

# Submission Regarding Protections within the Victorian Planning Framework

Dear Environment and Planning Committee,

Thank you for the opportunity to participate in the Inquiry into Protections within the Victorian Planning Framework ('the Inquiry') and provide feedback on the adequacy of the Planning and Environment Act 1987 and the Victorian planning framework.

My feedback is informed by our recent experiences while participating in the VCAT appeal process when I joined a group of neighbours to oppose an application for the development of 32 units on a 9410 m<sup>2</sup> area block of land in Highton, Geelong. The feedback is, therefore, predominantly given with reference to lack of protections in the Greater Geelong Planning Scheme and how that fits into the state planning framework.

I am not trained planner nor planning lawyer. I feel it is important to communicate our concerns and suggestions based on our lived experience of the process and the protections the Act provides from a community user's perspective as this will improve the outcome of the enquiry.<sup>1</sup>

My submission focuses on the following specific elements listed in the Inquiry's terms of reference:

1. environmental sustainability and vegetation protection, especially
  - a. green infrastructure management
  - b. minimum garden requirements
  - c. sustainability of developments
2. ensuring amenity within developments; and
3. community concerns about VCAT appeal processes.

## 1. Environmental sustainability and vegetation protection (specifically Tree Canopy Protection)

### 1.1. Concern & Context: Absence of appropriate state-wide tree protection

Engaging with the planning process, we were appalled to learn how little protection the Greater Geelong Planning Scheme provides to trees. The Scheme only protects native Victorian trees on private property, and despite provisions in the Victorian Planning Provisions, private non-native trees, regardless of their age and their value to the community, receive no protection in Geelong.<sup>2</sup> Consequently, removal of non-native trees and vegetation on private property does not constitute a ground for objection when opposing development applications under the Greater Geelong Planning Scheme.

The absence of appropriate tree protection in the Planning Scheme facilitates the regular indiscriminate clearing of all vegetation, including the perimeter trees, on entire blocks of land to facilitate easy and cheap access and development.

Our consideration of the proposal for the Highton site included a review of sites developed by the applicant in the past. It is evident that the applicant consistently implements a broadscale removal of trees. The locations include sites across different planning zones in Greater Geelong: Oxford Street in Whittington, Barrabool Road and Taylor Court in Highton, Percy Street in Newtown, Meadowvale Drive in Grovedale and two sites in Hazel Street in Belmont.

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<sup>1</sup> As lay people, we are not knowledgeable about the technical planning terminology and the specific legislative provisions.

<sup>2</sup> Clause 73.01 of the Planning Scheme defines native vegetation as 'plants that are indigenous to Victoria, including trees, shrubs, herbs, and grasses'.

The increasing number of razed blocks of land in Geelong highlights the prevalence of this approach, which is not just employed by corporate developers. Examples near us in Highton include numerous sites in Roslyn and Barrabool Road and three sites in South Valley Road.

In our case, the applicant, in keeping with their approach in the past, proposed to remove all the vegetation on the site. Of the sixty-five (65) trees on the review site, the Planning Scheme only protected one (1) tree, a native Blackwood tree. And yet some of those trees are majestic. They include three 18 metre English oak trees, a number of equally large eucalypts, and a stand of smaller eucalypts.

During the VCAT proceedings, the developer's legal team was at pains to highlight that there are no tree controls that protect any of the existing trees, bar one, on the subject site:

*But the important, inescapable, fundamental fact is: Those trees are there by the grace of my client. They could be removed tomorrow<sup>3</sup>*

*My client could have, and could tomorrow, go down there with a chainsaw and cut each and every tree down.<sup>4</sup>*

In closing, the solicitor highlighted that the City of Greater Geelong has not employed any of the tools available in the current Planning Framework, for example a VPO or ESO, to protect the trees in the zone the review site was located in. He also reiterated that the Council exercised a discretion not to adopt tree protection measures for the area:

*Council has the tools available to it to address that crisis that [objector] says is besetting Highton. But it hasn't done that.<sup>5</sup>*

As part of our research, we discovered that although since 2015 the Geelong City Council has officially endorsed/or adopted several strategies and associated action plans supporting environmental sustainability, these do not have force of law in the planning scheme and are in fact window dressing. They include the *Urban Forest Strategy 2015 – 2025*, the *Action Plan in November 2015* and the *Environment Strategy 2020-2030* and *Action Plan in September 2020*.

