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 DEAKIN ACT 2600
 2 August 2006

Mr Mick Gentleman MLA
 Chair
 Standing Committee on Planning and Environment
 ACT Legislative Assembly
 GPO Box 1020
 Canberra ACT 2601

Dear Mr Gentleman

I am writing to comment on the Exposure Draft Planning and Development Bill and the Exposure Draft Planning and Development Regulation as part of the Public Inquiry into this Bill and associated Regulation. I would like to thank the Committee for providing an opportunity for members of the community to make written comment on this proposed legislation, and should they so wish, to appear before the Committee.

I am commenting in my capacity as a private citizen and a Deakin resident. As the committee would know, I have been involved with many other Deakin residents and those in the wider community in action over the adverse impact of planning decisions on the Embassy Motel site at Deakin. Deakin residents remain very concerned about proposed development on this and prospectively other major sites in Deakin.

I have also written in to ACTPLA as part of their public comment process in similar terms to this Submission.

My Submission identifies

- the impact of the proposed legislation and planning processes on the capacity of the community to respond effectively to the adverse effect of major and controversial development, which impact may or may not be intended, and
- consequences, whether intended or unintended, of the conversion of current B8 zones to C5 and C6 zones and language relating to C5 zones.

I made extensive comments on ACTPLA's initial draft reforms. I note ACTPLA's acceptance that unincorporated organizations can have a formal voice. The original draft only allowed incorporated associations and I argued strongly that this was highly undemocratic as many community groups who wanted a voice did not want to incorporate just to do this and should not have to. This is a good outcome.

However, as outlined below, there are many adverse impacts in the proposed legislation and regulations. These are of considerable concern to the community. I hope that the Committee will focus closely on these and take the action requested at the end of this Submission.

1. Community impact – intended or unintended?

In a democratic society, government must allow for effective involvement of the wider community in planning policies and processes, especially where these may have a direct and adverse impact on that community. However, the proposed reforms restrict, to an unacceptable degree, opportunities for the community to engage in the planning processes, and to successfully argue against developments that would have an adverse impact.

This has been done both directly through the proposed legislation and by omission. This outcome may be intended, or unintended.

Relevant areas of concern are

- The provision allowing a technical variation to the Territory Plan to change a code without public consultation
- No requirement for “major” public notification on “merit assessable development” in all circumstances and no detail in current ACTPLA documentation of the “merit matters” that will require “major” public notification (and conversely those that will not)
- No automatic requirement to allow third party representations at the application stage on “merit assessable development” and no automatic requirement to allow third party appeal rights at the review stage
- The restrictive definition for allowable third-party appeals on “merit” and “impact” assessable development that will virtually eliminate effective community protest about major, controversial developments.
- The removal of automatic Ministerial referral to the Assembly Standing Committee on Planning and Environment of draft variations to the Territory Plan, eliminating a further source of community input
- The lack of any reference to systematic consultation with the community once reforms are in place, further disenfranchising the community in the planning process.

a. Technical variations to the Territory Plan (Chapter 5, Section 82)

In principle, there are good administrative reasons to allow strictly technical amendments or corrections of errors in the Territory Plan without public consultation. However the ability to change a code without public consultation is much more problematic. The wording of the relevant provision in the legislation would allow officials considerable latitude and discretion and potentially disadvantage affected individuals and communities.

The basis of the argument that the new codes do not warrant third party appeals is that these codes have undergone major public consultation. If a code is later changed without such consultation, this action undercuts the argument that code development should not attract third party appeals. It would also open up the possibility for a legal challenge, which presumably would be an unforeseen consequence of this provision.

b. No detail on “merit matters” that require “major” public notification (Chapter 7)

This is potentially one of the most controversial issues in the legislation. Under the proposed legislation, “merit assessable developments” may not be open to contest by the community and the decision on whether they will or will not hinges on whether there are matters that require “major” public notification.

It is not acceptable for ACTPLA to seek in principle agreement in this consultation process, that there need not be “major” public notification in some circumstances, if such circumstances have not been spelled out. This is the “trust us” approach; it is not a proper approach to the making of public policy. As part of the current public consultation process, ACTPLA should publish the list of proposed “merit matters” and allow the community to make a judgement on these “merit matters”. In the absence of the list, and the opportunity to debate its contents, the only possible approach to preserve opportunities for effective community comment on major and controversial developments is that the legislation should require “major” public notification of all “merit assessable developments”.

c. Restricted Third-Party appeals (Chapter 7, Chapter 12 and Schedule 1)

The legislation eliminates most third party appeal rights and unacceptably limits remaining rights, providing either very limited or in some case no opportunity for the community to effectively protest unacceptable development. This may be deliberate but may also be unintended.

