



Conservation Council
OF THE SOUTH EAST REGION & CANBERRA

Sustainability, strategic planning, preserving ecological diversity and environmental impact assessment in the ACT

**Submission to the ACTPLA
Planning System Reform Project**

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Overview of the Conservation Council

The Conservation Council is Canberra's peak non government, environment organisation. As an umbrella organisation, the Conservation Council represents the interests of community and conservation organisations in the ACT and Australian Capital Region as well as the broader environmental interests of all citizens of the ACT. The Conservation Council's mission is to achieve the highest quality environment for Canberra and the surrounding region.

The Conservation Council provides independent policy development and advocacy on issues relating to the natural and built environment in the ACT. It is also a key communications link between the community and all levels of government on environmental matters. The Conservation Council plays a key role in encouraging, coordinating and supporting community participation in ACT environmental issues as well as facilitating public education and sharing of information on local, regional, national and global environmental issues.

Summary

The Conservation Council welcomes the opportunity to participate in the Planning System Reform Project. We support a planning system designed to deliver better ecological outcomes for the Canberra region and we also support the Minister's aim of achieving a vibrant urban fabric.

The Conservation Council understands that this review is primarily about reforming planning administration and mechanisms – rather than planning policy per se. However, in this context we suggest that some recent developments, such as the environmental approvals for the Gungahlin Drive Extension (GDE) and East O'Malley residential development; implementation of DV200; and the processes around the various "sustainability codes" highlight areas where there is considerable scope for reform of the existing planning system.

The Conservation Council's preferred outcome is a planning system that achieves the right balance between delivering strategic planning outcomes with approval mechanisms for particular developments, as well as mechanisms to preserve and enhance current ecological integrity, while allowing appropriate community and scientific input. Therefore we advocate the need for:

1. some form of statutory "strategic environmental assessment" of Government programs, plans or projects, including giving statutory effect to the Spatial Plan;
(Recommendations 1 to 3)
2. appropriate and clear environmental assessment processes and criteria for particular developments;
(Recommendations 4 to 8)
3. ongoing ecological assessment of the ACT environment with statutory protection of key ecosystems, environments or objects;
(Recommendations 9 to 10)

4. appropriate community engagement including adequate opportunity to comment on and input into planning policy with public notification of significant planning processes and third party enforcement rights; and
(Recommendations 11 to 12)
5. high sustainability standards for urban design and all developments as well as mechanisms that provide flexibility if projects can demonstrate best practice environmental outcomes.
(Recommendations 13)

The Conservation Council acknowledges that a general thrust or intention of the planning reform project is to reduce the resources going to planning approvals and thereby making additional resources available for the development and review of planning policy. The Conservation Council supports this approach and stresses the importance of good codes to guide development.

The five points above reflect our broad priority areas for reform however there are a range of other matters which the Conservation Council recommends be addressed through this process. These include, but are not limited to:

6. removal of the Ministerial call-in power;
7. limiting the number of Draft Variations to the Territory Plan but retaining the role of the Assembly Planning and Environment Committee;
8. conservation aspects of rural leases being publicly available; and
9. investigation of cat free zones under planning instruments.

1. Strategic planning and sustainability

The Conservation Council supports and is an advocate for sustainability which we broadly describe as decision-making which seeks to integrate the social, economic and ecological needs of the community in a balanced manner, for current and future generations. For a broader consideration of the Conservation Council's view on sustainability please refer to our October 2002 submission to the ACT Government on sustainability.¹

The Conservation Council argues that while we need to have assessment mechanisms for all development applications, large or small, that individual project based assessment does not deliver sustainability outcomes. There are many sources that provide an overall critique of environmental impact assessment as a weak tool for integrated decision-making. One example is by Court, Wright and Sinclair who state: "ESD or sustainable use of resources requires both an integrated and a precautionary approach to resource management. Project specific assessment fails on both these counts".²

Annandale also sums it up by saying "the traditional approach to dealing with development [in Western Australia] weights economic goals implicitly and explicitly higher than others. Environmental and social goals are met by amelioration, where institutions and regulations such as EIA, planning laws, and social welfare support are brought in after an economic decision has been made".³

Annandale also notes these add-on tools are necessary but sustainability decision-making means looking at all these three criteria at the key decision point and all with equal weighting. This requires changing traditional ways of governing and business management to incorporate environmental, social and ethical concerns.

