



Legislative Assembly for the ACT

STANDING COMMITTEE ON PLANNING AND
ENVIRONMENT

Draft Variation to the Territory Plan No 256 Kingston
Group Centre Part Section 22

MAY 2006

Report 20

Committee membership

Chair	Mr Mick Gentleman MLA
Deputy Chair	Mr Zed Seselja MLA
	Ms Mary Porter AM MLA

Secretary:	Dr Hanna Jaireth
Administration:	Ms Lydia Chung

Resolution of appointment

On 7 December 2004 the ACT Legislative Assembly agreed to establish general purpose standing committees as follows:

- (1) The following general purpose standing committees be established and each committee to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community: ...
 - (e) a Standing Committee on Planning and Environment to examine matters related to planning, public works and land management, conservation and heritage, transport services, and environment and ecological sustainability....

The Assembly also agreed that if the Assembly is not sitting when the Standing Committee on Planning and Environment had completed consideration of a report on draft plan variations or draft plans of management referred to the Committee by the Minister under the *Land (Planning and Environment) Act 1991*, the Committee may send its report to the Speaker, or, in the absence of the Speaker to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.¹

Terms of reference

Section 25 of the *Land (Planning and Environment) Act 1991* (ACT) states:

The Minister shall, within 28 days of receiving a draft plan variation under section 24, refer —

- (a) the draft plan variation; and
 - (b) the documents referred to in section 24 (1) that relate to the draft plan variation;
- to an appropriate committee of the Legislative Assembly together with a request that the committee report on the draft plan to the Legislative Assembly.

¹ Legislative Assembly of the ACT, *Minutes of Proceedings*, No. 2–7 December 2004, pp.12–16

Preface

Both federal and ACT law and policy governs planning in the ACT. The *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth)² establishes the National Capital Authority, which prepares and administers the National Capital Plan. This Act also enables the Legislative Assembly to establish a statutory planning authority – now the ACT Planning and Land Authority – to develop and implement the Territory Plan. The *Land (Planning and Environment) Act 1991* (ACT)³ (the Act) requires the Territory Plan to set out the planning principles and policies for giving effect to its object,⁴ which is:

to ensure, in a manner not inconsistent with the national capital plan, that the planning and development of the ACT provides the people of the ACT with an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and have their recreation.⁵

The Territory Plan includes both a written statement and a map. The written statement contains general planning principles (Part A), specific land use policies (Part B), overlay provisions (Part C) and definitions of terms (Part D). The Territory Plan map shows which land use policies and overlays in the written statement apply to particular sections of land in the Territory. The Territory Plan is developed and implemented taking account of other strategic ACT Government policy documents such as *The Canberra Plan* and *People Place Prosperity: A Policy for Sustainability in the ACT*.⁶

Recognising that land use policies may change over time, the Act provides for variations to the Territory Plan. The ACT Planning and Land Authority prepares these for stakeholder comment. There can be a number of versions of a draft variation depending on the consultation program.

The Minister is required by the Act to refer each draft variation, within 28 days of receiving it, to an appropriate committee of the Assembly – currently the Standing Committee on Planning and Environment – for consideration and report.⁷

² Accessible at <<http://scale.law.gov.au/html/pasteact/0/160/top.htm>>

³ Accessible at <<http://www.legislation.act.gov.au/a/1991-100/current/pdf/1991-100.pdf>>

⁴ Land (Planning and Environment) Act 1991, sub-Section 7(2))

⁵ Land (Planning and Environment) Act 1991, sub-Section 7(1)

⁶ Accessible at <<http://www.cmd.act.gov.au/canberraplan/>> and <<http://www.sustainability.act.gov.au/policy.html>>

⁷ Land (Planning and Environment) Act 1991, Section 25

The Minister is required to have regard to the Committee's recommendations before approving the proposed variation and tabling it in the Assembly (see below), or returning it to the ACT Planning and Land Authority with written directions for further action.⁸

The Territory, the Executive, a Minister or a Territory authority must not do or approve anything that is inconsistent with the Territory Plan, or the proposed draft variation, in relation to land that is subject to a draft variation, once the draft variation has been notified for public consultation under the Legislation Act and until it commences operation, is disallowed by the Legislative Assembly, or is withdrawn.⁹

Following the Committee's tabling of its report in the Legislative Assembly, the Minister must take the findings of the committee into account before making his decision in relation to the draft plan variation.¹⁰ If the Minister approves it, he will table the proposed variation and associated documents in the Legislative Assembly.¹¹ Unless wholly or partially disallowed by the Assembly within five sitting days, the variation will commence on the date nominated by the Minister.

⁸ Land (Planning and Environment) Act 1991, paragraphs 26(1)(a) and (b), sub-Section 26(2)

⁹ Land (Planning and Environment) Act 1991, Section 9

¹⁰ Land (Planning and Environment) Act 1991, sub-Section 26(2)

¹¹ Land (Planning and Environment) Act 1991, Section 29

TABLE OF CONTENTS

Committee membership	2
Resolution of appointment.....	3
Terms of reference	3
Preface	4
SUMMARY OF RECOMMENDATIONS	7
1 INTRODUCTION	9
Background	9
Current and proposed land use policies	12
2 CONSULTATION COMMENTS	13
Statutory consultations	13
Committee consultations	16
Issues raised at the 11 April 2006 site visit.....	17
Submissions received.....	20
Public hearing – 16 May 2006	23
Submissions lodged for DV260	30
3 COMMITTEE COMMENTS	31
Appendix 1 – Land use controls for Group Centres	39
Appendix 2 – Current Territory Plan Policies	40
Appendix 3 – Proposed Variation to the Territory Plan Map	41
Appendix 4 – List of submissions.....	42

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

3.6 The Committee recommends that the Ministers for Disability and Community Services, and Planning, give favourable consideration to supporting a Canberra Central or Inner South Community Council, should such an organisation be incorporated in the short to medium term.

RECOMMENDATION 2

3.26 The Committee recommends that the Minister consider

- (a) inserting an area specific policy into the Territory Plan,
- (b) varying the leases for Blocks 14 – 32 in Section 22, and/or
- (c) reviewing and amending as agreed with industry, the ACT Commercial Waste Industry Code of Practice and the Waste Minimisation Regulation 2001, with a view to limiting commercial deliveries and waste collection to between the hours of 7.00am – 7.00pm in Section 22 Kingston.

RECOMMENDATION 3

3.27 The Committee recommends that the Minister for the Territory and Municipal Services consider the need for a broader review of waste collection law and policy in view of the increased residential density around commercial centres in the ACT under the A10 (Residential Core) Area Specific Policy.

RECOMMENDATION 4

3.28 The Committee recommends that the Minister for the Territory and Municipal Services consider whether signs warning of the potential hazard of reversing trucks for pedestrians and cyclists, and particularly the frail, the aged and children, should be installed in Block 33 Section 22 Kingston.

RECOMMENDATION 5

3.29 The Committee recommends that the ACT Planning and Land Authority expressly addresses the influence of the *Human Rights Act 2004* (ACT) on the discharge of its statutory and non-statutory responsibilities, including when proposing variations to the Territory Plan.

RECOMMENDATION 6

3.30 The Committee requests that the bodies corporate in multi-unit residences in Section 22 consider what investments might be necessary to ameliorate the perceived negative impacts of changing adjacent land uses such as window treatments, landscaping and screen planting, solid rear fencing, closure of pathways used as public thoroughfares through private property etc.

RECOMMENDATION 7

3.31 Subject to the recommendations above, the Committee is of the view that the proposed variation should proceed.

RECOMMENDATION 8

3.32 The Committee invites private stakeholders in dispute over residential amenity and commercial activities to consider the use of the services of organisations such as the Conflict Resolution Service to facilitate the reaching of compromises that may enable conflicting land uses to co-exist more equitably and harmoniously.

1 INTRODUCTION

- 1.1 The intent of the proposed variation to the Territory Plan is to permit a range of commercial land uses in Kingston, whilst maintaining residential amenity, particularly for those living in Section 22. The proposed variation removes as permissible land use activities in Kingston part 22 – ‘club, drink establishment, indoor entertainment facility, and service station’. But under the Territory Plan, other activities listed in Schedule 1 of part B2C are permitted within the designated precinct (refer [Appendix 1](#)).
- 1.2 The proposed variation aims to improve noise management by businesses on the eastern side of Jardine Street, Kingston. Where permission is sought for a new restaurant or commercial accommodation use¹², the ‘relevant authority’¹³ is required to endorse a noise management plan that has been prepared by an accredited acoustic specialist.

Background

- 1.3 This proposed variation follows two decisions of the ACT Administrative Appeals Tribunal (AAT) concerning development applications for premises in Jardine Street, Kingston. It also follows a meeting in April 2004 between the Minister for Planning, Mr Simon Corbell MLA, and local residents who were concerned about a proposal to establish a Belgian Beer Café on the eastern side of Jardine Street. The Minister is reported to have asked the ACT Planning and Land Authority to develop a variation of the Territory Plan to create a buffer zone between commercial activities and private residences.¹⁴
- 1.4 In May 2004, in *Ergas & Bird and ACT Planning Land Authority Ors*¹⁵ (*Ergas & Bird*) the Tribunal found that Development Application No. 2036739 for a variation of the Crown lease to allow a restaurant/drink establishment on

¹² ‘Commercial accommodation use’ is defined in Part D of the Territory Plan to mean ‘a commercial accommodation unit, guest house, hotel, motel or tourist resort but does not include a caravan park/camping ground or a group or organised camp’

¹³ Environment ACT is responsible for monitoring compliance with the *Environment Protection Act 1997* (ACT)

¹⁴ Submission No 3

¹⁵ [2004] ACTAAT 18 (18 May 2004)

Block 27, Section 22 Kingston (now the Belgian Beer Café) should be approved with conditions. The Tribunal held that Planning and Land Authority should include conditions in the lease for Block 27, to –

- require that noise from the premises does not exceed 50dB(a) between 7am and 10pm Monday to Saturday, 40dB(A) between 10pm and 7am Monday to Saturday, and 50dB(A) between 8am and 10pm on Sundays and public holidays, and 40dB(A) between 10pm and 8am on Sundays and public holidays
- require the lessee to obtain a noise measurement by a qualified acoustic consultant for the purpose of ascertaining compliance, following the written request of any resident of Blocks 13, 19, 20, 22 or 34 of Section 22 Kingston
- require noise measurements to be taken along the boundary of Blocks 19 or 20 in Section 22 Kingston. Noise from any other source or from temporary construction or maintenance activities on the premises was to be excluded from the measurement
- limit waste collections to between 7.00am and 7.00pm, and to limit public access to the rear of the premises
- to require the development of a noise management plan.

