



Opportunistic, ill-considered and impossibly vague: barriers to inclusionary zoning in Victoria

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ABSTRACT

Melbourne's housing affordability crisis is threatening the long-term social, economic and environmental sustainability of its urban development. One planning tool used elsewhere to increase the supply of affordable housing is 'Inclusionary Zoning' (IZ), where local authorities are empowered to require a contribution towards affordable housing from new developments. A mixed methods research design combined policy, legislative and case analysis with interview data to discover and critique the barriers to the introduction of IZ in Victoria, and through this, the perceived and actual role of planning in influencing housing outcomes.

Findings suggest that even in the event an IZ scheme overcame core criticisms of opportunism and vagueness of definition, there are stronger, cultural forces at play militating against use of IZ to create affordable housing opportunities, in particular the persistent conservatism of planning policy in Victoria. Other identified barriers include conflicting evidence and opinion as to the effectiveness of IZ in achieving desired outcomes, the limited capacity of local governments to administer IZ schemes and the risk of perverse outcomes where action is not coordinated at a metropolitan level. The study concluded that in order for IZ to be introduced in Victoria, a significant shift in policy coupled with legislative reform would be needed at the State Government level.



DECLARATION

This thesis does not contain any material that has been accepted for the award of any other degree or diploma in any education institution and, to the best of my knowledge, contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed:

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1.INTRODUCTION

1.1 Background

Inclusionary Zoning (IZ) is a planning tool that local authorities within Australia and elsewhere have employed to increase the supply of affordability housing (see Davison et al., 2012; Cullingworth & Nadin, 2002 and Crook & Whitehead, 2002). Significant research and policy advocacy has been undertaken to build the case for IZ to be introduced in Victoria (City of Moreland, 2012; Gurran et al., 2008; SGS Economics and Planning, 2007; Wood et al, 2008) with various opinions and strategies put forward as to the best way in which a scheme should be realised, along with policy and regulatory justifications.

Over the past thirty years several attempts have been made by inner city councils in Melbourne to implement limited IZ schemes, which have in turn been successfully challenged at Victoria's planning appeals tribunal, the Victorian Civil and Administrative Tribunal (VCAT). Two recent cases include *East Brunswick Village Pty Ltd v Moreland CC* [2012] VCAT 1307 ("*East Brunswick Village*"), and *Merri Merri Developments Pty Ltd v Darebin CC (Red Dot)* [2010] VCAT 1045 ("*Merri Merri*"), where attempts were made to impose conditions on the permit for specific developments, requiring a percentage of the housing to be designated as permanently available affordable rental housing¹.

These attempts at IZ arose in the context of what is widely considered a 'crisis' in housing affordability in Melbourne, and Australia more broadly (Beer, Kearins, &

¹ In *Merri Merri Developments Pty Ltd v Darebin CC*, condition terms were:

. "4. Before the development and/or use start, the owner of the land at 38 Merri Parade, Northcote must provide a written undertaking to the satisfaction of the Responsible Authority to the effect that, without the written consent of the Responsible Authority:

a) a minimum of 15% of the residential dwellings on the land must be designated and used for social housing."

In *East Brunswick Village Pty Ltd v Moreland CC*, amended condition terms required EBV to:

'a) Set aside 15 dwellings (ie 2.36% of its maximum 650 dwellings) for permanent rental by households in the lowest 40% of the overall income distribution.

b) Partner a registered housing association in making this provision, with the association meeting 50% of EBV's costs in supplying those dwellings.



Pieters, 2007; Berry & Hall, 2005; Rowley & Phibbs, 2012). There has been a steady decrease in the availability of diverse and affordable housing for Australians on middle to low incomes over the past decade, with Australian house prices now more than seven times typical household incomes, compared to four times incomes at the start of last decade (ANZ & NATSEM 2011). According to analysis by ANZ & NATSEM (2011), inner Melbourne is the least affordable housing market in Australia. This lack of affordable, well-located housing is a threat to the long-term social and economic sustainability of our cities (see, e.g. Birrell et al., 2012; Tomlinson, 2012).

1.2 Aims and justification of research

This research project sought analyse these previous attempts at introducing IZ in Victoria, as well as the broader planning policy and legislative environment, to determine why they had failed, and what barriers remain to the introduction of IZ in Victoria. Underpinning this technical analysis was the broader question of whether the current culture of planning in Victoria supports the introduction of a planning mechanism such as IZ, and what the limits to planning might be with respect to responding to the housing affordability crisis.

1.3 Research methodology and thesis structure

As background to the research question, a literature review was undertaken (**Chapter 2**) on the current crisis in housing affordability facing Australian cities and what implications this might have for the long-term social and economic development of Melbourne. IZ is then investigated as one in a basket of planning tools available to procure affordable housing. This is followed by a review of the critical literature related to the role of planning in responding issues of housing supply and affordability.

Chapter 3 describes the method that is followed in answering the research question. The research method involved analysis of current planning legislation, policy and case law in Victoria, including the three leading VCAT appeals reviewing local attempts at introducing IZ schemes (**Chapter 4**). This is followed by a recount of findings from interviews with five recognised experts in Victorian planning policy, practice and



legislation, selected for their particular involvement in previous attempts to introduce IZ, as well as their professional or academic engagement with planning policy and practice related to housing in Victoria (**Chapter 5**). Interviewees were asked to attend hour-long, semi-structured interviews with discussion driven by the particular expertise of the interviewee. Taken together, these sources were analysed to determine what key barriers remain to the introduction of IZ in Victoria. The concluding research findings are presented in **Chapter 6**.



2.LITERATURE REVIEW

This literature review contextualises discussion on the barriers to IZ by first providing an overview of the issue of housing affordability, why it is an important focus, and why it has become an issue of immediate concern in Victoria. The planning mechanism of IZ is profiled as one mechanism used successfully elsewhere to increase the supply of affordable housing. Following this, a brief survey is made of the current critical debate related to the role of planning and urban governance with regard to housing provision.

2.1 Housing affordability and affordable housing

‘Housing affordability’, at its simplest, is the notion of reasonable housing costs in relation to income. To be ‘reasonable’, is it generally accepted that housing costs should not exceed 25 - 30% of gross household income (Bacon, 2012). This notion of housing affordability is particularly relevant to those on low-incomes as wealthier households spending a significant percentage of their income on housing are viewed as more likely to have chosen that outcome (Beer et al., 2007).

This understanding of housing affordability has been incorporated into accepted notions of what end of the market ‘affordable housing’ should seek to service. In the New South Wales *Environment and Planning Assessment Act 1979*, ‘affordable housing’ is defined as ‘housing for very low income households, low income households or moderate income households². The benchmark for rental housing to be considered ‘affordable’ under the supporting *State Environmental Planning Policy (Affordable Rental Housing) 2009* is for the households to pay no more than 30% of their gross income in rent. This is the definition used, for example, to describe housing provided through the City West Housing Affordability scheme, the first IZ scheme in Australia.

² These households are defined as follows (SEPP2009 (6)):

- (1) In this Policy, a household is taken to be a very low income household, low income household or moderate income household if the household:
 - (a) has a gross income that is less than 120 per cent of the median household income for the time being for the Sydney Statistical Division (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent, or
 - (b) is eligible to occupy rental accommodation under the National Rental Affordability Scheme and pays no more rent than that which would be charged if the household were to occupy rental accommodation under that scheme.



Some definitions go further, including within them accessibility indicators. For example, the City of Moreland includes within their definition of affordable housing that it be ‘well located in relation to transport and services’, in recognition that access to jobs and services is especially critical for those on low and moderate incomes (City of Moreland, 2012).

Finally, in some studies ‘affordable housing’ has been defined more narrowly again, as permanent *rental* housing which is available to households in the bottom two quintiles of the income distribution at less than 30% of their gross income (SGS Economics and Planning, 2007). ‘Permanent’ here implies that the housing is managed by a Government authority or registered housing association, or at the very least is encumbered by a covenant on title restricting who the property can be sold or leased to. This was the definition put forward in expert evidence in the IZ test case, *East Brunswick Village v Moreland CC*, analysed later in this study.

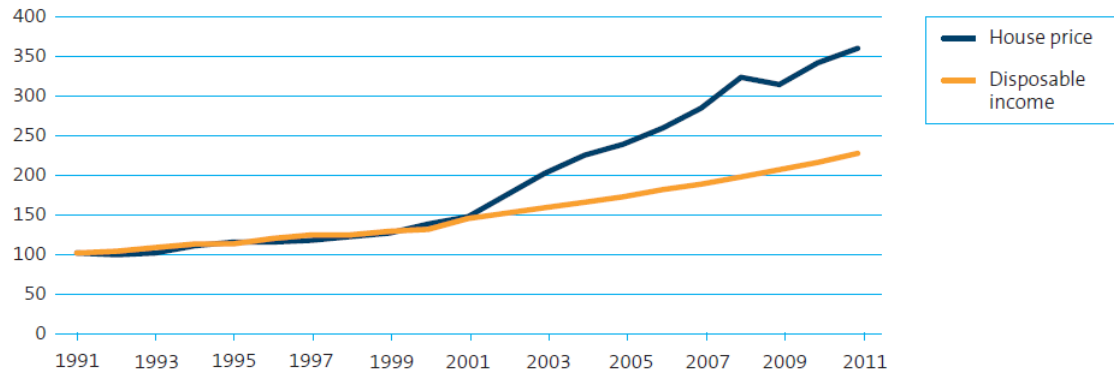
While determining the exact tenure type of ‘affordable housing’ will depend on the particular administrative organisation of an IZ scheme, for the purposes of this research the definition of affordable housing adopted (unless stated otherwise) is housing that is affordable to those in the lowest two quintiles of the average income bracket, costing no more than one third of household income.

