



Carlton Gardens, September 2017



# 3. Existing policy settings

## 3.1 What sunlight access controls are in place now?

The most recent overarching review of the sunlight to open spaces policy was undertaken in 1999 with the introduction of the new planning scheme format. The strategic basis for the existing policy dates back to the Places for People strategy prepared in 1994.

Sunlight access controls are fragmented across policy, zones and a number of Design and Development Overlays (DDOs) (refer table 1). They are expressed in a number of different ways - as policy, as design objectives, decision guidelines, application requirements and built form outcomes. Each overlay has been developed as local plans for different parts of the city have been prepared, with the Melbourne Planning Scheme (MPS) updated incrementally across the last 18 years.

This has created a complex and inconsistent set of overshadowing regulations which aren't based on a cohesive and overarching policy position on the importance of sunlight (based on people's needs) nor an analysis of how people use open spaces.

The current approach is also inconsistent with the objectives and recommendations of the City of Melbourne's Open Space Strategy. The Technical Report for the Open Space Strategy 2012 establishes assessment criteria for sunlight access for new parks as "a minimum of 3 hours direct sunlight between 9am and 3pm during mid-winter and at least 5 hours of direct sunlight between 9am and 3pm on September 22' (sections 6.3.1). This establishes the importance of winter sunlight access to parks within the municipality.

There are some complications in implementing this approach. Requiring a minimum number of hours of sunlight access to be met establishes a 'first in, best served' basis, where once one development overshadows the park within this time, no other development can increase overshadowing of the space. This approach was not adopted within the recently introduced sunlight access controls for the Central City.

The recent Central City Built Form Review and the Queen Victoria Market Development Plan Overlay have introduced winter sunlight access controls. Elsewhere in the municipality sunlight protection is largely provided in spring and summer months only.

The current controls incorporate a three tiered scale of protection. Winter sunlight access to Tier 1 parks (all in the central city) are well-protected. Sunlight access at the equinox is relatively well-protected for Tier 2 parks.

Tier 3 parks are relatively unprotected and include most parks across the municipality, including those in high growth areas.

## **Existing Sunlight to Public Spaces Policy**

The overarching policy setting is provided in the Sunlight to Public Spaces Policy at Clause 22.02 of the Melbourne Planning Scheme.

This policy applies to ‘public spaces throughout the municipality including parks and gardens, squares, streets and lanes, and privately owned publicly accessible spaces within developments, including building forecourts, atria and plazas’.

The policy is based on the recognition that ‘a fundamental feature of Melbourne’s character, liveability, comfort and attractiveness is its ability to offer sunlight to its streets and public spaces at the times of the year when the intensity of pedestrian activity is highest’.

The objectives established in the policy include:

- ‘To achieve a comfortable and enjoyable public realm
- To ensure new buildings and works allow good sunlight access to public spaces
- To ensure that overshadowing from new buildings or works does not result in significant loss of sunlight and diminish the enjoyment of public spaces for pedestrians
- To protect, and where possible increase the level of sunlight to public spaces during the times of the year when the intensity of use is at its highest
- To create and enhance public spaces to provide sanctuary, visual pleasure and a range of recreation and leisure opportunities’

### **Factors influencing this policy position**

From this it can be concluded that this policy position is determined by the inter-relationship within a public space between the following factors:

- The amount of sunlight access provided
- The experience of that sunlight in terms of comfort, enjoyment and delight (visual pleasure)
- The usage of the park in terms of intensity (overall numbers of people)
- The usage of the park in terms of times of year (when are the people there)
- The usage of the park in terms of types of use - respite (sanctuary) and active uses (recreational and leisure) - and how important sunlight is to these uses

### **Design and Development Overlays (DDOs)**

Specific protection for parks from overshadowing is provided across a range of DDOs across the municipality (refer table below).

The current policy approach distinguishes three tiers of public space. The highest tier includes specific mention of public spaces and includes mandatory provision for the protection of sunlight to open space at the winter solstice. These parks are all located within the Central City. The second tier includes specific mention of public spaces and includes a range of discretionary protection controls that vary according to the space at the equinox.