The Conservation Council suggests there is scope for greater integration between the *Land (Planning and Environment) Act 1991 (ACT)* (the Land Act) and the *Environment Protection Act 1997 (ACT)* (the Environment Protection Act) in regard to particular development proposals. In addition the Conservation Council suggests the need for higher level strategic planning and broad ongoing ecological assessments.

The Conservation Council believes a major weakness of the current Land Act is that broader strategic planning issues are not separated from individual development applications, Preliminary Assessments or environmental impact assessment.

Individual project assessment is a key component of environment protection and planning legislation, however, the Conservation Council has previously argued there is also a need for strategic assessment of broader policy, programs and planning decisions.

The Conservation Council has identified three key recurring themes in our submissions and commentary regarding particular developments. They are impressions that:

- detailed environmental assessment to which the community can input takes place after political decisions have been made;
- ‘trade-offs’ between environment, social and economic interests are made prior to environmental assessments being undertaken; and
- environmental / ecological assessments are often inadequate

For example, in regard to East O’Malley, in November 2000 the Conservation Council in its submission to the Draft Development Control Plan noted the disjunction between environmental assessment and the detailed planning work already undertaken, stating it was “yet another example of the fact that detailed environmental assessments occur far too late in the planning process”. The Conservation Council also suggested that the East O’Malley proposal was contrary to the principles of sustainability in that greater emphasis was being placed on economic and financial values in the planning process. The Department responded by stating that “the proposed development is in accordance with the government’s environmental sustainability principles by use of existing infrastructure and in meeting the requirements of Action plan No 10 for the endangered Yellow Box Red Gum Grassy Woodland”.

In the case of both the GDE and East O’Malley essentially the opportunities for public input and the environmental assessment occurred after the political decisions had been made to proceed with these developments. We therefore do not see them as examples of sustainable decision-making.

The sense that environmental assessments are ‘compromised’ before they begin by assumptions regarding trade-offs between perceived economic and social benefits arises in two ways. Firstly, a relatively accepted view is that while environmental impact assessment is vital, it is generally used as a tool to mitigate environmental impacts rather to assist in actual decision-making of the merits or otherwise of particular developments. Secondly, detail within the Preliminary Assessments for both East O’Malley and the GDE appears to indicate either the consultants have been explicitly contracted to work within such constraints or have done so themselves.

As noted above there are examples of this in practice in regard to developments in the ACT which are being assessed for their environmental impacts. For example in regard to the East O'Malley development the consultant undertaking the ecological analysis states:

"In a Canberra wide context, most of the study area has been assessed as being of high to very high significance as Yellow box-Red Gum woodland (Ref. 1) and in a different context, may justify total protection for its woodland values. Because of conflicts with other planning objectives for East O'Malley, however a compromise has been determined whereby the woodland east of the unnamed creek will be retained as a reserve, while the woodland west of the creek will be substantially developed. This position is understood to be not negotiable and has been adopted as the starting point for the current analysis".⁴

Subsequently, the environment assessment was undertaken within a construct specifically to *minimise* loss of the most ecologically significant sections or trees within certain constraints rather than being an ecological assessment to inform holistic decision-making about how to meet different social, economic and environmental criteria.

Likewise in regard to GDE the Preliminary Assessment for the Western Route stated:

"Notwithstanding a number of identifiable impacts of the proposed road on the local environment, the overall assessment shows a net positive benefit in social and economic terms, and that no further environmental studies would be required".⁵

Similar to East O'Malley, the consultant providing the ecological assessment of GDE 'accepted a priori' that the road would go ahead. There are numerous examples in the environment report which demonstrate a focus on mitigation rather than non-judgementally assessing the environmental impacts. For example:

"While a selective tree survey may be useful in identifying trees to be protected along the margins of the roadwork's corridor, this could prove to be a very costly exercise ... in particular there is no point in surveying trees within the road alignment which will need to be removed irrespective of their quality".⁶

Another reason sometimes presented for proceeding with certain developments is that they are, or have been on the Territory Plan or the National Capital Plan for a long time. So for instance East O'Malley was marked on the Territory Plan for residential development in the 1970s at a time when there was little or no focus on conservation values or environmental assessment of particular areas. Subsequent studies of East O'Malley proceeded on the underlying assumption that the development would proceed.

As a consequence of these ongoing trends and practises, the Conservation Council has started to advocate a need for strategic assessment of broader policy, programs and planning decisions.

Recommendation 1:

The Conservation Council recommends that the ACT planning system includes some form of statutory "strategic environmental assessment" of government plans, programs and policies.

