

ATTACHMENT  
TO

Submission to the ACT Legislative Assembly  
Standing Committee on Public Accounts

**INQUIRY INTO THE AUDITOR-GENERAL'S REPORT (No 2/2005) ON THE  
DEVELOPMENT APPLICATION AND APPROVAL PROCESS IN THE ACT**

Submission to the ACT  
Planning and Land Authority

**THE PLANNING SYSTEM REFORM PROJECT**

**Rowan Basil-Jones**

Unit 3 *Oakleaves*  
6 Howitt Street  
KINGSTON ACT 2604

Tel: 6260 8890

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This submission, which I am making in a private capacity, provides comments under six headings:

- 1 Leasehold administration in the ACT
- 2 Changes to the Territory Plan
- 3 Streamlining development assessment and approval
- 4 Environmental impact assessment
- 5 Community consultation
- 6 Perception of potential conflict of interest

## **1 Leasehold administration in the ACT**

I support the following proposals outlined in *Technical Paper 1*:

- the production of a map showing agency responsibilities for unleased public land
- on-line access to information, including planning, lease and development information on a block-by-block basis
- amendment to the Land Act so that 'use' is an assessable element of a DA, including a DA that only seeks to vary the lease
- restrictions on the right to vary a lease to add new uses for leases granted through a direct or restricted grant process
- empowering ACTPLA to require additional information when assessing a DA, including plans for any application to vary the use or permitted intensity of development, where the proposal is assessed as potentially impacting on the surrounding area
- the charging of lessees when permission is given for additional uses or development rights
- infrastructure charging
- improvements to the complaints system for compliance matters
- controls on speculative dealings in undeveloped leases.

I would like to see a greater focus on elements of the lease that contribute to the delivery of planning outcomes. Specific use purpose clauses to support planning policy have proved appropriate in the past in giving effect to a particular planning or development intent. This objective remains relevant to orderly planning and development.

While I agree that there is a need for a balance between planning control and the operation of market forces, I would not wish to see commercial, industrial and mixed-use leases including a larger range of permitted uses determined in the main by market forces.

I am also concerned about the possible implications of the proposal that all development controls would be addressed through conditions of development approval. Does this imply that land use controls will no longer be contained in the Territory Plan?

I share the concern that DAs for lease variations to change use do not require an associated development scheme or plan that shows how the use will be

implemented. As a joined party to the proceedings in the case of *Stryver Pty Ltd and ACTPLA & Ors ACTAAT 42 (13 December 2004)*, I welcome (a) the proposed amendment to the Land Act so that 'use' is an assessable element of a DA, including a DA that only seeks to vary the lease; and (b) the proposal that ACTPLA be empowered to require additional information when assessing a DA, including plans for any application to vary the use or permitted intensity of development, where the proposal is assessed as potentially impacting on the surrounding area.

While these amendments may well help the community to better assess the potential impacts on their living environment, more importantly they will provide a better basis for ACTPLA to assess the 'development' and, in the event that the matter proceeds to the AAT, a more objective basis for its decisions.

On the other hand, having also been a joined party in *Ergas & Bird and ACTPLA & Ors [2004] ACTAAT 18 (18 May 2004)* where the lease variation was accompanied by a (not publicly notified) DA providing details of the associated building works and was subject to a PA, I am not confident that the amendments will provide adequate protection from high impact development proposals close to noise-sensitive receiving environments. In that case, despite the apparent protection afforded by the provision that a 'drinks establishment' within 150 metres of a residential area is one of a defined class of decisions 'known or suspected to have a high probability of environmental impact', both ACTPLA and the AAT approved such an establishment less than 25 metres from residences. Residents' 'fears' (as the AAT described their objections) became the reality with both the construction phase and the ongoing operation of the licensed premises having a significant adverse impact on residents' amenity, lifestyle and health.

The case also indicated that the use of the lease purpose clause as the principal means for controlling appropriate and desirable development had been superseded by a willingness on the part of ACTPLA (and other agencies within the planning portfolio, including the AAT) to rely on regulatory provisions relating to compliance, etc after the event rather than at the development application and approval stage. This effectively placed the onus for monitoring lessees' compliance with the relevant legislation, regulations or guidelines on those who are adversely affected by breaches. This is not only unfair but, in my view, is also an abrogation of ACTPLA's responsibility to administer the ACT leasehold system in the way intended and the responsibility of other relevant government agencies to ensure that a high standard of environmental amenity is maintained in the ACT.