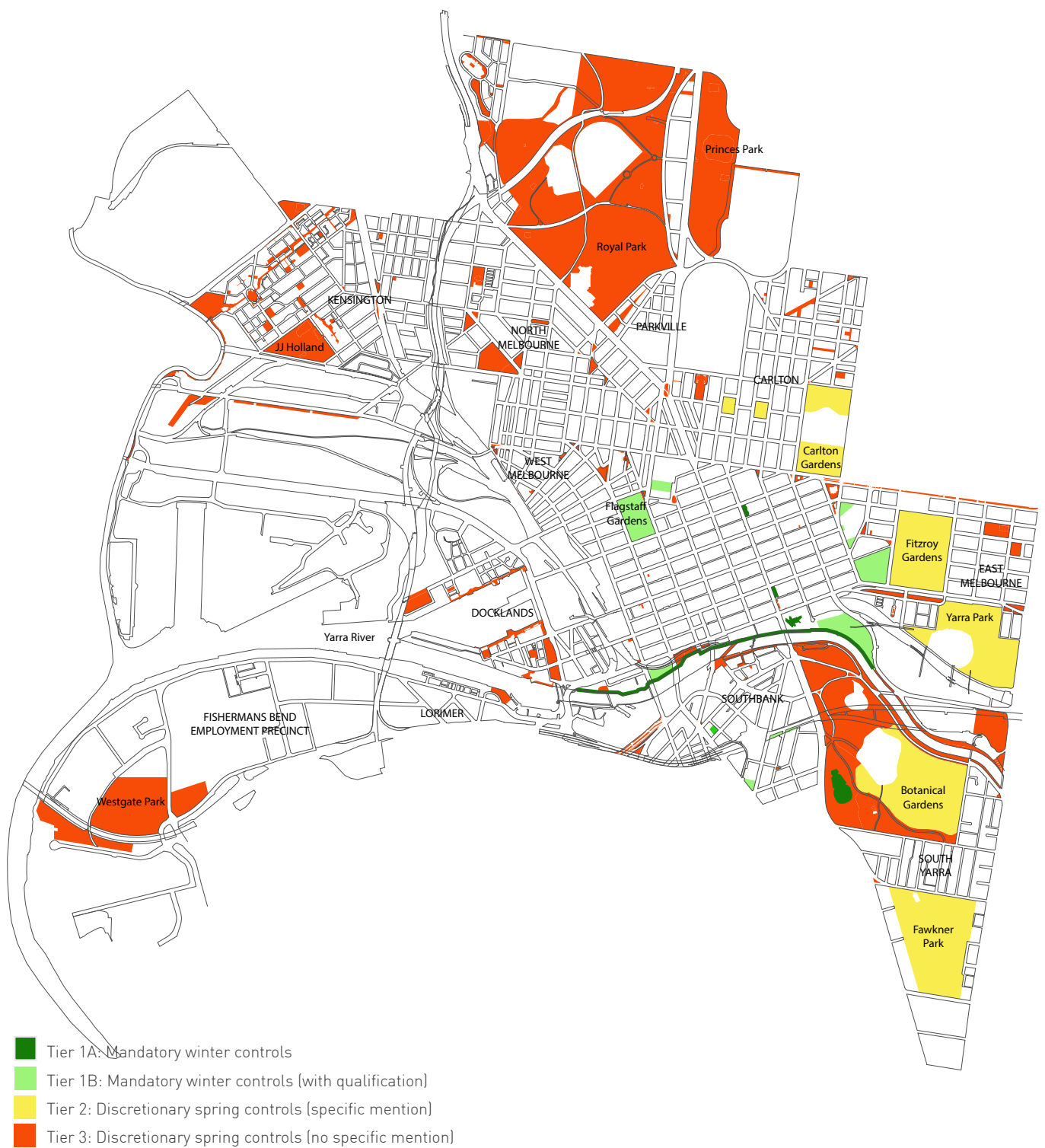
The third tier captures the remaining public spaces without mentioning them by name and provides a blanket discretionary protection between 11 and 2pm at the equinox. This has created a hierarchy of perceived importance between different public spaces, with those in the third tier considered the least important. Refer to Map 3.