The concept of Strategic Environment Assessment (SEA) is not new, but its uptake has been limited, sporadic and varied. Useful summaries of SEA are provided by Marsden and Dovers (2001), Court, Wright and Guthrie (1996) and Thomas and Elliott (2005).⁷

Broadly, SEA aims to bring environmental considerations into the planning process as early as possible in order to determine what is to take place, leaving EIA to resolve how activities should be carried out. SEA of government policy, plans and programmes is the essential tool to ensure that the principles of sustainability are built into key government decisions. SEA is a structured, proactive process to strengthen the consideration of environmental issues in strategic decision making and can set the context for project specific EIA. SEA can also provide a mechanism for addressing cumulative environmental impacts.

Some features of SEA include:

- baseline assessment of preferred options or alternative locations;
- policy assessment – impacts of preferred option appraised against objectives;
- application at a sectoral level – e.g. waste management, energy, transportation; and
- application at a regional level – e.g. regional and local land use plans.

SEA could cover issues such as: water resource policies and catchment management; transportation strategies; energy; conservation strategies; urban pollution; urbanisation/ urban planning and infrastructure; or land subdivision and residential development.

An important outcome that SEA should achieve is that Cabinet are fully aware of all the impacts of the decisions they are making – ecological, social and economic.

SEA has been incorporated into a number of EIA procedures – New Zealand, California, France, and Netherlands. A form of SEA has been used in Australia under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) in regard to fisheries. Informally, aspects of it are applied in Western Australia, Victoria and New South Wales. In July 2004 the European Union adopted SEA for certain plans and programs.

One option is for SEA to replace the current regulatory impact assessment processes. RIA covers the effects of primary legislation and subordinate legislation and provides an assessment of the costs and benefits of the proposed regulation, identifies feasible alternatives to the regulation and analyses the merits of the alternatives relative to the regulation proposed. SEA could broaden regulatory impact statements from a narrow focus on costs and benefits to assess the broader ecological and social impacts.

The Planning System Reform Project states: “In time, and having regard to the Government’s sustainability legislation, it may be possible to undertake strategic environmental assessments that would provide an overall framework for major land use or land allocation decisions, which could be used to tailor the need for and scope of any site specific environmental impact assessment.”⁸

In addition to the introduction of sustainability legislation, SEA also relates directly to the activities of the Authority. SEA could be introduced into the Land Act to improve the assessment of planning for urban development and infrastructure provision, such as planning for residential land release and planning for public and private transport routes.

Therefore the Conservation Council recommends that ACTPLA dedicate additional resources to investigating how SEA could be usefully incorporated into the ACT planning system. This could take the form of preparing a specific paper on SEA, undertaking a workshop or a mix of these approaches.

Recommendation 2:

The Conservation Council recommends some form of process to further investigate how “strategic environmental assessment” could be incorporated into the ACT planning system or other Government decision-making processes such as the proposed sustainability legislation.

The Conservation Council is firmly of the view that the changes to the planning system be done in a manner which complements the Governments’ proposed sustainability legislation.⁹ In particular, the need to ensure consistency in terminology in regard to sustainability definitions, objectives, principles and definitions of the environment.

Recommendation 3:

The Conservation Council recommends that the proposed ACT sustainability legislation and reforms to the Land Act be complementary and in particular – use the same terminology.

2. Environmental Impact Assessment

The Conservation Council places great value on ensuring we have an effective environmental impact assessment system in the ACT. Our policy states: “All planning, development and land management decisions should consider the impact on the environment and contribute to the conservation of energy, land, biodiversity and material resources as well as the reduction of wastes and emissions including greenhouse”. However, as noted above we believe that individual project assessment needs to be located within a broader strategic planning framework and requires strong mandatory standards which all developments must comply with.

The Conservation Council has been very critical of the environmental assessment processes for recent developments in the ACT – notably the GDE and East O’Malley residential development. In both cases the Conservation Council argued that a full environmental impact assessment should occur and include consideration of the no-action option. However, both were undertaken ‘technically’ under the Land Act at the level of a Preliminary Assessment. It is clear, particularly with the GDE, that extensive studies and reports were prepared. A concern for the Conservation Council is that a lot of this work, as it was not part of a formal process under the Land Act, was not available for public scrutiny and was prepared on the premise that development would proceed.

The Conservation Council agrees that the present system of Environmental Impact Assessment is not always effective or efficient.

The Conservation Council believes that the current system of Preliminary Assessment (PA) is not working. As the technical paper notes, of the 186 PAs completed to date, five projects have been required to undergo further assessment in the form of public environment reports. No projects were subject to an EIS and no inquiries were initiated. Of the 186 projects, many

did not warrant a significant environmental assessment but there has been a small number of projects where the significant environmental impact from the project created a sense in the community that proper planning procedures were not adhered to because a full environmental impact assessment was not undertaken.