## **1.2. Our suggestion**

Amend the Victorian Planning Framework to include provisions that mandate tree-protection, including tree-retention across the state.

These provisions should go beyond the existing higher-order policy provisions and be stronger than existing guidelines that merely encourage protection instead of mandating it. The objectives contained in Schedule 1 to Clause 32.04 and Schedule 2 to Clause 32.07 of the Moreland Planning Scheme provide a good example of provisions that could be contained in the primary zone objectives.

In addition, include a clear definition of what constitutes a canopy tree in the general definition section to ensure state-wide application. No such definition exists in the current Geelong Planning Scheme.

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<sup>3</sup> *Arc Townhomes Pty Ltd v Greater Geelong CC* [2021] VCAT 1318 (Official Recording, Day 4, 19 October) 0:02:06-0:02:08.

<sup>4</sup> *Arc Townhomes Pty Ltd v Greater Geelong CC* [2021] VCAT 1318 (Official Recording, Day 4, 19 October) 0:01:17-0:01:20.

<sup>5</sup> *Arc Townhomes Pty Ltd v Greater Geelong CC* [2021] VCAT 1318 (Personal transcript from the Official Recording, Day 4, 19 October) 0:02:30-02:56:00.

### 1.3. Arguments for inclusion of tree preservation into the planning schemes on a state-wide basis

#### 1.3.1. Urban Heat Island Effect & Vulnerable Populations

One of the best-known effects of the influence of the urban environment on its climate is the urban heat island (UHI) effect.<sup>6</sup> With climate change, it is globally recognised that urban trees provide a significant defence against the Urban Heat Island Effect (UHI)<sup>7</sup>. Both the Geelong *Urban Forest Strategy* and the *Environment Strategy* highlight the importance of reducing urban heat risk. In particular, the Urban Forest Strategy confirms that urban tree canopy management is widely recognized as an effective tool to reduce the impact of climate change, specifically increasing urban temperatures caused by the Urban Heat Island effect:

*They also build the ecological platform of resilience, adaptation and mitigation against urban heat island effects and climate change.*<sup>8</sup>

*The UHI effect can be mitigated by a range of factors. The most cost effective and efficient mitigation tool is an increase in tree canopy cover.*<sup>9</sup>

There is more recent scientific research to which I could refer you to support the contribution of trees to reducing the Urban Heat Island Effect. In summary, greening is the most simple, powerful and cost-effective way of combating increased UHI effects caused by climate change.

Referring to the 'heat gap', researchers highlight that temperatures often vary across different local municipalities in the same city; and that this variation corresponds with the variation in tree canopy cover.<sup>10</sup> The 'heat gap' between lower socio-economic suburbs with higher density populations and more affluent suburbs is widely recognised.<sup>11</sup> Research also identifies young children, the aged and members of low socio-economic households as more vulnerable to the impact of increasing high temperatures.<sup>12</sup> The overlap between heat vulnerable communities and areas with low canopy cover underscores the urgency to address the discrepancy in tree canopy cover in different areas of Victoria.

I refer you to the report on the Climate Change and Heatwave Project – Identification of High-Risk Areas across the City of Greater Geelong<sup>13</sup>. It shows that the suburbs with populations most vulnerable to combined heat risk factors include St Albans, Marshall, Newcomb, Clifton Springs and Whittington, all of which could be described as lower socio-economic areas.

#### 1.3.2. Consistency and Fairness across different Victorian Council Areas

Urban tree canopy management is widely recognized as an effective tool to manage the impact of climate change, specifically increasing urban temperatures.<sup>14</sup>

Currently, tree management across Victorian councils is inconsistent. Some Victorian Councils already have progressive canopy management provisions in place, while others have weak or non-existent

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<sup>6</sup> Laura Kleerekoper, Marjolein van Esch and Tadeo Baldiri Salcedo, 'How to Make a City Climate-proof: Addressing the Urban Heat Island Effect' (2012) 64 *Resources, Conservation and Recycling* 30.

<sup>7</sup> Margaret Loughnan et al, A Spatial Vulnerability Analysis of Urban Populations During Extreme Heat Events in Australian Capital Cities (National Climate Change Adaptation Research Facility, 2013) 21.

<sup>8</sup> City of Greater Geelong, *Urban Forest Strategy* (2015) 31.

<sup>9</sup> City of Greater Geelong, *Urban Forest Strategy* (2015) 49.

