LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND URBAN RENEWAL
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Submission Cover Sheet

Engagement with Development Application Processes in the ACT

Submission Number: 064 - Griffith and Narrabundah Community Association

Date Authorised for Publication: 5 September 2018

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Inquiry into Engagement with Development Application Processes in the ACT

Submission by the Griffith Narrabundah Community Association

Introduction

The Griffith Narrabundah Community Association (GNCA) has worked since 2000, to protect and promote the amenity and interests of the Griffith and Narrabundah communities, particularly in relation to the preservation of community facilities and open space. We currently have a membership of approximately 300 people and are also one of the Associations comprising the Inner South Canberra Community Council.

We welcome the opportunity to contribute to the Standing Committee's work on the important issue of Development Applications (DAs).

Development Applications are the essential nuts and bolts of how Canberra has developed in the past and how it will advance in the future. We recognise that the issues under consideration are complex. They include major projects like the re-development of the Gowrie Court and the Stuart Flats, down to minor changes, such as adding a carport to the side of a house.

The stakeholders include not just those immediately affected by any development, but the government, which controls the process and develops the planning policy, the developers who undertake the construction work and all those living in the neighbourhood.

The DA process, particularly for large projects may take several months, but if what is to be built will last for 50 or more years, it is important that good outcomes are achieved.

We do not need buildings that leak or residents that receive no sun. We need buildings that are consistent with the zero emissions target of the government and buildings that are energy efficient and space for the urban forest to prosper and green spaces for recreation.

Throughout our analysis of the current process, we have identified two overarching issues that need urgent attention. These are ***Transparency*** and ***Compliance.*** Transparency, because getting information on some of the developments is like pulling hens teeth and Compliance because the planning rules are not always enforced.

Transparency and Compliance

The complexity and subjectivity of the current planning regime means that decision makers are not held accountable for the judgements they make in their decisions. The language and criteria in the Territory Plan are qualitative and subjective, meaning that decisions on *e.g.* what is 'reasonable access', a 'proportionate' open space, and a 'minor impact' are made routinely and with no scope for scrutiny by affected neighbours. The first they know is when a building begins to take shape in their street.

In exempt developments in RZ1 areas even decisions on less subjective elements such as plot ratio and solar access are not available for external scrutiny and our experience is that certifiers are not uniformly accurate or scrupulous in their certifications and nor does the EPSDD check all certifications for errors and oversights.

We recommend that the qualitative Criteria and subjective language be removed from the Territory Plan. However, as a minimum, the planning regime needs to make the development plans (with dimensions) **transparent** and easily accessible for every development (including exempt), who is the assessor/decision maker, the basis for their decisions and the evidence on which they have made their (often subjective) judgement.

The complexity and lack of transparency of the current planning regime means that often residents in a local area do not become aware of a breach of the Territory Plan until a building has begun to appear in their street. We contend that a responsive **compliance and enforcement framework** is needed to make it less appealing to bend the rules to the detriment of other residents. In particular there should be Government officials who are able to respond quickly to genuine resident concerns about non-compliant buildings, and sanctions (including fines) should be introduced for negligent or deliberate erroneous certifications and non-compliant constructions.

We contend that the external scrutiny and improved accountability created by greater transparency and enforcement of compliance will lead to much better planning outcomes, community engagement and trust in the operation of the ACT's planning system.

Most of the recommendations contained in this document are the same or similar to those in the ISCCC submission. We have included them in our document for completeness.