1.5 The Tribunal said –

36. We have considered the development applications and the evidence in the light of the relevant policies in the Territory Plan and we find in respect of DA No. 2036739 that the application for a variation of the Crown lease to allow a restaurant/drink establishment should be approved with conditions. Those conditions are that the lease is to include a covenant limiting the level of noise emitted from the subject land and measured at the boundary of the nearest nearby residential land to that permissible under the Environment Protection Act. The covenant would allow nearby residents to request ACTPLA to direct that the noise be measured by a qualified acoustic consultant at the lessee's expense. A second covenant is to be included in the lease to preclude access to the rear area of the premises by the public in normal circumstances. A third covenant is to be included in the Crown lease to further restrict the hours of waste collection from the rear of the premises. Those conditions are aimed at ensuring that, if the subject land is used for a restaurant/drinks establishment, significant adverse impacts are not experienced by nearby residents. Taken together with the covenant limiting the available area to 246 square metres on the ground floor of the building, and the protection offered by other legislative schemes and in particular the Liquor Act and the Environment Protection Act, we are satisfied that a restaurant/drinks establishment could operate on the land without unacceptable adverse impacts on nearby residents.

37. We find that there is insufficient detailed evidence as to architectural design, materials and equipment to allow the Tribunal to be satisfied that the proposed refurbishment outlined in the application will allow the noise standards specified to be achieved. Accordingly we find that the preferable decision in respect of DA No.20038458 is to remit it to the ACPLA with a direction that more detailed plans and

specifications, including for the air-conditioning and exhaust equipment, be submitted together with a noise management plan from a suitably qualified acoustic consultant and endorsed by the Manager, Environment ACT, demonstrating how the noise levels generated by the proposed activities, including the operation of plant and equipment, shall comply with the requirements of the lease. Likewise, as recommended in the evaluation of the Preliminary Assessment, details of acceptable arrangements for waste disposal, including a waste disposal facility roofed and screened from the public, are to be provided before the refurbishment application is approved.¹⁶

- 1.6 Following the *Ergas & Bird* decision, in September 2004, the Planning and Land Authority issued a lease over Block 27 Section 22 Kingston which included clauses limiting waste collection to between 7.00 and 7.00pm; regulating the amount of permissible noise from the premises; providing for noise measurement; and providing that the Planning and Land Authority could, at the written request of a resident of Block 13, 19, 20, 22 or 34 of Section 22, Kingston, direct the lessee to pay for noise measurement by a qualified acoustic consultant.
- 1.7 In September 2004 Eric Taylor Acoustics submitted its noise management plan for the Belgian Beer Café in Kingston (Block 27 Section 22) to then lessee Meo Pty Ltd. That plan had been commissioned to discharge the lessee's obligations to keep noise within prescribed limits.
- 1.8 In December 2004, in *Stryver Pty Ltd and ACT Planning Land Authority & Ors*¹⁷(*Stryver*) the Tribunal considered an application by the lessee of Block 22 Section 22 Kingston,¹⁸ to vary the uses allowed for the building under the Territory Plan. The Tribunal set aside the Planning and Land Authority's 'deemed refusal' and directed the Authority to –
 - vary the Crown lease over Block 22 Section 22 Kingston to permit the site to be used for a wider range of uses, including non-retail commercial uses, restaurant, shop, child care centre, community activity centre, cultural facility or health facility
 - include a condition in the lease to restrict shop use to a maximum gross floor area per shop of 100m² or 300m² where the shop or part of the shop is physically contiguous with development on Block 21 of Section 22 Kingston

¹⁶ [2004] ACTAAT 18 (18 May 2004), at pp14–15. See also Preliminary Assessment: Block 27 Section 22 Kingston / prepared by MEO Pty Ltd, ACT Planning and Land Authority, Canberra, 2003

¹⁷ [2004] ACTAAT 42 (13 December 2004)

¹⁸ part of the building was occupied by the Commonwealth Bank

- include a condition in the lease to ensure appropriate waste management, including limiting the hours for waste collection to those in residential areas
- include a condition in the lease limiting access to the premises, other than by employees, through the rear entrance after 7.00pm
- require the lessee to pay any applicable 'Change of Use Charge' within 28 days of being notified of the amount or within such further time as may be approved by the Planning and Land Authority.

Current and proposed land use policies

- 1.9 The Commercial 'C' land use policy for Group Centres applies to the Kingston Group Centre under Part B2C of the Territory Plan.¹⁹ Sections 19–22 in Kingston are currently designated as precincts 'a' (retail core), 'b' (business area) and 'd' (car parking), as represented in [Figure 1](#) in [Appendix 2](#). Schedule 1 of Part B2C prescribes the uses that are permissible in these precincts.
- 1.10 The permissible uses in precincts 'a' and 'b' are the same, except that precinct 'b' permits a funeral parlour and veterinary hospital to operate in the 'b' precinct, and permits ground floor residential use. Permissible shop size also differs depending on the precinct.
- 1.11 Under the proposed Territory Plan variation, new land use controls are proposed for part Section 22, precluding clubs, drink establishments, indoor entertainment facilities and service stations from operating in Kingston part Section 22.²⁰
- 1.12 Additional restaurants or commercial accommodation uses will be permitted in part Section 22 in the 'b' precinct, provided the relevant authority endorses a noise management plan prepared by an accredited acoustic specialist. The noise management plan must
- detail the design, siting and construction methods which will be used to minimise the impact of noise on neighbours in accordance with the noise standards prescribed in the relevant environmental legislation and the hours of operation relevant to the appropriate noise standards.²¹

¹⁹ ACT Department of Urban Services, *The Territory Plan, 2002, Written Statement*, Vol. 1 Part B2C

²⁰ The terms 'club', 'drink establishment' 'indoor entertainment facility' and 'service station' are defined in Territory Plan Part D – Definition of Terms

²¹ Proposed new noise control: ACT Planning and Land Authority, *Recommended Final Variation to the Territory Plan No. 256: Kingston Group Centre Part Section 22*, January 2006, p6

- 1.13 The proposed variation extends the 'b' precinct to include Blocks 21, and 25–33 in Section 22 Kingston, as indicated in Figure 2, Appendix 3.
- 1.14 The proposed variation also deletes the definition of 'restaurant' from Part D of the Territory Plan.
- 1.15 The Committee notes that the Territory Plan applies additional land use restrictions for Kingston Sections 19 and 20. These prevent the following land uses – 'club, drink establishment, indoor entertainment facility, indoor recreation facility, restaurant, service station, shop (except for arts, crafts and sculpture dealers and personal services), and tourist facility. They also permit residential use at ground floor level. The maximum plot ratio is prescribed as 0.5.1.²²

2 CONSULTATION COMMENTS

Statutory consultations

- 2.1 On 3 March 2005 the ACT Planning and Land Authority released DV256 for public comment until 31 March 2005.
- 2.2 The Planning and Land Authority sought the views of the ACT Planning and Land Council (the Council) on the proposed variation to the Kingston Group Centre Land Use Policy. The Council supported the proposed variation, recognising the need for some fine tuning of the land use arrangements to protect residential amenity, stating that it would create an appropriate buffer area between the retail core and adjoining residential areas. The Council supported the proposed restrictions on land use activities, as these would mitigate the adverse impacts on the adjoining residential areas. The Council had some concerns that the proposed restrictions in precinct 'b', through *post hoc* planning changes, would not be consistent with the aim of establishing a vibrant centre, but by majority, supported the position recommended by the Authority in respect of the proposed variation.²³ The Council also noted that the proposed restriction was in contrast to the proposed expansion in relation to the Mawson

²² Territory Plan Part B2C, Section 4.2, pp 12–13

²³ ACT Planning and Land Council, *Minutes: Meeting No. 19, Tuesday 14 December 2004*, pp 7–8

site,²⁴ and commented that this appeared to be inconsistent in terms of the Authority's planning processes.

2.3 In accordance with the *Land (Planning and Environment) Act 1991*, the ACT Planning and Land Authority also sought and considered the views of the National Capital Authority, the ACT Heritage Council and the Conservator of Flora and Fauna.

- On 7 February 2005 the National Capital Authority advised that the proposed variation to the land use policy change was not inconsistent with the National Capital Plan.
- On 9 February 2005 the ACT Heritage Council advised there were no heritage concerns in relation to the proposed variation.
- On 27 January 2005 the Conservator of Flora and Fauna advised that there were no issues of concern.