#### *Change of use charge and infrastructure charging*

The discounting of the change of use charge and the lack of an infrastructure charge on development have effectively been subsidies for developers paid by the wider Canberra community. I would strongly support the imposition of fees for additional land uses and for increased intensity of use.

## **2 Changes to the Territory Plan**

The proposal that area specific policies (to be re-named 'precincts') will only be retained as separate entities where significant distinctions in terms of planning

outcomes are identified does not appear to be consistent with the Government's 1998 response to the (1995) Stein report, where the Government supported the concept of specific area 'Development Control Plans' developed in consultation with the local community and commercial stakeholders through the precinct planning and management process. Restrictions on land use should, at the least, be maintained and, with the broadening of lease purpose clauses, may need to be even more specific.

The proposal that master plans and neighbourhood plans will 'cease to be matters for consideration in development assessment' but will be retained as planning tools also appears to be inconsistent with the Government's stated position. If planning guidelines are to be given primacy over subsidiary documents such as master and neighbourhood plans, then the status of those guidelines needs to be strengthened - from discretionary 'careful consideration' to mandatory 'compliance' - to ensure that appropriate safeguards of neighbourhood amenity are retained. If not, then a clear definition of 'carefully considered' and strict protocols for documenting the 'consideration' are required.

#### *Location of planning guidelines*

The example given that planning rules for access and mobility should be located in residential codes is wrong. The *ACT Guidelines for Access and Mobility* do not relate just to residential development – they relate to public access to all buildings, services and facilities on all land in the ACT. They should therefore be applied to all forms of development.

#### *Lease and development conditions*

Some further explanation and analysis are required in respect of the proposed introduction of 'less onerous' planning rules in relation to lease and development conditions.

#### *Draft variations to the Territory Plan*

I do not support the proposal that the referral of draft variations to the Territory Plan to the relevant Legislative Assembly committee be at the discretion of the Minister. The alternative of allowing the relevant committee itself to make the decision on referral is preferable. I do, however, support the proposal that the timeframe for committees to report on draft variations be quantified in the legislation, regulations or standing orders of the Assembly.

#### *Exemption of minor variations to the Territory Plan from public notification*

I would be extremely concerned if ACTPLA were empowered to make minor variations to the Plan without referral to the Legislative Assembly. In fact, I would like to see more rigorous application of the non-exemption from public notification of variations described as 'correction of a formal, clerical error' when that correction has the potential to 'affect adversely' the rights of a member of the community.

### **3 Streamlining development assessment and approval**

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### *The Development Assessment Forum (DAF) model*

As stated in Appendix D to *Technical Paper 2*, the major innovation in recent years has been the introduction in some schemes [in other jurisdictions] of place-specific policies, including statements of desired character for localities and neighbourhoods. In other words, while State Government policies provide the broad intent of policies, detailed planning schemes are developed and administered at the local government level.

While ACTPLA purports to have adopted the Development Assessment Forum (DAF) model, there is no discussion of the model as a whole – only that aspect of the model (ie the assessment tracks) which the ACT proposes to adopt. In particular, it would be expected that the technical papers contain some discussion of the leading practices integral to the DAF model, notably

- the separation of roles – that, for reasons of transparency and equity and to minimise conflicts of interest, the development of planning policies be separate from the assessment of applications against those policies (see comments under heading *Perception of potential conflict of interest*)
- the importance of community engagement in the development of technically excellent assessment criteria reflecting community values
- independent and expert assessment of development applications, including the establishment of panels at the local level to assess projects not determined by professional staff and to review staff decisions
- proposals to reduce the legal complexity and cost of the appeals process to ensure equity and for each State and Territory to establish an independent expert commission to review appealed local panel decisions
- the importance of appropriate checks and balances in the planning system to ensure appropriate governance of the assessment process.

The absence of any community or environmental representation on the DAF is a major concern.

### *Common set of standards*

*Technical Paper 2* states that there should be a standard or common set of rules and procedures that apply across all development applications in a given assessment track.

A common set of standards applicable across the ACT does not recognise differences within and between local areas. The 'one-size-fits-all' approach is not only counter to good planning principles but is also inappropriate in that it assumes community expectations and physical environments are homogeneous. The standardisation approach may well benefit developers but it is less likely to benefit ordinary citizens.

A list of permissible land uses in each zone will also not ensure adequate protection for environmentally sensitive zones or different adjoining zones.

