
Re Amendment C270 to Melbourne Planning Scheme

Memorandum of Advice

- 1 I am asked to give my opinion as to the validity of Amendment C270 (“the Amendment”)¹ to the Melbourne Planning Scheme (“the scheme”).
- 2 The scheme has been made pursuant to the *Planning and Environment Act* 1987 (“the Act”).
- 3 The Amendment proposes to introduce a requirement in the Capital City zone in the following terms:

A permit must not be granted, or amended (unless the amendment would not result in additional floor area above 18:1) to construct a building or construct or carry out works with a floor area ratio in excess of 18:1 on land to which schedule 10 to the Design and Development Overlay applies unless:

- a public benefit as calculated and specified in a manner agreed to by the responsible authority is provided; and
- the permit includes a condition (or conditions) which requires the provision of a public benefit to be secured via an agreement made under section 173 of the *Planning and Environment Act* 1987.

For the purpose of this schedule the floor area ratio is the gross floor area above ground of all buildings on a site, including all enclosed areas, services, lifts, car stackers and covered balconies, divided by the area of the site. Voids associated with lifts, car stackers and similar service elements should be considered as multiple floors of the same height as adjacent floors or 3.0 metres if there is no adjacent floor.

Background

- 4 I have previously given oral advice to the Department of Environment Land Water and Planning about an amendment to the scheme directed at similar objectives to the Amendment. That advice was given in the broad, and did not specifically relate to the text of the Amendment now being considered.

The uplift document

- 5 A document called “How to calculate floor area uplifts and public benefits” dated April 2016 has been made available with the Amendment. This

¹ I have been asked to consider the so-called “Panel version”.

document may be subsequently adopted by the Minister as a policy or guideline. However, it is not intended that the document be incorporated into or form part of the scheme. Thus, in my opinion, this document is not relevant to the *meaning* of the Amendment. The meaning of the Amendment cannot be determined, or coloured, by an extraneous non-statutory document.

Key questions

- 6 In my opinion, the key questions that determine the validity of the Amendment are:
- What does the Amendment mean?
 - And, is the Amendment, with this meaning, within the scope permitted by the Act.
- 7 In relation to the second question, a convenient approach is:
- First, to consider whether the provision falls within the empowering provisions of the Act; and
 - Second, to consider whether the provision is expressly or impliedly repugnant to the Act or part of the Act.

The meaning of the Amendment

- 8 In my opinion, the gist of the Amendment is that, for a permit to be granted or amended to allow a building that exceeds the specified floor area ratio, a public benefit must be provided. Further:
- this public benefit must be calculated and specified in a manner agreed to by the responsible authority; and
 - the permit must include a condition which requires the provision of the public benefit to be secured via an agreement made under section 173 of the Act.
- 9 Neither the Amendment nor the scheme contain any definition of “public benefit”. Hence these words should be given their natural meaning.

The scope of the Act

- 10 Section 6 of the Act relevantly provides:
- (1) A planning scheme for an area—
- (a) must seek to further the objectives of planning in Victoria within the area covered by the scheme; and
- ...
- (b) may make any provision which relates to the use, development, protection or conservation of any land in the area.
- (2) Without limiting subsection (1), a planning scheme may—

....

(b) regulate or prohibit the use or development of any land;

...

(k) provide that any use or development of land is conditional on an agreement being entered into with the responsible authority or a referral authority;

11 The objectives of planning in Victoria are set out in s 4(1) of the Act as follows:

(1) The objectives of planning in Victoria are—

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

(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;

(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;

(e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

General principles as to whether Amendment within scope of Act

Within empowering provisions

12 The Amendment proposes to regulate the development of buildings of a specified character (by reference to a floor area ratio). Such a provision is obviously a provision in relation to the development of land; and is a provision that regulates the development of land.

13 The Amendment further proposes to regulate the development of land of this character by reference to whether a public benefit is to be provided. There is nothing inherently flawed in regulating development by reference to such a criterion, *provided* the public benefit is of a character contemplated by the Act.

14 If the public benefit is of a character contemplated by the Act, the regulation could require the *precise* nature of this type of public benefit to

be calculated and specified in a manner agreed to by the responsible authority.

- 15 Further, the Act contemplates that a scheme may provide that development is conditional on an agreement being entered into with the responsible authority: and this provides a sufficient foundation for the provision in the Amendment that any permit include a condition which requires the provision of the public benefit to be secured via an agreement made under section 173 of the Act.
- 16 Thus much depends on how one approaches the question of “public benefit”. If the public benefit is of a character contemplated by the Act, the Amendment would be within the empowering provisions. However, if the public benefit is *not* of a character contemplated by the Act, then the Amendment would not be within the empowering provisions nor lawful.

