OPTIONS FOR DELIVERING AND SECURING AFFORDABLE HOUSING ON LOCAL GOVERNMENT LAND

A Guide for Councils and Registered Housing Agencies

Prepared by Affordable Development Outcomes in partnership with Moores

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DEFINITIONS

Affordable Home Ownership	Affordable Housing, where a household that meets defined income eligibility requirements purchases a property at a rate that is affordable for their household, and where a subsidy provided to support the housing outcome is appropriately secured to ensure future repayment and reinvestment.
Affordable Housing	Defined in the *Planning and Environment Act 1987* as housing, including social housing, that is appropriate for the housing needs of very low, low and moderate income households.
Affordable Housing Agreement	The parameters agreed between a council and a developer through the planning system to deliver an *Affordable Housing Contribution*.
Affordable Housing Contribution	A contribution made by a landowner or developer towards an Affordable Housing outcome.
Affordable Rental Housing	Housing that is provided at a discount to rent to households that meet the PE Act or Victorian Housing Register income eligibility requirements.
Community Housing	Affordable Housing managed by not-for-profit organisations.
Community Housing Organisations	Not-for-profit organisations that manage Affordable Housing. Community Housing Organisations include but are not limited to Registered Housing Agencies.
Commonwealth Rent Assistance (CRA)	A non-taxable income supplement, payable to people who receive a government support payment and rent in the private rental market or community housing.
Eligible Household	A household that meets the income threshold set out in a Governor in Council Order (for Affordable Housing), or as set by the Director of Housing for the Victorian Housing Register, and that meets any other eligibility requirements (residency, asset threshold).
Housing Act	Victorian Housing Act 1983
LG Act	Victorian Local Government Act 1993 and replacement 2020 Act
PE Act	Victorian Planning and Environment Act 1987
Public Housing	Social Housing that is owned and/or managed by the Victorian Government.
Registered Housing Agency	A Community Housing Organisation registered under Part VIII of the Housing Act 1983 and subject to regulation overseen by the Victorian Housing Registrar. Organisations are registered as a Housing Association or a Housing Provider.
Registrar of Housing Agencies	The Registrar of Housing Agencies, supported by the Office of the Housing Registrar, is responsible for regulatory oversight of the community housing sector in Victoria under the Housing Act 1983.
Residual Land Value	A method for calculating the value of development land. This is done by subtracting all costs associated with the development, including profit but excluding the cost of the land from the total value of the development.
Section 173 Agreement	A legally binding agreement between council and a landowner. The agreement remains with the land, regardless of any change of ownership.
Social Housing	Defined in the Housing Act as *public housing* (owned and managed by the State Government) and housing owned, controlled or managed by a participating registered agency (a *Registered Housing Agency*).
Special Purpose Vehicle	A subsidiary company formed to undertake a specific business purpose or activity, such as Affordable Housing.
Victorian Housing Register	The register **for households that apply for and are determined to be eligible** for *Social Housing* in Victoria.

WHEN TO USE THIS GUIDE

***Options for Delivering and Securing Affordable Housing on Local Government Land* is a resource guide developed to support councils and Registered Housing Agencies to progress the delivery of Affordable Housing on local government land.**

This guide builds on earlier CHIA-MAV commissioned work, available **here**, which is recommended foundational reading on Affordable Housing, the community housing and local government sectors.

This guide outlines options for delivering and securing council land for Affordable Housing where the land is subsequently owned and/or managed by a Registered Housing Agency. **A summary of the guide is available at www.chiavic.com.au.**

Part 1 provides important legal and policy context and an overview of Affordable Housing delivery;

Part 2 analyses four models by which land could be released and developed as Affordable Housing; and

Part 3 analyses four mechanisms that could be applied to secure delivery and the value of a council contribution.

Both **Part 2 and Part 3** provide an analysis of each option from different stakeholder, legal, feasibility and risk perspectives.

Councils are encouraged to refer to the guide for information, clarification or inspiration where it:

- Has identified a need to increase Affordable Housing in its municipality;
- Is reviewing its strategic direction in relation to council land use;
- Has identified land that is underutilised or surplus to council needs; and/or
- Has been approached by a Registered Housing Agency with a proposal for the development of council land.

Registered Housing Agencies are encouraged to refer to the guide where it:

- Has identified council land that is suitable for Affordable Housing and is seeking to understand options to support engagement with the council and the release of the land to the Agency to develop; and/or
- Has been invited to put forward a submission in relation to the potential development of council land and wants to determine its preferred approach or assess a council-proposed approach.

This guide is expected to also be useful for other organisations that have an interest in directing land to an Affordable Housing purpose, including not-for-profit groups, church groups and philanthropic entities.

NOTE: The guide does not provide a ‘how to’ on every step required to release and develop land for Affordable Housing.

Attachment 1 sets out wider considerations that the parties will need to explore when assessing council land use opportunities.

Affordable Housing can also be delivered through the planning system, which is discussed separately in the report ***Options for Delivering and Securing Affordable Housing through Planning Agreements.***

EXECUTIVE SUMMARY

OPPORTUNITY

Victoria has the lowest proportion of Affordable Housing in Australia.[1] This is a critical social and economic issue for individuals, communities and the State.

Access to affordable and appropriate land is essential to increasing the supply of Affordable Housing.

The role of local government ('council') is to provide good governance in its municipal district for the benefit and wellbeing of the community. Councils undertake several roles to realise this purpose, including leader and advocate, responsible authority, investor and manager of community services.

To realise their objectives, councils own and manage land and assets. Increasingly, councils are looking to facilitate an increase in Affordable Housing by tapping into their land resources. Whilst there are historical examples, it is not typically the role of a council to develop, own and/or manage Affordable Housing.

Community Housing Organisations (CHOs) are mission-driven, not-for-profit organisations that have a dedicated purpose to reduce housing stress and provide housing for lower income households. CHOs registered under the *Housing Act 1983* ('the Housing Act') are defined as a 'Registered Housing Agency' and are regulated by the independent Registrar for Housing Agencies.

Registered Housing Agencies are structured and experienced in bringing together land, financing and funding; managing the acquisition and development of dwellings; and managing the resulting Affordable Housing tenancies and assets.

There is a key opportunity for councils and Registered Housing Agencies to work together and utilise council land to respond to local Affordable Housing need.

Objective

This resource aims to support councils and Registered Housing Agencies to determine an appropriate model to release and develop council land for Affordable Housing, and the mechanism(s) to secure delivery and the value of a council contribution over time.

Application of the guide is intended to support:

- Improved cross-sectoral knowledge on how to efficiently achieve socially-positive housing outcomes of mutual benefit to local government and the community housing sector;
- Informed decision-making by councils and Registered Housing Agencies;
- Standardisation of approaches; and
- The release of council land, attraction of investment and the delivery and management of Affordable Housing for the benefit of very low to moderate income households in housing need.

Terminology

The guide uses the term 'Affordable Housing' as defined in the *Planning and Environment Act 1987* ('PE Act'), being ***"housing, including Social Housing, that is appropriate for the housing needs of very low, low, and moderate income households"***.

[1] Australian Institute of Health and Welfare (2019), *Housing assistance in Australia 2019*
https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2019

- This definition reflects there are a range of housing program responses that could meet the needs of households who are at risk of, or experiencing homelessness, housing stress, or discrimination in the market;
- Social Housing is one type of Affordable Housing, defined as housing owned and managed by the State Government (Public Housing), or owned and/or managed by a Registered Housing Agency; and
- Social Housing providers' primary focus is on providing rental housing to households that meet the Victorian Housing Register (VHR) eligibility requirements. Registered Housing Agencies may also apply income eligibility set out under the PE Act, where delivery does not depend on Government funding.

Whilst there are a range of Community Housing Organisations, the resource focusses on models that involve a Registered Housing Agency, as these organisations are regulated and prioritised as owners and managers of new Affordable Housing in Victoria.

References to land refer to any land parcel comprising one or more titles, or a portion of a site that is part of a single title (without requiring subdivision).

WHY UTILISE COUNCIL LAND FOR AFFORDABLE HOUSING

Access to safe, secure and affordable housing is recognised as a human right and concerns the ability of a person to have somewhere to live that is appropriate. This requires consideration of tenure, affordability, accessibility, location, and cultural adequacy. Affordable Housing is also recognised as essential infrastructure, due to its impact on workforce attraction and retention.

A lack of Affordable Housing has direct and indirect economic and social costs for individuals and the community. It is estimated that, across Australia, more than two-thirds of lower income households in private rental experience rental stress, paying more than 30 per cent of their income on rent.[2] Moderate income households are also, increasingly, finding it difficult to find affordably priced housing.

Affordable Housing cannot be realised without the availability of appropriately located and priced land. Local Government land can support delivery of Affordable Housing, due to its spatial and locational qualities, potential for uplift in value, and the ability of a council to accept a social return in lieu of a financial payment.

Reasons why a council and a Registered Housing Agency may agree to apply and develop council land include:

COUNCIL	REGISTERED HOUSING AGENCY
▪ Enables direct council action and represents a meaningful contribution towards addressing policy objectives and local housing need. ▪ Maximises the potential of well-located, finite public resources to support socially inclusive, environmentally sustainable housing outcomes. ▪ Takes advantage of land's unique spatial qualities to support social outcomes. ▪ Attracts government investment into the municipality. ▪ Supports a partnership approach.	▪ Supports the Agency to meet its objectives to respond to Affordable Housing demand. ▪ Provides an opportunity to access strategically located land in areas the Agency may otherwise not be able to purchase. ▪ Subject to delivery model, improves the feasibility of development and increases the likelihood of attracting funding and financing. ▪ Supports a partnership approach.

Table 1: Reasons for applying council land for Affordable Housing

[2] Productivity Commission (2019), *Vulnerable Private Renters: Evidence and Options, Commission Research Paper*, Canberra

Proposed Shared Strategic Objectives

The State Government, councils and Registered Housing Agencies share several strategic objectives that are recommended to inform decision-making in relation to the use of council land for Affordable Housing, including:

Proposed Shared Strategic Objectives
Meet legal and regulatory requirements.
Maximise public / social outcomes.
Ensure organisational and project viability.
Deliver value for public Investment.
Place resident (citizens, tenants) interests at the centre of decision-making.
Regulated management of investment and tenancies.
Appropriate and mitigated risks.
Long-term outcomes and reinvestment of subsidy over time.

Table 2: Proposed Shared Strategic Objectives

OPTIONS FOR APPLYING AND SECURING COUNCIL LAND FOR AFFORDABLE HOUSING

The release and development of council land is a resource-intensive and potentially complex process that will require organisations to have the resources, skills and time to assess and make decisions in relation to several matters, including:

- Legislative and regulatory requirements;
- Site suitability and development potential;
- Social and economic priorities and value;
- Housing demand, priority household cohorts and their housing and support service requirements;
- Development feasibility;
- Planning requirements and process; and
- Risks, responsibilities and mitigations.

Key issues recommended for consideration are outlined at **Attachment 1**.

This guide aims to assist councils and Registered Housing Agencies to determine an appropriate model for providing and developing council land and for securing the value of the council contribution over time.

Part 1 sets outs key context to inform the release and development of council land.

Part 2 sets out the following models by which land could be released and developed:

1. Gifting of land, including 'air rights';
2. Sale of land at a discount;
3. Leasing of land;
4. Joint Venture or Partnership Agreement.

Part 3 sets out four mechanisms that a council could apply to secure delivery and, subsequently, the land, dwellings or the value of its contribution:

1. Ownership by a Registered Housing Agency;
2. Ownership of assets in a Special Purpose Vehicle (SPV), established or supported by the council for the purpose of Affordable Housing (e.g. Housing Trust);
3. Legal agreement, including a Section 173 Agreement, Heads of Agreement and Joint Venture;
4. Security via a mortgage instrument.

ANALYSIS OF MODELS AND MECHANISMS

For each mechanism and delivery model the resource explores:

- The structure and potential application;
- Benefits and disadvantages from different stakeholder perspectives;
- Key legal and risk considerations;
- Feasibility considerations and potential impact on subsidy requirements, with reference to a hypothetical development scenario; and
- Resourcing and process considerations to implement.

The analysis aims to support organisations to assess and compare options and determine which delivery model and mechanism best suits a particular circumstance.

The delivery models and mechanisms are assessed against a set of objectives using the following rating:

High	Model or mechanism rates highly against criteria. i.e. Provides high-level assurance or likelihood criteria will be realised.
Medium	Model or mechanism rates moderately against criteria. i.e. Provides degree of assurance or likelihood criteria will be realised with some risks.
Low	Model or mechanism rates low against criteria. i.e. Limited or no assurance or likelihood criteria will be realised and/or considerable risks.

Tables 2 and 3 summarises the assessment with detailed explanation provided at Part 2 and 3.

Figure 1 illustrates which mechanisms could be applied under each delivery model and highlights there are a range of options for consideration:

Figure 1: Mechanisms depending on delivery model

Note on assessment:

- The guide assumes involvement of Registered Housing Agency in the delivery, ownership and/or management, either directly or via control of a Special Purpose Vehicle (SPV), as Registered Housing Agencies are structured, experienced, regulated, and have access to funding, financing and taxation benefits for this purpose.
- Whilst the guide does not contemplate a council owning and managing Affordable Housing, it highlights leasing, SPVs and Joint Venture or partnership agreement models as options that could potentially support a higher degree of council input into the delivery and/or management of outcomes.
- A discounted sale model involving a private developer is also outlined, as this option may be appropriate for large or complex sites, with a Registered Housing Agency managing the resulting Affordable Housing.
- The assessment asumes a mechanism is applied in isolation of any other tool and is a subjective assessment of the authors taking into consideration project reference group input.
- How a mechanism or model is ultimately rated will depend on the council and Registered Housing Agency objectives, site context and the terms of an agreement.
- Organisations could develop their own criteria or place a weighting on specific objectives when assessing options.

Assessment of Models to Release Land

Objective: / Model:	Gifting	Discount Sale	Lease at nil return	Lease at discount	Joint Venture or Partnership Agreement
1. The number of Affordable Housing outcomes is maximised.					
2. Delivery model supports priority, very low to low income households.					
3. Development results in a financial return on land to council (council objective).					
4. Development and operational feasibility.					
5. Reinvestment of the value of the council contribution in an Affordable Housing outcome at the end of an agreed term or dwelling life.					
6. Reinvestment of the value of the council contribution in the local municipality at the end of an agreed term or dwelling life.					
7. Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.					

Table 3: Summary of Assessment of Delivery Models

Assessment of Mechanisms to Secure Delivery and Outcomes

Objective: / Mechanism:	Registered Housing Agency ownership	SPV ownership	Section 173 Agreement	Other Legal Agreement	Mortgage Instrument
1. Land will be developed into Affordable Housing.					N/A
2. Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.					
3. Development and operational feasibility.					
4. Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.					
5. Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.					
6. Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.					

Table 4: Summary Assessment of Mechanisms

SUMMARY

There is a significant need to increase the supply of dedicated Affordable Housing in Victoria.

There is a significant opportunity for councils to act on policy objectives and directly facilitate Affordable Housing outcomes within its community, through utilisation of under-developed or surplus council land.

Registered Housing Agencies are well-placed to work with councils to support the development and management of Affordable Housing that is realised on council land.

How the land is delivered, developed, owned and managed over time requires careful consideration to determine an appropriate and feasible structure.

Whilst the guide does not cover every question, circumstance or process involved in the release and development of land for Affordable Housing, it is intended that it supports improved and consistent knowledge and capacity-building within councils and Registered Housing Agencies, and application of council land for an Affordable Housing purpose.

PART 1: CONTEXT

AFFORDABLE HOUSING OVERVIEW

Affordable Housing is defined under the Planning and Environment Act 1997 (PE Act) *as "housing, including Social Housing, that is appropriate for the housing needs of very low, low and moderate income households".*

- 'Affordable Housing' encapsulates a range of housing programs that provide targeted affordability outcomes to households that earn within defined very low to moderate income ranges. Delivery of Affordable Housing requires subsidy to address the gap between household income capacity and market prices.
- Social Housing is the primary form of Affordable Housing in Victoria, defined in the Housing Act 1983 as public housing and housing owned, controlled or managed by a participating registered agency.
- A 'participating registered agency' is an organisation that is declared and registered as a Registered Housing Agency - either a housing provider or housing association - and is regulated by the Registrar of Housing Agencies. Other Community Housing Organisations also provide Affordable Housing but are not regulated specifically for this purpose.
- This resource focuses on arrangements that would involve a Registered Housing Agency, as these organisations are the only entities that are specifically structured and regulated to provide Affordable Housing, with regulation establishing performance standards and providing significant oversight of an organisation's performance. A list of Registered Housing Agencies is available here.
- Household eligibility for Affordable Housing realised under the PE Act is determined with reference to income criteria established under either the PE Act or the Victorian Housing Register (VHR).
- Dwellings managed by a Registered Housing Agency are predominantly rented to a household that meets the VHR eligibility, with a priority on housing vulnerable, very low and low income households.
- Residents of housing managed by a Registered Housing Agency are charged a maximum 30 per cent of gross household income on rent and can access Commonwealth Rent Assistance. Tenancies are regulated under the Residential Tenancies Act.
- Determining the locations, housing type, and price that is appropriate for lower to moderate income households requires consideration of a range of matters, highlighted in Figure 2. Registered Housing Agencies are skilled in considering these factors when assessing an opportunity to invest.

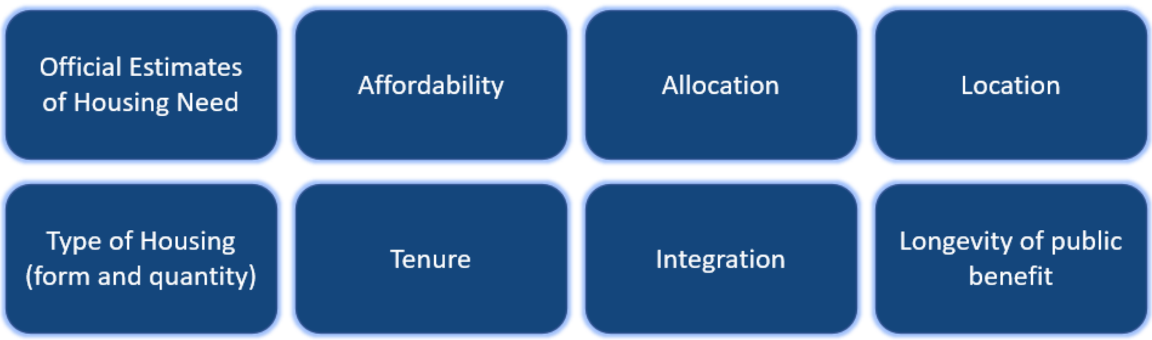


Figure 2: Matters gazetted under the PE Act required to be considered to determine 'appropriateness' of a built-form for Affordable Housing

DELIVERY REQUIREMENTS

The development of Affordable Housing shares the same characteristics as the delivery of market-priced housing, in terms of land, planning and construction inputs and processes.

Delivery of Affordable Housing also requires:

- Determination of the households to be supported and assessment of their financial capacity and dwelling requirements;
- Subsidy to bridge the gap between market prices and below-market revenue;
- Specialised tenancy management;
- Connection to support services for residents where required; and
- Regulation of subsidy to ensure appropriate use and reinvestment over time.

Figure 3: Elements to support Affordable Housing

Funding and Financing

Investment or subsidy is required to meet the costs of Affordable Housing development, as the return from rents, after taking into consideration operating costs, is insufficient to support any, or significant borrowing.

Costs of developing and managing Affordable Housing include:

Land and remediation	Project planning (design, planning, feasibility)	Financing	Construction
Tenancy Management	Ownership (rates, insurance, Owners Corp, etc)	Asset management and maintenance	Resourcing of land release process

Inputs to meet costs include:

Rental income	Government & philanthropic grants	Gifted, discounted or leased land
Housing Agency savings	Low-cost debt finance	GST input tax credits
Planning incentives	Builder discount	Individuals purchasing

Land is a key cost input.

How land is acquired or secured has a considerable impact on project feasibility and other investment.

The State Government's **'Big Housing Build'** is a significant investment, supporting the development of Affordable Housing that is prioritised for allocation to Registered Housing Agencies and that, subject to the site, project feasibility and the value proposition, could be secured by an Agency to develop land provided by a council.

Ownership and Management

This guide recommends and assumes that a Registered Housing Agency manages the Affordable Housing that results from the development of council land as they:

- Have a primary not-for-profit purpose to provide and manage Affordable Housing and are structured and experienced to undertake this role;
- Are independently regulated, which provides accountability to government and other investors, tenants and the community, and provides the Registrar with the tools to address poor performance;
- Have a strong track-record in tailoring housing and services to tenant needs, and working with local service providers to ensure tenants have access to required support services and can sustain tenancies; and
- Have access to funding and financial inputs that are required to support the feasibility of below market-priced housing.

Councils managing Affordable Housing assets is not contemplated, as it is not their primary role, they do not have access to funding or the skills or experience to deliver and operate outcomes at scale, and they are not regulated for this role.

How the ownership of land and dwellings is structured can significantly impact on a Registered Housing Agency's ability to secure debt, attract subsidy and manage the resulting assets.

Ownership of dwellings by a Registered Housing Agency is considered to provide the highest level of assurance that the value of the council investment and resulting housing outcomes will be appropriately used over time. This mechanism for securing outcomes is explored in Part 3.

Reflecting councils may require land assets to remain in the municipality, Part 3 also includes analysis of alternative ownership structures and mechanisms for securing outcomes over time:

- A lease arrangement, where land is retained in council ownership and leased, either at a discount to market-price or at a peppercorn rate (i.e. $1), for an agreed period;
- A Special Purpose Vehicle (SPV), such as a Housing Trust, which is an alternative mechanism that a council could establish to enable a higher level of council input into the ownership structure and the subsequent delivery and management of outcomes in its municipality over time.

It is important to note that, once established, a SPV is an entity independent from direct council control, with the housing expected to be managed by a Registered Housing Agency. Establishment of a SPV is expected to be a more complex and resource-intensive process, with careful consideration of the benefits/disadvantages, risks, and justification required, explored in detail at Part 3.

Determining Household Beneficiaries

The type of Affordable Housing and the targeting and allocation of housing that is delivered on council land will primarily depend on the Registered Housing Agency priorities and terms of government funding.

Critically, the capacity for a Registered Housing Agency to apply equity or debt to support an outcome and the subsequent subsidy gap will depend on which households are supported and their income capacity.

