The Kaleen retirement and aged care development – A case study on ~~large project~~ development issues in the ACT

1. A couple of weeks before Christmas in 2015 the ACT Labor Government quietly amended the rules relating to land zoned Community Facility Zone (CFZ) to allow them to be used for residential purposes. Being a controversial amendment, the Christmas season timing was, politically and tactically, good timing to get it through when Assembly members, and the wider population, were pre-occupied with celebrating the festive season.

2. What is not generally known, is that these rules are now being used to allow very high density, huge two- and three-story developments (usually only allowed in RZ4 category zones, intended for high density use) right in the middle of low-density, residential neighbourhoods zoned as category RZ1.

3. The ACT Planning and Land Authority has now allowed a three storey residential development, consisting of independent living units, and a two-storey residential aged care facility (a nursing home), in a Community Facility Zone in Kaleen, located in the heart of an RZ1 zone, intended for low density residential housing. This development has been approved despite the fact that it is in very close proximity to neighbouring houses and overshadows them from solar penetration at the most important part of the day in winter, in the early morning, when passive solar warming, through radiant heat, is most effective. The sunlight will be cut off for some homes in the morning, the best part of the day for passive solar heating in winter. This Government agency has completely disregarded the overshadowing and privacy impacts; and residential amenity impacts; and seems oblivious to the fact that a huge, high-density residential development is completely out of character with the neighbourhood (RZ1, low-density residential).

4. Most people living in the area purchased their properties in good faith some four decades ago and it is completely unfair that the ACT Government should appropriate a portion of the value of their property by allowing a totally inappropriate development to proceed. There are currently other abuses of the CFZ zone underway throughout the territory and the Government cannot be permitted to get away with these abuses. Significant legal issues are involved in the context of the prejudice to the rights of pre-existing lessees by the adverse effects of post-dated legislation allowing such use of land zoned CFZ.

5. The CFZ building code has a minimum setback requirement of 6 metres. This means a double storey, 'residential aged care facility'-(jargon for nursing home) can be built at that distance from the fence of an ordinary home in a low-density residential area (technically, an RZ1 zoned area). The one approved for construction in Kaleen has an 80 room capacity. The northern aspect overlooks two homes, one having a living room within 1 metre of the boundary – a total of 7 metres from the nursing home, where the upper storey has a balcony, which one would expect to be used in winter by most of the residents. The residents of both homes could expect up to 80 elderly people sunning themselves in the winter, overlooking their homes and their entertainment areas (technically 'Principal Private Open Spaces') where they enjoy quality family time with their children, friends etc.

6. Nursing homes have a staff to-resident ratio of approximately 80%. An industrial scale laundry and cleaning facilities for equipment; food service facilities; nursing facilities; and staff to use them to provide those services, is necessary – hence the high number of staff, creating a high level of human activity. The nursing needs of residents at all hours of the day and night; ambulance services, with sirens blaring; a high level of ambient noise from laundry and other servicing activity; and higher-than-normal ambient level of light; is *de riguer.*

7. Add to the above, the triple storeyed 'independent living units', of which there are going to be 90, on a block of land some 17,000 sq metres in area. The 'plot ratio' (total floor space-to land area) is going to exceed 90%. Ordinary homes are limited to 50% in RZ1 areas, but there does not appear to be any limit on plot ratios for CFZ developments. What is technically known as the 'Streetscape' i.e. what the ordinary people living in adjoining homes in the street will see, will be totally dominated by this overwhelming development.

8. Can anyone think of a more inappropriate development for the neighbourhood? Well, one of the objectives of the CFZ zone is *'To safeguard the amenity of surrounding residential areas against unacceptable (sic) adverse impacts, including from traffic, parking, noise or loss of privacy'.* So, ordinary rules of interpretation require that if *any of those (and indeed any other amenity-related) factor reducing amenity 'unacceptabl(y)'* should require the rejection of approval of the proposed development. No, not so! It has been approved!