2.4 In response to the 25 written responses submitted to the ACT Planning and Land Authority during the consultation period, the Authority amended the site details and maps in the proposed variation, and replaced restrictions on restaurants' opening hours with a requirement for the submission of a noise management plan for both restaurants and commercial accommodation use. Restrictions on indoor recreation facilities, shops and tourist facility were also removed, and part of the explanation for the definition of 'restaurant' in Part D – Definitions in the Territory Plan, was removed.²⁵ The issues raised in submissions to the Authority are summarised in [Table 1](#):

TABLE 1: SUMMARY OF KEY ISSUES AND ACT PLANNING AND LAND AUTHORITY RESPONSES

Stakeholder comment	Response by the ACT Planning and Land Authority
A better buffer between commercial premises in Jardine and Giles Streets and residences in Section 22 is needed cf. DV256 amounts to poor practice 'spot rezoning'	The Authority recognises and has proposed an appropriate response to the potential conflict between residential and commercial uses by prohibiting nightclubs and drink establishments, consistent with

²⁴ See ACT Legislative Assembly, Standing Committee on Planning and Environment, *Draft Variation to the Territory Plan No 255 – Commercial C, Precinct Rationalisation Mawson (Southlands) Group Centre: Report No 12*, Canberra 2005

²⁵ ACT Planning and Land Authority, *Draft Variation to the Territory Plan No. 256*, p4

rezoning'	the Garden City variation, Canberra Spatial Plan and Economic White Paper
Restaurants' permissible opening hours are incompatible with residents' needs. Only 8.00am–6.00pm businesses should be allowed to operate. cf. Restricting restaurants' opening hours is unnecessarily onerous, bad for business etc	The Department of Justice and Community Safety regulates the hours that alcohol can be served but this applies to restaurants as approved (and not retrospectively). The definition of 'restaurant' in the Territory Plan will be amended to remove 'brasserie' and 'bistro'. The AAT has permitted two drink establishments in part Section 22 with noise issues to be addressed with a noise management plan and compliance with the <i>Environment Protection Act 1997</i> (ACT). Opening hours will not be regulated under the proposed variation
Jardine Street and precinct 'b' in Kennedy and Eyre Streets should be subject to the same land use restrictions	Kennedy and Eyre Streets do not face the retail core of Kingston so have different functions, and space provides a buffer for nearby residences
Anti-social behaviour will escalate in the area	Restaurant patrons are not particularly prone to engage in anti-social behaviour and the social impacts of alcohol abuse cannot be regulated by the Territory Plan
The car park on Block 33, Section 22 poses noise, security and health concerns	The ACT police respond to inappropriate behaviour on public land such as the car park but some noise from usage is inevitable
Anti-social behaviour will escalate in the area	Amendments will be made to clarify the site description
Two AAT decisions permit inappropriate commercial uses in the area which are not prevented by this DV	Territory Plan variations cannot retrospectively prohibit previously approved land uses
The definition of 'shop' should exclude supermarket, bulky goods retailing and retail plant nursery for this area	Limiting the type of permissible shops is unnecessary given the small subdivisions in this area
Noise attenuation measures are too expensive in old buildings	Noise impacts are regulated by the <i>Environment Protection Act 1997</i> (ACT) and a noise management plan will be required for restaurants in Section 22

Community consultation was inadequate	Not agreed; consultation noted
Clarification requested re development applications and parking requirements	Proponents must demonstrate there is sufficient parking within 100m (short stay) or 200m (long stay) of the site. The Authority will consider the ACT Parking and Vehicular Access guidelines. Parking constraints may limit future developments in Kingston
The Authority does not seem to be using lease purpose clauses to regulate development activities	It is not the Authority's role to regulate liquor licensing, public nuisance or noise
Shops are a land use compatible with residential amenity	There will be no restriction on shops, indoor recreation facility and tourist facility in the proposed variation
The same plot ratio restrictions applicable to Sections 19 and 20 (0.5:1) should apply to Blocks 21, 22 and 13 in Section 22	Group Centre performance controls will apply (max plot ratio 1:1 or existing plot ratio, whichever is greater)
Clarification requested re development applications and lease conditions	Intending restaurateurs will need to submit a development application if their lease does not already permit restaurant uses. A noise management plan will be required

Committee consultations

- 2.5 On 23 March 2006, pursuant to the *Land (Planning and Environment) Act 1991* (ACT), the Minister for Planning, Mr Simon Corbell MLA, referred DV256 to this Committee for inquiry and report.
- 2.6 Although the interim effect of DV256 ceased on 2 March 2006, equivalent provisions were included in *Draft Variation No. 260 – Changes to A10 Residential Core Areas for Garran, Griffith, Hackett and Yarralumla; Kingston Group Centre Section 22*. For example, in relation to Kingston, DV260 includes the requirement for a noise management plan for certain land uses in Kingston part Section 22, which effectively extended the interim effect of DV256.
- 2.7 On 28 February 2006 the Committee resolved to invite submissions by way of advertisements and correspondence, with a closing date of 21 April 2006. The Committee invited stakeholders to express their views on the final recommended variation by letter and an advertisement in *The Canberra Times*

and *The Chronicle* on 4 and 7 March 2006 respectively.

- 2.8 A significant number of the letters sent to stakeholders by the Legislative Assembly's Committee Office were returned to the Committee Office, marked 'return to sender'. The Committee Office had used the data list appended to the Planning and Land Authority's consultation report. This suggested that the Authority's consultation documents had also not reached intended recipients. An officer of the Authority advised that the Territory Plan Section of the Authority is precluded by the *Privacy Act 1988 (Cwlth)* from accessing property rates data, and therefore many of the addresses were out of date. The inaccuracies in the Authority's data were also noted in stakeholder submissions to the Committee.²⁶ The submission from the Executive Committee, Owners Corporation (UP 585), Oakleaves, Kingston said

4.1 We have serious reservations about the 'community consultation' process which has done no more than comply with the minimum legislative requirements and certainly cannot be regarded as promoting or facilitating 'community engagement'. A particular concern is that lessees in Section 22 received no formal correspondence from ACTPLA, notwithstanding the fact that Section 22 was the very subject of the Draft Variation. This shortcoming is compounded by the fact that, unlike most other Inner South suburbs, Kingston has no formal mechanism for community consultation on planning matters. In addition, the Explanatory Statement contained many errors of fact and the omission of any Block numbers in Section 22 from the figures provided rendered the document almost meaningless. We do not believe it is an unreasonable expectation that information provided by a government agency should be accurate.²⁷

Issues raised at the 11 April 2006 site visit

- 2.9 The Committee inspected the area affected by the proposed variation on 11 April 2006. The Manager of Development Assessment and Territory Plan Variations, and another officer from the Territory Plan section in the ACT Planning and Land Authority, attended. Five local residents also attended. In response to issues identified for further investigation at the site visit, ACT

²⁶ Submission Nos 4, 6, 8

²⁷ Submission No 6

Government officials provided the following information²⁸ –

Noise and waste management by the Belgian Beer Café.

- 2.10 The Planning and Land Authority provided the Committee with a copy of the Noise Management Plan for the Belgian Beer Café.
- 2.11 The Department of Urban Services advised that an ACT NOWaste Certificate of Compliance was issued for the Belgian Beer Café based on an agreement that all waste for the premises would be stored within the lease boundary, and collected from within the rear service lane. Jim Perryman from Asset Acceptance, Department of Urban Services advised that if this agreement were being breached he would investigate, and if necessary, have the situation remedied through City Rangers or compliance action.
- 2.12 The Planning and Land Authority advised that the lease for 27/22 Kingston (Belgian Beer Café) restricts waste collection times to between 7am and 7pm on any day. The AAT had required this restriction. The Authority also advised that the lease for 22/22 Kingston (the Commonwealth Bank site) restricts waste collection times to between 7am and 5pm Monday to Friday.

Reversing trucks

- 2.13 Currently the trucks using the Block 33 laneway for deliveries either reverse in and drive out, or drive in and reverse out. This poses a potential risk to unsupervised children and is noisy for residents who are irritated by the 'beeping' noises of reversing trucks.
- 2.14 The ACT Planning and Land Authority and Roads ACT advised that it would not be possible for the ACT Government to remove the wire fences behind the buildings facing Giles St in Blocks 21 and 22 and Jardine St, or to level the driveways so that the laneway/parking lot on Block 33 could become a thoroughfare for trucks entering from Eyre St or Giles St.
- 2.15 The Planning and Land Authority advised that as Blocks 21 and 22 in Giles Street were private property and not unleased Territory land, the driveways were for the exclusive use of the tenants/lessees of those Blocks, and therefore could not be used as a public thoroughfare for waste/delivery vehicles except with the authorisation or agreement of the lessees of those Blocks. The

²⁸ Response from the ACT Planning and Land Authority, dated 1 May 2006, to issues raised at the DV256 Kingston site meeting 11 April 2006

Authority advised that waste/delivery vehicles could enter and exit Block 22 from Block 33 in a forward direction.

Development application for the building occupied by the Commonwealth Bank on Block 22 Giles St

- 2.16 The Planning and Land Authority advised that there was a development application (DA200400728) for a lease variation lodged in 2004 to expand the purpose clause in the lease over the site to allow a wider range of uses identified as permissible in the Group Centres Land Use Policies of the Territory Plan. The application was deemed refused as the Authority did not finalise its decision within the prescribed time. The outcome of the applicant's subsequent appeal to the AAT is summarised above (refer *Stryver* case, AAT). A further development application (DA200501822) over Block 22 Section 22 Kingston was lodged on 13 May 2005 and approved on 15 June 2005. The approval was for minor external building modifications including new signage that encroached onto the unleased Territory Land road reserve, and provision of a new corridor to provide access to tenant amenities and the car park.

Signs

- 2.17 Roads ACT, through the ACT Planning and Land Authority, advised that signs may be erected on private property within the Block boundary to designate loading zones. However unless a license for the use of unleased Territory land as a loading zone has been granted by the Department of Urban Services, then the practice would be considered unlawful.

Rubbish skips on Block 33

- 2.18 The Department of Urban Services, through the Planning and Land Authority, advised that skips had been placed temporarily at the rear of Blocks 26–28 on Jardine St during an office refit above Fox Imports, and subsequently for an office refit above the Belgian Beer Café. For short-term projects the Department permits the location of skips on public land on the proviso that they will be removed promptly on completion of works. Longer term projects require the issue of a license and payment of a fee.

