastructure, which includes services and programs arising from increased urban development.
- 4.14. There is a Ministerial Direction on the Preparation and Content of Development Contribution Plans under section 46M(1) of the PE Act.
- 4.15. The community infrastructure levy was capped at \$1,150 per dwelling in 2018 and is automatically indexed.
- 4.16. The justification for the payment of a community infrastructure levy must be provided in a DCP and the funds collected must be accounted for and spent in accordance with the justification of the levy.
- 4.17. Payment of the community infrastructure levy is triggered at the building permit stage for relevant building work under section 46O of the PE Act and section 24(5) of the *Building Act 1993*.
- 4.18. Amongst other things, the introduction of a DCP to collect a community infrastructure levy for affordable housing would require justification by way of local planning policy in the planning scheme. As outlined previously, there is already general state level policy that broadly supports the provision of affordable housing.
- 4.19. The introduction of targeted local policy into a planning scheme in support of the provision of social housing in conjunction with a DCP would be appropriate.
- 4.20. A DCP could apply to the whole of a municipality for the purpose of collecting a community infrastructure levy to be used as a funding source for a council's affordable housing.
- 4.21. As part of the justification for such a DCP, it would be necessary to develop a costed proposal for the provision of affordable housing over the life of the DCP.

- 4.22. Given the relatively low quantum of the community infrastructure levy that can be collected on the basis of each new dwelling, the total income from such a DCP is limited. Based upon the 2018 levy amount of \$1,150 per dwelling, by way of example, such a DCP would raise \$575,000 per 500 dwellings per year.
- 4.23. For the reasons outlined above, we consider a DCP that is intended to only raise a community infrastructure levy for the purpose of funding a social housing project is feasible. Even so, we are not aware of any example of where this has been previously done in Victoria.
- 4.24. In order to progress such a proposal, it would first be necessary to obtain the authorisation of the Minister for the preparation of an amendment to the planning scheme. Should the Minister not support the use of a community infrastructure levy to raise funds for affordable housing, authorisation would not be forthcoming and such an amendment would not be possible.

## **5. HOLDING AND MANAGING VOLUNTARY CASH CONTRIBUTIONS**

- 5.1. A council is sometimes able to negotiate a voluntary cash contribution from a developer to be used for the purpose of providing affordable housing.
- 5.2. Prima facie, the collection of, holding and administration of any such contributions, should not pose any particular unique issue for a council.
- 5.3. The administration of any such funds would be subject to a council's existing governance, probity and accounting obligations under the LG Act.
- 5.4. Amongst other things, there would arguably be an expectation from the contributor and the community more widely that any such funds collected for the purpose of affordable housing should be used for that purpose.
- 5.5. It would be appropriate for any such funds collected to be done so pursuant to an agreement. Such an agreement could outline how, in a broad sense, the contribution will be administered and used. It could also provide a level of protection to the council with regard to any potential subsequent claim from the developer with regard to the contribution.
- 5.6. It should be noted that funds held internally by a council may be subject to changes in policy of the council.
- 5.7. There are other potential options for a council in relation to holding and administering voluntary contributions.
- 5.8. A charitable trust could be established into which money could be contributed by Council for the purposes of affordable housing endeavours.
- 5.9. A council may create a trust for the purpose of holding funds and providing affordable housing to the community. Such a trust would be a perpetual charitable trust, which could permanently protect an affordable housing fund.
- 5.10. A council may appoint the trustee of the trust under section 193 of the LG Act. The trustee could be the council or a trustee company.
- 5.11. A trust deed could be drafted to ensure that the purpose of the trust and any funds or assets provided to it were perpetually committed to the provision of affordable housing. This would effectively protect the funds should there be a change in council policy or strategy.

