

# Affordable Housing Agreements:

A win for councils, developers, community housing organisations, and Victoria's most vulnerable tenants.

The Victorian Government has amended planning laws to encourage the use of agreements to include affordable housing in new developments.

The new Affordable Housing Agreements (AHAs) provision of the *Planning and Environment Act 1987* encourages councils to negotiate the inclusion of affordable housing as part of the planning process for developments using a s173 agreement.

These changes set the scene for developers and councils, with the early involvement of community housing organisations, to negotiate agreements that benefit all parties.

*There is work to be done not only in understanding what can be done in an AHA but also in what works and doesn't work. As deals start to be negotiated and signed CHIA Vic's advice will be updated to reflect the learnings of the sector.*

The Department of Environment, Land, Water and Planning (DELWP) has provided guidance on what should be considered in the agreements, and community housing organisations (CHOs) are well-placed to deliver on those requirements.

These include:

**The housing must be secured for the long-term**

CHOs mission is to provide secure, appropriate, long-term housing for their tenants.

**It must be affordable for very low to moderate income households**

CHOs are required by the Housing Registrar to have policies and strategies on their delivery of housing at affordable rents to low income tenants.

**It must be allocated to eligible households**

CHOs are required by the Registrar to have clear eligibility and allocation policies.

**It should have secure tenure**

CHOs are required by the Registrar to have policies and procedures to sustain tenancies and treat eviction as a last resort.

**Must be suitable in terms of size, quality and accessibility for target group**

As CHOs house tenants for the long-term, they are committed to providing well-designed, appropriately sized and accessible properties to suit their tenant cohort. They also seek to reduce the burden of maintenance and repairs through well-built and durable homes.

**Must be well-located**

CHOs seek to provide housing that is located close to services, transport and employment opportunities.

**Must be integrated into the local community**

CHOs are skilled at providing housing for low income tenants in developments that include private renters and home buyers.

**Must be provided in areas of need**

CHOs can demonstrate local housing need from their own wait list or from the broader Victorian Housing Register.

***The challenge is now to ensure that the opportunities provided by the agreements are appropriate and sustainable into the future.***

## Background

### Section 173 Agreements

Affordable housing agreements are a class of agreements entered into under section 173 of the *Planning and Environment Act 1987*. Section 173 agreements, as they are known, are between a responsible authority (i.e. local government or other authority administering a planning scheme) and a land owner.

Section 173 agreements are unusual because they create a legal obligation that is recorded on the title to the land, and bind subsequent owners of the land. The agreements may have an agreed expiry date but this is not required. Typically they are used to ensure ongoing compliance with planning permit conditions, for example, the need to maintain open space or prevent further subdivision.

### Affordable housing agreements

Under the changes to the Planning and Environment Act, which came into force on 1 June 2018, a responsible authority may enter into an **affordable housing agreement** with an owner of land for the development or provision of land in relation to affordable housing.

### What is affordable housing?

For the purpose of the Planning and Environment Act, 'Affordable housing' is *housing, including social housing, that is appropriate for the housing needs of very low income, low income, and moderate household.*

'Social housing' is defined as public housing and housing that is owned, managed or controlled by a participating<sup>1</sup> registered [housing] agency.

The definition of very low, low and moderately low incomes are set out in a [Ministerial Order](#). For social housing income limits, see the DHHS [income & eligibility guidelines](#)

Determining what is 'appropriate for the housing needs' of these households, must cover [matters](#) specified by the Minister for Planning, including:

- allocation
- affordability (for the target cohort of very low income, low income and moderate income households)
- longevity of the public benefit
- tenure
- quality and type of housing
- location, including proximity to amenities, employment and transport
- integration, in terms of the physical build and local community
- official estimates of housing need.

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<sup>1</sup> Where 'participating registered agency' is defined as "a registered agency that is declared by the Director under section 142F(2)(b) to be a participating registered agency" in the Victorian Housing Register.

## Addressing ‘matters to be considered’

DELWP has outlined how developers and Councils can give regard to the matters specified by the Minister, and community housing organisations have a unique ability to assist in this space.

Outlined below are the matters to be considered, with suggestions for how community housing organisations could demonstrate this has been done, potential issues or risks the matter may raise for organisations and options to address this, and finally guidance from CHIA Vic if there is a preferred position.

