

**ATTACHMENT C– REVIEW OF RELEVANT DECISIONS OF VCAT AND
REPORTS BY PLANNING PANELS COMMENTARY REGARDING THE
PROVISION OF AFFORDABLE HOUSING**

Part 1: VCAT decisions

Decision	Context and relevance
<p><i>Willowe Pty Ltd v Glen Eira CC</i> [2016] VCAT 140 and <i>Willowe Pty Ltd v Glen Eira CC</i> [2015] VCAT 1123 - see [25] and [50]</p>	<ul style="list-style-type: none"> • Proposal for a 6-storey mixed-use development accommodating 97 dwellings. • Tribunal accepted that applicant’s intention to dedicate 12 dwellings to affordable housing was a relevant factor in considering appropriate yield. • Applicant accepted condition requiring a section 173 agreement to ensure provision of affordable housing. • Condition specified transfer to ‘the Ripponlea Housing Project Ltd or such other operator as approved by the Responsible Authority’. The agency had accepted offer prior to hearing.
<p><i>Haines Street Holdings Pty Ltd v Melbourne CC</i> [2015] VCAT 1428 - see [17] and [62]-[69]</p>	<ul style="list-style-type: none"> • Proposal for a 13-storey building accommodating 143 dwellings. • Draft DDO included requirement that a permit could only be granted for a building above a certain height if it provided a ‘demonstrable benefit to the broader community’, such as affordable housing. • Applicant accepted condition requiring a section 173 agreement to gift a one-bedroom dwelling (equivalent to 5% of dwellings above preferred height in DDO) to a housing trust for affordable housing. • Condition specified transfer to ‘Housing Choices Australia as trustee of the Inner City Social Housing Trust, at the cost of the owner of the land’. The agency had accepted offer prior to hearing.
<p><i>Women’s Housing Limited v Hobsons Bay CC</i> [2014] VCAT 1121 - see [1]-[4] and [19]-[25]</p>	<ul style="list-style-type: none"> • Proposal for social housing in 3-storey building accommodating 21 dwellings. • Council refused application on neighbourhood character, amenity and car parking grounds. • Applicant submitted that concessions should be made because of social housing use. • Council proposed condition requiring a section 173 agreement to ensure social housing use in long term. • Applicant objected to condition and noted Director of Housing already had interest registered on title. • Tribunal agreed with council’s concern that Director could remove interest at any time and the greater certainty provided by a section 173 agreement was required.

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<p><i>Green v Hobsons Bay CC (Red Dot)</i> [2013] VCAT 2091</p> <p>- see [142]-[165]</p>	<ul style="list-style-type: none"> • Proposals for multiple apartment buildings and townhouses from 3 to 6 storeys. • Council and objectors submitted that permits should contain conditions requiring a section 173 agreement for 10% of dwellings to be for affordable housing. • Applicant objected to condition. • Tribunal raised concerns regarding lack of statutory control for requirement within the planning scheme and uncertainty of condition. • Proposed condition did not make clear whether the affordable housing should be provided to an agency at no charge. Tribunal concerned regarding acquisition without compensation. • No agency identified prior to hearing as wishing to acquire dwellings. Tribunal considered unlikely they would want to on the open market and noted limited government funding available. • Tribunal concerned applicant may be unable to comply with condition without agency willing to accept dwellings. • Tribunal agreed with applicant that smaller dwellings will encourage provision of affordable housing in any case. • Condition not imposed.
<p><i>Richmond Icon Pty Ltd v Yarra CC</i> [2013] VCAT 298</p> <p>- see [33]-[38]</p>	<ul style="list-style-type: none"> • Proposal for 9 storey mixed-use development. • Local policy recommended no development above 5-6 storeys unless ‘specific benefits’ could be achieved, such as affordable housing. • Tribunal noted the term ‘affordable housing’ rarely has objective criteria attached and is not necessarily the same as social housing. • Tribunal satisfied that increased supply of one and two bedroom apartments in this location contributed to housing affordability objectives.
<p><i>East Brunswick Village Pty Ltd v Moreland CC</i> [2012] VCAT 1307</p> <p>- see [35]-[40]</p>	<ul style="list-style-type: none"> • Proposal for mixed use development accommodating approximately 1,000 dwellings. • DPO required ‘significant proportion of new development’ to be ‘affordable for households on low to moderate incomes’. • Council proposed condition requiring applicant to partner with a registered housing association to provide 2.36% of dwellings as permanent rental for households in lowest 40% of income to maintain existing ‘social mix’, with the association to meet 50% of costs. • Applicant objected to condition. • Tribunal raised concerns regarding uncertainty of affordable housing and social housing definitions and lack of clarity in planning framework for requirement.