- 5.12. A charitable trust is regulated by the Attorney-General, Supreme Court of Victoria and the Australian Charities and Not-for-profits Commission.
- 5.13. Another option is that a council could establish a company, which may operate either as a “for-profit” or “not-for-profit” company. A company would have a separate legal identity to Council, however as a Council controlled entity would still be subject to the same legislative restrictions as Council.
- 5.14. Council could control the company. A company could also act as a trustee to a charitable trust.

## 6. SECTION 173 AGREEMENTS

- 6.1. A 173 Agreement is statutory agreement that has features that distinguish it from an agreement at common law.
- 6.2. The main distinguishing feature of a 173 Agreement is that it runs with land and can bind successive owners of the land upon which it is recorded to the covenants in the agreement, despite the subsequent owners not being a party to the original agreement.
- 6.3. Pursuant to Division 2 of Part 9 of the PE Act, there are a number of statutory requirements for a 173 Agreement to be enforceable against successive land owners.
- 6.4. A 173 Agreement must be between a responsible authority in terms of the PE Act and an owner of land in the area covered by the planning scheme for which it is a responsible authority (s 173(1) PE Act).
- 6.5. An agreement may be entered into with a purchaser in anticipation of the purchaser becoming the owner ((s 173(4) PE Act).
- 6.6. A 173 Agreement must be under seal and must bind the owner to the covenants in the agreement (s 174(1) PE Act).
- 6.7. An agreement may provide for any one or more of the following matters:
  - 6.7.1. the prohibition, restriction or regulation of the use or development of land;
  - 6.7.2. the conditions subject to which the land may be used or developed for specific purposes;
  - 6.7.3. the provision of affordable housing; or
  - 6.7.4. any matter intended to achieve or advance the objectives of planning in Victoria; or the objectives of the planning scheme or any amendment to the planning scheme.
- 6.8. An agreement must not require or allow anything to be done which would a breach a planning scheme or a permit (s 180 PE Act).
- 6.9. A responsible authority must apply to the register of titles, without delay, to record an agreement relating to land other than Crown land (s 181(1) PE Act).
- 6.10. Section 182 of the PE Act provides that after the making of a recording in the Register, the burden of any covenant in the agreement runs with the land affected; and the responsible authority may enforce the covenant against any person deriving title from any person who entered into the covenant.

- 6.11. A 173 Agreement is potentially a powerful legal mechanism for enforcing and administering a payment for the purpose of affordable housing that is either agreed to be made on a voluntary basis or where there is a legal obligation to make the payment.
- 6.12. One significant limitation with using a 173 Agreement with regard to a payment is that the agreement is generally only entered into voluntarily by the land owner.
- 6.13. In circumstances where there is a clear legal basis for a payment, such as a statutory public open space contribution under a planning scheme, or the payment of a contribution under a DCPO and DCP, the basis to require the payment under the agreement would not be in dispute.
- 6.14. In such cases a 173 Agreement may conveniently be used with regard to the timing and process for the required payment. This type of use of a 173 Agreement is common.
- 6.15. Although a 173 Agreement is enforceable by a council, or any other person, a land owner cannot ordinarily be compelled to enter a 173 Agreement in relation to the provision of affordable housing.
- 6.16. Section 173(1A) of the PE Act expressly provides that a 173 Agreement can relate to the provision of affordable housing.
- 6.17. However, in circumstances where there is no clear legal basis to compel a payment, it may be impossible to get an owner of land to enter an agreement to pay a contribution unless they do so voluntarily.
- 6.18. Prima facie, the legal requirements drafting of a 173 Agreement for the purpose of affordable housing is no different to the requirements for drafting a 173 Agreement for any other purpose.
- 6.19. Drafting a 173 Agreement for affordable housing purposes should be such that the obligations of the land owner under the agreement achieve the necessary purpose and are clear and enforceable.
- 6.20. The Department of Environment, Land, Water and Planning has published a template agreement titled "Affordable Housing Agreement under Section 173 of the Planning and Environment Act 1987" (**Template Agreement**).
- 6.21. The Template Agreement addresses for scenarios for obligating the owner of the relevant land with regard to affordable housing matters.
- 6.22. DELWP has also published on its website guidance in the form of videos with regard to negotiating a 173 Agreement for affordable housing purposes.