Table 1: Current protection for sunlight access to parks across the Melbourne Planning Scheme

Reference in Melbourne Planning Scheme	Overview of sunlight/overshadowing controls included	Current status
<b>Local Policy</b>		
Clause 22.02 Sunlight to Public Spaces	<p>General Development should not unreasonably reduce the amenity by casting additional shadow between 11am and 2pm on 22 September (discretionary)</p> <p>Key Spaces - Policy and DD010 No additional shadow on Yarra River (11am-2pm, 22 June), Federation Square, City Square, State Library Forecourt, Bourke Street Mall, Shrine, (11am-3pm, 22 April to 22 September) Boyd Park (12am-2pm, 22 April to 22 September) (mandatory)</p> <p>No additional shadow in key CBD sites- various 11am- 3pm, 22 April to 22 September and 11am-2pm, 22 April to 22 September (Discretionary)</p>	Recently reviewed through C270
<b>Zones</b>		
Docklands Zone Schedule 2 (Victoria Harbour Precinct)	The construction of buildings and works which would cast a shadow across the south bank of the Yarra River between 11.00am and 2.00pm on 22 June is prohibited (mandatory)	Review required
Docklands Zone Schedule 3 (Batman Hill)	The construction of buildings and works which would cast a shadow across the south bank of the Yarra River between 11.00am and 2.00pm on 22 June is prohibited (mandatory)	Review required
<b>Design and Development Overlays</b>		
Schedule 2 to the Design and Development Overlay (Hoddle Grid)	Overshadowing provisions-numerous areas: Yarra River corridor Federation Square City Square State Library Forecourt Bourke Street Mall Flinders Street Station Steps Batman Park Birrarung Marr Swanston Street, Elizabeth Street, Hardware Lane and McKillop Street	No review required (recently revised through C270 amendment)
Schedule 9 to the Design and Development Overlay (Fawkner Park)	Built form outcome-the amenity of Fawkner park should be protected from additional overshadowing between 11am and 2pm on 22 March and 22 September	Review required
Schedule 10 to the Design and Development Overlay-General Development Area-Built Form Central City	A permit must not be granted for buildings and works which would cast any additional shadow across the spaces listed during specified hours (Clause 2.3)	No review required (recently revised through C270 amendment)
Schedule 13 to the Design and Development Overlay (Parliament Area)	Clause 2.1 The amenity of the Fitzroy Gardens is protected from additional overshadowing between 11am and 2pm on 22 March and 22 September	Review required

Table 1: Current protection for sunlight access to parks across the Melbourne Planning Scheme

Reference in Melbourne Planning Scheme	Overview of sunlight/overshadowing controls included	Current status
Schedule 15 to the Design and Development Overlay	Royal Botanic Gardens are protected from shadow between 11am and 2pm on 22 March and 22 September Royal Botanic Gardens are protected from shadow between 11am and 2pm on 22 March and 22 September	Review required
Schedule 17 to the Design and Development Overlay	Must adhere to the Shrine Vista Height Control Formula which does not translate to site specific setback controls, but rather a calculation on a precinct scale	No review required - not related to sunlight controls
Schedule 21 to the Design and Development Overlay (Wellington Parade and Clarendon Street)	No overshadowing of Fitzroy Gardens and Yarra Park between 11am and 2pm on 22 September and 22 March	Review required
Schedule 22 to the Design and Development Overlay	No additional overshadowing of Yarra Park between 11am and 2pm on 22 September and 22 March	Review required
Schedule 33 to the Design and Development Overlay (CBD Fringe)	No overshadowing of Flagstaff gardens between 11am and 2pm on 22 September and 22 June	Currently under review through the West Melbourne Structure Plan
Schedule 40 to the Design and Development Overlay (Special Character Areas-Built Form-River Environs)	No additional shadow of the Yarra River corridor at 11am to 2pm (22 June), Federation Square 11am-3pm (22 April to 22 September), Flinders Street steps, Batman Park and Swanston Street 11am-3pm (22 April to 22 September)	No review required (recently revised through C270 amendment)
Schedule 45 to the Design and Development Overlay	Development that does not overshadow Lincoln Square between 11am and 2pm on 22 September and 22 March	Review required
Schedule 47 to the Design and Development Overlay (Central Carlton South)	Development that does not overshadow Argyle Square, Carlton gardens or the Royal Society of Victoria Gardens between 11am and 2pm on 22 September and 22 March	Review required
Schedule 60 to the Design and Development Overlay (Special Character Area-Built Form-Southbank)	With the exception of minor works or minor changes to existing buildings within that defined space, a permit must not be granted for buildings and works which would cast any additional shadow across a space listed below and shown in Figure 2 of this schedule during the hours and dates specified (Shrine, Boyd Park, Sturt Street Reserve) General provision 11am-2pm September 22	No review required (recently revised through C270 amendment)
Schedule 61 to the Design and Development Overlay (City North)	Buildings and works should not cast a shadow between 11.00 am and 2.00 pm on 22 March and 22 September over public space, public parks and gardens, public squares, major pedestrian routes including streets and lanes, and privately owned plazas open to the public. A permit may only be granted if the overshadowing will not prejudice the amenity of those areas (general provision)	Review required
Schedule 62 to the Design and Development Overlay (Special Character Area Bourke Hill)	Clause 2.3-listed places, dates and times	No review required (recently revised through C270 amendment)



