
ACT Division
Planning Institute of Australia
11 National Circuit
Barton ACT 2600

1 June 2012

Committee Chair
Standing Committee on Planning, Public Works and Territory and Municipal Services
Legislative Assembly
Canberra ACT
Attn: Ms Mary Porter MLA
committees@parliament.act.gov.au

Dear Ms Porter

Subject: Territory Plan (Recommended Draft Variation No 306) Residential and other Codes

The Planning Institute of Australia is the national association representing professional town planners throughout Australia. The Institute has a total membership of about 4,500 people of whom within the ACT a large portion are current and past ACT Government employees.

It is therefore apparent that Planning Institute of Australia, mindful of its strict code of ethics is uniquely sensitive to criticisms of the performance of the Planning Authority and its draft variations.

The Planning Institute of Australia ACT Division (PIA) appreciates this opportunity to make further submission on residential policy in this Recommended Draft Variation 306 (RDV306) following from that policy and rules first proposed in Draft Variations 301 and 303 and then the initial release of Draft Variation 306.

PIA ACT wishes to acknowledge the substantial efforts undertaken by the Environment and Sustainable Development Directorate's Planning and Land Authority (the Planning Authority) staff to prepare a summation of the significant number of issues arising from the first draft of the Residential policy and codes in relation to RDV306.

Our Submission is divided into two parts being:

- Specific Code matters; - improving the residential codes performance and understanding.
- Plan making matters; - providing the planning authority with opportunities to facilitate collaborative solutions.

Summary of this submission

The Planning Institute Australia ACT Division contends that:

- The drafted criteria are less than optimal for justifying non-compliance with the planning codes and undermine the effectiveness of the criteria. Consequently, Recommended Draft Variation 306 does not represent a significant improvement or resolution of the initial problems identified in previous PIA submissions on the residential policy review in DV301, 303 and 306.
- PIA is concerned the planning codes are not based on measurable rules and objective tests and are therefore contrary to the intent of the DAF Model best practise planning system that underpins the Planning and Development Act 2007 and Territory Plan 2008
- PIA affirms the COAG initiative to sets up, through the DAF model, boundaries around the exercise of discretion in design response and to remove ambiguous language (see Attachment 1) that will not provide clarity and definition. Accordingly every effort should be made to remove ambiguous language in the planning codes attached to Recommended Variation 306.
- Specific matters that need redress are:
 1. The unnecessary duplication of Zone Objectives, rules and criterion in the planning codes and establishment of a clear zone based development hierarchy.
 2. Uncertainty surrounding the content and implementation of the underpinning policy and analysis e.g. the links between the solar access provisions and the relevant objective of good access.
 3. Ambiguity of language and definition that fail to guide from developers and the community in application to both the statements against criteria and appropriate design response expectations.
 4. The use of “reasonable” and implicitly a “reasonableness test”, should be defined within the planning system to avoid unnecessary litigation.
- PIA submits an objective test example for a preferred solar access criterion that can achieve the planning authority intent, retain flexibility in the authority’s description, avoid indefensible decisions and consequential litigation costs, and provide the certainty that developers and the community seek in the planning codes.
- In the interest of reducing the unnecessary time and costs being imposed on the community, professions, this Assembly Committee in the plan change process; PIA proposes the introduction of an independent mediated forum for submitters and the Planning Authority to improve the scope of changes sought prior to Committee hearings.

Draft Objective Test based Criterion (with reference to Appendix 1).

Solar access must provide;

- a) That no building will overshadow a neighbouring block more than the shadow cast by a 1.8m fence on the boundary,**
- b) a minimum of 3 hours of sunlight,**
 - i) for additional building bulk adjacent to boundaries, other than the northern boundary of an adjoining residential block, and**
 - ii) subject to boundary setback and building height controls.**
- c) in relation to the sun angle plane application to:**
 - i) all large blocks (i.e. Greater than 500m²).**
 - ii) all blocks in the Molonglo Valley.**
 - iii) all mid-sized blocks approved on or after the commencement date of (this variation) dd/mm/2012.**
 - iv) all compact blocks approved on or after the commencement date of (this variation) dd/mm/2012.**

Part 1 Specific matters

PIA has extensively commented on its concerns regarding elements of the drafting language, structural complexity of codes, the relationship between rule intent and policy delivery, and the need for evidenced based planning in submissions to the Planning Authority and this Committee.

These matters remain extant and a reprise of them all here would expand this submission significantly. PIA has instead chosen to draw out just a few representative examples of our wider and finer grain specific concerns regarding this Recommended Variation 306.

Our detailed submission is divided into several sections providing comment on:

1. Zone Objectives
2. Specific Code Provisions
3. Specific Code Comment

1.0 Zone Objectives

The Planning Authority's Fact Sheets¹ provide examples of desired character for each zone and set out intended outcomes in a clear and concise way. These fact sheets are laudable efforts in visual representations that in many respects provide simple, transparent and innovative planning guidance expected by the community and development industry.

The zone objectives do not display the same simplicity and clarity of thought that is evident in the fact sheets. Many of the objectives are duplicated and applicable in every zone, with nothing to distinguish or inform the response to criteria in the planning codes without over reliance on the expertise of the individual interpreting them.

