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INQUIRY INTO VICTORIA PLANNING PROVISIONS AMENDMENTS VC257, VC267 AND VC274

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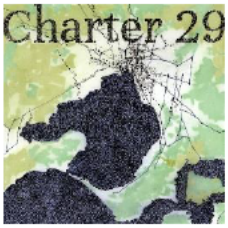

SUBMISSION

TO THE

SELECT COMMITTEE

ON

VICTORIA PLANNING PROVISIONS AMENDMENTS VC257, VC267 & VC274

PARLIAMENT OF VICTORIA

CHARTER 29

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Michael Buxton EMERITUS PROFESSOR RMIT
BA, DipEd, BEd, PhD, Hon Fellow PIA

Geoffrey Falk ARCHITECT + ARTIST
BArch, Reg'd Arch (Vic), MAIA, MAustAssnArchIllustrators

Jim Holdsworth ARCHITECT + URBAN DESIGNER
B Arch, Reg'd Arch (Vic), Hon Fellow PIA

Mike Scott PLANNER + URBAN DESIGNER
BA(TP)Hons, FPIA

Steve Thorne ARCHITECT + URBAN DESIGNER
BA, BAS, BArch(Hons), MA(UD)

1. INTRODUCTION

The duties of a planning authority specifically refer to the requirement, under section 12 (1)(a), for a planning authority to implement the objectives of planning in Victoria. The Minister for Planning is the planning authority for the three amendments in question, VC257, VC267 and VC274. **In preparing and adopting the amendments, the minister has failed to observe the requirement to implement the objectives of planning.**

The amendments were prepared and introduced without adequate consultation with the public or local government, or prior public exhibition. The minister has used section 20(4) as the mechanism for ignoring the convention for public consultation and notice, citing that the interests of Victoria or any part of Victoria makes such an exemption appropriate. This approach ignores the provisions of the Act which specify previously normal procedure under Part 3 of the Act, particularly sections 17-19. These Part 3 sections are intricately related to all the objectives of the Act on the assumption that the opportunity for public consultation may achieve just, fair and improved outcomes. They are designed specifically to implement the objectives under sections 4(2) of the Act as follows:

> *(i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice;*
>
> *(j) to provide an accessible process for just and timely review of decisions without unnecessary formality.*

The manner of the formulation and adoption of these amendments conflicts with both objectives.

The use of s 20(4) to introduce such far reaching amendments as VC257, VC267 and VC274 follows recent widespread ministerial practice. **The extensive nature of the use of section 20(4) to introduce amendments has now made this practice habitual**. The fundamental change to the way the Act is used can be seen by the extensive use of unexhibited amendments. Nine amendments or related clauses have been used to radically alter planning provisions across the entire metropolitan area for housing approvals (and many other developments), including VC257, VC267 and VC274. The government has supplemented these with seven other special purpose planning amendments directed at specific projects and other purposes, such as level crossing removals, state projects and school expansions. Suburban Rail Loop legislation similarly excludes normal planning processes by allocating housing (and other) approvals to a minister over a large part of metropolitan Melbourne.

The three planning scheme amendments contradict the purposes of the Planning and Environment Act 1967 in two ways: by the manner of their formulation and the process used in their adoption; and through the breach of normal planning process for development facilitation and other planning issues they address. These will be considered in turn.

2. THE FORMULATION AND PROCESS OF ADOPTION

The way the amendments were developed contradicts objectives under section 4(2)(g) and (h). These are:

> *g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;*
>
> *(h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making.*

The minister may prepare planning scheme amendments under sections 4B and 8. However, these two objectives are intended to involve local councils as Responsible and Planning Authorities in the achievement of planning objectives in planning processes. Such processes include the preparation of amendments to planning schemes and the administration of such schemes. The two objectives refer to the use of the procedure for amending planning schemes. Normal procedure for preparing and administering amendments emphasises the central role for local councils as specified under Part 2, 8A and 8B and Part 3 of the Act. For example, under section 8(A)(1), a municipal council is a planning authority for any planning scheme in force in its municipal district.

Local councils were not adequately consulted on the preparation of the amendments. Instead, the amendments were prepared in secret, contradicting the reference to achieving objectives through positive actions by councils and the reference to the use of a clear procedure for amending planning schemes. Some council officers were consulted, sometimes without the knowledge of superior officers and sometimes involving confidentiality agreements on the stipulation that councils were not informed of the amendments. Such limited consultation also limited the scope of information, preventing discussion on alternative proposals or critical responses.