Key factors that will inform the Housing Agency's determination as to which households to prioritise for a development include:

- Evidence of local housing demand and the requirements of priority groups, in terms of location, dwelling type and size, accessibility, amenity, car parking, and any support services;
- State Government funding priorities;
- Agency focus, strategic objectives and funding availability and priorities;
- Scale of the development;
- Operational requirements and costs;
- Development and operational feasibility, noting that rent varies by household under an income-based housing model.

Councils are encouraged to:

- Engage with the State Government and Registered Housing Agencies to understand the evidence of need and the priority cohorts for funding;
- Understand impact of the council nominating a priority cohort on the project feasibility and delivery;
- Reflect that Registered Housing Agencies are regulated to deliver and manage Affordable Housing and are highly experienced in determining the optimal household mix with regard to site and development context, operational feasibility and sustainable community outcomes; and
- Avoid being overly prescriptive as to which cohorts must be housed.

LEGISLATIVE AND POLICY CONTEXT

Legislation and policies that relate to release and development of council land and the provision of Affordable Housing include:

Legislation	Policy
▪ Local Government Act 2020 ▪ Planning and Environment Act 1987 ▪ Housing Act 1983 ▪ Residential Tenancies Act 1997 ▪ Building Act 1993 ▪ Sale of Land Act 1962 ▪ Property Act 1958	▪ Plan Melbourne ▪ Homes for Victorians (2017) and Big Housing Build (2021) ▪ Local Government Best Practice Guidelines for the Sale, Exchange and Transfer of Land 2009 ▪ Victorian Government Land Use Policy and Guidelines 2017

Table 5: Key legislation and policy informing release and development of council land

Of key relevance are the following Acts and policies:

Local Government Act 2020 (The LG Act):

- Establishes the role and responsibilities of councils and provides for the disposition of property, defined as:

  > *"…conveyance, transfer, assignment, settlement, delivery, payment, gift or other alienation of property, including the following… creation of a trust in property; the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property…and any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person".*

- Confirms a council can transfer, sell or lease land, with leases provided for up to maximum 50 years, and requires a council that is seeking to sell, exchange or lease land to:
  - Publish notice of intention to dispose or lease land, and undertake a community engagement process (unless selling to a designated public body specified in the Act); and
  - Secure an independent valuation of the land within 6 months of the transaction.
- Provides for a council to participate in a 'beneficial enterprises' including becoming a member of a corporation, participate in the formation of a trust, or enter a partnership or joint venture;
- Provides for transfer, sale or lease of land 'without consideration' and for exemptions from public notice if a council is disposing of land to the State Government; trustees appointed under an Act to be held on trust for public or municipal purposes; or a public authority specified in the Act, such as a hospital; and
- Does not exclude sale 'without consideration' to other entities, but a public notice and consultation process must occur and the council must publicly justify a below-market return.

Planning and Environment Act 1987 (PE Act):

- Establishes the legal framework for planning the use, development and protection of land in Victoria. Objectives of planning include "to facilitate the provision of Affordable Housing in Victoria". The Act does not mandate Affordable Housing as a requirement of planning.

- Clauses under the Victorian Planning Policy Framework set out objectives specific planning provisions that apply where the majority development will result in Affordable Housing 'by or on behalf of the Director of Housing', including by a Registered Housing Agency. This includes specific design, consultation, decision-making and appeal processes, relating to these developments.

Housing Act 1983 (Housing Act):

- Establishes the legislative framework for the development and management of Social Housing, including establishing the Registrar of Housing Agencies; categories of rental housing agencies; agency performance standards; powers of the Director and Registrar, and the Victorian Housing Register ('VHR');
- Objectives include "the participation of non-profit bodies in the provision of well maintained, affordable rental housing of suitable quality and location" and the promotion of the orderly planning, assembly and development of land for Affordable Housing; and
- Provides for the Director of Housing to register an interest in land owned by a Registered Housing Agency where the land has been purchased or developed with funds provided by the Director or the land was transferred to the Agency by the Director.

Plan Melbourne 2017 – 2050:

- Establishes a vision for Melbourne and objectives and strategies to guide growth. Includes objectives to increase the supply of Social and Affordable Housing.

Homes for Victorians - Housing Affordability, Access and Choice:

- Victorian Government's 2017 strategy to respond to the housing affordability crisis in Victoria. Established new investment including the Social Housing Growth Fund and acknowledgement that changes to the PE Act were required to facilitate Affordable Housing including that value-capture was an appropriate means of securing landowner contributions.

Big Housing Build:

- Victorian Government's 2020 investment and policy reform package, comprising $5.3 billion in investment to support development of over 12,000 new Social and Affordable homes, establishment of Homes Victoria, a commitment to develop a 10-year strategy, and reforms to planning to support streamlined approval of Affordable Housing developments.

Local Government Best Practice Guidelines for the Sale, Exchange and Transfer of Council Land (2009):

- Provides guidance to councils in relation to clauses in the LG Act concerning the disposal of land. Principles include that the sale, exchange and transfers of land must comply with the provisions of the Act and should:
  1. Be conducted through a public process unless circumstances exist and are explained to justify an alternative method of sale;
  2. Be in the best interests of the community and provide the best result, both financial and non-financial, for the council and the community;
  3. Occur at not less than the market value assessed by a valuer engaged by the council, "however, in the event that land is sold for less than the market value or exchanged for land of a lesser value, the council should explain the circumstances, reasons or factors which led to the decision to accept a sale price that is less than market value, or land on exchange with a lower value".
  4. Involve land that is appropriately zoned to ensure that the highest sale price is achieved.

Victorian Government Land Use Policy and Guidelines (2017):

- Establishes a framework to support a strategic, whole-of-government approach to State Government land use decision-making to maximise public value.
- Whilst councils are not required to refer to this policy, it contains principles that are recommended to inform the consideration of the optimal use of council assets. Of note is that the definition of 'public value' incorporates:
  - **Intergenerational value** - how land use decisions made today benefit current and future generations;
  - **Social value** - equity of access to health, housing, education and recreational space, improved amenity and social inclusion;
  - **Economic value** - access to employment, and benefits for business and industry; and
  - **Environmental value** - resource use, sustainably, reduction of contamination, improved ecosystems, biodiversity, climate change.
- Emphasises the importance of identifying the likely operational and financial impacts of each option for land use or disposal. It is expected that the recommended option be *"cost-effective and feasible, as well as deliver public value benefits".*
- Highlights potential impacts that may also apply to the use of council land, including:
  - Risk associated with each option and the expected impacts of these risks on delivery;
  - How long it will take to implement;
  - Costs associated with the option, including land value, delivery, asset and operational costs, and revenue impacts; and
  - Budget and funding impacts, noting *"any foregone revenue of an option needs to be weighed against the policy outcomes delivered".*

Procurement Policy

- The LG Act requires councils to use resources efficiently and effectively and to carry out procurement activities in accordance with policies and the public tender requirements in the Act. Procurement activities should provide:
  - Value for money;
  - Accountability;
  - Risk-management;
  - Probity, transparency and open and fair competition; and
  - Social value.
- The LG Act requires public notification of a land disposal unless an exemption applies. Councils will also have procurement processes that require transparent decision-making.
- Registered Housing Agencies must ensure value for money, social value, accountability for funding and the transparent procurement of goods and services. State Government also requires an Agency to meet social procurement requirements if receiving funds to develop or acquire Affordable Housing under the Big Housing Build.

KEY CONSIDERATIONS AND RESOURCING REQUIREMENTS

This guide does not address the considerations and processes that a council and Registered Housing Agency will need to undertake to release and develop council land, including to:

- Meet council legal obligations and process requirements to dispose of land;
- Determine priority cohorts and the subsequent impact on design, construction and operating costs;
- Identify and assess site suitability (including remediation, planning, design, traffic, engineering advice);
- Assess development feasibility and determine financing and funding requirements and sources;
- Prepare, release, submit and assess tenders relating to the land release;
- Undertake community consultation;
- Secure funding and/or financing;
- Undertake detailed design and secure planning approval;
- Negotiate and enter an agreement relating to the land disposal or use;
- Contract a developer and oversee construction;
- Manage resulting assets and tenancies; and
- Put in place mechanisms to secure and monitor outcomes over time.

Attachment 1 highlights the breadth of considerations and highlights that council land release is not a simple process and will require organisations to have or to source appropriate expertise and resourcing over a considerable time frame.

Risk Considerations

Organisations will need to give careful regard to risks and mitigations. Each model and mechanism are assessed against the following set of risks:

Risks
Financial risk – can you be exposed to financial loss?
Legal liability risk - could you be held liable to compensate someone?
Reputational risk - could your reputation be negatively impacted by participating?
Outcome risk - can the proposed structure fail to deliver the outcomes for the full duration of the intended period?
Legislative compliance risk – is there a risk of non-compliance with legislative and regulatory requirements?
Outcome risk – is there a risk that outcomes will not be realised?

Table 6: Key risk considerations

PART 2: LAND RELEASE MODELS

Land Release Options

This section assesses the following models that a council could apply to release land for Affordable Housing:

1. Gifting of land, including 'air rights';
2. Sale of land at a discount;
3. Leasing of land;
4. Joint Venture or Partnership Agreement.

The potential reasons for applying the model, benefits, disadvantages, key feasibility, legal and risk considerations from different stakeholder perspectives, and resourcing to implement, are highlighted.

Organisations are expected to consider State Government, council and Registered Housing Agency context, policy drivers, strategic objectives and the specific site constraints and opportunity when determining an appropriate model.

Summary of Assessment and Comparison of Delivery Models

Each model is assessed against a set of objectives, summarised in Table 7, that reflects the primary objectives of councils and Registered Housing Agencies, with reference to the following rating system:

High	Model rates highly against criteria. i.e. Provides high level assurance or likelihood criteria will be realised.
Medium	Model rates moderately against criteria. i.e. Provides degree of assurance or likelihood criteria will be realised with some risks.
Low	Model rates low against criteria. i.e. Limited or no assurance or likelihood criteria will be realised and/or considerable risks will not be achieved.

Model: Objective:	Gifting	Discount Sale	Lease at nil return	Lease at discount	Joint Venture or Partnership Agreement
1. The number of Affordable Housing outcomes is maximised.					
2. Delivery model supports priority, very low to low income households.					
3. Development results in a financial return on land to council (council objective).					
4. Development and operational feasibility.					
5. Reinvestment of the value of the council contribution in an Affordable Housing outcome at the end of an agreed term or dwelling life.					
6. Reinvestment of the value of the council contribution in the local municipality at the end of an agreed term or dwelling life.					
7. Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.					

Table 7: Summary of Assessment of Delivery Models

Key Consideration – Feasibility

How land is applied can have a considerable impact on project feasibility, reflecting that land is a reasonable cost input.

To assist organisations to understand the potential feasibility implications of each delivery model a high level indicative hypothetical model is referenced.

Note: The example and associated $ values are a hypothetical and provided as a general guidance only. The council and a Registered Housing Agency will need to undertake detailed and site-specific feasibility to determine project-specific costs, inputs, subsidy requirements and overall viability.

The scenario and indicative feasibility assume a mid-rise development of 3 – 5 storey apartments comprising 30 units, all developed and operated as Affordable Housing. Assumptions are summarised at **Attachment 2**.

The assumptions do not include any dwellings being sold at market value, remediation costs or costs of replacing or developing council assets.

The hypothetical costs and their value as a percentage of the estimated total Gross Realisation Value (GRV) (market value at completion of the development), is summarised in Attachment 2 and highlighted in Figure 4.

The actual subsidy gap will depend on how the land is provided, total costs and inputs provided by other parties.

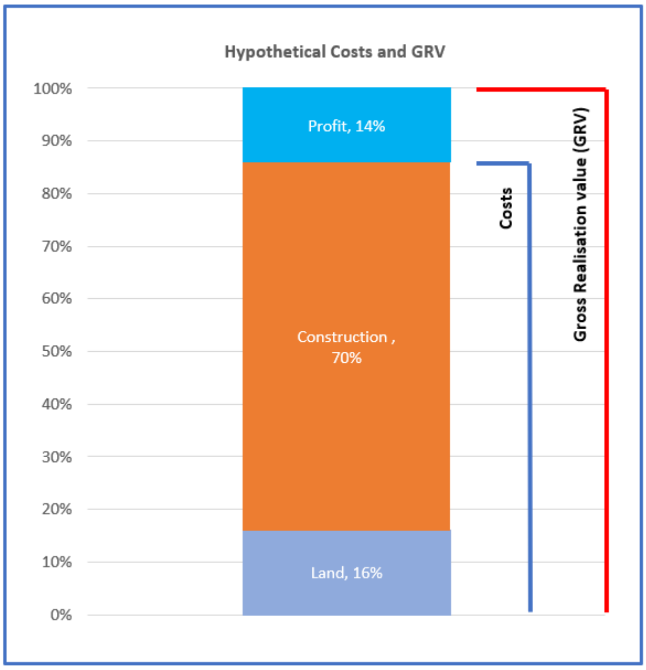


Figure 4: Hypothetical costs as percentage of Gross Realisation Value (GRV)

Hypothetical Illustration of Differences in Subsidy Requirements

The potential impact of the delivery model on the subsidy gap is illustrated with reference to the hypothetical model at Figure 5. The percentage shown is the indicative / hypothetical subsidy as a percentage of estimated total Gross Realisation Value (GRV).

The modelling has assumed leasing of land does not allow for debt finance, and a discounted sale model is at a 50 per cent discount to the land, with the land cost met by subsidy.

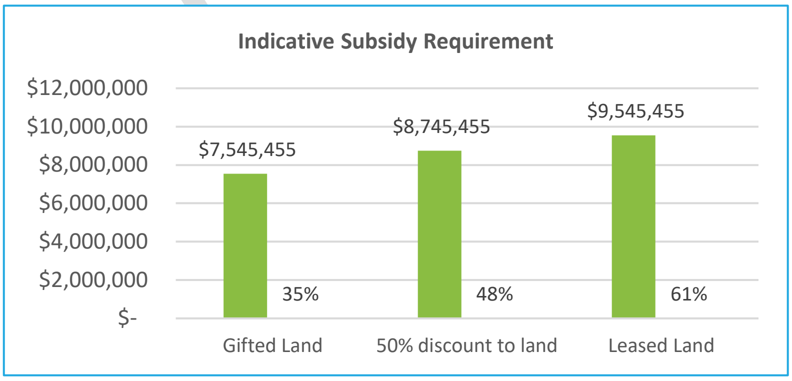


Figure 5: Hypothetical subsidy gap by delivery model

MODEL 1: GIFTING OF LAND (INCLUDING 'AIR RIGHTS')

Model:	Gifting of Land including 'air rights'
Overview	▪ Provision of land at nil consideration (gifting) and transfer of title to a Registered Housing Agency or a council-established SPV. ▪ Requires the council to forego all value and potential financial return for the land. ▪ Can include the transfer of title to property that is not yet in existence. Referred to as gifting 'air rights', technically it is a mechanism by which a council can give up some of its interest in existing land and transfer separate title to a Registered Housing Agency or SVP for use as Affordable Housing. For example, a council can retain or upgrade the existing land use but allow a Registered Housing Agency to develop housing assets above the land. Through a plan of subdivision, title to the housing assets is then transferred to the Registered Housing Agency and council retains ownership of the original land on ground-level.
Landowner for term of use	▪ Registered Housing Agency or council established SPV
Key Strengths	▪ Maximises value of land for public benefit. ▪ Reduces subsidy gap required for development to occur. ▪ Provides Registered Housing Agency with control of the asset, assisting in securing financing and funding.
Key Weaknesses	▪ Requires council to transfer land from its ownership. ▪ Unless coupled with a mechanism to lock in a specific term or use, may involve council also foregoing a right to the value of land or the reinvestment of the council contribution.
Responsibility for assets and tenants at end of term or dwelling life	▪ Registered Housing Agency or SPV
Level of Resourcing to Implement	▪ Low – moderate depending on procurement process and legal agreement, or other mechanisms that are applied to secure value over time.

Application and Reasons for Applying

Key reasons why a council may decide to gift land to a Registered Housing Agency include that:

- Council has a strong policy commitment to act to increase Affordable Housing supply, with the gifting of assets one of the highest value contributions a council can make (other than direct funding);
- It increases the likelihood of the project attracting Registered Housing Agency interest and State Government investment and is a relatively simple model to deliver;
- A gift of 'air rights' allows council to preserve current and future use of land while transferring the development potential of the land to a Registered Housing Agency or SPV;
- It can support a 'partnership' type approach with a Registered Housing Agency. For example, gifting of land may justify council having a greater role and influence in design and/or in setting tenant priorities; and
- Provides a stronger rationale for council requiring the ongoing use of the specific piece of land as Affordable Housing beyond the initial dwelling life cycle.

Key reasons why a Registered Housing Agency may accept the gifting of land include that:

- Access to land is a critical to delivery of Affordable Housing;

- The provision of land at no cost is a significant input that reduces the subsidy gap and increases the likelihood of attracting funding and financing to enable delivery; and
- It results in Registered Housing Agency ownership and control of the asset (unless coupled with a mechanism that limits use), with the land contribution becoming equity the Agency can use to secure borrowing.

Circumstances where the gifting of land or ’air rights’ will most likely suit include:

<table>
<tr><th></th><th>Most likely to suit scenarios where:</th></tr>
<tr><td>Gifting Existing Land</td><td>
Council’s primary objective is maximising the scale and likely delivery of Affordable Housing;
Council only expects to release a small number of sites and/or developments are of a small scale;
The land is clearly identified for disposal and is not expected to be required for a future council use;
Registered Housing Agencies have limited funds or access to funding and require significant contributions to deliver;
Council has limited internal resources to administer the disposal;
Council is open to transferring of title, subject to agreement as to how it will ensure its value contribution is secured managed over time;
Council has already established a SPV for the purposes of receiving and managing council contributions; and/or
There is an urgency to release land to address demand and/or to align to funding opportunities and, therefore, a simpler delivery model is required.
</td></tr>
<tr><td>Gifting ‘air rights’</td><td>
The land is suitable for multi-level residential development;
Council desires retention of an existing use of the land in the medium- to long-term;
Council has reasonable access to internal and external resources to administer the disposal;
The site has contamination issues that impact on ability to significantly disturb the underlying land; and/or
A Registered Housing Agency has access to funding to meet development costs and does not depend on traditional finance, which would typically require security against the land.
</td></tr>
</table>

The gifting of existing land or ‘air rights’ is less likely to suit scenarios where:

<table>
<tr><th></th><th>Less likely to suit scenarios where:</th></tr>
<tr><td>Gifting Existing Land</td><td>
Other council services are required to be delivered (although a lease-back arrangement could be agreed);
Council requires a financial return;
Council expects the site could be required for another purpose in the future; and/or
Council has a strong policy position to not transfer land out of council ownership.
</td></tr>
<tr><td>Gifting ‘air rights’</td><td>
The land needs to serve as security for debt finance;
Council requires a financial return; and/or
Council wants to retain options for further development of the land in the long-term.
</td></tr>
</table>

Strengths and Weaknesses of Model

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages

Council	▪ Meaningful council contribution, demonstrating leadership and commitment.
	▪ Reduces subsidy gap, increasing the likelihood of development.
	▪ Increases justification for the land being required to be retained for use as Affordable Housing.
	▪ Increases potential for very low and low income households to be housed.
	▪ Supports competitive tendering, providing greater council choice as to recipient Housing Agency and/or type of housing outcomes.
	▪ Provides a greater opportunity for council to influencing outcomes or design.
	▪ Recipient entity is responsible for and controls delivery and associated risks.
	▪ Less likely to depend on market sales and associated risks.
	▪ For existing land – low to moderate level of resourcing to action.
	▪ For 'air rights' only - allows council to maintain a component of public use of land and potential new/replacement facilities (subject to funding).
		▪ For existing land, council relinquishes ownership, development potential and future control over land use (subject to mechanism to secure outcomes).
		▪ For 'air rights':
		    ▪ More complex legal agreement required.
		    ▪ May reduce existing community facility, i.e. reduction in car parking.
		▪ May require higher funding contribution if Registered Housing Agency cannot borrow.
		▪ No financial return on land.
		▪ Risk, subject to mechanism to secure outcomes, that land could be sold into a non-Affordable Housing purpose at a later date.
		▪ Gifting of land may not be supported by community if there are strong views concerning public ownership.
		▪ For 'air rights':
		    ▪ High legal risk, as assets do not transfer until construction is completed;
		    ▪ More complex legal agreement required;
		    ▪ May limit capacity to borrow;
		    ▪ Requires complementary other use and/or management to ensure no conflict between uses.

Community	▪ Improved social outcomes realised on underutilised or surplus public assets. ▪ Land is developed and managed by not-for-profit entity, not private developer. ▪ Increases the potential to support lower income households.	▪ Community assets are no longer in council ownership and are not able to be used for other purposes. ▪ Considered privatisation. ▪ Potential concern about 'over concentration' if large site and 100 per cent Affordable Housing.
Registered Housing Agency	▪ Does not require funding to acquire land or dwellings. ▪ Significant opportunity to deliver in strategic locations. ▪ Reduces reliance on funding, financing and/or market sales and increases likelihood of attracting government investment. ▪ For gifted land - value translates to equity and provides security for borrowing. ▪ For 'air rights' – opportunity to develop and own assets that might otherwise not occur. ▪ Assuming 100 per cent Affordable Housing, 'profit' is captured as value. ▪ Registered Housing Agency primarily controls design and delivery.	▪ Risk of contamination may sit with Agency. ▪ For 'air rights': ▪ High legal risk, as assets do not transfer until construction is completed; ▪ More complex legal agreement required; ▪ May limit capacity to borrow; ▪ Requires complementary other use and/or management to ensure no conflict between uses.
Residential Developer	▪ Construction contract without risks associated with developing to sell.	▪ No access to strategic land opportunities for developments as market-priced housing.

Key Legal and Risk Considerations

Legal considerations

<u>Gifting existing land:</u>

- Local Government Best Practice Guidelines for the Sale, Exchange and Transfer of Council Land requires a council to publish a justification for disposing of land at less than market value.
- Likely to require an agreement to transfer before the transfer occurs to provide assurance to each party of intention and pre-conditions and to support the Registered Housing Agency to secure funding and/or financing. The agreement should consider what happens in the event the Registered Housing Agency cannot meet any pre-conditions in a desired timeframe and who is responsible for costs associated with design and planning if the transfer does not occur.
- It is still appropriate to record the gift in a formal transaction document (e.g. a contract of sale or other instrument of agreement).
- For Registered Housing Agencies, GST may still be triggered by the provision of non-monetary consideration in exchange for the land (although recoverable if a charitable entity is purchasing). Specialist advice may be required.