Please contact the undersigned if you have any queries regarding the above.



**Ian Pridgeon**  
Principal

17 October 2019

Rachel Hornsby  
Hornsby & Co.

**BY EMAIL:** [rachel@hornsbyco.com.au](mailto:rachel@hornsbyco.com.au)

Dear Rachel

**AFFORDABLE HOUSING CONTRIBUTIONS PROJECT  
SUPPLEMENTARY ADVICE CONCERNING LEGAL MATTERS**

We refer to your instructions to provide further advice in relation to certain additional legal matters associated with the Affordable Housing Contributions Project as outlined in your instructions by email of 12 October 2019.

**1. MEMORANDUM OF UNDERSTANDING**

- 1.1. A memorandum of understanding (**MOU**) is a formal way of recording agreement between parties that is intended to facilitate the progress of a more formal and binding arrangement between those parties.
- 1.2. An important aspect of a MOU is that although it may be reasonably detailed and formal in nature, it is not binding on the parties.
- 1.3. The non-binding aspect of a MOU is one of its attractions in relation to the early stages of negotiating and developing a project as it allows parties to agree to an intention to move towards a certain goal, without prematurely creating legally binding obligations.
- 1.4. A MOU may be used as a precursor to a legally binding obligations under a contract or legally binding section 173 agreement.
- 1.5. Even so, although a MOU is not legally binding on the parties, if a government department or municipal council enters an MOU, it arguably creates a moral or social obligation to behave consistently with the matters they have agreed to in the MOU. This is more so the case than it would be with a private developer.
- 1.6. An MOU may be used in the early stages of negotiation between parties with regard to implementing affordable housing outcomes, however, an MOU alone does not create any legally binding obligations.
- 1.7. If there is to be an enforceable outcome, an agreement, contract or other legally binding arrangement between the parties is required.

## 2. PERMIT CONDITION

- 2.1. To be legitimate and enforceable, a planning permit condition, amongst other things, must be:
  - 2.1.1. reasonable;
  - 2.1.2. relate to the planning permission being granted;
  - 2.1.3. fulfil a planning purpose; and
  - 2.1.4. be certain and clear.
- 2.2. Given the objective of the *Planning and Environment Act 1987 (PE Act)* regarding affordable housing at section 4(1)(fa), the *Planning Policy Framework* concerning affordable housing and any applicable *Local Planning Policy*, it is possible that a planning permit for a particular use or development may necessitate a condition relating to the provision of affordable housing, having regard to relevant planning considerations.
- 2.3. If, having regard to the planning merit of a proposal, it is concluded that that a condition requiring affordable housing is warranted (and this requirement is affirmed under any appeal), that condition becomes enforceable and the provision of affordable housing pursuant to the permit would not be voluntary.

## 3. PLANNING SCHEME PROVISION

- 3.1. It is possible to include a provision in a planning scheme that imposes a requirement for the provision of affordable housing in certain circumstances. In such a case, where the planning scheme requires the provision of affordable housing, it would not be voluntary.
- 3.2. A provision in a planning scheme that mandates the provision of affordable housing in certain circumstances is unlikely to be approved if it is contrary to Government policy.

## 4. SECTION 173 AGREEMENT

- 4.1. As outlined in the previous advice, a section 173 agreement alone does not create an obligation in relation to the provision of affordable housing.
- 4.2. A section 173 agreement is a means of implementing the provision of affordable housing for which there is either a pre-existing obligation or an obligation that has been accepted on a voluntary basis.
- 4.3. The Department of Environment, Land, Water and Planning website provides comprehensive guidance in relation to the drafting of section 173 agreements in circumstances where the use is appropriate in relation to the provision of affordable housing.