Restaurant kitchens operating with open rear doors

- 2.19 The ACT's Health Protection Service (HPS) advised through the Planning and Land Authority that it is contrary to the Australian New Zealand Food Standards Code requirements for restaurant kitchens to operate with open rear doors. The kitchen area must be vermin proof and a screen door fitted. The HPS expects kitchen areas to be fully enclosed, and to adhere to the premises' structure requirements under the Code. Complaints about breaches of the Code can be made to the HPS Health Complaints Section (phone 62051700), which will be assessed by a public health officer and appropriate action taken.

Public use of laneway

- 2.20 The Planning and Land Authority advised that as neither the original lease nor the current Units Plan (No 585 for Blocks 19–20 Section 22) contain any clauses, provisions or covenants requiring a pathway across Block 19 to remain accessible to the public, the body corporate may seek approval to close it off preventing access to the public.

Submissions received

- 2.21 The Committee received eight submissions on the proposed variation, as listed in [Appendix 4](#). The key issues raised in those submissions include –
- that DV256 permits licensed restaurants to operate in the proposed Section 22 'buffer zone', permitting adverse impacts on residents such as visual pollution,²⁹ loss of privacy, noise (causing adverse social and health effects also), anti-social activities, and loss of property value.³⁰ These impacts are exacerbated by the fact that many residents in the apartments adjoining Block 33 are retired or semi-retired, with several having mobility or disability problems.³¹
 - assurances by the Belgian Beer Café that its operations would not impact adversely on residents are not being honoured.³²
 - neither Environment ACT nor the ACT Planning and Land Authority has undertaken compliance action in relation to the particular noise problems

²⁹ a kitchen scullery area, waste disposal unit and utility service area are visible to some residents because the roller shutters are constantly left open: Submission No 6

³⁰ including increased traffic and congested parking; general noise, and noise when patrons return to cars; increased litter; vandalism; graffiti; and violence– see generally Submission Nos 1, 2, 3, 6

³¹ Submission No 6

³² Submission No 6

facing residents of Section 22 and residents are reluctant to put complaints in writing for fear of victimisation.³³

- all licensed restaurants are potentially ‘drinking establishments’ and should not be permitted along Jardine Street in Section 22.³⁴
- motor vehicles and heavy vehicles, including waste collection vehicles, using public roads are exempt from noise standards prescribed in environmental protection legislation. Block 33 is a public road. The level and frequency of noise from waste collection vehicles is exacerbated because businesses along Jardine Street use different waste collection contractors.³⁵
- that the Territory Plan and ACT legislation, including the *Human Rights Act 2004* (ACT), require residential amenity to be protected.³⁶ The Planning and Land Authority should take a precautionary approach to zoning to ensure amenity is protected.³⁷
- an appropriate land use buffer would permit only retail and commercial enterprises to operate in Jardine St during normal business hours i.e. 8.00am – 6.00pm.³⁸ This would also better ensure that Kingston remains a viable centre as more diverse businesses and services would be available.³⁹ A good model for a buffer is Kennedy Street, Section 20, Kingston.⁴⁰
- one submission suggested that a solid barrier should be constructed on the boundary of the laneway and the Block 33 car park, with appropriate landscaping on the car park side.⁴¹
- the Belgian Beer Café should be closed and the leaseholder compensated.⁴²
- that commercial leaseholders’ views should not be given preference over residential leaseholders’ views.⁴³

³³ Submission No 6

³⁴ Submission Nos 1, 3

³⁵ Submission No 6

³⁶ Submission No 3

³⁷ Submission No 7

³⁸ Submission No 6

³⁹ Submission Nos 2, 3, 4

⁴⁰ Submission No 1

⁴¹ Submission No 6

⁴² Submission No 3

⁴³ Submission No 6

- that a requirement for noise to be minimised in accordance with a noise management plan is inadequate protection for residential amenity.⁴⁴ The ‘beeps’ made by hazardous reversing trucks are particularly irritating.⁴⁵
- concern was expressed about the ineffectiveness of the conditions imposed by the AAT.⁴⁶ In contrast, one submission said that since the AAT conditions provided sufficient safeguards for residents there was no need for DV256⁴⁷. Another said that the proposed controls on commercial operations in Section 22 could limit their commercial viability, or diminish the value of the premises and was inconsistent with the promotion of mixed land uses in other parts of Canberra, and retrospectively limited rights in place when businesses were acquired (e.g. Kingston Foreshore, Civic, Manuka and Dickson).⁴⁸
- that traffic and parking trends should be better monitored in Kingston⁴⁹
- that the narrow lane and car park behind the buildings on Jardine Street is inadequate as a service lane for restaurants. The varied but constant use made of it by businesses on Jardine Street⁵⁰ impacts adversely on nearby residences. The Kinston Group Centre has a dedicated service lane which is far more appropriate for such uses.⁵¹
- DV256 retrospectively authorises the operation of an indoor recreation facility in Jardine St.⁵²
- concern that DV256 is a ‘spot rezoning’ which applies complex rules to a specific site contrary to DV158 which applies to all Group Centres.⁵³
- that many Howitt St residents bought their units when commercial zoning for Section 22 was already in place, including ‘drink establishments’ as a permissible use.⁵⁴

⁴⁴ Submission No 6

⁴⁵ Submission No 6

⁴⁶ Submission Nos 1, 3, 4

⁴⁷ Submission No 5

⁴⁸ Submission No 5

⁴⁹ Submission No 4

⁵⁰ adverse impacts include noise generated by heavy vehicle movement, utility services, mechanical plant and equipment, staff and patrons and their vehicles and problems associated with the disposal of waste: Submission No 6

⁵¹ Submission Nos 3, 4

⁵² Submission No 6

⁵³ Submission No 5

⁵⁴ Submission No 5

- stakeholders are frustrated with the perceived inability of the AAT and the Planning and Land Authority's processes to respond adequately to residents' concerns.⁵⁵ The Authority's consultation processes were criticised in three submissions.⁵⁶
- that there are several inaccuracies in the explanatory statement for DV256 - including that Green Square is not the retail core of Kingston; that Block 33 does not divide the precinct 'a' commercial land use area from residential land use area; that Block 14 does not comprise residential buildings with offices on the top floor and that the apartment complexes on Blocks 19, 20 and 34 do not comprise 2–3 storey townhouses.⁵⁷
- that the Liquor Licensing Authority does not consider whether the issuing of a liquor licence will adversely affect the amenity of an adjoining lease, on the assumption that such considerations would have been addressed at the planning and approval stage by the ACT Planning and Land Authority or Environment ACT. For licensing purposes no distinction is made between restaurants and drink establishments, with both able to operate for extended trading hours. So if a land use policy permits 'restaurants', this effectively permits a 'drink establishment' to operate. A third party appeal should be available to challenge licensing approvals under the *Liquor Act 1975* (ACT).⁵⁸

Public hearing – 16 May 2006

2.22 The Committee held a public hearing on the proposed variation on 16 May 2006. The following witnesses were called and examined –

- Mr Peter Jansen for Kingston Traders
- Mr Tony Adams, Senior Planner – CBRE Consulting
- Ms Rowan Basil-Jones; Ms Deborah Robinson & Dr Christopher John Moore for Owners Corporation Executive Committee, Oakleaves, 6 Howitt Street, Kingston, Units Plan 585, Kingston
- Mr Daniel Walters, Environment Protection, Environment ACT
- Mr Steven Thomas, Environment Regulation and Education, Environment ACT

⁵⁵ Submissions No 3, 4

⁵⁶ Submission Nos 3, 4, 6

⁵⁷ Submission No 6

⁵⁸ Submission No 6

- Mr Gabriel Joseph, Asset Management Services, Department of Urban Services
- Mr Tony Gill, Roads, Department of Urban Services
- Mr Tony Brown, Registrar of Liquor Licenses, Office of Fair Trading, Department of Justice and Community Safety
- Ms Kathleen Taperell, Kingston resident (who provided apologies for Pamela Rutland, Aldo Guirgola, Margaret Williams and Gillian Bird)

2.23 The following documents were tabled at the public hearing–

- Environment ACT, Information Sheet: Noise in Residential Areas, 4 May 2006
- Environment ACT, Information Sheet: Live Music and Entertainment Noise, 19 January 2006
- Department of Urban Services, Development Control Code for Best Practice Waste Management in the ACT, September 1999
- Environment ACT, Noise Environment Protection Policy, November 1998
- ACT Commercial Waste Industry Code of Practice, Instrument No 238 of 1998

2.24 Evidence given during the public hearing is accessible via the Assembly's website.⁵⁹ The key issues raised by witnesses were that –

- changing land uses, with banks moving out of Jardine Street, were taken into account when investments in Section 22 were made.⁶⁰
- planning rules should apply consistently throughout Canberra and particular grievances should be addressed on a case-by-case basis.⁶¹
- whichever land uses are permitted in Section 22 there will be noise from the Block 33 car park which is publicly accessible, and from the rest of the Kingston Group Centre.⁶²
- noise from businesses in Section 22 can be mitigated with acoustic measures, such as a breakable glass door at the rear of the Belgian Beer Café, and possibly restrictions on waste collection hours.⁶³

⁵⁹ accessible at <<http://www.hansard.act.gov.au/hansard/2005/comms/default.htm>>

⁶⁰ Evidence from Mr Peter Jansen for Kingston Traders, Legislative Assembly for the Australian Capital Territory, Standing Committee on Planning and Environment, *Transcript of Evidence: Proof Copy – Reference: Inquiry into Draft Variation of the Territory Plan DV256: Kingston Group Centre part Section 22*, 16 May 2006