<u>Gifting 'air rights' over existing land:</u>

- Expected to also require an agreement to transfer to provide assurance to each party of intention and pre-conditions of transfer.
- Requires advanced plans and drawings before contracts can be prepared, expected to be at considerable cost to council and/or Registered Housing Agency.
- Requires construction of property prior to subdivision and transfer, which increases development risk for the Registered Housing Agency.
- Sunset date under any contract should contain a suitable buffer or process to consider an extension to account for any construction delays.

Risk considerations

	Risks	Mitigations
Council	**Financial risk** ▪ Council may need to pay for demolition of the works, or step in to fund their completion if 'air rights' are granted and the Agency fails to complete the development.	▪ Obtaining confirmation of funding from lender/State Government. ▪ Execution of tripartite agreement between builder, financier and the Registered Housing Agency. ▪ Due diligence on Registered Housing Agency's record of project delivery (at relevant scale).
	Legal liability risk ▪ Where air-rights are gifted, council will retain ownership of the gifted premises until registration of the plan of subdivision and will bear any public liability risk for the premises.	▪ Appropriate level of public liability insurance cover. ▪ Contractual allocation of risk (i.e. indemnity from Registered Housing Agency and any other party in possession of the site).
	Reputational risk ▪ Gifting of council land could have negative public perception. Low to moderate reputation risk the gifting of land to a Housing Agency is perceived as 'privatisation'.	▪ Council to communicate reasons for releasing land. Council and Registered Housing to work together on communication.

	Risks	Mitigations
	Regulatory compliance risk ▪ Low to medium risks associated with statutory consultation and tender process to choose Registered Housing Agency partner, as it requires significant additional resourcing and/or time to confirm Registered Housing Agency recipient.	▪ Council expected to have experience in public consultation and managing public tender process.
	Outcome risk ▪ Registered Housing Agency is unable to secure funding or financing to develop the land. ▪ The Registered Housing Agency sell one or more dwellings and reinvest outside the local government area, resulting in a loss of Affordable Housing in the local government area. ▪ The Registered Housing Agency wind-ups.	▪ Registered Housing Agencies are highly experienced in securing funding and financing. ▪ Council engagement with State Government to discuss funding opportunities and alignment. ▪ Registered Housing Agencies are constitutionally structured so that, should they wind-up, assets are required to be transferred to a 'like' organisation. ▪ The parties could agree to a further agreement (e.g. Section 173 Agreement) upon sale to retain an Affordable Housing outcome in the local government area for a period.
Registered Housing Agency	**Financial risk** ▪ Granting of 'air rights' will require detailed drawings and project delivery plan to be ready prior to contract. Could be significant financial cost if the project does not proceed. ▪ Granting of 'air rights' requires Registered Housing Agency to construct at its own cost prior to acquiring any property interest. Project failure would result in sunk costs, with no assets to liquidate.	▪ Seek early confirmation of funding from lender/State Government. ▪ Execution of tripartite agreement between builder, financier and the Registered Housing Agency. ▪ Robust feasibility assessment early in project.
	Legal liability risk ▪ Granting of 'air rights' requires construction on land owned by council. Registered Housing Agency bears the risk of demolition costs in the event of project failure. ▪ Termination due to delay could expose the Registered Housing Agency to a compensation claim.	▪ Seek early confirmation of funding from lender/State Government. ▪ Appropriate conditions precedent with milestone dates, with ability to terminate if project is in trouble.
	Reputational and regulatory compliance risks ▪ No material risks.	
	Outcome risk ▪ Funding or financing is unable to be secured. ▪ Where 'air rights' are gifted and the development has been delayed beyond the sunset date, risk that council or funding party may terminate.	▪ Early engagement with State Government to discuss funding opportunities and alignment. ▪ Ensure appropriate time allowance to complete project and force majeure clauses to allow for extensions of delivery time, if necessary.

Feasibility Considerations

The primary financial consideration for a council in gifting land relates to the decision to forego the land value.

Transfer of ownership will impact on a council's balance sheet and may impact on council's borrowing capacity for other projects.

The development feasibility will be considerably improved by the gifting as land can represent a significant cost input that will not need to be met through equity, debt or grant funding. In addition, the Registered Housing Agency or SPV will capture the land value as equity, which it can then use as security for borrowing.

These benefits may not be as considerable in relation to gifting of 'air rights', particularly if debt is not able to be applied.

Gifted land is expected to reduce the subsidy gap, as highlighted using the hypothetical development scenario and summarised in Figure 6, assuming:

- Gifted land with a hypothetical value of $2.4 million, representing 16 per cent of the GRV;
- Registered Housing Agency contribution of $2,954,545, comprising debt and GST recovered on construction costs, representing 20 per cent of GRV;
- Notional development margin of 14 per cent that becomes value held by the Registered Housing Agency (or SPV); and
- Estimated subsidy gap of $7,545,455 or $251,515 per unit, representing 50 per cent of GRV.

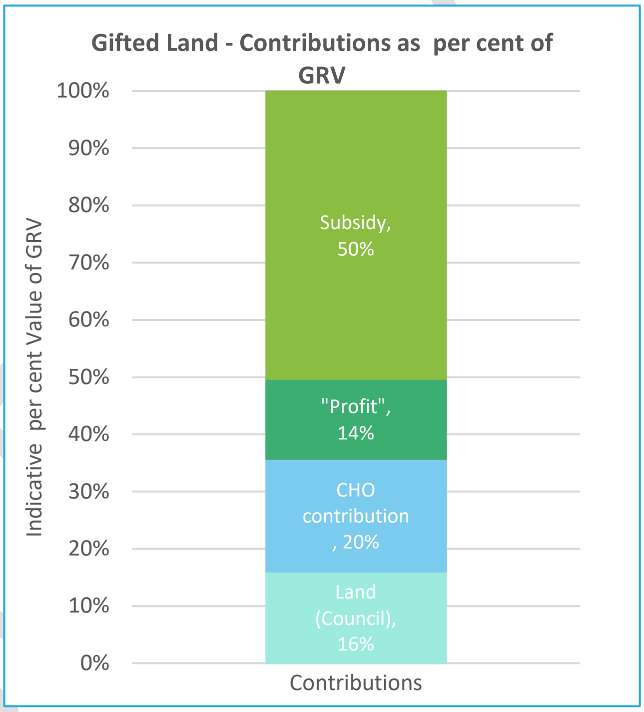


Figure 6: Hypothetical example – Gifted Land

Process and Resourcing Considerations

The process and resourcing to gift land to a Registered Housing Agency is expected to be relatively lower than other models but still require considerable resources and a process to undertake a process to determine a recipient Housing Agency (unless it has already undertaken a process to establish a SPV and managing Registered Housing Agency).

A tender process will require a reasonable level of resourcing by council and Registered Housing Agencies to prepare and assess proposals. Council is recommended to be clear on objectives and to only include necessary tender criteria. Council is likely to require external expertise in planning and design to understand the planning context and potential, develop an initial concept scheme, and potentially to assess proposals.

A process of gifting also requires council to publish the reasons for why it is proposing to receive less than market value for land. Resourcing may also be required to develop a pre-transfer agreement, setting out conditions of the transfer, and subsequently, to secure the outcome (subject to mechanism).

A process to release land under a gifting model is expected to include the following steps:

Assessment of Model

Objectives	Assessment	Rational for Assessment
The number of Affordable Housing outcomes is maximised.		- Gifted land maximises viability and in turn capacity of the Housing Agency to deliver optimal amount of Affordable Housing dwellings on the land.
Delivery model supports priority, very low to low income households.		- Gifted land can support lower income households, as there is less reliance on higher rental returns to service debt financing.
Development results in a financial return on land to council (council objective).		- Gifting of land will not provide a financial return to council. - Potential to be coupled with a mechanism, such as a mortgage instrument requiring a return to council, should the land be sold.
Development and operational feasibility.		- Gifted land maximises viability of development, as it reduces the subsidy gap and/or debt financing requirements.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		- High likelihood that the land as the council contribution will be always provided into an Affordable Housing use or that if it was sold, that the value of the council contribution would be reinvested by the Housing Agency in new Affordable Housing as this is the Agency's constitutional purpose.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		- Medium likelihood that the value of the council contribution will be reinvested in the local municipality but not guaranteed. - A mechanism, such as a legal agreement or mortgage instrument, is required to secure any reinvestment in the area, if the land was ever sold.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.		- Gifted land without legal agreements restricting use provide the Registered Housing Agency with full control over site and asset use.

EXAMPLE – GIFTING OF LAND

EXAMPLE:	DRILL HALL REDEVELOPMENT
Local Government	City of Melbourne
Housing Agency	Housing Choices Australia
Outcomes	▪ 58 Affordable Housing units, including several suitable for a person with a disability, and the refurbishment of the hall and lease back to council on a 99-year period for community use.
Background / Structure	▪ The 1937 Royal Melbourne Drill Hall was a Melbourne City Council owned site that was in disrepair, requiring significant funds to refurbish due to heritage overlays. ▪ Council undertook a process to transfer the land to Housing Choices Australia at no cost for the purposes of Affordable Housing and restoration of the building and hall. ▪ The total project cost excluding land and including the hall refurbishment was $24.6 million (2011 $). ▪ Housing Choices contributed $2.05 million and secured $19.3 million under the Commonwealth Nation Building Economic Stimulus program, $2 million from the Sidney Myer Centenary Fund and $1.25 million from the Melbourne City Council.

Photos: Drill Hall Affordable Housing Development, Melbourne CBD

EXAMPLE:	**PORT PHILLIP HOUSING TRUST PROJECTS**
Local Government	City of Port Phillip (CoPP)
Housing Agency	HousingFirst (formerly Port Phillip Housing Association)
Landowner	Port Philip Housing Trust
Structure	CoPP has facilitated the development of Affordable Housing across several land assets including: • **Liardet Community Housing, Port Melbourne (completed 2004)** Six units developed by council in air space over and adjoining the Liardet Community Centre as it was being upgraded in 2004. 25 per cent funding by CoPP and 75 per cent by DHHS. Two-lot plan of subdivision, following development with dwellings owned and managed by HousingFirst. • **Woodstock Community Housing Project, Balaclava (2006)** 30 units delivered by City of Port Philip through an air space development, via two-lot plan of subdivision over a replacement Council car park. Dwellings managed by HousingFirst and car park managed by City of Port Phillip. • **Kyme Place, Port Melbourne (completed 2012)** A 27-unit community housing project developed in 2012 by Port Philip Housing Association in air space over a replacement council car park. Resulted in a two-lot subdivision with the Trust owning the dwellings and the CoPP owning the car park. • **Inkerman Oasis (completed in stages 2003 - 2012)** Gifting of a former council depot to a private developer for development of a total 262 units, in exchange for the development and transfer of 28 community housing units (mixed with private dwellings) back to council for use as Affordable Housing at no cost, as a return on the land value (in addition to a broad range of design deliverables). An additional three units were purchased by DHHS. All 31 Affordable Housing dwellings are owned by the Trust and managed by HousingFirst. • **Marlborough Street (under development)** Council will gift approx. 1,800m2 of land used as a car park to Port Philip Housing Trust Trustee and HousingFirst in exchange for it being developed as 46 Affordable Housing units and development of a basement car park and expanded nearby Balaclava Walk – the latter to remain council's responsibility. The project is valued at $23 million (2020 $), with land comprising $7 million or $5 million when adjusted to account for the public car park. HousingFirst has secured a $22 million grant from the State Government and construction has commenced, due for completion in July 2022.
Key Learnings	*See for example Mechanism 2: Special Purpose Vehicle*

Photos: L: Kyme Place, R: Woodstock

MODEL 2: SALE OF LAND AT A DISCOUNT

Model:	Sale of Land at a Discount
Overview	▪ The model involves the sale of land at a discount to either: ▪ A Registered Housing Agency or a SPV for 100 per cent Affordable Housing development, or; ▪ A Registered Housing Agency or a private developer for a mixed tenure development with a requirement for a percentage of Affordable Housing. The title to the land is transferred to the purchaser in accordance with sale terms.
Landowner for term of use	▪ Private landowner if land sold to developer with a Registered Housing Agency or council established SPV the owners of the resulting Affordable Housing.
Key Strengths	▪ Provides for a financial return in addition to social outcomes (subject to discount, interest and capacity of a Registered Housing Agency to purchase). ▪ Potential model for development of large scale sites that require involvement of a developer.
Key Weaknesses	▪ Council relinquishes ownership, development potential and future control over land use ▪ Registered Housing Agency requires funding to purchase site or model involves sale to private developer. ▪ Discount may not be sufficient to support any meaningful Affordable Housing outcome. ▪ Requires determination of discount, likely to result in a more complicated tender process.
Responsibility for assets and tenants at end of term or dwelling life	▪ Registered Housing Agency or SPV.
Resourcing to Implement	▪ High

Application and Reasons for Applying

Whilst in theory, a council could sell land at full market value, the need for subsidy to support the realisation of Affordable Housing for households in housing stress means that it is highly unlikely a Registered Housing Agency would have the capacity to purchase land at market value. This model therefore assumes a discount is applied. The extent of the discount will influence the outcomes and delivery.

A discounted sale model is expected to suit circumstances where:

- Council requires a financial return on the land; and/or
- It is a complex and/or large site that requires a developer and a market sale component to support feasibility of Affordable Housing and diverse community and housing outcomes.

It will not suit circumstances where:

- There is no funding available for a Registered Housing Agency to purchase land, or the discount would effectively need to be 100 per cent (i.e. gifted) for the Affordable Housing to be feasible; or
- Where sale to a private developer is not supported by council.

Strengths and Weaknesses of Model

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages
Council	▪ Subject to discount and sale structure, could support a meaningful contribution towards Affordable Housing. ▪ Receives a financial return on land. ▪ Subject to discount and value for investor / impact on subsidy requirement, could attract funding or financing. ▪ Recipient entity is responsible for, and controls delivery and associated risks.	▪ Council relinquishes ownership, development potential and future control over land use (subject to mechanism to secure outcomes). ▪ Requires consideration of what is an acceptable discount with regard to the amount of Affordable Housing to be delivered. Uncertainty on return if competitive bidding process. ▪ Discount may need to be considerable to offset costs. ▪ May require sale to a private developer (reputational risks) and need to determine Affordable Housing percentage and expectations (more complex tender). ▪ Registered Housing Agencies less interested as require funding to purchase. Reduces pool of Agencies that can tender. ▪ May impact on feasibility and Agency capacity to house very low and low income households. ▪ Increases reliance on other funding. ▪ Risk, subject to mechanism to secure outcomes, that land could be later sold into a non-Affordable Housing purpose to repay debt. ▪ May not provide council a strong basis for influencing outcomes or design. ▪ Could require Agency to include units for market sale to meet costs (risk). ▪ Moderate to higher level of resourcing to action. ▪ Sale of land may not be supported by community, particularly if sold to a developer.
Community	▪ Improved social outcomes realised on underutilised or surplus public assets. ▪ Land is developed and managed by not-for-profit entity, not a private developer.	▪ Community assets are no longer in council ownership and are not able to be used for other purposes. ▪ Perception of privatisation, particularly if sold to a developer. ▪ Development could result in a majority of market-priced housing. ▪ May not support very low income households.
Registered Housing Agency	If land is sold to a Registered Housing Agency: ▪ Significant opportunity to deliver Affordable Housing. ▪ Subject to discount, may reduce funding and financing requirements. ▪ Land in Agency control increases likelihood of attracting investment and value is security for borrowing. ▪ Assuming 100 per cent Affordable Housing, 'profit' is captured as value. ▪ Agency primarily controls design and delivery.	▪ Need to have funds or to secure funding to purchase land. ▪ Need to invest in tendering and determination of discount. ▪ If Agency developing - need to secure and manage development financing, process and risks. ▪ If land is sold to a developer – need to partner and determine delivery arrangement. Developer has greater control over outcomes, including timing.

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages
	▪ May not be dependent on market sales or driven by developer objectives. ▪ Potential to include market-priced housing to offset cost of land. If land is sold to developer: ▪ Opportunity to partner and realise a component of Affordable Housing. ▪ Agency does not need funds to pay for land. ▪ Development risks and costs borne by developer. ▪ Potentially reduces subsidy gap.	
Residential Developer	If land is sold to a developer: ▪ Opportunity to purchase strategically located land at a discount and deliver mixed tenure outcomes. ▪ Affordable Housing take-out could be viewed as pre-sale subject to terms.	▪ If land is sold to Registered Housing Agency - no access to strategic land opportunities for developments as market-priced housing.

Key

Legal and Risk Considerations

Legal considerations

- Land Disposal Policy requires council to publish a justification for disposing of land at less than market value.
- Sale to Registered Housing Agency is expected to require an agreement prior to a contract of sale being entered to support Registered Housing Agency to secure funding and financing. This will require consideration of circumstances and timing of sale, and implications if Registered Housing Agency is unable to secure funding or financing, including who is responsible for costs of progressing planning and design.
- Sale to developer will require determination of the form of the sale agreement, process and timing to pay funds and transfer the land. A development agreement is one means of securing a development right prior to the transfer of land.

Risk considerations

	Risks	Mitigations
Council	**Financial risk** ▪ Risk the offered price does not meet council's financial return expectations.	▪ Determine and provide guidance on price / discount expectations. ▪ Seek independent analysis to understand cost impact of Affordable Housing expectations on land value.
	Legal liability risk ▪ Housing Agency is unable to meet contract terms prior to land transfer.	▪ Establish communication process to identify and support mitigation of any risks to contract execution. ▪ Provide option for Registered Housing Agency to seek contract extension in defined circumstances.
	Reputational risk ▪ Sale of land could have negative public perception / perceived as privatisation.	▪ Council to communicate reasons for releasing land. ▪ Council and Registered Housing to work together on communication.
	Regulatory compliance risk ▪ Low to medium risks associated with statutory consultation and tender process to choose Agency partner, as it requires significant	▪ Council expected to have experience in public consultation and managing tender process.

	Risks	Mitigations
	additional resourcing and/or time to confirm recipient.	▪
	Outcome risk ▪ Agency needs to sell dwellings in the future to repay debt or manage costs. ▪ Agency decides to sell one or more dwellings and reinvest outside the local government area. ▪ Agency forced to wind-up. ▪ Land is sold but is not developed as the Agency was unable to secure funding, financing and/or planning approval.	▪ Contract of sale subject to funding/financing. ▪ Registered Housing Agencies are constitutionally structured so that should they wind-up, assets are required to be transferred to a 'like' organisation. The Affordable Housing outcome would be transferred to a housing agency with an aligned purpose ▪ Parties could agree to a further agreement (e.g. Section 173) upon sale to retain an Affordable Housing outcome in the local government area for a period.
Registered Housing Agency	**Financial risk** ▪ Finance / funding not secured or is not sufficient to purchase and develop.	▪ Contract of sale subject to funding or financing. ▪ Seek early confirmation of funding from lender/State Government. ▪ Robust feasibility assessment early in project.
	Legal liability risk ▪ Granting of 'air rights' requires construction on land owned by council. Agency bears the risk of demolition costs in the event of project failure. ▪ Termination due to delay could expose the Agency to a compensation claim.	▪ Put in place appropriate conditions precedent with milestone dates, with ability to terminate if project is in trouble.
	Reputational risk ▪ Negotiating discount with a council can be difficult where parties have minimal experience doing so or working with each other. Some degree of relationship risk, which might jeopardise future projects together	▪ Landowner and council referring to this resource when negotiating may assist with perception of 'good faith'.
	Regulatory compliance risk ▪ No material regulatory risk	
	Outcome risk ▪ Council expectations on sale price cannot be met. ▪ Council discount may not be sufficient to support development or housing for very low income households and/or Registered Housing Agency cannot secure funding or financing. ▪ Sale to developer places control of land and outcomes with developer.	▪ Seek early confirmation of funding from lender/State Government. ▪ Engagement with council to support understanding of the relative costs of delivering Affordable Housing and need for sufficient discount and subsidy. ▪ Ensure clear Registered Housing Agency and council agreement with developer.

Feasibility Considerations

Sale of land at a discount requires several critical considerations in relation to project feasibility including:

- The estimated land value and how the inclusion of Affordable Housing impacts on valuation;
- The discount that the council supports and how this impact on the way in which Affordable Housing is delivered and/or the number of outcomes;
- Charitable tax considerations;
- Timing of the sale and payment, including if a deposit is payable;

- Whether council will accept a delayed payment for the land to improve viability. Such an agreement will require an appropriate legal agreement to allow for development before title transfers.

For the purpose of showing a potential impact on subsidy requirements, the hypothetical example assumes the land is sold at a 50 per cent discount to a Registered Housing Agency; the cost of purchasing the land is funded by government subsidy; and the entire site will be developed as Affordable Housing. The potential impact on subsidy in this hypothetical example is illustrated in Figure 7, summarised as:

- Land sold at a 50 per cent discount, resulting in a value of council contribution of $1.2 million, representing 8 per cent of the GRV;
- Registered Housing Agency contribution of $ $2,954,545, comprising debt and GST ITC, representing 20 per cent of GRV
- There is a notional development margin / 'profit' of 16 per cent ($2.4 million) captured by the Registered Housing Agency; and
- Estimated subsidy gap of $8,745,455, or $291,515 per unit, representing 58 per cent of GRV.