## 5. DEVELOPMENT CONTRIBUTION

- 5.1. The ability to impose a community infrastructure levy contribution by way of an approved development contributions plan exists under the current legislation.
- 5.2. Although it is understood that a development contribution plan has not been used to date for the purpose of the provision of affordable housing, it is arguably a potential tool that is available now to assist with the provision of affordable housing.

## 6. LEGAL AND POLICY CONTEXT

- 6.1. It is understood that current State Government policy is that the provision of affordable housing should be voluntary and not compelled. This policy position is not clearly articulated in the PE Act or the Victoria Planning Provisions.
- 6.2. The provision for affordable housing on as voluntary basis has inherent practical hurdles, subject to exactly what is meant in practice by voluntary.
- 6.3. Amendments to the PE Act in 2017 and 2018 define affordable housing, make facilitating the provision of affordable housing an objective of planning in Victoria and confirm that an agreement under section 173 may be used for the development or provision of land in relation to affordable housing.
- 6.4. Although the amendments define the term *affordable housing* in the PE Act and recognise affordable housing, they arguably add very little in practical terms to assist with implementation of affordable housing.
- 6.5. Clauses *11.03-2S Growth areas*, *16 HOUSING* and *16.01-4s Housing affordability* within the *Planning Policy Framework* of the VPPS provide planning policy support for the provision of affordable housing.
- 6.6. In addition to the Planning Policy Framework, the Local Planning Policy Framework, provides an opportunity for individual councils to include policy that is tailored for a particular municipality.
- 6.7. It is noted that there are no provisions in the PE Act or VPPs that directly compel the provision of affordable housing, although, having regard to the objective of the PE Act and policy context, it is possible that a certain use and development could necessitate provision for affordable housing.

## 7. WHAT DOES VOLUNTARY MEAN?

- 7.1. It is understood that Government policy is to the effect that affordable housing should be provided on a voluntary basis.
- 7.2. The term voluntary in relation to provision for affordable housing can have different meanings depending on the context.
- 7.3. If the provision of affordable housing is mandatory pursuant to a planning scheme provision or a planning permit condition, it is not voluntary. This is one end of what I will call the “voluntariness spectrum”.
- 7.4. At the other end of the “voluntariness spectrum”, it is possible, but unlikely, that a developer will make provision for affordable housing, without being required to under the planning scheme or a permit, or subject to any other legal obligation, for reasons that that are unrelated to any commercial reward.
- 7.5. Between the above two ends of the spectrum, there is a potential range of facts and circumstances where a developer may be able to negotiate or agree to a favourable commercial outcome on the basis of providing affordable housing.
- 7.6. The degree of voluntariness in relation to negotiations or an agreed outcome would, amongst other things, depend on the level of commercial advantage identified by the developer.

- 7.7. Negotiations that are based upon a commercial advantage to the developer in return for provision for affordable housing must be within the scope of the PE Act, the planning permission sought and have planning merit.
- 7.8. A summary with regard to the various tools and voluntariness is attached to this advice.

## 8. CURRENT LEGAL MECHANISMS

- 8.1. Although there is not currently any direct specific mandatory requirement to make provision for affordable housing in a planning scheme, the approval of a proposal by way of a planning permit may require the provision of affordable housing on the basis of planning merit.
- 8.2. Current legal mechanisms that may create an obligation to make provision for affordable housing as part of a planning approval include:
  - 8.2.1. a pre-amendment 173 agreement that is a requirement of the *planning authority* before the amendment can proceed;
  - 8.2.2. an approved development contributions plan; or
  - 8.2.3. a provision in a local schedule to a zone or an overlay.
- 8.3. The above mechanisms which are within a planning scheme require the approval of the Minister for the relevant amendment of the planning scheme concerned. Accordingly, although they can potentially impose a mandatory obligation, such provisions may not be approved in the first place if they are contrary to Government policy.
- 8.4. Other mechanisms include:
  - 8.4.1. a planning permit condition; or
  - 8.4.2. a registered restrictive covenant.
- 8.5. These mechanisms are subject to the discretion of the decision maker and reliant upon the particular facts, circumstances and planning merit of a proposal on a case by case basis.
- 8.6. As discussed previously, section 173 agreement is a mechanism for enforcing an obligation that already exists or to record a voluntary agreement between parties.