<sup>10</sup> Australian Conservation Foundation, *Temperature Check: Greening Australia's Warming Cities* (2021) 5.

<sup>11</sup> Ibid.

<sup>12</sup> Margaret Loughnan et al, A Spatial Vulnerability Analysis of Urban Populations During Extreme Heat Events in Australian Capital Cities (National Climate Change Adaptation Research Facility, 2013) 21-23; City of Greater Geelong, *Urban Forest Strategy* (2015) 33.

<sup>13</sup> <https://www.geelongaustralia.com.au/environment/documents/item/8d07ddbc8d1be5a.aspx>

<sup>14</sup> City of Greater Geelong, *Urban Forest Strategy* (2015)

protections. It appears that the inconsistency corresponds to the financial position, capacities, and climate change policies of different councils.<sup>15</sup> The inconsistent approach enables developers to pursue developments with less amenity and no climate change response in those municipalities with weaker local planning provisions. This is illustrated by our experience and the list of examples of sites in Geelong where trees were indiscriminately felled after receiving planning approval.

All urban communities in Victoria deserve protection from heating of cities and suburbs. Heat-resilience should not depend on the resources and attitudes of your local council. In the context of metropolitan Melbourne, the Victorian Department of Environment, Land, Water and Planning (DELWP) acknowledged this in their 2018 report. They reported urban tree cover ranging from 5.5% in the western part of Melbourne to 25.9% in the north-eastern part of Melbourne<sup>16</sup>. Unfortunately, this report, ignores the regional and rural cities. A report to the Central Victorian Greenhouse Alliance in 2018<sup>17</sup> shows that Ballarat and Bendigo, Mildura and Ararat have tree cover ranging from 3.4% to 20.4% in various different neighbourhoods.

Changing the provisions of the Victorian Planning Framework to mandate tree preservation and management across the state will ensure that the health and wellbeing of all the residents of Victoria are equally protected across the State.

Consistency and fairness also relate to the size of trees planted by different councils. Geelong is inadequately served by street tree planting conducted by Council in the past. According to Council's own numbers greater than 50% are less than 5 metres in height – mostly being callistemon and other small native species<sup>18</sup>. Thus, they are not canopy trees and do not provide the benefits of canopy trees. In addition, many street trees were planted directly below power lines, which has ensured that they will never reach a mature height as they are pruned low each year. State-wide protections for existing trees and mandated guidelines regarding street-tree planting would force Councils to plant properly. This may require them to plant more slowly, but planting smaller, less effective species is counter productive. Larger trees have a much greater impact on climate for a greater distance around them<sup>19</sup>.

In 2021, the Victorian State Government pledged to fund the planting of 500,000 trees in some metropolitan council areas in the west of Melbourne.<sup>20</sup> However, the initiative would have little, if any, impact if an equivalent number of trees on private property are felled to facilitate development. In Geelong, according to the Greater Geelong Urban Forest website<sup>21</sup>, trees on private property constitute 50% of the City's current tree coverage. It states that the urban Geelong tree canopy averages 14% coverage, of which 7% is on public land and 7% is on private land. Peer reviewed literature recommends 40% tree canopy for optimum benefit, including amenity, shade, water retention, carbon capture and reduction in the Urban Heat Island Effect

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<sup>15</sup> Research highlights the existing and growing discrepancy in tree coverage and protection. People from low-socioeconomic backgrounds are also disproportionately affected: Zhang, Y, Nitschke, M, & Bi, P 2013, 'Risk factors for direct heat-related hospitalization during the 2009 Adelaide heatwave: A case crossover study', *Science of the Total Environment*, vol. 442, pp. 1-5, doi:10.1016/j.scitotenv.2012.10.042; Hondula, D & Barnett, A 2014, 'Heat-Related Morbidity in Brisbane, Australia: Spatial Variation and Area-Level Predictors', *Environmental Health perspectives*, vol. 122, no. 8, doi:10.1289/ehp.1307496; Deakin report.

