

**Submission
No 28**

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

Organisation: Planning Democracy Group

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LEGISLATIVE COUNCIL COMMITTEE INQUIRY SUBMISSION

1. HERITAGE PROTECTION

Heritage protection once enjoyed strong bi-partisan support and had strong public defenders, both inside and outside the Victorian Parliament. Now it has few strong defenders, either inside or outside the Parliament. Heritage was seen as an asset. Now too often it is seen as a problem, an inconvenience. Too often support for heritage is lip service – a mile wide, but an inch deep.

This is true not only for the built heritage, but also for our indigenous heritage, as shown by the Western Highway duplication project between Buangor and Ararat, for our cultural heritage, as evidenced by the City of Melbourne's constant undermining of the traditional Queen Victoria Market, and for our natural heritage, as evidenced by the relentless decline in numbers of many of our beautiful and unique birds, plants, and animals.

When Clifford Hayes MP moved that this Inquiry be established in October 2020, his speech to the Legislative Council identified 20 heritage homes which had been demolished in recent years in his electorate, some while their heritage values were still being assessed – 34 Armadale Street, Armadale; 19 Moir St, Hawthorn; Forres at 9-11 Edward Street, Kew; 981 Burke Road, Camberwell, 993 Burke Road, Camberwell, 33-35 Huntingtower Road, Armadale; Breedon House; 34 Were Street, Brighton; Idylwilde at 16 St Georges Road, Toorak, 18 St Georges Road, Toorak; 27 Mariemount Avenue, Beaumaris; 17 Nautilus Street, Beaumaris; 32 Middle Crescent, Brighton; 25-27 Victoria Avenue, Canterbury; 360 Auburn Road, Hawthorn; 368 Auburn Road, Hawthorn; 55 Seymour Road, Elsternwick; 2 Burgess Street, Beaumaris; 46 Rowland St, Kew, the home to young Gough Whitlam, and 1045 Burke Road Camberwell.

It is a depressing and embarrassing roll call. No doubt other demolitions have taken place in other electorates, and more demolitions have taken place since that speech.

Professor Michael Buxton says that our heritage protection is ineffective compared to that of many other countries. There is no proper consideration of precincts, and our system relies too much on the use of the heritage overlay. Overlays omit too many important areas and buildings. The process is costly, cumbersome, and the overlay protection provisions are weak.

RECOMMENDATION 1: That a demolition permit not be issued without a planning permit. Demolitions should not occur until the planning process has decided what is to replace it.

This would put a stop to developers and owners demolishing buildings ahead of consideration of their heritage significance. The current arrangement puts demolition powers in the hands of private building surveyors. Requiring a Council planning permit brings Councils into the picture, as they should be.

It would also help address the problem identified by the Boroondara Residents Action Group some years ago, that Federal Government Foreign Investment Review Board Rules contain a perverse incentive for foreign nationals to demolish existing homes. The frequent outcome has been that foreign nationals buy up quality homes, obtain a permit to demolish through a private Building Surveyor, clear the block of all vegetation and canopy trees, then build a large fake "Georgian" or "French Provincial" McMansion, property boundary to property boundary, with a few small trees in the front.

This has resulted in the loss of heritage homes, as well as tree canopy cover, permeable land and open space.

RECOMMENDATION 2: That applications for demolition permits be required to provide information concerning the greenhouse impact of demolishing the existing building, and replacing it with a new building or buildings. Developers should be forced to prove that a new development is not going to add to the site's carbon footprint.

Victoria's current planning policy is exacerbating climate change, and contradicts its climate change policy, through the loss of period homes and established gardens, and the increase in hard surfaces. It is a spectacular case of cognitive dissonance. Period homes and gardens are a significant weapon in the fight against climate change. With passive cooling features such as verandas, eaves, pitched roofs, porches, thick insulating walls, high ceilings, relatively small windows, large gardens and shade producing trees, they have less reliance on energy-hungry devices such as air-conditioners.

Gardens act like sponges, soaking up rain during flooding events. Plants are net absorbers of the dominant greenhouse gas, carbon dioxide (CO₂) with older trees absorbing more than younger ones.