The original intent of a preliminary assessment was to form the first stage of a three part process of environmental impact assessment. The PA was to identify any environmental impacts from the proposed development as a basis to determine if further environmental assessment was required. The practice has been that PAs not only identify potential impacts but also discuss how impacts will be managed or mitigated.

This is in contrast to NSW where the determining authority must assess the significance of a proposed activity as proposed not as modified by any conditions designed to mitigate environmental impacts.

In cases where there may be minimal environmental impact, documentation of the PA is overdone in order to circumvent the rest of the process. In other cases where there may be significant environmental impact, PA documentation can be too broad in scope and fail to address key elements in sufficient detail. Also, as discussed above, PAs tend to be produced on the assumption that a project will proceed and therefore discuss trade offs and mitigations rather than assessing whether the environmental impacts are of such significance that the project should not proceed or only proceed with significant modification.

This in turn raises a number of subsequent issues and problems, for example:

- PAs are publicly available for comment over a very short period of time.
- People can feel overwhelmed by the amount of information and the short period of time to respond.
- The legislation allows for public notification of PAs but does not provide an express invitation to comment, so there is no obligation on the proponent to respond to comment. Whereas for EIS, public consultation is mandated.
- Environmental assessment of proposals involving clearing of native vegetation have focussed on an assessment of the values of individual trees, rather than the impacts of clearing in terms of biodiversity values and the broader landscape.

Therefore the Conservation Council supports restructure of the environmental impact assessment to better reflect the level of environmental impacts and replacement of Preliminary Assessment with environmental impact statements for certain projects. This will allow for better focussed and more timely public involvement and a level of environmental impact assessment that is appropriate to the risk of environmental impact.

The Planning System Reform Project recommends a three tier assessment system:

- Level 1 – minimal (DA)
- Level 2 – expanded design response (DA)
- Level 3 – EIS for listed activities or when Minister directs

The Conservation Council supports this system with some qualifications and proposed amendments.

The Conservation Council believes certain activities should not take place and therefore should not be subject to environmental assessment. It is recommended that such activities be prohibited activities in the ACT. Examples include:

- nuclear activities – nuclear power generation, research reactors, nuclear waste storage, uranium mining or milling;
- coal fired power generation;
- developments involving the release of genetically modified organisms;
- certain developments in Canberra Nature Park or national parks, including wilderness areas; {note only wilderness area is within national park} and
- development likely to affect world heritage properties or the values of world heritage properties.

The Conservation Council supports mandatory environmental impact statements triggered by certain activities. For example:

- developments which will generate significant greenhouse emissions;
- developments resulting in significant water extraction / consumption;
- activities with impacts on endangered ecological communities or threatened species;
- activities which impact on key woodland/biodiversity corridors identified in Action Plans, such as Action Plans 27 and 28;
- activities involving significant clearing of native vegetation;
- activities involving or generating certain pollutants – relate to *Environment Protection Act 1997*; and
- specific developments such as dams, mines or major infrastructure.

The trigger point could be determined by use of the term “significant impact” which would need to be defined. The national *Environment Protection and Biodiversity Conservation Act 1999* (EPBC ACT) uses “significant impact” as a key factor in determining whether actions require approval under the EPBC Act. However, the EPBC Act does not define the term. The Federal Department of Environment and Heritage has produced administrative guidelines but they are not legally binding. Hence the only authoritative statement of the meaning of “significant impact” under the EPBC Act is provided by the Federal Court case *Booth v Bosworth* (2001), where Justice Branson suggested that a “significant impact” is one that is “important, notable or of consequence having regard to its context and intensity”. If this approach is used such definitions should be part of the Act or regulation – to ensure they are legally binding. Alternatively, the trigger point could be numerical – i.e. developments above a certain level of tonnes of greenhouse emissions, gigalitres of water use or hectares of native vegetation clearing.

The Conservation Council supports the Planning Minister having discretionary authority to require an EIS in circumstances where a mandatory trigger does not occur. In addition the Conservation Council supports the Ministerial discretion to trigger an EIS also being provided to the Minister for Environment.

Recommendation 4:

The Conservation Council recommends removing requirements for Preliminary Assessments if appropriate criteria are put in place with;

- ***prohibitions on certain activities***
- ***mandatory EIS in some circumstances, and***

- compliance with stringent mandatory sustainability guidelines required for developments not subject to an EIS; or in other ways the development satisfies sustainability criteria.