This does not mean that there should not be consistency in approval mechanisms and in the application of land use controls. However, the papers do not provide details of specific mandatory and discretionary provisions. Greater detail is required on what permitted activities may be added to which zones and how consistency of approach will be achieved. There also needs to be a list of core prohibited activities for the zones.

#### *Development near zone boundaries*

There need to be clear statements about the development of land on or near the boundary between two zones to ensure that development is consistent with the objectives of both zones.

#### *The concept of 'streamlining'*

A major concern is that the 'streamlining' process is sacrificing

- public consultation and notification
- environmental protection
- accountability
- transparency
- local strategic planning and development control considerations
- the precautionary principle.

While I would support some refining of zone categories, I do not support broadening the range of permissible uses. There is also a need to balance future planning needs with existing uses and past planning decisions. No information is provided in relation to permissible uses in zones – or, for that matter, in precincts. Lists of both should be provided for public consultation as should lists of mandatory and discretionary provisions.

#### *Objective vs subjective assessment*

It is not clear at all what is meant by the recommendation that the review of planning rules include an 'assessment of opportunities to convert planning policy requirements into explicit rules and objective ... criteria'. *Technical Paper 2* states, on the one hand, that current planning rules tend to be 'well-defined and objective' but, on the other hand, that they are 'discretionary and open-ended' in their application. It also argues that, as far as possible, planning requirements should be translated into 'objective explicit criteria that are quantitative' but, at the same time, that 'some flexibility may need to be built into the process', adding that an over-emphasis on explicit quantitative criteria can 'rob' the proponent and assessor of opportunities to meet a performance measure through alternative means. This appears to suggest that some subjective criteria will be applied, as suits, as to when objective criteria will be applied or not applied.

#### *Allocation of DAs to tracks*

The area that receives DAs will need to decide where to send them for assessment. The community requires an assurance that staff are qualified to make this decision and are not placed under pressure to refer as many DAs as possible to the code stream. Who will make the decision that some matters 'genuinely' require more complex levels of assessment. Are staff responsible for the allocation of DAs to tracks qualified to make decisions about the relative complexity of proposals? I have particular concerns about the definition (or the interpretation of the definition) of 'minor development' when initial decisions are made about the allocation of DAs to tracks and exemption from public notification.

#### *Private pre-lodgment certification*

The possibility that private sector agents undertaking pre-lodgment certification and validation of documentation may not hold appropriate, or any, qualifications is unacceptable. It raises issues of quality control and the risk that, for reasons relating to cost-saving, efficiency gains, etc, validation by a certifier could become a *de facto* 'assessment' at the pre-application stage with ACTPLA merely adding the rubber stamp.

#### *In-principle preliminary planning approval*

Another major concern is the proposal for 'in-principle preliminary planning approval' – in other words, the 'green light'. Proponents, particularly of large complex proposals, should be prepared to commit funds to the development application and approval process – this is part of the commercial risk associated with major development. The statement that in-principle, preliminary approval would be 'indicative only' is disingenuous. The proposed list of permissible land uses for the various categories of development and/or zones should in itself provide the developer with a level of assurance and confidence and be 'indicative' of the likelihood of their development being approved.

Both the Minister and the Chief Planning Executive have acknowledged the practice whereby applicants have been 'spoon fed' by the Authority to the point where ACTPLA will 'green light' applications in the pre-lodgment phase leading to community perceptions of ACTPLA 'as some sort of agent for the development proponent'. The Minister has also clearly stated that 'We will provide assistance early on ... but we will not be giving a proxy or de facto approval as part of that process' (Proof transcript of the Standing Committee on Planning and Environment 22 February 2005 – Annual and financial reports 2003-2004).

#### *Delays to the development application and approval process*

Delays to the development application and approval process caused by ACTPLA's assessment of objections, discussion of objections with the proponent and the need for the applicant to provide further information addressing objections could be overcome if ACTPLA proceeded directly to assessment of the original application together with the objections. Basically, the proponent gets 'another bite of the cherry' and is supported by yet more assistance from ACTPLA. There is no opportunity for objectors to see if their concerns have been adequately addressed and certainly no assistance from ACTPLA in this respect. The goal that all affected parties have

equal access to decision-making processes for reasons of equity is not supported by the facts.

