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FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND URBAN RENEWAL
Ms Caroline Le Couteur MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair)
Ms Tara Cheyne MLA, Mr James Milligan MLA, Mr Mark Parton MLA

Submission Cover Sheet

Engagement with Development Application Processes in the ACT

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The Committee Secretary
Standing Committee on Planning and Urban Renewal
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601.
Email: LACommitteePUR@parliament.act.gov.au

NEED FOR TRANSPARENT AND STRUCTURED PLANNING DECISIONS

There appears to be widespread public lack of confidence in Environment, Planning and Sustainable Development Directorate's (EPSDD's) ability to fairly and disinterestedly assess and evaluate applications for development approval. How reasonable is this lack of public trust? There is firm evidence of very profound failings within EPSDD's planning area that although brought to the Minister's attention have been allowed to continue uncorrected. This evidence is provided in by the ACT Auditor General's Performance Audit Report on Single Dwelling Development Assessments (Report No 3 of 2014).

This audit was initiated by suggestions that a senior ACT public servant had influenced the outcome of a development application in relation to his home in Deakin. The Auditor General accepted the invitation to become involved and conducted an audit on whether the Development Application exemption and Development Application approval processes for single dwelling developments are open to improper influence. As part of this audit the Audit Office engaged an expert, Purdon Associates, to provide independent assessment of (seven) development case studies and technical advice.

While the audit found that there was no evidence of improper influence being exerted on, or by, the Environment and Sustainable Development Directorate's assessing officers, for the seven case studies examined as part of this audit, the report raised concerns about a number of other issues in the Audit Conclusions (paragraph 1.11, p.8). Some of these are as follows:

- "*the safeguards for mitigating improper influence in the Development Application exemption and Development Application Merit Track assessment processes for single dwellings need to be strengthened*"
- "*An important safeguard missing is the Directorate's auditing of the fundamental decision made by a certifier on whether or not to exempt a development. Safeguards are important as the ACT's complex planning framework and discretionary decision-making powers provide the opportunity for improper influence to occur*."
- "*transparency, which is a safeguard against improper influence, was lacking in most case studies due to insufficient assessment documentation*"
- "*Two developments (Case Studies 5 and 6) which were approved by the Directorate, but would have been refused by the audit planning expert, were not subjected to peer reviews*"
- "*Issues relating to certifiers were identified in four of the case studies reviewed (Case Studies 1, 2, 4 and 7)*"

- "*Inadequacies were identified in the Directorate's safeguards to monitor the decisions of certifiers and mitigate the risk of improper influence. Importantly, there is no auditing undertaken of the fundamental decision made by a certifier on whether or not to exempt a development and therefore undertake the assessment themselves, rather than inform a homeowner that the development should be subjected to the Directorate's Development Application process. The need for these audits is highlighted in that certifiers incorrectly assessed developments as exempt in two case studies (Case Studies 1 and 7)*"
- "*Other inadequacies, which need to be addressed relate to certifiers' training, Directorate communication with certifiers, insufficient public material explicitly on exemption and certification, and the need to undertake targeted audits on a range of certifier compliance issues*"
- "*As the penalties for certifiers are small, these need to be reviewed to encourage compliance with relevant legislation and provide a disincentive to improper influence. An additional disincentive would be publicly reporting the demerit points of certifiers*"
- "There is inadequate documentation of the assessments made by Directorate assessing officers"
- "*peer reviews are not always undertaken for developments assessed under the Development Application Merit Track process*"

These quotes amply demonstrate that there is room for considerable improvement by EPSDD in its processing of development approval applications. But perhaps this misses the most important point, which is that an independent analysis of seven approval decisions indicated that two of the seven should not have been approved. So 2 out of 7 DAs are being approved when they should not be, an error rate of 28.7%. That certifiers had erroneously identified two case studies as exempt when this was not the case is also cause for the most serious concern. These high rates of error, and an apparent complete inability or unwillingness on the part of EPSDD to monitor the performance of certifiers or its own DA assessment officers reflect a system that is deeply defective, if not completely broken. This is clearly unacceptable and urgent action should be taken to rectify the situation.

The audit report makes 14 recommendations (p.13). While these all have merit, simpler measures may lead more quickly to a reliable and effective DA assessment system that generates public confidence. Bad decisions are made at present because the officers concerned are sheltered by anonymity, and nothing but the outcome of their assessments are made public. Consequently when a decision is published in relation to a DA, EPSDD should also publish (via the internet):

- The assessing officer's name;
- The assessing officer's assessment of the DA against every applicable rule or criteria;
- The assessing officer's reasons as to why he or she believed that the DA either complied with, or did not comply with, each identified rule or applicable criteria;
- When dealing with criteria expressed in subjective terms, such as "reasonable", "minor", etc, the inclusion of a brief note indicating the assessing officer's

understanding of such terms together with the provision of relevant examples, demonstrating that the interpretation being given to the term was not unusual or idiosyncratic.