9. Concessional leases. It is not clear why leases to parties to build, own and operate revenue-generating businesses should be granted at concessional if prices. Due to the rapid aging of the population, the building, ownership and operation of residential aged care and retirement living facilities are rapidly growing, profitable markets. There are large, well-funded, commercial operators, such as Aveo and Lend Lease (and presumably others) competing vigorously due to the growth of the market and assistance provided by the Commonwealth through subsidies for aged pensioners in 'residential aged care facilities' (i.e. nursing homes). Aveo has been the subject of a recent 4 Corners report, although I am not suggesting that the allegations made in that programme are true. The fact that some are run by off-shoots of 'religious organisations' like Baptist Aged Care (which may or may not be financially supportive of that 'religion'; or by off-shoots or derivatives of so-called 'service organisations' like the Returned Services League (the remuneration for and conduct of the officers of its peak body have been publicly questioned and personnel changes made) do not make them less 'commercial' in that they charge market rates for their services to their 'customers' and tap into Commonwealth subsidies in exactly the same way as profit-making corporations such as Aveo, Lend Lease, and others. If, in fact, the businesses affiliated with religious or service organisations do contribute financially to such parent organisations, that, itself, raises significant issues relating to the channeling of funds for purposes that are not known to, or authorized by, the community at large, and, possibly, by the governments providing such financial benefits. RSL Lifecare, the proposed lessee of the Kaleen development, has more than 1.23 billion (yes, with a 'B', not an 'M') in assets and more than 400 million in nett equity. In that context, why is the ACT Government further subsidizing such operators with 'concessional' leases?

10. ***Lack of competitive tendering.*** The proposed lease to RSL Lifecare of the Kaleen block appears to have been the subject of an agreement 'behind closed doors' rather than an openly tendered opportunity. Why? In light of my observations under paragraph 9 above, should not the ACT Government seek to obtain a market price based on open, vigorous and competitive bidding? Is this not a serious failure by the Territory Government, by granting such unjustified financial benefits to its selected beneficiaries, to protect the Territory's revenue base? Why should the long-suffering burghers of the Territory be burdened with rates and taxes that are higher than they would otherwise be, if competitive tendering were adopted for such leases? *Should land not be utilized in its highest value use, and priced accordingly, in keeping with Ricardian Rent Theory (apart from genuine widely accepted, socially beneficial reasons e.g. leases to genuine religious organisations)?* That is the basis for the sale of leases of land for residential purposes in the Territory, so why not for commercial purposes, where substantial profits are to be made?

11. ***Privatising the revenue and socialising the costs.*** The arguments, in paragraphs 9 and 10 above, point to a deliberate policy of allowing revenue to be privatized, while the costs are socialized, in the case of such 'concessional' leases that are agreed in secret and made public *ex post facto* without any explanation. Is this a sign of an arrogant government? *Usually, one sees such conduct in right-wing political parties, not a coalition of Labor and Greens.*

12. ***Dictatorial approach by Government to lessees of leases in the Community Facility Zone.*** The mechanics of the grant of leases in the Community Facility Zone appear to be as follows *(and I am happy to be corrected, if wrong):*

(a) Secret deals, negotiated and agreed, in principle, behind closed doors;

(b) Government dictating to lessees the minute details of development even before a development application is lodged. This is achieved by 'draft leases' which make the grant of substantive leases conditional on the development being of certain size or, as in the Kaleen case, providing accommodation for a stated number of 'residential aged care' rooms and a stated number of 'independent living units'. In the Kaleen case, it is 80 and 90 respectively. This causes the developer to design and build facilities which may have no redeeming architectural features, or lack socially-desirable functional features, in complete disregard of the streetscape, local residential amenity and lack of proximity to shopping, professional services, and other services, which are necessary to meet the day-to-day needs of such residents of the development. One would expect that Governments act responsively to both, their constituents on the one hand, and the developer, on the other, implying a timely, and effective, consultative approach with neighbouring residents; and the developer, to establish the nature of their aspirations, and whether that is in the best interests of the wider community. Developers are best placed to suggest appropriately designed facilities, including capacity for, in this case, residential aged care and independent living units, respectively, which are suitable to the block. Such issues should be settled in a public, consultative, process before the selection of the prospective lessee, under a competitive tender, so that the awardee is not surprised by the nature, size and cost of the facility expected, and indeed, demanded, by way of prescription in a draft lease, by the Government, of the facilities to be built. The developer's views, in the Kaleen case, do not

appear to have been sought in advance of the decision on the number of beds/dwellings *although I am happy to be proved wrong.*