### Allocation

#### **DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider how any dwellings provided under the agreement might be allocated to eligible households. Eligible households include very low income households, low income households and moderate income households as defined under the Planning and Environment Act 1987.*

*If the dwellings are social housing, allocation will be subject to the regulations governing their allocation. Information regarding social housing is available at [Housing.vic.gov.au](http://Housing.vic.gov.au).*

If the completed affordable housing dwellings are owned by an entity that is a registered housing agency (i.e. that is registered under Victoria’s regulatory system for community housing organisations) then this already provides a strong level of assurance about the ongoing use of the dwellings as affordable housing.

Community housing organisations can provide developers and Council with clear eligibility and allocation policies to demonstrate that a process is in place to ensure the appropriate allocation of affordable housing dwellings to eligible households.

They can point to obligations under the Housing Act for registered agencies to:

- apply their resources back towards charitable objects of providing affordable housing to persons in housing need;
- comply with prescribed performance standards (Performance Standards) which require registered housing agencies to *manage housing assistance in accordance with its policies and the legal and policy requirements*; and
- be subject to ongoing regulation by the Housing Registrar, an independent statutory authority which significant powers to intervene in the affairs of the agency to protect public investment.

### Risks for CHOs

One of the risks for CHOs is that Councils may want to specify the cohorts to be housed. This may affect how much rent can be charged and therefore the financial viability of the units.

The degree of input by Council should depend on the level of their contribution to the affordable housing outcomes. If Council contributed land or funds then a greater input from Council on cohorts to be housed might be appropriate and could be captured in a time-limited s173 agreement.

The cohorts desired by Council should be specified early enough in the negotiations that the financial impact can be factored in by the CHO.

**Affordability (in terms of the capacity for very low income, low income and moderate income households that it is intended for)**

***DELWP Guidance***

*Parties to a voluntary Affordable Housing Agreement must consider whether housing costs – in terms of rent or mortgage payments – will be affordable for very low income households; or low income households; or moderate income households. To be affordable, housing costs cannot account for more than a certain proportion of household income. A widely accepted benchmark is that to be affordable, housing costs must not account for more than 30 per cent of gross household income.*

*In the case of home purchase products with a mortgage, consideration should be given to determining an affordable purchase price given an affordable housing costs. The determination of an affordable purchase price will depend on assumptions about the size of a deposit, the term of the loan, the interest rate for borrowings and the frequency of payments. A rule of thumb is to assume:*

- *a 10 per cent deposit;*
- *a 25-year loan; the standard variable owner occupier housing loan lending rate published by the Reserve Bank of Australia; and*
- *a fortnightly repayment.*

Demonstrating the affordability of the proposed dwelling can easily be done by community housing organisations.

CHOs are required to have clear policies around rent setting and these, along with the existing regulation of the registered industry, should be sufficient to demonstrate that properties transferred to a registered community housing agency will have rents that are, and will remain, affordable for very low, low and moderate income households.

If the affordable housing is owned by a registered housing agency, then the Performance Standards require registered housing agencies to be fair, transparent and responsive in delivering housing assistance in relation to determining and managing rents.

The Performance Standards do not mandate a particular rent model, however, they require registered housing agencies to *have policies and strategies to deliver housing services at affordable rents to low income tenants*. These are monitored by the Registrar, with an expectation that rents are below 75% of market rent and between 25% and 30% of tenant income.

DHHS guidelines on rental affordability for housing owned by registered housing agencies recommend that *'For lower income households, the net rent<sup>2</sup> charged at the commencement of a tenancy should be set at no more than 30 per cent of gross household income.'*

### Risks for CHOs

One of the key risks for the community housing sector is that developers will only be interested in offering properties targeted at moderate income families, as this is the highest income level available under the PE Act guidelines and is likely to be one of the few cohorts that CHOs could afford to finance the purchase of the property without requiring additional subsidy from government or other sources of grant funding. This targeting by developers could result in no housing being developed through affordable housing agreements for very low or low income households.

CHOs also need to consider whether they can cover the operating costs of the dwelling on the rents intended to be charged. This is particularly true when CHOs are targeting very low income households, if the property is expected to have a high owners' corporation fee, or if debt is required to purchase the dwelling.

For now CHOs should keep in mind that the income limits for affordable housing are higher for moderate income families than the current Register of Interest limits for the Victorian Housing Register (VHR).