Recommendation 5:

The Conservation Council recommends the Minister for Environment as well as the Minister for Planning has Ministerial discretion to trigger an EIS.

In regard to environmental impact assessment the Conservation Council supports:

- scoping of EIS documentation by the Authority with public participation, and involvement of appropriate experts, including government advisory panels e.g. Flora and Fauna Committee, with proposals which potentially impact on endangered communities or threatened species;
- specified minimum content for EIS in a document approved by the Authority and publicly notified (possibly as an approved form)
- specific guidelines for ecological assessments required as part of EIS e.g. flora and fauna surveys;
- assessment of proposed developments in terms of the cumulative effects of loss of and fragmentation of remaining native vegetation, particularly in the context of impacts on biodiversity in the ACT's key woodland and grassland corridors
- a list of pre qualified consultants and possibly certification of consultants through a professional body like the ANZ Environment Institute (ANZEI);
- public notification of draft EIS with express invitation to the public to make submissions;
- adequate timeframes for public comment on draft EIS – i.e. six to eight weeks
- a requirement for the Authority to take public submissions into account (current practice for DAs);
- a requirement for the Authority to make publicly available a statement of reasons for significant planning decisions;
- undertaking an EIS prior to DA for proposals where site selection is involved;
- requirements allowing round table conferencing particularly where site selection is involved. This could be a useful process to reach a satisfactory outcome for all parties. This process has been suggested by number of community and government representatives as a process that could help to avoid community conflict that has arisen in the past, for example with the residential development at East O'Malley;
- independent peer review of EIS;
- retaining the practice of tabling EIS in the Legislative Assembly;
- appropriate review process to ensure that development has adhered to conditions established as a result of the EIS; and
- mechanisms providing for post-operation audits.

Recommendation 6:

The Conservation Council recommends transparent and open processes for EIS processes including:

-- scoping of EIS documentation with public participation;

- *specified minimum content;*
- *mechanism for public involvement;*
- *independent peer review of EIS; and*
- *mechanisms providing for post-operation audits.*

The Conservation Council believes the Conservator of Flora and Fauna has a vital role to play in providing advice on conservation matters in regard to environmental assessment and variations to the Territory Plan.

The Land Act currently requires the Authority to consider any recommendations or submissions made by the Conservator of Flora and Fauna when preparing variations to the Territory Plan. The Conservation Council supports a more clearly defined role for the Conservator in planning issues – including variations to the Territory Plan and environmental assessment. The Conservation Council also supports a requirement for the Authority “having” to take into account the Conservator’s recommendations and comments, and the Authority’s response to those comments being publicly available to ensure transparency in government decision making.

Recommendation 7:

The Conservation Council recommends the role of the Conservator of Flora and Fauna being more clearly defined in regard to planning issues where biodiversity factors are involved, including:

- *involvement in commenting on environmental assessments*
- *greater weight being given to the Conservators recommendations*
- *public availability of the Conservators advise; and*
- *the Authority being required to outline reasons if it does not accept the Conservators recommendations.*

Land Act s.117 (7) of the Land Act requires the Minister to send a copy of PAs, without charge, to the Conservation Council of the South East Region and Canberra. The Conservation Council supports the continuation of this practice for EISs if that from of assessments replaces PAs.

Recommendation 8:

The Conservation Council recommends copies of environmental assessment documentation being provided free of charge to the Conservation Council as a statutory obligation.

3. Integration of ecological assessments into planning law

Another theme recurring in Conservation Council submissions into previous planning processes is that the environmental studies were inadequate. Sub-themes to this were that: environmental assessments should be subject to independent peer review; and decisions should be made only after broader ecological assessments are completed.

In the case of East O’Malley the Conservation Council argued that decisions regarding that development should be made after the ACT Lowland Woodlands Strategy for the ACT was completed. The decision to develop was announced in May 2003 and the final Woodlands

Strategy was not completed until April 2004 by which time the land had already been sold and land clearing had commenced.