Comments on issues identified by the Committee

1) Community engagement and participation in the Development Application process including:

a) The accessibility and clarity of information on Development Applications and Development Application processes, including Development Application signage; the Development Application finder app; and online resources

This is a Transparency issue. There is scope for improving the accessibility and clarity of information on DAs, particularly for knock-down re-builds approved by private certifiers. These developments can affect local streetscapes as well as neighbours, but the plans are not publicly available without making FOI requests. This is completely unsatisfactory, and residents should know what is proposed in the way of development in their own neighbourhood. We therefore recommend that:
All knockdown rebuilds must be processed by the government through Development Applications, which are made publicly available. (R1)

It is sometimes difficult to check the stated Private Open Space, Plot Ratio, Solar Access and other parameters, because the numbers used in the calculations are either not provided or are unreadable on the available plans. We therefore recommend that: **All parameters used to determine factors such as plot ratios, solar envelopes and set-backs be clearly shown in the DAs. (R2)**

DA Finder is a valuable resource, but it does not include all DAs. We therefore recommend that: **All DAs are notified and accessible on DA Finder - this should include currently Exempt DAs for knock down rebuilds and minor DAs. (R3)**

The Territory Plan and the associated codes are currently unnecessarily cumbersome and opaque. To make matters easier for everyone, we recommend that: **Software be developed so that anybody can click on any block through ACTmapi and is able to access all the building codes and lease conditions of that block. (R4)**

b) Pre- Development Application consultation and statutory notification processes
This is getting better for large projects but sometimes the outcome is ostensibly pre-determined; making a mockery of any consultation. For example, the Manuka Oval Lights and Media Centre were approved, even though a Conservation Management Plan required by the legislation had not been established; and the development on Section 42 Griffith, where call-in powers were also used, even though some aspects of the development were non-compliant with the multi-dwelling Development Codes.

Pre DA-Community Consultation Guidelines are currently limited to a development proposal where one or more of the following are prescribed:

(a) a building for residential use with 3 or more storeys and 15 or more dwellings;
(b) a building with a gross floor area of more than 5000m²;
(c) if the development proposal is for more than 1 building—the buildings have a total gross floor area of more than 7 000m²;
(d) a building or structure more than 25m above finished ground level;
(e) a variation of a lease to remove its concessional status.

In practice many other developments can affect local streetscape and impact on the amenity of local residents, *e.g.* smaller scale residential redevelopments including dual occupancies and block amalgamation. Consequently, **we recommend that the following categories be added to the list as requiring pre-DA consultation: (f) block amalgamations above 2000m^2, (g) developments affecting a property listed (or provisionally listed) on the ACT Heritage Register and (h) all Merit Track applications. (R5)**

We also note that there does not appear to be a definition or any guidelines for what should constitute Community Consultation in any of the relevant Development Codes. **We**

recommend that guidelines for what constitutes Community Consultation be drafted as soon as possible. (R6)

As an example of the need for more pre-DA consultation, consider DAs 201732015 and 201833756 (Appendix). DA 201732015 was an application to consolidate three blocks in Landsborough Street and build ten dwellings, where currently there are three. This would have affected the whole character of the street, but the first the residents knew about the proposal was when the boards went up outside the three blocks stating that these applications had been submitted.

The original Lease Variation Application DA 201732015 was so at variance with DA 201833756, it should have been rejected by the EP&SD Directorate and not released in the public domain. The time wasted examining both applications could and should have been avoided. We realise that the Directorate cannot and should not prevent people submitting applications, but surely DA 201732015 should have been rejected and never been put into the public domain.

Subsequently, DA 201732015 was amended and, at the time of writing, is a simple application for a Lease Variation to permit three dwellings on a block larger than 1050 m^2. As with previous applications the immediate neighbours were not consulted until after the application was made public.

We understand that the EP&SD Directorate regards the Lease Variations and the 'Building' Applications as independent processes. However, when both applications refer to the same block **we recommend that they both be considered together at the same time. (R7)**

If this is not possible, then the Lease Variation Application should precede the Building Application. It should not be done in reverse as happened with DA 201833756 and DA 201732015.

c*) The availability and accessibility of current and historical Development Applications and decisions in relation to Development Applications, including reasons for Development Application approvals, conditions or rejections.*
Current DAs are usually available and accessible, but those approved by certifiers in RZ1 can be particularly difficult to access. That is one of the reasons we recommend that all knock-down re-builds should be assessed by the EPSDD, rather than certifiers, who may act in the vested interest of the builder and owner. Decisions by the ESPSDD are usually available to people who have made submissions, but it is not easy to access those made over a year ago. We have not been able to do this through the website. It should not be difficult to archive documents from previous years and make them accessible to readers though an archive component of the website. **We recommend that all Development Applications and the decisions made by the EPSDD be made readily available on the government website. (R8)**