2.2 Housing affordability in Australia

Australia has experienced a steady decrease in availability of diverse and affordable housing for those on middle to low incomes over the past decade (Beer et al., 2007; Berry & Hall, 2005; Rowley & Phibbs, 2012). According to analysis undertaken by AMP & NATSEM, average Australian house prices are now more than seven times typical household incomes, compared to four times incomes at the start of last decade,



with median house prices more than doubling from \$169,000 in 2001 to \$417,000 in 2011 (Figure 1) (AMP & NATSEM, 2011)³.



Note: The median house price index was calculated using RP Data median house prices for Australia on an annual basis up to March of each year. RP Data house prices include all residential dwellings sold during the year. Median after-tax income was based on ABS Census estimates for 2001 and NATSEM modelled data for 2011. Numbers between 2001 and 2011 were interpolated and numbers prior to 2001 were indexed using growth in the ABS' National Accounts Gross Disposable (after-tax) Income measure divided by households (cat no 5206.0).

FIGURE 1 AUSTRALIAN HOUSE PRICES AND AFTER TAX INCOME
(SOURCE: ANZ & NATSEM 2011)

The same report found that across Australia in 2008 over 860,000 households⁴ were experiencing what is commonly termed ‘housing stress’ – that is, households on the lowest 40 per cent of equivalised household incomes spending more than 30 per cent of their income on housing costs (ANZ & NATSEM 2011). Inner Melbourne, in this study, was found to be the most ‘unaffordable’ housing market in Australia, when median house prices were set against average incomes (Figure 2). Other studies corroborate these findings (see, e.g. Gurren et al., 2008 and Demographia, 2013).

³ NATSEM's figures are derived from the Australian Bureau of Statistic's Household Income and Income Distribution, Australia, 2009-10, and calculate rates of housing stress defined as households on the lowest 40 per cent of equivalised household incomes who spend more than 30 per cent of their income on housing costs (NATSEM 2013).

⁴ This figure does not include ACT or NT, as data was not available.



TOP 10 LEAST AFFORDABLE					TOP 10 MOST AFFORDABLE				
RANK	CITY	MEDIAN	PRICE/ INCOME 2011	PRICE/ INCOME 2001	RANK	CITY	MEDIAN	PRICE/ INCOME 2011	PRICE/ INCOME 2001
1	Melbourne inner ring	\$625,000	10.2	6.1	1	Latrobe Valley (VIC)	\$162,000	4.3	1.7
2	Sydney inner ring	\$685,000	9.7	8.1	2	Albury-Wodonga (NSW/VIC)	\$245,000	4.9	3.1
3	Adelaide inner ring	\$459,000	8.8	4.8	3	Bendigo (VIC)	\$254,000	5.4	3.0
4	Wollongong (NSW)	\$425,000	8.5	4.7	4	Brisbane middle ring	\$335,000	5.5	4.8
5	Melbourne outer ring	\$505,000	8.4	4.8	5	Toowoomba (QLD)	\$331,000	5.6	3.2
6	Sunshine Coast (QLD)	\$445,000	8.2	5.5	6	Cairns (QLD)	\$360,000	5.6	4.1
7	Sydney outer ring	\$479,500	8.1	6.1	7	Rockhampton (QLD)	\$300,000	5.6	2.8
8	Mandurah (WA)	\$385,000	8.0	4.1	8	Ballarat (VIC)	\$259,000	5.7	3.1
9	Perth inner ring	\$515,000	7.7	4.9	9	Townsville (QLD)	\$390,000	5.8	3.5
10	Newcastle (NSW)	\$350,000	7.7	5.0	10	Mackay (QLD)	\$402,000	6.0	3.8

FIGURE 2 AFFORDABILITY RANKINGS, 2011 (SOURCE: ANZ & NATSEM 2011)

2.3 Affordable housing provision in Victoria

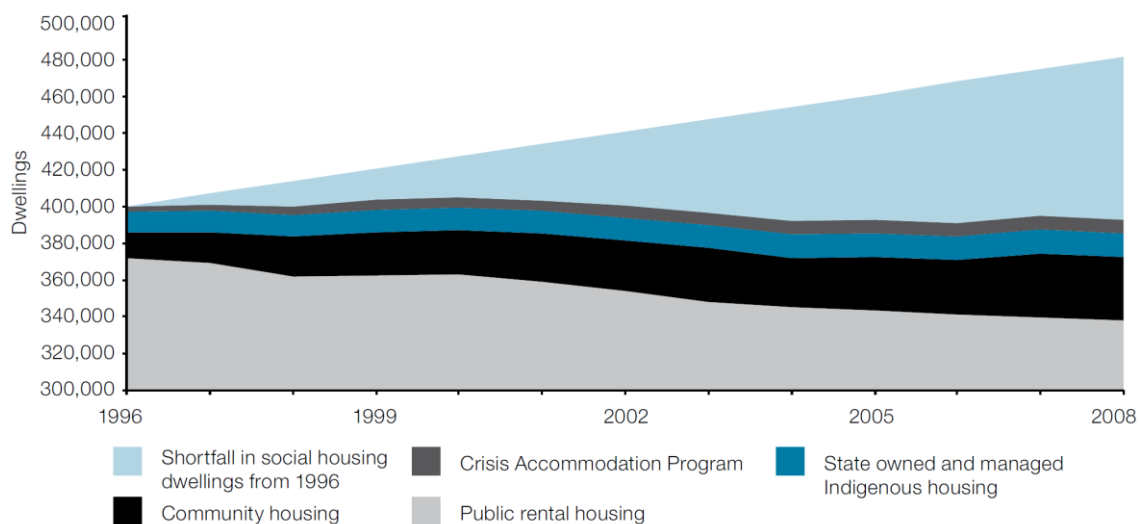
In a similar fashion to the rest of Australia, assisting Victorian households who are struggling to secure affordable housing has traditionally been the province of the tax transfer and public housing systems. Very low income households are, in theory, eligible for subsidized tenancies in dwellings supplied and managed by the State or other social housing landlords⁵ or alternatively may apply for Commonwealth Rent Assistance (CRA) – an income supplement paid directly to lower income households (SGS Economics and Planning, 2007, p. 2).

At March 2013, 36,748 people were waiting for public housing accommodation in Victoria, 27,341 of these in metropolitan Melbourne (Department of Human Services, 2013). This high level of unmet demand is partly explained by research showing that over the past fifty years there has been a steady decrease in capital commitments by

⁵ Social housing encompasses both the public housing sector and the community housing sector. Public Housing is owned and managed by the Victorian Government (through the Director of Housing), whereas community housing is owned and/or managed by non-government organisations (such as community or not-for-profit groups (KPMG, 2012)).



State and Federal Governments in the creation of new public housing, and an increasing cost burden upon State Governments to maintain the aging stock of existing public housing (SGS Economics and Planning, 2007, p. 2). Figure 3 demonstrates the estimated shortfall (as of 2008) in social housing stock that has developed over the past decade. This shortfall has meant that increasingly, State developed and managed housing has changed its role from being ‘a ladder of opportunity for ordinary working people’ to a much narrower ‘welfare safety net’ and option of last resort for those who are particularly vulnerable or destitute (Spiller 2013, p.8).



Note: An implication could be drawn from this graph that there was no unmet need for social housing in 1996. As at 30 June 1996, however, the *Housing Assistance Act 1989 Annual Report 1995–96* indicated that there were 236,000 applicants on the waiting list for public housing.

Source: ‘Social housing shortfall’ derived from trend in growth of total dwellings from Australian Bureau of Statistics, 2006 *Census Tables, Australia*, ‘Dwelling Structure by Occupied/Unoccupied Dwellings, Time Series Statistic’, cat. no. 2068.0, ABS, Canberra, 2007; Commonwealth Department of Social Security, *Housing Assistance Act 1989 Annual Report 1995–96*, DSS,

FIGURE 3 SOCIAL HOUSING DWELLINGS (NUMBER), 1996 - 2008
(SOURCE: FACHSIA 2009)

The Victorian Government has been investigating new development models ‘to improve the availability of quality social housing in Victoria in a financially sustainable manner’ (KPMG, 2012). Options put forward in a recent discussion paper commissioned by the Victorian Department of Human Services included the development of public-private partnerships and increased community housing provider (CHP) development agreements, where community housing organisations would enter into financial partnerships to undertake socially mixed housing development projects (KPMG, 2012).



However, there was no funding for additional units of public housing allocated in the Victorian Government's most recent social housing policy, *New Directions for Social Housing: A Framework for a Strong and Sustainable Future* (DHS, 2014), with the focus instead being on strategies to reduce or deter anti-social behaviour of public housing tenants (a 'three strikes out' rule); improve the state of the current stock through progressive upgrading; and 'attract more private investment in social housing' (DHS, 2014). The latter is intended to be achieved through promoting partnerships with the private and not-for-profit sector, as well as trialling 'place management strategies' (DHS, 2014).