Jenny Bounds, Canberra ornithologist and Vice-President of the Conservation Council notes:

“One reason advanced in various reports and indeed by the government for developing East O’Malley was that other woodland areas, eg Callum Brae would be preserved. The concept of interchangeability, that you can keep a piece of woodland habitat in one place and justify clearing another somewhere else, and there is no effect on biodiversity, has no sound scientific basis. In terms of birds what will usually happen is that many of the displaced birds will die, won’t find other territory, will starve, be stressed, and succumb to predation”.¹⁰

With both East O’Malley and GDE, conservationists and a range of independent scientists argued that the ecological assessment sections of the PA were flawed. Reasons included:

- the limited ecological studies undertaken were not made publicly available;
- assessments were undertaken at inappropriate times;
- no independent expert or scientific advice or [peer review] was sought on the ‘ecological’ advice or assessments undertaken;
- critiques of the notion of trade-offs between parcels of land – that protection of some land in a reserve “compensates” for land-clearing in another; and
- critiques of the notion flora species can be re-located or that fauna will relocate themselves.

The draft Spatial Plan suggested a biodiversity overlay in the Territory Plan to protect and conserve significant biodiversity values. The Conservation Council supported this proposal subject to the overlay being developed using a holistic approach and with independent and expert scientific advice.

The Spatial Plan states “location of future residential development will ensure that areas identified as having significant biodiversity values, such as threatened species and ecological communities and habitat for threatened species are protected from development”.¹¹

Recommendation 9:

The Conservation Council recommends incorporation of a biodiversity overlay in the Territory Plan, using in the first instance the information contained within Action Plan 27 and Action Plan 28.

The Conservation Council supports this and suggests threatened species, threatened species habitat and ecological communities, as well as wildlife corridors, heritage areas and objects, and riparian zones, should have statutory protection in the Territory Plan. There is now an opportunity to incorporate the biodiversity information gathered through the woodlands strategy and grassland strategy that are now available and the soon to be available riparian zone strategy, to identify areas to be protected from development. In addition a biodiversity overlay which guides future development will ensure that the Spatial Plan principle of protecting the natural environment is achieved.

Map 5 of the Spatial Plan identifies, broadly, the major wildlife corridors in the Territory. Action Plan 27 *The ACT Lowland Woodland Conservation Strategy* Figure 6.1 also shows these corridors. The Strategy establishes the importance of the wildlife corridors in providing connectivity between woodland units and identifies opportunities to improve the connectivity. Maintenance and enhancement of connectivity is identified as an important

conservation action for threatened woodland species. As well as the need to identify and protect the ecotones between different habitats, for example from woodlands to grasslands.

Recommendation 10:

The Conservation Council recommends that a “wildlife corridor” zone be created. Activities should be restricted to those that are not inconsistent with protection of the ecological values of the wildlife corridor.

4. Community engagement and public participation

Capacity for public participation is a key principle for legislation or processes intended to protect the environment. The Conservation Council believes that public participation should be seen not only as a right but as a means of enhancing the operation of environmental law in a number of ways. Community engagement with planning processes is also vital.

The ACT Government’s Community Engagement Service Charter states that the ACT Government is committed to engaging the Canberra community in the development and implementation of government policies, programs, projects, public works and services. The ACT Government Community Engagement Manual, launched in June 2005, provides a guide for government agencies on how to effectively engage the community.

Essential points for public participation are the capacity for the public to have:

- opportunity to input into the setting of planning standards and codes;
- open access to information about development and other planning applications (in an inexpensive, comprehensive and understandable format);
- notification and opportunity to provide input into development applications and other environmental impact assessment processes with adequate timelines;
- access to information supplied about planning matters and reasons for decisions; and
- third party enforcement rights (ie judicial and merit review).

The ACT Government Community Engagement Manual strongly recommends that the absolute minimum for any community engagement activity be six weeks.

Recommendation 11:

The Conservation Council recommends the minimum timeframe for community participation in planning processes be six weeks.

The Conservation Council supports third party rights as a key part of good environment and planning legislation.

Third party rights provisions under existing ACT planning and environment legislation is inadequate. Proposals to grant exemptions to override these limited rights set an extremely worrying precedent. In contrast, the law relating to third party appeals should be enhanced to provide for open standing; costs should not provide a substantive barrier; and there needs to be effective capacity for review of the merits of decisions.

Traditionally there have been three key barriers to civil enforcement: standing; costs; and liability for damages if the case fails. Environmental and planning law is relatively young

and is evolving to meet new expectations – so, on balance the law relating to civil enforcement is generally becoming more open. For example, in November 2003 the Queensland Government introduced amendments to their *Nature Conservation Act 1992* allowing standing to the public, providing established environment groups capacity for ‘judicial review of decisions and removal of costs as a significant barrier. Likewise the Commonwealth *EPBC Act* provides for standing for interested persons and specifically excludes requiring security of costs as a requirement of seeking an interim injunction. Therefore there are precedents in the marketplace for generous standing provisions in free public interest cases.