(c) If Governments are going to take a high-handed approach and stipulate the number and type of dwellings/beds, then that should be done publicly, in advance of the selection of the lessee, rather than behind closed doors. For example, the proposed release of land in Ngunnawal, at the top of Gungahlin Drive, for a retirement village and aged care facilities, has been announced. Why could not that announcement have included the number and type of dwellings/aged care beds etc? Potential lessees would, thereby, have full advance knowledge of what is expected, rather than being confronted with an onerous requirement which they are compelled to meet; spend substantial amounts for plan preparations, and then run the risk of having their project rejected after public consultations, the processes for which, very belatedly, have been tightened substantially – see Canberra Times of 5th July (you can access the article at this URL: http://www.canberratimes.com.au/act-news/developers-required-to-report-on-public-feedback-under-draft-guidelines-20170704-gx4ene.html).

13. There are further, very important dimensions of such dictatorial conduct. In at least one decision by the ACT Civil and Administrative Tribunal, it was held that the number of aged care beds to be provided was a 'Government requirement' that needed to be met by the developer of a project that became subject to an application for review by that tribunal. By stipulating in a draft lease, or otherwise, the details of the development on the land that is to form the subject of the lease, the executive Government is, in effect, pre-empting its own planning, land use, and design assessment processes which are administered by the Government's own agency which was, formed, and exists, to administer the planning laws of the Territory, and, thus, brings into disrepute the framework for assessment of such projects.

14. Again, such ***'government by executive fiat or diktat'*** appears to contravene the well accepted Westminster constitutional doctrine of ***'separation of powers'***. If the Tribunal decision, as interpreted by me in the discussion in the preceding paragraph, is accepted as a binding precedent in law, it nullifies the jurisdiction of the Tribunal and, arguably, the Courts, in reviewing development approvals granted by the ACT Planning and Land Authority, under 'merits review' and 'judicial review' respectively.

15. ***Less Onerous Standards for Large Projects vis-a vis Residential Lessees.*** Ordinary residential lessees are subject to stringent planning requirements including maximum plot ratios. Developers of aged care facilities and independent living units that are not the subject of separate title or unit title do not appear to be subject to plot ratio limits *although I am happy to be corrected if wrong.* One would have thought that large projects and structures should be subject to ***more stringent*** planning criteria than ordinary residential lessees, rather than ***less stringent*** ones, if not through plot ratios, then through other means of assessment of aesthetic, functional and impact criteria.

16. ***Use of Public Urban Recreational Space for Private Access to revenue-generating facilities.*** There is an interesting twist to this development approval. The lessee does not appear to be acquiring the adjoining PRZ1 zoned land (nor, indeed, should it be permitted to do, as it is

zoned for public urban recreation use, *but there is a suggestion that it may be allowed to do so*), but will be constructing a road on such land to access its own private revenue-generating purpose on an adjoining block, which would not have any other access. My reading of the zone objectives strongly suggests that the above use of the land, so zoned, is not consistent with the zone objectives. They are:

> ***PRZ1 - Urban Open Space Zone Zone Objectives***
> *a) Provide an appropriate quality, quantity and distribution of parks and open spaces that will contribute to the recreational and social needs of the community*
> *b) Establish a variety of settings that will support a range of recreational and leisure activities as well as protect flora and fauna habitats and corridors, natural and cultural features and landscape character*
> *c) Allow for stormwater drainage and the protection of water quality, stream flows and stream environs in a sustainable, environmentally responsible manner and which provides opportunities for the community to interact with and interpret the natural environment*
> *d) Allow for ancillary uses that support the care, management and enjoyment of these open spaces including park maintenance depots, small-scale community activity centres*
> *e) Ensure that development does not unacceptably affect the landscape or scenic quality of the area, adequacy of open space for other purposes, access to open space, or amenity of adjoining residents*
> *f) Provide for integrated land and water planning and management"*