#### *Amended development applications and modified approvals*

I do not agree with the proposal that ACTPLA be authorised to waive the requirement for re-notification of amended applications if it considers the amendment is of benefit to, or does not introduce new impacts on, third parties. This would be a subjective decision on the part of ACTPLA (and one lacking in transparency) which may not necessarily reflect the views of third parties. If amended applications are not subject to re-notification then, at the absolute minimum, they should be provided to objectors. The same (precautionary) principle should apply to decisions about 'minor' modification of granted development approvals.

#### *Government referrals*

The paper states that 'industry has expressed concerns with delays, complexity and the frustration of having to deal with multiple government agencies'. I would point out that ordinary members of the public who are adversely affected by planning decisions also have to (attempt to) deal with multiple agencies and are less likely than 'industry' to receive a timely response (or any response at all).

The proposals to better 'integrate' the role and advice of government agencies are effectively proposals to minimise such referrals. I would like to see the referral process strengthened and this could be achieved through the proposed requirement for referral agencies to set out their documentary and other requirements and assessment criteria and to provide their advice within a specified timeframe.

The argument that it is not appropriate for the development assessment process to include referrals to different government agencies in connection with ongoing business operations because they are not relevant to design and siting issues is spurious. The advice of other agencies may be extremely relevant in terms of potential future environmental impact on neighbouring lessees and, cumulatively, on a much wider area. For example, the proposed or permissible trading hours of a licensed establishment will have a significant impact on environmental considerations. Land uses with the potential for adverse environmental impact should therefore be identified early in the process, particularly when there is no third party appeal mechanism.

#### *The assessment tracks*

The ACT may well be the first jurisdiction in Australia to adopt the assessment track model – this is hardly surprising when the ACT does not have the pesky irritant of local councils wanting to retain control over planning and development in their areas.

Exempt – this track is to include development which 'has a low impact beyond the site' and 'should be simple to identify without the need to make an application'. My understanding is that the number of developments exempt from the development assessment process will increase although there is no indication of the nature of developments which will be exempt in the future. I would be very concerned if it



extended to the full range of 'minor developments' currently exempt from public notification.

Code and merit assessment - under code assessment, DAs will be assessed by an 'expert assessor' against quantitative and objective criteria while under merit assessment, DAs will be assessed by a 'professional assessor' against complex criteria relating to quality, performance and on-site and off-site effects. It would be useful to have some information on the relative formal qualifications and expertise required of 'expert' and 'professional' assessors respectively. The shortage of qualified planning staff and lack of formal training is a major source of lack of confidence in the consistency and fairness of the system.

### *Appeals against decisions*

I do not agree with the views expressed in the *Auditor-General's Report on the Development Application and Approval Process in the ACT* that '[The] small number of appeals suggests that the vast majority of participants do not have major objections to the fairness of decisions' and that the fact that 'The majority of AAT decisions find in favour of the Authority ... suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny'.

The Auditor-General acknowledged that the audit 'did not examine whether the appeal process is complex or costly and may discourage applicants to appeal'. The complexity and the cost (both in terms of time and legal representation) at the least 'discourage' and, probably more commonly, put the appeals process out of reach for most ordinary members of the community, regardless of whether they are applicants or objectors to a proposal.

Without examining the documentation, including transcripts of AAT proceedings, it cannot be assumed that AAT decisions are fair. The only other means of effective scrutiny of AAT decisions is through appeal to the Supreme Court on a matter of law. Unless they are extremely wealthy, individual private citizens are effectively excluded from this course of action not only by the cost of engaging legal representation to argue their case but also by the possibility that the costs of all parties to the proceedings may be awarded against them – a fact well known to all parties to appeals and to the AAT itself.

## **4 Environmental impact assessment**

The term 'Environment Minister' (which apparently refers to the Minister administering Part 4 of the Land Act – ie the Minister for Planning rather than the Minister for the Environment) is certainly 'peculiar' and should be abandoned – if necessary, through amendment to the legislation.

I do not support the recommendation in *Technical Paper 4* that the Minister for Planning have the discretionary power to direct that an environmental impact statement be prepared, especially when that power is delegated to ACTPLA, nor the recommendation that the role of the Minister for the Environment be confined to environmental authorisations.

*Technical Paper 4* states that 'Given the independent nature of [ACTPLA], it should be given a significant role in the administration of environmental impact statements, including scoping of environmental impact statements'. There is a need to define what is 'significant' in the context of environmental impact.

If, as the paper states, there are no minimum qualifications for members of panels conducting environmental impact inquiries – and panels can determine their own procedures - then this needs to be addressed as a matter of urgency. I would also suggest that the qualifications of panel members need to be more robust than simply 'experience' in a given field or sector.

