LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
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Submission Cover Sheet

Inquiry into Planning Bill 2022

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SUBMISSION ON THE PLANNING BILL 2022

The ACT Law Society appreciates the high level of consultation and engagement provided originally by EPSDD and now welcomes the opportunity to provide a submission to the Standing Committee in respect of the *Planning Bill 2022*.

Our preliminary comments on the draft Planning Bill 2022 were included in the ACT Law Society's letter to EPSDD (dated 15 June 2022) (**Submission**).

The *Planning Bill 2022* (**Bill**) has since been presented to the ACT Legislative Assembly. From our review, some comments and concerns as outlined in the Submission have not been addressed by the Bill and there are a number of areas that we consider require refinement or amendment.

We have sought input from members of the ACT Law Society's Property Law Committee and based on the feedback received, we provide the following comments.

Submitting Development Applications on inconsistent Territory Plan provisions

Section 62 of the Bill deals with the notion of permitting a Territory Plan variation to have interim effect during the public consultation period. At the same time section 50 provides that nothing can be done that is inconsistent with the Territory Plan (in its unvaried state). The effect of these provisions is that, even though there may be an intention under section 62 to provide interim effect to a Territory Plan amendment, the lowest common denominator under both the Territory Plan without the variation and with the variation applies – the result being that interim effect often cannot occur.

A good example of this is DV381 where the TPV was to increase the permitted shop GFA in local centres from 1000sqm to 1500sqm. The TPV was given interim effect, meaning the intention was that shops up to 1500sqm were permissible during the period of the interim effect, but due to the inconsistent wording between sections in the P&D Act (the same as in the Bill), the interim effect could not be given because section 50 still required shops to be no more than 1000sqm.

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As noted in the Submission on the draft Planning Bill, there has been no clear guidance on how inconsistent provisions of the current and draft Territory Plan will be assessed.

These comments were acknowledged in the Consultation Report, but no changes or further guidance has been provided by EPSDD, other than that the matter has been referred to a relevant team or agency.

As previously stated, applying the lowest threshold in the determination of a development application is counter-intuitive and could lead to adverse planning outcomes. In this way, section 62 should be amended so it is made clear that if interim effect is provided to a Territory Plan variation then section 62 will override the application of section 50. Including an example in the drafting of section 62 would also be beneficial.

Territory Priority Projects

We are pleased that the Territory Priority Project declarations now potentially include non-government opportunities to take advantage of the Territory Priority Project regime, by expanding the criteria of Territory Priority Projects in the Bill. This will capture some of the powers in the existing Ministerial call-in power.

Section 215 (1) of the Bill requires that a Territory Priority Project declaration be made by both the Chief Minister and the Planning Minister. This seems to be a very high threshold of Ministerial endorsement for a declaration. With the test of what proposals will qualify for Territory Priority Project status already being a rather high benchmark, we query why there also needs to be the requirement for the two Ministers to declare the proposal as a Territory Priority Project.

Ministerial Consent on Concessional Leases

In the Submission, it was noted that the requirement for Ministerial consent for the removal of the concessional status of a Crown lease seems unnecessary. The Consultation Report notes that this is agreed in principle and changes have been made to the Bill to reflect this.

However, no changes have been made to Division 10.5.3 of the Planning Bill 2022. We would welcome further guidance on whether any changes were made elsewhere to give effect to this, or how the Planning Bill 2022 limits or removes the requirement for Ministerial consent.

We note that the current Planning and Development Act 2007 (**P&D Act**) provides a process for removing concessional status, involving the calculation and payment of an amount for the market status of the lease. There are a range of other mechanisms that can be used to ensure that concessional leases are used for the specified purpose for a set period or the duration of the Crown lease.

If a Crown lease is not subject to these types of restrictions then the introduction of a requirement for the Minister to agree to the removal of the concessional status may create uncertainty and end up limiting the future viability of community, sporting, religious and not-for-profit organisations that require additional flexibility to develop the land on which they hold a concessional lease at some time into the future if there is insufficient political support for this change.