Period homes and gardens are often much more environmentally friendly than what is replacing them. For all the talk about energy efficiency, new homes tend to eat up as much energy as older homes, because they are on average 30% larger. More square footage, more appliances, more of everything. And these factors are magnified when a single period home is replaced by a multi-unit development, as is currently occurring in growth areas such as Box Hill.

Last year the Architects' Journal submission to the British House of Commons Environmental Audit Committee said that demolishing old buildings was bad for the environment. They found that the amount of carbon emitted during the construction of new buildings, due to the creation of steel, cement and bricks for them, vastly outweighed the energy savings the newer building provided. The Royal Institute of Chartered Surveyors estimates that 51% of the lifecycle carbon from an average residential premises is emitted before the building is occupied. For commercial premises it is 35%. It is many decades before the new buildings start to show dividends, when all the science says we need reductions now.

The greenest buildings are in fact the ones we already have. When you take into account the cement, iron, and other building materials needed for a new building, it is much more energy efficient to fix up an old one than start from scratch. And allowing the demolition of old trees and gardens leads to an increase in hard surfaces and the urban heat island effect.

RECOMMENDATION 3: That Heritage be given greater prominence in Federal, State, and local administrative arrangements.

At present heritage is treated as the poor cousin in relation to planning and other machinery of government arrangements. This could be improved at a Federal level by the designation of a Minister responsible for Heritage, charged with protecting and promoting this country's unique built, cultural, indigenous and natural heritage. Of course, your Committee has little influence over Federal

arrangements, but the same arguments apply at a State level. A State Minister for Heritage could reasonably be expected to do more by way of heritage protection and promotion than is presently the case.

At the level of local government, the employment of full-time heritage advisers and advocates would go a long way to lifting heritage protection out from the shadows. Councils should have Heritage Services Sections separate from the Planning Division, promoting local heritage.

RECOMMENDATION 4: That Heritage be given greater independence in the assessment of planning applications.

Resident groups believe the present arrangements load the dice in favour of developers, and against heritage.

While it is reasonable to require developers to pay for heritage advice on any building they propose to demolish, they should not be permitted to appoint the heritage expert. This should be done by Councils, either using their own in-house heritage expertise, or independent heritage advisers.

At present residents are often kept at arms length from the heritage assessment process. Their questions are unanswered, the process is not transparent, and they are not encouraged to participate.

There is little confidence in the Victorian Civil and Administrative Tribunal (VCAT) as a heritage protector. The Committee should consider whether a Victorian Heritage Tribunal should be established to hear appeals which concern heritage issues.

RECOMMENDATION 5: That heritage decision makers be expressly discouraged from focusing on “intactness” or accepting “facadism”.

Buildings alter over time, but this does not mean they forfeit their heritage significance. Councils and VCAT have been using the fact of building alterations to deny their heritage significance, although there is no legislative support for this. They should be discouraged from doing so.

Similarly, “facadism” is not genuine heritage protection, and should be discouraged.

RECOMMENDATION 6: That State Government does more to promote heritage, including through the provision of financial support for the owners of heritage buildings to maintain them.

Heritage is a great economic and cultural asset. It is an important tourist drawcard – the great cities of Europe benefit enormously from tourists coming to see their heritage buildings and streetscapes. It is a matter of pride that the Royal Exhibition Buildings and Carlton Gardens have World Heritage Listing. The maintenance and promotion of our heritage assets is an important part of our claims to be a liveable city.

Of course, heritage buildings require maintenance. Sometimes it is unreasonable to expect the owners of these buildings to bear all the maintenance costs themselves, given the public value of the building. The funds made available for the maintenance and promotion of heritage buildings should be increased.

2. PLANNING

Residents are despondent at their lack of a genuine say in planning matters. They feel completely disempowered. They believe that property developers call the shots, using campaign donations and career opportunities to win support from the major parties. They have many stories of being given a week to respond to lengthy Government or Council reports which have been years in the making, or of spending years on a process to establish height limits in a particular location, only to find the limits thrown out within 12 months.

RECOMMENDATION 7: That political donations by property developers be banned.