17. I would suggest that the construction of a road, to serve a privately-owned, revenue-generating facility exclusively, is not consistent with the above zone objectives on any interpretation of the law. Furthermore, while the development code for public urban space land authorizes ***ancillary*** uses, on any reasonable interpretation, that would only relate to the uses permitted for ***that land***, so zoned, not for the benefit of ***other land, being developed for private gain.*** For your convenience, I provide the URL below for that code, so that you can conveniently read, analyse and consider whether the relevant provisions fit with the use of such land, now approved by the A.C.T. Land and Planning Authority:
http://www.legislation.act.gov.au/ni/2008-27/copy/90288/pdf/2008-27.pdf

189. If the relevant PRZ1 zoned land is going to be re-zoned, or the consolidation of the two blocks permitted, or the boundaries of the block on which development has been approved, expanded under the Territorial Plan amendment process, two issues arise. First, that should be done in advance of indicating a preparedness to grant a lease of the land, under the competitive tendering process I've suggested above, so that all prospective developers/lessees have that information available, to level the playing field by removing information asymmetry. It should certainly not be done *ex post facto* the development approval process, because that undermines the approval process and other potential lessees, who may have considered the project, would have had no opportunity to compete for it. Secondly, the consultative process for the amendment of the Territorial Plan should allow sufficient time for effective public consultation, which should include letter-box drops, newspaper notification and through the ***creation of an Office of Public Planning Advocate***, who would be knowledgeable in the intricacies and legalities of the planning process.

19. ***'Right the Wrongs' – Limited Window of Opportunity for Government to rectify Kaleen development.*** There is a request to the A.C.T. Civil and Administrative Tribunal by an adjoining residential lessee for a 'merits review' of the approval for the development, both of the structure and the road, but the primary concern of the applicant appears to be the reduction in amenity to that lessee, rather than the broader public interest issues and ***it is likely that the proceedings will be terminated in the next couple of days by agreement of the parties to consent orders aimed at addressing the particular concerns of that lessee. That, however, does not address the fundamental public interest issues raised in this and previous communications by me, about the use of PRZ1 land for the purpose of access to private, revenue-generating facilities on an adjoining block.*** The relevant Minister, and, more broadly, the Government, have an opportunity to right the wrongs in this case, before it is too late. ***This they can do by seeking leave of ACAT to be joined as a party to the proceedings before they are terminated in the next couple of days, if they are entitled to do so*** *(unfortunately, my reading of the ACAT legislation suggests that no-one who has not made an original representation against the development has standing to do so. If correct, that is a serious defect in the legislation, intended or not, and should be rectified as soon as possible).* Once joined, the Government could have a seat at the table and ensure that the process has regard to the environmental issues arising from the construction of the 'private' road through unleased Territory land zoned PRZ1; and revisit its dictated outcome to the developer to provide 80 residential aged care beds and 90 independent living units (which approach it should eschew for future leases of land zoned for community use). ***There may well be other public interest and environmental issues that it could explore in these proceedings, which opportunity would be lost if the rapidly closing window of opportunity does close in the next couple of days.***

20. ***The role of organisations which aim to serve the community.*** The legislation establishing the A.C.T. Civil and Administrative Tribunal allows organisations to be granted leave to be joined as parties to proceedings where issues relevant to the objects of such organisations are involved. However, whether by accident or design, such intervention, in practice, appears to be excluded by effect of the law, as discussed above. Examples of such organisations which should be allowed to intervene, but apparently are disqualified from doing so, are:

(a) ***The Environmental Defender's Office***, established to do what its name expresses. The matter has been raised with it, but as it is funded by the ACT Government, its ability to act is limited by its legislation and its purse, the strings of which are controlled by the ACT Government. The EDO is not empowered to litigate or engage in particular proceedings. The Government should consider whether the EDO is well placed to seek leave of the ACAT to be joined in such proceedings and amend the law to allow such intervention by the EDO and others make a financial subvention to cover its costs relating thereto.

(b) Similarly, the objects of the ***Belconnen Community Council*** can be presumed to be focused on the issues raised in this representation in the Belconnen district and, again, the matter has been raised with it, but no response has been forthcoming from it yet.

