



Affordable Housing Agreements Toolkit

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This Toolkit was prepared by Hornsby & Co.
(hornsbyco.com.au) for CHIA Vic and MAV for their exclusive use.

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About this Toolkit

This Toolkit was prepared by Community Housing Industry Association Victoria (CHIA Vic) and the Municipal Association Victoria (MAV) to assist local government land use planners successfully undertake Affordable Housing negotiations.

The funding, delivery, and management of Affordable Housing involves multiple players who work within different operating contexts, including different legislative and regulatory frameworks, funding arrangements, corporate structures, economic influences, and competitive environments.

Add to that the voluntary nature of Affordable Housing negotiations, and the need for ongoing management of Affordable Housing outcomes, and it becomes clear why facilitating the delivery of Affordable Housing through the planning system is complex.

This Toolkit provides practical advice and is supported by three fact sheets that you can use or provide to applicants/proponents, and a detailed report that provides additional information.

The report and factsheets can be found at chiavic.com.au/affordable-housing-toolkit ➔

There is also additional information and guidance available on the Department of Environment, Land, Water and Planning (DELWP) website planning.vic.gov.au/policy-and-strategy/affordable-housing ➔

Understanding the community housing sector

Understanding the operating context of all parties involved is critical to effective Affordable Housing negotiations and the successful delivery of Affordable Housing for the community. While the *Planning and Environment Act 1987* does not say that Affordable Housing must be owned or managed by the community housing sector, they are the sector with the greatest experience. Within the community housing sector, registered housing agencies are regulated to deliver Affordable Housing outcomes and have existing support and compliance systems in place.

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

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

A diverse sector

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

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

The registered community housing sector has been the recipient of government investment and as of 2018 has access to dedicated government funding through a range of initiatives under *Homes for Victorians*. Regulation under the Housing Act 1983 forms a key part of the accountability framework to guarantee that the significant government and other investment into the registered community housing sector is retained for future generations.

The community housing operating model

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

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

CHOs can either own their properties or manage them on behalf of the owner. The Director of Housing leases many of the properties that are managed by the sector.

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

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

The following table highlights the maximum rent that could be charged for single person if a maximum of 30 per cent of income is paid in rent:

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

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

CHOs are efficient, lean, not-for-profit organisations delivering Affordable Housing outcomes to the community. Community housing organisations must cover all their operating costs out of the rents paid by tenants. This includes debt repayments where CHOs have financed part of the purchase of new stock.

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

- owners corporation fees
- maintenance of fittings and fixtures.

To keep operating costs low, CHOs prefer low owners corporation fees and durable, low maintenance fittings and fixtures within properties.

Some CHOs are unable to take on any debt to develop new properties because their tenant profile does not provide the rental income to repay the debt. However, some agencies have increasingly been able to leverage their balance sheet to secure borrowings and in turn, finance new projects.

Potential sources of funds and value for an agency to access and leverage include:

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

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

A regulated sector

Part VIII of the *Housing Act 1983* established the regulatory framework under which the registered community housing sector operates. This includes:

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

Four key objectives drive the regulation of Registered Housing agencies:

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

The regulatory framework ensures registered agencies are held accountable to government and other investors, tenants and the community housingregistrar.vic.gov.au/How-we-regulate  It promotes best practice and gives government the tools to address poor performance by registered agencies.

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

Housing associations are:

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

Housing providers:

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

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

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

This Toolkit encourages councils to negotiate agreements that result in Affordable Housing outcomes that are managed by a Registered Housing Agency as they have well-regulated and have demonstrated success.

Additional resources on the community housing sector

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

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

The following section steps you through the parts of a negotiation, more detail for each step then follows.

The steps in a negotiation

Step 1



Provide the Affordable Housing Fact Sheet for Developers at the earliest opportunity

If someone enquires about a significant proposal that involves:

- rezoning land to a zone which includes a residential component, or
- buying land to develop it for residential use, or
- preparing a planning permit application for residential use

then provide them with the *Affordable Housing Fact Sheet for Developers*

chiavic.com.au/affordable-housing-toolkit

Step 2



Communicate the need for an Affordable Housing Report

When documenting the information required to form part of a rezoning proposal or a planning permit application, set out the requirement for an Affordable Housing report. The Affordable Housing Fact Sheet for Developers has an overview of what should be included in an Affordable Housing report.

chiavic.com.au/affordable-housing-toolkit

Step 3



Decided whether to engage an Affordable Housing consultant

You may decide to engage an Affordable Housing consultant to attend pre-application meetings and to initiate negotiations. Or you may engage them only to review and provide advice on the proposal/application itself.