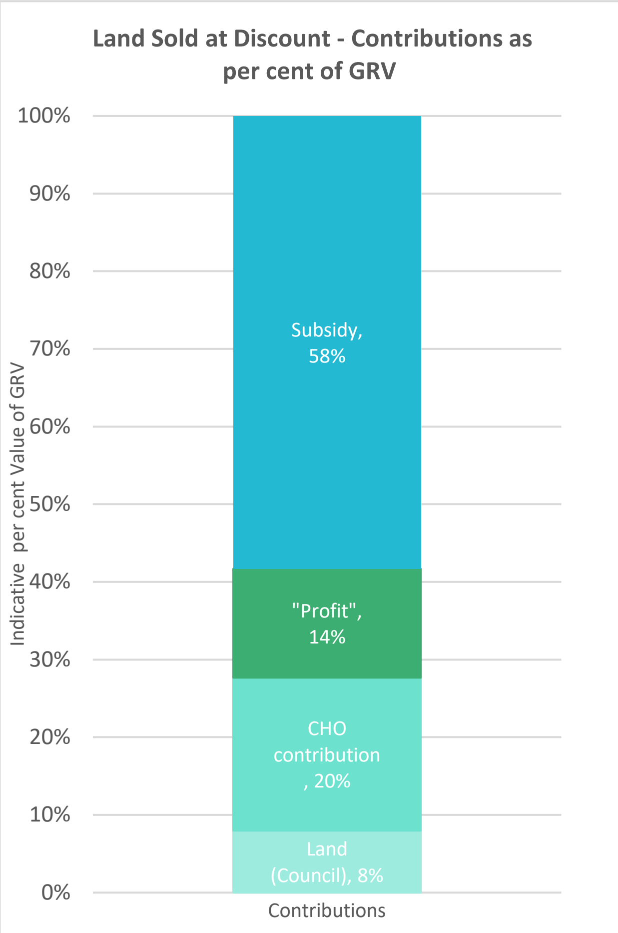


Figure 7: Hypothetical example – Discount to Land

Sale to a developer at a discount, and assuming a portion of the site is developed as market housing, will require complex consideration of how the 'for profit' component impacts on the developer's assessment of land value and how the Affordable Housing is expected to be funded.

Process and Resourcing Considerations

The process of releasing land at a discount is expected to be considerably more resource-intensive than gifting land, as it will require council to determine the parameters of the sale and undertake a process of assessing and comparing offers and subsequently entering a sale arrangement. It will require careful consideration of trade-offs and objectives relating to the amount of Affordable Housing and the financial return.

Sale of land to a developer, which may be required for very large or complex sites, is also expected to require a sophisticated tender process to assess capacity, outcomes, return and risk, likely to require external expertise.

Resourcing is also expected to support legal structuring of a sale arrangement, noting that it is likely the purchasing entity will seek to delay settlement to maximise feasibility.

A tender process will require a moderate to high level of resourcing by council and Registered Housing Agencies to prepare and assess proposals. Determination of the discount the council is prepared to accept will require significant consideration and potentially external advice. The council is recommended to be clear on objectives and to only include necessary tender criteria. A council is also likely to require external expertise in planning and design to understand the planning context and potential, develop an initial concept scheme, and potentially to assess proposals.

A process of selling land at a discount also requires council to publish the reasons for why it is proposing to receive less than market value for land. Resourcing may also be required to develop a pre-transfer agreement, setting out conditions of the transfer, and subsequently, to secure the outcome (subject to mechanism).

The process to release land at a discount is expected to involve:

1. Council identifies land and determines suitability and indicative discount.
2. Council undertakes process to select recipient and to dispose of the land at discount
3. Purchaser undertakes detailed design, secures planning and sources investment to fund constructionn.
4. Mechanism applied to support outcomes over agreed period.
5. Purchser owns development and manage as Affordable Housing.

Assessment of Model

Objectives	Assessment	Rationale for Assessment
The number of Affordable Housing outcomes is maximised.		▪ Discount will impact on feasibility. Subject to funding and sale model, the need for a Housing Agency to pay for the site may impact on the number and type of outcomes that are realised.
Development model supports priority, very low to low income households.		
Development results in a financial return on land to Council (council objective).		▪ Discount may need to be very high to attract Registered Housing Agency interest. Level of return may therefore be nominal.
Development and operational feasibility.		▪ Registered Housing Agency needs to source funds to purchase. The overall feasibility is subsequently impacted by the discount. A very high discount could move this assessment to green.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		▪ High likelihood that the land as the council contribution, will be always provided into an Affordable Housing use or that, if it was sold, the value of the council contribution would be reinvested by the Housing Agency in new Affordable Housing, as this is the Agency's constitutional purpose.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		▪ Medium likelihood that the value of the council contribution will be reinvested in the local municipality but not guaranteed. Will not necessarily be for the total land value if land is sold to a developer. ▪ A mechanism such as a legal agreement or mortgage instrument is required to secure any reinvestment in the area if the land was ever sold.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.		▪ Discounted sale of land to a Registered Housing Agency without legal agreements restricting use provide the Registered Housing Agency with full control over site and asset use.

EXAMPLE – SALE AT A DISCOUNT

EXAMPLE:	BRUCE STREET, BOX HILL SALE AND MIXED-USE DEVELOPMENT
Local Government	City of Whitehorse
Housing Agency	HousingFirst
Developer	MAB Corporation
Outcomes	▪ The project will deliver a total 233 units across a 10 and 19-storey development, 73 dwellings (31 per cent) will be owned by HousingFirst, comprising one and two-bedroom dwellings located in the 10-storey tower. HousingFirst secured State Government funding towards the project. ▪ The remaining dwellings will be sold by MAB at market value.
Background / Structure	▪ 2012-13 - the City of Whitehorse identified a need to relocate several persons living in three council-owned boarding houses that were no longer suitable for residents. ▪ Council also identified an underutilised car park at 2-4 Bruce Street, comprising approximately 2,500 sq m, located within the Box Hill Activity Centre, that would be suitable for Affordable Housing development and the rehousing residents of the boarding houses. ▪ The land was zoned Public Use, so, in 2016, Council undertook a planning amendment to zone it to Mixed Use, enabling residential development. ▪ The land was released for sale via a tender directed to Registered Housing Agencies. Agencies could submit in partnership with a developer, but developers could not tender without a Registered Housing Agency partner. ▪ HousingFirst, in partnership with developer MAB Corporation, was selected to acquire the site at a significant discount.
Key Learnings	▪ Council agreeing to the Affordable Housing objectives and getting sign-off from councillors early in the process was critical. ▪ Providing a permitted and contracted project that met criteria for State Government Social Housing Growth Fund funding supported funding approval. ▪ Manage community expectations about development timing, including impacts of COVID. ▪ Market sales are dictated by supply and demand factors and can be impacted by macro-economic factors beyond the control of the developer and Housing Agency. ▪ Costs/budget can be managed though the contract of sale providing surety of project costs and delivery, utilising the expertise of a leading developer. ▪ Requires council and Registered Housing Agency to have skills and resourcing to manage extensive tendering and approval processes.

Photo: Box Hill development Concept Scheme

EXAMPLE:	PAKENHAM WOMEN'S HOUSING PROJECT
Local Government	Cardinia Shire Council
Housing Agency	Women's Property Initiatives
Outcomes	▪ Development of four three-bedroom double-storey dwellings and two two-bedroom single-storey dwellings targeted at low-income, women-led families, many of whom will have had experience with family violence.
Background / Structure	▪ In 2016 Cardinia Shire Council identified a vacant parcel of land as a suitable site for Affordable Housing and resolved to sell or lease the property to a Registered Housing Agency ▪ Registered Housing Agencies were asked to identify through an Expression of Interest process their preference for a lease or sale arrangement, and to nominate a proposed purchase price if the later was preferred. Council had a market valuation and a social valuation prepared, with the later forming the basis for comparing bids. ▪ Following review of tenders and a public notification process the land was sold at a discount to Registered Housing Agency Women's Property Initiatives (WPI) who secured funding from the Victorian Property Fund and the Edward Wilson Trust to support development. ▪ The sale of the land was accompanied by a Section 173 Agreement which outlined obligations for WPI to proceed with the planning application and construction of Affordable Housing within specific timeframes and for the land to be returned to council, should WPI dissolve.
Key Learnings	▪ From a Council property perspective, the sale of land is a simpler transaction than a long-term lease. Council's only ongoing role with the site is in relation to compliance of a section 173 agreement to ensure the site continues to be used for the agreed use, rather than lease compliance issues. ▪ Council should clearly define their desired outcome for the community and what need the housing project is addressing in the local community. It should also ensure all appropriate internal departments are involved in early discussions so there are no surprises for the Registered Housing Agency of the council's requirements to proceed with a sale, including associated statutory processes. ▪ Utilising council land can have additional challenges about community acceptance as council must notify the community of their intent to sell/lease the land and for what intended purpose. ▪ Council and Registered Housing Agency need to work closely together to respond to and address community concerns, particularly when wider neighbourhood issues are unfairly associated with a social housing property. Community engagement/communications needs to be carefully considered on commencement of the project, and an ongoing basis. ▪ Roles and responsibilities of council and Registered Housing Agency with regard to property/tenancy management (including other issues that can arise which are council-wide and not related specifically to Affordable Housing), should be clearly articulated, so that the council can consistently respond to resident complaints/concerns and wider issues are not wrongly perceived to be associated with an Affordable Housing development. ▪ The process of releasing council land would be enhanced by a wider communications campaign that highlights the importance of social housing, the great work that Registered Housing Agencies and council do to support people in the community, and the great outcomes that can be achieved.

Photo: Pakenham Women's Property Initiatives development

MODEL 3: LEASING OF LAND

Model:	Leasing of Land
Overview	▪ The model involves the leasing of land to a Registered Housing Agency at a below market return, including at a 'peppercorn' or nominal rate (i.e. $1 per year). ▪ A lease agreement provides the Registered Housing Agency with rights to develop and use the land. The Registered Housing Agency will need to secure funding and financing for the development and manage costs over time. A lease could be at a discount to market rent or effectively nil return ('peppercorn lease'). ▪ Section 115 of the Local Government Act 2020 provides that a council can enter a lease for up to a maximum term of 50 years. ▪ Council retains title to the land and at the end of the lease term, the land, and depending on the terms of the lease, any assets constructed or brought onto the land revert to council control or must be removed from the land, unless a new lease or a sale agreement is reached. ▪ Note: it is not feasible to lease 'air rights' of vacant space above a council lot, as the Registered Housing Agency cannot develop this space in isolation from council's land use. Leasing, therefore, refers to an entire piece of land.
Landowner for term of use	▪ Council
Key Strengths	▪ Council retains ownership of underlying land and has control of land at the end of an agreed lease period.
Key Weaknesses	▪ Can impact on feasibility as Agency is unable to use the land to secure finance. ▪ Requires consideration of responsibilities and risk over lease term and in relation to tenancies at end of lease period. ▪ Time-limited use may impact on Agency willingness to invest.
Responsibility for assets and tenants at end of term or dwelling life	▪ Assets will be the responsibility of council as landowner unless otherwise agreed. ▪ Registered Housing Agency may be responsible for terminating tenancies / handing back vacant properties – subject to Residential Tenancy Act regulation.
Level of Resourcing to Implement	▪ High level resourcing the first time the model is applied by a council.

Application and Reasons for Applying

The primary reason why a council may pursue a lease model is that it requires title to the land to remain in its name because:

- Its key objective is to maintain a legal interest in council assets;
- It has multiple assets it is considering and other models, such as gifting, are not feasible (too high an impact on balance sheet), and/or are not acceptable to the community;
- Community facilities to be owned by council will be delivered on the site, making the transfer of title complex or not easily achievable, and/or would impact on council's ability to manage the future redevelopment of council assets;
- There is a reasonable expectation the land will be required for another purpose at a future point.

Reasons why a Registered Housing Agency may support a lease model include that:

- The site is very well located and will support a reasonable amount of Affordable Housing supply, relative to resourcing and effort;
- The development will result in other council uses that means other disposal methods cannot be easily implemented;
- There are limited other options to secure strategically located land at no cost;
- There is reasonable confidence that funding will be available to meet development costs;
- The term supports Registered Housing Agency and/or other investment to enable construction;
- The terms relating to end of lease are acceptable and expected to be managed; and/or
- The Registered Housing Agency has experience in lease models and understands and can manage risks.

Leasing of land is generally not a high-priority model for Registered Housing Agencies, as it does not provide the same benefits as models where the Registered Housing Agency has title to the land, as it increases investment requirements and risk without the control granted by freehold title.

Additional resources: CHIA has released a lease template, prepared by Moores Legal, to assist councils and Registered Housing Agencies progress and streamline leasing arrangements.

Strengths and Weaknesses of Model

Stakeholder	Strengths / Benefit	Weaknesses / Disadvantages
Council	▪ Supports delivery of new Affordable Housing in strategic locations. ▪ Council retains ownership of the land and value of land is retained on council balance sheet. Potentially greater level of support by community. Not viewed as 'privatisation'. ▪ Potential for modest financial return under lease agreement. ▪ If council decides to sell land in the middle of the lease period, the lease would survive and the purchaser would take on the role of landlord. ▪ Land is available for potential future alternative use. ▪ Registered Housing Agency is responsible for, and controls, delivery and associated risks. ▪ Council has potential stronger basis to influence outcomes or design (more partnership approach). ▪ Registered Housing Agencies have experience managing Director of Housing or council stock and land and bring experience delivering and operating within a 'headlease' or 'sublease' model.	▪ There is unlikely to be any significant financial return during lease term (likely to be nominal). ▪ Requires more complex legal agreement (time and cost). ▪ Less attractive option for Registered Housing Agencies and, therefore, level of competitive interest. ▪ Land cannot be used as security for debt, therefore has an impact on subsidy requirement and likely delivery (higher risk option). ▪ Risk Affordable Housing use is lost after end of lease term. ▪ Reputation risk/issues for future council associated with eviction of vulnerable households. ▪ Does not support Affordable Home Ownership or other sale models that could improve feasibility or housing diversity. ▪ Potential risk that assets are not well maintained if no incentive and/or funds for Registered Housing Agency to invest in maintenance towards the end of a lease term. ▪ Requires monitoring of terms over lease period. ▪ Council may be required to contribute to structural or capital costs following development if it expects to receive the developed assets at the end of the lease term. ▪ Contamination risk may sit with council.
Community	▪ Land is retained in council control, not 'privatised'. ▪ Land is developed and managed by not-for-profit entity, not a developer.	▪ Potential concern that 100 per cent Affordable Housing is an over-concentration, particularly if a large site.

Stakeholder	Strengths / Benefit	Weaknesses / Disadvantages
		▪ Potential concern about what happens to tenants at the end of the term.
Registered Housing Agency	▪ Opportunity to deliver Affordable Housing in strategic locations where land supply options are constrained. ▪ Rights to develop without having to source funds to purchase the land. ▪ If council decides to sell land in the middle of the lease period, the lease would survive and the purchaser would take on the role of landlord. ▪ Assuming 100 per cent Affordable Housing, 'profit' is captured as value. ▪ Experienced operating within a 'headlease' or 'sublease' model. ▪ Primarily controls design and delivery. ▪ Not dependent on market sales or driven by developer objectives.	▪ Requires more complex legal agreement (time and cost). ▪ Considerable risks as lease does not commence until assets developed. ▪ Required to significantly invest in construction and maintenance of asset over time without ownership of land or future redevelopment potential. ▪ Risks and costs associated with needing to support tenants to vacate at end of term. Potentially no alternative Affordable Housing available. ▪ Funders are unwilling to accept leasehold interest as security for a loan, limiting the availability of debt finance for the development and increasing subsidy gap / funding requirements. ▪ No certainty of use beyond term of lease.
Developer	▪ Construction contract without risks associated with developing to sell.	▪ Does not gain access to strategic land opportunities for development.

Key Legal and Risk Considerations

Legal considerations

Although a council could grant a lease to a Registered Housing Agency on the condition that it is developed into Affordable Housing, there is considerable risk in granting a long-term lease prior to the development the assets. In general, it will be simpler for the lease to the Registered Housing Agency to commence after the building works are complete.

An 'agreement for lease' structure is one mechanism to reduce the uncertainty that would otherwise come from a long-term lease of vacant land. This type of agreement provides access rights to land for the Registered Housing Agency (or its developer), provides a licence to develop the proposed assets, and has a sunset date for the development of the assets. The agreement for lease also sets out the conditions precedent required prior to commencing the development, such as acceptable planning and finance approval. Where conditions are not met within an agreed timeframe, the agreement may provide for the parties to terminate the agreement for lease without investing considerable resources.

The agreement for lease may operate for several years, with the lease to the Registered Housing Agency only commencing once occupancy certificates are obtained for the developed assets. An agreement for lease will typically need to cover:

- Conditions precedent for development and lease commencement and responsibility for costs and cost-sharing, in event the agreement is terminated;
- Who is responsible for remedying pre-existing contamination on the land;
- Whether there will be a project control group, its composition and role in project delivery;
- The design approval process for the assets and level of input the council will have;
- The conditions of the licence to develop the assets, such as workmanship, procurement obligations, delays and occupation health and safety responsibility;

- Insurance coverage required by the Registered Housing Agency or its developer during the licence period;
- A sunset date for the completion of the works;
- How the commencement date for the lease will be determined; and
- Each parties' obligations in the event the assets are substantial damaged or destroyed during the development.

It is not always necessary to have an agreement for lease, but it can be a useful tool for managing the relationship between council, Registered Housing Agency and developer during the construction period.

The lease itself will typically be an annexure to the agreement for lease, with the terms of the lease needing to be pre-agreed to provide certainty to all parties.

The terms of the lease will need to consider the following:

Type	Key Considerations
Rent	▪ Does council expect to receive a financial return from the rent, or is it willing to accept a nominal or discounted rate of rent to facilitate the project? This is a similar consideration to deciding whether to gift or sell land to a Registered Housing Agency. ▪ If the rent is nominal, will council expect that all other costs associated with the land and the assets be paid by the Registered Housing Agency? If rent is not discounted, how might rents be reviewed over the term of the lease?
Maintenance	▪ Will the Registered Housing Agency or council be responsible for capital or structural maintenance of the building assets? How might this change if council expects to receive ownership of the assets at the end of the lease?
Insurance	▪ Who is responsible for insuring the property, and what level of coverage is required to protect each party's interests? ▪ Where council is the insuring party, will the Registered Housing Agency be required to reimburse any premiums as outgoings?
Reporting requirements	▪ Does council require ongoing annual reporting by the Registered Housing Agency, and what should the Registered Housing Agency be required to report on? Is the Agency's regular annual reporting to the Housing Regulator is sufficient? ▪ Alternatively, would council prefer to have a right to request these details as required?
Major damage or destruction	▪ If the assets are substantially damaged or destroyed, will there be an obligation to rebuild to ensure continuity of the housing outcome? ▪ Alternatively, will the Registered Housing Agency have a right to terminate the lease where reconstruction costs are prohibitive? If so, who will be responsible for remediating the land back to a vacant lot?
Failure to perform / meet obligations	▪ Disputes between the parties present considerable risk, as both parties will be investing significant resources into the development of the Affordable Housing asset and unwinding on termination will be very difficult. ▪ What dispute resolution and mediation procedure do the parties need in place, and what proactive measures can be taken to prevent disputes from escalating (e.g. regular meetings between Registered Housing Agency and council to review the asset and each party's performance of their obligations)?
Termination / expiry of the term	▪ It is not currently possible to grant the Registered Housing Agency an option to renew the lease beyond 50 years and so the parties should consider what happens to the assets at the end of the term and how any process of relocating tenants will be managed. ▪ The lease could provide for the assets to be returned to council, potentially as consideration for the grant of lease at a nominal or discounted rent. Alternatively, the parties may agree that the Registered Housing Agency has an option to purchase the land at the end of the term, or that council must purchase the assets (excluding land value). ▪ In the event of early termination of the lease due to a default by one party, consideration as to whether the ownership of the assets will be affected is required. In year 10 of a 50-year lease, the Registered Housing Agency had an expectation of receiving the benefit of the assets for another 40 years and may have funding obligations to government relating to a specific term of use. Therefore, the possibility of

Type	Key Considerations
	termination in year 10 presents significant financial, investment and reputational risk for the Registered Housing Agency and to a degree, council that need to be considered.
Sub-tenants	▪ Will the landlord (council) have any ongoing input into the target sub-tenant cohort? ▪ Who will be responsible for sub-tenant damage to the property (including damage which requires structural or capital works or repairs)? ▪ Who will be responsible for relocating subtenants where the lease ends due to termination or expiry of the term? ▪ What rights do council have to appoint a new Registered Housing Agency to take over the lease and manage the subtenancies?

Risk considerations

	Risks	Mitigations
Council	**Financial risk** ▪ Where lease does not require the Agency to return the land vacant at the end of the lease (e.g. with constructed housing remaining at the site) , Council may take possession of aged buildings in need of repair or demolition. ▪ Where Agency or its developer fails to complete the development (e.g. lack of funding), Council may be forced to take back premises with partial constructed buildings and either pay for completion or find a new Agency to continue the project.	▪ Parties to consider and reflect in an agreement and processes what will happen to the developed housing assets at the end of the lease (or earlier termination). E.g. If council is aware in advance it will be taking the constructed dwellings, it can budget for their remediation or removal. ▪ Funders (either lender or State Government) will typically require step-in rights to ensure the delivery of the housing outcome. ▪ Ensure early and refined due diligence and feasibility assessment to ensure viability.
	Legal liability risk ▪ No material legal liability risk.	
	Reputational risk ▪ Long-term lease of council land could have negative public perception. ▪ Stigma associated with Affordable Housing or any negative tenant activity may reflect upon council as landowner	▪ Council to communicate reasons for releasing land. ▪ Council and Registered Housing to work together on communication. ▪ Registered Housing Agency experienced in managing tenants with complex needs.
	Regulatory compliance risk ▪ Landlord is only able to terminate a tenancy where the premises are to be demolished or substantially renovated. Agency may therefore not be lawfully able to terminate tenancies at the end of the term, requiring a handover of the tenancies to council or an extension of the lease term. ▪ Land continues to be held in council's name, and it will be responsible for the land to the extent that responsibility is not transferred to the Agency under the lease. ▪ Low to medium risks associated with statutory consultation and tender process to choose Agency partner, as it requires significant additional resourcing and/or time to confirm recipient.	▪ Council and Agency should proactively manage tenancies toward the end of the lease term to either move tenants to alternative premises or arrange an extension. ▪ Residential Tenancies Act currently provides for a tenancy to be terminated if dwelling has reached end of building lifecycle. ▪ Depending on terms of agreement with Agency (e.g. whether lease is rent free), council should draft lease to minimise its own responsibility for the land for the duration of the lease. ▪ Council expected to have experience in public consultation and managing tender process.
	Outcome risk ▪ Agency is unable to secure funding or financing for development which may be due to lease terms.	▪ Careful consideration of lease terms and early engagement with funders and financiers. ▪ Agencies will typically seek to deliver outcomes to groups with greatest need. Flexibility

	Risks	Mitigations
Registered Housing Agency	▪ Shifting housing priorities for council over the term of the lease may result in the original target cohort no longer being a priority. ▪ Agency forced to wind-up.	measures should be built into the lease to allow Agency to determine tenant cohort or to account for changes in housing needs. ▪ Registered Housing Agencies are constitutionally structured so that should they wind-up, assets are required to be transferred to a 'like' organisation. Management therefore expected to be transferred to another Agency. Agreement with council to also cover Agency wind-up or inability to operate.
	Financial risk ▪ Finance / funding not secured or is not sufficient to fund development. ▪ Depending on rent required by council, housing mix may not yield sufficient rental income to meet any rent to council, debt or operational costs. ▪ Depreciation of developed housing assets over time, without the ability to sell the land to realise a profit.	▪ Lease subject to funding or financing. ▪ Seek early confirmation of funding from lender/State Government. ▪ Robust feasibility assessment early in project. ▪ Confirmation of rent required (including any scheduled rent increases during the term) should be obtained as part of financial feasibility modelling for the development. ▪ Sufficient term of lease to ensure return on investment is realised.
	Legal liability risk ▪ Breach of lease may require compensation payment to council. ▪ 'Make good' obligations of the site at the end of the lease may require demolition or removal of improvements.	▪ Ensure lease document is fit for purpose. ▪ Ensuring that lease obligations are actively managed during the term. ▪ Where end of lease requirements are known in advance, Agency can budget for demolition and remediation costs. ▪ Provide for review during lease period.
	Reputational risk ▪ Difficulties ending tenancy agreements at the end of the lease and perception of efforts to evict tenants.	▪ Registered Housing Agency to plan to support tenants to relocate alternative accommodation prior to lease termination.
	Regulatory compliance risk ▪ No material regulatory risk.	
	Outcome risk ▪ Agency is unable to secure funding or financing for development due to lease terms. ▪ Asset is not owned by Agency and can not be used to secure finance. ▪ Outcomes are only realised for term of the lease.	▪ Careful consideration of lease terms. ▪ Early engagement with funders and financiers including sharing of proposed lease terms. ▪ Certain lenders may be willing to consider lending against the leased asset or leveraging against the Agency's portfolio. Alternatively, Agency may be able to fund smaller developments with its own cash.