This burden of proof (justification) for developers and planners opens the process to challenge.² PIA is concerned that over reliance on ambiguous language in planning codes, in combination with a relaxation of planning capacity skills and knowledge at all levels in development assessment, opens the planning system to challenge and unintended outcomes for the authority, the community and Government policy.

A further concern is the majority of the cohort of 9 or 10 objectives in each zone is simply repetitive, irrespective of the zone typology. An examination of NSW's equivalent approach set out in its standard instrument finds zone objectives run to between 2 and 5 in number. Similarly the Victorian Planning scheme zone objectives are usually 4 or 5. It is not immediately apparent that the ACT requires twice as many objectives per similar zone, rather it appears a case of quantity over quality of content.

PIA notes planning systems have comparable key components. Consideration of adjacent jurisdictions to the ACT, provides insight into objective writing as these jurisdictions in advisory material state that policies and objectives should not repeat, and are statements of intent or expectation.³ It is understood that these planning jurisdictions are different however the purpose of zone objectives parallels the ACT.

The Territory Plan 2008⁴ states:

"Zones and Zone Objectives"

The Zones are depicted on the Plan maps to:

- *apply different planning policies to different land areas and different types of land uses, and*
- *provide a structure of land uses that can be applied to parcels of land.*

There are 11 Zones, four of which have sub-Zones.

¹ ESDD Website Recommended Draft Variation 306 Appendix 2

² See Attachment 1 for consideration of the word "reasonable" and the implicit "reasonableness test".

³ Victorian Govt Dept Planning Practise note 8, 2010 writing a local planning policy

⁴ <http://www.legislation.act.gov.au/ni/2008-27/copy/68135/pdf/2008-27.pdf>, Downloaded 1 June 2012

Each Zone or sub-Zone has objectives that provide broad policies for defined land areas inform controls in Codes and applied by Development Tables and provide context to the formulation of proposals to vary the Plan. The objectives are also relevant to the assessment of merit track development proposals (s120) and impact track development proposals (s129)."

With this in mind, PIA considers as unnecessary duplication of zone objectives where they do not pass the administrative requirement of the Territory Plan to provide a point of differentiation to inform zone planning controls between zones.

Where an objective for a residential zone is so generic as to be applicable in every circumstance, from low density to high density multi use zone development typology it cannot be placed in the plan in a hierarchical position that demonstrates its applicability to all similar zones. Where interpretation of the objective is too fluid to be of specific value it should be removed.

The proposed duplication of objectives are such broad motherhood statements that they are susceptible to erosion and corruption of purpose and become merely aspirational.

The objectives that were in the original housing development codes, though with similar drafting issues, were necessary as parameters of intent to guide interpretation of the criteria. The removal⁵ of land use based, zone specific objectives and replacement with the proposed high level, non-specific, subjective and ambiguous objectives in the Zone Development Codes cannot provide effective and clear linkages to criteria.

The objectives and policy that the rules and criteria are seeking to implement must be clearly understood and uniquely stated so that they link to the respective purpose of each zone to facilitate a design response appropriate to development typology for each zone.

Below are the proposed Residential 1 Zone Objectives (note: duplicated objectives are in bold)

"Residential 1 Zone Objectives

- a) Provide for the establishment and maintenance of residential areas where the housing is low rise and predominantly single dwelling and low density in character.*
- b) Protect the character of established single dwelling housing areas by limiting the extent of change that can occur particularly with regard to the original pattern of subdivision and the density of dwellings*
- c) Provide for a wide range of affordable and sustainable housing choices that meet changing household and community needs***

⁵ ACTPLA correspondence Ref A6430313 to PIA dated 30 May 2011

d) Ensure development respects valued features of the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties

e) Provide opportunities for home based employment consistent with residential amenity

f) Provide for a limited range of small-scale facilities to meet local needs consistent with residential amenity

g) Promote good solar access

h) Promote energy efficiency and conservation

i) Promote sustainable water use”

Examples of the duplication of objectives across the zones are set out in the following table.

Low to high density Zones	RZ 1 objective common with other zones	Desired Character for Zone	Unique Objective
RZ 1 9 objectives		low rise and predominantly single dwelling and low density in character	
RZ 2 10 objectives	6 exactly - c, e, f, g, h, i	low to medium density in character particularly in areas close to facilities and services in commercial centres	a, b, d,
RZ 3 9 objectives	6 exactly - c, e, f, g, h, i,	low rise and predominantly medium density in character and particularly <i>in areas that have good access to facilities and services and/ or frequent public transport services</i>	a, b, d,
RZ 4 9 objectives	6 exactly - c, e, f, g, h, i,	medium rise and predominantly medium density in character and particularly <i>in areas that have very good access to facilities and services and/ or frequent public transport services</i>	a, b, d,
R5 9 objectives	6 exactly - c, e, f, g, h, i,	generally high density in character <i>particularly in areas that have very good access to facilities and services and/ or frequent public transport services</i>	a, b, d,
Zones	RZ2 Objectives common with	Minor changes	Unique Objective