2.4 Inclusionary Zoning

Inclusionary Zoning (IZ) typically refers to a regulatory instrument that requires the inclusion of an element of affordable housing from development undertaken within the inclusionary zone. For example, there may be a requirement to deliver 15% affordable housing within a new residential apartment block, either physically, or through a cash-in-lieu contribution equal to the value of such dwellings (Rowley and Phibbs, 2012). Development approval can be made conditional upon such inclusion or contribution being made. Within these basic parameters there are a number of implementation possibilities, including mandatory requirements and standards for affordable housing, coupled, in most cases, with offsets against the cost of providing the affordable housing; incentive-based zoning that is voluntary, but results in the production of affordable housing if the incentives are taken up; and/or negotiated development approvals that either set land aside for non-market development or produce affordable housing based on a policy framework articulated in local plans (Gladki & Pomeroy, 2007).

IZ thus represents 'a complete integration of land and housing policies with urban planning' (Meda, 2009) through use of a planning instrument to develop affordable housing within a specific location. Aside from the general benefits attached to provision of housing to those in need (such as avoiding homelessness or severe housing stress), IZ appears to attract the most support where it is applied in an area that has seen an increase in the value of property as a result of an urban planning decision (i.e. through rezoning or infrastructure improvement) and thus acts as a way of recovering a portion



of the increase in land value for wider society (Whitehead, 2007; Crook et al., 2002; Calavita and Mallach, 2009).

Importantly, in planning for income and housing diversity in desirable, well-serviced areas, IZ also directly tackles the issue of locational disadvantage, working against the observed dislocation of housing and labour submarkets in modern cities and ensuring a more even distribution of resources and opportunity (Gleeson et al. 2012, p.120). Other researchers have commented on the importance of IZ in assisting in social integration in communities (Nirider, 2008) as well as in providing better located housing not only for the poorest communities but also for key service workers (Gladki & Pomeroy, 2007), and increasing access to important income defining opportunities such as employment, education, health, and other services (Rusk, 2006).

2.5 International examples of Inclusionary Zoning

IZ has been successfully introduced in a number of jurisdictions internationally. In the UK, for example, national planning policy since the late 1970s has contained mechanisms to enable local authorities in England to provide for affordable housing (Crook et al. 2002). Express provision for a national IZ scheme was established in 1990 in the context of rapidly declining central government investment in public housing (Cullingworth & Nadin, 2002). The scheme gave local authorities the power to mandate the inclusion of affordable housing within new developments (at times up to 50 per cent), though Section 106 Agreements⁶. In the 15 years between 1990 and 2005, it is estimated that over 40 per cent of affordable housing built was created through this policy (Cullingworth & Nadin, 2002). According to Crook and Whitehead (2002), proactively securing development opportunities for social housing providers has been one of the most enduring roles of the planning system in the United Kingdom.

In the United States the first IZ scheme was introduced in 1971 in the County of Fairfax. A more recent example is the IZ scheme established in Highland Park Illinois⁷. From 2003, it required that twenty percent of all residential development with five or more

⁶ Section 106 of the Town and Planning Act (UK) regulates the development of these Agreements.

⁷ See HIGHLAND PARK, ILL., CODE § 150.2102(C)(2003).



units be sold at “affordable” prices set by the city (Nirider, 2008)⁸. While evidence suggested that the ordinance at first resulted in a stalling of development, within three years there was resumption in home-building rates (Nirider, 2008, p. 1939). Several other Chicago-area suburbs followed suit by adopting IZ in their areas (Nirider, 2008).

2.6 Planning for affordable housing and IZ in Australia

A 2012 report into emerging practices in affordable housing, urban renewal and planning in Australia showed that there has been an increasing use of the planning system to secure affordable housing in recent years, with approaches most advanced in Queensland, South Australia and New South Wales (Davison et al., 2012) (see Table 1 and Table 2). Schemes introduced in these states, including IZ, barrier reduction, affordable housing incentivisation, density bonuses and streamlined planning processes were generally more effective than ‘first generation’ affordable housing schemes (Davison et al., 2012). These schemes achieved multiple ends, including increasing the supply of affordable housing in all three cities, across multiple projects; delivery of better-located and more diverse housing; embedding the provision of this housing within the overall development process; and involving not-for-profit housing providers, thereby further contributing to the growth of Australia’s affordable housing sector (Davison et al., 2012).

The City West Housing Affordability Program in Ultimo-Pyrmont, Sydney remains the leading example of successful introduction of an IZ scheme in Australia. It was created in March 1995, though a local planning overlay⁹ intended to apply to all new residential development in the area. The aim of the Scheme was ‘ensure that households with low to moderate income continue to live and work in Ultimo-Pyrmont’ (Sydney Local Environment Plan, 2005) based on principles of access to economic opportunity and recognition of the value of social diversity. The policy specifically recognised the

⁸ Nirider notes that payments in lieu could be made to the city’s Affordable Housing Trust Fund if developments are under a certain size. Residents were selected for eligibility these affordable houses on the basis first of income, but also on residency and employment status, with priority given to those who already live locally and work for one of the several local governmental bodies that serve the area (Nirider, 2008, p. 1934).

⁹ The Sydney Regional Environmental Plan No. 26 City West (October 1992) set out the initial principles regarding the provision of affordable housing, with specific clauses enabling the collection of affordable housing contributions from the private sector added later through Amendment No. 4 - Affordable Housing (March 1995). This was superseded in 2005 by the Sydney Local Environment Plan (LEP) 2005.



connection between the Scheme and the objects of the *Environmental Planning and Assessment Act 1979*, in contributing to the ‘proper management and development of resources for the social and economic welfare of the community and a better environment and the provision and maintenance of affordable housing’ (Department of Planning, 2010). While the conditions of this overlay were successfully challenged, first at the NSW Land and Environment Court, and then the Supreme Court, the NSW Government responded by passing an amendment to the *Environmental Planning and Assessment Act 1979* (NSW) (June 2000) enabling environmental planning instruments to make provision for providing, maintaining and regulating matters relating to affordable housing¹⁰ (Department of Planning, 2010).

446 units of affordable housing were built in the Utimo-Pyrmont area between 2000 and 2005 as a direct result of this scheme, across 11 locations and housing 800 people with an ultimate aim of providing 600 financially self-sufficient units of accommodation by 2024 (SHFA, 2004, p. 20). This housing program was undertaken in the context of a larger program of urban renewal in the area, which saw over 18 hectares of parks and gardens developed and additional transport brought into the area. During this period, the median price of a house in the Pyrmont area more than doubled, from \$250,000 to \$585,000 (SHFA, 2004, p. 3).

¹⁰ See Environmental Planning and Assessment Act 1979 and State Environmental Planning Policy No. 70 - Affordable Housing (Revised Schemes)



TABLE 1. PLANNING LEGISLATION AND AFFORDABLE HOUSING: STATE-BY-STATE COMPARISON (SOURCE: DAVISON ET AL. 2012)

Jurisdiction	Legislation	Reference to housing needs—choice or affordability
ACT	Planning and Development Act 2007	Territory plan may make provision for affordable housing (s51)
NSW	Environmental Planning and Assessment Act 1979	Affordable housing an objective of the Act (s5)
NT	Planning Act 1999	(no reference)
Qld	Sustainable Planning Act (SPA) 2009	Housing choice and diversity to be considered in decision making, s5(1)(c). Reference to ‘affordable development’ as a component of sustainable communities (s11(c)(i))
SA	Development Act 1993	An objective of the Act (s3) is to promote or support initiatives to improve housing choice and access to affordable housing
Tas	Land Use Planning and Approvals (LUPA) Act 1993	(no reference)
Vic	Planning and Environment Act 1987	An objective of the Growth Areas Authority is to promote housing diversity and affordability in growth areas (s46AR(d))
WA	Planning and Development Act (PDA) 2005	(no reference)

TABLE 2. LEADING APPROACHES TO PLANNING FOR AFFORDABLE HOUSING IN AUSTRALIA (SOURCE: DAVISON ET AL. 2012)

State	Mechanism
Queensland	The Queensland Government has pursued site-specific affordable housing initiatives in recent years under the auspices of its Urban Land Development Authority (ULDA), established in 2007. The ULDA has applied a combination of land supply, barrier reduction, affordable housing incentivisation and inclusionary zoning to large renewal sites in Brisbane.
South Australia	In 2006, landmark amendments to South Australia’s Development Act 1993 enabled local plans to include provisions for affordable housing. This operationalised a state affordable housing target announced in 2005, for achieving 15 per cent affordable housing in new development areas, including 5 per cent high needs housing. The planning provisions were initially restricted to the redevelopment of government sites, but are increasingly applied when major new residential areas are released or rezoned to allow higher density development.
New South Wales	The government introduced State Environmental Planning Policy (SEPP) (Affordable Rental Housing) in 2009, incorporating a number of existing provisions relating to retention or provision of low-cost or special needs housing, as well as some measures to encourage affordable housing development, including a streamlined planning process and density bonuses. The City of Sydney has also sought to secure affordable housing on urban renewal sites through inclusionary zoning and negotiated planning agreements.