<sup>16</sup> <https://www.planning.vic.gov.au/policy-and-strategy/planning-for-melbourne/plan-melbourne/cooling-greening-melbourne/mapping-and-analysis-of-vegetation,-heat-and-land-use>

<sup>17</sup> [https://www.cvga.org.au/uploads/9/8/3/8/9838558/cool\\_it\\_cvga\\_regional\\_summary\\_and\\_recommendations\\_final\\_oct\\_18.pdf](https://www.cvga.org.au/uploads/9/8/3/8/9838558/cool_it_cvga_regional_summary_and_recommendations_final_oct_18.pdf)

<sup>18</sup> City of Greater Geelong, *Urban Forest Strategy* (2015)

<sup>19</sup> Department of Environment, Land, Water and Planning *Trees for Cooler and Greener Streetscapes Guidelines for Streetscape Planning and Design* (2019)

<sup>20</sup> Roy Ward, 'Half a million trees to be planted in Melbourne's west to bridge gap with leafy suburbs', *The Age* (Online, 13 May 2021) <<https://www.theage.com.au/politics/victoria/half-a-million-trees-to-be-planted-in-melbourne-s-west-to-bridge-gap-with-leafy-suburbs-20210513-p57ri1.html#:~:text=The%20state%20government%20will%20fund,than%20other%20parts%20of%20Melbourne>>.

<sup>21</sup> <https://www.geelongaustralia.com.au/urbanforest/article/item/8d3016c84e0d5a5.aspx>

### 1.3.3. Burden on Neighbours

It places an unfair burden on neighbours and society generally that they need to object to development applications which propose to remove trees. In areas where the Planning Scheme does not contain tree protection, residents have no other avenue to address their concerns and protect the amenity of their community.

If existing tree protection was included at state level in planning schemes, it would save much time, resources and VCAT time and provide developers with more certainty.

### 1.3.4. Death by a thousand cuts

There is another issue related to subdivision of suburban blocks, which relates to the crowding of multiple detached dwellings upon a single block. This also contributes to a lack of urban tree canopy because the remnant gardens are of insufficient size for the planting of large trees. In sections of suburbs in Geelong there are no remaining canopy trees because the majority of the lots have been broken up this way and therefore covered in hard surfaces. Although each individual development received approval and presumably satisfied the planning scheme the cumulative effect is disastrous for the urban tree canopy. Below is an image of a section of Highton which illustrates this phenomenon. The lots with multiple dwellings have much less greenspace and no canopy trees (except for street trees).



Figure 1 An aerial view of a section of central Highton

## 2. Minimum Garden Requirement in Residential Growth Zones

### 2.1. Concerns & Context - Removal of Minimum Garden Requirement in Increased Housing Diversity Areas

At a meeting on 24 March 2020, the Greater Geelong City Council adopted a report on implementing the new residential zones. In order to comply with VC110, the Council report recommended that land zoned as Residential Growth Zone Schedule 2 (RGZ2, Urban Increased Housing Diversity Areas) be rezoned to a new General Residential Zone Schedule 4 (GRZ4, Urban Increased Housing Diversity Areas).

The Council also recommended that the new General Residential Zone schedule remove the garden area requirement consistent with the previous Residential Growth Zone Schedule 2. The exemption, it was said, was required to differentiate the zone from conventional residential zones and to ensure the zone continues to facilitate increased housing density and diversity.

The amendment has not been approved yet. If it is approved and becomes operational, it would leave significant areas of Geelong without any garden or canopy tree requirement and instead permit an associated increase in hard surfaces resulting in higher suburb temperatures. Without alternative heat mitigation measures in the planning scheme residents living in these areas face a future of extreme heat<sup>22</sup>.

We understand the need for and support initiatives aiming to increase housing density. We also recognize that finding a balance between the need for housing and responding to environmental issues presents a serious challenge. Although it is well recognised that urban densification leads to a reduction in transport related energy consumption, urban densification can lead to a decline in the perceived quality of the living environment, contribute to unexpected changes in everyday life practices and affect the wellbeing of inhabitants<sup>23</sup>

However, we are concerned that local decisions about planning in growth zones may not be occurring within the framework of the state-based and even local sustainable development policies. In particular, we are concerned that the current provisions in the State Planning Framework regulating green space in growth areas do not ensure that environmental impact is given due consideration in planning decisions. The City of Greater Geelong's request to the Minister underscores this concern.

## **2.2. Our Suggestion:**

We believe green space or garden area should be mandatory in all residential areas. Prevent councils from removing the minimum garden area from any planning scheme residential zone. It should not be subject to exemptions. However, we recognize that achieving this goal requires innovative approaches to green spaces, green infrastructure and what constitutes a 'garden area'.