⁶¹ Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

⁶² Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

⁶³ Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

- the first floor premises in Jardine Street have always overlooked the residences at the rear⁶⁴ cf. first floor windows are being enlarged which reduces residents' privacy.⁶⁵
- planning restrictions should be applied consistently throughout Canberra and area-specific policies should not be allowed, including restrictions on operating hours or limits on the size of retail establishments⁶⁶ cf. special planing measures are needed because the units adjacent to Block 33 are old and poorly designed with respect to air flow, requiring rear sliding doors to be open for air to circulate.⁶⁷
- retrospective land use changes, such as prohibiting drinking establishments along Section 22 Jardine Street, are undesirable.⁶⁸
- changing land use is negatively impacting on residential amenity (to an 'untenable' level), particularly the noise generated by the Belgian Beer Café (from external activities, waste consolidation and collection [bottles especially], deliveries, staff etc).⁶⁹ Residents cannot enjoy the full value of their properties because of the high noise levels affecting rear bedrooms.⁷⁰ The rear roller door at the Belgian Beer Café is often left open during opening hours.⁷¹
- more restaurants disposing of their waste in skips or hoppers would create eyesores and odours, particularly in summer.⁷²
- Environment ACT has not responded adequately to complaints from residents about noise⁷³ cf. Environment ACT has been helpful.⁷⁴
- the Human Rights Act protects the rights of families and children and reversing trucks are a safety issue, particularly for children and people with a disability.⁷⁵
- approval for use of premises as a gym should not be given retrospectively.⁷⁶

⁶⁴ Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

⁶⁵ Evidence from Ms Deborah Robinson, Kingston resident, *Transcript of Evidence*, 16 May 2006

⁶⁶ Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

⁶⁷ Evidence from Ms Deborah Robinson, *Transcript of Evidence*, 16 May 2006

⁶⁸ Evidence from Mr Peter Jansen, *Transcript of Evidence*, 16 May 2006

⁶⁹ Evidence from Dr Chris Moore, Kingston resident, *Transcript of Evidence*, 16 May 2006

⁷⁰ Evidence from Ms Deborah Robinson, *Transcript of Evidence*, 16 May 2006

⁷¹ Evidence from Ms Rowan Basil-Jones, Kingston resident, *Transcript of Evidence*, 16 May 2006

⁷² Evidence from Dr Chris Moore, *Transcript of Evidence*, 16 May 2006

⁷³ Evidence from Ms Deborah Robinson, *Transcript of Evidence*, 16 May 2006

⁷⁴ Evidence from Ms Rowan Basil-Jones, *Transcript of Evidence*, 16 May 2006

⁷⁵ Evidence from Ms Deborah Robinson, *Transcript of Evidence*, 16 May 2006

⁷⁶ Evidence from Ms Deborah Robinson, *Transcript of Evidence*, 16 May 2006

- whilst Environment ACT implements noise environment protection law and policy and deals with complaints, it is preferable for noise management plans to be developed at the planning and design stage of proposed developments so that legislative exceptions and common noise measurement difficulties (such as with intermittent noise) do not impede the delivery of assistance from Environment ACT. Environment ACT approved the noise management plan for the Belgian Beer Café and will investigate valid complaints. Officers have already had discussions with the Café in an attempt to reduce noise from bottle waste. Studies have found that humans tend to become irritated by noise at about 55–60 dBA, and intermittent noise is more irritating than continuous noise.⁷⁷
- ACT NOWaste administers a development control code and assesses design for particular developments. ACT NOWaste and collectors have agreed to comply with the ACT Commercial Waste Industry Code of Practice, including for noise collection times.⁷⁸ ACT NOWaste assesses collection arrangements on a case-by-case basis and may approve reversing trucks if that will not compromise the safety of pedestrians, cyclists and cars using the street that the truck would be reversing onto. Trucks have highly sophisticated rear vision facilities and beepers are an additional protection mechanism. Waste skips on Block 33 have been a temporary measure and the Belgian Beer Café is required to contain its waste within the boundary of its property. Skips, bins and loading vehicles may only be placed in public car parks or loading zones with a permit.⁷⁹
- the Registrar of Liquor Licenses administers the *Liquor Act 1975* (ACT), and is responsible for considering the granting of liquor licences and complaints about licensed premises, and running an enforcement and compliance program. The Registrar also assists the Liquor Licensing Board, which is the disciplinary body under the Act, which has powers to discipline licensees where it is found that they have failed to comply with their obligations under the Act, the regulations, or the licensing standards manual. Complaints by members of the public about the conduct of licensed premises, or loss of amenity in the vicinity of licensed premises arising from that conduct, can be referred to the Board for investigation. These can include people talking, car doors closing, people coming and going in cars, leaving noisily, bottles being thrown into hoppers late at night, early house of the morning, music, people fighting etc. Matters may also arise as a result of inspections that officers have undertaken of the

⁷⁷ Evidence from Mr Daniel Walters, Environment ACT, *Transcript of Evidence*, 16 May 2006

⁷⁸ See ACT Commercial Waste Industry Code of Practice, Instrument No 238 of 1998, Environment Protection Regulation 2005 (ACT) Sch 2 but cf. Waste Minimisation Regulation 2001 Reg9

⁷⁹ Instrument No 238 of 1998 accessible at <www.legislation.act.gov.au>, evidence from Mr Gabriel Joseph, Department of Urban Services, *Transcript of Evidence*, 16 May 2006

premises, or they might arise as a result of matters brought referred by the police. No complaints seem to have been lodged in relation to Section 22 Kingston, but could be, provided there is a causal connection between the activities of the licensed premises and the matter which is complained of. Over the last 10 years, only 6–8 complaints have been investigated about the conduct of licensed premises.⁸⁰

- in relation to the opening hours of licensed premises, there are five categories of licences which can be issued under the Liquor Act: (1) on-premises licences which permit the consumption of liquor on the premises, (2) off-premises licenses which allow the sale of liquor for consumption elsewhere, (3) general licences for hotels which generally have accommodation and bars as well as a drive-through or bottle shop arrangement, (4) club licenses and (5) special licences which permit the Registrar to tailor the conditions attaching to licensed premises in a manner which is consistent with their operations (such as for tourism-type facilities, education facilities etc). Liquor licensees selling liquor for on-premises consumption can, as a matter of right, trade 21 hours a day, with the three hour no-sale period to be notified to the Registrar. Off-premises sales can occur between 7.00 am and 11 .00pm.⁸¹
- the Registrar advised the Committee that the Liquor Licensing Board has within its disciplinary powers the ability to limit the hours of trade of licensed premises if it considers that that would be appropriate⁸²
- the Registrar of Liquor Licenses is responsible for issuing liquor licenses and a relevant consideration to be taken into account is whether the ACT Planning and Land Authority has given the leaseholder permission to do the activity proposed.⁸³
- it is inequitable that Jardine St is treated differently with respect to its buffer than other areas of Kingston and the current proposed variation does not provide for an effective buffer. A ‘balance between commercial and residential’ land uses is not a buffer. Restaurants trading 20 metres away from a bedroom is not a buffer because the impact on residential amenity and the quality of life is ‘huge’ and would be ‘horrific’ if a whole street of restaurants were to be permitted.⁸⁴
- a restaurant with a liquor licence is a de facto drinking establishment. There are 36 restaurants and drinking establishments already in Kingston and in summer vandalism, damage to property and violence to persons is

⁸⁰ Evidence from Mr Tony Brown, Registrar of Liquor Licences, Office of Fair Trading, Department of Justice and Community Safety, *Transcript of Evidence*, 16 May 2006

⁸¹ Evidence from Mr Tony Brown, *Transcript of Evidence*, 16 May 2006

⁸² Evidence from Mr Tony Brown, *Transcript of Evidence*, 16 May 2006

⁸³ Evidence from Mr Tony Brown, *Transcript of Evidence*, 16 May 2006

⁸⁴ Evidence from Ms Rowan Basil-Jones, *Transcript of Evidence*, 16 May 2006

a problem and any increase in the number of licensed premises will increase the incidence of anti-social behaviour.⁸⁵

Supplementary submissions

2.25 Following the Committee's public hearing on 16 May 2006, additional submissions were lodged with the Committee. The key issues raised in those submissions were–

- that the Belgian Beer Café should not be singled out for criticism concerning noise as Fox Imports has used the rear access to the business at 25 Jardine Street for loading and unloading furniture from a large truck since 1997. The truck driver starts work at 9am. Power tools are used in a workshop at the rear of the business, with the rear door open in good weather. Staff have taken their breaks in the rear lane since 1997.⁸⁶
- skips have been placed at the rear of businesses on Jardine Street as a temporary measure during office refurbishments, and not since the beginning of 2006.⁸⁷
- evidence given at the public hearing concerning the 'extensive public consultation' about DV158 was criticised, and the inaccuracies in the address information used by the Planning and Land Authority to consult on DV256 was referred to.⁸⁸
- residents' belief that planning legislation would protect their residential amenity if land use changes were proposed for neighbouring blocks was referred to.⁸⁹
- concern was expressed that DV256 refers to residences being 'within 150 metres' of commercial premises when the distances are between 10 and 25 metres.⁹⁰
- that residents were seeking to improve their residential amenity above what is consistent with land uses that have applied since 1993 was denied.⁹¹
- a request was made that land uses in Section 20 Kingston be the same as those for Section 22 Kingston.⁹²
- the currently 'ineffectual and unenforceable' noise management plan for Block 27 was criticised and a request made that noise-generating land

⁸⁵ Evidence from Ms Kathleen Taperell, Kinston resident, *Transcript of Evidence*, 16 May 2006

⁸⁶ Submission No 7

⁸⁷ Submission No 7

⁸⁸ Submission No 8

⁸⁹ Submission No 8

⁹⁰ Submission No 8

⁹¹ Submission No 8

⁹² Submission No 8

uses listed in the ACT Government's Noise Management Guidelines be prohibited in Section 22.⁹³

2.26 The Committee requested further information from the Departments of Arts, Heritage and Environment, and Urban Services on the following issues –

- the policy rationale for the 5am–10pm operating hours for Manuka and Kingston Group Centres in the ACT Commercial Waste Industry Code of Practice when other group centres (Zone C) are 6.00am to 10.00pm;
- whether any serious industry concerns are anticipated if the AAT's 7.00am-7.00pm restriction were to be extended to all businesses in Section 22 Jardine Street; and
- advice on what the current policy is with commercial waste (particularly organic) from restaurants.