2) Accessibility and effectiveness of Development Application processes, including:

a) The information provided in relation to the requirements for Development Applications;
As stated above, the information provided is often inadequate. It is not accessible on the government website, and all the dimensions are not always provided. Not all DAs are shown on the Finder App.

b) The current development assessment track system;
It is generally not possible to obtain plans or detailed information about proposed DA-exempt developments without going through the Freedom of Information processes. This is unnecessarily bureaucratic and serves only to cloak in secrecy, matters that should be open to public scrutiny and discussion. There is no reason why the DA website should not include the plans that would be provided for a normal Development Application so that parameters such as solar access, plot ratio, dimensions of private open space and setbacks can be determined. While certifiers are still able to approve knock-down re-builds, it should be mandatory for the certificates to be made available. These should provide, with full justification – not just ticked boxes – where there is any departure from Rules in the Codes under relevant legislation. Our R1 & R2 cover this issue.
c) The Development Application e-lodgement and tracking system, e-Development; No comment.
d) Processing times for Development Applications; No Comment.
e) Retrospective Development Applications;
In general, these should not be approved, and penalties should be applied for deliberate, negligent or "significant" breaches in any of the Codes. **Retrospective DAs should only be approved in exceptional circumstances and fines should be applied for breaches. (R 9).**
f) Reconsideration and appeal processes;
We are opposed to the current provisions which do not allow appeals for exempt residential developments in RZ1. Improved transparency and external scrutiny in the early stages of a DA could reduce the number of cases where appeals are warranted. Currently, neighbours cannot see the plans for an exempt development, cannot see the basis for any approvals and cannot appeal even if (after access to plans via FOI) the proposal does not comply with the Territory Plan. There is no incentive for proponents to do the right thing as they cannot be seen or held to account. The balance in the regime between neighbour and builder is unfairly skewed toward the builder of the new dwelling.

A narrow category of residents are notified about developments being considered under the Code, Impact and often even Merit tracks. Of this group, only those who lodge an objection can appeal a decision. In practice this significantly restricts the appeal rights of local residents and again unfairly skews the advantage in the process toward the builder of the new dwelling.

To give the Committee a sense of the complexity faced by residents I have attached an extract from an internal GNCA email. It describes how the notification and appeals process applies for each DA track and how notification is restricted and how this limits appeal rights.

We therefore reiterate our recommendation 7 that **All Development Applications and the decisions made by the EPSDD be made readily available on the government website.** In addition, **all residents in RZ1 areas should have access to an appeals process for currently exempt DAs (R10)**

The current processes for appealing decisions and for re-consideration would be improved if an independent body examined each case. At present the original decision to either approve of reject an Application is made in the Planning Directorate and any review or reconsideration also is undertaken in the same Directorate. **A process independent of the EPSD Directorate should be established. (R11)**

ACAT, as it currently operates, is both cumbersome and costly. The best plan is to try to minimise disputes by reducing ambiguities in the Building Codes so that the scope for misunderstanding and disagreements is reduced. As a first step, we recommend that all the Criteria are eliminated from the Codes and all the Rules are made mandatory. Terms in the plan such as 'reasonable access', 'proportionate', and 'minor impact'' should also be replaced with measurable provisions. It makes no sense to have a quantitative Rule that can be over-ridden by a qualitative Criterion. **We recommend that all the Criteria are eliminated from the Codes and all the Rules are made mandatory. (R12).**

g) Heritage, Tree Protection and Environmental assessments.
All three of these issues are essentially compliance issues by the developer and the EPSDD. There are two major problems with current legislation and subsidiary Codes.
Builders and developers effectively have immunity from requirements that prohibit parking on verges and storing bricks and other materials on verges. Heavy machinery and trucks parked next to street trees result in inadequate protection for trees and verges, resulting in compaction of soil that will be detrimental to the long-term health of trees.
We recommend that the tree and verge protection must be articulated in the DA and monitored to ensure compliance, during the building process. (R 13).