The government claims that the public was consulted during the preparation of the amendments. However, the process of consultation has been widely condemned as a text book example of 'managed consultation'. It consisted of the establishment of reference groups for activity centres, presentations and an online information program. The topics presented to the public were strictly limited and the process of discussion controlled. The public was given little opportunity to contribute alternative concerns during meetings. In person and online presentations continued this process of limiting issues and information. Responses were therefore circumscribed to the subjects the government specified and the opportunity to make alternative contributions denied. Matters raised outside defined topics were routinely ignored and made no difference to the government's agenda.

ORIGIN OF THE AMENDMENTS

The three amendments in question are the culmination of a process of deregulation which the Labor government began in earnest after it was elected in 2014. This, in turn, drew heavily from a national agenda. State and territory

planning ministers in 2005 endorsed the *Leading Practice Model* developed by the Development Assessment Forum (DAF) which comprised representatives of governments, the development industry and professions. The Productivity Commission in 2011 summarised the DAF model as increased private sector involvement through self-assessment of applications and planning scheme amendments, standardized planning provisions in local council planning schemes, professional determination of applications through the use of codes, substantial reductions in third party rights, and a reduction in prohibited uses and the need for permits.

The State government implemented this agenda through the *Smart Planning* program. The government specifically referred to the *Leading Practice Model* as the basis for the *Smart Planning* program. It outlined four stages in change to the planning system. These were amended slightly but the process now has reached the fourth and final stage.

> *Stage 1* was the addition of further categories to VicSmart focusing on residential zones.
>
> *Stage 2* comprised a first package of further changes to VicSmart, and allegedly minor changes to the VPPs.
>
> *Stage 3* was intended to include a major restructure of the VPP to be implemented in mid-2018.
>
> *Stage 4* would 'further reshape the planning system' in even more fundamental ways. under a program titled Transform.

CONSULTATION

Community groups and residents were excluded from the Smart Planning process.

Property and professional groups were represented on the technical reference and advisory groups for the program but not residents. The following groups were represented on the advisory group:

Municipal Association of Victoria
Australian Institute of Architects
Building Designers Association of Victoria
Housing Industry Association
Master Builders Association of Victoria
Planning Institute of Australia
Property Council of Australia
Urban Development Institute of Australia
Victorian Planning and Environmental Law Association.

A *Smart Planning* presentation to industry organised by the Planning Institute on 31 October, 2016, proposed the following reasons for the exclusion of the public from consultation:

- Members of the public are incapable of understanding strategic planning

- Members of the public might initially object to changes to planning systems or specific developments but invariably ultimately accept them
- The large number of past reports into planning make further public consultation unnecessary.

On 18 February 2022 the Premier, Daniel Andrews, announced that from 1 July, new Victorian developments of three or more dwellings and subdivisions of three or more lots must contribute 1.75% of the development value to a social housing growth fund in exchange for 'fast tracking' developments. Five days later, the Premier abandoned the planned further deregulation of the planning system after accusing the property industry of reneging on the agreement. The Premier made clear the consultation with the property industry, describing it as the result of 'long dialogue' and 'deep engagement'. An agreement had been reached to provide the property industry with 'massive windfall profits' or 'super profits' through faster approval rules if they agreed to the levy. **This agreement involved a radical rewriting of the planning system after an agreement arranged secretly with the property industry.** It excluded any consultation with residents and local government.

On 26 September 2023 the Premier resigned. Before resigning, he returned to his original agreement with the property industry and introduced two new planning amendments in a process contrary to normal procedure under the Planning and Environment Act, **without exhibition or consultation with residents or local government or referral to an independent panel.** In contrast, the property industry was intricately involved in the framing of the new planning agenda. These amendments were intended to form the background statutory basis for the three amendments now under consideration by the Select Committee. **Amendment VC242** added two new clauses to the Victoria Planning Provisions, *clause 53.22 Significant Economic Development,* and *clause 53.23 Significant Residential Development with Affordable Housing*. These clauses allow a separate pathway to ministerial approval for a wide range of uses and developments on the basis of the estimated cost of developments. A category in clause 53.23 includes the provision of 10 per cent of the number of dwellings in a development as affordable housing, which can be waived. Both clauses are intended to override any inconsistent existing planning provision, nullifying the provisions of the planning system.