2.7 Inclusionary zoning in Victoria

There is a significant body of research and advocacy putting forward the case for IZ in Victoria (City of Moreland, 2012; Nicole Gurran et al., 2008; SGS Economics and Planning, 2007; Victorian Council of Social Services, 2010; Wood et al., 2008), with several local governments in Melbourne having advocated for or made attempts (thus far unsuccessfully) to introduce schemes in their municipalities.¹¹

¹¹ See, e.g. *East Brunswick Village Pty Ltd v Moreland CC* and *Merri Merri Developments Pty Ltd v Darebin CC*, analysed in Chapter 5.



The IMAP group of councils¹², in particular, commissioned SGS Economics and Planning in 2007 to develop a defensible a framework for an IZ scheme for the inner Melbourne area. The model chosen was an ‘Affordable Housing Overlay’ targeting all development in a given area. Housing units or funds generated through IZ would be channelled through registered Housing Associations to ensure permanent provision of social housing in the Region. The cost could be either entirely supplied through the contribution amount, or alternatively 50% of the cost could be borne by State Government, Commonwealth Government (e.g. NRAS) and community contributions. All dwellings acquired through the scheme would be vested in registered Housing Associations (SGS Economics and Planning, 2007). Thus far this scheme has not been realised.

2.1 Current debates on the role of planning

Debate as to the legitimacy or otherwise of IZ can be positioned within a broader discussion on the role of planning in the context of urban intensification in the 21st century, and how ‘urban goals’ could or should be achieved (see, for e.g. Legacy and Leshinsky, 2013; Gleeson and Low, 2000; Sager, 2011). An ideological divide in current planning theory and practice has been observed, between those who would limit the role of central government-led planning regulation to maximising the efficient allocation of resources through land use policies, and those that require of planning broader policy imperatives, including social equity and ecological sustainability (Legacy & Leshinski, 2013, p. 410).

This unresolved tension is playing out at the policy level in Victoria, where it has been argued there is a gap between high level recognition of the significant long-term challenges facing Melbourne in terms of affordability and location of housing, and the planning tools available to influence local outcomes. According to the University of Melbourne Chair of Urban Planning, Professor Richard Tomlinson, ‘the disjuncture between intent and outcome is perhaps most evident in the strategic plans prepared by

¹² The Inner Melbourne Action Plan or IMAP group of councils comprise the municipal Councils of Melbourne, Port Phillip, Stonnington and Yarra.



the states for metropolitan regions which, in practice, appear to have little significance aside from the release of land for property developers' (Tomlinson, 2012, p.2).

It is claimed that this disjuncture in intent and outcome is a result of fragmented urban governance (Tomlinson, 2012) as well the increasingly neo-liberalist approach in planning, eschewing government intervention in favour of market-based and voluntary instruments of growth management (Cheshire and Sheppard 2005; Legacy and Leshinsky, 2013; Rydin 2013; Buxton et al., 2012). The concern in the literature is that this trend militates against the introduction and use of 'planning tools' that intervene in the market to achieve a social outcome (Tiesell and Allmendinger 2005, p.58; Legacy and Leshinsky, 2013, p.410). Data collected through the following analysis is analysed in light of these concerns in order to illuminate the potential ideological, as well as technical, barriers to the introduction of IZ in Victoria.



3.METHODOLOGY

3.1 Research question

This research project seeks to answer the question of what the barriers are to the introduction of an IZ scheme in Victoria. It responds to recent, unsuccessful attempts by local governments in Melbourne to introduce IZ, and is framed by the wider issue of a crisis in housing affordability in Melbourne, and the need to develop effective and efficient responses.

A qualitative research method was deemed most suited to the nature of this inquiry, given the need to examine the contextual conditions surrounding policy development and interpretation and the ability afforded by approach to identify themes and patterns that could not otherwise be predicted (Jabareen, 2006). This research takes a ‘meta-policy’ approach, seeking ‘insights not answers’ (Wilkinson, 2011 p.597), and uses the problem of a contested IZ scheme to undertake a broader interrogation of the systems of modern planning regulation.

3.2 Policy, legislative and case analysis

An analysis of Victorian planning policy, legislation and case law related to affordable housing was undertaken in order to understand the barriers – and potential enablers - to the use of IZ in Victoria, and what might need to change in order to see it introduced.

Sources included the Victorian *Planning and Environment Act 1987* (Vic); State and Local Planning Policy frameworks; the new metropolitan planning strategy, *Plan Melbourne* (DTPLI, 2014), and relevant case law including, in particular, three prominent test cases of IZ at the local level, *K.Shaw and Ors v City of St.Kilda and Mandalay Gardens Pty.Ltd. 1988* (“Mandalay”), *Merri Merri Developments v Darebin CC* (“Merri Merri”) and *East Brunswick Village Pty Ltd v Moreland CC*.



3.3 Interview method

In order to better understand the particular barriers to IZ in the Victorian context, as well as to gain insight into the findings of the policy and legislative analysis, the views of selected experts across the fields of planning law, policy and practice were sought through targeted (purposive) interviews.

The choice of participants (5) was based on the need to achieve an understanding of the range of barriers to and enablers of IZ, from across the planning profession, within the constraints of this research project. Interviewees were selected on a purposive sampling technique, on the basis of their direct connection to the implementation of IZ in Victoria, involvement in previous attempts and established expertise in housing policy, affordable housing, and Victorian planning law and regulation. A list of participants is provided at Table 3, along with their relevance to this study. Their views are taken as representative of a wider sample or similarly placed actors (Berg, 2004).

Participants were invited to take part in hour-long semi-structured interviews and asked to provide their opinion on and past experience of barriers and enablers to the introduction of IZ in Victoria, including past attempts at legislative reform and/or action by local governments. It was hoped that the semi-structured interview approach would allow new issues to be uncovered which may have otherwise gone overlooked, and enable the opinion of the interviewee to be explored. Interviews were digitally recorded, and the consent given by interviewees to have their comments personally attributed.

Information gathered through interview was used as primary research into the barriers and likely enablers of the use of IZ in Victoria, as well as to iteratively prompt further research and policy analysis.



TABLE 3. LIST OF PARTICIPANTS

Name	Title and Institution	Relevance to study
Jane Monk	Director, Planning Statutory Services, Department of Transport, Land Use and Local Infrastructure (DTPLI) (currently Director of the Inner City, Metropolitan Planning Authority, Melbourne)	<p>Jane Monk is an urban planner of over thirty years' experience including as a planner in local government, as a past Senior Member of the Victorian Civil and Administrative Tribunal, as Chair of the former Government's Priority Development Panel, and currently as Director of State Planning Services in DTPLI (OVGA 2014).</p> <p>As Director, Monk is responsible for assessing planning scheme amendments, environmental effects assessments and local level heritage controls (DPCD, 2014). She was also involved in the drafting of the first iteration of the <i>Planning and Environment Act 1987</i> and thus well positioned to comment on its intent and current interpretation.</p>
Liz Nairn	Unit Manager, Strategic Planning, City of Moreland	<p>Liz Nairn was the unit manager at the time of the <i>East Brunswick Village v Moreland CC</i> VCAT appeal, and oversaw the development of expert witness statements. She has subsequently led work in Moreland reviewing the potential to implement an inclusionary zoning scheme in the municipality and thus provides important local government context to the case and policy analysis.</p>
Marcus Spiller	Principal and Partner, SGS Economics and Planning	<p>Marcus Spiller was involved in the formation of the first IZ scheme in Australia, in Ultimo-Pymont as advisor to the then Commonwealth Government, on the Better Cities Program.</p> <p>Subsequently, he advised the IMAP group of Councils on how inclusionary zoning could be introduced into the Victorian Planning Policy, including outlining the practicalities of how the scheme would operate. This included who would be eligible to pay, how it would be collected, and what types of development it might cover.</p> <p>Spiller was the expert witness for the City of Moreland in <i>East Brunswick Village v Moreland CC</i>.</p>
David Waldren	National Executive Design Manager, Grocon	<p>Grocon is Australia's largest residential property developer, with experience developing mixed tenure social housing. Grocon has publicly acknowledged the likelihood of inclusionary zoning being introduced in Victoria, and could provide insight into how the property development industry viewed inclusionary zoning.</p>
Rebecca Leshinsky	Senior Lecturer, Planning and Property Law, Australian Catholic University.	<p>Rebecca Leshinsky was chosen to give expert legal and academic opinion on what legislative support there is for inclusionary zoning, and the role of planning in light of the current policy and legislative frameworks. Her recent academic work looking at tools for equitable urban intensification is also relevant, and cited, in this study.</p>



3.4 Limitations

There were a number of limitations to the methodological approach taken in this study. Firstly, while all effort was made to locate the most relevant case law examples of attempts at introducing IZ, it is possible that there have been other attempts that were not discovered in the course of the research due to not being contested at VCAT. Further, the small number of experts interviewed on this topic means that it is unlikely the full range of potential opinion and experience was gained. This was mitigated to some extent through seeking opinion from across the ‘spectrum’ of planning influence.

3.5 Discussion and conclusion

The findings of these investigations are brought together in a discussion of results, setting out key findings with regard to the identified barriers to the introduction of IZ in Victoria, and the implications of this in regard to the broader question of what role planning has or should have in relation to influencing housing outcomes.



4.POLICY, LEGISLATION AND CASE LAW ANALYSIS

In this Chapter the Victorian Planning and Environment Act 1987, planning policy framework and supporting policies are analysed in order to understand the current mandate for an IZ scheme, and interrogate the views put forward at VCAT that there are limits to the extent that planning can play a role in solving the housing affordability crisis.