Step 4



Negotiate an Affordable Housing contribution with the proponent/applicant

The negotiation is likely to be an iterative process and may require several meetings, discussions, and a review of the Affordable Housing report provided by the applicant/proponent. Read through the Toolkit to get handy tips and advice on what the negotiation should include.

Step 5



Document the Affordable Housing Agreement

If you are able to reach a voluntary agreement with the proponent/applicant, document the agreement being sure to set out the method for calculating the Affordable Housing contribution and the timeframe for delivering the contribution.

Step 6



Engage a lawyer to prepare (or review) a Section 173 Agreement

You may ask the proponent/applicant to prepare a draft Section 173 Agreement or you may decide to have it drafted by a lawyer on behalf of council. Check the draft agreement contains all the detail required (see handy hints and advice in this Toolkit)





Step 7



Get the applicant/proponent to sign the Section 173 Agreement

It is difficult to gauge the exact point when you should get the Section 173 Agreement signed by the other party. If possible, get the S173 signed before the council decision to Authorise a Planning Scheme Amendment or before a Council decision on a planning permit application. Keep the signed copy safe but do not sign it yet.

Step 8



Council decision

Council decides to authorise a Planning Scheme Amendment or makes a decision on a planning permit application.

Step 9



Attend Panel or VCAT

You – or the Affordable Housing consultant you have engaged – may be required to give evidence at a Panel hearing or at the Victorian Civil and Administrative Tribunal (VCAT).

Step 10



Planning scheme approved or planning permit issued

Once the planning scheme is approved or the planning permit is issued, the Council should sign the Section 173. If the Amendment is abandoned or the permit is refused, the council should return the S173 agreement, unsigned by council for destruction. A note should be made on file that the S173 was not executed.

Step 11



Celebrate a successful Affordable Housing negotiation and agreement

Celebrate your success and ensure there is sufficient monitoring and enforcement of the permit as the development proceeds, so that the developer delivers the agreed Affordable Housing contribution.

Working through the elements of a negotiation

There are eight elements that a council must have regard to when deciding whether a proposed Affordable Housing contribution will result in appropriate housing for very low, low, and moderate income households.

They are:

- **Allocation** – a process to select eligible households
- **Affordability** – generally that rent or mortgage repayments will be no more than 30% of household income
- **Longevity** – how long will the dwellings remain Affordable Housing
- **Tenure** – rent, ownership, or something else
- **Type of housing** – in terms of form and quality
- **Location** – site location and proximity to amenities, employment and transport
- **Integration** – in terms of the physical build and local community
- Official estimates of housing need

Given the relative infancy of local government involvement in facilitating Affordable Housing, and the complexity of the Affordable Housing sector itself, it is essential that negotiations don't deliver unviable Affordable Housing contributions or result in unintended consequences. It is also important that the council doesn't inadvertently become a tenancy manager, asset owner, or take on compliance responsibilities unless it has the desire to do so and has the necessary capacity and resources.

The eight elements above, plus some other important aspects, can be addressed by answering the questions below.

Who should own or manage Affordable Housing?

There are many different types of Affordable Housing, so local governments need to exercise a degree of caution in negotiating an Affordable Housing contribution where it is not clear who will be responsible for compliance, monitoring and enforcement, and whether there is sufficient oversight of whoever is allocating the Affordable Housing and setting the rent/price point.

Registered community housing organisations (called 'registered housing agencies' in the Housing Act 1983) have a significant compliance regime with monitoring and reporting requirements set by the state government. The registered CHOs are well placed to take on the management and/or ownership of Affordable Housing.

Registered housing agencies have experience in allocating properties and ensuring the rent settings reflect the household incomes. If Affordable Housing outcomes are not proposed to be managed by a Registered Provider, local government will need to monitor the outcomes over time and may need to undertake enforcement action.



Through the negotiation process and documentation in an agreement, staff should ensure that the preferred owner/manager of Affordable Housing contributions is a registered housing agency, or other organisations that have a sufficient monitoring and compliance regime in place.

How long should a dwelling be required to remain Affordable Housing?

When deciding how long a dwelling should remain as Affordable Housing, planners should have regard to the amount of value that was created by the planning mechanism. To deliver the maximum benefit to the community, people may assume that it is best to ask that any Affordable Housing contribution is provided in perpetuity. However, requiring any organisation, and particularly a community housing organisation, to guarantee that a building will be used for Affordable Housing long past the useful life of that building creates a significant cost burden. All buildings require maintenance throughout their life, and maintenance costs increase exponentially as the building gets older. An organisation needs to be able to adopt a good asset planning and management approach.

When negotiating an Affordable Housing contribution there needs to be some flexibility around the term for which the dwelling will remain Affordable Housing. There also needs to be some recognition that if a concession has been given (eg. additional height) that there is a benefit provided back to the community.