They have been a corrupting influence, exposed by State anti-corruption bodies in Queensland and New South Wales, and by the IBAC Inquiry into the Casey Council here in Victoria. To their credit, the Queensland and New South Wales Parliaments have outlawed campaign donations by property developers. Victoria should do likewise.

State Governments have progressively stripped Councils of their capacity to determine planning applications, imposing rules that Councils must agree to whether they like it or not. This disempowers residents. Giving residents a genuine say, as opposed to going through the motions, necessarily involves restoring real planning powers to Councils. This does not mean being naïve or starry eyed about Councils. If they have more say, developers will seek more influence with them. Greater say must be accompanied by greater transparency and scrutiny.

But the most effective way to give residents a real say is to return planning decision making powers to Councils. They are democratically accountable to their residents.

RECOMMENDATION 8: That Councils be given powers to set mandatory planning standards such as height limits, lot sizes, minimum apartment sizes, and site coverage by buildings.

One issue that causes residents particular distress is that Councillors are unwilling to advocate on their behalf in relation to planning disputes. Upon being elected, new Councillors get told that they should stay quiet, like Judges, otherwise they might create the impression that they are biased – “apprehended bias” – and create the grounds for legal challenge to Council’s decision on the application in question.

While Councillors probably have more legal room to get involved than their officers are telling them, Victoria would almost certainly benefit from a legal clarification such as that introduced by the Cameron Government in the UK after its election in 2010. The UK Localism Act clarified the ability of Councillors to be able to discuss matters which may relate to a planning application prior to voting

on that application at Committee, as long as they could show that they were going to make their judgment on the application with an open mind, listening to all the evidence and not having pre-determined their position.

According to the UK Government's Plain English Guide to the Planning System, issued in 2015, it enables "planning decisions to be taken at the lowest possible level with the involvement of the people", and "ensures strong protections are in place to conserve and enhance our valuable natural and historic environment".

RECOMMENDATION 9: That Victoria clarify the legal ability for Councillors to discuss planning applications which are before Council, following the model of the 2011 UK Localism Act, and examine the Act for other features which could enhance local democracy in planning.

Not only are residents hamstrung by State Government rules allowing developments to which they are opposed. Council planning decisions are regularly appealed to VCAT. In theory VCAT should not be determining planning decisions on their merits, but only upholding an appeal where a Council has behaved unreasonably, for example by ignoring its own standards, or treating similar applications inconsistently. But in practice VCAT acts like a planning body in its own right.

For example, in 2020-21 appellants were successful more than 50% of the time in the Councils of Bayside, Stonnington, Whitehorse, and Kingston. Why not appeal to VCAT – you have a toss of the coin chance of success! In many other Councils appellants also enjoy high rates of success.

There are myriad examples of how VCAT in practice results in outcomes greatly resented by residents, and the following example is by no means remarkable – it is a regular occurrence. The City of Moreland developed, with considerable time, expense, and resident input, a Brunswick Structure Plan. For the area covered by 116-118 Lygon Street and 205 Edward Street in Brunswick East, the Plan had a height limit of 17 metres (5 storeys). The applicant tried his luck with an application for 8 storeys, over 27 metres high, more than 10 metres higher than the Structure Plan limit.

You would expect that the Council Planner would support the Structure Plan, but in fact they recommended a 7-storey building, only one storey less than the application. You might also expect that the Councillors would support their Structure Plan, but they didn't either. They approved a 6-storey building.

The applicant again felt lucky, and appealed to VCAT. VCAT cited the case of *Parkhowe v Macedon Ranges SC* [2004] VCAT 2468 as saying it is appropriate for the Tribunal to give some weight to the views of the Council Delegate Planner. They allowed 7 storeys. What is the point of the Structure Plan, if neither Council staff, nor Councillors, nor VCAT, follow it?

It is not how things work in other countries. In the US, for example, there is no equivalent to VCAT at all. The idea of a bureaucratic body overturning the decisions of an elected body would be considered undemocratic.

RECOMMENDATION 10: That a clause be inserted into Section 84B of the Planning and Environment Act requiring VCAT to give effect to the planning policies of local Councils.