The proposed model provides for environmental impact statements of DAs at three levels ranging from minimal for minor development, through expanded design response report to listed activities with a high anticipated level of environmental risk. Reliance on the nature and scale of developments as the major criteria fails to take account of the very different impacts of the same land use in locations with very different physical, social and cultural characteristics.

No doubt, the proposals that environmental impact statements will be triggered at a 'higher threshold level' and that there will be fewer DAs attracting environmental impact statements will be 'favourably regarded' by proponents of DAs. It is not at all clear how 'neighbourhoods will continue to be protected' when the number and type of DAs which will be exempt from public notification will increase; referrals to other government agencies will be minimised; thresholds for environmental impact assessments will increase; and access to appeals mechanisms will be significantly curtailed.

## **5 Community consultation**

The *Review of Stakeholder Engagement in the ACT* was prepared for the Minister to assist in consideration of issues surrounding community consultation and engagement. The context of the review was the abandonment of the proposed Community Planning Forums to replace the Local Area Planning Advisory Committees. The review showed a low level of trust and confidence and a lack of transparency in the community consultation process.

It is unclear why there is a recommendation to 'assess the need for a set of standard practices for community engagement ...'. The need was made clear in the report of the *Review of Stakeholder Engagement in the ACT*, the Artcraft Research project and the recent *Auditor-General's Report on the Development Application and Approval Process in the ACT*. The recommendation also seems quite extraordinary when the project is recommending the downgrading of the role of master plans and neighbourhood plans and the Government has shown no interest or enthusiasm in reinstating local representative bodies similar to the former LAPACs.

I would suggest that, at the least, serious consideration should be given to setting up a residents' reference panel on planning issues.

It is stated that 'community consultation procedures for developing planning rules and policy are to continue'. How the community 'will contribute to the development of

planning policies and codes up-front' is unclear, given the absence of consultative mechanisms in most Canberra suburbs.

For example, Kingston residents have no formal consultative mechanism whereby they can raise concerns relating to planning and development. Despite being an Inner South suburb, Kingston has been excluded from the Inner South neighbourhood planning groups. While I appreciate that the principal focus of the neighbourhood planning process has been on medium-density housing development (and associated sensitivities) and that Kingston has 'been there, done that', there is growing concern among Kingston residents that the encroachment onto residential areas of inappropriate commercial activities - notably those operating after hours, generating excessive noise from service and utility vehicles, and those involving the service of alcohol - is not considered important or deserving of control by planning authorities.

Finally, having attended ACTPLA's so-called consultation session with the Inner South community on 5 July, I would certainly agree with the concerns reported in the *Review of Stakeholder Engagement in the ACT* that the timing of the consultation (two weeks before the end of the eight-week period for public comment) was too late in the process to be of any value and, to use the words of the same report, the 'perfunctory' and 'heavily controlled' way in which the exercise was conducted is not conducive to community engagement.

## 6 Perception of potential conflict of interest

With ACTPLA performing both State and municipal functions, there is no separation of responsibilities such as that afforded by the State and local government structures in other jurisdictions. It is argued in relation to the administration of environmental impact in *Technical Paper 4* that 'There is no reason why the proposed reforms will increase the potential for conflict of interest ...'.

The proposed reforms to all aspects of the planning process assign to ACTPLA and the Minister for Planning virtually unfettered control of the entire planning system with a commensurate diminution in the role of other government agencies which provide appropriate checks and balances.

The *Economic White Paper* makes very clear the limited and narrow resource base of the ACT, the ACT Government's heavy dependence on returns from housing and land transactions for revenue, and the need to maximise returns to the Territory from land development. Together with the Government's commitments to a 'pro-business' policy approach and 'business-friendly' planning policies, regulations and processes, this may well give rise to perceptions among other sectors of the community that economic outcomes will be pursued at a cost to environmental considerations and broader social and cultural community standards and wellbeing.

The Minister himself has commented that separation of power is a key element of the DAF model but has also stated that 'ACTPLA is a government department for the purposes of its policy role and is not independent from government policy' (Hansard 26 June 2004). While he may well believe that 'in its decision-making role ... it is at arm's length', I do not share his view that 'arm's length' provides adequate separation.

Appropriate separation of powers and a very clear and effective system of checks and balances are essential components of any reform agenda which has the trust and confidence of the Canberra community.

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