The Affordable Housing Agreement should require the contributed dwellings to remain as Affordable Housing for a time commensurate with the value of the planning mechanism used to facilitate the contribution, so the term does not create an asset management burden to the owner of the Affordable Housing.

Should an Affordable Housing dwelling be for rent or for sale?

The *Planning and Environment Act 1987* does not set out whether Affordable Housing should be rental or available for purchase. Regardless of the tenure, the rent or mortgage repayments need to be affordable to moderate, low, or very low-income households.

A single person at the top of the moderate-income range (\$1,164 per week) could pay \$350 per week in mortgage repayments, without being in housing stress. Under current lending requirements and rates (March 2020) this means they could borrow in the order of \$330,000 (they would also need to save up a deposit). For a mid-range low-income household (\$600 income per week) this drops to a \$185,000 loan amount. Given the high land and property values across metropolitan Melbourne and in many regional areas, there would need to be a substantial discount for a property to be Affordable Housing for individual purchase. There is also a question about how that discount (benefit) can be captured so it is not just a windfall gain for the first purchaser. It is possible to do this through a formal shared equity scheme.

Making a property available for rent (either social rental or affordable rent), with the dwelling owned by a community housing organisation means the Affordable Housing benefit is directed into that sector, and there is no leakage of the value to an individual or to the private sector. When a property is owned by a CHO the benefit accrues to that organisation and to the sector more broadly, even if they need to recycle the asset at a point in the future.

If the dwelling is to be rented out as Affordable Housing but is to remain in private ownership, it should be managed by the community housing sector to ensure appropriate allocation and affordability. In this scenario, the value of the Affordable Housing contribution ends when the property is no longer rented at a discount and as that benefit does not accrue to the Affordable Housing sector.



In negotiating an Affordable Housing contribution, staff should have regard to the proposed tenure, recognising the challenge that high land values create for Affordable Housing purchase by eligible households.

What form should the housing take?

Affordable Housing can be delivered through many built forms: free-standing, townhouse, or apartment buildings. In inner Melbourne it is most likely that it will be delivered as part of apartment developments. In outer Melbourne or rural and regional areas it may be more likely to be detached dwellings. Regardless of the built form, it is important that the internal amenity and the quality of the dwellings is not reduced to an unacceptable level. Poor quality housing is not Affordable Housing. It may be appropriate to reduce the number of bathrooms in a dwelling or use practical hard-wearing finishes rather than luxury finishes to deliver a more cost-effective dwelling, but the internal amenity of the dwelling should still meet the requirements of the Better Apartment Design Standards.



Staff should ensure that that Affordable Housing dwellings meet the same design and internal amenity standards as market-housing dwellings, while allowing some flexibility in floorplan or number of car parks.

Where should Affordable Housing be located?

As for any other housing, Affordable Housing is best located close to services and transport. But that does not mean that areas outside the Activity Centres are inappropriate for Affordable Housing. For an inner Melbourne municipality all residential areas are suitable locations for Affordable Housing. For Growth Areas, there may be a greater focus on areas where infrastructure and services have already been delivered. Any significant residential development provides the opportunity to negotiate an Affordable Housing outcome.

It is likely that significant residential developments will occur in the Activity Centres where there is also more opportunity to accommodate change. An Affordable Housing Policy can provide officers the opportunity to undertake negotiations should significant developments be proposed outside of those areas.



Staff should instigate negotiations for an Affordable Housing component in all significant residential developments.

How well is the Affordable Housing integrated into the neighbourhood and the development?

There can be a stigma associated with Affordable Housing, particularly where that housing is so obviously different from the surrounding dwellings or is set apart from the rest of the neighbourhood. For some types of Affordable Housing (eg. houses where women and are escaping from domestic violence) it is dangerous for the occupants to have the houses identified as Affordable Housing. The stigma and safety concerns can be overcome if the Affordable Housing looks no different from the other dwellings in that development. This approach is called having dwellings that are 'tenure blind'.



Staff should ensure that Affordable Housing dwellings are required to be tenure blind.

What is the need for Affordable Housing in this location?

With the demand for Affordable Housing so significantly outstripping the supply, any type of Affordable Housing is likely to fill a need.

A council may identify particular priorities for their municipality based on community need. Those priorities should be reflected in council documents such as the Housing Strategy and Council Plan.

It is useful to have an assessment of need as part of Affordable Housing negotiations, if the applicant wants to restrict negotiations to a type of Affordable Housing that is not consistent with the Council's priorities. Confirmation of housing need in that location from a Registered Housing provider may be adequate evidence of Affordable Housing demand.



Council can ask applicants/proponents to prepare an Affordable Housing report as part of their application that sets out the demand for Affordable Housing in the location, as well as providing a proposed approach to an Affordable Housing contribution.