2.27 The Departments provided the following response⁹⁴:

The Environment Protection Authority [EPA] has reviewed its files on the development of the ACT Commercial Waste Code of Practice. The Code was subject to public consultation – the 5am start for the Kingston and Manuka Group Centres was requested by industry during the consultation phase for the development of the Code.

The EPA have contacted the main commercial waste contractors Theiss, Cleanaway and Sita and they agree in principal that Manuka and Kingston group centres could be aligned with the times for other group centres for consistency (i.e. 6am–10pm as detailed in the Code of Practice). They also expressed the view that any change to a later time could impact their operations financially and in their view compromise public safety (OH&S) as they attempt to gain access to shopping centres before other deliveries occur, staff arrivals and general public movement.

The contractors also raised the issue of consultation with industry for changes that could impact on their business. The Code was developed through industry and public consultation and agreement. The contractors generally expressed the view that they thought this should be the mechanism for any changes that would impact their industry.

The times mentioned of 7.00am to 7.00pm for Section 22 Kingston would appear to not have support from industry (note: limited

⁹³ Submission No 8

⁹⁴ Email dated 26 May 2006 from Ms Maria Mangeruca, Departmental Liaison Officer, Chief Minister's Department, 'Request for Information from the SC on Planning and Environment - DVP 256 Kingston Group Centre'

consultation) and could potentially create an anomaly in waste collection for the Kingston area, if one waste contractor had additional bins in the Kingston group centre. Without details of who the waste contractors are that collect from Section 22 Kingston it is difficult to accurately anticipate the industry reaction.

....

ACT NOWaste is currently considering options for viable alternative for large-scale food waste processing suitable for this industry.⁹⁵

Submissions lodged for DV260

- 2.28 As noted above, the ACT Planning and Land Authority extended the interim effect of DV256 by incorporating provisions concerning Kingston part Section 22 into DV260.
- 2.29 The Committee sought and obtained copies of submissions sent to the Authority on DV260.
- 2.30 The new issues that were raised in these submissions not previously raised included –
- that the proposed variation to the Territory Plan is inconsistent with the guidelines on Crime Prevention Through Environmental Design (CPTED) and that the Australian Federal Police should have been consulted on the proposal.⁹⁶
 - that the proposed variation is inconsistent with the ACT Planning and Land Authority's planning Objectives for Group Centres land Use Policies in that it will continue the supplanting of retail services by restaurants and reduce environmental amenity.⁹⁷
 - there is nowhere else in Canberra where residents live so close to the rear of commercial premises without an appropriate buffer, and where residents are so often disturbed by a range of noises emanating from one or more businesses.⁹⁸

⁹⁵ Email communication dated 26 May 2006 from Ms Maria Mangeruca, Department Liaison Officer, Heritage, Environment, and Sustainability

⁹⁶ Comments on DV260 lodged by Ms Pamela Rutland on behalf of Units Plan 402, dated 5 May 2006

⁹⁷ Comments on DV260 lodged by Ms Pamela Rutland on behalf of Units Plan 402, dated 5 May 2006

⁹⁸ Comments on DV260 lodged by Ms Debbie Robinson, dated 4 May 2006

- if 'restaurant' were removed as a permitted land use, residents would probably be able to accept the rest of DV256 and DV260.⁹⁹
- DV256 and DV260 should include a definition for 'buffer' and both proposals reflect very poorly on the ACT Planning and Land Authority and it should not retain its role in planning and land management.¹⁰⁰

3 COMMITTEE COMMENTS

- 3.1 The Committee appreciates the level of concern expressed in the submissions by Kingston residents particularly, concerning the diminution of their residential amenity in recent years. The Committee is aware of the provisions of the *Land (Planning and Environment) Act* 1991 (ACT) and the Territory Plan which require the ACT Government to ensure that planning and development in the ACT provides an ecologically sustainable, healthy, attractive, safe and efficient environment in which to live, work and undertake recreation.¹⁰¹
- 3.2 Notwithstanding these provisions, the Territory Plan has permitted entertainment land uses in Jardine and Giles Streets since it took effect in 1993.¹⁰² Moreover, the AAT has required the ACT Planning and Land Authority to permit a restaurant/drinking establishment on Block 27, Section 22, and a wide range of land uses on Block 22, Section 22, including 'non-retail commercial uses, restaurant, shop, child care centre, community activity centre, cultural facility or health facility', as permitted under the Territory Plan. The AAT considered that conditions in leases with respect to noise management, waste collection and limiting after-hours rear access would address residents' concerns.
- 3.3 The Committee notes that many of the submissions lodged to this inquiry, and to the Planning and Land Authority in response to the DV256 and DV260, were submitted by Kingston residents in a personal capacity or on behalf of bodies corporate for unit complexes. Many of the submitters had also been involved in the AAT litigation. The Committee appreciates that participating

⁹⁹ Comments on DV260 lodged by Dr Chris Moore, dated 3 May 2006

¹⁰⁰ Comments on DV260 lodged by Ms Rowan Basil-Jones, dated 4 May 2006

¹⁰¹ Object of Territory Plan: Section 7, Land (Planning and Environment) Act; 'Territory Plan Part A1: Objects and Goals'

¹⁰² ACT Planning and Land Authority, *Variation to the Territory Plan No 256: Kingston Group Centre Part Section 22*, January 2006

in Committee inquiries and litigation can be very stressful for the parties involved.

- 3.4 The Committee is aware and concerned that there is no Inner South Canberra Community Council, because in relation to planning matters, this denies residents of inner south Canberra representation in the ACT Government's Planning and Development Forum, where other Community Councils are represented.¹⁰³ While the Forum does not discuss or involve itself in individual development proposals, it does discuss broad policy issues. These could include policy issues in relation to the protection of residential amenity in mixed-use developments, for example.
- 3.5 The Committee considers it regrettable that there is no Community Council for the inner south/central Canberra area, and would welcome any community initiatives to form such a Council. Councils can play a very constructive role in building cooperative relationships amongst stakeholders, and can promote higher ethical standards of behaviour amongst stakeholders based on relationships of respect and caring and stronger public accountability. Better communication amongst stakeholders, such as can be encouraged at Community Council meetings, can lead to better consensus on agreed values, and enhanced social responsiveness amongst stakeholders.¹⁰⁴

RECOMMENDATION 1

- 3.6 **The Committee recommends that the Ministers for Disability and Community Services, and Planning, give favourable consideration to supporting a Canberra Central or Inner South Community Council, should such an organisation be incorporated in the short to medium term.**
- 3.7 The Committee notes that since mid-2004, all legislation in the ACT, including Territory planning legislation, must be interpreted through the lens of the *Human Rights Act 2004* (ACT), to ensure that interpretations consistent with human rights are as far as possible preferred. International law and the

¹⁰³ The Current councils are: Belconnen Community Council, Gungahlin Community Council, North Canberra Community Council, Tuggeranong Community Council, Weston Creek Community Council, and Woden Community Council. The Planning and Development Forum also includes representatives of the Master Builders Association, the Property Council of Australia, the Royal Australian Institute of Architects, the ACT Council of Social Service and the Australian Institute of Landscape Architects

¹⁰⁴ Australian Centre for Corporate Social Responsibility, 'The five capabilities of socially responsible organisations', accessed 10 May 2006 from <<http://www.accsr.com.au/html.csr2.htm>>

judgements of foreign and international courts and tribunals may be considered in this context.¹⁰⁵ The Human Rights Act protects privacy, family, home and correspondence from unlawful or arbitrary interference.¹⁰⁶ Several recent cases in the ACT demonstrate that the judiciary is assessing issues before them in view of the rights protected under the Human Rights Act, including in relation to protection of the family as ‘the natural and basic group unit of society’.¹⁰⁷

- 3.8 The rights protected under the *Human Rights Act 2004* (ACT) can be limited by reasonable limits set by ACT laws that can be demonstrably justified in a free and democratic society.¹⁰⁸ The need for restrictions on protected rights must be demonstrated and proportionate to the pursuance of legitimate aims and not impair the essence of a protected right.¹⁰⁹ The onus of proving that the limitation on the right is reasonable and justifiable rests on the person (in this case the Planning and Land Authority) seeking to uphold the infringement of the right. The proponent must establish that the objective of the measure limiting the right is sufficiently important to warrant overriding a protected right, and relate to societal concerns that are pressing and substantial. Secondly, the measures being used to meet the objective of the legislation must be rationally connected to that objective, and in reasonable proportion to the importance of the objective. The measures must also be fair and not arbitrary, and there must be as little interference as possible with the right affected.
- 3.9 The ACT Supreme Court has not yet provided a detailed analysis of what constitutes a reasonable limit on rights in a democratic society under the Human Rights Act, or the proportionality test applied in other jurisdictions.¹¹⁰
- 3.10 Overseas planning and environmental cases suggest that in order for a human

¹⁰⁵ Refer HR Act ss30, 31

¹⁰⁶ Refer Sections 11, 12, *Human Rights Act 2004* (A.C.T.)

¹⁰⁷ *R v Carrington and Day* (unreported judgment of Magistrate Dingwall), 23 Mar 2005 considering HR Act s12 re privacy and reputation found breached by defective search warrant; *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 (10 May 2006) concerning an appeal against care and protection orders and HRAct s 11(1) recognising the need for the protection of the family as the natural and basic group unit of society

¹⁰⁸ HRAct s28

¹⁰⁹ UNHCR General Comments No 31, 26 May 2004. See also the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), cited in Submission no 16

¹¹⁰ s28 has been raised in Tribunal matters but not considered in detail in *Bragon Traders Pty Ltd and ACT Gambling & Racing Commission* [2006] ACT AAT, *Peters v ACT Housing* [2006] ACTRTT 6, *Kiternas v Watts* [2006] ACTRTT 4

right to be found infringed, the interference has to be very substantial and not outweighed by other stakeholders' rights.