Once there is clarity around the treatment of affordable housing outcomes from the planning system under the VHR members may be able to house households up to the maximum income threshold given by the Planning Minister. Until such time, however, members are advised to assume they will need to set rents in accordance with DHHS guidelines.

The lower VHR income limits for moderate households should be kept in mind when negotiating the value and treatment of affordable housing properties with developers and Councils.

Finally, CHOs should consider how their rents relate to market rents and whether there are any potential taxation implications.

### Options for CHOs

Some cohorts, such as singles, require a much greater discount on the purchase price than others. Some may only be viable if the property is fully gifted. Community housing organisations entering into affordable housing agreement negotiations are advised to be clear about what outcomes can be achieved at different levels of price discount or gifting and communicate this to Council and developers early in the conversation. This can help

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<sup>2</sup> Net rent is the rent charged minus Commonwealth rent assistance.

Councils understand the tradeoffs involved in achieving housing outcomes for very low income cohorts, which could include fewer units being fully gifted.

CHOs could also work with Councils to identify opportunities where it might be possible to achieve housing for very low and low income households through Council contributions of land, or other innovative development approaches.

### Longevity (in terms of the public benefit of the provision)

#### **DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider how the public benefit of the provision of affordable housing or a contribution to housing affordability is retained. Will the affordable housing provided be secured in the longer term (for example 20-25 years, perpetuity) or is it time limited? If the affordable housing is to be sold at a later date, will the proceeds be re-invested in affordable housing? There is no single method for securing affordable housing. One way is to direct the affordable housing to a registered housing agency regulated under the Housing Act 1983.*

**There are a range of views within the community housing sector on how to recognise the relative contributions of the Council and the community housing organisation, and how this should be reflected in the s173 agreement or other legal arrangement.**

Local councils are justifiably interested in retaining the affordable housing outcome in their municipality and may not consider the existing regulation of the registered community housing sector enough assurance that this will occur.

However, housing assets do not last forever. Nor does the community's need for affordable housing remain static.

Community housing organisations are committed to providing long-term housing for their tenants. They should be clear about their intention to retain the affordable housing property but also outline the considerations that might make it necessary to redevelop the site or sell it to invest elsewhere. These reasons could include unsustainable owners' corporation fees, an environment that is no longer appropriate for community housing tenants, or extensive repairs/upgrades that are not financially viable on the property.

Through renewal or sale of unsuitable assets the community housing sector is able to retain the value of an affordable housing outcome within the social housing system in perpetuity.

Each affordable housing agreement will be unique, so CHOs are encouraged to think through the risks (and options to manage them) outlined below and be aware of what works for them before entering into conversations with developers and local council planners about what is possible.

### Risks for CHOs

There are four main ways that CHOs and councils can formalise the agreement to provide affordable housing in the dwellings built through an AHA. The risks for each are set out below.

Type of agreement & length of time	Risks
S173 removed when title transfers to CHO, no further legal agreements between CHO & council	<ul style="list-style-type: none"> <li>• standard risks of newly developed properties</li> <li>• reputational risk with council if property is disposed of after a short period of time</li> <li>• does not provide reassurance to council that affordable housing outcome will remain in LGA.</li> </ul>
Agreement to retain the value of an affordable housing outcome within the LGA without a restriction on title (likely to be a deed)	<ul style="list-style-type: none"> <li>• prevents opportunistic acquisitions if they are not in the same LGA</li> <li>• larger CHOs may end up with agreements with multiple councils, adding an admin burden</li> <li>• limits CHOs ability to respond to changing housing needs.</li> </ul>
Time-limited s173 with a sunset clause	<ul style="list-style-type: none"> <li>• may not reflect the value that council brought to the agreement/does not acknowledge the investment made by the CHO (both purchase and maintenance)</li> <li>• value of the property is likely to be reduced by the presence of a s173, which may also impact on financing arrangements</li> <li>• risk that owners' corporation fees will rise and impact viability of the property as a social/affordable housing unit</li> <li>• neighbourhood or building may evolve and no longer be appropriate for community housing tenants.</li> </ul>
s173 in perpetuity	<ul style="list-style-type: none"> <li>• commitment to hold that asset extends beyond its lifecycle</li> <li>• may not reflect the value that council brought to the agreement/does not acknowledge the investment made by the CHO (both purchase and maintenance)</li> <li>• does not reflect the diminishing value of the</li> </ul>

original investment

- value of the property is likely to be reduced by the presence of a s173, which may also impact on financing arrangements
- risk that owners' corporation fees will rise and impact viability of the property as a social/affordable housing unit
- neighbourhood or building may evolve and no longer be appropriate for community housing tenants.