What form should the Affordable Housing contribution take?

An Affordable Housing contribution can take the form of dwellings, land or cash. Some councils have established housing trusts or other organisations to receive Affordable Housing cash or land contributions. A housing trust can be a useful third party to hold and structure assets but it does come with an administrative cost, and a governance structure that will need to be established and resourced. For councils that do not have a housing trust, cash and land contributions can still be secured by requiring the contribution to go to a registered housing agency (community housing organisation).

Cash contributions are often preferred by landowners/developers. However, it can be difficult for a CHO to find and finance a site and construct Affordable Housing dwellings in specific locations. To ensure the Affordable Housing contribution is to the benefit of the local community, a contribution through land or dwellings is often more useful.



Affordable Housing contributions may be by way of dwellings, land or cash.

How much Affordable Housing should be contributed?

There is no sector-wide requirement on how much Affordable Housing should be contributed through an Affordable Housing negotiation. The development economics for each development will dictate the size of the contribution and will largely depend on the amount of value generated by the planning mechanism used to facilitate the Affordable Housing contribution. If the amount of value is small, the Affordable Housing contribution is also likely to be small. Each site is different and it is unlikely to be practical to set a flat rate of contribution across the municipality. As a starting point, a rate of 5% of dwellings in a development is considered a reasonable and meaningful starting point, provided that it does not make the development unviable.

In terms of viability of a project it is important to note that it is not just the amount of Affordable Housing that will be provided, but the discount at which it will be provided (see next section) that will determine the viability of the project.



That staff should adopt a flexible and pragmatic approach to the amount of Affordable Housing sought through negotiations, a starting point for discussion could be 5% of dwellings offered at 75% discount.

What level of discount should be applied to the Affordable Housing dwellings?

In the past Affordable Housing agreements have failed because there was a requirement to 'make available' 5% of the dwellings as Affordable Housing, but the way in which they were to be made available was not set out at the time of the agreement. For one party 'make available' meant make available for sale to a CHO (no discount), for another party it meant make available for sale at a 20% discount, and for another party it meant make available at no cost (100% discount).

For community housing organisations, the very low rent revenues, plus the uncertainty around availability of subsidies or grants, means that they do not have the cash reserves or grant funding to be able to buy a dwelling unless there is a significant discount. Creating an agreement that relies on possible (but uncertain) grant funding is setting the agreement up to fail.

A community housing organisation can generally borrow about 25% of the value of a social housing development. This low level of borrowing reflects the low rent revenue that must be used to meet the financing repayments plus meet operating costs (tenancy and property management). For an Affordable Housing Agreement to be viable for community housing organisations, the discount rate (for purchase) needs to be in the order of a 75% discount. A smaller discount rate may be viable for some moderate-income Affordable Housing outcomes.

The discount rate is as important as the overall amount of the contribution because together they make up the value of the contribution.



During Affordable Housing negotiations, staff should recognise the low rent revenue of social housing reflect this in the discount rate at which the Affordable Housing dwellings will be sold to the community housing sector. A discount rate of 75% discount is usually sufficient to enable community housing organisations to purchase the property and use it for social housing delivery.

How do you calculate the value of the Affordable Housing contribution?

The value of an Affordable Housing contribution should reflect the value that was generated by the planning mechanism. When an Affordable Housing contribution is being delivered by the sale (or transfer) of dwellings to a community housing organisation the value of an Affordable Housing contribution is based on the number of Affordable Housing dwellings and the discount agreed for each dwelling.

For example:

A 100 dwelling apartment development is proposed. The sale price of each apartment is estimated to be \$500,000. A 5% contribution would be five dwellings. A 75% discount from the sale price equates to a \$375,000 contribution per apartment. The overall value of the Affordable Housing contribution would be $(5 \times \$375,000) = \1.875 million.

Whether a development would be viable with this size contribution depends on how much was paid for the land and the cost of construction. That is why the 5% (amount) and 75% (discount) should be considered as baseline for negotiations.

If an Affordable Housing contribution is to be delivered by making the dwellings available for rent then the Affordable Housing contribution is similar but includes a measure of the number of years a property will be available as Affordable Housing.

For example:

A 100 dwelling apartment development is proposed. The rental revenue of each apartment is estimated to be \$350 per week or \$18,200 a year. A 5% contribution would be five dwellings. A 20% discount on the rent price equates to a \$3,640 contribution per apartment per year. If the dwellings remain Affordable Housing for a period of 20 years, an estimate of the overall value of the Affordable Housing contribution would be $(5 \times \$3,640 \times 20) = \$364,000$. Note this does not account for the future rent increases or the future value of money.