4.1 The role of planning according to the Planning and Environment Act

The *Planning and Environment Act 1987* sets the form work for planning and environmental regulation, processes and practices across Victoria. The Act, and recent amendments, reflect a clear intent to have planning decisions guided by consideration of a wide range of impacts, including the economic, social and environmental impacts of decisions, for present and future generations, as well as to give effect to current policy directions related to land use and development.

A holistic approach to land use planning is set out in the Act, requiring that planning frameworks developed under the Act are coordinated with State environmental, social, economic, conservation and resource management policies (Section 4(2)(c)). It also contains explicit provision for consideration of social and economic effects when decisions are made about the use and development of land (Section 4(2)(d)); and encouragement for the achievement of the Objectives of Planning (set out in Section 4(1) of the Act) through positive actions by responsible authorities and planning authorities (Section 4(2)(g)).

The following Objectives are particularly relevant to our analysis of planning tools related to affordable housing (Section 4(1)):



- (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
- (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
- (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;
- (g) to balance the present and future interests of all Victorians.

Decision makers also must have regard to these Objectives when making a planning decision, and they inform the contents of the State and Local Planning Policy Frameworks (SPPF and LPPF), which guide development at the local level.

Consideration of social effects of planning decisions has been further entrenched in Act through recent amendments to the factors that decision makers must take into account when making a planning decision (Section 60) or amending a planning scheme (Section 12). Previously, decision makers were directed to consider economic and environmental effects, and additionally that they ‘may’ consider social effects. Decision makers now must give equal consideration to all three.

4.2 The Victorian State Planning Policy Framework

The Victorian Planning Provisions (VPPs) and State Planning Policy Framework (SPPF)¹³ give effect to the *Planning and Environment Act 1987*, providing a standard format and overarching policy direction for all Victorian planning schemes. Local governments must provide the local planning policy content, including a Municipal Strategic Statement, and select the appropriate zones and overlays from the VPP, for

¹³ The State Planning Policy Framework (SPPF) is developed in line with the VPPs, and included within every local governments planning scheme in Victoria. It informs planning authorities and responsible authorities of those aspects of State level planning policy which they are to take into account and give effect to in planning and administering their respective areas (Clause 11, Introduction). According to this document, the overriding objective of planning policies in the State of Victoria are: ‘directed to land use and development, as circumscribed by the Planning and Environment Act 1987, a primary objective of which is to provide for the fair, orderly, economic and sustainable use and development of land.’



inclusion in their Planning Scheme (together called the Local Planning Policy Framework or LPPF).

At the strategic level, planning decisions related to housing in Melbourne are guided by three key clauses of the SPPF: Clause 13; 15 and 16. *Clause 13: Settlement* requires that planning ‘anticipate and respond to the needs of existing and future communities through provision of zoned and serviced land for housing, employment, recreation and open space, commercial and community facilities and infrastructure’. It appears to take a broad view of the role of planning in recognising the need for, and as far as practicable contributing towards ‘health and safety; diversity of choice; adaptation in response to changing technology; and economic viability’.

Clause 15: Built Environment and Heritage further requires that planning should achieve high quality urban design and architecture that, relevantly, ‘contributes positively to local urban character and sense of place’ and ‘enhances liveability, diversity, amenity and safety of the public realm’. This is a recognition of the value of diversity in place, and the need for ‘inclusivity’, as well as the role that planning has in preserving and enhancing such diversity. It specifically asks for local authorities to require new development to respond to its context in terms of urban character and cultural heritage and to ‘contribute to the complexity and diversity of the built environment’.

Clause 16: Housing Affordability is the most explicit reference to housing character in the Scheme, demanding that planning have regard to a particular social or economic outcome in devising land use strategies, or making land use decisions. The objective of Clause 16 is ‘to deliver more affordable housing closer to jobs, transport and services’ (Clause 16.01-5) with a demand that planning provide for housing diversity, and ensure the efficient provision of supporting infrastructure:

‘New housing should have access to services and be planned for long term sustainability, including walkability to activity centres, public transport, schools and open space. Planning for housing should include providing land for affordable housing’.



Local governments are given suggested strategies to deliver these on objectives. These include: *encouraging* a significant proportion of new development, including development at activity centres and strategic redevelopment sites, be affordable for households on low to moderate incomes; ensuring land supply continues to be sufficient to meet demand; increasing choice in housing type, tenure and cost to meet the needs of households as they move through life cycle changes and to support diverse communities; and promoting good housing and urban design to minimise negative environmental impacts and keep down costs for residents and the wider community.

It is notable that these strategies all require a level of positive, interventionist action by local authorities, going beyond mere land use planning to speak to the diversity of the housing developed in terms of cost, tenure, internal amenity and environmental performance. It is notable however that no definition of ‘affordable housing’ is provided, leaving the term ambiguous and open to interpretation.

4.1 Interpretation of the State Planning Policy Framework

Ability of local governments to set local policy

VCAT regularly invokes the policies of the SPPF when assessing development applications. Strong statements have been made by VCAT regarding the recognised role of councils as planning authorities to set policy at a local level and to include that policy in the planning scheme, and the need for VCAT to be cautious before finding that such a policy is not capable of implementation or should be disregarded. In *Doncaster Property Partnership v Manningham CC* [2004]¹⁴ the presiding Member held that VCAT should seek to implement a policy unless it was ‘nonsensical’ or ‘irrelevant’ and so long as there were ‘no competing policies or any overriding community interest to the contrary’ (53 – 55). The Tribunal in this case also confirmed that it is open to the

¹⁴ In *Doncaster Property Partnership v Manningham CC* [2004] there was a refusal of a grant of permit for new two-storey building to house a car dealership and service centre on the grounds that the proposal would be an underdevelopment of the site. The local planning policy and strategic vision for the area set out in the Manningham Planning Scheme was for the area, for a high density, mixed use precinct including cafes, restaurants and outdoor seating



planning authority to change a policy that is not working or is producing unwanted or undesirable outcomes or where the needs of the community change (55).

This view supports local authorities developing local policies according to local needs, as well as the implementation tools necessary to implement such policy.

Interpretation of Clause 16, “Affordable Housing”

The Tribunal has made several attempts to provide clarity on the definition of affordable housing, however, ambiguity still remains. For example, contributions to the supply of affordable housing have been seen as equally important to considerations of neighbourhood character, urban consolidation and housing diversity¹⁵ and while the Tribunal has accepted arguments related to this principle being achieved by smaller, more compact housing¹⁶, or housing without car parks, it has been reiterated that “affordable housing does not mean poor amenity”¹⁷. Overwhelmingly however, VCAT has been reluctant to proscribe clear definitional boundaries around the term, maintaining that the provision of affordable housing is ‘a complex matter’ (*East Brunswick Village*, 9) and preferring to assess “affordability” on a case-by-case basis.

4.1 Metropolitan planning policy and affordable housing

Plan Melbourne

Melbourne’s newest metropolitan strategic planning statement, *Plan Melbourne* (DTPLI, 2014) clearly prioritises affordable housing as a key issue of concern. It places housing affordability in the top five pressures facing Melbourne, and notes that it is an issue that, if left unchecked, will undermine the city’s liveability and competitiveness over the coming decades (Government, 2012, p. 5). Seven key ‘Outcomes and Objectives’, are listed, underpinned by ‘Directions’¹⁸, with ‘Housing Choice and Affordability’ listed second, trumped only by ‘Delivering Jobs and Investment’. The intent of this Objective is to ‘provide a diversity of housing in defined locations that cater for different

¹⁵ NJJKT Pty Ltd v Whitehorse CC [2008] VCAT 1410 (11 July 2008).

¹⁶ TP Equity Australia Pty Ltd v Boroondara CC [2013] VCAT 777 (16 May 2013)

¹⁷ See 4 Wills Street Pty Ltd v Stonnington CC & Ors [2011] VCAT 1068 (6 June 2011), noting however the Tribunals comment that “affordable housing does not mean poor amenity”.

¹⁸ These include, in order: Delivering Jobs and Investment, Housing Choice and Affordability, A more Connected Melbourne, Livable Communities and Neighbourhoods, Environment and Water, A State of Cities, Implementation: Delivering Better Governance.



households and are close to jobs and services’, with Direction 2.4 being to ‘facilitate the supply of more affordable housing’ (Government, 2012, p. 18).

In prioritising affordable housing, the Plan recognises many of the concerns raised by this research, including the growing spatial inequality in Melbourne, and the risk this poses to sustainable communities and places. Encouraging aspects of the Plan include the express commitment to investigate land-value capture mechanisms, to engage with the community housing sector in the redevelopment of urban renewal precincts. The Government plans to achieve greater levels of investment in affordable housing, through, for example, encouraging the integration of social and affordable housing options within major urban-renewal and growth-area housing developments. There is also a commitment to amending the VPPs to insert a clear definition of affordable housing and social housing (Government, 2012, pp. 67 - 77).

However, *Plan Melbourne* is silent on how the State or Local Government might create affordable housing opportunities in established suburbs. The initiatives outlined in the Plan are limited to ‘explore’, ‘consider’ and ‘assess the benefits’ (Government, 2012, p. 77) of affordable housing schemes: in effect, promising to investigate and research solutions, rather than trial or implement them. Further, no timeframe for the exploratory studies is given, nor consideration of what planning tools might be employed to promote the supply of affordable housing.