	other zone		
RZ 1 9 objectives	c, f, g, h, i,	limiting the extent of change that can occur particularly with regard to the original pattern of subdivision and the density of dwellings	a, b, d, e
RZ 2 10 objectives		redevelopment by enabling a limited extent of change with regard to the original pattern of subdivision and the density of dwellings	
RZ 3 9 objectives	"b", c, "d", e, f, g, h, i	"b"- enable changes "d"– <i>development</i> and redevelopment	a, "d"
RZ 4 9 objectives	"b", c, d, e, f, g, h, i	"b"- enable changes "d"– <i>development</i> and redevelopment	a, b,
RZ 5 9 objectives	"b", c, "d", e, f, g, h, i	"b"- enable changes "d"– <i>development</i> and redevelopment	a, b,
Medium to High Zone	R3 Objectives common with medium and high density zones		Unique Objective
RZ 3 9 objectives	b, c, d, e, f, g, h, i		a,
RZ 4 9 objectives	b, c, d, e, f, g, h, i		a,
RZ 5 9 objectives	b, c, d, e, f, g, h, i		a,

While the right hand column of the above table shows obvious transition in unique objectives between low and high density zones, it is difficult to match the administrative governance of the Territory Plan Zone and Zone Objectives noted above to the implementation where at best 4 of the 9 objectives and at worst 8 of the 9 objectives are identical for each distinct zone.

Conclusion

Zone objectives need to successfully convey the explicit intention of the zone to ensure there is a 'point-of-difference' in each zone as well as acknowledging the differences within different geographic areas of the same zone. (i.e. the objectives must clearly distinguish RZ1 from RZ2, for example, as well as acknowledge the

distinct differences in an RZ2 zone in Wanniasa for example from an RZ2 zone in O'Connor or an RZ1 zone in Gungahlin from an RZ1 zone in central Canberra).

We note that the Committee has had the benefit of a presentation from ESDD which provided a table of the objectives for each zone and an explanation of the key differences. PIA remains concerned that the wording of the objectives still do not adequately distinguish the desired differences between each zone.

We note that it is ESDD/Planning Delivery Branch's intention to publish further explanatory material on the plan's objectives using plain English, photographs and diagrams to explain the key differences between the five residential zones. PIA is keen to see this explanatory material produced prior to the introduction of any new residential Codes.

1.1 Density Policy

PIA note that Variation 200 established policies for suburban core areas through increased densities close to local commercial centres. These areas were originally considered through area specific policies and are now represented in the RZ2 zone.

We are concerned that proposed density controls have been reduced and are now equivalent to an RZ1 zone contrary to the original planning intentions for these areas.

PIA supports the introduction of set density controls for RZ2 zones. We consider that this will remove the debate about the "level" of development and focus the debate in achieving quality urban design outcomes.

However, PIA consider that rather than have a series of tables that outline the number of units that may be built relative to different block sizes, a much simpler approach would be to include a Rule which simply stated: "*One unit per 200m² site area*" for example.

We also consider that the reduction in density (development yield) within the RZ2 zones, as proposed in the final recommended Code will have a significant impact on the 50% urban infill target under the 2004 Spatial Plan and draft 2011 Planning Strategy.

PIA is concerned that the cumulative effect of the range of RZ2 controls have not been sufficiently tested to consider the implications in relation to the achievement of urban infill targets and affordable housing.

In addition, the controls, coupled with other development factors (including the Lease Variation Charge) will potentially have a significant effect on housing affordability or lead to the prospect that low density redevelopment within RZ2 zones is not economically feasible resulting in limited, or no, redevelopment occurring in these areas.

1.2 Rules / Criteria

Most developments are Merit track whether or not they comply with the rules of the Codes, due to the limitations imposed through the Development Tables. As such, it

could be expected that a development proposal will attempt to ignore the intentions of a rule and focus on the criterion.

PIA considers that either there should be some procedural benefit in complying with the rules of the Codes (e.g. Code track assessment) or that the Codes should offer strong guiding principles as to what variations to the rules would be acceptable.

There should be clear linking between the rule and the related criterion as when a proponent wants to depart from the rule there has to be clear understanding of what is a reasonable departure.

PIA considers that the general approach to assessment of development proposals is that applicants should be encouraged to comply with the Rule. Only where the proposal demonstrates exemplary design outcomes or some other public benefit, then a departure from the Rule should be considered and the responsibility rests with the applicant to demonstrate that the departure is reasonable in the prevailing circumstances. Notwithstanding this assessment approach, PIA also considers that all Rules should have an associated Criterion. This maximises opportunities for design innovation.

There should be links (cross references) between the rules/criteria and the zone objectives to explain the purpose and reasons for the rule/criteria.

Diagrams and explanatory notes should be included within the Codes. The diagrams used in fact sheets should be incorporated directly into the Codes to clearly outline what a particular planning control was trying to achieve and what design outcomes should be avoided.

1.3 Mandatory Rules

PIA has been a strong supporter of the ACT Government and Planning Authority in implementing the principles of the DAF model for Development Codes.

We consider a fundamental principle of this approach is that planning controls establish a quantitative control (usually a numerical measure) and associated with that measure, a performance criteria is outlined (usually a qualitative target) to enable design innovation while still achieving the intention of the rule.