There may be a considerable amount of time between negotiating an Affordable Housing Agreement and the development being completed. In that time there may be a change in the value of the dwellings. For this reason, an Affordable Housing Agreement should set out the way the contribution will be calculated rather than locking in a specific dollar value.



Staff should ensure that an Affordable Housing Agreement sets out the way that the Affordable Housing contribution will be calculated based on both the amount of Affordable Housing and the agreed discount.

What else can impact on the viability of an Affordable Housing outcome?

In negotiating an Affordable Housing outcome, staff need to be cognisant of all the parties affected- the existing community, the future residents, the community housing organisation, and the developer. Any Affordable Housing Agreement needs to be viable for all parties.

During negotiations staff will need the flexibility to negotiate an outcome that works. In those negotiations staff will still have regard to the provisions in the relevant Planning Scheme and the potential impact of the proposed development.

It may be that during negotiations staff negotiate different trade-offs such as some additional height, a reduction in car parking, a fixed-term for the contribution, a contribution through discounted sale to a community housing organisation, or a contribution through discounted rental. The negotiation is likely to be an iterative process and may or may not directly involve a CHO.

There may be specific requirements included to make the project viable and to ensure a meaningful and sustainable Affordable Housing contribution. Staff and the applicant may negotiate a reduction in the amount of Affordable Housing or the size of the discount.

Staff will keep senior management apprised of negotiations. The final decision on the proposal will still rest with council. Council cannot compel an Affordable Housing contribution (it must be made voluntarily) so it is important that due consideration is given to a negotiated agreement. Due to the complexity of negotiations, the agreement would ideally be negotiated outside the council chamber.



Staff should negotiate Affordable Housing agreements in line with a council-approved Affordable Housing policy, as part of the planning applications process.

Does a community housing organisation need to be part of the negotiation?

It is not necessary to include a specific community housing organisation in the negotiations but you do need to be aware of their requirements. A community housing organisation may not be able to make a formal commitment now for dwellings that won't be available for another two to five years because by that time they may not be in a position to purchase the Affordable Housing dwellings (even if there is a significant discount) if they have committed their resources to other projects. You should take care that the Affordable Housing Agreement will be viable for the community housing sector so that more than one organisation could take up the opportunity.



Preparing a Section 173 Affordable Housing Agreement

What is an Affordable Housing Agreement?

An Affordable Housing Agreement is an agreement between Council and a landowner setting out the Affordable Housing contribution that will be provided when the site is rezoned/redeveloped/developed. The Affordable Housing contribution and any associated requirements are usually secured through a Section 173 Agreement.

Does the proposal/application need a Section 173 Agreement?

If you have negotiated an Affordable Housing contribution, and particularly where you have agreed to certain concessions in exchange for an Affordable Housing negotiation, you should seek to secure the contribution through a Section 173 Agreement. The exceptions to this are:

- where the applicant is a community housing provider — or Department of Health and Human Services (DHHS) — and you have not made any significant concessions in relation to their application
- the landowner is the government and is reluctant to sign a Section 173 Agreement in which case a Memorandum of Understanding or a Heads of Agreement may be sufficient.

What should be included in the Section 173 Agreement

There are example Section 173 Agreements available on the DELWP and DHHS websites. See:

planning.vic.gov.au/policy-and-strategy/affordable-housing/example-agreement ➤

dhhs.vic.gov.au/delivering-social-housing-affordable-housing-contribution ➤

A successful Affordable Housing Agreement needs a balance of certainty and flexibility. The essential aspects to have certainty on are:

- the way the value of the contribution will be calculated
- when the contribution will be made
- for how long will the contribution be secured.

Setting out the value of the contribution

The agreement could include an absolute value (eg. \$750,000) but that does not allow for changing land values and the time-value of money (a dollar today is not worth a dollar in five years' time due to inflation). It is usually better to lock in the way the value of the contribution will be calculated rather than an absolute amount. For example, you could say:

- the owner will gift three dwellings to a registered housing agency, or
- the owner will gift 3% of the dwellings to a registered housing agency, or
- the owner will sell 5% of the dwellings to a registered housing agency at a 75% discount from market value, or
- the owner will sell 5% of useable floorspace to a registered housing agency at a 75% discount from market value, or
- 10% of properties will be rented to eligible households at 80% of market rent.

The key thing to be aware of is that the value of a contribution is calculated using the amount of housing and the discount. Without one or the other there is no certainty of the value and of the cost to the developer (owner). It is not enough to simply say the owner must provide 5% of the dwellings to a registered housing agency, because it is not clear whether the dwellings must be provided for free (gifted), provided at cost, provided at market value or provided at a discount.

Note that if the Affordable Housing contribution is to be by way of discounted rental only (the asset remains in private ownership) then the value is calculated: number of dwellings x discount from market rent x period of time.