Third party representations and appeals are to be eliminated entirely for “exempt” and “code” development. For “merit assessable development”, officials may approve a development that does not meet the “prescriptive code requirements”, subject to some very general considerations (Section 112). Third party input is only possible if “major” public notification occurs, and this is subject to (currently unknown) “merit matters”. Third party appeals are “potentially available” for “merit assessable development” at the review stage; the legislation says only that “there *may* be a right of review” (Section 113 – my italics); and only if there has been “major” public notification. There is no requirement to permit third party appeals. The result is that there is no guarantee that the community will have a voice when major or controversial developments in the “merit assessable track” are being assessed. A boon to developers, but is this what is intended?

Where third party appeals (and presumably third party “representations” at the application stage) are permitted for “merit” and “impact” assessable developments, these would be only where there is “material detriment”, narrowly defined as “a decision has, or is likely to have, an adverse impact on the person’s use or enjoyment of the(ir) land”. Appeals can also be exercised by organisations where the application raises issues relevant to the objects of the organisation and the organisation itself could suffer “material detriment”.

This would effectively limit appeals to individuals, clubs or businesses with immediate boundaries or views on a development. It would not allow appeals by organisations (whether incorporated or not) on the basis of far-reaching impacts of a major development on a community in the immediate suburb or in surrounding suburbs. It would also exclude heritage or environment groups being able to institute an appeal on significant heritage or environmental grounds.

This is an extraordinarily limited basis for appeals. As an example of its impact, if applied, third parties “materially” affected in relation to the proposed multi-story development on the Deakin Embassy Motel site and who would not have been allowed to appeal under this definition would have included residents and organisations affected by the impact of changed traffic flows and parking in surrounding streets; residents and others affected by the loss of existing tourist accommodation (including the local hospital and visitors to the hospital); residents and groups affected by the loss of a recreation facility; residents potentially subject to increased rates to cover infrastructure and offsite costs of a major development; local residents and others affected by the loss of significant national vistas; organisations with significant security concerns such as security agencies responsible for protection of international visitors on the national processional route (the security concerns of Embassies and Canberra Girls Grammar School might qualify and would need to be tested); and residents in surrounding suburbs affected by the precedent set for such developments in the inner south. All of these are “material” impacts but would appear excluded by such a narrow definition.

It is hard to understand the reason for such a narrow definition. It may be designed to limit the opportunity for protest on major development to simply those with boundaries or views. It would certainly exclude from protest most of an affected community, leaving a few individuals or organisations, potentially with limited resources and voices, to deal with major developer. Was this planned? It is certainly the effect.

d. Bypass of Standing Committee on Planning and Environment (Chapter 5)

The proposal to provide the Minister (presumably on the advice of planners) with discretion to make a judgment as to what variations to the Territory Plan may or may not be brought forward to the relevant Assembly Committee will also serve to reduce community oversight of ACTPLA’s planning process.

With elected representatives from more than one political party, the Assembly Committee should have a better grasp than planners of likely community reactions to specific variations. The Assembly Committee should decide, on the basis of criteria that it develops (with community reaction in mind), what constitutes a minor and/or non-controversial variation, not the Minister acting alone. But perhaps this is yet another intentional way to reduce community oversight of ACTPLA's processes?

The option for the Committee to consider a variation, even if it is not referred by the Minister (Section 70 (3)), is unreliable. It is likely that this would involve members of an adversely affected community in an additional time-consuming and expensive process to bring the variation to the Committee's attention and to its agenda. This would not be necessary if the referral by the Minister was automatic.

I would suggest too that the approach proposed risks opening the Minister, in some cases, to charges of favouritism and corruption. It is a far better and more transparent course for all variations to the Territory Plan to be sent by the Minister to the relevant Assembly Committee for consideration.

e. Lack of mechanism for systematic community consultation

The reforms do not propose any systematic consultation with the community on planning issues. Perhaps this is an unintended omission or perhaps it is deliberate.

Over time, mechanisms for the community to engage in an organised way with ACTPLA have dropped away. LAPACs have been disbanded, community councils no longer provide coverage of many significant parts of Canberra (there is none in the inner south), and community processes that used to engage the community (Neighbourhood and Master Plans) are to be discontinued. The recent (and publicly unannounced) abolition of the Planning and Land Council, which as part of its mandate was required to consider "any matter that in its view involved significant policy, planning or community issues", is another sign of the government shutting out the community.

