LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
Ms Jo Clay MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Mr Mark Parton MLA

Submission Cover Sheet

Inquiry into Property Developers Bill 2023

Submission Number: 6

Date Authorised for Publication: 22 February 2024

16 February 2024

Standing Committee on Planning, Transport and City Services
ACT Legislative Assembly
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Submission – Property Developers Bill 2023

We the undersigned respectfully provide the attached submission to the Standing Committee on Planning, Transport and City Service regarding the Property Developers Bill 2023 (ACT) “the Bill”. This submission has been endorsed by aged care and retirement living operators who collectively provide 51% of the age-appropriate seniors accommodation in the ACT.

For the reasons outlined in our submission our view is that the Bill introduces a regulatory scheme and extends existing actions of recourse which:

- Will directly impact the ability of the aged care and retirement living operators to attract and retain desperately needed skilled and experienced individuals to their Boards, most of whom join the sector in order to ‘give back’ to our community;
- Are not warranted for the aged care and retirement living sector; and
- Will disincentivise aged care and retirement living operators from investing in already under supplied age-appropriate accommodation for seniors, and consequentially have a direct adverse impact on the health of senior Canberrans and the operations and finances of the ACT Health system.

We strongly encourage the Committee to consider our request to recommend that aged care and retirement living operators be exempted from the legislation. We would be very willing to appear before the Committee during the public hearing stage of the inquiry.

Yours sincerely

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PROPERTY DEVELOPERS BILL 2023 (ACT)
SUBMISSION BY AGED CARE AND RETIREMENT LIVING OPERATORS

Background

In response to the growing community concerns about the conduct of residential property developers and controversies around building defects, the ACT Government tabled the *Property Developers Bill 2023 (ACT)* in the Legislative Assembly on 30 November 2023. Aspects of the Bill are the product of the Parliamentary and Governing Agreement between the Australian Labor Party and the ACT Greens.

The Bill has six (6) main features:

1. The creation of a licensing regime for person who are carrying out residential development;
2. Making a developer responsible for building defects caused by others (eg the builder and its subcontractors);
3. The creation of a new statutory duty of care for developers and builders for losses arising from building defects;
4. The ability for rectification orders to pierce the corporate veil and to apply not only to the developer company but also to directors of the developer company (and for up to 10-year-old developments);
5. For the first two years post building completion, for any claim to rectify works, there will be a presumption that the claimed defect is a defect; and
6. The ability for the regulator to go back up to 10 years from the law commencement date, to issue a rectification order.

Whilst we commend the ACT government on introducing measures to *'combat developers that do the wrong thing'* and to *'give Canberrans the confidence that their homes will be built to the highest standards by trustworthy professionals'*, this submission outlines our views on why the proposed legislation will have a detrimental impact on the provision of an already undersupplied age-appropriate accommodation market for seniors in the ACT and our request for the Committee to recommend that the aged care and retirement living sector be granted exemption from the legislation.

Outline of Bill and applicability to the aged care and retirement living sectors

The Bill establishes a licensing regime for persons/entities involved in developing and/or building residential buildings. In summary, residential buildings are defined as those classified as a class 1 or class 2 building under the National Construction Code. This means that properties located within retirement villages are covered by the Bill.

Residential aged care facilities (aka nursing homes) are not defined as 'residential buildings' because they are either class 3 buildings or class 9c buildings. This is an important distinction because there are many sites in the ACT which have both retirement living and residential aged care facilities co-located, thereby resulting in some seniors' accommodation being covered by the Bill and some not.

Outline of aged care and retirement living in the ACT

The provision of age-appropriate accommodation for seniors is an integral component of the housing make-up for the ACT.

There are currently two main forms of accommodation types for seniors. Those that have higher care needs generally live in residential aged care facilities. In the ACT there are currently 27 facilities with a capacity of 2,745 beds. There are a further two facilities currently under construction. Seniors that do not require a higher level of care move into retirement villages. In the ACT there are currently 29 villages containing almost 3,100 properties (approximately 5,000 seniors) and there are a further two under construction. To support the delivery of services to these seniors, there is a direct workforce of almost 3,000 taxpayers. It should be noted that there is an additional extensive workforce that provide home care services to seniors who reside in the general community.

The majority of aged care facilities and retirement villages in the ACT are run by not-for-profit organisations, with most being headquartered outside of the ACT.

The need for age-appropriate housing and services

It is a well-known and established fact that Australia's and the ACT's population is ageing at a rapid rate. Data from the 2021 ABS Census indicates that in the next two decades:

- The proportion of 65+ year olds will increase from 14% to 18%; and
- The number of 75+ year olds will increase by 226% and the number of over 85 years will increase by 291%.

There is an imperative policy challenge to deliver suitable housing and support for this increasing cohort of Canberrans. This presents an opportunity for more development and expansion of retirement villages and residential aged care facilities. The current pipeline of new projects will simply not meet current and future demands. Further, there is an increased requirement for dementia, palliative and bariatric care and an implied need for flexibility to change facilities to accommodate specific needs.