For example:

If there are 10 dwellings, each being rented at a \$100 discount per week and they remain Affordable Housing for 10 years then the discount is 10 dwellings x (\$100 x 52 weeks) x 10 years = \$520,000 total contribution.

Setting out when the contribution will be made

The agreement should say when the contribution is to be made. For a development with only one building it is usually enough to say:

- that prior to a certificate of occupancy being issued, (XY) dwellings must be transferred at no cost to a registered housing agency.

For a more complex development (more than one stage) you may require some of the Affordable Housing to be delivered in each stage, for example:

- the Affordable Housing contribution must be delivered on a pro-rata basis for each Stage of the development, or
- 20% of the Affordable Housing must be delivered when 60% of the private market housing has been completed and 100% of Affordable Housing must be completed before the occupancy permit is granted for 80% of the private market dwellings.

Setting out the longevity of the contribution

Ideally an Affordable Housing contribution would remain in the community for many years to come. However, buildings require maintenance and the older they are, the more expensive they are to maintain. For not-for-profit organisations like registered housing agencies, it can be unsustainable to hold onto a dwelling and rent it out as social housing.

The Affordable Housing Agreement should set out the period for which the dwelling must remain as Affordable Housing. Where a property will be owned by a registered housing agency a minimum of 10 years is suggested.

If the Affordable Housing contribution is to be by way of discounted rental only (the asset remains in private ownership) then a longer period may be appropriate in order to receive a reasonable value for the contribution.

Who are the parties to the Section 173 Agreement?

The Council and the landowner are the parties to the Section 173 Agreement. While a developer, planning consultancy or government organisation (eg. Victorian Planning Authority) may be part of the negotiations, the agreement is between the council and landowner. There is no need to lock in a registered housing agency as part of the Affordable Housing Agreement, but you should be sure that any agreement is viable and sustainable for registered housing agencies, particularly where they are required to purchase a dwelling.

Who prepares the Section 173 Agreement?

You can ask the applicant/proponent to prepare a draft Section 173 Agreement or you may get council's lawyers to draft it. To avoid unnecessary legal fees, it is important to agree to all the elements of the Affordable Housing contribution and document it via an exchange of emails or letters before you ask the lawyers to prepare or review the Section 173 Agreement.

When do you need to sign the Section 173 Agreement?

If you have sufficient time to negotiate and agree the wording of a Section 173 before a decision on a permit/authorisation on an amendment, then it is good to get the land owner to sign the Section 173 Agreement. The council can then hold the agreement (unsigned) and once the planning decision is finalised can sign the document to form a legally binding agreement.

The reason to hold-off on signing it is that, if for some reason the permit is refused (by Council or VCAT), you can return the unsigned Section 173 rather than having to go through the legal mechanism of cancelling/removing the agreement.

Note that you should take care that the Section 173 Agreement provides for likely planning outcomes even where that differs from the proposal. For example a VCAT decision may be for the building to be five storeys rather than the proposed six storeys, so the Section 173 will need to be clear on what happens in that circumstance rather than delivering an all-or-nothing approach.

Should you have a separate Section 173 Agreement for Affordable Housing?

You may include the Affordable Housing aspects in the same Section 173 as other matters (eg. vesting of roads etc.) or you may decide to have a separate Section 173 Agreement that just deals with the Affordable Housing contribution. The benefit of preparing a separate Section 173 for Affordable Housing is that it focuses negotiations and there is less potential for distractions by other matters. It may also be done in advance of other agreements.

Can you include the requirement for a Section 173 Agreement as a condition on a planning permit?

To date, VCAT has taken a dim view of conditions on planning permits that require an Affordable Housing contribution without evidence of prior agreement from the landowner (applicant). The guidance provided on the DELWP website also reinforces the voluntary nature of Affordable Housing negotiations. You can include a condition on a planning permit if you have reached an agreement (or understanding) with the landowner and can demonstrate that to VCAT. A condition on a permit is particularly important if you have reached an agreement with the landowner but have not yet been able to get a Section 173 drafted and signed.

Can you include the requirement for a Section 173 Agreement in a Planning Scheme Amendment?

The best option is to negotiate an Affordable Housing contribution with the landowner and have that secured through a Section 173 Agreement prior to rezoning. It is also worth working directly with DELWP about how requirements can be reflected in the provisions of a Planning Scheme Amendment to help ensure an effective, transparent and user-friendly Planning Scheme.

Who is responsible for monitoring and enforcement of the Affordable Housing Agreement?

Ultimately council (and through delegation – council staff) will be responsible for monitoring and enforcing the requirements of an Affordable Housing Agreement secured by way of a Section 173 Agreement. This is why it is so important that the Section 173 is worded in a way that allows council to discharge its responsibilities effectively and does not lock council into monitoring or enforcing aspects of the Affordable Housing where it does not have sufficient experience or resources to do so.