Without a systematic process for community consultation with planning authorities into the future (and none is proposed) it is difficult to see how the Canberra community can effectively engage, in an organised way, with ACTPLA and make input into policy and processes. But perhaps this is deliberate and ACTPLA would prefer just get on with its planning without restraint and not to have deal with the nuisance of the community having an organised and effective voice?

2. Lease Variation: C5/C6 zones (Chapter 9 & Outline of the Territory Plan Restructure)

According to ACTPLA's outline of the proposed restructure, under the new legislation, "most" sites covered by **B8** "entertainment, accommodation and leisure" would become **C5** "intended for indoor entertainment and recreation facilities, clubs, drink establishments, restaurant, and commercial accommodation. Limited shops, residential, non-retail commercial and community areas would also be permissible".

However some sites now covered by **B8** will become **C6** "residential mixed use zone" that is "primarily intended for very high density uses in accessible locations, with non-retail commercial uses and commercial accommodation and limited shops, restaurants and community uses subject to their design and siting to minimise incompatibility with the 'primary' residential use".

There is no specific listing of B8 sites that will become C5 and those that will become C6. The difference in the uses that would be allowable is very significant indeed. Sites that would be changed from B8 to C5 or C6 should be individually listed, and open to public consultation before the legislation becomes final.

Also despite assurances in the ACTPLA guide that "uses in an area under the Territory Plan will not change" the lease conditions attached even to the new C5 zones have been significantly

broadened beyond current initial allowable uses for B8, and the limits of allowable development are not clear.

Under the current system, there is a clear list of developments allowable under B8. Residential development, and including intensive multi-unit residential development, is not one of these. However under the C5 definition there is now a significant extension of the allowable uses to include residential development and no details about what specific forms of residential development would be permissible.

To take an example, the old Solander Gallery site at Deakin is now classified as B8. Would this become a C5 or C6? If it is C5, would the new broadened lease allow for intensive multi-unit residential development? How will local residents know what is allowable? What voice would they have if the new lease conditions significantly change the use of the site?

There is the additional issue of course that lease variations will be treated as development applications, and such variations do not require public consultation unless the development is “merit” or “impact”. However, even if the broad lease clause permits a significantly different and potentially controversial form of development on a site, provisions governing “merit assessable development” may prevent the community having an effective voice.

Under current provisions, a change from B8 to Residential Area B15 (which now applies on the mirror Embassy Motel site) required a formal lease variation and the affected community had some opportunity to express a view. Under the new lease conditions, it seems an intensive multi-unit residential development could be allowable (it is allowable under C6 and seems not excluded under C5). Even though a development application would be required for building works, it seems it could be approved as a “merit assessable development” on a broad interpretation by ACTPLA of “residential development”, without “major” public notification, opportunity for third party representations or third party appeals. This would, of course, be unacceptable.

What is required?

At very least, the Committee should ask ACTPLA

- to publish the list of “merit matters” that, under these reforms will be required for “major” public notification and allow full consultation on this list before any agreement is reached on the provisions of the legislation covering “merit assessable development”
- to list B8 sites that will become C5 and those that will become C6, and where a site is to become C6, given the significant change that would entail in the lease conditions, to allow public consultation on this issue before the legislation and regulation covering the new zones becomes final

In the meantime, the Committee should recommend that the legislation be amended

- to require “major” public notification on all “merit assessable development” applications
- to permit third party representations on all “merit assessable development” applications at the application stage and third party appeals at the review stage
- to more broadly define the allowable basis for third party representations as those from individuals, incorporated or unincorporated groups or corporations, to be where these have suffered or potentially could suffer an “adverse impact” as a result of a proposed development

The Committee should also recommend that associated Regulations should

- convert all B8 zones to C5 zones
- include unambiguous language in relation to C5 zones about permissible development in such zones to explicitly exclude intensive multi-unit development.

The Committee should recommend that the government negotiate and agree to a systematic process for effective community consultation across all areas of the ACT on planning issues.

If the issues above are not addressed the community will draw the obvious conclusion that the adverse impacts now entailed in the proposed legislation and processes are entirely deliberate and indicative of a government that has set out to streamline processes for developers at the expense of the legitimate concerns of the wider community.

The ACT community looks to the members of the Standing Committee on Planning and Environment, as its elected representatives, to ensure that ACT planning policy, processes and legislation provide opportunities for the community to have an effective voice. This is especially important for major and potentially controversial developments, where there is a significant risk of serious adverse impacts on the community.

Yours sincerely

Di Johnstone