Melbourne 2030

Melbourne’s previous metropolitan plan, *Melbourne 2030: Planning for Sustainable Growth* (UN-HABITAT, 2009), and its update, *Melbourne 2030: a Planning Update, Melbourne @ 5 million*, contained a similar level of support for action on affordable housing, though with a stronger imperative upon local governments to undertake strategic planning exercises. Policy 6.1 outlined the State Government priority areas of ‘increasing the supply of well-located affordable housing’ and encouraged initiatives to achieve this objective, including partnerships with local governments, the private sector and Office of Housing. *Melbourne 2030* was somewhat more forceful than *Plan Melbourne* in its obligations upon local governments, requiring that local governments



undertake housing strategies, including supply and distribution of affordable housing, in order to demonstrate how they would accommodate their share of the projected 620,000 new households that were expected to locate in Melbourne by 2030. Importantly, *Melbourne 2030* also committed the government to monitor the supply of and demand for affordable housing, as well as to undertake their own ‘affordable housing’ projects in ‘Transit City’ areas.

Despite these commitments, the *Melbourne 2030* lacked detail on how local governments would be supported, empowered, or required to achieve the affordable housing outcomes desired in the plan. No targets were set for affordable housing provision, and while monitoring and evaluation was foreshadowed, very little in the way of a substantive policy response was required in the Plan.

4.2 Inclusionary Zoning test cases

As noted, the motivation for this research arose from a series of recent decisions at VCAT, where attempts by local authorities to introduce IZ in selected developments were successfully challenged by the development proponents. Two recent cases include the City of Moreland (*East Brunswick Village Pty Ltd v Moreland CC* [2012] VCAT 1307 (“*East Brunswick Village*”), and the City of Darebin (*Merri Merri Developments Pty Ltd v Darebin CC (Red Dot)* [2010] VCAT 1045 (“*Merri Merri*”). An earlier, similar attempt at a local IZ scheme was the landmark 1988 “Mandalay” case (*K.Shaw and Ors v City of St.Kilda and Mandalay Gardens Pty.Ltd.* 1988), involving the then City of St Kilda. These three cases are analysed below, to identify the key barriers to IZ from a legislative perspective in Victoria.

***K.Shaw and Ors v City of St.Kilda and Mandalay Gardens Pty.Ltd.* 1988 (“Mandalay”)**

An early example of a local attempt to introduce IZ is the City of St Kilda’s 1984 ‘Affordable Housing Development Levy’, crafted with the specific intent to mitigate the social impact of decreasing housing affordability in the local area. The City was determined to ‘do what it could to provide safe, secure and stable housing as essential elements to people’s well-being’ (Aspin, 2008). The test case for this new planning ordinance was the Mandalay flats, a block of 16 rental flats which was to be



redeveloped into a higher density block of apartments. The City imposed a condition on permit requiring that 16 of the newly developed apartments in the 54 unit development be sold either to the Council or the State Housing Authority (Robertson, 1990, p. 179). The developer successfully challenged the levy at the Administrative Appeals Tribunal, who found that the guidelines accompanying the planning provisions of local government were specifically worded to prevent councils from using the newly drafted *Planning and Environment Act 1987* this way (Aspin, 2008, p. 48).

Specifically, the Tribunal found that planning controls were not the appropriate mechanism for achieving the desired maintenance of social mix, and that the permit condition was not able to be classified as an otherwise allowable voluntary agreement with the development under Section 173 of the Act. In reflecting on his personal involvement in this case, and consequent role as Housing Development Officer with the City of Port Phillip (an amalgamated local government authority which subsumed the City of St Kilda), Spivak (2000, p.180) held that the key factors contributing to the loss of the Mandalay appeal included the fact that the Council used the development as a test case before a fulsome policy framework was developed; a lack of supporting data or analysis to justify the inclusionary quantum; the City's failure to clearly define what it meant by 'affordable housing'; and the lack of communication or co-ordinating with the state housing authority to ensure that acquisition of the flats was in fact affordable.

Merri Merri Developments v Darebin CC ("Merri Merri")

Merri Merri Developments Pty Ltd v Darebin CC (Red Dot) [2010] VCAT 1045 (*Merri Merri*), involved a refusal by Darebin City Council, as the Responsible Authority, to grant a permit for 99 dwellings in a four level apartment building. The amended proposal for 93 dwellings was supported by Council subject to conditions, including that a minimum 15% of the residential dwellings be designated and used for "social housing". VCAT considered the appropriateness of this permit condition, concluding that it was 'highly elaborate' and involved 'a degree of detailed social control not commonly imposed in Victoria' (see in particular paragraphs 27 to 52 of the judgment).



In argument, Darebin City Council had claimed the expression “social housing” was interchangeable with “affordable housing” and “public housing”, none of which are defined in the planning scheme. VCAT rejected this, finding the term “social housing” vague and more uncertain than either ‘affordable housing’ or ‘public housing’ and that the meanings are ‘not generally the same’ (*Merri Merri*, Summary). They noted that the Darebin planning scheme did employ the expression “social housing” in clause 52.41 under the heading Government Funded Social Housing; as did clause 16.05-2 (Affordable Housing) with a strategy of ‘facilitating a mix of private, affordable and social housing in activity centres, strategic redevelopment sites and transit city project’. However, they determined that ‘whilst vagueness may be acceptable in a general policy provision, it is hardly acceptable in a permit condition’¹⁹ (*Merri Merri*, Summary) and that in any case the requirement for a 15% contribution was not justified:

‘There are problems, both in relation to equity and nexus as well as doubt as to its scope, intention and meaning, including what is meant by the expression “social housing.”’

(*Merri Merri*, Summary).

The Tribunal here determined that “affordable housing” generally means ‘housing that is available at low cost so as to be affordable, whether for purchase or rental, by people of modest means’ (*Merri Merri*, 31). As such, ‘in that connection the studio/bed- sitting room accommodation in this proposal (particularly that to which no car parking space attaches) could be considered to be affordable housing. It is housing intended to be provided by a private developer and put on the market at what must be, at least comparatively, a low price.

East Brunswick Village Pty Ltd v Moreland CC (‘East Brunswick Village’)

In 2012 the City of Moreland also attempted to enforce a limited form of IZ, This case involved the developer of a newly rezoned brownfields site, East Brunswick Village,

¹⁹ Vagueness of permit condition is an issue that particularly concerns VCAT because of the legal and enforceable obligation that is created. The terms and limits of the obligation need to be clearly defined, with breaches having serious consequences including prosecution, the imposition of penalties and the imposition of serious civil remedies (see *Merri Merri*, 29).



challenging the imposition of a permit condition, requiring the inclusion of 20% ‘affordable’ housing within the new housing estate.

Here, the basis for the permit condition was the City of Moreland’s Development Plan Overlay Schedule, DPO11, which required any Development Plan for the East Brunswick Village area to include ‘details showing how affordable housing will be distributed through the site and how the proposed mix and type of housing responds to local needs’. The structure plan covering the East Brunswick Village stated, in particular, that new developments were to include a minimum of 20% affordable housing.

In the case of this permit condition, the City of Moreland defined affordable housing as ‘permanent rental accommodation that is affordable to households in the lowest 40 per cent of the Victorian income distribution’ (*East Brunswick Village*, 17). East Brunswick Village would need to partner with a registered housing association to deliver this housing, with the association meeting 50 per cent of East Brunswick Village’s costs in supplying these dwellings.

The developer challenged the permit condition on the grounds that the structure plan did not clearly define affordable housing. Further, in any case, they were offering an appropriate amount of affordable housing in offering for sale a range of housing typologies targeted at different markets and coming in under the amount determined to be ‘affordable’ to the median income bracket of a couple in the adjacent suburbs (*East Brunswick Village*, 32)²⁰. Regardless of either the precision of the term ‘affordable’, or the extent to which they were meeting it in their current plans, it was argued that the Council was without a head of power with which to impose such a condition, the only allowable charges being those in the form of a DCP, or open space contribution plan.

The challenge to the permit condition was successful: according to the Tribunal there were ‘conceptual and practical issues’ with the DPO11 and the associated permit condition, with a lack of clarity in the definition of affordable housing, and no evidence

²⁰ Expert opinion put forward for *East Brunswick Village* claimed that the EBV dwellings were affordable housing because 90% of them could be purchased or rented by a local family on a median household income. The 450 EBV one-bedroom dwellings were considered to be a significant addition to the supply of affordable housing because only 185 dwellings sold at or below \$400,000 in the study area in 2011 (*East Brunswick Village*, 32).



that a housing association was willing to partner with EBV to take on 15 ‘permanently available affordable rental housing units’ required by the condition (*East Brunswick Village*, 17; 39). Particularly notable was the Tribunal’s finding that ‘the provision of affordable housing in rapidly gentrifying inner suburbs is a difficult social and economic problem’, but that ‘there are limits to the extent to which the planning system can make a useful contribution to addressing [it]’ (*East Brunswick Village*, 33).

The following chapter moves on from this analysis of planning policy, legislation and case law to explore the opinions of five recognised experts in planning policy and legislation in Victoria, asking for their reflections on the use of IZ in Victoria, and of the planning system more generally in influencing affordable housing outcomes.