Community Housing organisations (called Registered Housing Agencies) have the processes, resources, and experience to allocate Affordable Housing to eligible households, set rent levels and help tenants sustain their tenancies. For that reason, it is recommended that councils encourage an Affordable Housing contribution to go to a CHO and that the housing is managed or owned by a registered housing agency.



Obtaining an Affordable Housing Report

What is an Affordable Housing Report?

In the same way that you would ask an applicant/proponent to provide technical reports to support their application (traffic, heritage, Environmentally Sustainable Design etc.) you may ask for an Affordable Housing Report to outline the proposed approach to delivering an Affordable Housing contribution (or justification for why they won't provide an Affordable Housing contribution). There are more details below about what should be included in an Affordable Housing Report.

When should you ask for an Affordable Housing Report?

You should insist on an Affordable Housing Report as part of any rezoning proposal. You should also ask for one as part of a significant application. You don't need an Affordable Housing report where:

- the applicant is a registered housing agency (or DHHS)
- the applicant is already proposing to provide a sufficient Affordable Housing contribution as part of their application (eg. a minimum of 5% of dwellings sold to a registered housing agency at a 75% from market value)

What should be included in an Affordable Housing Report?

The Affordable Housing Report should set out the:

- need for Affordable Housing in the location (Council has this data and can provide it to save the proponent/applicant time)
- yield of the proposal (i.e. number of dwellings)
- Affordable Housing contribution eg. 5% of dwellings at a 75% discount
- preferred mechanism to deliver the Affordable Housing (eg. land, cash, gifting or sale of dwellings).

If you can get the applicant/proponent to include the details of the development economics for the site that would be helpful - although they are unlikely to provide it due to commercial sensitivity.

Who should prepare the Affordable Housing Report?

The Affordable Housing Report should be prepared by a suitably qualified person. There are consultants who specialise in Affordable Housing and many of the large planning consultancies may have people on their staff who can prepare the report. Having a suitably qualified person prepare the report will help make sure it reflects the definition and matter for consideration set out in the *Planning and Environment Act 1987* and Ministerial Notice.

It is critical that the report include the information you need. Unlike some reports you will request, if a landowner is willing to set out an Affordable Housing contribution and can document that without an Affordable Housing consultant then that is okay - provided the size of the Affordable Housing contribution is clear.

What to look out for when reviewing an Affordable Housing Report

When you receive a report you should have a read before deciding whether you want it reviewed by an Affordable Housing specialist. When reviewing the report keep an eye out for these considerations.

- Does the proposal meet the definition of Affordable Housing?
- Is the Affordable Housing contribution quantified ie. quantum and level of discount?
- Will the benefit of the Affordable Housing remain for an appropriate period of time?
- Will the Affordable Housing be delivered in-step with the rest of the development (not left until the very end)?

Once you have reviewed the report you may want to seek a review from an Affordable Housing specialist.

What is the difference between an Affordable Housing Report and an Affordable Housing Plan (or Strategy)?

An Affordable Housing Report relates to a specific proposal (rezoning or development) and sets out the parameters of the Affordable Housing contribution, that can then be secured through a Section 173 Agreement.

For larger proposals where there are multiple stages, the Affordable Housing Agreement may provide for more detail on how the Affordable Housing contribution will be delivered for each stage. In that case, there may be a requirement for an Affordable Housing Plan to be provided prior to each stage being delivered.

An Affordable Housing Strategy is usually developed by a Council and sets out the Council's approach to facilitating Affordable Housing on their municipality. It may also include key demographic data and identify the existing demand for Affordable Housing and the forecast demand.

When should council prepare an Affordable Housing Report?

In a council-led rezoning the council may want to include an Affordable Housing Report to help support the proposal at Panel. Similarly, in a proponent-led rezoning, the council may prepare an Affordable Housing Report if they feel the report prepared by the proponent is insufficient.