Whether the concessional status of a Crown lease should be removed should be a decision taken on its merits rather than becoming a political decision.

Use as development

The Submission highlighted the need to clarify 'use' as a form of development that requires development approval. The Consultation Report states that this was 'noted'. The Bill has not provided further clarity on the application of these provisions.

Under both the current P&D Act and the Bill, if the use is permitted under the purpose clause in the Crown lease, even if it has not been activated to date, commencement of that use with physical works or impact on the sites and surrounds necessitates a development application. This requirement is not readily understood or implemented. We question the need to retain "use" as a form of development in our Crown leasehold system.

Most Crown lessees are not aware that there is a requirement to obtain a development approval to activate a use in their lease that they have already paid for. There is the notion of "authorised use" under section 145 which does not require development approval, but that exemption is lost under section 146 if there are any works proposed to be undertaken. This circular system of use being treated as a development then potentially exempt from development approval and then no longer exempt from development approval is very confusing and problematic. Usually, development approvals are silent on approving use and activating the uses already permitted in the Crown lease. Consequently, there is widespread technical non-compliance with use throughout the city.

Further, the example given in section 147 contemplates that a prior position of uses in a building being authorised (and therefore exempt from development approval) is lost once the lessee proposes to do earthworks around the building. The notion that a lessee could effectively lose the right to use the permitted uses under their lease seems nonsensical. If the uses were lawful immediately before the commencement of earthworks, then they should remain lawful after the earthworks. Indeed, the earthworks should have nothing to do with the lawfulness or not of the existing uses in the building.

Use as a development is a very confusing and often misunderstood concept.

Ministerial consent for transfer ahead of settlement

The Submission highlighted the need for Ministerial consent to transfers that occur following entry into a contract for sale of a first grant Crown lease, but before the Crown lease is issued, noting there is justification for purchasers who get into financial difficulties. In the Consultation Report, this was "agreed in principle", but that no change is required.

We note that section 298 of the P&D Act, relating to the requirement to obtain Ministerial consent to a transfer of a Crown lease that contains a building and development covenant, is retained in the Planning Bill effectively in its current form (see sections 366 - 369). The Property Law Committee has been advocating for a policy change to allow Ministerial consent to be provided to transfers that occur following entry into a contract for sale of a first grant Crown lease, but before the Crown lease is issued, noting there is justification for purchasers who get into financial difficulties.

In the current economic conditions, with high inflation and rising interest rates, there is even more concern that purchasers may incur financial difficulties in completing their contracts for sale. We accept that the circumstances of when consent is able to be provided should remain as currently generally provided for in the legislation. However, we propose that the Bill make clear that transfer consent can be provided prior to issue of the Crown lease and enable a party to get consent to

transfer ahead of settlement so that a purchaser does not need to default under the contract for sale.

Concurrent LVC calculation

The Submission stressed that the assessment and calculation of a Lease Variation Charge (**LVC**) should form part of the Development Application for the approval of the variation. In the Consultation Report, this was "noted" and referred to the relevant team or agency. No further guidance has been provided on this issue.

We consider there remains a disconnect in timing between the lodgement and determination of the development application for a Crown lease variation, when compared to the corresponding LVC assessment which occurs post-development approval. Concurrent determination would be preferable, and we encourage reforms to action this. Often the assessment of a development application will take in excess of 6 months and then the applicant needs to wait a further 6 months for the LVC to be determined. This sequential and non-concurrent assessment creates delays and imposes an unnecessary time burden on applicants.

The ability to extend Development Applications

Sections 184 and 188 of the P&D Act currently allow for extensions of the timeframe to commence works under a Notice of Decision. Section 208 of the Bill only provides for an extension to the date that the Notice of Decision ends, and as such, the timeframe for the commencement of works under the Notice of Decision cannot be extended. We consider that such extensions of time should be permitted in the Bill.