Benefits of retirement living for better housing and better health

Better for the Health system

Projections of ACT Government spending show that the Health budget significantly outstrips all other budget expenditure which may present future challenges for the community unless aged care and retirement living operators can assist in relieving the burden and reduce the number of so called "bed blockers" caught up in the hospital system.

Living independently in a retirement community has shown to delay entry into the taxpayer funded aged care system. Further, retirement village residents are also 20% less likely to be hospitalised after entry into a retirement village. These outcomes result in freeing up space in the health system, which in turn delivers real and material socio and economic benefits to the Territory.

Better life for seniors

Retirement villages have been shown to result in a better life for seniors. These living communities reduce barriers to physical activity and provide access to fitness and recreational facilities which helps residents remain approximately 15% more frequently active than those living independently in the community. Further retirement village residents are up to 5 times more engaged in social activities with others than non-residents, thereby resulting in greater emotional wellbeing levels.

Key component of addressing housing shortage

Similar to other states and territories, the ACT is experiencing supply and cost pressures in the housing sector. We know that there are currently insufficient properties to accommodate the ageing population. The retirement living sector is a key component to solving some of these issues. Specifically:

- Entry prices into a retirement village in the ACT are on average 43% lower than the median house prices in similar areas. This enables a greater proportion of seniors to access villages.
- Planned retirement dwelling development will reduce the housing gap by 18% by 2030 (nationally).

- Enabling seniors to move to a retirement village frees up existing housing stock for new generations. Further, in the ACT only 6% of people over 75 years old live in a dwelling with no spare bedrooms, pointing to a significant underutilisation of existing housing stock.
- ‘Rightsizing’ provides environmental benefits by reducing household energy consumption by 7%.

From the above information it is clear there are significant benefits to senior Canberrans and the Territory to facilitate access to aged care and retirement living environments. The sector already finds it difficult to supply age-appropriate housing because town planning favours commercial development of housing rather than ‘right-sizing’ housing types and there is insufficient weighting of retirement communities in land allocations. The Bill provides creates further, unnecessary, barriers for aged care and retirement living operators to meet the accommodation needs of senior Canberrans.

Submission and Arguments for exclusion

As already mentioned, a significant majority of existing aged care and retirement living operators in the ACT are not-for-profit organisations. Additionally, almost all the retirement villages and their properties are owned and managed by these organisations, ie residents do not have legal title to the property they reside in. Therefore, the properties developed and built by aged care and retirement living operators are not typical of those developed by normal residential building developers.

Disincentive for attracting skilled Board members

We fully support the government’s initiative for affected parties to have recourse in the event that a normal residential corporate builder and/or property developer is deregistered, subject to a winding-up order or in administration, receivership or liquidation.

However, the powers to be given to the Registrar to hold directors of the developer personally liable for serious defects is a significant barrier to attracting and retaining skilled and experienced talent to the Board’s of aged care and retirement living operators. Most commonly, the decision of an individual to join the Board of an organisation in our sector is values based and is not driven by any remuneration they may receive or other commercial benefit. Given the significant growth and focus on this sector over the last 10 years and the anticipated growth over the next two decades, it is vitally important that organisations are able to attract individuals with the right expertise and experience to govern and oversee them. As drafted, the personal liability provisions will result in the perverse situation of existing directors potentially being held personally liable for building work that was completed before they became a director.

Existing protections and incentives

There are a range of existing protections and commercial business incentives for aged care and retirement living operators to ensure quality and safety in the development and construction of seniors accommodation. Operators are already incentivised, as they need to:

- Ensure their properties will last for a lifespan of 30+ years;
- Ensure they are designed and built in such a manner to minimize the ongoing maintenance costs over a significant period of time; and
- Attract seniors to their villages, not just on completion of a build, but also throughout a village’s lifespan.

Further, existing obligations in the *Building Act, Building Regulations, Construction Occupations (Licensing) Act and the Retirement Villages Act* provide both the owner (ie the aged care and retirement living operator) and residents with legislative protection. For example, under the *Retirement Villages Act*, a resident can create a charge over the land of the property they occupy (and do not own) which makes it more difficult for the operator to ‘walk away’ and leave the resident without recourse. We also point out that there has been no history of aged care or retirement village developments in the ACT which have incurred serious defects, requiring rectification.

Request for exclusion

The issue of extending personal liabilities to directors of aged care and retirement living organisations is a significant issue and along with the other reasons outlined in this submission we respectfully request the Committee recommend that aged care and retirement living organisations be given an exemption to the *Property Developers Bill 2023* and the associated consequential amendments to the *Building Act, Building (General) Regulation, The Civil Law (Property Act), The Civil Law (Sale of Residential Property) Act* and *The Planning Act.*