Glossary

<i>Affordable Homeownership</i>	Affordable housing where the eligible household purchases the dwellings.
<i>Affordable Housing</i>	Defined in the <i>Planning and Environment Act 1987</i> – housing, including social housing, that is appropriate for the housing needs of very low, low and moderate-income households.
<i>Affordable Housing Agreement</i>	The parameters agreed between a council and a developer through the planning system to deliver an Affordable Housing contribution.
<i>Affordable Housing Contribution</i>	A contribution from a landowner (developer) of land, cash, and/or dwellings, negotiated through the planning system. It should not be confused with development contributions required under a Development Contribution Plan or Incorporated Contributions Plan Overlay.
<i>Affordable Housing Report</i>	A site-specific report setting out the proposed approach to providing Affordable Housing. It may be provided as part of a planning permit application, development plan, or a rezoning proposal. In some cases, it may be prepared by the Council to support their case at VCAT or Panel.
<i>Affordable Rental Housing</i>	Rental accommodation that is Affordable Housing and – for the purposes of this report – is distinguished from social housing. The rent is usually set at a discount from market rent (often rent is 75-80% of market rent). More likely to be accessed by moderate income rather than very low and low income households.
<i>Community Care Accommodation</i>	A term used in the Victorian Planning Provisions (see Clause 52.22) and defined as land used to provide accommodation and care services. It includes permanent, temporary and emergency accommodation. It may include supervisory staff and support services for residents and visitors.
<i>Community Housing</i>	Affordable Housing managed by not-for-profit organisations.
<i>Community Housing Organisations (CHOs)</i>	Not-for-profit organisations that manage Affordable Housing, predominantly social housing. This includes but is not limited to registered housing agencies.
<i>Commonwealth Rental Assistance (CRA)</i>	A non-taxable income supplement payable to eligible people who rent in the private rental market or community housing.
<i>Co-operative Housing</i>	Long-term rental accommodation that gives tenant members the opportunity to participate in the running of the co-operative.
<i>Crisis Accommodation</i>	Short-term housing managed by not-for-profit organisations.
<i>Eligible Household</i>	A household that meets the income threshold set out in the Governor in Council Order (for Affordable Housing) or as set by the Director of Housing (for social housing) and meets other eligibility requirements (residency, assets threshold).
<i>Housing Affordability</i>	The relationship between the cost of housing (mortgage or rental payments) and household income.
<i>Housing Association</i>	A registered housing agency that owns and manages community housing and has the capacity to develop properties at scale.
<i>Housing Provider</i>	A registered housing agency that owns and/or manages community housing. Generally smaller in scale than a Housing Association.

<i>Housing Stress</i>	When a very low, low, or moderate-income household's housing cost exceed 30% of household income.
<i>Memorandum of Understanding (MoU)</i>	A document that describes the broad outline of an agreement that two or more parties have reached.
<i>Planning Authority</i>	A Minister or public body that is authorised under Section 9 of the <i>Planning and Environment Act 1987</i> to prepare an amendment to a planning scheme.
<i>Planning Permit</i>	A legal document that allows a certain use and/or development on land. It normally contains a written document with conditions that must be met and a set of plans. Most applications for a planning permit will be made to the local council, but some are made to the Minister for Planning.
<i>Public Housing</i>	Social housing that is owned and/or managed by the Victorian Government.
<i>Registered Housing Agency</i>	A rental housing agency, registered under Part VIII of the <i>Housing Act 1983</i> and subject to regulation overseen by the Victorian Housing Registrar.
<i>Rental Housing Agency</i>	A non-profit body that provides or is established to provide rental housing.
<i>Residual Land Value</i>	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.
<i>Responsible Authority</i>	The organisation who is responsible for the administration and enforcement of a planning scheme including deciding on planning permit applications. It may be the municipal council (most frequently), the Minister (sometimes) or another specified person (uncommon).
<i>Rezoning</i>	The process of changing the zone of a parcel of land through a Planning Scheme Amendment.
<i>Rooming House</i>	Accommodation where residents may share a bedroom and facilities. A rooming house may be managed by a community housing organisation in which case it meets the definition of Affordable Housing. Privately-run rooming houses do not have the safeguards in place (e.g. allocation and affordability) to be considered Affordable Housing. Planners note Clause 52.23 of the Victorian Planning Provisions.
<i>Section 173 Agreement</i>	A legally binding agreement between council and a landowner. The agreement remains with the land, regardless of change of ownership.
<i>Social Housing</i>	Public housing and housing owned, controlled or managed by a participating registered agency. Defined in the <i>Housing Act 1983</i> .
<i>Specialist Disability Accommodation (SDA)</i>	A market-based system that has been created under the National Disability Insurance Scheme (NDIS) to provide housing for people with very high support needs. SDA payments are made by the National Disability Insurance Agency to a person with SDA funding allocated in their NDIS plan. The funding is used to cover the cost of capital to build specialised housing.
<i>Supported Housing</i>	A type of housing that provides higher-level care and support for people with particular needs.
<i>Tenure Blind</i>	When homes built for private sale and rent, and those built for affordable housing are purposefully designed to be similar to each other to mask the tenure, assisting better social integration.

<i>Transitional Housing</i>	A supported short-term accommodation program designed to help people move to more permanent housing in public housing, community housing, or the private rental market.
<i>Value Sharing</i>	When part of the increase in value of a site, created by a planning mechanism or government investment, is shared with the community by requiring the landowner to contribute to public works or services.