### Options for CHOs

In CHIA Vic's view, registered housing agencies should commit to holding the affordable housing dwellings for a period of time in recognition of the role the council has played in negotiating the affordable housing outcome.

Such fixed terms would provide a level of certainty to all parties but preserve flexibility for the future. The agreement should also provide that during the term of the agreement, the affordable housing can be sold with the consent of the council (or responsible authority), which must not be unreasonably withheld.

If signing up to a s173 agreement in perpetuity, CHOs could consider including a set of circumstances under which all parties agree it would be reasonable for the s173 to be removed, with a process for dispute resolution should council and the CHO disagree.

The length of public benefit and the way this is agreed to should reflect the extent and source of any subsidy generated. For example, if the planning system generated minimal subsidy, then provisions under existing regulation or a deed with council might be appropriate; however, if council contributed land then a longer agreement to retain the affordable housing outcome in that municipality, and greater input from council on cohorts to be housed, could be appropriate, and could be captured in a time-limited s173 agreement.

The commitment of the CHO to retain the affordable housing dwelling in a particular location and the process for selling it, should that become necessary, should be negotiated well in advance of the transfer of ownership to the CHO, and should be well documented.

However, not all local councils will require a legal agreement past the point that the dwellings are transferred to a community housing organisation.

Community housing organisations are encouraged to discuss the existing legislation and regulations that govern their operations, and assist councils to become more familiar with how the community housing sector operates and our typically long-term approach to holding assets.

## Tenure

### **DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider how secure the tenancy of the affordable housing provided as part of an Affordable Housing Agreement will be. The provision of rental housing owned and/or managed by a registered housing agency provides a way of providing secure tenure, but there are many other ways housing might be provided such as shared equity and low-cost purchase schemes.*

The mission of CHOs is to provide long-term, stable and affordable rental housing to low-income vulnerable Victorians.

CHOs can provide developers and councils with copies of their policies and procedures that strive to sustain tenancies and treat eviction as a mechanism of last resort.

### Risks for CHOs

If CHOs are leasing affordable housing outcomes (rather than having the title transferred upon completion of the development) they will only be able to offer tenants security of tenure for the length of the lease.

CHOs should consider which groups of tenants are suited to shorter-term holds and ensure they have 'wind up' arrangements in place

## Type of housing, in terms of form and quality

### **DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider whether the housing provided as part of an Affordable Housing Agreement will be suitable in terms of size (for example the number of bedrooms), quality (beyond mandated building standards such as the quality of internal finishes and energy efficiency) and accessibility (for example, whether there are stairs) for the intended target resident group.*

CHOs are required by the Registrar to manage their assets in a manner that ensures suitable properties are available now and into the future, particularly in relation to:

1. Determining changing housing needs and planning asset acquisitions, disposals and reconfiguration to respond (strategic asset management).
2. Setting and meeting relevant property condition standards.
3. Planning and undertaking responsive, cyclical and life-cycle maintenance to maintain property conditions (asset maintenance)

As a result, they are committed to well-designed and appropriately-sized dwellings relative to household needs that are well-built, adaptable, and will not require onerous maintenance.

CHOs should be able to provide justification for the desired size, quality and accessibility of affordable housing units based on the local housing need and types of tenants they anticipate housing and their policies regarding property standards and maintenance plans.

### Location, in terms of site location and proximity to amenities, employment and transport

**DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider the location of the affordable housing secured under an agreement in relation to access to services, transport and employment in terms of the very low income, low income and moderate-income households that it is intended for.*

Community housing organisations seek to provide housing that is well-integrated within the wider community and is matched to tenants' needs. They can provide guidance on the types of local services and amenities that are needed by social housing tenants, and whether the development is better suited to particular cohorts.

Community housing organisations are encouraged to consider the suitability of a site for their tenants when entering into discussions about the possibility of taking on an affordable housing outcome.

#### Risks for CHOs

The location may not be appropriate for community housing tenants, or the owners' corporation fee for the proposed development may be too high for affordable housing units to be financially viable.