Feasibility Considerations

Leasing is not expected to impact on council's overall asset value and balance sheet as the land is retained within council ownership.

The primary financial consideration relates to what impact leasing of land has on the overall project feasibility and attraction of funding and/or financing to support development costs:

- Whilst the Registered Housing Agency or receiving SPV does not have to pay for the land, it may not be able to use the land as security to borrow funds towards development, thereby impacting on the subsidy gap;

- The Registered Housing Agency will need to use its other assets as security, which may not be possible given existing debt, or meet the gap through accessing increased funding;

Whether debt can be applied or if the amount of debt is impacted by the lease will be subject to the assessment of the financier of the lease terms and whether the Registered Housing Agency is willing and able to offer other assets as security for borrowing.

Assuming debt is **not applied** the potential impact on subsidy is illustrated using the hypothetical development in Figure 8.
In summary:

- Leased land with a hypothetical value of $2.4 million, representing 16 per cent of GRV;
- Registered Housing Agency contribution of $954,545, comprising GST recovered on construction costs, representing 6 per cent of GRV:
- Notional development margin / 'profit' of 14 per cent ($2.1 million); and
- Estimated subsidy gap of $9,545,455, or $318,182 per unit, representing 64 per cent of GRV.

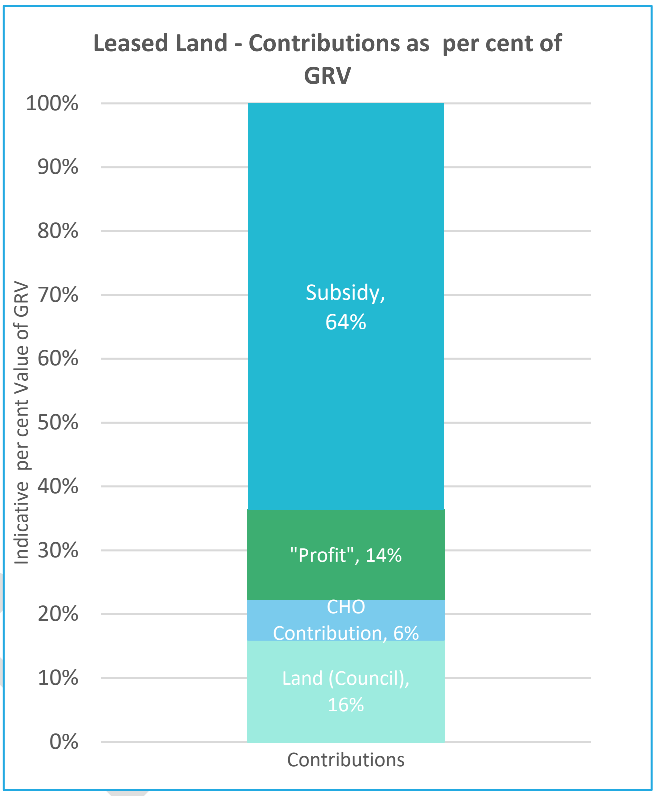


Figure 8: Hypothetical example – Leased Land

Process and Resourcing Considerations

Leasing of land is expected to be highly resource-intensive process, requiring:

- Process to release, apply and assess tenders (or to establish a SPV to then lease land to), which may require external expertise to support assessment;
- Determination of and legal drafting of terms of an Agreement to Lease and lease agreement, requiring consideration of a range of matters outlined in this paper, and a significant process of legal and board/council review;
- Process to secure funding to develop the land.

The process to release land for lease is expected to include:

Assessment of Model

Criteria	Lease at nil return	Lease at discount	Rationale for Assessment
The number of Affordable Housing outcomes is maximised.			▪ Site is expected to be provided for purpose of Affordable Housing; therefore, outcomes are expected to be maximised. ▪ This rating is lowered if the lease model impacts on feasibility of delivery.
Delivery model supports priority, very low to low income households.			▪ Lease model can impact on ability of Housing Agency to secure finance, thereby increasing reliance on government subsidy. To reduce subsidy requirements, a different income group may need to be housed.
Development results in a financial return on land to council (council objective).			▪ No immediate financial return. At end of lease period, land reverts to full council control, at which point council could sell land and realise a financial return.
Development and operational feasibility.			▪ Lease can impact on development feasibility, as the land is unable to be used as security for borrowing, therefore either increasing subsidy requirement or requiring the Housing Agency to apply other assets as security.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.			▪ No guarantee a future council will reinvest the land, or any sale proceeds, in Affordable Housing at the end of the lease term.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.			▪ Should council sell the land at the end of the lease term, it is expected that the proceeds would be reinvested in the local municipality.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.			▪ The ability to meet regulatory requirements and undertake management will depend on the specific lease terms. ▪ It is expected a Registered Housing Agency would only enter an agreement if this rated as 'green', therefore careful consideration of terms will be required.

EXAMPLE – LEASING OF LAND

EXAMPLE:	HARRIS TRANSPORTABLE HOMES – LEASE
Local Government	City of Maribyrnong
Housing Agency	Launch Housing
Outcomes	▪ 57 detached studio dwellings across nine parcels of land.
Background / Structure	▪ The project involves the leasing of nine parcels of vacant land owned by State Government authority VicRoads located in inner-western Melbourne to Launch Housing, enabling it to build and locate 57 transportable homes on the sites for people at risk or experiencing homelessness. ▪ The land is provided on a five-year lease with a further five-year renewal option. 12 months' notice will be given if VicRoads requires the land back. At the end of the lease Launch Housing is responsible for detaching and moving the homes, returning vacant land to VicRoads. The houses are compact, studio dwellings with a component of private open space. ▪ Each dwelling is built with a long-term lifecycle in mind to enable relocation if that is required before the end-of-life of the dwelling. ▪ Planning permits were approved by Maribyrnong Council but were subsequently called in and approved the Minister of Planning following resident appeal to VCAT. ▪ Construction totalled approximately $156,000 per unit and was funded with a $4 million philanthropic investment from Harris Family Foundation, $3 million State Government investment through the Victorian Property Fund and $2 million Launch Housing reserves.

Photos: Harris Transportable Homes, Launch Housing

EXAMPLE:	TOWHALL AVENUE, PRESTON 50-YEAR LEASE
Local Government	City of Darebin
Housing Agency	Housing Choices
Outcomes	▪ Subject to planning, the development is proposed to comprise a six-storey apartment building comprising 39 dwellings, 29 public car spaces, including three car-share spaces and one accessible resident space; a public pocket park and community/office space at ground floor. ▪ Minimum six-star NatHERS rating.
Background / Structure	▪ Comprising approximately 1,140 square metres the site at 52-60 Townhall Avenue, Preston currently comprises 42 public car spaces. ▪ Following an extensive process of site selection, tendering and community consultation, Darebin City Council resolved to lease the land to Housing Choices Australia (HCA) for development and use as Affordable Housing and replacement of public car spaces. ▪ HCA will be obliged under a lease agreement to use the site solely for the purpose of constructing an Affordable Housing development. Key terms of the lease include: ▪ 50-year term for $1.00 per annum rent; ▪ Requirement to provide public car spaces; and ▪ HCA to be responsible for the maintenance and repair of the improvements constructed on the site and all outgoings and other charges. ▪ Council was successful in attracting a commitment of a $1 million grant from the Lord Mayor's Charitable Foundation (LMCF), to be paid to the Registered Housing Agency subject to the proposal meeting the LMCF criteria. Housing Choices has secured Social Housing Growth Funds towards the project.
Key Learnings	▪ Analyse and provide evidence in response to key issues raised in consultation. Act on issues based on evidence. ▪ Resolve car parking issues prior to consultation and tender process.

Image: Artist impression Townhall Avenue development, Housing Choices Australia

MODEL 4: JOINT VENTURE OR PARTNERSHIP ARRANGEMENT

Model:	Joint Venture or Partnership Agreement
Overview	▪ The model involves the council and a Registered Housing Agency agreeing to enter a Joint Venture (JV) or a Partnership Arrangement to realise a common strategic goal whilst maintaining an appropriate separation of other business and assets. ▪ Division 10, Clause 3 of the LG Act provides for a council to enter a partnership or joint venture with any other person or body.
Landowner for term of use	▪ Subject to arrangement. Affordable Housing assets could be owned in a SPV, council or by a Registered Housing Agency.
Key Strengths	▪ Supports an active council role in development decision-making and share in risks and rewards. ▪ Can be applied to council sites with high potential and other intended community uses – supports development to proceed with cost-sharing and distribution of assets.
Key Weaknesses	▪ Complex, requires sufficient skills and resourcing to implement and manage over time. ▪ Higher level of risk. Most likely to also apply to more complex sites involving significant funding and financing and mix of public benefits.
Responsibility for assets and tenants at end of term or dwelling life	▪ Dependent on structure of agreement and control of assets. May be Registered Housing Agency, SPV or council.
Resourcing to Implement	▪ High level of resourcing.

Application and Reasons for Applying

Joint Venture (JV)

A JV typically focuses on the development process, with a defined end point, governed by a legal agreement between the parties. A third entity, such as a developer, could also be party to a JV. The organisations determine the inputs each will bring to the venture (i.e. council provision of land), define interests, and are typically liable for their own debts, which they incur individually.

A JV development is done on an 'open-book' basis, with inputs, roles and responsibilities, risk-management, governance, dispute resolution and returns agreed by the parties.

The end ownership and management of Affordable Housing assets, and any other returns resulting from a JV, will need to be determined via an agreement. Outcomes post-development could include an ongoing partnership, via the establishment of a SPV to hold and manage Affordable Housing assets on completion, or a split of any 'proceeds' between the parties. For example, Affordable Housing that is delivered is placed in Registered Housing Agency ownership and/or management and other community uses are retained by council.

Partnership Arrangement

A partnership arrangement is where two or more organisations have joint interests in the project and are jointly and severally liable for the expenses of the project. The partnership may be structured to result in the co-ownership of assets arising from the development partnership, or they could be placed in a SPV, or placed in council or Registered Housing Agency ownership.

Reasons and circumstances where a council and Registered Housing Agency may decide to enter a JV or partnership agreement include:

- Council has a strong desire to have a greater role and subsequently share in the risks and potential rewards arising from the development;
- Precinct redevelopment and/or multiple sites intended to be provided into an Affordable Housing purpose with a significant development scale and a corresponding financial and risk profile;
- Other community services are proposed to be delivered on the site requiring other council investment and/or level of control, whilst also ensuring separation of risk and liability from other council business;
- Parties are seeking to scale the other entity's resources to complete a specific project or goal while reducing total cost and spreading out the risk and liabilities;
- Council and Registered Housing Agency are committed to a dedicated partnership approach over a longer period.

Strengths and Weaknesses of Model

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages
Council	▪ Partnership approach. Co-input into all phases of development with Registered Housing Agency partner. ▪ Supports approach to complex development that results in other community assets integrated with Affordable Housing. ▪ Separates risk from other council business. ▪ Potential for financial return or delivery of other community assets. ▪ Leverages the skills, resources and potential funding and financing inputs of Agency. ▪ Can be structured to maximise charitable tax status of Registered Housing Agency to improve value for investment. ▪ Buy-in private sector skills rather than developer-led. ▪ Opportunities to access external low-cost financing towards housing infrastructure costs.	▪ Complex and resource intensive to establish and manage input into arrangement. ▪ Complex and new approach for council and community understand and communicate. ▪ Requires a longer-term approach to partnering that may be difficult with election cycles. ▪ Requires decision in relation to ownership of resulting Affordable Housing assets – potential risk of perceptions of 'privatisation' if Registered Housing Agency owns assets. ▪ Depends on parties being able to work together over a long period of time. ▪ Requires workable governance structure and processes of conflict resolution.
Community	▪ Improved social outcomes realised on underutilised or surplus public assets. ▪ Assets are managed by not-for-profit entity, not developer-led.	▪ Complicated to understand. May involve considerable assets being transferred into SPV or to Registered Housing Agency on development. ▪ Lines of accountability may be difficult to see.
Registered Housing Agency	▪ Partnership approach. Co-input into all phases of development with council partner). ▪ Results in new Affordable Housing owned and/or managed by the Agency. ▪ Separates development from other Agency business. ▪ Leverages the skills, resources and potential funding and financing inputs of Agency. ▪ Can be structured to maximise charitable tax status of Agency to improve value for investment. ▪ Buy-in private sector skills rather than developed led.	▪ Complex and resource intensive to establish and manage input into arrangement. ▪ Requires careful attention to structuring to ensure Agency does not loose charitable tax status. ▪ Depends on parties being able to work together over a long period of time. ▪ May be at risk of change in council leadership and position. ▪ Requires workable governance structure and processes of conflict resolution.

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages
	▪ Opportunities to access external low-cost financing towards housing infrastructure costs or potential outcomes or other investment.	
Residential Developer	▪ Opportunity to be a partner to a JV or to be contracted to deliver construction without risks associated with development.	▪ Not placed in control of development.

Key Legal and Risk Considerations

Legal considerations

A **Joint Venture (JV)** agreement is a legally binding agreement which is enforceable. Typically, the organisations will establish a separate, new legal entity to run the JV with purpose and obligations set out in a JV Agreement. A JV Agreement is expected to include terms relating to:

- What each organisation will initially contribute and how this will be valued;
- Governance structure and the specific roles each organisation will be obliged to perform throughout the duration of the joint venture;
- Dispute resolution process; and
- Wind up of the JV or what will happen if one organisation wants to exit the JV.

Organisations are obliged to the duties and obligations described in the agreement as they relate to themselves and each other and are expected to exercise their rights and powers in good faith to benefit the JV. General obligations towards the other organisations in the JV may also arise from common law obligations and the nature of the relationship between those in the JV. It is important the JV Agreement does not create a fiduciary relationship which would result in certain duties and obligations outside the intention of the JV.

A **partnership** is a specific type of legal relationship between persons carrying on a business in common with a view to profit. Partners are obliged to the duties and obligations described in a Partnership Agreement and to exercise their rights and powers in good faith to benefit the partnership.

For a not-for-profit organisation such as a Registered Housing Agency, partnerships are different to a JV because partnerships typically involve joint responsibility and liability for the activities of the partnership (rather than activities of individual entities that are signatory to a JV). This means that the Registered Housing Agency or the council could be responsible and liable for the partnership's activities and financial obligations if the other is unable to pay.

A Partnership Agreement will need to consider the purpose, obligations and liabilities to project costs, how assets will be distributed and managed, governance and decision-making, dispute resolution and the duration and terms of termination of the partnership.

General obligations can also arise from common law and the special nature of the partner relationship and will need considering in deciding to enter a partnership.[3]

[3] https://www.nfplaw.org.au/partnerships

Risk considerations

	Risks	Mitigations
Council and Registered Housing Agency	**Financial risk** ▪ Difficulty valuing each party's contribution to JV or partnership (particularly where land is gifted as part of a larger development). ▪ Upfront costs of establishing joint venture or partnership (e.g. preparation of agreement, valuing contributions, etc.)	▪ Discuss risk allocation early and reflect in agreement. ▪ Agreement that upfront costs will be shared.
	Legal liability risk ▪ Partnership may result in the parties being jointly liable for the actions of the other party in the partnership.	▪ Partnership agreement could contain indemnity provisions to limit liability in certain circumstances.
	Reputational risk ▪ Shared reputational risk of council and Agency collaborating through JV or partnerships.	
	Regulatory compliance risk ▪ Both council and Registered Housing Agency are likely to be large organisations with their own systems (e.g. property management, IT, reporting, etc). Establishing a joint venture will require these systems to work together. ▪ Parties will need to establish responsibility under various regulatory regimes. This may not be the same party in every circumstance (e.g. Housing Act 1983 responsibilities may sit with one party, while privacy obligations may sit with the other). ▪ Parties without experience of JVs or partnerships are uncertain how to best manage the relationship.	▪ Comprehensive legal advice should be obtained in relation to the proposed joint venture structure. ▪ Recommend at least one party to JV or partnership has some experience in adopting the structure.
	Outcome risk ▪ JVs and partnerships are typically complex for external stakeholders to understand, which may present issues when attempting to obtain funding. ▪ Dispute between the parties can prevent progress.	▪ Terms of JV or partnership agreement should be clear enough to explain to a third-party and have appropriate dispute resolution procedures.

Feasibility Considerations

Critical feasibility considerations include:

- Value of inputs each party brings to the JV or partnership, including which organisation is entitled to the value of any State Government funding secured by the Registered Housing Agency and how future project value at the end of the venture is to be shared;
- What are the development costs and how these will be met?;
- How will the agreement and delivery be structured to both maximise and not jeopardise the Registered Housing Agency's charitable tax status and benefits?;
- Are there other assets to be delivered, how will the costs be met and assets distributed upon completion?;
- Will there by market sales that will offset costs and which entity is responsible for associated risks?;
- What is the subsidy gap? What funding is available and what are the terms?; and

- What debt could be applied, what assets will be used as security, and who is liable for any default on financing?

Development feasibility is difficult to model without project specific application.

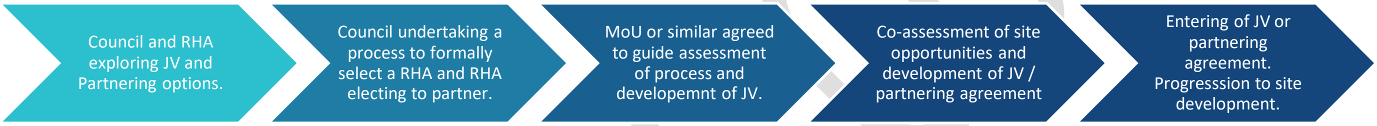
Process and Resourcing Considerations

This model is significantly more 'hands on' than other models and will require considerably higher level of resourcing by council and the Registered Housing Agency to establish and manage over time. It may also require resourcing to establish a SPV entity to own the assets that result from a JV or partnership.

The process is expected to require:

- Process of confirming the parties to an JV or Partnering Agreement, which may involve a council tendering for a Registered Housing Agency partner and the Agency participating in the tender process;
- Process and resourcing to develop the terms of the arrangement (expected to require legal and potentially also taxation advice);
- Resourcing of the JV.

The process is expected to involve:



Assessment of Model

Objective	Assessment	Rationale for Assessment
The number of Affordable Housing outcomes is maximised.		- It is assumed the parties would only enter a joint venture or partnership agreement with an intention to maximise Affordable Housing and that the structure of the arrangement enables this outcome.
Development model supports priority, very low to low income households.		- As above.
Development results in a financial return on land to Council (council objective).		- Whether council realises a financial return on the land will be subject to the structure and terms of the arrangement.
Development and operational feasibility.		- The partnering / JV structure is expected to maximise development and operational feasibility.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		- Subject to how the land and dwellings are owned and any agreements reached between the parties. - If council owns the land and dwellings, their contribution may not be reinvested in Affordable Housing. - If a Housing Agency owns the assets, reinvestment in other Affordable Housing is expected.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		- Subject to how the land and dwellings are owned and any agreements reached between the parties. - If council owns the land and dwellings then their contribution is expected to be reinvested in the municipality.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.		- Dependent on structure of the arrangement

PART 3: MECHANISMS TO SECURE A COUNCIL CONTRIBUTION

MECHANISMS TO SECURE OUTCOMES

This section explores four mechanisms for securing the delivery and the subsequent council contribution over time:

1. Ownership by a Registered Housing Agency;
2. Legal Agreement, i.e. Section 173 Agreement, Heads of Agreement, right to lease, contract to sale;
3. Placement of assets in a Special Purpose Vehicle (SPV), e.g. Housing Trust;
4. Mortgage instrument.

Assessment Criteria and Summary of Analysis

Each mechanism is assessed against set out in Table 8 that that reflects the primary objectives of councils and Registered Housing Agencies, with reference to the following rating system:

High	Mechanism rates highly against criteria. i.e. Provides high level assurance or likelihood criteria will be realised.
Medium	Mechanism rates moderately against criteria. i.e. Provides degree of assurance or likelihood criteria will be realised with some risks.
Low	Mechanism rates low against criteria. i.e. Limited or no assurance or likelihood criteria will be realised and/or considerable risks.

Mechanism: / Objective:	Registered Housing Agency ownership	SPV ownership	Section 173 Agreement	Other Legal Agreement	Mortgage Instrument
1. Land will be developed into Affordable Housing.					N/A
2. Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.					
3. Development and operational feasibility.					
4. Reinvestment of the value of the council contribution in an Affordable Housing outcome at the end of an agreed term or dwelling life.					
5. Reinvestment of the value of the council contribution in the local municipality at the end of an agreed term or dwelling life.					
6. Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.					