- Re-thinking and re-imagining the role of the garden area/green space provisions to extend their purpose beyond protecting the open garden character of neighbourhoods.
- Including mandatory environmental and sustainability provisions in the stated purposes of zones in state-based policies, for example Clause 32.07. Different minimum garden areas for different kinds of developments could be set. This could be prescribed for the development as a whole rather than for each individual dwelling. The minimum garden area does not have to be at ground level – a roof garden would help, especially if it included canopy trees. I would caution against including green walls in this concession, as some require significant maintenance and can easily be neglected and die.
- Amending state-based policies, for example, Clause 32.07-1, to include objectives that require applications to provide evidence of consideration of the development's impact on thermal comfort and the tools employed to mitigate and/or reduce the urban heat island effect. The design objectives in Schedule 2 to Clause 32.07 of the Moreland Planning Scheme provide a good example
- Additionally, for developments over a certain size, the requirement for the inclusion of UHI impacts within proposed development application packages could include modelling the impact of the development on thermal comfort of neighbours and development residents. This is similar to the building code where designers have a choice whether to follow the prescriptive requirements or show modelling to meet performance requirements.

## **2.3. Arguments for inclusion of minimum garden requirements on a state-wide basis**

### **2.3.1. Need for a state-based law**

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<sup>22</sup> COGG 2020 *Climate Change and Heatwave Project – Identification of high-risk areas across the City of Greater Geelong* <https://www.geelongaustralia.com.au/environment/documents/item/8d07ddbc8d1be5a.aspx>

<sup>23</sup> Kytta, M. and A. Broberg (2014). *The Multiple Pathways between Environment and Health. Wellbeing : a complete reference guide: volume II.* E. Burton, C. L. Cooper and R. Cooper. Sussex, John Wiley & Sons. II: 627-652

Often planning appears to be informed by the financial position of the local government or the political makeup of the elected councillors. Do they want to encourage development to increase their ratepayer base or discourage development? Thus, there needs to be more consistency across the state. Some councils have a tendency to prioritise high density development, particularly for infill, without considering the other planning and larger environmental issues.

### **2.3.2. Amenity**

As shown in their publications, DELWP is very aware of amenity issues regarding access to garden space for city dwellers<sup>24</sup>.

### **2.3.3. UHI effects**

The discussion in paragraph 1.3.1 above is particularly pertinent to residential growth areas.<sup>25</sup> Green space is even more necessary in the city centres where higher density housing drives the conversion of vegetated areas to impervious surfaces and increases the hardscape.<sup>26</sup>

### **2.3.4. Fairness and Consistency**

Comparable to tree protection measures, responses to climate change and planning scheme provisions aimed at mitigating the urban heat island effect vary across councils in Victoria.

As stated in paragraph 1.3.2, there seems to be a correlation between the financial position, capacities, and climate change policies of different councils and the regulation of urban temperatures.

Urban heat island effects compounded by climate change pose considerable heat-related health risks for urban residents, combined with increased energy costs (for example, air conditioning), and water consumption. It is therefore vital to urban public health and sustainable development that we take urgent action to mitigate the urban heat island effect across Victoria. Minimum garden requirements set at state level and mandated across all residential planning zones would enable fairness and consistency for all urban residents.

## **3. Sustainability of Developments**

### **3.1. Concerns and Context**

The trained architect in our group observed that the sustainability in the 33 dwellings proposed for the 9410 square metre site at 2 Morven Court was inadequate. The bulk of the houses were multi-level, attached houses and the rows oriented in a north-south direction. The windows were very small – in effect the dwellings were “eskies” (highly insulated with very small openings), presumably to meet building code minimal sustainability requirements. The development plans also included minimal green space and permeable surfaces. There were legitimate concerns raised about flooding caused by the addition of impermeable surfaces. A small park was provided in a corner of the estate with no surveillance from nearby houses. We suspect that this park was only proposed because existing sewer and stormwater easements prevented building upon that corner. A further deficiency was an almost complete lack of north and south facing windows on all dwellings, with most windows facing east and west with no sun screening. This would expose those rooms to uncomfortable heat gain in either the morning or afternoon for the hotter months. The lack of northerly sun in colder months would prevent utilising the sun to improve comfort by solar warming through windows. Complete destruction of all trees and removal of all existing vegetation on the lot would have resulted in a huge net release of CO<sub>2</sub> to the

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<sup>24</sup> <https://www.planning.vic.gov.au/policy-and-strategy/planning-for-melbourne/plan-melbourne/cooling-greening-melbourne>

<sup>25</sup> UHIs cause higher temperatures in urban centres than in surrounding suburban and rural areas: S. Peng et al, 'Surface Urban Heat Island Across 419 Global Big Cities' (2012) 46 *Environmental Science & Technology* 696.