All supposedly Exempt Development proposals should be reported to EPSDD so that they can be made publicly available on the internet, and the same requirements as those proposed above for DA assessors should be imposed on Certifiers when certifying that a proposal is an Exempt Development.

The introduction of these procedures should serve to quickly and effectively raise the standard of assessments. No one likes to have their name publicly associated with fatuous or obviously incorrect assessments, and so the quality of assessments should improve.

Further incentives to improve decision making amongst Certifiers would be to:

1. introduce random audits of certifiers assessments that a proposal was exempt;
2. increase to a significant level penalties for a certifier's non-compliance with relevant Acts and codes
3. publicly reporting when a certifier has been found to have incorrectly assessed the exempt status of a development proposal.

Another easily implemented internal reform within EPSDD would be to require Assessors to respond, albeit briefly to every objection lodged. This would identify the rule or criterion that the objector believed the DA did not comply with, and explain why EPSDD did, or did not agree with this view. As conditions are sometimes imposed upon applications in the Decision granting a DA, it is clear that in some cases EPSDD does agree that there might be some conflict between what is proposed and what is permitted. In these cases the Assessor (or perhaps the head of EPSDD) should write to the objector, thanking him or her for bringing the matter to EPSDD's attention.

EXEMPT DEVELOPMENT

It is not clear to what extent the Standing Committee is aware that a large proportion of building in the ACT bypasses the DA process and is built as "Exempt Development" beyond EPSDD's control or knowledge. The decision maker in relation to whether a proposed building project is an exempt development rest with a private sector "Certifier" paid by the builder. Not surprisingly, this approach has given rise to problems.

The first planning legislation following self-government in the ACT in 1989 appears to be the *Land (Planning and Environment) Act 1991*. *The Land (Planning and Environment) Regulation 1992* accompanied this Act. Earlier versions of this Regulation do not appear to have countenanced Exempt Development, but the *Land (Planning and Environment) (Bushfire Emergency) Regulation 2003*, introduced after the Canberra fires permitted Exempt rebuilding of houses destroyed by the bushfire. A house destroyed by the fire could be

replaced without further approval if its height was no greater than the original house and the Gross Floor Area no more than 15% larger than the original house.

The *Land (Planning and Environment) Act 1991* (and presumably its dependent regulations) were repealed and replaced by the *Planning and Development Act 2007* (PDA). New Regulations to the Act were made by the *Planning and Development Regulation 2008*. The new regulation incorporates the changes introduced as part of the response to the Canberra Bushfires of 2002, and allows the exempt redevelopment of bushfire damaged properties (see ss 370 to 375, Chapter 9 Bushfire Emergency Rebuilding).

The *Planning and Development Regulation 2008* also permits Exempt Development under a number of conditions, as specified in Schedule 1. The Explanatory Statement for the Regulation does not explain why these measures were thought to be necessary or desirable, even at the introduction of the first version of the *Planning and Development Regulation* on 27 February 2008 the provisions in Schedule 1 were considerably wider than merely authorising the rebuilding of bush fire damaged buildings, so it does appear that some kind of policy decision on this issue had been reached, even if there was no debate about it in the Assembly.

It is not widely recognised just how much the provisions of Schedule 1 have been modified since their initial introduction. It appears that at first Exempt development was restricted to developments which would have qualified as Code track developments under the PDA, so granting Certifiers power to "approve" these did not make much difference. Except that the advantage of having certifiers to approve these rather than EPSDD staff is not clear. Perhaps it was because transferring this role to certifiers transferred the costs of the process to the developer of the building.

However, over time the role of the Certifier has expanded and more recent changes to Schedule 1 give certifiers the authority to make subjective judgements about whether a proposal is compliant. The delegation of such authority to Certifiers does not seem to be something that was contemplated by drafters of the PDA in 2007, and it may not reflect the views of a majority of the Assembly.

The Standing Committee might wish to explore the growth of exempt developments and make a judgement as to what extent these rules allow/require certifiers to make decisions which are more properly restricted to public servants in the ACT Planning and Land Authority (ACTPLA), currently part of EPSDD.

Yours faithfully

[redacted]

John Edquist

3 August 2017