A particular problem in the planning appeals process is that applicants can appeal to VCAT if Councils fail to make a decision within 60 days - "Failure to Determine". This means that Councils, under time pressure, can fail to give residents an adequate amount of time to prepare objections. It also means that applicants can take Councils to VCAT before Council has developed a considered position, reinforcing the tendency of VCAT to hear issues as if they are the original decision-maker.

RECOMMENDATION 11: That the statutory timeframe for Councils to consider applications be increased from 60 days to 90 days.

Resident rights have been progressively curtailed by the introduction of rules with Orwellian titles such as "VicSmart" and the "Good Design Guide". Restrictions on notification and third-party appeal rights should not be limited by such arrangements. First, residents are entitled to a say in the character of their street, their neighbourhood, their community. They have to live there. Developers typically don't. Secondly, the results of this planning free for all are now obvious, and they are not good. Melbourne is becoming an obese, hardened-artery, parody of its former self. Severe traffic congestion, smaller living spaces, loss of tree canopy cover and open space, intense competition for open space, streets being turned into soulless wind canyons, are all blighting our city.

Victorian Government regulations passed in September empower the Planning Minister to declare projects with a degree of state funding, or situated on Crown Land, to be of state significance and exempt from Council planning requirements. There is no justification for this undermining of Councils and residents. The Government has referred to it as necessary for "Recovery from COVID". Recovery? During the past 2 years, life expectancy has increased, unemployment has fallen, bankruptcies have fallen, job vacancies are up, productivity is up, labour force participation is up, the share market is up, and wages are starting to rise. Of course, we all want to see an end to the pandemic as soon as possible, but it cannot be used as a smokescreen for further undermining the democratic rights of residents.

Concern has also been expressed about proposed changes to ResCode, foreshadowed by the Department of Environment, Land Water, and Planning Paper, "Improving the Operation of ResCode: A New Model for Assessment". The proposed changes could lead to more intense development outcomes, especially in the Neighbourhood Residential and General Residential Zones. Once again, the changes appear to be driven by a State Government view that Councils are troublemakers needing to be kept in check, rather than respect for the democratic rights of residents.

Too often planning consultation processes appear to be going through the motions. Governments, Councils and Agencies have their minds made up and make minimal or no changes to a proposal which has been developed behind closed doors. Resident groups describe consultation processes as "just about ticking the box". In years gone by, advocates of a proposal usually had to front a Public Meeting, with opportunities for public questions and comments. At such meetings residents could not only hear what the proponent wanted them to hear, they could also hear the views of their fellow residents. If someone raised an issue that hadn't been properly thought through, everyone could hear it, leading to real pressure for it to be addressed.

But now project proponents are more cunning. Instead of public meetings, we have extended "one on one" consultation sessions, where individuals can ask questions, but no-one else hears them, or

hears the answers. Or there are feedback boxes, but again the results are made public selectively, or not at all. There is a real challenge for us to make “consultation” something more than a charade.

The steps that have been taken by successive State Governments to diminish resident say in planning and heritage protection are utterly incompatible with the clear intent of the Local Government Act 2020 to embed community engagement and require participatory democracy of Councils. These principles should also apply to planning decisions.

RECOMMENDATION 12: That the State Government cease and desist from further steps that erode the say of local residents in planning matters, and review existing rules with a view to re-instating opportunities for residents to be heard.

3. ENVIRONMENT

Your Committee carried out a detailed and impressive Inquiry into Ecosystem Decline last year, and needs little further information on this topic. Some of your key findings were that –

- The ongoing removal and degradation of native vegetation is a key driver of ecosystem decline and is threatening Victorian biodiversity
- The Department of Environment, Land Water and Planning has not delivered the Western Grassland Reserve and the Grassy Eucalypt Woodlands Reserve by 2020, as specified in the Melbourne Strategic Assessment Program. (These unkept promises were a trade off for the poor decision in 2010 to expand Melbourne’s Urban Growth Boundary).
- The Government’s biodiversity strategy, Protecting Victoria’s Biodiversity – Biodiversity 2037, lacks the necessary funding for implementation of its goals and actions.

Of particular concern is our declining tree canopy cover. Government and Councils have put a lot of time and effort into Urban Forest strategies etc, but the overall picture is of decline. Take Moreland, for example. In 1989 its tree canopy cover was 14%. Over the next 16 years, to 2005, it increased to 15.6% - moving in the right direction.