<sup>26</sup> Caiyan Wu et al, 'Estimating the Cooling Effect of Pocket Green Space in High Density Urban Areas in Shanghai, China' (2021) 9 (May) *Frontiers in Environmental Science* 2.

atmosphere. The design was dominated by roads and garages which would discourage pedestrian activity and incidental meetings of neighbours.

Examining previous completed developments by this developer in Geelong shows that their other developments have similar deficiencies. This examination also showed deterioration of the finishes chosen which will result in a reduced useful life of the buildings when they are replaced by something "better".

### 3.2. Suggestion

A stronger planning framework would reduce the need for community members to appeal to VCAT. How does DLWP decide which matters are to be mandated by the planning scheme, which are more effectively managed by the building code and which left to the market? We suggest an inquiry be conducted by an expert review panel comprising expert designers, architects, civil engineers, planners and planning lawyers. They would need to consult with representatives of all stakeholders including builders, developers, renters, landlords, and homeowners to determine the effects of changes to the planning regime. They can then come to a consensus about the appropriate regulation method for different sustainability requirements.

### 3.3. Arguments

#### 3.3.1. Morphology of Development is Set at Planning Stage

Improvements in the sustainability of a dwelling can be very difficult to make at building certificate stage when the morphology of the dwelling and development is already set from planning stage. It is well understood in architecture and construction that changes to improve sustainability are much easier to make earlier in the process<sup>27</sup>. Improving the sustainability of a building is very limited and more expensive if passive solar design has been ignored at planning stage.

#### 3.3.2. Longevity of Buildings

An important aspect of sustainability is the longevity of a building. As Carl Elefante so succinctly said "*The Greenest Building Is... One That Is Already Built.*"<sup>28</sup> I argue that three main things contribute to this: 1) the durability of the materials used, 2) the care in building and 3) affection for the building due to quality of design. Part of planning decisions is to accept or deny developer aspirations regarding exterior finishes. I would argue that at this stage decisions made regarding morphology also limit any changes that could be made to the structure of a building based on sustainability of the choice of materials. In any case, external finishes and exterior design, in particular, strongly influence the longevity of a building. If a building has higher perceived value, people are prepared to fight for its preservation<sup>29</sup>. For example, veranda detailing and chimney brickwork on Federation-era houses often inspires heritage protection for neighbourhood character or individual dwellings. In the case of new dense developments, what is the minimum longevity the design should achieve? Perhaps it would be better to specify this than particular materials, to encourage variety in our cities. Also, the use of materials which require frequent maintenance are less sustainable as they use more energy both in manufacture, maintenance and replacement<sup>30</sup>. If those materials are not maintained, as they deteriorate residents will not care for the buildings and their life in service will be reduced.

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<sup>27</sup> Bond, S. (2010). "Lessons from the leaders of green designed commercial buildings in australia." *Pacific Rim Property Research Journal* 16(3): 314-338.

<sup>28</sup> Elefante, C. (2013). "The Greenest Building Is... One That Is Already Built." *Forum Journal* 27(1): 62-72.

<sup>29</sup> Goodrum, W. M. (2012). *Beauty in Buildings: How Beauty and Inspiration Impact Building Energy Performance*. Ann Arbor, University of Colorado at Boulder. **1511977**: 255.

<sup>30</sup> Alshamrani, O. S., et al. (2014). "Integrated LCA-LEED sustainability assessment model for structure and envelope systems of school buildings." *Building and Environment* 80: 61-70.

### **3.3.3. Minimum acceptable result – Consistency and Fairness**

It is admirable to have general policy documents regarding sustainability and ways of achieving that. However, what is included in the planning scheme is the minimum and many developers will only do that and ignore design guidance. Thus, the minimum mandated should have increased sustainability requirements than what is current. Once again, for consistency and to prevent developers targeting jurisdictions with lesser laws, these regulations need to apply state-wide.