Table 8: Summary of Assessment of Mechanisms against Key Criteria

KEY CONSIDERATIONS IN SELECTING A MECHANISM

The provision of council land requires consideration of:

1. How delivery of agreed outcomes will be assured once land is transferred out of council's control; and
2. How the value of the council contribution will be secured to ensure an agreed and appropriate period of use and any agreed reinvestment of the contribution at the end of the dwelling life or if the asset is sold.

Mechanisms to Secure Delivery

Legal agreements that could ensure delivery of agreed outcomes on council land include:

- A Heads of Agreement;
- A Section 173 Agreement recorded on the title to the land;
- A Joint Venture or Partnering Agreement; and/or
- An 'agreement for lease' setting out terms/precedents to be met before a lease agreement is entered.

Terms of relating to the development of the land would be met upon construction completion at which point the agreement is discharged and/or replaced with another agreement.

Mechanisms to Secure a Contribution and Outcomes Over Time

How a specific piece of land, its value, and/or the Affordable Housing outcomes delivered on the land is secured in this use once the dwellings are constructed requires consideration and balance between:

- Council, community and Registered Housing Agency objectives;
- Intended ownership structure of the land and resulting dwellings;
- The value of the land relative to other cost inputs required to realise delivery and the source and terms associated with that funding;
- Registered Housing Agency capacity to secure funding or financing, develop the site and manage outcomes over time in accordance with constitution, legal, regulatory and funding requirements;
- Term of use relative to the value of the council contribution; and
- What other mechanisms will be applied to ensure use for a defined period.

Councils are recommended to take these factors into consideration when considering if their primary objective is to secure:

- The specific parcel of land in an Affordable Housing purpose 'in perpetuity', regardless of dwelling lifecycle;
- The value of the contribution, i.e. value of gifted land or the discount to land; or
- The Affordable Housing outcome, i.e. a number of dwellings.

These are important distinctions that can strongly influence the choice of delivery model, the mechanism to secure outcomes over time and the Registered Housing Agencies' capacity to deliver.

It is important councils' note:

- Land, even if gifted, comprises only one cost input to the delivery and end value of a development;

- A Registered Housing Agency will need to provide equity, secure grant funding and/or debt to meet construction costs;
- Where the State Government provides funding, it will require the outcomes to be utilised for an agreed period - currently a minimum 20 years under the current Social Housing Growth Fund - and will require Director of Housing interest to be registered on title; and
- The ownership structure and any limitations on the use of the land and, therefore, value or re-sale potential can impact on a Registered Housing Agency's capacity to borrow or secure favourable financing terms.

The impact on delivery and operational feasibility is particularly critical to understand.

For example, a lease does not provide a Registered Housing Agency with the same rights compared to models where the title is in the Registered Housing Agency's name as the land cannot be applied as security for borrowing, thereby increasing the reliance on other assets for security and/or increasing the subsidy gap.

In a market-based property investment scenario, the 'equity stake', or rights to a return, for an entity providing land would typically reflect the value of the land as a proportion of the Gross Realisation Value (GRV) (end market value of a project), noting:

- The land value as a percentage of GRV would generally be expected to increase in value or a 'return' on land as a result of planning approval and development (i.e. highest and best use value is only realised by development occurring);
- The landowner would not have a right to the total development value if the dwellings or land were sold as the landowner input was only one part of the total investment required to realise the outcome; and
- There may be an agreement to profit sharing of any sale proceeds or 'super profits' to reflect that the development could not occur without the land being made available or as a result of the commercial term of the agreement.

Taking this approach, a council focus on the value of the contribution that it provides and ensuring that this value is retained in an agreed Affordable Housing purpose for an appropriate period in the municipality could be achieved by:

- Trusting that ownership by a Registered Housing Agency provides assurance on use for an appropriate period, reflecting the Agency purpose and objective and conditions of government funding relating to term of use;
- A time-limited arrangement secured by an agreement, such as a Head of Agreement or a Section 173 Agreement, reflecting the value provided by council in either retention of a defined number of dwellings, or use of the land for a required length of time whilst also ensuring practical considerations relating to asset management, financier and Registered Housing Agency requirements to invest are supported; or
- A mortgage instrument that translates the value of the land into a proportional equity share arrangement and means that, if there was a future sale, the council would be entitled to an equivalent percentage of the (future) market value.

Hypothetical Example of Capturing Value of a Council Land Contribution

In this example, a council decides to gift the land and capture the value of its contribution in the form of an agreed number of dwellings being maintained for an Affordable Housing purpose and the value of these dwellings being reinvested in Affordable Housing in the municipality if they are ever sold.

To calculate the value of the council contribution as a number of dwellings, the hypothetical assumes a 30-unit development where the land has an estimated value of $3 million and the project has a Gross Realisation Value upon development of $15 million.

The value of the council contribution as a percentage of GRV, or a percentage of total dwellings subsequently varies depending on how the land is provided. For example:

Scenario 1:	**Gifting of Land**
Value of Land Contribution:	$3 million
Land contribution as per cent of GRV: as per cent of $15 million)	20 per cent ($3 m million
Contribution as per cent of Dwellings: dwellings =	20 per cent of 30

Scenario 2:	**50 per cent Discount to Land**
Value of Land Contribution:	$1.5 million
Land contribution as per cent of GRV: as per cent of $15 million)	10 per cent ($1.5 million
Contribution as per cent of Dwellings:	10 per cent of 30 dwellings = **3 dwellings**

Taking this approach a council and a Registered Housing Agency could agree to:

- Ensure a specific number of dwellings are maintained in an Affordable Housing purpose for the life of the dwelling and for any subsequent redevelopment or for any proceed of sale of the nominated dwellings to be retained in the municipality in recognition of the council investment;
- Reach agreement on a commensurate period that all dwellings in the development are required to be used as Affordable Housing, i.e. 30 dwellings for 20 years; or
- Agree that if the land was ever sold the council's original investment as a proportion of total GRV must be reinvested in new Affordable Housing.

These arrangements could be captured via a **legal agreement** and/or a **mortgage instrument.**

MECHANISM 1: OWNERSHIP BY A REGISTERED HOUSING AGENCY

Mechanism:	Ownership by a registered housing agency
Overview	▪ Land and resulting housing is owned directly by a Registered Housing Agency through the transfer of title (either through gifting or sale of the land) without requiring any ongoing agreement or requirement for use on title. ***Note** – this is different to ownership by a Special Purpose Vehicle managed by a Registered Housing Agency (see Mechanism 2).*
Ownership of land	▪ Registered Housing Agency
Management of assets	▪ Registered Housing Agency
Key Strengths	▪ Reflects purpose and regulation of sector as appropriate vehicles for managing Affordable Housing investment and resulting housing outcomes. ▪ Positively supports attraction of funding and financing as it does not involve covenants or other agreements that may be perceived to limit use or value. ▪ Removes need for process and costs of developing other legal agreements. ▪ Provides Housing Agency with full control and ability to manage assets over time in accordance with regulatory requirements. ▪ Not complex to establish or administer over time.
Key Weaknesses	▪ Ownership on its own does not lock in Affordable Housing always being realised on the specific piece of land or in the municipality.
Responsibility for determining use of land at end of dwelling life	▪ Registered Housing Agency
Level of Resourcing to Implement	▪ Minimal. Registered Housing Agency without other agreements does not require any additional resourcing to implement.

Application and Reasons for Applying

The application of this mechanism involves council acceptance that Registered Housing Agency ownership of the land and the regulation of the Agency provides appropriate assurance that delivery and management of the land and dwellings will achieve desired Affordable Housing objectives over time.

Applying this approach means that once the title is registered in the name of the Registered Housing Agency, there is no further legal agreement between the council and the Agency or on the title.

Note: A council and Registered Housing Agency could still agree to apply a legal agreement, such as a Section 173 Agreement, to govern the transfer and development of the land, which would 'sunset' and be discharged once the terms of delivery are met.

Reasons why ownership by a Registered Housing Agency may be agreed include that:

- There is significant independent regulation of the sector, which sets standards and ensures a high degree of oversight of a Registered Housing Agency's operations and performance and provides the Housing Registrar with step-in rights should the Agency not meet or be able to remedy non-performance;
- Registered Housing Agencies have a specific purpose and strong track-record in owning, managing or operating Affordable Housing for the benefit of lower income households and are the priority recipient of government funding;

- A Section 173 Agreement could impact on a Registered Housing Agency's ability to secure financing and/or funding from funders not familiar with the Affordable Housing sector, impacting on project feasibility;
- Where the State Government provides funding, a Director of Housing's interest will be placed on the title and a funding agreement entered that will establish requirements for dwellings to be used for a minimum period;
- In the event a Registered Housing Agency can no longer operate, its constitution will require the transfer of any assets to a 'like' organisation; and/or
- Council does not have the resources or systems in place to monitor a legal agreement over time.

Strengths and Weaknesses of Mechanism

Stakeholder	Strengths / benefits	Weaknesses / disadvantages
Council	▪ Results in assets in the ownership of a regulated organisation that has a primary purpose to own and manage Affordable Housing. ▪ Supports a stronger relationship, trust and ways of working together between the sectors. ▪ Removes the need to resource the development of legal agreements governing land use over time ▪ Reflects that Director of Housing likely to place interest on title and that funding will ensure use for a minimum period.	▪ On its own, does not secure a guaranteed term of use or specific housing outcome. ▪ Council has no recourse once land is transferred. Depends on trust that the Agency will appropriately manage outcomes for an acceptable period. ▪ Risk that dwellings are sold in the future and proceeds reinvested in another municipality. ▪ Does not secure any ongoing reporting to council on use of land over time. ▪ Agency can seek to remove Director's interest and reinvest elsewhere without council approval.
Registered Housing Agency	▪ Reflects and reinforces the role of Registered Agencies and the regulatory system as the appropriate means to monitor Affordable Housing outcomes over time. ▪ Removes risk that ongoing conditions will impact on the Agency's ability to securing funding or financing. ▪ Limits risk that ongoing legal requirements would impact on Agency capacity to prudentially manage assets and respond to changing demand. ▪ Maximises the capacity to attract finance and funding and prudentially manage the assets in accordance with regulation and Agency's strategic objectives. ▪ Provides Agency with long-term control over asset. ▪ Removes need for each party to resource development of legal agreements governing use over time. ▪ Reflects the council contribution of land is only part of the total feasibility. ▪ Does not place a constraint on the Agency's ability to sell dwellings should that be necessary, particularly towards the 'end-of-life' of a building.	▪ Agency has a 'take it or leave it' option. It is less flexible than funding, which can be applied to any available site.

Key Legal and Risk Considerations

Application of this mechanism assumes that any requirements relating to delivery are addressed by an appropriate legal agreement and that on title transfer there are no ongoing legal agreements relating to the site between council and the Registered Housing Agency. There are subsequently no specific legal considerations relating to the mechanism of ensuring ownership by a Registered Housing Agency, other than the Agency ensuring it continues to meet its legal and regulatory requirements to operate.

	Risks	Mitigations
Council	**Financial and Legal Risks** ▪ No material risks.	
	Reputational risk ▪ Only where outcome risk is realised.	
	Outcome risk ▪ The Registered Housing Agency decides to sell one or more dwellings and reinvest outside the local government area during the intended outcome period. ▪ The Registered Housing Agency may wind-up. ▪ The land is transferred but is not developed as the Registered Housing Agency was unable to secure funding, financing and/or planning approval.	▪ Registered Housing Agencies have a strong track-record of delivering once land is secured and funding is available. ▪ Registered Housing Agencies are regulated, with the Registrar of Housing having a high level of oversight into the Agency's business and the ability to step-in to ensure financial stability and compliance with the Australian Not-for-Profit and Charities Commission and the Australian Taxation Office requirements of charities. ▪ Registered Housing Agencies are constitutionally structured so that should they wind-up, assets are required to be transferred to a 'like' organisation. The Affordable Housing outcome would be transferred to a housing agency with an aligned purpose ▪ The parties could agree to a further agreement (e.g. s173) upon sale to retain an Affordable Housing outcome in the local government area for a period. ▪ Specific planning clauses provide for a streamlined planning approval process and no third-party appeals.
Registered Housing Agency	**Financial risk** ▪ Risk financing is unable to be secured. ▪ Costs of undertaking appropriate due diligence on the land.	▪ Council and Registered Housing Agency can agree to share costs of feasibility investigations to reduce financial burden prior to transfer.
	Legal liability, reputational, and legislative compliance risks ▪ No material risks.	
	Outcome risk ▪ Development does not proceed. ▪ Underlying contamination or geological issues with the land are identified after the transfer. ▪ Failure to obtain planning permit, with sunk application costs.	▪ Development is subject to permit timeframe. Council to consider any extension in light of impact on delivery of Affordable Housing. ▪ Proper due diligence (including planning considerations and site testing) should be completed.

Process and Resourcing Considerations

Application of this mechanism does not require specific process or resourcing other than the resourcing required to gift or sell the land to a Registered Housing Agency. The resourcing implication is assessed as low relative to other mechanisms.

Assessment of Mechanism

Objective	Assessment	Rationale for Assessment
Land will be developed for Affordable Housing purpose.		▪ Agencies must act in accordance with constitutional objective to provide Affordable Housing and are regulated for this purpose. ▪ Agencies have priority access to government funding to support development. ▪ Agencies have skills and experience in managing building contracts.
Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.		▪ Agencies must act in accordance with their constitutional objective to provide Affordable Housing and are regulated for this purpose. ▪ Agencies are experienced in determining which households need assistance and which best suits a specific location and development circumstance. ▪ Agencies are expected to need to secure funding to develop council land, which will result in a requirement to apply the subsidy for a defined period. ▪ Agencies are committed to delivery of long-term housing outcomes.
Development and operational feasibility.		▪ Unencumbered ownership of land by a Registered Housing Agency will maximise the attraction of government and philanthropic funding to the project. ▪ Agency control over the housing outcomes over time maximises their ability to manage operational cash flow, maintenance, etc.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		▪ Registered Housing Agency constitution requires investment in an Affordable Housing purpose.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		▪ Agencies seek to deliver Affordable Housing in areas of high demand where there are suitable services, transport etc and where there is access to opportunities. ▪ No guarantee that an Agency will reinvest the value of a council contribution in the municipality at the end of an agreed term, however Agencies are noted to prioritise investment in areas where they have an established presence and there is demand. ▪ This assessment could move to 'green/high' rating if the mechanism was combined with another tool that requires reinvestment in the LGA should the dwelling be sold (such as a mortgage instrument or legal agreement), however, this may impact on the Agency ability to meet regulatory requirements or secure funding in the future.
Housing Agency ability to meet regulatory requirements and prudentially manage asset over an agreed term.		▪ Ownership of land by an Agency maximises its ability to control outcomes and meet regulatory requirements over time.

MECHANISM 2: ASSETS PLACED IN A SPECIAL PURPOSE VEHICLE (E.G. HOUSING TRUST)

Mechanism:	Assets placed in a special purpose vehicle
Overview	▪ Council establishes a Special Purpose Vehicle (SPV), which is a subsidiary company that is formed to undertake a specific business purpose or activity, such as Affordable Housing. ▪ Examples of SPVs include housing trusts and companies limited by guarantee. ▪ Registered Housing Agencies may also establish a SPV for a particular development to separate it from its other assets and investment. ▪ A Registered Housing Agency can be a party to a SPV, or contracted to manage the development and/or resulting dwellings on behalf of the SPV. Alternatively, the SPV could be registered as a Registered Housing Agency (subject to Registrar approval).
Ownership of land	▪ Special Purpose Vehicle, such as a Housing Trust.
Management of assets	▪ Depending on the structure, options include oversight by a SPV Board, with day-to-day management by a Registered Housing Agency on behalf of the SPV, or the SPV, if it is registered as a Housing Agency.
Key Strengths	▪ Separates the development, liabilities and risk from other assets owned by the council and Registered Housing Agency. ▪ Can have specific focus, such as development of Affordable Housing within a local government area. ▪ Once established, may be able to receive council assets each time development opportunities are identified without council requiring an open procurement process. ▪ Can be structured as a charitable entity.
Key Weaknesses	▪ Can be significant cost and process to establish and resource over time depending on the structure of the SPV. ▪ Once assets are transferred into the SPV control they are no longer in council ownership or direct control. ▪ Generally only assets within the SPV can be used for borrowing, or other guarantees are required. ▪ Requires careful consideration and legal and taxation advice to ensure charitable tax status. ▪ Additional decision-making layer, increased resourcing and risk for the Registered Housing Agency.
Responsibility for determining use of land at end of dwelling life	▪ SPV – depending on structure; may be a Board or Trustee.
Resourcing to implement	▪ Moderate to high depending on purpose and structure of the SPV. ▪ Resourcing required to operate the SPV and ensure it meets legal, regulatory and operating requirements.

Application Rational for Applying

SPVs are commonly utilised in certain structured finance applications, such as asset securitisation, joint ventures, property deals, or to isolate parent company assets, operations, or risks. An SPV could be formed with a Registered Housing Agency, or an Agency could be appointed as a trustee and/or manager of assets and tenancies

The council would transfer assets into the SPV by way of gifting, selling or leasing the land, with development and subsequent management of outcomes overseen by the SPV's governing board or trustee. The SPV could seek to be registered as a housing agency or it could contract development, asset and/or tenancy management to a Registered Housing Agency.

Key reason why a council might pursue establishment of a SPV as a mechanism to secure assets, and a Registered Housing Agency participate in a SPV arrangement include:

Council	Registered Housing Agency
▪ Council requires high level assurance that the outcomes it facilitates (including any future proceeds of sale) will only be utilised for Affordable Housing in its municipality. ▪ Council is committed to directing a number of sites and potentially funding to an Affordable Housing purpose, resulting in a larger pool of assets/contributions that council wants to protect and that would benefit from management on a single portfolio basis. ▪ It provides for a more 'partnering' arrangement between the council and the Registered Housing Agency. ▪ Council wants to have a level of (indirect) control over outcomes over time, for example, by appointing directors to the Trust Board or SPV. ▪ Council expects to secure other land, dwellings or monetary contributions through planning negotiations. ▪ Council wants additional assurances above that offered by ownership by a Registered Housing Agency and/or a legal agreement that the assets will be used for a specific agreed purpose over time.	▪ It enables a Registered Housing Agency to work with different councils without risking assets that are managed under other funding and financing agreements. ▪ It can support an increased number of land assets being made available for Affordable Housing development. ▪ It provides for a more 'partnering' arrangement between the council and the Registered Housing Agency. ▪ Subject to the SPV structure, it can attract other investment.

It is important for councils considering establishing an SPV to note:

- There are differing Registered Housing Agency views on whether a council establishing a Housing Trust is beneficial and cost-effective relative to the scale of outcomes that may be realised and considering the existing number of existing regulated entities;
- Registered Housing Agency preference is to have title and full control over land as this maximises their ability to secure funding and finance, deliver and control outcomes over time;
- Registered Housing Agencies will need to consider the structure of the SPV, the role of the agency in the SPV, any council commitment to placing assets in the vehicle, the feasibility implications - including how costs of operating the SPV will be met - and the ability to secure debt and funding, as well as the risk structure; and
- For a landowner, direction of a contribution to SPV should be no different to providing it direct to a Registered Housing Agency. The SPV will need to be established at the point the landowner is ready to make the contribution.

Examples of SPV include a Housing Trust and a Company Limited by Guarantee:

Special Purpose Vehicle	Key Attributes
Housing Trust	▪ Involves a council preparing a Trust Deed, establishing the objectives of the Trust, including how the property/assets are to be managed and specific duties of a Trustee. The Trust is expected to be established to be a charitable entity to reflect its purpose and to maximise taxation benefits, this will require legal and taxation advice and approvals to ensure the structure aligns to Australian Charities and Not-for-profits Commission (ACNC) requirements. ▪ Either a Trust Board is appointed by council as Trustee that could include council nominees that then contract a Registered Housing Agency to manage assets, or the Trust operations is managed by a council-appointed Registered Housing Agency as Trustee. Council seed-funding is likely to be required to support the early years resourcing of the Board and activities of the Trust. ▪ Once appointed, the Board or Trustee is responsible for pursuing actions to achieve the objectives of the Trust. The Board or Trustee, including any council nominee to a Board, must act in the interest of the Trust in making decisions about the Trust activities. ▪ The Trust could seek to borrow using assets in the Trust as security. Borrowing may be limited in the early years as the portfolio is built. ▪ Outcomes are secured 'in perpetuity' in the Trust purpose, for example, requiring investments and assets to be utilised for the purpose of Affordable Housing in the municipality.
Company Limited by Guarantee	▪ A SPV could take the form of a public company limited by guarantee, that has a purpose to own and/or manage Affordable Housing. Under this mechanism, it is expected a company would be established by agreement between the council and a Registered Housing Agency. ▪ The constitution would establish the objectives of the company, its powers, membership (which could include director appointees made by council and the Registered Housing Agency), powers and duties of directors, governance, and resourcing. SPVs could be established for a single site or multiple sites within a municipality. ▪ Subject to its structure and constitution, the SPV would likely be eligible for charitable entity status reflecting its purpose, enabling it to maximise charitable taxation status to support project viability. ▪ The responsibility for the SPV meeting its objectives would sit with the governing board. The SPV could seek to be registered as a Registered Housing Agency or could contract the management of development and tenancies to the Registered Housing Agency member.

Strengths and Weaknesses of Mechanism

Stakeholder	Strengths / Benefits	Weaknesses / Disadvantages
Council	▪ Assets are held and managed in a council created vehicle that has a dedicated purpose to deliver Affordable Housing in the municipality. ▪ Provides a vehicle to direct assets and landowner contributions without the need for tender processes each time opportunities arise. ▪ Separates assets and liabilities from other projects. ▪ Council can appoint members to a SPV Board, and/or appoint Trustee. ▪ Potential to provide for a more collaborative approach with a Registered Housing Agency. ▪ Potential to work directly with the SPV to explore the use of council assets. ▪ Can be structured as a charitable entity. ▪ Trustees are regulated by state legislation.	▪ More complex mechanism to establish and communicate to the community. ▪ Once established a council has no or very limited direct control over the SPV. ▪ Requires significant up-front resources to establish and resource in early years before SPV is self-sustaining. ▪ Requires assets to be placed in SPV for security for borrowing, or for the Housing Agency to provide a guarantee. ▪ Requires ongoing communication and education of council and community about purpose, role etc. ▪ May limit competition in terms of delivery of outcomes over time.
Registered Housing Agency	▪ Supports new housing outcomes that might not otherwise be realised (i.e. through provision of council land). ▪ Separates investment from other projects / portfolio. ▪ Potential to provide for a more collaborative approach with a council. ▪ Potential to work directly with the SPV to explore the use of council assets. ▪ Can be structured as a charitable entity.	▪ Can be a complex mechanism to establish. Adds a new governance layer that requires resourcing and monitoring over time. ▪ Restricted to deliver outcomes with the purpose of the SPV. ▪ May be limited opportunities over time relative to the effort. ▪ Requires assets to be placed in SPV for security for borrowing, or for the Housing Agency to guarantee. ▪ May be perceived as 'council vehicle' with risks to independence. ▪ Depending on structure, Agency involvement could be a time-limited role.