Amendment VC243 introduced *clause 53.24 Future Homes* for apartments, applying to two or more dwellings on land which met a licensed template design within 800m of a rail station or activity centre in metropolitan Melbourne. All these clauses limit third party rights, and clause 53.24 exempts applications from notice, objection and appeal. This clause provides a telling example of 'mission creep'. It was limited to the General Residential Zone (GRZ) and excluded land within a Heritage Overlay. However, it has led to even more radical measures. **Amendment VC257** intends that activity centres will progressively be redeveloped to between 4-20 storeys in 'core' areas, and to between 4-6 storeys for single or consolidated lots over 1,000 sq m in 'catchment' areas. This amendment covers a large area formerly affected by the Neighbourhood Residential Zone (NRZ). It also greatly expands allowable uses in former residential zones to include office, retail and a

wide range of other commercial uses. **Amendment VC280** introducing clause 53.25 now expands even this extension of clause 53.24. It allows development between 3-8 storeys across all residential zones without a permit, including 5 storeys for the GRZ for developments of at least 8 dwellings, and meeting some design and other principles. Clause 53.25 also is intended to prevail over any inconsistent provision in a planning scheme. Height controls in new zones generally are discretionary. The outer boundaries usually extend considerably further than the nominated 800m, allowing redevelopment of a vast interlocking area of the metropolitan area. **Amendment VC267** allows multi-unit development to 3 storeys without a permit, and clause 58 to 4 storeys. **Amendment VC274** is intended for Suburban Rail Loop precincts but can be applied also to activity centres. No zone compares to its lack of content. It is a holding zone and will eventually comprise mainly schedules. To approve this zone is to approve the unknown.

3. BREACH OF PROCESS FOR DEVELOPMENT FACILITATION AND OTHER PLANNING ISSUES

The government's purpose in approving the three amendments in question (and others specified) also breach the objectives in the Act relating to the facilitation of development. Two objectives outline the requirement for the principles to be followed in administering the Act. These are:

> *Section 4(1)(f): to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e); and*
>
> *Section 4(2)(e): to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes.*

The failure to act consistently with section 12(1)(a) (that a planning authority must implement the objectives of the Act) and with sections 4(1)(f) and 4(2)(e) will now be examined in relation to the other objectives which the minister as planning authority has not observed in adopting the amendments in question.

4(1)(a) to provide for the fair, orderly, economic and sustainable use, and development of land;

The failure to consult adequately with local government and residents demonstrates unfairness in process and therefore potential unfairness in the final decisions relating to the three amendments.

4(1)(b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;

(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

The objectives do not protect 'man-made resources'. Securing a pleasant and safe working, living and recreational environment for Victorian and visitors is not simply a token benefit. Victorian planning strategies reflect the international interest in 'liveable' cities for legitimate reasons. Such environments provide

substantial mental and physical health benefits, and a valued sense of identity to communities. They also provide substantial economic benefits by attracting people to localities and activities, promoting and connecting with income generation, and providing substantial tourist and other economic benefits. The cities which protect their natural and built assets this century are most likely to survive and prosper.

4(1)(d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;

The amendments contradict the objective to conserve and enhance buildings of aesthetic architectural, historical interest or of special cultural value. **Their unstated objective is to demolish or radically alter the built environment over a vast area of metropolitan Melbourne, in particular, the architecture of the internationally distinctive traditional Victorian and pre-World War 2 shopping precincts, and the recognised high heritage value of housing and other buildings.** The significance of the amendments is the scale of their impacts. The significance of the amendments is the scale of their impacts. An estimated 917,724 properties are contained in the 800m radius 'catchment' areas of key activity centres in 15 municipalities, including **an estimated 59,454 properties affected by the Heritage Overlay.** If successful, the amendments could result in the demolition of all Melbourne's major traditional shopping precincts along with most of Melbourne's pre-World War 2 heritage housing. Few Western country and city governments would contemplate such a culturally destructive process.

Many heritage buildings are located in precincts around rail stations and activity centres. A concentration of development in these precincts will demolish much of Melbourne's distinctive character. The planning strategy *Plan Melbourne* identified the crucial contribution cultural heritage, including "Melbourne's distinctive high-street shopping strips" and housing, makes to Melbourne as a 'distinctive city':

> *"Melbourne is one of the world's most distinctive, liveable cities…To ensure Melbourne remains distinctive, its strengths will be protected and heritage preserved…Melbourne is a city of distinctive centres and neighbourhoods, from the high-density, inner-urban areas of the central city to the leafy neighbourhoods of the east to the foothills of the Dandenong Ranges to the bayside beaches to the new growth areas to the south-east, north and west.…Melbourne is a design capital—thanks to its well-preserved heritage buildings, strong and distinctive architectural character… it is vital that current assets are protected."*