However, after 2005 Moreland’s population started to grow rapidly, and tree canopy cover went into decline. By 2016 it was 14.2%, basically back to where it was in 1989, and falling. As Moreland’s Urban Forest Strategy report identified, Council’s tree planting program in public areas was totally nullified by tree clearing in private yards. There was a 24% drop in private tree canopy. From 2010-2015 the suburb of Pascoe Vale lost 345 netball courts of tree canopy!

Removing tree canopy cover leads to the creation of urban heat islands. Cities like Melbourne are now 4-10 degrees hotter than non-urban areas. This level of additional heat is bad for our health.

Trees are not only under threat from private developers. There appears to be a form of exceptionalism among Government agencies and Councils, that infrastructure related tree clearing is somehow different. The loss of mature trees caused by Level Crossing Removal Projects at Surrey Hills, Mont Albert and Moreland Stations, Melbourne City Council at Fawkner Park, the Western Highway Project near Ararat, and the foreshadowed tens of thousands of trees threatened by the North East Link, are just some examples. The response that the trees will be replaced by others is inadequate. The seedlings that replace them will take many years to provide the same health and environmental benefits.

RECOMMENDATION 13: That State Government and Councils commit to increased tree canopy cover across both public and private land within their jurisdiction, and provide annual reports on their progress.

4. HOUSING

Declining housing affordability is a major tragedy of our time. It is a blot on the legacy we are handing down for future generations. "A home of your own" used to be a core part of the Australian Dream, and our very high rate of home ownership distinguished us from many other countries.

But in the past twenty years the proportion of young people who own their own homes has collapsed. In 2002, 34% of 18-39 year-olds in Melbourne were home owners. By 2018 that figure had dropped to 22%.

Young people will not have the same opportunities as previous generations while ever land prices continue to skyrocket. Governments cannot claim to be concerned about housing affordability, while at the same time running policies designed to increase the price of land. Policy makers should stop cheering when the price of housing goes up.

Rising house prices have knock on effects in the rental market. Rents become higher. Rental data released by Domain on 20 January this year showed that not one suburb in New South Wales or Victoria would be considered affordable for essential workers such as checkout operators, pharmacy sales assistants, or kitchen hands.

Higher rents lead to overcrowding in rental properties. The 21st Century has taken us back to the 19th, with slums and slum landlords. It is illegal for apartments to be separately rented to more than 3 people without being registered as a rooming house. Nevertheless, units shared with up to 7 people have been advertised on online websites such as Gumtree. In Docklands, 6 girls were found to be paying \$140 per week to be squeezed into a one bedroom apartment.

Melbourne's planning laws are too lax. Melbourne has been flooded with small, poorly-designed units. There are bedrooms in Melbourne's high rises that do not have direct access to sunlight. Floor plans have shrunk. By 2015, 40% of the CBD apartments were less than 50 square metres. Some apartments have kitchens squeezed into a hallway corridor.

Contrary to the claims of the property industry, the problem of unaffordable housing and Lilliputian apartments is not a supply problem. There has been a dramatic increase in the supply of housing in the inner cities of Melbourne and Sydney, and demonstrably no reduction in sale prices or rents in housing in the middle and outer suburbs. The Council to Homeless Persons said in 2018 "Despite record dwelling constructions across Victoria in recent years, new supply alone has demonstrably failed to provide for greater affordability".

Elvis Presley is sighted more often than downward pressure on house prices arising from construction.

In fact, the more construction that happens in a given area, the more valuable it becomes, so the higher the price of land. And it is rising land prices that are proving so lethal for young would be home owners.

Plan Melbourne's headline statement re Housing is that we will build another 1.6 million homes in Melbourne by 2050. This will make us a much denser city.

But density is bad for our health. The coronavirus pandemic is a spectacular example. It is no coincidence that as of the start of 2022, the deaths from coronavirus in Australia's 2 most densely populated cities, Sydney and Melbourne, totalled 2206, while total deaths everywhere else in Australia were a mere 53.

This pattern was repeated around the world. A Chinese study found that every outbreak involving three or more people occurred indoors. Outdoors, there are many factors such as air flows, humidity and sunshine which lower the chance of the virus surviving.