Determining the scope of “a public benefit”

- 17 Section 22 of the *Interpretation of Legislation Act* 1984 relevantly provides that every subordinate instrument (which would include the scheme) shall be construed as operating to the full extent of, but so as not to exceed, *inter alia*, the power to make the subordinate instrument conferred by the Act pursuant to which it is made, to the intent that where a provision of a subordinate instrument would, but for s 22, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power.
- 18 Thus the task is not to be approached by considering a meaning of “a public benefit” which might make the Amendment invalid; but, rather, by adopting a meaning of “a public benefit” that is within power, if this is possible.
- 19 In my opinion, it is possible to adopt a meaning for the expression “public benefit” that is within power. Subject to the qualifications set out below, that meaning could extend to any benefit that promotes the objectives of planning in Victoria. In my opinion, if the benefit promotes those objectives, it would necessarily be a “public” benefit, as the Act and the objectives are intended to promote the public interest.
- 20 In my opinion, it is not necessary that a required public benefit have a nexus with the development. Such might be required if the provision of a benefit was a condition of a permit; but the test for a validity of a scheme provision is not the same as that for a permit condition.

Inconsistent with Constitution

- 21 A qualification on the above analysis is that the Amendment must not be inconsistent with any law of the Commonwealth, as any such law would override any inconsistent State law (including a planning scheme provision) by reason of s 109 of the *Constitution of the Commonwealth of Australia*. This does not appear to arise in relation to the Amendment.

Expressly repugnant to provision of Act

- 22 A further qualification is that the regulatory provision, requiring the provision of a public benefit, must not be inconsistent with, or repugnant to, an express provision of the Act.
- 23 Thus the provision, requiring the provision of a public benefit, must not infringe the protection given by s 6(3) of the Act in relation to existing uses. This does not appear to arise in relation to the Amendment.
- 24 Moreover, the provision, requiring the provision of a public benefit, could not seek to vary or remove a covenant under the *Heritage Act 1995* or the *Victorian Conservation Trust Act 1972*. Nor could the provision require the provision of a public benefit contrary to express provisions in Part 3AA of the Act (concerning green wedge land) or Part 3A of the Act (concerning the Upper Yarra and Dandenong Ranges).

Impliedly repugnant to provision of Act

- 25 A further qualification is that the regulatory provision, requiring the provision of a public benefit, must not be *impliedly* repugnant to the Act or a provision of the Act.
- 26 Thus, in my opinion, a provision requiring a public benefit must not amount to the *acquisition* of property.
- 27 The Act makes specific provision for the acquisition of land, incorporating the provisions of the *Land Acquisition and Compensation Act 1986*. If the Act were used to compulsorily acquire property using some other mechanism, particularly one that did not provided compensation, this would by-pass the protection afforded by the Act.
- 28 This follows by the application of long-standing principles of statutory interpretation.
- 29 It is a conclusion that is reinforced by two other considerations:
- the “principle of legality”; and
 - the Victorian *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”).
- 30 The principle of legality is essentially a principle that requires legislation to be interpreted as avoiding intrusion into private rights unless the legislation clearly justifies such an interpretation. The former Chief Justice of New South Wales has expressed the principle this way:

If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.²

- 31 Section 20 of the Charter is relevant:

² James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

A person must not be deprived of his or her property other than in accordance with law.

- 32 In *Hoskin v Greater Bendigo City Council* [2015] VSCA 350, particularly at [26], the Court of Appeal accepted that provisions of the Charter inform the construction of the objectives of planning as they are stated in s 4 of the Act.
- 33 Although there has been very little Victorian jurisprudence on the meaning of this Charter principle – especially in the higher courts - it is clear that “property” is not confined to real estate, but includes rights, powers and privileges.
- 34 There is a distinction between a law that provides for the *acquisition* of property and a law that merely *deprives* a person of property.³ In my opinion, a provision of a scheme that has the effect of acquiring property without compensation is repugnant to the Act and is invalid. By contrast, a provision that merely deprives a person of property (without involving the acquisition of property) is not repugnant to the Act merely by reason of that fact. This is because the Act clearly contemplates planning schemes that will inevitably have that effect: see *Lloyd v Robinson* (1962) 107 CLR 142.
- 35 Hence, in my opinion, although this Charter principle suggests one should adopt a conservative approach, it cannot be relied on to invalidate a regulatory provision in a planning scheme, that deprives a person of property, *merely* because of that fact.
- 36 Further, in my opinion, in the absence of some specific provision⁴, the Act does not allow a scheme to contain a provision that requires the payment of a tax as a condition of a particular development. The imposition of a tax must be expressly authorised. A common definition of a “tax” is a compulsory extraction of *money* by a public authority for public purposes, enforceable by law.

Improper purpose

- 37 Yet a further qualification is that the Amendment must not be *made* for an improper purpose. What is “improper” is not to be ascertained by some general notion of propriety, but by a close analysis of what the Act contemplates. In other words, the authorised purposes are to be gathered from the words of the Act, including the subject matter, scope and purpose of the Act.
- 38 Clearly the Act permits the regulation of development; and, as I have indicated, a provision that requires the provision of a public benefit (of a type that promotes the objectives of planning) if a permit is to be granted

³ Acquisition looks at the matter from the viewpoint of the acquirer; deprivation looks at the matter from the viewpoint of the person deprived.