This approach provides certainty for the community by establishing the 'base-line' for development and in addition allows flexibility for industry by allowing innovative design solutions. This is distinct from their use by the Planning Authority for its determining whether the flexibility is appropriate to the location.

2.0 Specific Code Provisions

Rather than address the many provisions, where ambiguous language and content are identified in submissions on the rules and criteria, PIA seeks only to point out the key concerns. With regard to the (DAF) Model Principles for Objective rule writing, previously provided to this Assembly in evidence and referred to in submissions on DV 301, 302, 303 and 306, we note current and previous Planning Minister

commitments to the COAG endorsed the DAF model which underpins the Planning and Development Act 2007 and its code assessable development framework, and the ACT Governments stated consistency with that model planning system.

PIA also notes that the Planning Authority's own web page states that the Territory Plan *"aims to ensure the Territory Plan remains a contemporary best practice document outlining planning requirements in the ACT and meets the recommendations of the national Development Assessment Forum."*⁶

Similarly rather than address the duplications of the occurrence of "reasonable" we propose to explore the issue in regards to its application to the solar access provision.

2.1 Reasonable as a criterion

PIA's stated position is that the use of ambiguous language such as "reasonable", and by implication the "reasonableness test" (in essence what a reasonable person may reasonably conclude is reasonable), is not best practise or meets the Development Assessment Forum (DAF) model recommendations.

The DAF model is a recent and significant structural shift to the ACT planning system and seeks to improve clarity and interpretation with regard to a planning system. To assist Governments a key underpinning is the need for objective rule tests i.e. the removal or reduction of subjective elements in planning codes.

The institute contends that the unregulated use of the expression "reasonable" has potential to open the legislation to interpretation by disaffected persons. For instance, adjacent landowners, and developers can be said to have a reasonable expectation from their interpretation of planning codes. However, the reasonable expectation of the disaffected person and the reasonable interpretation of a consent authority may be widely different.

A recent and similar experience is the use of an ambiguous phrase "affordable housing", which to a technically literate person has a specific and clear meaning. "Affordable housing" is intended to be housing that can be afforded by the lower quartile of the house purchasing public. To a reasonable person, "affordable housing" may have the same meaning as housing that is affordable, in other words finds a market. A reasonable interpretation to a common person in this case is not a reasonable interpretation to a planning authority. Consequently, PIA is clearly of the view that reasonableness should be limited to the interpretation of the reasonable consent authority. A consent authority is in the unique position of balancing a number of objectives and criteria and expectations identified within its planning scheme. A disaffected person may have a range of "reasonable" expectations based on other factors; and anticipated change in land value, realisation of development returns or anticipated continued amenity for example can drive an individuals

⁶ http://www.actpla.act.gov.au/tools_resources/legislation_plans_registers/plans/territory_plan downloaded 28 May 2012

reasonable expectations. For a more detailed explanation of our concerns regarding reasonableness see appendix 1.

Proposed solar access Criterion

Solar access must provide;

- a) That no building will overshadow a neighbouring block more than the shadow cast by a 1.8m fence on the boundary,
- b) a minimum of 3 hours of sunlight,
 - i) for additional building bulk adjacent to boundaries, other than the northern boundary of an adjoining residential block, and
 - ii) subject to boundary setback and building height controls.
- c) in relation to the sun angle plane application to:
 - i) all large blocks (i.e. Greater than 500m²).
 - ii) all blocks in the Molonglo Valley.
 - iii) all mid-sized blocks approved on or after the commencement date of *(this variation)* **dd/mm/2012**.
 - iv) all compact blocks approved on or after the commencement date of *(this variation)* **dd/mm/2012**.

Should this Assembly Committee consider the above example as a better objective test than the existing reasonable solar access criterion we would like to develop a recommended change, in discussion with the planning authority, for the committees inclusion in its reported response to the Minister.

Similarly should the recommended change be supported the following table specifies the criterion where reasonable solar access could be replaced with a DAF modelled response.

Occurrences of the above Reasonable Solar Access criterion in the recommended DV306.

App B - Residential Code	App C - Single Residential housing Code	App D - Multiunit housing Code
C26 c C30 c C51 c C52 c	C7 b C8 c C9 c C14 e C16 c C17 c C18 c	C20 c C21 c C22 c C23 c C26 c C30 e C31 c C32 c C39 h - reasonable solar access to principal private

		open space. C56 f – reasonable solar access C88 e
--	--	---

It is noted that there are two inconsistent applications of reasonable solar access (C39 h and C56 f) in the above list that could also benefit from the proposed PIA criterion.

It is noted that if the solar access criterion is considered as an overarching requirement then implicitly this would be relevant in every instance and not need repeating. As the codes are divergent and evolving in their format and content, as evidenced by downloading a random sample of the codes, a technical solution to structural change to enable the overarching application of the criterion would not be overly difficult.

PIA recognises that the current process and timeframe does not provide time to resolve a reduction in the unnecessary replication of the same criterion throughout the respective codes with the planning authority, unless directed by this Committee to do so.