**Map 3** Existing protection from overshadowing by tiered category

## Public open space contributions - sunlight provisions for future parks

This policy applies to all development applications that include an application for subdivision that would trigger an open space contribution. It outlines the circumstances in which the Council would accept a land contribution instead of a cash contribution towards the delivery of open space. This policy therefore provides guidance on the City of Melbourne's expectations of 'adequate' sunlight provision for future parks as follows:

*'whether the open space area receives adequate levels of sunlight (a minimum of 3 hours of direct sunlight between 9am and 3pm on June 22 and at least 5 hours of direct sunlight between 9am and 3pm on September 22)'*

This is drawn from the Open Space Strategy Technical Report 2012 which states in regards to the appropriate amenity and function of the open spaces that:

*'The open space must receive a minimum of 3 hours of direct sunlight between 9am and 3pm during mid-winter and at least 5 hours of direct sunlight between 9am and 3pm on September 22. Where this minimum is not currently met, the development must not create additional shadowing of the open space.'*  
(Section 6.5.1)

Key reasons for the inclusion of these controls were the recognition that one of the key values of open space, particularly where people are living in multi-storey buildings without much or any private outdoor spaces, is access to natural sunlight and vitamin D. The requirement for 3 hours of sunlight access was set to align with the current general provisions in Clause 22.02.

It also recognised that the period in time when people mainly experience Vitamin D deficiency is in winter, hence the inclusion of a winter control, rather than only an equinox control.



## Height limit controls

While not driven by an overarching objective to protect sunlight access to open spaces, the current height limit controls have a significant and direct impact on the degree of sunlight access provided to parks.

There are a wide variety of height controls that apply across the study area, with the tallest buildings allowed within the growth areas, including City North, Docklands and Arden-Macaulay. Map 3 illustrates the range of height limits that currently apply across the municipality as well as those proposed by the Draft West Melbourne Structure Plan.

Parks that are located in immediate proximity to potentially tall buildings are the most likely to be subject to overshadowing.

There is currently one solar carve control in the Melbourne Planning Scheme which applies to the northern edge of Fitzroy Gardens. While the DDO has an objective to provide sunlight access at the equinox between 11am and 2pm, the built form control actually designates winter sunlight protection. This is a discretionary control.

There are 24 parks that are immediately adjacent to growth areas (height limits over 4 storeys). These have been identified (see Map 4) and investigated in more detail in the modelling.