Section 374 (currently 303) licence as registered interests

Currently, section 303 encroachment licences apply to the person to whom the licence is granted and thus do not flow with the land. This means that with every transfer of a crown lease which benefits from an encroachment licence a new section 303 licence needs to be issued.

The Bill provides for the equivalent licence under section 374. We consider that section 374 licences should become registerable interests that pass with title, and thus attach to the land, rather than the registered proprietor at the time. This simple change would save a lot of administrative resources for both the Government and parties dealing with the Crown lease and prevent the requirement to keep replacing the same licence when the property is sold.

Identification of rural leases

It is currently very difficult to identify rural leases. Rural leases are subject to very specific restrictions under Part 10.8 of the Bill and so it is important for those dealing with a Crown lease to understand whether it is a rural lease or not.

A "rural lease" is defined in section 252 of the Bill as "a lease granted for rural purposes". Just what is a rural purpose is not clear. For example, just because a Crown lease is located outside the city urban area does not necessarily mean that the lease is a rural lease. We consider that a register of rural leases should be introduced to provide transparency and ease of identification. New leases that are rural leases should specify they are rural leases (like for market value leases).

Designated DA case officer

As detailed in the Submission, we recommend that a single case officer be assigned to each DA that is lodged so the applicant is able to track the progress of the DA through the assessment pathway. Having a single point of contact for an application is very important to applicants and reflects an expectation of a degree of respectful service. At present, no-one appears to take responsibility for the progress of the DA assessment and this is often a point of significant frustration by applicants.

Review of the DA appeals system

We are conscious that the new planning system review did not extend to the planning decisions appeal process. There is often great angst between applicants and objectors when a DA approval is contested in ACAT under the current law.

Given that often (though not always) community representatives or neighbours are the primary objectors there should be consideration given to a form of appeal system which allows the objectors views to be heard more speedily with perhaps less formality than now and with a deliberate strategy to seek to mediate the dispute.

The Society would welcome a review of the appeal process to appropriately complement the new planning system.

Transition

It is pleasing to see a detailed set of transition provisions in Part 20 of the Bill.

Section 613(2) allows DAs in the system prior to the commencement of the new Act to continue to be treated under the P&D Act. This is appropriate. Section 613(4), however, contemplates circumstances where the DA is taken to have been withdrawn after lodgement. This seems a strange position to permit. The effect of this provision is that the assessment of those DAs will abruptly end (even if the assessment is nearly at its end) and the DA needs to be relodged (presumably with a requirement for payment of another fee) and so the assessment will start again.

The starting principle should be that all DA's in the system prior to the commencement of the new Act should be able to be assessed under the P&D Act and if the subject of review then the review continues under the P&D Act.

As well, can it be made clear that decisions made with respect to a DA lodged before the commencement date of the new law will also be made with regard to the previous Territory Plan and not the new Territory Plan. The 2 systems are not compatible nor can overlap.

In addition, as the transition provisions are an important element in understanding what the new law applies to and does not apply to then Part 20 should stay visible in the new Act after it comes into effect and should not disappear from view due to the application of section 88 of the Legislation Act – that will only confuse people more.

Declared land subleases and prescribed lease

Part 10.11 of the Bill deals with declared land subleases.

Declared land subleases are land subleases under a declared lease. A declared lease is a perpetual Crown lease to ANU or University of Canberra. A declared lease should also pick up the possibility

that the perpetual lease is surrendered and replaced with a 999 year lease (as is permitted under the PALM Act).

Conversion of Commonwealth National Land leases

Section 379 deals with the conversion of National Land Crown leases to Territory Land Crown leases under the new Act.

The reference in section 379(3) to "prescribed law" should also contemplate that leases can be granted under the new *Australian Capital Territory National Land (Leased) Ordinance 2022* (Cwlth). So the Ordinance itself should be a "prescribed law".

We appreciate the opportunity to provide further comment on the Bill and are willing to assist in future stages of the reform project.

Yours sincerely,

[redacted]

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