Sites with these sorts of issues may be more appropriate for cash in lieu contributions by developers. Community housing organisations could work together with local councils or developers to identify potential sites or projects that could be developed using cash in lieu contributions from other locations in the LGA.

### Integration, in terms of the physical build and local community

**DELWP Guidance**

*Parties to a voluntary Affordable Housing Agreement must consider how the affordable housing will be integrated into the physical build and local community. In terms of integration with the physical build, will the design of the affordable housing look similar or different to other dwellings within the same development? In terms of integration into the local community, consideration should be given to neighbourhood character and community cohesion.*

Community housing organisations are committed to well-designed, integrated dwellings that are indistinguishable from products being sold to the private market.

There are many examples of successful multi-tenure developments where social housing tenants live in integrated developments with private renters and home buyers, and CHOs can share learnings from past developments with councils and developers.

Where possible CHOs should work with the developer to ensure that the units are appropriately integrated and the project best meets the needs of the local community.

### Risks for CHOs

Where affordable housing is separate from the rest of the development, community housing organisations should consider how they can ensure that the affordable housing feels integrated into the local community.

This may be the best way to deliver affordable housing that is financially viable for the community housing organisation, or could be because land has been gifted.

### Official estimates of housing need

#### **DELWP Guidance**

*Consideration needs to be given to the policy basis for the level or type of affordable housing proposed as part of a voluntary Affordable Housing Agreement. The parties to a negotiation should be able to provide evidence of the need for a particular type of affordable housing in the area of the proposed development.*

*Official estimates of housing needs include:*

*Australian Bureau of Statistics Community Profiles*

*Census profiles for Victoria*

*Department of Health and Human Services Rental Report*

*Public housing waiting list*

*Land use and population research*

Community housing organisations will have examples of local housing need from their wait list or the VHR, which could be used to support the proposed affordable housing outcomes.

DHHS has developed a model of housing assistance demand and supply that should be available to the community housing sector in early 2019. It will show the level of housing need for different groups, and project the supply needed out to 2036.

CHOs should ensure that the tenants they propose to house in the AH units are in line with identified local housing need. If this is not the case, CHOs should be able to justify why.

## Community Housing Framework for Affordable Housing Agreement negotiations

Matter	Community Housing Organisation considerations
<b>Allocation</b>	Degree of contribution by council and whether they wish to specify cohorts to be housed.
<b>Affordability</b>	<p>Which income band is the social housing appropriate for?</p> <p>What will the operating costs be, and can they be covered by the expected rent? Consider potential owners' corporation fees, debt repayments, etc.</p> <p>Can CHOs allocate affordable housing for moderate income households above the Register of Interest income threshold?</p> <p>Are there any tax implications if rents are close to market rates?</p> <p>Early communication with developers and councils to educate on the cohorts it is possible to house under different scenarios (for example, gifted stock, purchase at a discount, etc).</p>
<b>Longevity</b>	<p>How much subsidy is being contributed by council? By the CHO?</p> <p>Based on this, what is a reasonable ask from council regarding the longevity of retention for the properties?</p> <p>Does council wish to have a legal agreement on title (or with the CHO) ensuring AH outcomes remain in that location (or municipality)? If so for how long?</p> <p>Will an s173 on title impact the financing arrangements?</p> <p>Does the CHO have a mechanism to gain council approval to sell the property or remove the s173 if it should become necessary?</p> <p>Is there a dispute resolution process in the agreement?</p>
<b>Tenure</b>	<p>Are properties being transferred to the CHO or leased/managed on behalf of a third party?</p> <p>If leased is there a particular cohort of tenants that would be more suited to a shorter term property?</p>

	Are there wind up plans in place for very short-term leases (i.e. pop-up housing)?
<b>Type of housing</b>	Does the housing proposed suit the intended tenant cohort?  Are there any quality or accessibility requirements that need to be negotiated with the developer or council?
<b>Location</b>	Is the location appropriate for the intended tenant cohort?  If not, is there a possibility of a cash in lieu contribution that could be used for a better located site? This should be discussed with council as well as the developer.
<b>Integration</b>	Are the affordable housing units integrated in the larger development or community?
<b>Estimate of housing need</b>	Is there evidence of local affordable housing needs? Does the council have an affordable housing policy?  Does the type of housing being built respond to these policy documents and suit the local need for affordable housing?  If not, can the CHO justify why they are planning to house a different tenant cohort?