5. INTERVIEW ANALYSIS

This chapter presents the findings from interviews undertaken with five recognised experts across the planning field in Victoria. Interviewees included Jane Monk, former Director of State Planning Services at the Department of Transport, Planning and Local Infrastructure (DTPLI, formerly DPCD) and now Director of the Inner City at the Metropolitan Planning Authority; Rebecca Leshinsky, senior lecturer in planning and property law at the Australian Catholic University and published researcher on the influence of neoliberalism on Victorian planning regulations and tools; Marcus Spiller, principal and partner at SGS Economics and Planning and former advisor to the Commonwealth Government on the Better Cities Program; David Waldren, National Executive Design Manager for Australia's largest property developer, Grocon; and Liz Nairn, Unit Manager Strategic Planning at the City of Moreland, who managed the *East Brunswick Village v Moreland* VCAT appeal, and subsequent efforts to investigate ways forward for IZ in Moreland.

5.1 Is Inclusionary Zoning right for the Victorian context?

There was a divergence in opinion amongst the interviewees as to whether IZ the right tool to use in Melbourne to increase the supply of affordable housing. David Waldren, giving the 'developer' perspective, expressed a view that while he thought IZ was 'inevitable' in Victoria, it was perhaps not the most efficient, or effective means of producing more affordable housing in the inner city. IZ is effectively a tax, he said, but instead of using the existing taxation system, which is broad based, with strong administrative structures already in place, IZ targets only a small market segment of new development. IZ lacks the sophistication, and flexibility of other tools available to us, said Waldren, and will result in higher prices for the other purchasers.

Along similar lines, but from the perspective of a long-standing State Government officer, Jane Monk held that IZ is 'passive' planning and 'the lazy option'. She advocated instead for the planner to use their position to negotiate and develop partnerships that will lead to positive outcomes:



There are far better ways of local government, through its planning role and having regard to the purposes of the Planning Act to get more upfront in talking about and negotiating and finding the partnership to deliver it. At [the City of] Port Phillip in the early days we were actually on the front foot, working with the community housing sector as it got going, to really push that opportunity.

Both Monk and Waldren were optimistic about the potential for planners and developers to be more heavily involved in partnership approaches and negotiated outcomes. Monk pointed to the example of the Merchant in Docklands. It was, she says, in LendLease's favour to sell 30% of its product to Melbourne Affordable Housing, as from this they could achieve multiple wins:

They would get different spec, get presales, reduce advertising costs, and worked with NAB to get a loan for the community housing association. At the end of the day, the Community Housing Association is going to run the Owners Corporation as an employment scheme, and will access NRAS so you have affordable rental for 10 years. They know that after this period they will be able to sell some, put more into the pool and reinvest.

It's not outside of planning to consider and be involved in this. Our role is to look at the social need of the community, and see how this needs to be translated into policies, etc. It is about influencing as well. That is planning! Planning is more than the planning schemes, and so forth. It (planning regulation) is just one of the tools in the planning toolkit.

A concern shared by both Waldren, and local government planner Liz Nairn, was that introduction of IZ also ran the risk of discouraging development in the areas it was applied. 'Sometimes our aspirations are our undoing', said Nairn, with the social and environmental policies of Moreland already apparently discouraging developers from putting forward proposals in Moreland. Instead, they take their business to neighbouring municipalities where there are less onerous Environmentally Sustainable Development, Developer Contribution Plan and other overlay requirements.



Participants were also cautious about the merits of IZ in the context of the wider failures of the housing market in Victoria. Monk alluded to the wider, structural issues at play in the housing affordability crisis and the need to address these before adding another layer of complexity. She was highly critical of the barriers put in place by local governments to new housing development, and the cost impost both directly (through the application and associated professional services fees) as well as the holding costs of a delayed or challenged decision. She held that the current market conditions are wholly unsuited to yet another cost impost on housing development:

I haven't seen it work sufficiently well to agree that its time is right now in the context of structural failure in terms of the supply of land to be able to deliver what we need. It's an additional impost. Unless we can get a more enthusiastic, facilitative understanding of the issues, adding another thing like that is not going to help.

Monk also questioned the success of IZ schemes elsewhere. In the UK for example, while in the pre-GFC era developers appeared happy to deliver housing under an IZ model, current financial pressures mean that, according to Monk, many are trying to renegotiate their previous agreements. Monk sees the IZ scheme in Vancouver as being more successful, but now that they have locked in a certain quantum of affordable housing they are 'moving on'.

Lack of capacity at the local level

Nairn also pointed to the challenge faced by local governments in trying to 'go it alone' in championing progressive social or environmental outcomes, without the support of State-led coordination. The challenge in this is twofold: first, the ability of local government to influence housing outcomes is limited both to the tools at their disposal, including planning controls, delegated legislation, and to a limited degree, funding and financing, as well as to the municipal boundaries that they work within. Second, implementing local controls that make development more expensive, or planning processes more drawn out are likely to result in development shifting to suburbs – or cities – that offer a higher return on investment. Thus, while IZ would be a useful addition to the 'toolbox' of affordable housing policy and planning interventions, interviewees suggested that it would need to be city-wide to be effective. It is not



sufficient to implement a scheme in one area that promotes ‘social mix’ through the proxy of diverse and affordable housing options, when in all likelihood this would only result in development opportunities moving to those municipalities that offer less onerous restrictions on development.

Reservation was also expressed, particularly by the local government officer, as to the ability of Victorian local governments to administer the complex financial and administrative arrangements created by an IZ ordinance. The questions of how the contributions are collected and administered, what vehicle is best suited to development, delivery and management of the social housing units, and how the scheme is to be coordinated and evaluated remain unanswered at this stage.

Despite this reservation, the power of local governments to influence State Government level planning policy was noted, as well as the potential for local governments to act proactively to seek certain outcomes from urban renewal sites. Nairn cited the example of environmentally sensitive urban design principles, championed at the local level and eventually picked up by the State when it was realized that there was a need for coordination and consistency in approach. Without this local action it is questionable whether there would have been progress in this sector.

Uncoordinated and opportunistic policy approach

According to Nairn, Moreland, like other Melbourne councils, has not taken a strategic approach to IZ, or, indeed, the more general task of requiring property developers to provide affordable housing or capturing the value of land-price uplift. There has been ‘no clear project or program’ to their approach. This was seen as a key barrier to an effective IZ scheme being developed.

In her view, the judgment of the VCAT tribunal in the *East Brunswick Village* case was accurate, seeing the attempt by Moreland to impose a permit condition regarding the supply of a percentage of social housing units as opportunistic, inequitable and vague in its definition of ‘affordable housing’. The intervention, she said, lacked strategic direction. Moreland City Council is now reflecting on the reasons for failure, to better



understand how they might develop a more comprehensive and justifiable approach in the future.

Nairn noted that negotiations on supply of affordable housing options, or social housing, are far more effective when undertaken at the commencement of a project, rather than at the point of permit approval. She noted that development proponents have informally accepted the idea of an IZ scheme, but emphasised the need for there to be clear guidance, and certainty in any such scheme such that investment decisions can be made on the basis of it. This view was echoed by Waldren, who while questioning the efficacy of an IZ scheme, agreed that it would be acceptable if it were applied equitably and with clear guidelines.

5.1 What would need to change to see Inclusionary Zoning introduced in Victoria?

A cultural change; a mind shift.

When asked to identify what would need to change in order to see IZ implemented in Victoria, all interviewees raised the need for a change in culture, or a ‘mind-shift’. Marcus Spiller, a long time advocate for IZ in his current work as founding partner and principal at consultancy SGS Economics and Planning, as well as in his previous role of advisor to the Commonwealth Labor government, pointed out that whilst in a broad sense all planning systems in Australia are very similar, being derived from the British planning system, the ‘culture’ across the Australian State jurisdictions differs.

Victoria, in Spiller’s view, is very ‘straight-laced, conservative: in a sense, pure and disciplined’. This, he said, is in comparison to NSW, which continues today to have a more ‘pragmatic’ approach to planning. For example, in the case of the City West Affordable Housing Program, there was broad agreement that social homogeneity in the inner was undesirable outcome of urban renewal processes and that IZ was a valid way to address this. If, as was the case, it was found that the Act did not fully support the planning tool required, they would change the Act: ‘there was no angst ridden, soul



searching about whether this was an appropriate role for planning, as you would have in Victoria.’

Spiller and property and planning law academic Rebecca Leshinsky both stressed the need for a good, intellectual, robust debate on this issue, to push beyond what Spiller termed the ‘legalistic, low level critique’ that we have had to date. This debate has focused on finding uncertainty in the State and Local Planning Policy Frameworks, rather than a discussion on what the scope of planning *should* be. Getting agreement on this, they argued, as well as achieving a broader understanding in the community of the value of affordable housing, is the first step. From this, we would be well placed to formulate a new planning Act, starting from first principles. In the words of Spiller:

It is not a question of legitimacy, it is a question of machinery (and) it is important not to give up on the intellectual debate. That’s why I look to every opportunity to push it.