Decision	Context and relevance
	<ul style="list-style-type: none"> • Tribunal noted no evidence a housing association was ready to partner with applicant and therefore compliance with condition may be beyond applicant's control. • Condition not imposed.
<p><i>Taras Nominees Pty Ltd v Yarra CC</i> [2010] VCAT 1917</p> <p>- see [31]-[46]</p>	<ul style="list-style-type: none"> • Existing permit for 3 to 7 storey mixed-use development. • Applicant seeking deletion of condition requiring occupants of one block to be 'eligible for housing under the "Victorian Affordable Housing Growth Strategy" or similarly approved affordable housing scheme'. • Condition was originally accepted by applicant when a funding arrangement was in place for a housing association to purchase that block. • Funding program was then over-subscribed and housing association no longer wished to purchase. Applicant had investigated alternative funding sources without success. • Tribunal considered it 'unrealistic and unreasonable' to expect applicant as a private developer to use the block for social housing. • Tribunal drew distinction with <i>Merri Merri</i> case (see below) where council sought to impose condition against applicant's wishes and without involvement by a housing association. • Tribunal deleted condition.
<p><i>Merri Merri Developments v Darebin CC (Red Dot)</i> [2010] VCAT 1045</p> <p>- see [27]-[47]</p>	<ul style="list-style-type: none"> • Proposal for 93 dwellings across 4 storey apartment building and townhouses. • Council supported amended proposal at hearing subject to conditions including written undertaking for a minimum of 15% of dwellings to be used for social housing. • Tribunal considered the term 'social housing' to be vague and uncertain, but different to 'affordable housing'. • Council offered no justification for 15% as appropriate figure or evidence of housing agency interested in acquiring the dwellings. • Tribunal found no policy support in the planning scheme for the condition and raised concern about compulsory acquisition without compensation. • Tribunal agreed with applicant that condition had equity and nexus problems. • Tribunal considered that 'anything more than market provision' would require more consideration, planning and preparation. • Condition not imposed.

Part 2: Planning Panel and Advisory Committee reports

Report	Context and relevance
<p>C88 Hobsons Bay Planning Scheme Precinct 15, Altona North - See Chapter 7</p>	<ul style="list-style-type: none"> • Council supported a mandatory 10 per cent affordable housing requirement, which is consistent with its adopted <i>Affordable Housing Policy Statement 2016</i>. • The Precinct 15 landowners of noted a State Government affordable housing policy framework was not in place and reliance on ‘untested’ local policy should not be given significant weight. They considered there should be further negotiation around a provision that does not exceed a contribution equivalent to 5 per cent of the dwelling yield at a below market rate. The VPA supported this approach. • The Panel concluded the site should provide affordable housing opportunities through a five per cent contribution of affordable housing at a 25 per cent discount to an appropriate agency. • The VPA supported addition of the following six principles in the Comprehensive Development Plan to deliver affordable housing: <ul style="list-style-type: none"> ○ Voluntariness ○ Accountability ○ Local provision ○ Perpetuity ○ Portability ○ Needs appropriate housing. • The Panel concluded that without a statewide policy framework in place, any notion of mandatory requirements, including the gifting of housing stock, cannot be supported. On this basis, the Panel did not accept the evidence from Dr Spiller that 300 dwellings should be gifted by the landowners to Council or a Housing Trust. • The Panel considered any requirement to provide affordable housing must be via a negotiated agreement, that, inherently, must be to the satisfaction of both parties. • The Panel considered that the issue of what constitutes affordable housing to be a moot point. Consistent with Council’s reference to Yarra Planning Scheme Amendment C185 Panel Report, the Panel said it was not for the Panel to define what constitutes affordable housing (whether it is solely market housing or social non-market housing), particularly given the State Government is seeking to resolve that issue.
<p>Former Moonee Ponds Market Site Advisory Committee, April 2017 - see sections 3.3-3.5</p>	<ul style="list-style-type: none"> • Planning permit application for 6-30 storey development accommodating 695 dwellings. • Preferred height in structure plan for 10-16 storeys.

Report	Context and relevance
	<ul style="list-style-type: none"> • Council proposed condition requiring sale of 9 dwellings (5% of dwellings above preferred height) to a ‘registered housing provider’. • Committee considered no statutory ‘hook’ to require such housing through application. • Applicant ‘lukewarm’ in objecting to condition. • Committee queried how condition would work in practice, for example, whether sale would be at market or reduced rate. • Committee nevertheless supported condition.
<p>Government Land Standing Advisory Committee, Tranche 4, Part 95 Williamsons Road, South Morang, March 2017</p> <p>- see section 4.2</p>	<ul style="list-style-type: none"> • Owner proposed to rezone land from Public Use Zone to Mixed Use Zone with a Development Plan Overlay. • Council submitted DPO should include a requirement for a section 173 agreement ensuring 5% affordable housing on site. • Recently approved Clause 21.09-3 stated that ‘Council aims to achieve the inclusion of 5% social housing and 10% affordable housing in the structure planning of any established or greenfield housing development’. • Owner objected to requirement. • Committee recommended requirement in the DPO for section 173 agreement that the owner will provide 5% of the total number of dwellings ‘for the purpose of social housing developed in association with an accredited housing association’. • Committee considered Clause 21.09-3 could have more clearly expressed the 5% provision as a ‘requirement’ but that Council had been ‘consistent and clear in its intention’.
<p>Amendment C221 to the Melbourne Planning Scheme (West Melbourne Waterfront), January 2017</p> <p>- see section 9.2 and appendix D</p>	<ul style="list-style-type: none"> • Proposal to rezone site from Commercial 2 Zone to Mixed Use Zone with a Development Plan Overlay. • Proponent proposed requirement for owners to enter section 173 agreements to provide affordable housing. • Requirement for 15% of residential floor area above 10 storeys ‘to be held in a Trust and managed as affordable housing, with the sole purpose of the Trust to be the provision of affordable housing’ or ‘provided to a housing provider at nil cost’.