The two planning provisions under amendment **VC257,** *clause 43.06 Built Form Overlay (BFO)*, and *clause 32.10 Housing Choice and Transport Zone (HCTZ)* replace significant areas covered by the Neighbourhood Residential Zone (NRZ) and by the Heritage Overlay. The government claims that *"there will be no changes to heritage overlays or amendments to local or state planning policies relating to heritage as part of the Activity Centres Program. New buildings will still have to follow existing heritage controls, as well as relevant state and local policy."* This

statement is misleading. The Neighbourhood Residential Zone includes the objective *"To manage and ensure that development is responsive to the identified neighbourhood character, heritage, environmental or landscape characteristics"*. The BFO and the HCTZ omit reference to heritage. Instead, the BFO seeks to facilitate higher density development and the HCTZ "to encourage a scale of development that provides a transition between areas of more intense development and residential areas". **These zones will override the provisions of the Heritage Overlay.**

The New South Wales government has introduced a similar activity centre development policy. However, it exempts heritage areas protected under Local Environment Plans. The same approach could be taken in Victoria to areas affected by the Heritage Overlay. The Activity Centres Standing Advisory Committee Referral 1 and 4 reports recommended removing areas within the Heritage Overlay and Neighbourhood Character Overlay from the 'walkable catchment' areas affected by VC257. The Referral 4 Standing Committee also commented that it was unable to hold public hearings or hold discussions with State government officials who selected the centres, consultants who assisted or council officers. The public was not mentioned.

4(1)(fa) to facilitate the provision of affordable housing in Victoria;

The government's housing plan is based on the belief that conventional zoning and planning rules restrict land supply, and that land supply is the sole or main determinant of land and housing price. The government sets heritage protection and housing supply – particularly for affordable housing – as opposing objectives. However, planning rules, including zoning, have not limited land supply or housing approvals. In recent years, the building industry has accepted that building and other costs, and supply chain problems have led to a reduction in multi-unit construction. **Building and land costs, rather than a lack of housing approvals or planning system failures, have largely ended affordable housing construction in middle ring and some established suburbs**. Multiple building and property experts have pointed to the large gap between the price of apartments and the price purchasers are prepared to pay. They argue that this gap will mean that affordable housing will not be built and that the government's activity centre redevelopment plan cannot be realized.

Max Shifman, CEO of Intrapac Property and past president of the UDIA has argued that the rise in construction costs has created the 'growing chasm' between the government's plan for activity centres in established suburbs and the reality of delivering apartments. The government through its plans for 60 activity centres, he argues, is *"selling an affordability dream to young people that cannot be realistically delivered. Speeding up planning in these activity centres will deliver little benefit if the result is a housing product that costs too much and doesn't meet the utility of buyers"*. Charter Keck Cramer chief executive Peter Hutchins has described the cost of development as prohibitive, and the firm's national research director, Richard Temlett, stated that only boutique, high-end apartments and townhouse developments in about 15 of the most sought after suburbs where buyers could pay over $2 million for an apartment were viable.

Multi-unit housing approvals consistently have more than met demand. There has been no failure to build in middle ring and established suburbs – no 'missing middle'. Between 2005-2021 (pre-Covid) twice as many multi-unit dwellings were built in the middle ring and established suburbs as inner area high rise construction. Middle ring high rise construction was two thirds the extent of inner area high rise.

However, many thousands of housing approvals have not been acted upon. The Municipal Association of Victoria estimated that in late 2023, 119,536 Victorian dwellings, and 86,619 in Melbourne had not been activated, and that little had changed since. PRD Real Estate found that between 25-30% of apartment developments across Australian capital cities lack a contracted builder. Cordell Connect has estimated that 50 apartment projects in the City of Melbourne with up to 750 apartments have not been commenced. Thousands more completed apartments remain unsold. Property advisory firm Charter Keck Cramer has shown that 8000 completed apartments in metropolitan Melbourne remain unsold, representing 17 per cent of units completed between 2020 and 2024. Large numbers remain unsold in activity centres nominated for redevelopment. Marshall White Projects Director Leonard Teplin has estimated that up to one year's unsold supply of apartments exists in some suburbs. This is leading to concerns within the development sector about the viability of future activity centre construction given that new apartment construction costs are exceeding those of existing ones by 30-50 per cent and unsold stock prevents new affordable construction. Simply declaring huge areas of land available for housing will not lead to increased supply beyond the current processes

2(a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels;

Many sources in the property industry and academia have identified the importance of sound strategic planning and coordinated governance as fundamentally important for city planning. In the absence of strategy, statutory measures stand alone, unrelated to sound and consistent objectives and a sound policy basis. This approach accurately describes the government government's recent development of the three planning amendments VC257, VC267 and VC274. **Housing targets have been allocated in a strategic vacuum in a process which ignores broader social, heritage, infrastructure, environmental and economic needs.** Strategy should establish the fundamentals. Statutory measures then should implement the strategy. However, the reverse has occurred in Victoria. The statutory measures have been developed first and strategy has belatedly followed. The amendments are not consistent with much of the 2017 *Plan Melbourne*. So the 2017 plan was abandoned and a new plan introduced after the statutory measures were announced or put in place. The statutory planning system has become the de-facto strategy.