Please contact the undersigned if you have any queries regarding the above.

Yours faithfully  
**RUSSELL KENNEDY**



**Ian Pridgeon**  
**Principal**

FPIA  
 Law Institute of Victoria Environment, Planning and Local Government Law Specialist

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**PROVISION FOR AFFORDABLE HOUSING - SUMMARY OF TOOLS AND DEGREE OF VOLUNTARINESS**

Tool:	Level of voluntariness:	Comment:
Development Contribution Plan	Not voluntary	Mandatory. Approval of DCP requires Minister's approval. Will not be approved if contrary to Government policy.
Pre-amendment section 173 agreement	Not voluntary	For example – the processing of an amendment is reliant upon the developer agreeing to make provision for affordable housing. The <i>planning authority</i> is in a very strong bargaining position to require provision for affordable housing. If this is against Government policy, <i>authorisation</i> for the amendment may be withheld. Alternatively, there may potentially be negotiations regarding a pre-amendment agreement that resulted in a commercial advantage to a developer and was therefore voluntary to some degree.
Provision in a planning scheme	Not voluntary	If the inclusion of a provision in a planning scheme that mandates provision for affordable is against Government policy the relevant amendment would not receive Ministerial approval.
Planning permit condition	Not voluntary	The imposition of a condition is subject to the relevant decision guidelines and the policy context. In some cases the approval of a use and development may arguably necessitate the provision of affordable housing having regard to planning merit. The ability to impose conditions requiring provision of affordable housing can be bolstered by clear and supportive local policy.
Existing 173 that includes an enforceable obligation	Not voluntary	An obligation in a section 173 can be enforced. A section 173 agreement is generally a tool for implementing a pre-existing obligation or giving effect to a voluntary agreement. A section 173 agreement does not in itself create an obligation for the provision of affordable housing.
Registered restrictive covenant	Not voluntary	This can be imposed outside the planning process. A vendor of land could impose a registered restrictive covenant that imposes an obligation for the provision of affordable housing. Generally not able to be enforced by a council. A planning permit must not be contrary to an applicable registered restrictive covenant.

IDP 8893767v2 IDP



Tool:	Level of voluntariness:	Comment:
Negotiated outcome based upon commercial advantage to developer	Voluntary based upon commercial compromise	This is subject to market forces and the planning context of the permission being sought. Ultimately any negotiated outcome regarding the provision of affordable housing to be included in a planning permission must have planning merit and relate to the permission granted. Planning policy can provide support for a negotiated outcome.
Gift	Completely voluntary	Provision for affordable housing without any obligation to do so and without receiving any commercial advantage.

**RUSSELL KENNEDY**  
17 October 2019

IDP 8893767v2 IDP

## Appendix 2: Governor in Council Order

Please refer to the website to ensure you are viewing the most up to date version.  
[www.planning.vic.gov.au/policy-and-strategy/affordable-housing/resources](http://www.planning.vic.gov.au/policy-and-strategy/affordable-housing/resources)

1070 G 23 6 June 2019

Victoria Government Gazette

### Planning and Environment Act 1987

#### SECTION 3AB – SPECIFICATION OF INCOME RANGES

##### Order in Council

The Lieutenant-Governor, as the Governor's deputy, with the advice of the Executive Council under section 3AB of the **Planning and Environment Act 1987** and on the recommendation of the Minister for Planning, the Minister administering the **Planning and Environment Act 1987**, hereby specifies, with respect to affordable housing that is not social housing, the following ranges to be the very low income range, low income range and moderate income range respectively:

Table 1 – Greater Capital City Statistical Area of Melbourne

	Very low income range (annual)	Low income range (annual)	Moderate income range (annual)
Single adult	Up to \$25,970	\$25,971 to \$41,550	\$41,551 to \$62,310
Couple, no dependant	Up to \$38,950	\$38,951 to \$62,320	\$62,321 to \$93,470
Family (with one or two parents) and dependent children	Up to \$54,520	\$54,521 to \$87,250	\$87,251 to \$130,870

Table 2 – Rest of Victoria

	Very low income range (annual)	Low income range (annual)	Moderate income range (annual)
Single adult	\$18,920	\$18,921 to \$30,280	\$30,281 to \$45,420
Couple, no dependant	\$28,390	\$28,391 to \$45,420	\$45,421 to \$68,130
Family (with one or two parents) and dependent children	\$39,740	\$39,741 to \$63,590	\$63,591 to \$95,380

*Note: Table 1 and 2 are derived from annual area median income from the Australian Bureau of Statistics 2016 Census of Population and Housing and indexed using the Australian Bureau of Statistics Housing Group of the Consumer Price Index.*

This Order applies from 1 July 2019.

Dated 4 June 2019

Responsible Minister:

HON RICHARD WYNNE MP  
Minister for Planning

PIETA TAVROU  
Clerk of the Executive Council

## Appendix 3: Ministerial Notice

Please refer to webpage to ensure you are viewing the most up to date version.  
[www.planning.vic.gov.au/policy-and-strategy/affordable-housing/resources](http://www.planning.vic.gov.au/policy-and-strategy/affordable-housing/resources)

### Planning and Environment Act 1987

#### SPECIFIED MATTERS UNDER SECTION 3AA(2)

##### Ministerial Notice

I, Richard Wynne, Minister for Planning and Minister responsible for administering the **Planning and Environment Act 1987**, under section 3AA(2) of that Act specify the following matters as matters to which regard must be had for the purposes of determining what is appropriate for the housing needs of very low, low and moderate income households:

- Allocation
- Affordability (in terms of the capacity for very low income, low income and moderate income households that it is intended for)
- Longevity (in terms of the public benefit of the provision)
- Tenure
- Type of housing, in terms of form and quality
- Location, in terms of site location and proximity to amenities, employment and transport
- Integration, in terms of the physical build and local community
- The following official estimates of housing need:
  - Australian Bureau of Statistics Community Profiles
  - Census profiles for Victoria
  - Department of Health and Human Services Rental Report
  - Metropolitan regional housing plans to guide housing growth
  - Public housing waiting list (Victorian Housing Register list)
  - Victoria in Future data tables.

This Ministerial Notice takes effect on 1 June 2018.

Dated 17 May 2018

HON RICHARD WYNNE MP

Minister for Planning

# PLANNING ON A PAGE

Planning Victoria's liveable communities together

The economic, social and environmental needs of the community are constantly changing.

Broad strategies need to be developed to plan for these changes...

The planning rules ensure that broad strategies and policies can be implemented

So that fair and transparent decisions, consistent with the planning rules, can be made.

The Victorian Government looks at the community needs to understand how to respond.

We work with the community and local councils to get a broad agreement on the ways to respond.

The Victorian Government, councils, and the community work together to develop the planning strategies.

The broader community is then asked what they think.

Strategic plans and policies that set out the way forward are agreed upon.

The Victorian Government and councils propose changes to the planning rules to deliver the policies.

The community, councils and industry are asked about the proposed changes.

Some changes may need expert advice from an independent committee or panel.

The Minister for Planning approves the changes and the planning controls are updated.

Before submitting a permit application, the applicant talks to council about the proposal\*.

\*Some proposals are assessed by the Victorian Government

Council may then refer the application for specialist advice to help make a decision.

The proposal may be advertised so anyone affected can have a say.

If those affected are not satisfied with the council decision, the Victorian Civil and Administrative Tribunal (VCAT) can be asked to review it.

Understanding the needs of the Community

Planning for the Community's needs

Making fair and transparent decisions

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