1.4 Desirable character

PIA notes the intended outcomes set out in the planning authority's Fact Sheets as to desired character for each zone. They greatly enhance the understanding of acceptable development outcomes and benchmark current community expectations.

The planning authority should be commended for this move from text based to visual communication.

PIA contends that the use of such visual material while encouraged will require regular update to ensure the interpretation of character for each zone retains a currency to enable innovative design solutions that fit within the context and locality.

2. Specific Zone Code Comment

The following represent specific commentary on an aspect of the codes.

2.1 Residential Zones Code

Mandatory Rules

The Residential Zones Development Code includes a total of 64 Rules and 39 of these (or 61%) are mandatory rules. This dominance of mandatory rules forces proponents to comply with (usually) numerical base-line standards often at the expense of quality urban design outcomes.

Secondary Residences

Definition

The definition of Secondary Residence is “a second dwelling on a block” and the definition of Dual Occupancy is “use of land for two dwellings”

If an application is lodged for 2 dwellings on a block is it considered as:

- 1 Dwelling plus 1 Secondary Residence (and required to meet the provisions under the Residential Zones Code)
- or
- A Dual Occupancy development (and required to meet the Multi-Unit Code provisions)

PIA ACT suggests this issue be resolved prior to the introduction of any new Codes.

Parking

Rules 22 & 23 – Are mandatory rules requiring an additional parking space for the secondary residence (not located in the front zone). On the basis that the principle reason for provisions relating to Secondary Residences is to replace the previous “Habitable Suite & Re-locatable Dwelling” controls (often referred to as “Granny Flats”) it is likely most applicants for this form of development will be households seeking enhanced accommodation on-site for their ageing parents, or for some independence for disabled children as they mature.

We acknowledge there may be numerous examples where a parking space would be required. However, non-compliance with a mandatory rule must result in refusal of an application. We consider this is considered a harsh imposition where in many cases the occupants of the secondary dwelling would not be capable of driving a vehicle.

PIA ACT suggests that this not be a mandatory rule and that an appropriate criterion be included where the circumstances for the secondary dwelling are considered prior to determining the need for additional parking.

Supportive Housing

It is not clear as to why relevant provisions applying to multi-unit housing, or at least modifications of those provisions, do not apply to Supportive Housing.

PIA ACT consider that amenity and environment controls such as solar access, landscape areas, privacy, ventilation, noise attenuation, storage and the like are equally important (if not more important) to a resident of a Supportive Housing unit as to an occupant of a multi-unit dwelling.

PIA ACT suggests that the relevant provisions of the Multi-Unit Housing Code should apply to Supportive Housing developments.

Boarding Houses

Rule 26 – Is a mandatory rule requiring a boarding room to be at least 12m².

PIA ACT consider that as the Canberra community ages, and occupancy of existing 3-4 bedroom detached dwelling stock often drops to 2 or less people, that an appropriate policy to assist in maintaining population within existing areas would be to facilitate households who wish to rent out their vacant rooms (e.g. to students),

and as such operate a very small scale Boarding House (as defined by the Territory Plan).

A common size for bedrooms built throughout Canberra in the 1960s-1980s is slightly less than 12m², particularly for the 2nd, 3rd and 4th bedroom of a detached dwelling. As such all these dwellings would be prevented from renting out their rooms.

PIA ACT considers this mandatory rule to be counter-productive and suggest that this not be a mandatory rule and that an appropriate criterion be included.

2.2 Single Dwelling Code

Rules 15 - R17 – establish mandatory rules for buildings on or near boundaries.

It is not clear why the dimensions stated in these rules are so critical to quality design outcomes that they must be mandatory rules.

For example, Rule 16 suggests that that a garage wall 8m long is acceptable but a garage wall 8.01m long is so offensive an application proposing it must be refused.

These rules would seem to prevent the opportunity for 'stack' parking arrangements within garages, thereby minimising the width of garages and subsequent detrimental impact on streetscape generated by wide, dominant garages.

Rule 41 – requiring noise reports by qualified acoustics consultants should enable one report to be prepared for all the blocks identified in the relevant Precinct Code. This would avoid individual dwelling owners from the expense of the reports, contributing to improved housing affordability.

2.3 Multi-Unit Housing Code

Mandatory Rules

Further to earlier comments on the extent of Mandatory rules, the Multi Unit Housing Development Code includes a total of 36 mandatory rules. This dominance of mandatory rules forces proponents to comply with (usually) numerical base-line standards often at the expense of quality urban design outcomes.

High Density Zones

Rule 22 – Allows 6 storey development within RZ5 only if the land is more than 50m from and RZ1, RZ2 or RZ3 zone or more than 40m from and CFZ, PRZ1, or PRZ2 zone.

A review of the Territory Plan maps shows RZ5 zones often occur along narrow strips within the future suburbs of Wright, Coombs, Kenny and Moncrieff.

These narrow strips usually adjacent to RZ1 Zones would likely mean that the full extent of development (achieved through building height) will not be achieved. Again this may have an impact on achievement the urban density targets outlined in the 2004 Spatial Plan.