Liberal third party enforcement processes – where in place – have not opened a floodgate of litigation and their existence and occasional use have value in ensuring compliance with environmental laws and in testing environmental best practice.

The Conservation Council has concerns that the definition of “materially affected” proposed by the Planning Reform System Technical Paper will potentially undermine third party enforcement.

Recommendation 12:

The Conservation Council recommends the barriers to third party enforcement of planning and environmental assessment processes be removed.

5. Strong sustainability codes

An important part of achieving the sustainability aims of the Spatial Plan and other ACT Government plans alongside the desire to streamline development approvals will be strong, mandatory sustainability codes.

We understand and appreciate the aim of adopting a code assessment system, but note that it is a significant departure from where the ACT operates at the moment. If community support is to be achieved; demonstrating that what the community values is going to be safe / protected will be essential. Strong sustainability codes and planning codes for all scales of projects, developed with sufficient public consultation will be an essential part of achieving community acceptance of the proposed reforms.

The Conservation Council supports the ACT Government’s intention to adopt the BASIX rating tool. This rating should be applied to all residential developments and require those developments to meet greenhouse and energy standards that will enable the ACT to reach its greenhouse and water targets.

In addition to the rating tool, guidelines should be provided to facilitate the adoption of innovative or non-standard practices to reduce resource consumption, e.g. grey water reuse, waterless toilets, rainwater tanks etc.

The Conservation Council supports the ACT Government’s intention to adopt the Green Building Council’s GreenStar rating tool. This rating should progressively be applied to all commercial building developments.

Water Sensitive Urban Design is an important design issue to be addressed for future developments at all scales. We understand that guidelines are under development and are

expected to be released in a couple of months. We also understand that the WSUD guidelines will set targets for the whole of ACT and discuss how to achieve those targets. Targets will be set for scales of development.

It will be important that appropriate mechanisms of assessment are adopted. If BASIX is adopted it will provide an assessment tool for residential buildings. Similarly, adoption of Green Star for commercial office buildings, would provide assessment of those developments. For other commercial, industrial and residential estate developments – assessment tools will need to be developed or the proposals will need to be referred to relevant section of Authority for assessment.

Recommendation 13:

The Conservation Council recommends all urban design and all developments comply with high sustainability standards such as:

- mandatory requirements for energy and water efficiency;***
- sustainable urban design criteria such as designing for water efficiency, solar passive site selection and block design etc; and***
- application of concepts such as embodied energy.***

Additionally the Conservation Council supports mechanisms that provide flexibility if projects can demonstrate best practice environmental outcomes.

6. Removal of Ministerial Call in Powers

The *Land Act* allows some development decisions to be made by the Minister for Planning rather than by the independent planning authority. Known as the call-in power its use has generally been controversial. The Conservation Council suggests that with principles of good governance and accountability we do not need ‘call-in powers’.

The ‘call-in power’ is part of the *Land Act*. These sections allow the Planning Minister to fast-track planning decisions. Such fast-tracking cannot be challenged by independent third parties in the way some other planning decisions can. Use of these powers means that planning decisions are made at a political level rather than in accordance with the set of rules outlined in the *Land Act*’s detailed administrative arrangements. In contrast, if the recommendation that the Minister for Planning and Minister for Environment have discretion to trigger an EIS is applied the administrative arrangements for an EIS will still be subsequently followed.

Decisions made using the call-in powers are not subject to third party appeals, as they are not included in Schedule 4 of the *Land Act* which sets out reviewable decisions. In addition Regulations 23 and 24, and accompanying Schedules six and seven specifically excludes decisions made by the Minister using the call-in powers. The *Land Act* also clearly states that call-in decisions are not challengeable via the AAT. [s279A(2)] Other legal proceedings – such as seeking an injunction in the Supreme Court can only occur within 28 days after the date of the decision.

The call-in powers have been used a number of times and in many cases its usage seems not to be in keeping with raising major issues or in providing substantial public benefit. For example, the Planning Minister, Simon Corbell used the call-in power to allow a Gungahlin

supermarket development with a road, rather than a pedestrian mall in April 2004, despite a number of objections from local residents. Another example is its use to approve cinemas.

The call-in power in the ACT is quite unique. While most other states also have a comparable call-in power a key rationale for the power is to allow the State government to 'call-in' local government planning decisions. The ACT being both effectively a local and State Government negates the need for such a provision.