### No. of storeys (range in metres)

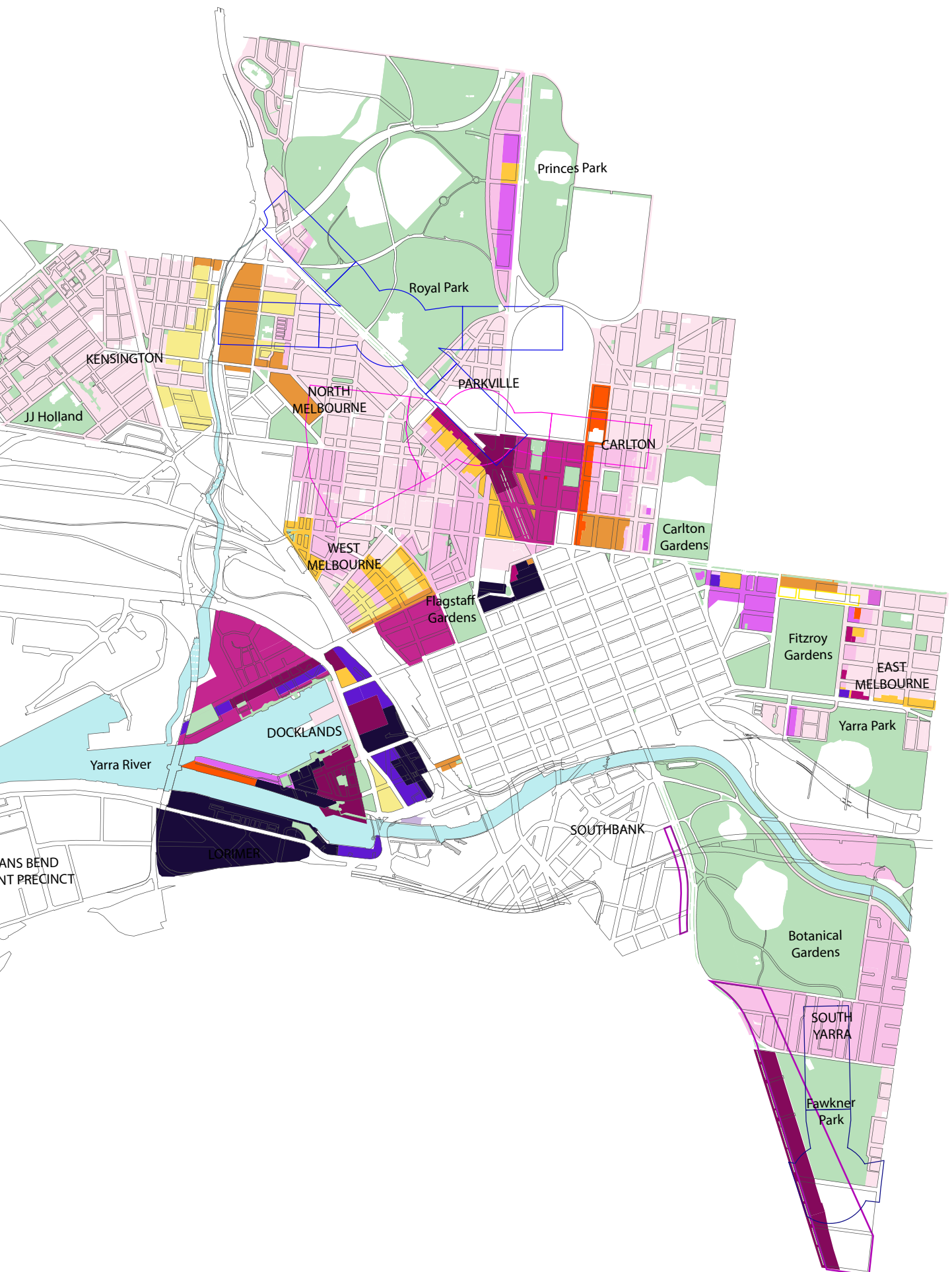
3	(7-11m)
4	(12-14m*)
5	(15-17.5m)
6	(20m)
8	(24-25m)
9-10	(30-32m)
11-12	(35-36m)
13-17	(40-52m)
19	(60m)
22-28	(70-90m)
33-59	(100-180m)