2.4 Lease Variation General Code

Lease Variation Application Details

PIA ACT submits that many applications for lease variation are based on a desire for the lessee to maximise the potential of their investment (i.e. their land asset). This is quite appropriate and, as such, many lease variation applications do not have details in relation to design, construction or floor layout.

The Lease Variation Code requires detailed design and impact analysis at lease variation stage which attempts to provide a precise solution to an issue at a time where the development proposal is usually quite imprecise.

The lessee may have a general understanding of how the design of their project may evolve if the lease was varied, but at the time of making the lease variation application these design outcomes are often not fully resolved. To require detailed documentation would necessitate resolution of design outcomes. This is considered inappropriate and is likely to lead to “hypothetical” designs being lodged, just to satisfy the DA lodgement requirements, with substantial amendments being lodged at a later date when the design and floor layout is fully resolved.

In addition, many leases include multiple land uses within the lease purpose clause, even though only one use at any one time may be proposed. It is not clear whether the detailed documentation (e.g. noise, odour, traffic, waste assessments) if required at lease variation stage, would need to consider the cumulative impacts if all potential uses operated within a site at the one time (which is an unlikely scenario), or whether one specific potential land use would need to be considered.

We consider that as the Territory regularly sells land with diverse uses included in the lease purpose clauses clearly establishes the principle that lease provisions may be considered

Part 2 Plan making matters

PIA understands the legislative processes and is not proposing any changes rather we note that the system of submission, review further submission and rebuttal sets a potential adversarial context to plan making.

We have also participated in a Ministerial Forum chaired and presented by the planning authority to which content and responses were provided for comment on and recommendations from append this RDV306 .

It is therefore to this committee that we advance a consideration of a new paradigm in the plan making processes with which you have oversight.

Forum for issues discussion

- Adversarial submission and response matters; The legislative process of submission and rebuttal is being applied without administrative opportunity for informal exchange of ideas and consequentially is uniformed by conversation between the Planning Authority and submitters as to what either party understands to be an issue and a solution. It therefore creates a perception of conflict where none may exist.

PIA supports the need for the Planning Authority to have qualified planning discretion and flexibility to exercise its decision making processes based upon best practise and procedures. Our members within the Planning Authority are qualified and capable at determining an appropriate scale of residential development through the exercise of their professional experience.

We contend that there are also opportunities to enhance the Planning Authority's capacity through PIA's complementary Certified Practising Planner expertise and Independent peer review panels.

- Mediated solutions; Non-legislated interventions in the submission process, called by the Standing Committee, can assist in reducing the committee workload and enable the opportunity for the planning authority to meet with submitters and work towards a mediated set of changes from submissions and that these then could form the recommendations to be returned to this Committee for its consideration and inform its advice to the Minister. Such a mediated process and reporting back date could be set at the Committees discretion to ensure the delivery of plan changes and response to the Minister is not delayed.

PIA suggests that it is more efficient to resolve issues before they get to this Standing Committee and in doing so the volume of material the committee needs to cover could be significantly reduced thereby allowing it more time on its deliberation.

We suggest that there is an opportunity for this committee to direct the parties to an independently mediated forum, in line with mediation practises through court and tribunal processes, to move from an adversarial submission process to that an more robust and effective process in addressing these plan changes

It would seem to PIA that were submitters and the Planning Authority able to refine matters following the release of the consultation report and prior to their being put to the Assembly Committee for consideration this would:

- reduce hearing times on such significant matters as the complete review of the residential policy and planning framework for the nation's capital,
- reduce the volumes of supporting conceptual frameworks and evidence submitted,
- enable the committee, with greater certainty that matters had been judiciously prepared for its hearing, to respond in its reporting back to the Minister and Government.

Conclusion

The Planning Institute Australia ACT Division thanks this Committee and the planning authority for the opportunity to comment and looks forward to providing further assistance in promulgating development controls that enable planning of the National capital.

Should you require further information or clarification please contact the Mr Viv Straw.

Yours Sincerely

Viv Straw CPP, MPIA

President PIA (ACT Division)

Attachment 1: The reasonableness of reasonable

Appendix 1 The Reasonableness of reasonable

PIA's stated position is that the use of ambiguous language such as "reasonable", and by implication the "reasonableness test" (in essence what a reasonable person may reasonably conclude is reasonable), is not best practise or meets the Development Assessment Forum (DAF) model recommendations.

The DAF model is a recent and significant structural shift to the ACT planning system and seeks to improve clarity and interpretation with regard to a planning system. To assist Governments a key underpinning is the need for objective rule tests i.e. the removal or reduction of subjective elements in planning codes.

It has been suggested that the use of "reasonable" has currency in the ACT, however that ignores that this is new policy and that codes are being tied back to an earlier test that no longer fits the current system. The reasonableness test provides no certainty of application or interpretation. The validation of its relevance as an objective test appears to be founded on its occurrence "over 800 times" in legislation through a word search may appear a substantial weight in numbers for justification. However a reasonable person would consider "legislation" to be the enacted statutes, i.e. current Acts. This interpretation however would mislead a reasonable person.