Key Legal and Risk Considerations

A council-established SPV can be a way to enable a formal and collaborative venture between council and a Registered Housing Agency. However, this mechanism has immediate and long-term legal, feasibility and risk considerations and implications that will need careful assessment by each organisation, including:

- Time and resourcing to establish the entity. Possible opportunity cost of establishing SPV compared with other opportunities;
- How the SPV is viewed by the State Government and how any funding would need to flow to meet government requirements, noting Registered Housing Agencies are recipients and accountable for funding use but the assets would sit in the SPV;
- How and who the SPV is controlled/managed once established, including appointment of directors, a board and/or trustees, and the legal obligations and liabilities of these individuals to the SPV;
- How the SPV activities will be undertaken and how these costs will be met before there are revenue-generating assets;
- Criteria and process to appoint any trustee or members to a board;
- What would happen to the SPV assets if it needed to wind-up;
- Registered Housing Agency interest in investing their own funds into SPV assets if they do not benefit in the long-term.

Risk Considerations

	Risks	Mitigations
Council	**Financial risk** ▪ Significant sunk financial costs to establish SPV, (including creating constitution, functions, etc.) with no guarantee SPV will be successful. ▪ SPV will likely require seed funding to establish operations.	▪ Few options to mitigate upfront costs. Possibility of cost sharing with a collaborating Registered Housing Agency, or grant funding to establish SPV.
	Legal liability risk ▪ No material legal liability risk	
	Reputational risk ▪ SPV may be viewed as part of, or managed by, council, even where council has little direct control or creates a perception of allegiance/alignment between Trustee and council. Could be helpful or harmful to both parties' reputation. ▪ Actions of SPV could reflect on council. ▪ Viewed by community as privatisation if assets are transferred from council ownership.	▪ SPV with greater autonomy may reflect less on council's public image. ▪ Alternatively, council establishing the SPV purpose, governance and role may provide for it to better influence the SPV behaviour.
	Regulatory compliance risk ▪ If proposing SPV registration as a Registered Housing Agency - requires significant resources, expertise and time and is subject to Registrar approval. ▪ Risk SPV or managing Registered Housing Agency is unable to comply with Housing Act 1983, Performance Standards for Registered Housing Agencies and Residential Tenancies Act 1997.	▪ Not necessary to register if management is contracted to a Registered Housing Agency. ▪ Partnership with established Registered Housing Agency (e.g. by appointment as trustee or manager) is expected to bring expertise required to establish and operate the SPV in accordance with legislation.
	Outcome risk ▪ If SPV becomes registered as a Housing Agency – risk new and inexperienced SPV has difficulty competing with larger, more-established Registered Housing Agencies for government funding. ▪ State Government needs to understand and be comfortable with the SPV structure before the SPV or managing Registered Housing Agency can attract funding. ▪ Once established, a SPV is a legally independent entity and is not directly responsible to council.	▪ Registered Housing Agency involvement (instead of SPV registering as an Agency) supports attraction of funding (subject to SPV structure and contractual arrangement with Agency). ▪ Continuing dialogue with funding bodies about management and structure of SPV. ▪ Bulk transfer of council land to SPV can quickly build balance sheet and act as security for borrowing. ▪ Careful drafting of SPV constitution to ensure SPV remains aligned with council's objectives. ▪ Council appoints Trustee or members to Board.
Registered Housing Agency	**Financial risk** ▪ Significant financial costs to establish SPV, (including creating constitution, functions, etc.) with no guarantee SPV will be successful. ▪ SPV will likely require administrative support and assistance from agency to get started.	▪ Few options to mitigate upfront costs. Possibility of cost sharing with council (including payment for agency's time allocated to the SPV), or grant funding to establish SPV.
	Legal liability risk ▪ Where SPV is a trust with Registered Housing Agency as the trustee, the agency will have responsibility to comply with the Trust Deed. A breach of trustee duties exposes the agency to direct liability.	▪ Ensure Registered Housing Agency always acts in Trustee capacity and limits its liability to trust assets as much as possible.
	Reputational risk	

	▪ Creates a perception of allegiance/alignment between Trustee and council. Could be helpful or harmful to both parties' reputation. ▪ Where council has material control over management of the SPV, the Registered Housing Agency may lose autonomy to make decisions in relation to trust assets.	▪ SPV legally separates business from other council and Registered Housing agency activities. ▪ Agency and SPV may be able to collaborate for future funding rounds. ▪ Registered Housing Agency to carefully consider their degree of autonomy as Trustee/manager.
	Regulatory compliance risk ▪ Once registered, SPV will need to comply with Housing Act 1983, Performance Standards for Registered Housing Agencies and Residential Tenancies Act 1997. Requires staff and management who understand the delivery of Affordable Housing and the obligations under legislative framework. ▪ Need to manage separate SPV and agency purposes, which may be different (e.g. SPV may focus on a particular cohort or geographical area).	▪ Registered Housing Agency should be able to deliver expertise required, provided it is funded to resource both itself and SPV.
	Outcome risk ▪ No significant outcome risks.	

Process and Resourcing Considerations

The process to establish a SPV can be complex and resource intensive particularly if it involves the establishment of a Housing Trust, requiring:

- Council decision to establish a SPV, likely to require process of assessing benefits and disadvantages and consideration of resourcing;
- Determination of SPV structure and purpose including any other proposed SPV members;
- Drafting of legal documentation to establish SPV, such as a constitution;
- Advice on taxation assuming the SPV is intended to have charitable status;
- Registration of entity;
- Appointment of members and representatives and/or a Trustee, depending on SPV structure;
- Establishment of procedures and resourcing to fund staffing until such time as the SPV receives operating income; and
- Agreement to transfer assets into the SPV without a wider procurement process.

It is expected the considerable external legal and potentially taxation advice will be required to ensure the structure is legal and appropriate for the intended purpose. Establishing the SPV is expected to require detailed drafting and consideration between all parties, including provision of external legal and taxation advice in relation to corporate and/or charitable structures and taxation matters

Assessment of Mechanism

Objective:	Assessment	Rationale for Assessment
Land will be developed into Affordable Housing.		▪ SPV must act in accordance with constitutional objective to provide Affordable Housing. Either SPV as Registered Housing Agency or independent Registered Housing Agency as Trustee is regulated to provide Affordable Housing. ▪ Registered Housing Agencies have priority access to government funding to support development. Subject to government acceptance of the SPV and clarity on the relationship between the SPV and Agency, funding can be provided to a Registered Housing Agency to support development. ▪ Agencies have skills and experience in managing building contracts.
Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.		▪ SPV must act in accordance with constitutional objective to provide Affordable Housing. ▪ Registered Housing Agency expected to manage outcome - experienced in determining which households need assistance and which best suits a particular location and development. ▪ Registered Housing Agencies are expected to need to secure funding to develop council land, which will result in a requirement to apply the subsidy for a defined period. ▪ SPV and Registered Housing Agency committed to delivery of long-term outcomes.
Development and operational feasibility.		▪ Ownership of land within an SPV presents some risk in relation to likely attraction of government and philanthropic funding to the project as government is not directly entering contract with SPV (funds must go through Registered Housing Agency). ▪ Registered Housing Agencies' ability to manage assets, dependant on SPV constitution and board membership and the structure of the management arrangement. The greater the input the Agency has into both these factors, the greater its ability to manage SPV assets. ▪ This assessment could be mitigated / move to 'green' through careful consideration to the legal agreement between the SPV and the Agency, or if the SPV is registered as a housing agency.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		▪ SPV constitution will require investment in an Affordable Housing purpose.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		▪ SPV expected to be structured to require investment and delivery within the municipality.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.		▪ Whilst a Registered Housing Agency is only expected to enter an arrangement where it can meet regulatory requirements and manage assets and tenancies, there is a risk the SPV structure impacts on their capacity and/or adds another layer of governance and resourcing requirements. ▪ Ownership of land by a SPV can have an impact on a Registered Housing Agency ability to control outcomes and meet regulatory requirements over time as it will require SPV approval. ▪ Clear legal agreement will be required to limit the potential risks.

EXAMPLE – LAND PLACED IN SPECIAL PURPOSE VEHICLE

Example:	Port phillip housing trust
Local Government	City of Port Phillip (CoPP)
Housing Agency	HousingFirst (formerly Port Phillip Housing Association)
Landowner	Port Philip Housing Trust
Outcomes	▪ Currently the Trust has over 350 units and delivered 568 dwellings across 16 properties, with total assets valued at approximately $98 million. Project examples are highlighted at Delivery Model 1 (Gifting of Land).
Background / Structure	▪ From 1985, the City of Port Phillip (CoPP) led the development of land for community housing and established a local housing agency that subsequently became the Port Phillip Housing Association (now HousingFirst) to manage the assets. ▪ In 2005, the CoPP endorsed a Trust Deed and establishment of the Port Phillip Housing Trust (PPHT) and, in 2007, transferred the ownership of most Council-developed properties and the project development role to HousingFirst. ▪ The establishment of the Trust supported regulation of housing outcomes, increased project delivery capacity, enabled continued access to State Government funding and resolved a perceived community conflict of interest in CoPP being the owner / developer and the responsible authority for planning approval. ▪ CoPP can appoint up to two councillors to the HousingFirst Board, and currently appoints one Councillor , and has provided a significant number of land assets and cash contributions into the Trust over time. Council protects its interests through a Trust Deed, which requires that housing is provided to persons with significant links to the CoPP, and who meet the eligibility criteria of the Director of Housing. ▪ Contributions provided to the Trust are effectively quarantined for that purpose within the municipal area as a result of the specific focus of the Trust to receive Council contributions and deliver community housing in Port Phillip.
Key Learnings	▪ Much Council land is in activity centres which are ideal for locating community housing - good access to public transport, shops and services. ▪ Land can be transferred to a community housing developer (as CoPP has previously done) or leased long-term. Air space development can provide dual uses for underutilised Council land. ▪ Air space development over community facilities or on land where facilities are consolidated to create land for housing, requires understanding of building life-cycles and community engagement . ▪ Developing community housing over replacement car parks can be heavily contested by local residents and shop traders – community engagement is important. ▪ CoPP is currently considering individual partner contractual arrangements and use of project specific agreements, e.g. Section 173 agreements or Funding Deeds, for any future land either provided by council or developed with council funds.

> ***"Council's housing initiatives over time have leveraged very significant co-investment from State and Commonwealth Governments and its Port Phillip Housing Trust partners. It is a smart and efficient response to Port Phillip's affordable rental housing needs."***
>
> 'Progressive Port Phillip' https://www.progressiveportphillip.org/

MECHANISM 3: LEGAL AGREEMENT (E.G. HEADS OF AGREEMENT, JOINT VENTURE AGREEMENT, SECTION 173)

Mechanism:	Legal Agreement
Overview	▪ Involves council entering a legal agreement with the recipient of the land requiring specific outcomes to be delivered and subsequently managed in accordance with agreed terms. ▪ There are a range of types of legal agreements that could be entered, each with different structures and legal obligations. More than one legal agreement may be put in place in relation to the delivery and/or post-delivery management. ▪ A Section 173 Agreement is a specific type of legal agreement that can be registered on land under the PE Act. Other agreements include a Heads of Agreement, 'right to lease' agreement, lease agreement and Joint Venture or Partnership Agreement.
Ownership of land	▪ Registered Housing Agency or SPV but could strictly be any person.
Management of assets	▪ Registered Housing Agency
Key Strengths	▪ Commonly used tool to secure an agreement between parties. Range of types of legal agreements. Ability to structure to suit circumstances. ▪ Agreements can be prescriptive and time-limited. ▪ Section 173 Agreement is registered on title and non-compliance can be pursued through a court process.
Key Weaknesses	▪ Requires process to develop, including review by each entity's legal advisers, which can be a time- and resource-intensive process. ▪ Section 173 Agreements remain on title and, unless they include a sunset clause, can be difficult to amend or remove, requiring both landowner and responsible authority agreement or a successful legal challenge. ▪ Section 173 Agreement may impact on Registered Housing Agencies' ability to secure funding or financing, depending on terms. ▪ Requires council monitoring over time.
Responsibility for determining use of land at end of dwelling life	▪ Subject to legal agreement between council and Registered Housing Agency/SPV. May be time-limited. If no agreement, once dwellings are completed, decision will be subject to Registered Housing Agency or SPV decision-making.
Level of Resourcing to Implement	▪ Moderate to high.

Application and Reasons for Applying

Legal agreements can be structured to confirm shared objectives, requirements of different parties and any conditions, resourcing and governance arrangements for a project.

In the case of council land disposal these legal arrangements could:

- Support progression of a development prior to a contract of sale being entered or a lease commencing over developed assets; and/or
- Establish requirements once land is transferred, such as to use the land for Affordable Housing for an agreed period.

Section 173 Agreement ('S173 Agreement')

- A S173 Agreement is established under the PE Act and enables a responsible authority to enter into an agreement with an owner of land in the area covered by a planning scheme. It can be used to establish:
- Delivery requirements / conditions on the landowner that must be met; and/or
- Ongoing requirements relating to the use of the land and buildings upon construction completion.
- Registered on the title to the land, making it 'run with the land' and bind future owners as if they were parties to the original agreement. It will remain on title unless provision is made for its discharge once obligations set out in the agreement are met. Changes to a S173 Agreement can only be made by the parties to an agreement, unless ordered by VCAT.
- The detail within a S173 Agreement will need to be determined by the parties and will be site and agreement specific. It is important that any proposed ongoing requirements relating to the land use are supported by a Registered Housing Agency to ensure it does not impact on funding and/or financing or regulatory requirements in relation to management of assets and tenancies.

DELWP has developed a template Affordable Housing Section 173 Agreement available here.

Other Types of Legal Agreements

- Other types of legal agreements include a Memorandum of Understanding, a Heads of Agreement, an agreement to a sale, a development agreement, a 'right to lease', a lease agreement, or a Joint Venture (JV) or Partnering Agreement.
- These agreements can be used to set terms before land is transferred, requirements of development or post-development use. They may be particularly useful where a S173 Agreement is not suitable as it would impact on assessment of value and in turn the financing and subsequent project delivery.
- A contract of sale is another legal agreement that will be required for any model where land is sold, even if gifted. Lease, Joint Ventures and Partnership Agreements are explored as delivery models at **Part 2**.

Strengths and Weaknesses of Mechanism

Stakeholder	Strengths / benefits	Weaknesses / disadvantages
Council	▪ S173 Agreement is registered on title and provides council with assurance as to delivery. ▪ Terms can be upheld by law. ▪ Agreements establish clear requirements on Registered Housing Agency as landowner. ▪ Agreements can establish level of detail that is not appropriate go to in planning controls. ▪ Agreements can manage a relationship between Registered Housing Agency and	▪ Ongoing S173 Agreement may impact on the assessment of a property value and on financing and ability for Affordable Housing to be delivered. ▪ Development of an agreement can be a costly and resource intensive process. ▪ Long-term agreements will require resourcing to monitor over time. ▪ Other forms of agreements not registered on title may be more readily contestable.

	council during the pre-transfer stage to ensure pre-conditions are met before sale. ▪ Unlike restrictive covenants, a S173 Agreement can include positive covenants and performance criteria or more innovative arrangements.	▪ Flexibility within contract arrangements could be later cause for different interpretation or dispute.
Registered Housing Agency	▪ Experiencing in working under contractual agreements in relation to funding. ▪ Agreements can manage a relationship between Registered Housing Agency and council during the pre-transfer stage to ensure pre-conditions are met before land is sold.	▪ S173 Agreement has an impact on the assessment of a property value and could impact on financing and ability for Affordable Housing to be delivered due to increase need for subsidy. ▪ A perpetual or long-term S173 Agreement may prevent an Agency from a strategic sale of an asset in the future - unattractive to an Agency and could impact its regulatory requirements to prudentially manage assets. ▪ Flexibility within contract arrangements could be later cause for different interpretation or dispute. ▪ Contract arrangements are inherently flexible – you can contract for almost any outcome (within legal limitations).

Key Legal and Risk Considerations

Legal considerations

Legal agreements could include:

- An agreement between the council and Registered Housing Agency setting out the terms of the land transfer, lease or sale potentially including the terms of use post-development; and/or
- A S173 Agreement registered on title, setting out terms of the development and/or use of the land or dwellings over time;
- A contract of sale.

A pre-transfer agreement, such as a Heads of Agreement or a 'Right to Lease' could cover:

- Pre-conditions the parties agree must be met before the title will be transferred, such as the Registered Housing Agency securing of funding for development or the council clearing the land;
- The return or lease-back of any council assets that will be delivered on the site;
- Project governance arrangements to apply during the planning and design phase;
- Agreement to prioritise a particular tenant cohort;
- Design, community engagement and/or planning approval terms or processes, for example, key stages that the Registered Housing Agency must engage with the council or community engagement requirements;
- The provision of other contributions the council will make towards reducing costs or the subsidy gap;
- How costs to finalise design and secure planning approval will be shared in the event the land is not transferred due to a factor outside of the Registered Housing Agency/SPV control (i.e. securing funding);
- Requirements relating to the use of the land and dwellings post construction, such as an agreement to a term of use.

When coupled with regulation of a Registered Housing Agency, the agreement could provide the council with confidence that the land will be used for the intended purpose and managed without the need for an ongoing S173 Agreement.

A S173 Agreement may provide a higher level of assurance and control over development and/or land use over time because it is registered on title, therefore enabling council to undertake legal action if requirements are not met.

Application of a S173 Agreement requires careful consideration to ensure that it will not unduly impact on the Registered Housing Agency's ability to secure and manage debt, operations and obligations to funders, noting:

- A S173 Agreement that limits the use of the land to Affordable Housing use effectively limits the development value to 'below market', as a full market return cannot be realised by any landowner on the assets;
- A financier will carefully consider the terms of a S173 Agreement to determine if it will impact on its ability to recover financing in the event a Registered Housing Agency was unable to meet repayments and the land had to be sold, and if this impacts on the amount and/or terms of financing.

Should a council require higher level of assurance that an Affordable Housing outcome will be delivered for an agreed period or directed to a specific use, a time limited S173 agreement may be an appropriate 'middle ground' that reflects the value of the council contribution without overly restricting the Registered Housing Agency's ability to develop and prudentially manage the tenancies and assets.

A Contract of Sale will be required where land is sold (including if land is gifted), to ensure the legal transfer of title, with obligations on the vendor (council) in relation to details that must be included in the contract.

Risk considerations

The key risk consideration for both councils and Registered Housing Agencies relate to the terms of the agreement and how adaptable they are to changing conditions over time. Key risks include:

- Terms are harsh, inflexible or create an unnecessary burden on one of the parties;
- The agreement does not provide clear ways of dealing with issues that might arise (e.g. an agreement does not include discussion as to what happens if finance cannot be obtained);
- Inconsistent or undefined terminology which can be ambiguous for parties when later interpreting the agreement;
- Default risk and loss; and
- Supervision risk – managing each parties' obligation.

With any agreement, the best ways to mitigate risks are:

- Careful consideration of the terms during drafting, with a view for how circumstances may change in future and input from qualified lawyers experienced in these forms of agreements;
- Having terms which are only as prescriptive as is necessary to achieve the aims of the agreement;
- Maintaining a good relationship between the parties, so that any disagreements can be resolved in good faith; and
- Providing for either party to seek to vary or amend the terms by agreement.

Other risk considerations include:

	Risks	Mitigations
Council	**Financial risk** ▪ Depending on nature of the agreement and the allocation of risk in the agreement, significant costs may be incurred in negotiation and due diligence without guarantee the agreement will proceed.	▪ Few options to mitigate upfront costs. Parties should bear their own legal costs at this stage.
	Legal liability risk ▪ Breach of agreement terms will typically give rights to damages or termination to Registered Housing Agency.	▪ Council should have staff responsible for managing the agreement to ensure compliance with the terms.
	Reputational and regulatory compliance risks ▪ No material risks.	
	Outcome risk ▪ Inconsistent or poorly defined terminology results in different interpretation / dispute over expectations at a later date. ▪ The cohort or location in need of appropriate Affordable Housing outcomes may shift over time, causing the agreement to lose relevance. ▪ Agreement may not appropriately provide for certain contingencies leaving the parties without guidance as to how to proceed.	▪ Ensure clarity of outcomes and expectations in drafting. ▪ Include an option to review and adapt the agreement during the term. ▪ Agreement should be appropriately drafted by a lawyer, and 'stress-tested' against a range of potential scenarios by the parties.
Registered Housing Agency	**Financial risk** ▪ Depending on nature of the agreement and the allocation of risk in the agreement, significant costs may be incurred in negotiation and due diligence without guarantee the agreement will proceed.	▪ Limited options to mitigate upfront costs. Parties should bear their own legal costs at this stage.
	Legal liability risk ▪ Breach of agreement terms will typically give council the rights to damages or may result in termination of agreement in favour of council.	▪ Ensure terms can be acted on and are reasonable.
	Reputational risk ▪ No material risk.	
	Regulatory compliance risk ▪ Terms of the agreement may impose additional reporting requirements, requiring the Registered Housing Agency to track and manage over time.	▪ Only include reporting requirements if necessary and seek to limit duplication (i.e. accept Registered Housing Agency reporting on outcomes within annual report). ▪ Reporting obligations to be added to the Registered Housing Agency's existing reporting program once the agreement is entered.
	Outcome risk ▪ Inconsistent or poorly defined terminology results in different interpretation / dispute over expectations at a later date. ▪ The cohort or location in need of appropriate Affordable Housing outcomes may shift over time, causing the agreement to lose relevance. ▪ Agreement may not appropriately provide for certain contingencies (e.g. major damage to the land and buildings), leaving the parties without guidance as to how to proceed.	▪ Ensure clarity of outcomes and expectations in drafting. ▪ Include an option to review and adapt the agreement during the term. ▪ Agreement should be appropriately drafted by a lawyer, and 'stress-tested' against a range of potential scenarios by the parties. ▪ Engage funders early and share proposed terms of the agreement. ▪ Consider how third parties may view agreement when drafting.