	Shrine vista controls
	Alfred Hospital (helicopter path)
	Royal Children's Hospital (helicopter path)
	Royal Melbourne Hospital (helicopter path)
	Sunlight access plane to Fitzroy Gardens
	Open space adjacent to a height limit greater than 4 storeys
	Open space adjacent to a height limit of 4 storeys or below

\*Includes 4 storey areas where commercial only buildings can increase to 16 metres

**Map 4** Current and proposed height limits and existing parks





### 3.2 How are the sunlight access controls being implemented?

The following four VCAT cases (2013-2017) have been reviewed to gain insights into how Clause 22.02, Sunlight to Public Spaces, of the Melbourne Planning Scheme is being implemented and challenged (further detail in Appendix C).

VCAT cases reviewed	
1	<p>DEXUS Property Group Ltd v Minister for Planning (18 May 2017), 32-44 Flinders Street, Melbourne</p> <p>VCAT reference number P1979/2016</p> <p>Minister for Planning application number TPM-2014/70139</p>
2	<p>10 Wellington Parade Pty Ltd v Melbourne CC (24 August 2015), 10 Wellington Parade, East Melbourne</p> <p>VCAT reference number P73/2015</p> <p>Planning application number TP-2014-579</p>
3	<p>CBUS Property West Melbourne Pty Ltd v Melbourne CC (19 October 2015), 9 Dryburgh Street, West Melbourne</p> <p>VCAT reference number P811/2015</p> <p>Planning application number TP-2014-843</p>
4	<p>Australian Hotel Developments Pty Ltd v Melbourne CC (28 May 2013), 33-35 King Street, Melbourne</p> <p>VCAT reference number P2675/2011</p> <p>Planning application number TP-2011-377</p>

In summary, the review of the above relevant VCAT cases identifies the following implications regarding how Clause 22.02, Sunlight to Public Spaces, of the Melbourne Planning Scheme is being implemented and challenged:

- The first tier of key public space with mandatory controls, including the Yarra River corridor, are well protected under the current (Amendment C270) version of Clause 22.02 and DD010 as illustrated by Case 1. However, this protection currently appears to rely on the subject site being included within DD010, as Clause 22.02 does not include the key times and dates identified for the first tier of public space.
- VCAT is also likely to implement the requirements of the current (Amendment C270) version of Clause 22.02 and DD010 as they relate to the second tier of key public space including Birrarung Marr with discretionary controls due to the statement 'unless the overshadowing will not unreasonably prejudice the amenity of the space'. However, again, this protection currently appears to rely on the subject site being included within the DD010, as Clause 22.02 does not include the key times and dates identified for the second tier of public space.
- Cases 2 to 4 indicate that VCAT is less likely to protect the sunlight to the more general third tier or 'Other Public Spaces within the municipality' defined as 'any public space, public parks and gardens, public squares, major pedestrian routes including streets and lanes, open spaces associated with a place of worship and privately owned plazas accessible to the public'. It is noted that the current Clause 22.02 does not apply to land within the Docklands Zone and Schedule 5 to the Capital City Zone (City North).
- In terms of this third tier of public space, cases 3 and 4 indicate that VCAT values recreational public

open space, such as public parks and gardens, ahead of streets, lanes and public squares and plazas, such as that at the front of the North Melbourne Train Station.

- Finally, the more general third tier makes no mention of proposed public open spaces, which was evident in the VCAT decision for Yarrabank Developments Pty Ltd v Melbourne CC (22 June 2017) in relation to the shadow impact of the proposed development at 405-421 Spencer Street, West Melbourne, over a potential public space at Batman Street under the future West Melbourne Structure Plan. In this case, the proposed development overshadowed a potential new park within the street. As there was no certainty that the park would be in this location, it was not given significant regard.



## Categorisation of sunlight access

Categorisation of sunlight access	Degree of sunlight access/overshadowing
High levels of sunlight access	The whole park is predominantly in sunlight for the time period nominated. Marginal overshadowing occurs only at the perimeter of the park
Partial overshadowing	Parts of the interior of the park space are overshadowed for a portion of the time period nominated
Significant overshadowing	Large portions of the interior of the park are overshadowed across the time period nominated