PIA has researched the ACT legislation database to clarify "800" context and found the word reasonable only occurs in 244 current pieces of legislation and of those only 41, have been introduced from the date of the Planning and Development Act. A reasonable person could conclude that the numerical tidal wave of 800 supporting arguments is being put forward in an attempt to contradict the well-founded legal concern⁷ regarding ambiguity. A reasonable person might also consider the context of the use of the word "reasonable" in legislation.

⁷ See, eg, W Parker, 'The Reasonable Person: A Gendered Concept?' (1993) 23 Victoria University of Wellington Law Review 105; A Thacker (ed), Women and the Law: Judicial Attitudes as They Impact on Women: Proceedings of a Conference held on 9-10 June at Melbourne (1988); T Adams, 'Universalism and Sexual Harassment' (1991) 44 Oklahoma Law Review 683; S Oskamp and M Costanzo (eds), Gender Issues in Contemporary Society (1993) 205-213; M Thornton, The Liberal Promise: Anti-Discrimination Legislation in Australia (1990); M Weiss and C Young, Feminist Jurisprudence: Equal Rights or Neo-Paternalism?, Cato Policy Analysis No 256, June 19 1996; P Johnson, 'The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?' (1993) 28 Wake Forest Law Review 619; V Grainer, 'Refining the Regulation of Sexual Harassment' (1993) 23(2) Victoria University of Wellington Law Review 127; M Einfeld, 'Sexual Harassment' (Dec 1988/March 1989) 21 Australian Journal of Forensic Sciences 43; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99 Yale Law Journal 1177; B Gaze and M Jones, Law, Liberty and Australian Democracy (1990); E Glidden, 'The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment' [1992] Iowa Law Review 1825; A Juliano, 'Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases' (1992) 77 Cornell Law Review 1558; E Wall, Sexual Harassment: Confrontations and Decisions (1992); M Thornton (ed), Public and Private: Feminist Legal Debates (1995) Chapter 5; N Harvey and A Twomey, Sexual Harassment in the Workplace: A Practical

PIA notes however 832 references to the word “reasonable” occur only if the definition of “legislation is broadened to include subordinate laws, disallowable and notifiable instruments, Commencement notices, approved forms, approval statements, bills, explanatory statements, regulatory impact statements, Assembly resolutions and exposure drafts.

PIA contends that the use of the word “reasonable” is primarily subjective rather than objective and that in the case of occurrence it is primarily used in the context of an explanation, not as a regulatory control and not in the context of planning.

This underscores PIA’s concerns about reasonable interpretation.

Similar problems with the “reasonableness test” occur in court and in evidence. The preeminent example of its flaw is evidenced in discrimination cases where the test relies on what a reasonable person of non-specific gender, age, faith, employment and education may consider a reasonable. No such person exists.

PIA agrees with the planning authority that a reasonable person is a common law basis of understanding⁸ and it is also understood that a reasonable person cannot be a specialist, expert or professional by the very legal requirement that a reasonable person is to be neutral. Essentially that is why in a court of law a lawyer cannot serve on a jury.

The nonsense of relying on a reasonableness test is beyond reasonable doubt. It is based on departmental, community, professional bodies and even the development industry submissions on the draft variation and compounded by an inability to define what is reasonable in such a way to be consistently applied, reliably interpreted by the development industry and community and utilised by the authority when it determines reasonable on a case by case basis.

Guide for Employers and Employees in Ireland (1995); D Rhode, Justice and Gender: Sex Discrimination and the Law (1989); P Smith (ed), Feminist Jurisprudence (1993); C MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); A Resnick, ‘The Reasonable Woman Standard’ (1992) 19 Ohio Northern University Law Review 17; D Brenneman, ‘From a Woman’s Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases’ (1992) 60 Cincinnati Law Review 1281; C Smart, Law, Crime and Sexuality: Essays in Feminism (1995) 186-202; C Forell, ‘Reasonable Woman Standard of Care’ (1992) 11 University of Tasmania Law Review 1; P Almony, ‘Ellison v Brady: A Legal Compromise With Reality in Cases of Sexual Harassment’ (1992) 37 Villanova Law Review 195; D Weisberg, Applications of Feminist Legal Theory to Women’s Lives: Sex, Violence, Work and Reproduction (1996) 725-825; D Cornell, The Imaginary Domain: Abortion, Pornography & Sexual Harassment (1995) Chapter 4; C Dragel, ‘Hostile Environment Sexual Harassment: Should the Ninth Circuit’s “Reasonable Woman” Standard be Adopted?’ (1991) 11 Journal of Law and Commerce 237; W Pollack, ‘Sexual Harassment: Women’s Experiences. Legal Definitions’ (1990) 13 Harvard Women’s Law Journal 35.

⁸ Anti-Discrimination Act 1991 (Qld) s 119; Sex Discrimination Act 1984 (Cth) s 28A; Anti-Discrimination Act 1992 (NT) s 22(2); Anti-Discrimination Act 1977 (NSW) s 22A; Anti-Discrimination Act 1998 (Tas) s 17; Discrimination Act 1991 (ACT) s 58; Equal Opportunity Act 1995 (Vic) s 85; Equal Opportunity Act 1984 (SA) s 87(11); Equal Opportunity Act 1984 (WA) ss 24-26.