Report	Context and relevance
<p>Amendment C185 to the Yarra Planning Scheme, January 2017</p> <p>- see sections 5 and 7.3</p>	<ul style="list-style-type: none"> • Proposal to rezone land and planning permit application for mixed use development. • Proponent accepted permit condition proposed by council for a section 173 agreement requiring owner to enter an 'arrangement with a state government accredited housing association in respect of 5 percent of the total number of dwellings to be purchased or managed by that accredited housing association as affordable housing within the meaning of that affordable housing agency's remit'. • Panel considered there was local policy support and precedents for the 5% requirement, although the examples provided were not contended at Panel hearings. • Panel noted it would not have supported a requirement for the dwellings to be gifted to a housing association. • Council and proponent did not attempt to distinguish between affordable housing and social housing. • Panel noted there are no generally agreed definitions but considered it was not its role to define the terms. • Panel accepted the definition of 'affordable housing' was effectively being passed on to the housing association as the implementer.
<p>Flemington Hill and Epsom Road Advisory Committee, Stage 4, June 2016</p> <p>- see section 7.4</p>	<ul style="list-style-type: none"> • Proposal to rezone two precincts to a Comprehensive Development Zone. • Proponent accepted a requirement for '5% of new dwellings to be held in Trust and managed as affordable housing'. • Council sought 10%. • Committee supported 5% provision, with no discussion in the report regarding 10%.
<p>Amendment C123 to the Moreland Planning Scheme (Coburg Activity Centre), October 2014</p> <p>- see section 8</p>	<ul style="list-style-type: none"> • Proposal to apply Activity Centre Zone to the Coburg Activity Centre. • Council proposed a requirement that developments of 10 or more dwellings must ensure that 20% of dwellings are affordable and targeted to people in the lowest 40% of income groups. • Panel acknowledged submissions and evidence that, in the absence of government funding support, the requirement could have a perverse outcome, undermining redevelopment objectives for Coburg and associated benefits for the broader community. • Panel considered there is an equity argument that broader societal needs should be met through the broader tax base rather than individual developments, unless there is a framework in place. • Panel considered that justification for such prescriptive requirements would need to include affordability criteria, the

Report	Context and relevance
	<p>proportion and type of dwellings to be provided, housing sub-market analysis, mechanisms to secure long term augmentation of supply, and responses to identified needs.</p>
<p>Amendment C134 to the Moonee Valley Planning Scheme (MSS Review), May 2014 - see section 5</p>	<ul style="list-style-type: none"> • Council proposed a strategy in the MSS encouraging 10% affordable housing provision for residential developments of 10 or more dwellings. • Panel considered this was not ‘practical or possible’ to mandate through the MSS. • The Panel recommended the strategy be amended to the following: ‘For residential developments of 10 or more dwellings, encourage the provision of affordable dwellings’.
<p>Moonee Valley Racecourse Redevelopment Advisory Committee, Stage 4 (December 2013) - see section 14.2</p>	<ul style="list-style-type: none"> • Proposal to apply Activity Centre Zone. • Council proposed requirement for a section 173 agreement requiring 5% provision of affordable housing to be delivered through the National Rental Affordability Scheme. • Proponent objected that this requirement was not imposed elsewhere and was a tokenistic response. • Committee noted 5% affordable housing contributions included in the Yarra Planning Scheme for the Amcor and Channel 9 redevelopment sites and considered this to be a ‘fair proportion of the overall development quota’.
<p>Amendment C104 to the Yarra Planning Scheme (Channel 9 Site), October 2011</p>	<ul style="list-style-type: none"> • Proposal to rezone land from Industrial 1 to Mixed Use and apply the Development Plan Overlay. • Draft development plan provided for at least 5% of homes to be affordable housing (owned and managed by a registered housing provider). • Provision not contested or discussed in Panel report.
<p>Amendment C70 to the Monash Planning Scheme, June 2008 - see section 9.4</p>	<ul style="list-style-type: none"> • Proposal to rezone land from Business 3 to Business 2 with Incorporated Plan Overlay and planning permit application. • Permit application included 39 apartments to be used as affordable housing. • Panel supported the provision of affordable housing on site and recommended a condition to maintain it in perpetuity. • Condition requires a section 173 agreement requiring ‘execution of an on-going management agreement for the affordable housing complex with a suitable affordable housing agency to ensure that the apartments are either sold or leased to the agency and thereafter made available to suitable candidates for no more than 30% of their income or at least 15% less than market rental rates; or by some other means which is to the satisfaction of the Responsible Authority’.