## **4. Amenity Within Developments**

### **4.1. Concerns and Context**

The trained architect in our group observed that the amenity in the dwellings proposed for the site at 2 Morven Court was inadequate. For example, front doors and garages opening directly onto the footpath, and/or too close to the road, so there was no transition from the private to the public realm. This was compounded by confusion regarding whether footpaths, marked by a different surface, were part of the road. Another example was dwellings cut into the hillside such that rooms on their lower floors had no or very little natural light, with windows within 1 meter of 5 metres of retaining walls. A further deficiency was an almost complete lack of north and south facing windows on all dwellings, with most windows facing east and west with no sun screening. This would expose those rooms to uncomfortable heat gain in either the morning or afternoon for the hotter months. The orientation would prevent utilising the sun in winter to improve comfort by solar warming and increase the depressing effect of winter due to a lack of natural light.

Objections to the lack of amenity during the VCAT hearing were frequently denied presentation on the grounds that those considerations were to be vetted later during the building certificate process. However, the morphology of the buildings is set at development approval, so solutions to these kind of amenity issues could not be implemented later.

### **4.2. Suggestion**

Incorporating a document in the planning scheme similar to the *Better Apartment Design Guidelines*, being mandatory better high density dwelling guidelines. It would not be left up to individual Council officers, who are often the most junior and least confident of the planning profession, nor left to Building Certificate stage, at which time many amenity issues cannot be corrected. Such a document could be developed in conjunction with the Office of the Victorian Government Architect.

### **4.3. Arguments for inclusion of development amenity protections on a state-wide basis at planning stage**

#### **4.3.1. Morphology of Development is Set at Planning Stage**

Improvements in the amenity of a dwelling can be very difficult and costly to make at building certificate stage where the morphology of the dwelling is already set from planning stage, as described at paragraph 3.3.1. For example, changing the size and location of windows to improve interior natural daylight may not be possible due to overlooking issues. Or if a row of attached terrace houses is approved in a north-south orientation, then the only option for windows is east-west.

#### **4.3.1. Social sustainability - Access to Playground Provision**

Dense developments which have a lower entry cost will attract young families. While aspirational, there is no provision in the planning scheme which requires the provision of safe access to a playground. Notice, I have not suggested supplying a playground because of the economics, however, school-age children need access to a playground, preferably independently i.e. without crossing major roads<sup>31</sup>. Also, if

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<sup>31</sup> Krysiak, N. (2020). Best practice for designing child-friendly high density neighbourhoods. Sydney, Cities for Play, funded by the Winston Churchill Foundation

provided, community facilities in subdivisions need to be subject to passive surveillance from nearby dwellings<sup>32</sup>. Speaking from the experience in our neighbourhood, playgrounds and parks are a great place for parents and children and dog-walking residents to meet each other and establish friendships and a support network within the community.

#### **4.3.2. Social Sustainability – multi-age developments and community**

There appears to be little neighbourhood life or contact between residents in the developments we examined with no front porches for elders to watch community activity and almost no front gardens requiring work outside. It is important for aging in place for elderly residents to come to know their neighbours so that they can be supported with tasks and to prevent loneliness for their mental health<sup>33</sup>. Incidental encounters are an important contributor to meeting and knowing the neighbours. Having elders around is also important for passive surveillance of children, so that they may have more freedom to play outside independently. Plans should show provision for these incidental encounters.

#### **4.3.3. Minimum acceptable result**

Similar to the case for sustainability provisions, it is admirable to have general policy documents regarding amenity and ways of achieving that. However, what is included in the planning scheme is the prescribed minimum and many developers will only do that and ignore design guidance. Thus the minimum mandated should have increased amenity requirements over current provisions. Once again, for consistency and to prevent developers targeting jurisdictions with lesser laws, these regulations need to be state-wide.

## **5. Community concerns about VCAT appeal processes**

### **5.1. Concern & Context: VCAT fails to provide fair, efficient and affordable justice**

In the case of our objection to 2 Morven Court, we banded together and raised funds via a GoFundMe appeal to employ a planner who was instrumental in winning our VCAT case. Elderly neighbours and poorer neighbours benefitted from the relative wealth of the group and the education and expertise of particular group members. In this case neighbours who felt they did not have the mental capacity to pursue an objection at VCAT could rely on the group. It was very clear during the hearing that developers with deep pockets to employ lawyers and multiple experts have a clear advantage over neighbours at a VCAT hearing. This was so in this case, where, although Council was also objecting, Council chose not to employ a lawyer or experts of their own.