In effect the planning authority is arguing that it is the sole arbiter of what is reasonable, as judge and jury, without limitation or inclusion of guidance. How can any developer justify reasonableness when such determination is withheld until after the application has been considered? Similarly the assumption of reasonable appears that a developer might not justify the development as reasonable from the developer's perspective? PIA questions this assumption.

PIA notes that the affected parties (community, neighbours or other government agencies) could be expected to have their own perspectives on the reasonableness of the adjacent development and that is not taken into account between the developers self-assessment of reasonable and the planners view of reasonable. This is also evident in the difficulty in which the planning authority has in providing a baseline defining of neighbourhood character where its view is that not of a resident in every community but as a professional outside of the community.

As to legal uncertainty and defensible decision making, should an affected person seek to appeal the decision the planning authority would have no basis, other than the planning qualifications, knowledge and experience of the individual officer, to defend its decision of what is reasonable when compared to the affected person's view of reasonable. This places the basis of the planning system not on the quality and content of the plan but solely on the quality of the operator.

The Tribunal must then decide what it considers reasonable. Its view of reasonable will not be that of either the appellant or the respondent as it will determine its own view of reasonable. While consequential case law will set a precedent of reasonable, as an outcome this approach lends itself to a cycle of litigation on a case by case basis. It also imposes additional inequitable community costs as only those affected persons that can afford legal and planning counsel are able to seek redress. This reasonable test then is demonstrably inequitable and unreasonable.

As to the over use of reasonable in the proposed planning codes PIA identifies the following example;

C12

"Buildings and other structures are sited to achieve all of the following:

- a) consistency with the *desired character*
- b) reasonable separation between adjoining developments
- c) reasonable privacy for *dwelling*s on adjoining *residential blocks*
- d) reasonable privacy for *principal private open space* on adjoining *residential blocks*
- e) reasonable solar access to *dwelling*s on adjoining *residential blocks* and their associated *principal private open space*"

Where is the democracy in such broad absolute power and discretion unfettered by any regard to guidance, relevance or direction in its exercise? It is not apparent how this clause could consistently be assessed or interpreted. That the context for its

interpretation relies on the relevant zone objectives places great weight clarity and purpose of the objectives.

That is why the DAF model sets out the objective need for clarity of interpretation, measurable and defined, so that the actors in a planning system (the developers, community, government and the planners) can have confidence those decisions of planning administrators will be uncorrupted by individual preference, consistently applied, and fair to both the development and community interest.

PIA is one of 66 submissions on the issue of content of the code, 31 of which related to clarity⁹ . The table below provides further proof of the concerns, cited from planning authority's own consultation report, and the adversarial nature to request for change, clarity and specificity.

Government Agency Submission	ESDD response
Environment Protection Agency as raising the concern in its submission "The term "unreasonable" is not clearly defined and can be interpreted in different ways by different people	<i>"..it is understood throughout the codes that the reasonableness of a proposal or departure is determined by the determining authority on the basis of information received from the applicant and, where appropriate, the referral agency."</i>
Public Submissions	ESDD response
when departing from a rule it should be clear what is a reasonable departure (e.g. including a numerical value or range)	Contrary to submissions, "reasonable" is an entrenched legal term which is typically interpreted as being what is reasonable to a reasonable person. It is common in legislation, occurring over 800 times in ACT legislation alone. When an applicant proposes a design solution that does not meet a particular rule, the onus is on the applicant to justify that departure in terms of the associated criterion. Depending on the criterion, this could involve justification on the grounds that the departure is "reasonable" under the circumstances. It is then the responsibility of the ACT Planning and Land Authority to decide whether the departure is, in fact, reasonable.
where terms like reasonable, character etc. are not defined, should provide some sort of guidance to assess this. Much time and resources spent in ACAT defining these things	
reasonable solar access is not specific enough and open to broad interpretation.	
'Reasonable' also needs to be defined	
use of terms such as reasonable, desirable, adverse and appropriate as it was considered that they were highly subjective.	
Phrases such as 'does not have unreasonable negative impact' are too vague and convoluted and should	

⁹ Pg39 section 5.5.5 Report on Consultation.

be replaced with 'does not have an adverse impact	
criteria such as desired character, reasonable privacy and typical resident do not provide certainty and are ambiguous and therefore should still have statements of intent applicable to them	

PIA respectfully suggests to this Assembly Committee that there is a better objective rather than subjective way and to that end we provide a potential example for your consideration as to how “reasonableness” could be dispensed with and clarity provided for assessing performance when addressing rules in the context of Solar Access.

As a baseline we have developed a new criterion using the planning authority’s own explanation of its intent, set out in the consultation report, its visual guidance of acceptable requirements set out in its Fact sheet on solar access, and the mandatory rule regarding Amenity (R36) that states:

“The floor or internal wall of a daytime living area of a dwelling is exposed to not less than 3 hours of direct sunlight between the hours of 9am and 3pm on the winter solstice (21 June).”

We note the original criterion which states:

“reasonable solar access to dwellings on adjoining residential blocks and their associated private open space.”¹⁰

¹⁰ Appendix B: - RESIDENTIAL HOUSING CODE ,Design and siting for supportive housing, Criterion 7 c)