Coronavirus spreads around residential towers via shared spaces – apartments, laundries, elevators and staircases. It can also spread via plumbing and ventilation, particularly in apartments where there are no balconies and where windows barely open. Not only are people in more densely populated areas more likely to get COVID-19, a study from Italy found they are more likely to die of it.

But well before the pandemic, the rapid construction of high-rise towers was raising health questions. There is no shortage of evidence that residents of high-rise buildings are vulnerable to mental health issues. A 1979 study in Glasgow found evidence that high-rise residents were presenting psychological symptoms more than other housing residents.

A 1991 paper compared elderly African-Americans living in high-rise and low-rise buildings in Nashville. The high risers had a higher incidence of depression, phobias, and schizophrenia. Of course, other factors could be contributing to this, but in Singapore the construction of high-rise buildings led to a four-fold per capita increase in the rate of suicide by leaping from buildings.

The move to high rise buildings has also come with a decline in building standards. The flammable cladding debacle is well-known. In 2020 the Channel 9 Program 60 Minutes found that a shameful 85% of new high-rise apartments in Australia had building defects. The move from Council Building Inspectors to private Building Surveyors, who are compromised by conflicts of interest, has been a failure. While there is no reason why building developers and owners should not pay for the cost of having their building inspected, there is every reason why they should not choose the Inspector.

RECOMMENDATION 13: That the approval of buildings be returned to being a function of local Councils.

Melbourne's housing problems are of comparatively recent origin. Until at least the turn of the century Melbourne had a well-deserved reputation for liveability. However, from around 2005, as a consequence of the trebling of the migration program by the Federal Howard Government, Melbourne started to grow by over 100,000 people per year. Plan Melbourne assumes this growth will continue unabated until 2050, and has no plan to stop it there, either.

RECOMMENDATION 14: That the premise of Plan Melbourne that there will be an additional 1.6 million homes built inside Melbourne by 2050 be re-examined, in the light of the coronavirus pandemic, and other experience since the Plan was announced.

5. GREEN WEDGES

The establishment of Melbourne's Green Wedges in the 1970s by the Hamer Liberal Government was a visionary act. One of its objectives was to help ensure that land important for food production was not paved over. Unfortunately, Governments have allowed various incursions into the Green Wedges. It is said that the approved land uses, such as Churches and Schools, are worthy uses. However, that is not the point. If they are permitted on Green Wedge land, it ceases to serve any purpose as a Green Wedge.

The Victorian Government made welcome commitments before the 2018 election to better protect the Green Wedges. But they have not been honoured. Waste soil from major projects has been dumped on Green Wedge land. The Heatherton Rail Stabling Yard represents a major unwanted threatened intrusion into the South East Green Wedge. The Green Wedges Coalition believes that the Green Wedges are receiving the death by a thousand cuts.

RECOMMENDATION 15: That the 2018 Victorian Government undertakings "to tighten controls to better protect Melbourne's Green Wedges from overdevelopment", "to protect the environment, landscape, agriculture, and rural industry of each area, and put a cap on the size of developments" and "to deliver a 355 hectare Chain of Parks from Warrigal Road in Moorabbin to Braeside Park in Dingley Village", be implemented.

6. CONCLUSION

It will be claimed that it is simply not possible to implement all of these recommendations. In particular it will be claimed that one cannot object to growth, both within Melbourne and outside its boundaries.

But this rate of growth of Melbourne, of over 100,000 per annum, is a comparatively new phenomenon. It has only been in place for the past 15 years or so. It is not inevitable. And we have seen enough of it now to know that it is not very desirable. How many Melbourne residents can really put up their hand and say they like what Melbourne has become, and look ahead for the next 10, 20 years and beyond, and say, they like what they see ahead?

The Hon. Kelvin Thomson,
Convenor,
Planning Democracy.

In 2005 Mary Drost OAM established Planning Backlash as an umbrella organisation of community and resident action groups. Now known as Planning Democracy, we work to protect Melbourne and Victoria's heritage and liveability, open space and tree canopy, and to give residents a genuine say in the character of their street and their neighbourhood.