(d) ***The ACT Commissioner for the Environment and Sustainability*** would also have a significant interest in this matter, at the very least, in the construction of the road over land zoned PRZ1, dedicated to Public Urban Recreational Use. It remains to be seen if this independent agency takes meaningful action on this matter.

(e) ***The Environment Protection Authority,*** a body corporate created by the *Environment Protection Act 1997*, is required to comment on development applications. In the Kaleen case, it responded in considerable detail to matters relating to the protection of the environment during the construction phase, but was deafeningly silent on the longer-term implications of (a) extending the boundaries of the block on which the development is to occur into the adjacent PRZ1 zoned block; (b) the possible consolidation of the block on which the development is to built, with another adjacent block, zoned PRZ1; or (c) the construction of a road over the PRZ1 zoned block to serve a privately owned, revenue generating enterprise on the adjoining block – on any assessment, serious abnegations of statutory obligations, given that the objectives of the PRZ1 zone include environmental values of the area.

(f) A key problem, faced by all the above organisations, as discussed above, is that the legislation denies individuals and organisations the right to intervene in ACAT proceedings if they have not made representations in the course of public consultation on the development application. Due to the number of development applications in train at any point in time, it is almost impossible for such organisations with limited resources to scrutinize and take action (and affected individuals as well, even if they are aware, at the public consultation stage, due to time constraints and lack of understanding of a complex area of regulation, and the costs of legal representation at ACAT or Court stages). This plays right into the hands of developers and the Government, which, although it can do so, chooses not to make intervention by more knowledgeable organisations possible, at merits or judicial review, by restricting such rights to those who have made representations at the public consultation stage.

21. ***Limits of application of legislation post-dating commencement of adjoining leases.*** It appears to be a well-accepted legal principle, upheld by the Tribunal, that the rights of lessees, whose leases commenced before the enactment of legislation, the provisions of which affect them adversely, are superior, and prevail against, the adverse effect on them of such legislation. The legislation allowing land zoned CFZ (Community Facility Zone) to be used for housing is relatively recent. The Kaleen development (and perhaps others) flow from legislation enacted only a couple of years ago, thus entitling residential lessees of adjoining land to resist development for housing in CFZ zoned land, if they had the wherewithal to pursue their rights in the Courts and Tribunals. Unfortunately, few ordinary Territorians have the resources to do that, thus allowing the Government to ride roughshod over their rights.

21. The combination of the legislative and administrative frameworks and disempowerment of citizens leads to a highly undesirable situation – right of review, but executive power limiting the scope thereof; public interest protection agencies being limited in their power, or constrained by resources by a Government holding the purse-strings; individual citizens limited by time and financial resources from taking up the cudgels; – one could be forgiven for associating it with descriptions like 'Kafkaesque' or 'catch 22'.

22. ***Flagrant violation of COAG competitive neutrality principles and disregard of neighbourhood character.*** The surrendered asbestos-decontaminated and cleared blocks, acquired by this Government and now being resold, have been granted a substantial economic advantage through Government regulatory fiat – irrespective of zoning, they can be economically exploited by subdivision into two blocks and construction of two dwellings ('dual occupancy'). Owners of other RZ1 blocks, in the same or other suburbs, are not allowed to do so. The economic implication of this is that the Government is able, at auction, to command higher prices than owners of other RZ1 blocks, whether in the same street or suburb or other streets or suburbs and, indeed, next door to such rehabilitated blocks, purely because of the economic advantage of the potential for such re-development. This is a flagrant violation of the competitive neutrality principles under the Council of Australian Governments agreement, to which the ACT had signed up, many years ago. Yet another example of a voracious, money-grabbing government, discriminating against, and exploiting for its benefit, its own citizens to swell its coffers. How much is enough? Where will the greed of this government take it? ***Hello ACT Independent Competition and Regulatory Commission! Where are you? Is this example of competitive non-neutrality not in your bailiwick? Have you thought about involving yourself to correct this apparent breach? Or haven't you noticed?***

23. It is not just the economic effect of *diktat* by a money-hungry government, blatantly exploiting its legal power for economic gain. Suburbs and neighbourhoods, long distinguished by their 'garden character', recognized by the RZ1, low-density residential housing zoning, and exhibiting such a character, will now be interspersed with a jarring, haphazard, dual occupancy feature, purely for economic benefit to the ACT Treasury's coffers. Surely residents in RZ1 areas, especially those adjoining these dual occupancy blocks, should not be unfairly and disproportionately penalized for the cost of remediating blocks affected by the unfortunate asbestos calamity. The cost should be one for the public purse, paid for in the usual way for other costs, by the tax system.