- 3.11 In *David Lough and Others v First Secretary of State and Bankside Developments Limited*,¹¹¹ for example, the United Kingdom Court of Appeal held that the right to home and privacy is not absolute, and a balance has to be struck between the interests of persons affected, and the interests of other property holders and the community as a whole. Not every loss of amenity involves a breach of the right, and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the right has been infringed.
- 3.12 In that case a residents' group had challenged the planning permission granted for a 20-storey building having 28 dwellings, with shops and restaurants on the ground floor. Notwithstanding that the proposed development impacted on neighbours' privacy, access to light, and caused overshadowing and overlooking, the court recognised that other landowners also have a right to enjoy their property rights. The court held that a reduction in amenity does not automatically breach the right to home and privacy.
- 3.13 The court was influenced by the advantages that would flow from the proposed development, including the replacement of an unsightly building with a building of substantial design quality, the provision of sustainable residential development, the efficient use of previously developed land, the provision of affordable housing, and the potential contribution to the regeneration of this area of London, and found these outweighed the impact on residential amenity. These satisfied proportionality considerations without a separate review of that having to be undertaken.
- 3.14 The court also held that loss of value of land to landowners caused by neighbouring developments did not constitute a separate or independent basis for alleging a breach of the privacy human right.
- 3.15 In *Andrews v Reading Borough Council* the UK Court of Appeal held that acts or omissions generating *substantial* environmental pollution, including noise, can infringe human rights. Applying *Lough*, the Court held that not every adverse effect on residential amenity will infringe rights, and a relevant factor is

¹¹¹ [2004] EWCA Civ 905, cited with approval in *R (Clays Lane Housing Co-operative Ltd) v the Housing Corporation* [2004] EWCA 1658

whether legislation provides a statutory compensation scheme or compels remedial work to be undertaken. The impact of increased traffic flows on residential amenity was found to warrant the provision of compensation in the circumstances.¹¹²

- 3.16 In *López Ostra v Spain* the applicant suffered health problems from the fumes and smells emitted from a waste treatment plant established in an urban area. The European Court of Human Rights held that a fair balance had not been achieved between the interest of the town's economic well being and the applicant's effective enjoyment of her right to respect for her home, and her private and family life.¹¹³
- 3.17 In *Guerra v Italy* the European Court of Human Rights held that individuals' well being, private and family life, and enjoyment of their homes, may be affected adversely by severe environmental pollution. The Court held that the Government of Italy had not fulfilled its obligation to secure the applicants' right to respect for their private and family life, because the applicants lived only about 1 km from a high-risk chemical factory which produced fertilisers and other chemicals.¹¹⁴
- 3.18 Similarly severe impacts, such as aircraft noise which caused extreme stress and for which compensation had not been paid, have been recognised as not human rights compliant.¹¹⁵
- 3.19 The Committee recognises that the ACT Planning and Land Authority has tried to address the concern about loss of amenity through this draft variation. The Committee notes however, that the Authority has not addressed the possible influence of the Human Rights Act on its deliberations.
- 3.20 Whilst the Committee recognises that commercial leaseholders in the ACT, including Jardine St Kingston, are entitled to enjoy the benefits of their leases, it also recognises the fundamental rights of adjacent residents to quiet enjoyment of their homes, their privacy and their families. The Committee accepts the residents' evidence that the operation of restaurants in Section 22 Jardine Street negatively impacts on those rights, and has considered whether limits on those rights can be justifiably demonstrated in a democratic society,

¹¹² *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42

¹¹³ [1993] 20 EHRR 277

¹¹⁴ (1998) 26 EHRR 357

¹¹⁵ *Baggs v UK* [1981] 52 DR 29 and *Arrondelle v UK* [1977] 19 DR 186 and DR 26

consistent with the Human Rights Act.

- 3.21 The Committee notes that under the Territory Plan, restaurants and drink establishments have been a permissible land use on Section 22 Jardine Street since 1993, and that the changing demographic mix in inner south Canberra means that more of such facilities are likely to be welcomed by many consumers. The Committee notes that enforceable ACT legislation regulates the storage of waste, requires garbage containers to be kept clean and covered, and requires that waste not be kept in an insanitary or unsightly condition.¹¹⁶
- 3.22 The Committee recognises that it is the responsibility of the Registrar of Liquor Licences, and Environment ACT, to respond to complaints about liquor-related declining residential amenity, and noise impacts respectively. In *Ergas & Bird*¹¹⁷ the ACT AAT was satisfied that the liquor-licensing regime established under the *Liquor Act 1975* (ACT), and ACT Police, could deal effectively with any complaints that might arise concerning the operation of a restaurant in the area. The AAT was of the view that the Liquor Act and ACT Police were responsible for dealing with unruly patrons and that the development approval regime under the Land (Planning and Environment) Act was not the appropriate legislation to use.
- 3.23 The Committee encourages Kingston residents to use all the complaints' mechanisms that are available to them to seek redress, such as pursuant to the Liquor Act.
- 3.24 The Committee considered the U.K. human rights cases summarised above, and notes that while in the important case of *Lough* the court was persuaded by the countervailing advantages that would flow from the building alleged to infringe amenity rights, in this case the countervailing advantages are less persuasive. Nevertheless, the Committee is aware that leaseholders are likely to have made investment decisions in Section 22 Jardine Street on the basis of longstanding permitted land uses, both commercial and residential, and those leaseholders are entitled to realise the advantages of those investments within the parameters of the ACT planning system. In the case of commercial lessees, this means that restrictions are likely to be necessary on approved development applications, so that nearby residents' rights to quiet enjoyment of their property and other human rights are protected, but permissible

¹¹⁶ *Waste Minimisation Act 2001* (ACT) and *Waste Minimisation Regulation 2001* (ACT)

¹¹⁷ [2004] ACT AAT 18 (18 May 2004)

commercial activities should nevertheless be allowed to continue. It is important in this context that relevant ACT Government agencies fully discharge their regulatory responsibilities, and that all involved stakeholders attempt to work together in a spirit of constructive engagement to resolve issues of contention.

- 3.25 The Committee appreciates the significant level of concern residents' feel about the impacts of delivery and waste collection activities on their residential amenity, and considers that adverse impacts could be better managed. The Committee considers it anomalous that a 7.00am–7.00pm limit on waste collection has been imposed on Section 27, Block 22, and a 7.00am–5.00pm on Section 22, Block 22, when other businesses in the same Section can have their waste collected anytime from 5.00am to 10.00pm under the Kingston and Manuka Group Centres' special noise zone rating. Waste can be collected at other group centres between 6.00am and 10.00pm. The Committee also notes that the *Waste Minimisation Regulation 2001* (ACT) permits waste to be collected by a garbage service in the ACT 'at any reasonable time'.¹¹⁸

RECOMMENDATION 2

- 3.26 **The Committee recommends that the Minister consider**
(a) inserting an area specific policy into the Territory Plan,
(b) varying the leases for Blocks 14 – 32 in Section 22, and/or (c)
reviewing and amending as agreed with industry, the ACT Commercial Waste Industry Code of Practice and the Waste Minimisation Regulation 2001, with a view to limiting commercial deliveries and waste collection to between the hours of 7.00am – 7.00pm in Section 22 Kingston.

RECOMMENDATION 3

- 3.27 **The Committee recommends that the Minister for the Territory and Municipal Services consider the need for a broader review of waste collection law and policy in view of the increased residential density around commercial centres in the ACT under the A10 (Residential Core) Area Specific Policy.**

RECOMMENDATION 4

- 3.28 **The Committee recommends that the Minister for the Territory and**

¹¹⁸ Regulation 9, Waste Minimisation Regulation 2001

Municipal Services consider whether signs warning of the potential hazard of reversing trucks for pedestrians and cyclists, and particularly the frail, the aged and children, should be installed in Block 33 Section 22 Kingston.

RECOMMENDATION 5

- 3.29 **The Committee recommends that the ACT Planning and Land Authority expressly addresses the influence of the *Human Rights Act 2004* (ACT) on the discharge of its statutory and non-statutory responsibilities, including when proposing variations to the Territory Plan.**

RECOMMENDATION 6

- 3.30 **The Committee requests that the bodies corporate in multi-unit residences in Section 22 consider what investments might be necessary to ameliorate the perceived negative impacts of changing adjacent land uses such as window treatments, landscaping and screen planting, solid rear fencing, closure of pathways used as public thoroughfares through private property etc.**

RECOMMENDATION 7

- 3.31 **Subject to the recommendations above, the Committee is of the view that the proposed variation should proceed.**

RECOMMENDATION 8

- 3.32 **The Committee invites private stakeholders in dispute over residential amenity and commercial activities to consider the use of the services of organisations such as the Conflict Resolution Service to facilitate the reaching of compromises that may enable conflicting land uses to co-exist more equitably and harmoniously.**

Mick Gentleman
Chair
30 May 2006

Appendix 1 – Land use controls for Group Centres¹¹⁹

SCHEDULE 1 PERMISSIBLE					
Land Use	Controls				
	Precinct				Other
	a	b	c	d	
Ancillary use	Y	Y	Y	Y	
Car park	Y	Y	Y	Y	
Civic administration	Y	Y	Y		
Club	Y	Y	Y		
COMMERCIAL ACCOMMODATION USE	Y	Y	Y		
COMMUNITY USE	Y	Y	Y	Y	
Craft workshop	Y	Y	Y		
Communications facility	Y	Y	Y	Y	
Drink establishment	Y	Y	Y	Y	
Emergency services facility	Y	Y	Y	Y	
Freight transport facility			Y		
Funeral parlour		Y	Y		
Indoor entertainment facility	Y	Y	Y		
Indoor recreation facility	Y	Y	Y		
Industrial trades			Y	Y	
Light industry	Y	Y	Y		
Minor use	Y	Y	Y	Y	
Municipal depot			Y	Y	
NON RETAIL COMMERCIAL USE	Y	Y	Y	Y	Subject to clause 3.3
Outdoor recreation facility	Y	Y	Y		
Parkland	Y	Y	Y	Y	
Pedestrian plaza	Y	Y	Y	Y	
Place of assembly	Y	Y	Y		
Plant and equipment hire establishment			Y		
Produce Market			Y		
Public transport facility	Y	Y	Y	Y	
Recyclable materials collection	Y	Y	Y	Y	
RESIDENTIAL USE	Y	Y	Y		Subject to clause 3.3
Restaurant	Y	Y	Y	Y	

Land Use	Controls				
	Precinct				Other
	a	b	c	d	
Service Station	Y	Y	Y	Y	
Shop	Y	Y	Y	Y	Subject to clause 3.3
Store			Y	Y	
Temporary use	Y	Y	Y	Y	
Tourist facility	Y	Y	Y		
Transport depot			Y		
Vehicle sales			Y		
Veterinary hospital		Y	Y		
Warehouse			Y		
Y Purposes for which land may be used					
NB All uses in Precinct 'd' are subject to clause 4.4					

¹¹⁹ Reproduced from Page 3 of Part B2C of the Territory Plan

Appendix 2 – Current Territory Plan Policies

The current land use policies for the area subject to this variation is shown in Figure 1 below, and is explained in the background to this report. The Commercial 'C' land use policy for Group Centres applies to the Kingston Group Centre under Part B2C of the Territory Plan.