Key Process and Resourcing Considerations

Application of a legal agreement as a means of securing a contribution could be relatively resource intensive depending on the type and breadth of the agreement.

The process and resourcing to develop and execute a legal agreement is expected to involve:

- Council and/or Board approval to enter an agreement;
- Parties agreeing to terms of agreement and drafting of a 'term sheet' setting out key expectations;
- Translation of agreement into an appropriate form;
- Review, amendment and agreement by each entity's legal representatives;
- Potential review by entities, such as ATO, ASIC, State Government, financiers and/or Housing Registrar;
- Council and/or Board decision to execute the agreement; and
- Registering of a S173 Agreement on title through the Land Titles Office.

Assessment of Mechanism

Criteria	Section 173 Agreement	Other Agreement	Rationale for Assessment
Land will be developed for Affordable Housing purpose.			▪ Section 173 Agreement is registered on title and can be used to set conditions of development and occupancy, providing for a high level of certainty that land will only be developed for Affordable Housing purpose. ▪ Certainty of land development under another form of agreement will depend on the terms of the agreement.
Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.			▪ Level of confidence will depend on terms of the agreement and the monitoring of it over time. ▪ A Section 173 Agreement expected to provide a higher degree of assurance as to use as it is registered on title.
Development and operational feasibility.			▪ Agreements may impact on attraction and terms of funding or financing as they can be perceived as a covenant on land, limiting development value. Requires careful consideration of terms to minimise impact / move to a higher rating.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.			▪ Level of confidence will depend on delivery model and terms of the agreement.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.			▪ Level of confidence will depend on terms of the agreement and the monitoring of it over time.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.			▪ Agreement may impact on Housing Agency ability to meet regulatory requirements if it unduly impacts on ability for Agency to undertake its role. ▪ Careful consideration of terms of agreement are required to move to green (high) rating.

EXAMPLE – USE OF LEGAL AGREEMENTS

EXAMPLE:	CITY OF PORT PHILLIP MARLBOROUGH STREET CAR PARK DEVELOPMENT
Local Government	City of Port Phillip (CoPP)
Housing Agency	HousingFirst (formerly Port Phillip Housing Association)
Landowner	Port Phillip Housing Trust (PPHT)
Outcomes	▪ Gifting of land at 46 - 58 Marlborough St, Balaclava by CoPP to HousingFirst to build a basement car park (to be owned and managed by CoPP) and 46 Affordable Housing units (to be owned by the PPHT and managed by HousingFirst). The project is under construction.

Background / Structure	▪ The planning permit was handled as a separate and independent process undertaken by Council in its capacity as the Responsible Authority. The process of disposal highlights the timeframes, process and the use of different agreements to secure delivery and outcomes:
	  ▪ March 2018 - Council unanimously resolved to progress this redevelopment and delegated authority to the CEO to negotiate and enter into a conditional Heads of Agreement with Port Phillip Housing Association Ltd (now HousingFirst) as Trustee for the Port Phillip Housing Trust for the redevelopment and sale of 46-58 Marlborough Street.
	  ▪ August 2018 - Council resolved to proceed with the conditional transfer of land at the site for community housing, following formal notice of its intention to sell the land and considering the public submissions as required under the LG Act.
	  ▪ May 2020 - Council endorsed variations to the Heads of Agreement with HousingFirst Ltd.
	  ▪ Following development completion, a Section 173 Agreement will be placed on the land, in accordance with the Heads of Agreement terms, which includes that HousingFirst shall covenant with council to only develop or use the land for the purposes of Affordable Housing owned by a registered housing agency. The Section 173 Agreement will terminate 50 years after the date of the agreement.

Key Learnings	▪ Air space development can provide dual uses for underutilised Council land. A Two-Lot Plan of Subdivision can be used to create dual land uses where ownership of the community housing is being transferred. ▪ Various legal agreements can be effectively used as a mechanism to secure housing outcomes. ▪ Implementing a Crime Prevention Through Environmental Design (CPTED) approach is a useful way to create safer shared spaces through the project design process. ▪ The role of council to determine a planning application and issue of a planning permit, must be independent of its role as landowner. ▪ Engage councillors, the community and traders early and actively. ▪ Seek to align the opportunity with State Government funding availability. ▪ Ensure sufficient allowance in the delivery program for local government processes surrounding disposal of land. ▪ Ensure clarity of project brief, as this impacts on project budget.

Concept image of Marlborough Street Balaclava Affordable Housing project

> *"This [Marlborough Street] is a great example of what can be achieved when local government works with the State and housing associations to provide much needed housing in our backyard and we hope more partnerships will follow."*
>
> Former City of Port Phillip Mayor, Bernadene Voss

MECHANISM 4: MORTGAGE INSTRUMENT

Mechanism:	Mortgage instrument
Overview	▪ A mortgage instrument is a written contract that provides a party - typically a lender - certain rights over a property value, which can include rights to compel a sale in the event of a default. ▪ Mortgages can also be used to secure an interest or 'equity stake' and its repayment upon any future sale of the land.
Ownership of land	▪ Registered Housing Agency or SPV. ▪ Individuals under an Affordable Home Ownership arrangement.
Management of assets	▪ Registered Housing Agency or individual households in an Affordable Home Ownership arrangement.
Key Strengths	▪ Commonly used financial mechanism to secure value of a land contribution, should the land ever be sold. ▪ Does not limit the property value, use of the land, or owner's ability to secure and apply debt finance. ▪ Mechanism to support home ownership sales where other mechanisms, such as Section 173 Agreement, could impact on delivery.
Key Weaknesses	▪ Potential to be a disincentive for the asset owner to significantly invest in improvements over time if the mortgagee has a share in the future property value. ▪ Application requires a legal agreement to be in place and the terms of the agreement. ▪ Future council may need to decide on expenditure of any returned equity – no guarantee of reinvestment in Affordable Housing.
Responsibility for determining use of land at end of dwelling life	▪ Registered Housing Agency. ▪ If land is sold, council's contribution as a proportional equity share is repaid and the (future) council is responsible for determining use of funds, unless an agreement with the Registered Housing Agency is in place requiring reinvestment.
Level of Resourcing to Implement	▪ Moderate in first instance depending on process to develop the associated legal agreement. Once developed, the legal agreement can be applied as a standardised arrangement.

Application and Reasons for Applying

A mortgage instrument could be applied by:

- A council to secure an interest in a development where it has contributed the land;
- The Director of Housing where there is agreement with a Registered Housing Agency; or
- A Registered Housing Agency to secure an interest in an Affordable Home Ownership arrangement it has facilitated where there is subsidy provided to support affordability.

The key rationale for applying a mortgage instrument is that the council wants to retain a right to the value of its contribution and ensure a return should the land ever be sold or to ensure reinvestment by the Registered Housing Agency whilst not wanting to unduly impact on development financing.

Strengths and Weaknesses of Mechanism

Stakeholder	Strengths / benefits	Weaknesses / disadvantages
Council	▪ Secures value of a council contribution through a clear legally-binding mechanism. ▪ Provides for a future return should the land be sold (unless the agreement provides for the reinvestment in new Affordable Housing).	▪ New mechanism for council. ▪ Still requires separate legal agreement to be agreed. ▪ Repayment of investment on any future sale is second to payment of debt to bank. ▪ Future council may need to decide on expenditure of any returned equity. ▪ May disincentivise an Agency to invest in significant capital refurbishment, as council would capture share of growth if asset sold.
Registered Housing Agency	▪ Commonly use mechanism to protects an interest in property and provide for repayment if the dwelling is sold – familiar tool for financiers and funders. ▪ Does not limit Registered Housing Agency securing financing or reduce the value of the asset for debt purposes. ▪ Does not limit the value or the use of the land. ▪ Established bank supported mechanism to support Affordable Homes Ownership via a shared equity model.	▪ Not commonly used mechanism by councils to date – requires knowledge to understand how to apply. ▪ Risk is an 'all-or-nothing' solution – where a breach of the underlying agreement occurs, the mortgagee must either take no action or compel a sale of the property. ▪ Still requires separate legal agreement to be agreed.

Key Legal and Risk Considerations

Legal considerations

A mortgage is a registered interest on a property title. In commercial lending, this underlying agreement is a loan agreement between lender and borrower. The interest granted by the mortgage is the right to sell the property where the conditions of the underlying agreement are not met.

Placement of a mortgage that deals with council land is expected to be recorded a 'second mortgage' (with a primary lender as the first mortgagee) and requires a legal agreement between the landowner (i.e. Registered Housing Agency) and the party seeking to register an interest (e.g. council and/or the lender).

In addition to providing a right to sell the property on default of the underlying agreement, a mortgage can also secure a payment to council on terms defined by the agreement. For example, council could secure an agreed 'equity share' percentage of the total property value, post-completion, requiring payment back to council of this percentage should the land ever be sold.

Where there are multiple mortgages on a title, an agreement which stipulates the priority amount or amount secured and payable to each lender, called a 'Deed of Priority', must be entered. Primarily, the first mortgage will rank above the second, i.e. if the owner defaults and the property is sold to cover the debt, the initial mortgage will be satisfied first, with remaining funds directed to repaying the second mortgage. The deed will contain provisions for the first mortgagee to consent to the second mortgage and limit the amount of money the first mortgagee is entitled to be paid in priority. This may not be an issue, depending on whether the mortgage is securing a council equity share in the land.

A mortgage to council which secures an Affordable Housing outcome will require a more bespoke form of agreement and must be used in combination with another legal agreement relating to the transaction.

Council will need to consider what it would do with any return if the property was to be sold in the future. This could include a requirement for re-investment in new Affordable Housing or could provide the council at that time to determine the desired investment. Realisation of long-term Affordable Housing outcomes are therefore subject to other agreements and/or future council decisions.

Risk considerations

	Risks	Mitigations
Council	**Financial and legal liability risks** ▪ No material risks.	
	Reputational risk ▪ Enforcement of a mortgage is a worst-case scenario and might indicate a failure of the Affordable Housing project.	▪ Enforcement of the mortgage should be a last resort, following negotiation with the Registered Housing Agency.
	Regulatory compliance risk ▪ May require ongoing monitoring of Registered Housing Agency's performance of the underlying agreement.	▪ Consider reporting requirements being embedded in an agreement and/or ensure resourcing to monitor over time.
	Outcome risk ▪ Mortgage cannot be used to compel a Registered Housing Agency to deliver an outcome. Enforcement will not deliver the outcome, only financial compensation to mortgagee.	▪ Mortgage can be used with other means of securing a council contribution.
Registered Housing Agency	**Financial, reputational and outcome risks** ▪ No material risks.	
	Legal liability risk ▪ Where mortgage is exercised and council is not able to recover full amount claimed, council could potentially seek damages from the Registered Housing Agency.	▪ Consider terms of agreement to ensure limited risk/recourse.
	Regulatory compliance risk ▪ Existing mortgagees or lenders with a general security agreement may require consent process or priority deed before registration of the mortgage.	▪ Registered Housing Agency to proactively engage with their lenders and funders to confirm council second mortgage will be acceptable.

Process and Resourcing Considerations

The *Transfer of Land Act 1958* obliges the first mortgagee to present a certificate of title to enable registration of a subsequent mortgage. The first mortgagee (typically a lender/funder, such as the National Housing Finance and Investment Corporation or a bank) cannot stop the registration of a second mortgage by a council, however, they may require a deed of priority as a condition of approving the second mortgage.

The process to apply a mortgage instrument requires agreement between the parties and the support of the first mortgagee (the bank) which is expected to include:

- Agreement as to the value of the council contribution (i.e. as a percentage of total end project value) and for the registration of a second mortgage to secure the council interest;
- Drafting of legal documentation reflecting the arrangement, which is expected to include an agreement between council and the Registered Housing Agency, and a deed of priority with the lender;
- Review of the legal arrangement by the first mortgagee (lender);
- Signing of legal agreements, including deed of priority; and
- Registration of interest as a second mortgage on title.

The resourcing to apply a second mortgage instrument is expected to be moderate to high in the first instance, subject to the resourcing required to develop a legal agreement. Development of a deed of priority will require legal advice and a process of bank review.

Assessment of Mechanism

Objectives	Assessment	Rationale for Assessment
Land will be developed into Affordable Housing.	N/A	▪ Not applicable – mortgage instrument does not influence development.
Developed site will be used for Affordable Housing for an agreed purpose, term and tenant cohort.		▪ Mortgage instrument does not negatively influence asset use.
Development and operational feasibility.		▪ Mortgage instrument should not impact on development and operational feasibility. Instrument only impacts on distribution of value should the land be sold.
Reinvestment of the value of the council contribution in an **Affordable Housing outcome** at the end of an agreed term or dwelling life.		▪ Subject to the land being sold, the council's interest protected by the mortgage instrument and the subsequent reinvestment of this value in Affordable Housing will depend on any associated legal agreement and/or the decision of council at the time. There is subsequently some medium risk the council proportional value is not reinvested in Affordable Housing.
Reinvestment of the value of the council contribution in the **local municipality** at the end of an agreed term or dwelling life.		▪ Subject to the land being sold, the council's interest protected by the mortgage instrument and the subsequent reinvestment of this value in the municipality is expected, as the council is required to use funds for the benefit of its community.
Housing Agency can meet regulatory requirements and prudentially manage asset over an agreed term.		▪ Subject to terms of underlying agreement. Mortgage instrument has no or minimal impact on Housing Agency ability to meeting regulatory requirements and manage assets over an agreed period.

CONCLUSION

There is a significant need to increase the supply of dedicated Affordable Housing in Victoria, with corresponding social and economic benefits for individuals and the community.

The application of council land is part of a suite of tools that can be utilised by local governments to support an increase in Affordable Housing supply.

How land is released, developed and secured to realise long-term Affordable Housing requires careful consideration to determine an appropriate and feasible structure.

Registered Housing Agencies are well-placed to support the realisation and appropriate management of Affordable Housing on council land.

Whilst the resource does not cover every question, circumstance or process, it is intended that it supports improved and consistent knowledge and capacity building for councils and Registered Housing Agencies and support exploration and application of council land for Affordable Housing outcomes.

Councils and Registered Housing Agencies are encouraged to refer to a range of other resources to support the delivery of Affordable Housing, including:

- *Affordable Housing Agreements: Advice for local government and community housing organisations*
- Lease Agreement Template

Feedback

CHIA-Vic, MAV and the report authors welcome feedback to the guide and the provision of additional case studies to reference on our websites. Feedback can be provided to admin@chiavic.com.au.

Attachment 1: Key Considerations in Releasing Land

The process of selecting, releasing, developing and managing land for Affordable Housing is expected to require councils and Registered Housing Agencies to assess a significant range of matters. The following table has been prepared to support organisations to understand the breath of considerations. Some of these matters are discussed in this resource.

Focus area	Considerations
Objectives	▪ What are council's primary objectives in releasing land for Affordable Housing, and are there specific tenant or housing outcomes the council wants to achieve? ▪ What are Housing Agencies' key strategic objectives and priorities? Is there alignment?
Roles	▪ What are the roles in delivering and managing Affordable Housing and which organisations are best placed and regulated for this purpose? ▪ What role is council seeking to play in delivery? How does this align to its legislative responsibilities? ▪ What is the role of Housing Agencies?
Legal and Regulatory Requirements	▪ What legal requirements must be met in the release and development of land? ▪ What regulatory requirements must a Housing Agency meet and how do these impact on their ability to support a delivery model or mechanism to secure outcomes?
Land Suitability and Development Potential	What land does council own that is suitable for development as Affordable Housing?: ▪ Where is it located and what services would residents be able to access? ▪ What criteria determines shortlist sites? ▪ What is the site history and is there a risk of contamination? Have any site investigations been undertaken? ▪ Are there other alternative community uses for the land that also need to be considered? What is the priority use for council and why? ▪ Are there existing uses on the land and will these need replacing? How will any costs of replacement be met; does council need to own the replacement asset; and how does this use impact on dwelling yield and potential site use as Affordable Housing? ▪ What planning controls apply? Is there a potential for a higher zoning to increase yield? ▪ What is the indicative height, type and number of dwellings that could be built?
Land Release Model	▪ How could the land be released / disposed of? ▪ What are the legal requirements? ▪ Does council have policy requirements it needs to consider in relation to asset disposal?

	▪ What is the Housing Agency's preferred land release model? How is council proposing to release the land or are there options? Are there models the agency will not consider participating in? Does the agency require ownership of the land to invest? ▪ What are the benefits and disadvantages of different options? What is council's preferred model? ▪ Does council need to retain ownership of the land and why? How is this weighed up against achievement of social outcomes through the delivery of Affordable Housing? ▪ Is council considering this a 'one-off' disposal, or is there potential for a pipeline of sites?
Development and Operational Feasibility	▪ What is the estimate of site value assuming a highest and best use? ▪ What is the indicative cost of development? Are there demolition or remediation costs? What are the costs of any replacing or including council facilities? ▪ What impact would council priorities in terms of program outcomes, target households, design and/or sustainability have on construction or operating costs? ▪ Would development be feasible if it was delivered as market-priced housing? i.e. would there be sufficient return on land and development (this test helps determine land value and likely financing); ▪ Does council require a financial return on the land? ▪ What are the current and potential funding and financing opportunities that could support construction costs? Who has access to these opportunities and what are the terms and conditions? Does the way the land is provided impact on these options, and is the criteria for funding consistent with the terms of the land release being considered by council? ▪ Does council have other contributions it could potentially make towards development costs?
Risks and Mitigations	▪ What are the risks for council and for the housing agency and how can these be mitigated?
Decision-making Process	▪ What is the organisation's decision-making process? ▪ Are there external approval processes that are required? How will these be managed and what is the timing? ▪ What governance arrangements might be required to be put in place between the council and Registered Housing Agency? ▪ What consultation and/or tendering process does council need to undertake before the release of land can occur? What approval processes does a CHO need to undertake to apply to receive and develop land?
Priority Households	▪ Are there priority households the housing agency or council is seeking to support? ▪ What are the State Government priorities? ▪ How does a particular priority emphasis influence the project feasibility?

	▪ What are the benefits and disadvantages of setting a specific priority household group?
Term of Use	▪ What is a reasonable term of use, taking into consideration the delivery model and mechanism to secure outcomes? ▪ What impact would an 'in perpetuity' objective have on a housing agency capacity to deliver? How does 'in perpetuity' take into consideration the lifecycle of a dwelling and the change in value over time?
Mechanism to secure contribution / outcome	▪ Is use of the specific piece of land as Affordable Housing 'in perpetuity' critical, or will council consider allowing a future sale of the land if the investment provided by council was appropriately secured and reinvested in the municipality? ▪ What are the mechanisms for securing a land contribution in an Affordable Housing purpose? ▪ Does council have an existing vehicle it is seeking to own outcomes, or is it considering establishing a special purpose vehicle for the purposes of Affordable Housing? How does this impact on options, process and timing to release land? ▪ What is a reasonable time to require use of a site as Affordable Housing? What factors influence this decision? ▪ What are the potential obligations in relation to the use of land over time?
Reinvestment requirements	▪ What conditions are reasonable to place on a Housing Agency in relation to reinvestment of the council contribution? ▪ How do the requirements (and means of securing) impact on delivery model?

Attachment 2: Hypothetical Assumptions

The hypothetical scenario and indicative feasibility assume:

- A mid-rise development of three to five-storey apartments comprising approximately 30 units;
- Mix of one- and two-bedroom dwellings, with an average market value of $500,000;
- 100 per cent Affordable Housing, managed by a Registered Housing Agency (either directly or on behalf of a SPV), with 75 per cent of tenancies targeting priority Victorian Housing Register households and 25 per cent targeting households on the register of interest;
- Land value of $2.4 million and construction costs of $10.5 million with a total Gross Realisation Value (GRV) of $15 million, being the estimated market value of the development upon completion, if it was to be sold without an Affordable Housing constraint. A theoretical 16 per cent return on costs (development margin) is used, noting that whilst a return is not expected, for the purposes of demonstrating viability, a project needs to show a profit after accounting for costs;
- All operating costs, including rates, insurances, management fees, short- and long-term maintenance to be met from rent. Does not assume an Owners Corporation charges, however maintenance costs will need to cover common area facilities, such as lift maintenance;
- Standard costs to develop a proposal, including design and planning-related costs and charges;
- Housing Agency can borrow funds if the structure of the model allows. Competitive long-term rates either through Treasury and Finance, NHFIC or standard bank lenders reduce cost of borrowing;
- There is no marketing or selling costs associated with the Affordable Housing component.

The scenario and assumptions do not consider:

- Sale of dwellings to individuals either under an affordable home ownership arrangement or at market price. Revenue from any sale that is provided for would positively impact on the feasibility but would also increase risks;
- Replacement of any current or future community facility, such as a car park; or
- Remediation costs.

Summary of Feasibility Inputs

Item	Per dwelling	Total (30 units)	% gross realisation value (grv)
Land Value	$80,000	$2,400,000	16 per cent
Construction Costs (GST inclusive)	$350,000	$10,500,000	70 per cent
TOTAL COSTS:	**$430,000**	**$12,900,000**	86 per cent of GRV
Gross Realisation Value	**$500,000**	**$15,000,000**	**100 per cent**
Profit Check (profit/cost)	***$70,000***	***$2,100,000***	***14 per cent of GRV 16 per cent of Costs***

Table 9: Hypothetical example - cost and profit assumptions

Hypothetical inputs into meeting costs

Different ways in which costs could be met, and the indicative value of each contribution relative to total GRV is summarised in Table 11 and referenced in the analysis of each of the delivery model.

Item	Potential contributor	Hypothetical project total value	Indicative per cent of total project grv
Land	**Landowner**	$2,400,000	**16 per cent**
Debt*	**Registered Housing Agency or SPV**	$2,000 ,000	**13 per cent**
GST Input Tax Credit (refund of GST on construction costs)	**Registered Housing Agency or SPV recovering GST on costs**	$954,545	**6 per cent**
'Profit Margin' (hypothetical value)	**Developer, Registered Housing Agency, SPV**	$2,100,000	**14 per cent**
Subsidy Requirement	**Government, philanthropic, developer contribution**	Subject to model and above inputs	

Table 10: Hypothetical inputs and potential value.

**Debt assumes that the Registered Housing Agency will apply debt to construction costs and then apply GST input tax credits (GST refunded on costs) to immediately reduce debt on construction completion.*

The actual subsidy gap will depend on total costs and what inputs are provided by other parties. For example, if the Registered Housing Agency is not able to apply or access debt finance,the subsidy requirement increases.