⁴ Such as that in relation to the provision of open space in the *Subdivision Act 1988* or the GAIC provisions in the Act.

for a particular species of building (such as over a specified floor area ratio) is, on its legal meaning, within power.

- 39 However, if there is other evidence that shows that the real purpose of the Amendment is to achieve an objective that is outside the scope of the Act, this could lead to the conclusion that the Amendment is invalid as being made for an improper purpose.
- 40 It is arguable whether the purpose of achieving “value sharing” is beyond the scope of the Act. One reason it is arguable, is that the notion of value sharing is undefined and will mean different things to different people. However, if the true character of the so-called “value sharing” is the provision of a public benefit contemplated by the Act, which provision is not expressly or impliedly repugnant to the Act, then that form of value sharing would be valid.

Unreasonableness

- 41 Finally, I note that any subordinate instrument that is so implausible, that no rational body could make the instrument pursuant to the enabling enactment, would be invalid on the ground of being “unreasonable” in the so-called *Wednesbury* sense⁵. In my opinion, that conclusion could not be reached in relation to the Amendment.

Specific public “benefits”

- 42 I have been asked to consider how these general principles apply to the following specific “benefits”:
- The provision of publicly accessible open areas of a site, which is additional to any public open space contribution required under the scheme or the Subdivision Act.
 - The provision of publicly accessible enclosed areas within a proposed building.
 - The provision of social housing within a proposed building.
 - The utilisation of a competitive design process for a proposed building.
 - The proposed use of a building for a commercial office use, or some other use which serves a strategic planning purpose.
- 43 In my opinion, each of these specific “benefits” are of a character that is within the enabling power in the Act as, in appropriate circumstances, each could advance one or other of the objectives of planning. Moreover, in appropriate circumstances, it cannot be said that any of these specific benefits are expressly or impliedly repugnant to the Act.

⁵ *Wednesbury* unreasonableness is so called after the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 and means a decision which is devoid of plausible justification.

- 44 The first two of these benefits are not dissimilar to benefits that allowed for an uplift of the permitted plot ratio under the planning controls that applied in the Melbourne CBD in the 1980s. Indeed, the plot ratio of the original Owen Dixon Chambers West was achieved by providing similar benefits.
- 45 As to the fourth benefit, it might be thought that the utilisation of a competitive design process for a proposed building might not necessarily be a benefit compared with engaging an outstanding architect, but this does not affect the legality of such a provision.
- 46 The last “benefit” in uncontroversial: the proposed use of a building will often be relevant as to the acceptability of the development of the building.
- 47 The validity of a requirement to provide social housing is a vexed question.
- 48 To my knowledge, this question has not been authoritatively determined in Victoria: the closest was the decision of the Supreme Court in *City of St Kilda v Mandalay Gardens* (Unreported, per Fullagar J, 4 September 1989).
- 49 In the *Mandalay Gardens* case the relevant tribunal had held that it should not impose a condition that required the provision of social housing, stating:
- ... there is, generally speaking, no merit from a town planning point of view in imposing such a condition upon the developer against his will, because this expedient will militate against worthwhile residential development taking place. Any good it may do in the instant case will be destroyed rapidly. What has happened here is imposition of the condition against the will of the developer, in other words compulsion, in other words the expropriation of property without paying adequate compensation.
- 50 In the Supreme Court, the City of St Kilda argued that this reasoning disclosed an error of law. However, the judge concluded that, if there was an error, it was not a vitiating error as, even if the tribunal had been told that it did have power to impose the condition, clearly it would not have done so.
- 51 A New South Wales case is *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning* [2000] NSWLEC 20. That case proceeded on the basis that the relevant NSW Act did not extend to making instruments to directly address social outcomes. In my opinion, the same cannot be said of the Victorian Act, which clearly extends to social and economic outcomes.
- 52 The *Meriton* decision also turned on the fact that part of the NSW Act that dealt with developer contributions had been held to provide an exclusive code for requiring such contributions; and to allow another provision to require similar contributions would be to side step the code. In my opinion, insofar as the notion of public benefit in the Amendment may involve the provision of social housing, this would not be inconsistent with, or repugnant to, any “code” in the Victorian Act.⁶

⁶ Such a development contributions plan under Part 3B of the Act which requires the payment of money.

53 I note that the *Meriton* decision held that the social housing obligation was *not* a tax. In my opinion, insofar as the notion of public benefit in the Amendment may involve the provision of social housing, this would not be a tax; and, as a consequence, inconsistent with, or repugnant to, in the Act.

Conclusion

54 In my opinion, for the reasons set out above, the adoption and approval of Amendment C270 to the Melbourne Planning Scheme would be a valid exercise of power under the *Planning and Environment Act 1987*.

A handwritten signature in black ink, appearing to read 'Stuart Morris', with a long, sweeping horizontal stroke extending to the left.

Stuart Morris

25 August 2016