3) Development Application compliance assessment and enforcement measures.

A significant principal-agent problem is that certifiers have little incentive to act in the interests of the community because they are engaged by builders or owners. Because no independent regulator oversees notices issued by certifiers, there is little if any scope for ensuring the integrity of current processes.

An example that came to the notice of the Griffith Narrabundah Community Association in mid-2017 was that of 48 Jansz Crescent (Block 2, Section 89, Griffith). Plans of the proposed "DA Exempt" construction were only obtainable under Freedom of Information legislation. (Given that redacted plans were ultimately made available, it is not clear why such plans cannot be made available publicly on the ACT website as a matter of course.)

Inspection of the plans showed that the basement appeared to be part of the living area (declared as "no basement parking" but had not been declared as part of the calculated gross floor area, so that it appeared to comply with the Rule on plot ratios. The roofed balcony was also erroneously excluded from the declared gross floor area. Yet the certifier had provided an assessment that declared the proposed construction to be compliant. Following representations through Access Canberra (incident 171015-000292) the builder was required to submit amended plans.

While the intervention of the Environment Planning and Sustainable Development Directorate was welcome, the incident at 48 Jansz Crescent indicates the seriousness of the situation. Not only is information difficult to access, but technical knowledge is required by citizens who should be able to rely on the integrity of the certification process. The situation is presently unconscionable. We recommend that **all compliance responsibilities associated with planning and development reside in EPSDD and the compliance responsibilities are staffed so that irregularities can be acted on promptly (R 14).** Because of the lack of adequate oversight of the veracity of certificates issued by certifiers, the

current process needs to be balanced with significant penalties for those found to be in breach of their professional responsibilities. The situation is not dissimilar to the breaches currently being unearthed by the Royal Commission into misconduct in the banking, superannuation and financial services industry. Early action by the ACT is important to ensure the avoidance of longer term problems of governance, accountability and compliance.

Consequently, we urge the Committee to recommend that our R1 is implemented as soon as possible. In addition, we recommend that **greater transparency and regulation of the activities of certifiers and public sanctions for poorly performing certifiers be established. (R15).**

4) Development Application practices and principles used in other Australian jurisdictions. Don't know

5) Any other relevant matter. None at this time

Recommendations

1. **All knockdown rebuilds must be processed by the government through Development Applications, which are publicly available. (R1)**
2. **All parameters used to determine factors such as plot ratios, solar envelopes and set-backs be clearly shown in the DAs. (R2)**
3. **All DAs are notified and all information including plans are accessible on DA Finder - this includes currently Exempt DAs. (R3)**
4. **Software be developed so that anybody can click on any block through ACTmapi and is able to access all the building codes and lease conditions of that block. (R4)**
5. **The following categories be added to the list as requiring pre-DA consultation: (f) block amalgamations above 2000m^2, (g) development affecting a property listed (or provisionally listed) on the ACT Heritage Register and (h) all Merit Track applications. (R5)**
6. **Guidelines for what constitutes Community Consultation be drafted as soon as possible. (R6)**
7. **Wherever possible, Development Applications for Lease Variations and 'Building' proposals for the same block should be considered together and if this is not possible Lease Variations should be considered first. (R7)**
8. **All Development Applications and the decisions made on them by the DSPDD be made readily available on the government website. (R8)**
9. **Retrospective DAs should only be approved in exceptional circumstances and fines should be applied for breaches. (R 9)**

10. **All residents in RZ1 areas should have access to an appeals process for currently exempt DAs. (R10)**

11. **A group independent of the Planning Directorate be established to review decisions by EPSDD when necessary. (R11)**

12. **All Criteria are eliminated from the Codes and all the Rules are made mandatory. (R12)**