This approach is driven primarily by an ideology of deregulation. **But deregulated planning systems, including removing zoning, often raise land and house prices because they fuel speculation and bid up the land component of more intensive development.** The highest priced land in Melbourne is land with the

most liberalised planning controls, notably land in the CBD and surrounding high rise precincts. Prices sometimes rise with increased supply. The most well known example of the effect of removing or liberalising planning controls is the ministerial 2012 rezoning of the Fishermans Bend precinct from Industrial 1 Zone to Capital City Zone (CCZ). The CCZ was one of Australia's most liberal zones and included no effective density, height or other controls. Prosper Australia showed that resulting windfall profits equate to a whole year's worth of rezoning windfalls across the state.

Government members have referred to other examples of large scale planning liberalisation to justify its approach, such as the 2016 rezoning of 75 per cent of Auckland. Auckland is a very different city from Melbourne with many factors that affect house price, including no capital gains tax, the existence of negative gearing, load to value restrictions and interest rates. House prices continued to climb in Auckland despite the removal of planning rules. CoreLogic and Demographia and other housing research groups have shown that Auckland in 2023 was the seventh least affordable housing market in the world and that new home buyers spend over half their annual income on average on mortgage payments. This record is hardly a justification for removing planning rules as a means of increasing housing affordability or as evidence of the success of deregulating planning systems.

In a primarily monocentric city such as Melbourne, where access to quality services, infrastructure and high value jobs diminishes with distance from the CBD, location is a key component of land price. Key reports, such as *State of Australian Cities* reports, have identified the main causes of house price increases as construction costs, infrastructure costs and government charges, not planning systems. Planning rules have not limited supply and have provided sufficient supply throughout Australia for 20 years to more than meet demand. Sydney, for example, has experienced simultaneously record housing supply and house prices. Record levels of housing supply in Sydney have not lowered house prices.

4. AN ALTERNATIVE APPROACH

Government housing targets were devised by estimating future housing capacity, future population, and continuing past development trends. The government's new model will not increase housing affordability or diverse housing types. **Providing affordable housing requires more than just trying to cram large population increases into suburbs.** More housing also must be accompanied by new services and infrastructure. The government's measures aim at very substantial population increases with little hope of providing the required new schools, hospitals, parkland and much else being provided. It makes no sense to destroy Victoria's planning system and demolish what makes Melbourne such a valued and distinctive city to achieve new housing when viable alternatives exist under a modified, not radically altered, planning system.

A key task for an alternative approach would be to match housing type and scale to land characteristics – to decide what types of housing and levels of intensification could be constructed where. Place-based analyses or other

detailed urban modelling techniques are widely accepted as the best means of calculating the capacity for urban growth and dwelling yield. Many property and other research firms use such techniques. They provide viable and superior approaches to the government's broadly based imposition of arbitrary dwelling targets. Value Advisory Partners, for example, have developed a detailed place-based analysis using ABS Mesh Blocks to accurately determine future dwelling yield and land uses as measures of future urban capacity related to existing planning zones and other provisions.

A number of modelling studies show the potential of constructing medium density housing using existing zoning and conditions in place of large- scale demolitions. A November 2024 CoreLogic and Archistar report showed that 1,163,118 potential medium-density dwellings could be built in Melbourne without dramatically changing the character of an area, by continuing existing patterns of dwelling construction using existing zonings and infill sites. Similarly, a 2016 RMIT report, *Melbourne at 8 Million*, showed that Melbourne's established areas could absorb more than 1.2 million new dwellings by 2051 using the 2013 zones, infill areas and larger redevelopment sites. **Ample land existed in the inner and middle ring suburbs to more than meet future dwelling requirements to 2050.without loss of heritage or amenity value.**

Many councils have undertaken or commenced such analyses using existing zones, particularly the Activity Centre, Commercial 1, Mixed Use and Residential Growth zones. For example, SGS Economics and Planning carried out modelling for Boroondara Council and concluded that with a "capacity for a net increase in dwellings of approximately 65,050 in Boroondara, there is more than adequate capacity under the current policy settings to provide for the 9,400 dwellings likely to be needed…It can be concluded that Boroondara's current zones can accommodate the anticipated housing need." Such analyses, including detailed analysis of need and capacity led to a Boroondara housing strategy and place and structure plan based on evidence and research not the arbitrary imposition of housing targets.