Spiller contrasted the objects of the current *Planning and Environment Act 1987* with the earlier Victorian *Town and Country Planning Act* (Vic) that was drafted principally to deal with infrastructure staging and avoiding incompatible uses of land and economic, rather than social, outcomes. Spiller claimed that at the time when the new Act was mooted, during the late 80s and 90s, there was a deliberate challenge to this view of the role of planning, and consequently explicit incorporation of the principles of sustainable development:

Planning is about sustainability, and there are three legs to this. Once you cross this divide, it seems to me that you cannot invoke an ‘original planning mandate’ to say that Inclusionary Zoning is an inappropriate role for planning.

Rather, said Spiller, IZ is a necessary tool to assist us in achieving ‘sustainable communities and places.’ It is untenable, he said, to have consideration of the social and economic effects of development written into the Act, and yet continue to partition off those effects that deal with changing the social fabric of a place.

Monk supported this interpretation of the *Planning and Environment Act 1987* as incorporating the values of sustainable development. Monk was involved in the drafting



of the first iteration of the Act, and noted that it drew specifically on the principles set out in the Brundtland Commission's *Our Common Future*, also known as the Brundtland Report (October 1987). The Brundtland Report set the standard definition of 'sustainable development', bringing together the spheres of 'environment' and 'development': "...the 'environment' is where we live; and 'development' is what we all do in attempting to improve our lot within that abode. The two are inseparable. From this we get the idea of 'triple bottom line' accounting, which influenced everything from assessing bank finance risk to planning applications". She went on to add:

We honestly thought when we were writing it that if anything came along, even if it were under heritage and it generated a significant environmental effect then you should turn your mind to that.

Monk noted however this broad view of what powers are available to planning authorities when making decisions has been under constant threat, almost from the moment the Act was drafted. She added that while planning has a long history of positive action, in recent decades the function of the planner has become to 'tick boxes', applying their (limited) regulatory power to the use and development of land without the vision or narrative of past planners.



6.DISCUSSION OF RESULTS

This study aimed to identify and analyze the barriers to introducing IZ in Victoria. It employed a mixed methods research design, including analysis of policy, legislation and case law related to IZ and the provision of affordable housing. Interviews with recognized actors in the Victorian housing and planning sector were used to test and elaborate on finding from this analysis, as well as to better understand the institutional factors at play that may not be revealed through analysis of the policy and legislation alone. Underpinning this close focus on the mechanism of IZ was an investigation into what meaningful role planning could or should have in relation to addressing the crisis in housing affordability in Victoria.

The study found that while planning for affordable housing provision appears to have high-level support in the ‘Objectives’ of the Planning and Environment Act 1987, the vagueness in definition of affordable housing in proposed IZ schemes, lack of explicit support or permission for IZ in the Act or State Planning Policy Framework and the ill-considered or opportunistic attempts at implementing IZ controls were key technical reasons why previous attempts had failed.

While all persons interviewed agreed that responding to the issue of affordable housing was firmly within the domain of planning, differences emerged in whether IZ is an appropriate tool, as well as view on what would need to change in order to see an effective and coordinated response. Competing views were put forward on whether IZ was a mechanism suited to the current planning and economic climate in Victoria. Some expressed concern over the capacity of local governments to administer such a scheme, while others saw IZ as an essential and inevitable component of any modern city, necessary to ensure sustainable social and economic development. However, there was broad agreement that the political ‘culture’ of Victoria has and will continue to militate against the use of IZ and that, above and beyond legislative reform, a ‘mind shift’ would be required in both political and public perception of the role of affordable housing – or, indeed, social housing – in creating sustainable places and communities if we were to



see a more robust role for planning in this area. These identified barriers to the introduction of IZ are discussed in greater detail in the following chapter.

6.1 Barriers to Inclusionary Zoning in Victoria

High level support in the Act, but vague and uncertain definition of affordable 'housing'

The intended outcomes of IZ - in particular to achieving the social goods attached to provision of well-located, affordable housing - were found to have high-level support in the *Planning and Environment Act 1987*. The Objectives of Planning as set out in the *Act* to frame the responsibility and powers of planning broadly. The *Act* draws heavily on the discourse of sustainable development, confirming that it is the responsibility of decision makers to balance the interests of current, as well as future generations whilst seeking outcomes that deliver the fair, ordered and efficient use of land. This sets an ambitious agenda of 'triple bottom line' assessment both in the context of planning decisions, as well as in the making of scheme amendments, requiring the consideration of social, economic and environmental effects when making decisions under the *Act*.

Further, IZ appears to meet the additional criteria of being a 'positive action' (Section 4(2)(g)) by a responsible authority in furtherance of the 'fair, orderly, economic and sustainable use, and development of land' (Section 4(1)(a)). There is no express provision against the development of an IZ scheme in the *Act*, and affordable housing has been recognised as having a special significance, in being given a separate clause in the State Planning Policy Framework (*Clause 16: Affordable Housing*).

The apparent strength of this mandate is belied by the failure of successive local governments to successfully introduce IZ schemes in their municipalities. In the cases analysed in this study, the *Planning and Environment Act 1987* has typically been read narrowly, finding definitions of "affordable housing" and "social housing" in the SPPF and local regulations 'vague' and 'uncertain' (*Merri Merri*, 44 – 45). Tribunal members consistently stated the need for a clear amendment to the *Planning and Environment Act 1987* if a scheme such as IZ were to be legitimate, or at the least a 'broader strategy framework' (*Merri Merri*, 47). There is thus need for clear and unambiguous provisions



to be inserted into both the *Planning and Environment Act 1987* and the State Planning Policy Framework, if local governments were to confidently regulate for IZ.

Lack of local administrative capacity

A lack of administrative capacity at the local level to administer an IZ scheme and the need for a metropolitan wide consideration of the location and supply of affordable housing were other key barriers identified in the study to local implementation of IZ. Interviewees from the development industry, as well as local government, reinforced the view that an IZ scheme would be accepted by ‘the market’ so long as it is equitably applied, and that the requirements were certain. However, there was a perceived risk that IZ implemented only at the local level would dampen housing development, or cause it to relocate to a municipality – or State – where development requirements are less onerous. This could result in less rather than more housing being built in the areas that need it most.

A nuance to this finding is the advocacy work by the IMAP group of Councils, who appear to have undertaken the groundwork sufficient to design a robust and effective scheme. In pooling resources and taking a wider geographic area as the ‘inclusion zone’, this Council group would likely be able to both successfully administer an IZ scheme, as well as ensure against perverse outcomes.

A gap between policy, intention and implementation

In addition to the above barriers, this research found institutional and cultural factors that militated against use of the planning system in the creation of affordable housing opportunities. The analysis of planning policy, corroborated by interviews with those who had long-term professional involvement in the sector, found that successive State Governments have demonstrated concern for affordable housing provision, but without supporting or implementing the ‘planning tools’ (Tiesell and Allmendinger 2005) that would create meaningful change, or allow for positive action by local authorities.

This trend continues in the State Government’s most recent metropolitan plan, *Plan Melbourne* (DTPLI, 2014), where provision of diverse and well-located affordable housing is recognised as being essential to the functioning of a sustainable and just city



(*Plan Melbourne*, 2014, p.5) yet mechanisms to achieve this outcome are limited. They include the traditional levers of zoning for additional land supply (constrained in any case through the new residential zoning schemes), and streamlining of planning application processes. Stronger mechanisms such as undertaking case-by-case negotiations for affordable housing inclusion at urban renewal sites or applying flexible development contribution charges to developments that deliver social housing dwellings are to be ‘explored’ or have their benefits ‘assessed’ (Government, 2012, p. 77).

While it is encouraging that mechanisms such as land-value capture and engagement of community housing associations at the planning stage of urban renewal were considered (Government, 2012, p. 77), overall *Plan Melbourne* lacks the robust housing targets, or policy levers that would increase the supply of affordable housing in any meaningful way. Statements by VCAT as to the limits of planning with regard to affordable housing appear to be correct, but are also circular in their logic: a key limit to the use of planning to address the issue of affordable housing is the power given to local authorities to enact local solutions, followed by the willingness of the State to coordinate action and implement stronger, more robust requirements for their delivery.

These findings are in line with recent critical literature describing a gap between the rhetoric of planning policy and legislation with regard to affordable housing, and the tools available to create meaningful solutions. This ‘planning deficit’ (Gleeson et al., 2012) is particularly concerning given the acknowledged crisis in housing affordability and the threat this poses to the long term social and economic sustainability of Melbourne’s urban development.

Addressing the persistent conservatism in planning in Victoria is a more challenging task than the above technical and local governance barriers. Interviewees suggested that education as to the merits of affordable housing was needed, at a community and political level. Developing understanding within the sector of the role that diverse housing opportunities play in creating successful, productive cities is key to this task.

6.1 Concluding comments: next steps for IZ and affordable housing policy



While there are strong and competing views as to whether IZ is the right planning tool to address the issue of affordable housing in the Victorian context, it is hoped that this research will improve certainty in understanding the key barriers that have been faced in previous attempts to introduce it.

Despite a somewhat pessimistic outlook, evidence of increased proactive planning action in other Australian states as detailed in the previous chapters raises the possibility of a similar shift occurring in Victoria. South Australia, Queensland and New South Wales all have operational IZ schemes to a greater or lesser extent. Ongoing research into the efficacy of these schemes, and advocacy where possible can help to better understand and calculate the benefits and pitfalls of these schemes, as well as other planning approaches to increasing the supply of affordable housing in Victoria.



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