LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
Ms Jo Clay MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Mr Mark Parton MLA

Submission Cover Sheet

Inquiry into Planning Bill 2022

Submission Number: 24

Date Authorised for Publication: 22 November 2022

DRAFT PLANNING BILL- LIMITING THE PLANNING AUTHORITY'S POWER

TIM FIELD

DRAFT PLANNING BILL- LIMITING THE PLANNING AUTHORITY'S POWER

The draft Bill provides for enormous power over decision making to be given to the Planning Authority. It would appear also that the Authority will have considerable discretion in the use of that power.

The following focuses on the apparent high level of discretion the Authority has regarding approving development applications (DAs), given the centrality of DA approvals to the planning process.

The Bill embraces 'outcome focussed planning'. A concern is that its proponents will want to adopt the approach set out in the Background Paper 3-Development Controls. (November 2020). The approach is basically that codes, criteria etc become minimum standards, with compliance with them 'deemed to satisfy' the requirements, but with discretion to approve DAs which 'breach' these controls.

For example, a code may specify a certain number of dwellings per RZ2 block, but the Bill would allow approval of more dwellings if it results in 'good planning outcomes'.

The problem, of course, is that there is a power and financial imbalance between developers and, on the other side, those who may oppose a particular development. Rejected applications, based on vague principles around 'good planning outcomes' will lead to court cases, with the likely outcome that developers end up driving the process.

Set out below is a number of ways the discretionary power of the Authority could be curtailed by amendments to the Bill.

It is important that, if restricting the Authority's power is desired, this needs to be reflected in the Bill, rather than just trying to influence the Territory Plan or other instruments subsequently made under the Act. If the Act allows for wide discretion, a court may find invalid, instruments that aim to restrict discretion.

An example of outcome- focussed legislation gone wrong is the Commonwealth *Aged Care Act 1997*, which governs residential aged care. In introducing this Act the then Minister stressed the 'focus on outcomes, rather than inputs'; that the Act would 'get rid of unnecessary red tape'; and provide for 'innovation, flexibility and creativity'. The 'unnecessary red tape' the Act removed was the

detailed measurable controls, such as covering nursing care hours. These changes provided an incentive for providers to cut costs, with the outcome of widespread sub–standard care. The proposed solution, by the Aged Care Royal Commission, is to reimpose input controls. The lesson would seem to be that 'outcome focussed' approaches need to be underpinned with measurable mandatory controls.

OPTIONS TO REDUCE DISCRETIONARY POWERS

1. Enhanced role for consultation in Decision Making

It is taken as given that the community consultation arrangements (or lack of) in the Bill need to be strengthened, and principles and arrangements added. What is specifically important here is that the Bill be amended so that the product of consultation is conscientiously taken into account in decisions on every DA, and how this has happened is to be made public. Obviously the form of consultation will be proportional to the impact and scale of the DA.

2. Enhanced role of District Plans in Decision Making

The Bill allows for district plans to be made by the Executive. The Bill should be amended to ensure Plans are a genuine co-design effort involving the full range of stakeholders (including the industry). Further, it should be spelt out in the Bill that every DA decision should have to comply with the relevant District Plan, and how this occurs is to be made publically available when the decision is made.

3. Exempt developments

The draft General Regulation issued with the Draft Bill allows for a range of practical exemptions, and specifies that certain proposals are not exempt. For example a proposal involving two or more dwellings is not exempt, and thus requires a DA. The regulation should be added to so that any proposal which 'breaches' the relevant Deemed to Satisfy code (for example, greater height or reduced setbacks) cannot be exempt and thus requires a DA.

4. Removing discretion in certain areas

If certain criteria are seen as critical, then the Bill could be amended so that the Authority has no discretion but to apply them. For example,

specifying in the Bill that only one dwelling per block for RZ1 is allowed would provide maximum protection for that criteria. If this is seen as too inflexible, then specifying in the Bill that instruments produced under the Act can remove the Authority's discretion would enable codes to contain mandatory elements.

5. Restricting discretion in certain areas.

Similarly, the discretionary powers of the Planning Authority could be restricted, to protect certain criteria. Regulations could indicate that, for example, only a maximum of two dwellings are allowed on RZ1 blocks, and only then if other criteria are satisfied. As with 4 above, the current Bill would need to be amended to allow for this.

A further approach to restrict discretion would be to amend the Bill to indicate that the Planning Authority can only exercise discretion beyond the mandated 'Deemed To Satisfy' criteria if, by doing so, the amenity of surrounding leaseholders is enhanced. The proponent would need to demonstrate this. For example, a DA for two dwellings on a RZ1 block may indicate greater setbacks than the minimum, greater permeable area etc. Such a provision would provide a generalised protection, and reduce the shift in amenity, and value, from existing leaseholders to the developer.

6. Stronger role for ACT Assembly

It is assumed all instruments made under the Act are disallowable; if not they should be. District Plans, consultation arrangements would also benefit from having to be tabled; if nothing else tabling provides an opportunity for public scrutiny.