13. **Tree and verge protection must be articulated in the DA and monitored to ensure compliance, during the building process. (R 13)**

14. **All compliance responsibilities associated with planning and development reside in EPSDD and the compliance responsibilities are staffed so that irregularities can be acted on promptly. (R 14)**

15. **Greater transparency and regulation of the activities of certifiers and public sanctions for poorly performing certifiers be established. (R15)**

EXTRACT
RESTRICTED NOTIFICATION AND APPEAL PROCESSES IN RZ1

"It has been suggested that developments in RZ1 are not appealable. This is not formally correct in a legal sense, but that's what appears to happen in practice. The combination of Exempt developments, Code Track developments and Limited Public Notification of most Merit Track developments severely reduces the opportunities for interested third parties to make representations in relation to a proposed development and consequently have the right to lodge a subsequent appeal to ACAT.

The Planning and Development Act 2007 (PDA) allows appeals for developments approved under the Code, Merit and Impact tracks. Those who have appeal rights are the proponent, and anyone who lodged a "representation" (i.e. an objection).

However, very many knockdown-rebuilds in RZ1 in existing suburbs would be Exempt Development under Schedule 1 of the Planning and Development Regulation 2008, where there is no DA against which an interested neighbour could lodge a representation, and no appeal rights.

Many other knockdown/rebuild applications can be classified as Code Track. If this is the case, then there is no need to public notification of the lodging of the DA (see s117 of the Planning and Development Act 2007 (the PDA)). Usually only the proponent will know that a DA has been lodged, which means that only those third parties (i.e. neither the applicant nor the planning authority) with psychic powers get the opportunity to exercise their right to lodge a representation. And only those third parties that have made representations have a right to lodge an appeal. So any Code Track DA's are in effect un-appealable by third parties because there is no public notification process. However, if the Code Track classification assigned to the proposal is correct then the proposal should clearly comply with all applicable rules, so there would be no grounds for any appeal.

The PDA (s121) is quite clear in requiring that a Merit Track DA must be "publicly notified" in compliance with Division 7.3.4 of the PDA. But there are two ways that this public notification can be achieved. The first route is so called "Major Public Notification", which involves placing a sign at the location of the proposed development giving details of the proposal and placing a notice in a local daily paper (although I'm not sure if this latter is still done). The second permitted public notification route ("Public Notice to Adjoining Premises") is to write to the lessees of all the adjacent blocks, i.e. all those blocks which touch the block which is the subject of the DA, or which are only separated from this block by a road, reserve, river, watercourse or similar division, notifying them of the development.

Under s152 of the PDA ACTPLA/EPSDD determines which Public Notification route is chosen in accordance with Schedule 2 of the Planning and Development Regulation 2008 which deals with "Limited public notification of certain merit track development applications". This provides for Limited Public Notification for any Merit Track DA proposal that involves "The building, alteration or demolition of a single dwelling, if the development would not result in more than 1 dwelling being on a block" (s4) or any development involving "the building or alteration of 2 or more dwellings, or buildings or structures associated with the dwellings, on a block that has ceased to be in a future urban area under the Act", (s1),

subject to the proposal meeting certain requirements about setbacks, and not resulting in the building of a structure of more than one storey, or more than 6.5m high. Various other developments are also covered subject to certain conditions.

The result of these broad circumstances where "Major Public Notification" is not required means that in very many instances interested third parties that might feel they have an interest in the proposed development are not aware of the lodgment of the Development Application and consequently do not have the opportunity to either lodge a representation, or subsequently appeal any decision to the ACAT. The pool of potential pool of appellants is significantly reduced by restricting public notification to written notice to a restricted set of neighbours, since unless one of the notified neighbours wishes to lodge a representation, there will be no appeal rights.

Consequently, while there is nothing that says there is no appeal right for developments in RZ1, in effect, unless the proposed development involves a dual occupancy, or possibly a two storey development, then the odds are that the applicable arrangements will mean that it will be difficult for third parties to have any right to lodge an appeal."

Yours Sincerely,

Leo Dobes
President