The call-in power is unnecessary for three key reasons:

- the call-in power does not provide adequate checks and balances;
- the use of the call-in power reduces the authority of our planning processes; and
- it leaves open capacity for undue influence by sectional interests.

The Conservation Council does not support the use of call-in powers and advocates the removal of these provisions from the Land Act.

Recommendation 14:

The Conservation Council recommends the Ministerial call-in power be removed

7. Draft Variations

An intention of the proposed planning reform is to reduce the number of variations to the territory plan by increasing the flexibility of the provisions of the plan. There is also a proposal to limit referral of draft variations to the Legislative Assembly Planning and Environment Committee at Ministerial discretion.

The Conservation Council supports a reduction in number of draft variations as long as significant changes are not fast-tracked, we still however support Draft Variations going to the Planning and Environment Committee. Reducing the number of variations will free up committee resources and enable them to expatiate consideration of proposals. Those variations that do proceed under the new system can be expected to be substantial / significant and therefore should be referred to the committee. The committee then determines what level of investigation they will apply.

Committee involvement provides a level of independent review that the planning system would not otherwise achieve. Proponents of variations will often be government agencies, including the Authority, reinforcing the need for independent review.

The Conservation Council agrees with the proposal to limit the response time for the committee in order to help improve timeliness.

Recommendation 15:

The Conservation Council recommends draft variations to the Territory Plan continue to be referred to the Planning and Environment Committee.

8. Rural Leases

Under Section 186C of the Land Act, the Authority may only grant, renew or vary a rural lease if a Land Management Agreement (LMA) is entered into. LMAs are vital in achieving off-reserve conservation of threatened ecological communities and species. Currently, LMAs are generally not publicly available because of a commercial-in-confidence status. This creates a problem for the conservation community; interested parties such as Parkcare groups cannot access the information on the management agreement, and therefore are constrained in their management of adjacent lands.

An example is where a Park care group spends volunteer hours removing weeds that are consistently replenished by unmanaged weeds over the fence on rural lease. To be an effective conservation tool the LMAs need to be publicly available. This transparency in detail may encourage lessees to meet the conditions of the agreements and allow Park care and other conservation organisations to work effectively with rural lessees.

Recommendation 16:

The Conservation Council recommends the conservation aspects of Land Management Agreements of rural leases be publicly available.

9. Cats

The Conservation Council has advocated for the prohibition of domestic cat ownership in residential developments adjacent to key conservation areas for threatened species protection. We understand that a barrier to the adoption of this policy is that the Authority is responsible for the regulation and enforcement of development conditions under the Land Act, and this requirement could not be met by the Authority in the case of domestic animals.

Declaration of cat free zones with delegation of responsibility for enforcement to the government agency with domestic animal control responsibilities would ensure an appropriate level of legislative protection and appropriate management. Such an outcome has the potential to provide a significant level of protection for ACT's threatened species that are vulnerable to cat predation.

Recommendation 17:

The Conservation Council recommends that as part of the reform of the Planning System the Declaration of cat free zones with delegation of responsibility for policing to the government agency with domestic animal control responsibilities be investigated.

Endnotes

- 1 Clare Henderson "Towards a Sustainable Australian Capital Territory" Submission to the ACT Chief Minister by the Australian Conservation Foundation (ACT Branch) and Conservation Council of Canberra October 2002
- 2 John Court, Colin Wright and Alistair Guthrie "Environmental Assessment and Sustainability: Are we Ready for the Challenge?" Australian Journal of Environmental Management Vol 3 Number 1, March 1996
- 3 David Annandale, "Models for Government Sustainable Development Decision-making" Paper to Sustainability 2001: The Way Ahead Perth 2001
- 4 David Hogg "East O'Malley Residential Estate Planning Study – Preliminary Ecological Analysis" 15 May 2000

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- 5 Preliminary assessment GDE Western Alignment November 2002 page v
- 6 Preliminary assessment GDE Western Alignment, Appendix 10, Ecological assessment November 2002 page 34
- 7 Simon Marsden and Stephen Dovers (Editors) *Strategic Environmental Assessment in Australasia* Federation Press 2002; John Court, Colin Wright and Alistair Guthrie “Environmental Assessment and Sustainability: Are we Ready for the Challenge?” *Australian Journal of Environmental Management* Vol 3 Number 1, March 1996
- 8 Direction’s paper, page 17
- 9 In the lead-up to the 2004 ACT election the ALP committed to introducing sustainability legislation in its next term of Government – November 2004 – October 2008.
- 10 Jenny Bounds, Communication to the Conservation Council
- 11 [Spatial Plan p33]