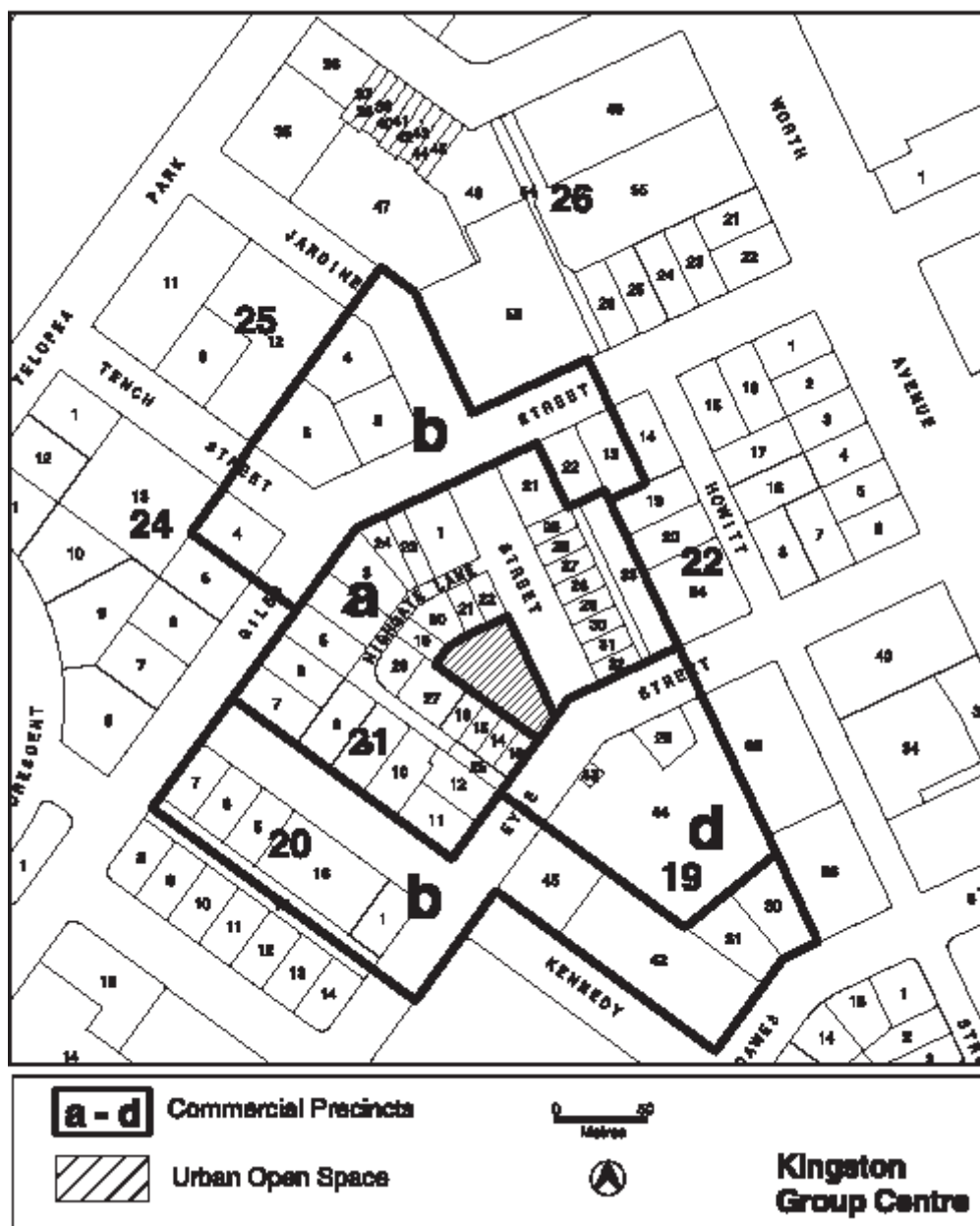


Figure 1 – Territory Plan Current Land Use Policies

Appendix 3 – Proposed Variation to the Territory Plan Map

The proposed land use policy for the area subject to this variation is shown in Figure 2. It extends precinct 'b' to include Blocks 21, 25 – 33 Section 22 Kingston.

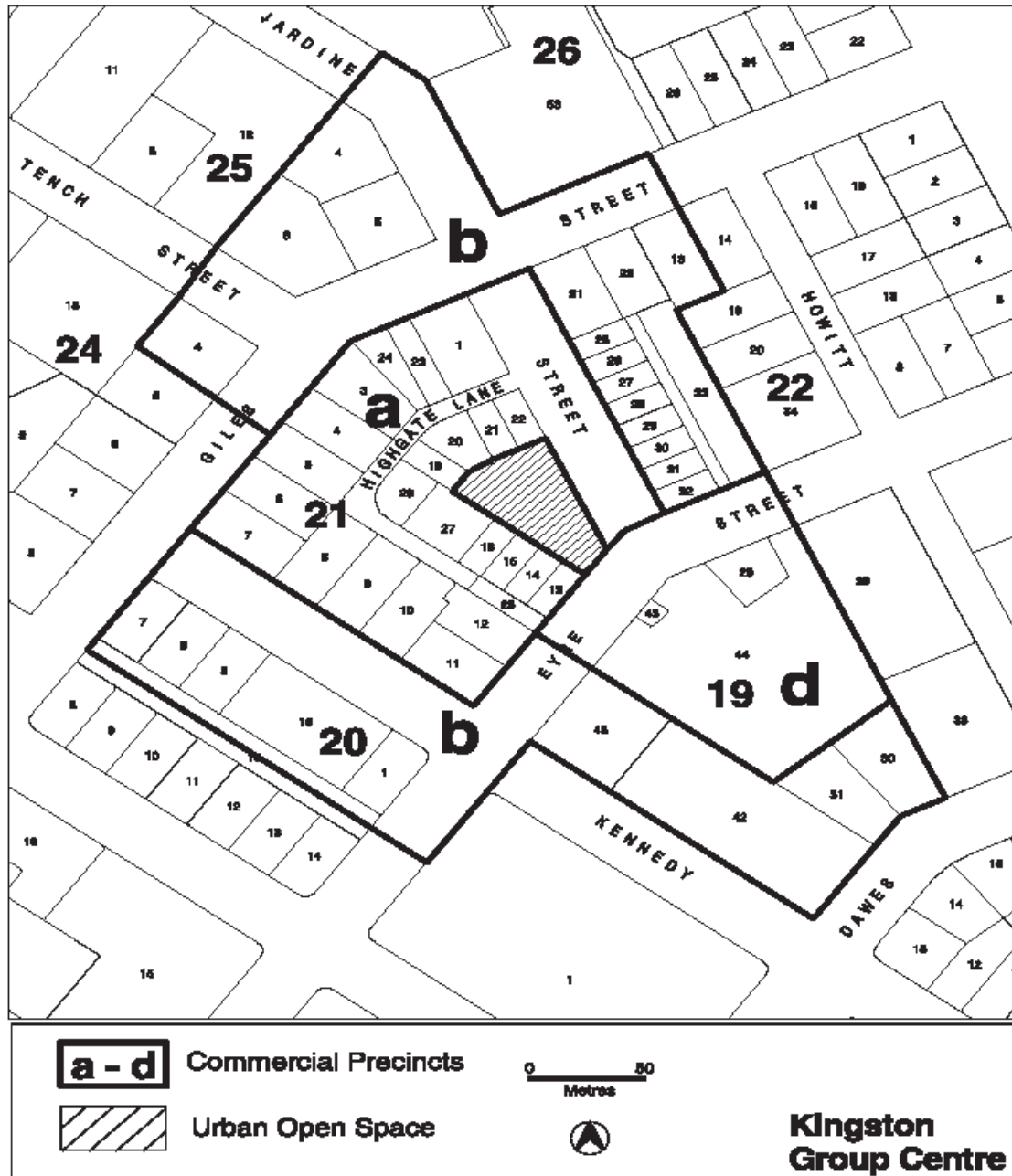


Figure 2 – Proposed Territory Plan Land Use Policies

Appendix 4 – List of submissions

No 1 — Mr Romaldo Giurgola AO LFRAIA FAIA

No 2 — Ms Margaret Williams and Ms Rada Naumov

No 3 — Ms Kathleen Taperell and Mr John Tucker

No 4 — Ms Pamela Rutland for the Body Corporate, Units Plan 402 Kingston

No 5 — CB Richard Ellis for the Kingston Traders

No 6 — The Executive Committee, Owners Corporation (UP 585), Oakleaves,
Kingston

No 7 — B.P. Faux for Fox Imports

No 8 — The Executive Committee, Owners Corporation (UP 585), Oakleaves,
Kingston, supplementary submission