There were many arguments that neighbours had spent much time, days in some cases, preparing, which, although included in submissions, were not allowed to be discussed at the VCAT hearing. For example, to show an example of a more sustainable development on the subject site which met most of the objections and would provide almost as many dwellings, one of our neighbours spent days preparing an alternative subdivision and dwelling footprint plan, which was not permitted to be discussed. Another objector prepared detailed stormwater calculations, which were also ignored.

There were also rules where expert reports presented on the correct form and witnessed appropriately were not accepted as such if the expert was unable to attend the hearing.

The issues listed above mean that, without costly professional representation, it is highly unlikely, if not impossible for community members to successfully oppose a planning application at VCAT. This discourages community members from pursuing planning disputes at VCAT level. Consequently, in terms of the Planning List, VCAT fails to provide fair, efficient, and affordable justice for the Victorian community.

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<sup>32</sup> ibid

<sup>33</sup> Eckhard Feddersen and Insa Lüdtké (2018) *Living for the Elderly: A Design Manual Second and Revised Edition*. Basel: Birkhäuser

## **5.2. Suggestion:**

A stronger planning framework would reduce the number of appeals to VCAT. In addition, VCAT hearing procedures and unwritten conventions need to be reviewed and updated. All rules should be documented and there should be training available to community members to understand what these are. A training video for community members available on the VCAT website would be good.

It is admirable that the VCAT website has so much information available for objectors. However, it incorporates so many web pages of written information that is difficult to navigate and find what is important. The sheer volume of these pages is a discouragement to reading.

## **5.3. Arguments**

### **5.3.1. Purpose and Genesis of VCAT**

The original purpose and genesis of VCAT as a planning appeal body was to give access to justice to the community when objecting to developments. The legal framework has gone some way towards this, in that parties can appear without legal representation and are not required to prove legal standing in the matter. However, the conduct of the hearings does not provide a level playing field for the parties.

### **5.3.2. Unspoken conventions of procedure and evidence allowed at hearing**

Although there are few formal rules documented for VCAT hearings, there are undocumented conventions regarding the conduct of hearings, including when it is permissible to speak to the member, rights of cross-examination and rebuttal.

### **5.3.3. Limitations on Grounds of Objection**

There are also unspoken rules regarding what evidence can be presented and what objection grounds cannot be considered by Tribunal members. We were fortunate to be represented by an urban planner with much experience at VCAT who was able to advise us beforehand on conduct of proceedings and which arguments would carry weight with the members. Other objectors who are not represented would experience much frustration, angst and anger when they try to present grounds and their arguments are shut down.

### **5.3.4. Behaviour of developer's lawyers during hearing**

The solicitor for the developer in our hearing was inexcusably rude to the neighbours presenting. Tactics he used included frequent interjecting, making derogatory comments in the background while a person was speaking, formally objecting, making derogatory comments regarding neighbours' evidence when he was permitted to speak, shouting down legitimate discussion where their experts had provided incorrect facts. So much so, that one of the neighbours began a complaint procedure to the Victorian Legal Services Board. The members appeared to accept this behaviour as normal for this solicitor and instructed us to ignore his "huffing and puffing" but we regarded it as deliberate intimidation tactics. And yet when one of the neighbours made a remark regarding the bias of a developer witness "we know who is paying her wages" he was threatened with expulsion from the hearing if he spoke out of turn again.

### **5.3.5. No Appeal Opportunity – VCAT Member power**

Appeal from VCAT to a higher court is only permitted on grounds of law and most of the decisions are based on an interpretation of the planning scheme based on the facts of the case. This effectively means that there is no appeal for objectors regarding the decision. As a result, the Members are incredibly powerful in this context and objectors do not wish to offend them, limiting objectors' protests during proceedings.

### **5.3.6. Perceptions of Difficulty**

All the factors listed above contribute to the perception by neighbours and members of the community that an objection to a development appealed to VCAT is very difficult and could be expensive. This

effectively discourages them from objecting. This perception would also be increased when the Council is supporting the development. We were fortunate in our case that Council also objected to the development.

## **6. Conclusion**

In summary, we would like to see the following state-wide mandated controls included in the planning scheme:

- tree preservation laws for canopy trees on private land, regardless of the species,
- minimum garden requirements across development types and zones and
- greater requirements for sustainability and amenity at planning stage and scrutiny of same.

We also strongly urge a review be conducted of the VCAT appeal process so that it provides a fairer and more affordable forum for community members to place them on greater parity with developers.