24. ***Beware the Powerful and Corrupting Influence of Business and Development Lobbies.*** In NSW, there is the well-known prohibition on real estate developers contributing to political parties. We do not have such legislation in the ACT, *although I am happy to be corrected, if wrong*. Furthermore, there is a powerful 'cop on the beat' there, in the form of the NSW Independent Commission against Corruption, which was responsible for aerating facts and circumstances there, which led to the well-publicised conviction and imprisonment of former Ministers, Mr Ian McDonald, arising from a decision to allocate land; and Mr Eddie Obeid, relating to a decision on a business lease. Again, to the best of my knowledge, *and I stand to be corrected if wrong*, there is no ICAC-equivalent in the ACT. Governments need to be extremely careful that, in their push to 'develop at any cost', they do not become cosy bedfellows with developers in unholy alliances, although it is stressed that no such allegation or imputation is being made in relation to the Kaleen development. It is a broad statement of risk in cosying up to the developer/business lobby. If Governments get too close with developers, they do so at the risk of being pressured to 'bend rules' and being found out.

25. ***The electorate remembers.*** The old days of electorates 'setting and forgetting' the government they elect are well and truly over. The phenomena of Trump and Brexit point to the disempowered being willing, and able, to strike back. If the Government, ***including the Greens***, considers that such issues will be forgotten by the time of the next election, they have another think coming. In times of economic stress, the last thing people want is an arrogant government, unresponsive to their needs and aspirations. If undesirable planning outcomes are permitted and occur on a government's watch, or are approved by individual ministers of government, they will wear the resulting public opprobrium and the electoral price will have to be paid. Following some contentious development decisions, this area of concern could well become a touchstone at the next election.

26. ***Broader planning issues in CFZ zones.*** The use of CFZ land needs to be revisited in depth. Where they are situated in long-developed suburban areas, their use should be limited to purposes in legal force and effect at the time of the development of the suburb. Subsequently enacted legislation, no doubt, prevails against lessees who acquire their properties after the amending legislation, but there would be lessees who have acquired their properties before the amending legislation and rather than the Government trying to bluff its way through the rights of unsuspecting lessees in long-developed suburban areas, their use should be limited to purposes in legal force and effect at the time of the development of the suburb. In new suburbs, of course, newly-legislated uses could be applied.

27. ***Aged care; retirement accommodation; and public housing;*** are likely to gain prominence from a futuristic perspective arising from population aging and the expected loss of 44% of current jobs by 2050. Policies need to be developed well in advance for both, although the train has left the station on the aged policy issue. May I, as a lay person, suggest some approaches. Residential aged care facilities (nursing homes) need to be planned for location in close proximity to hospitals, to avoid delay in transporting them for urgent hospital treatment. They could be located in hospital precincts (like the one being built on the University of Canberra grounds), with a high-care unit at the top of the hospital, only a lift journey to an intensive care unit.

28. ***Public housing*** raises complex issues, but certainly revisiting the old approach, long eschewed, of the 'Melba Flats' and 'Burnie Court' failed experiments, and which needed to be demolished, which those of us old enough would remember, is inviting disaster. A more nuanced approach to deal with the range of issues affecting the economically disadvantaged sections of the community is needed. We need to get ahead of the rapidly rising unemployment curve, with innovative ideas about the size, location and composition of accommodation, especially for the elderly, whether for the indigent elderly or self-funded retirees. There is room here for creative solutions which meet their needs while avoiding the relatively high charges and other arrangements, which erode their nest eggs, which they justifiably wish to leave to their beneficiaries on their departure from this mortal coil.