GNCA SUBMISSION ON TERRITORY PLAN AND DISTRICT STRATEGY

Summary

The Government has been working on this new planning system for several years and claims that it *"will deliver better outcomes for communities, the environment and people across Canberra. The reforms include a new Planning Act, new district strategies and a new Territory Plan."*

Unfortunately, the new planning legislation is seriously flawed.
The GNCA does not see the need for the proposed changes which are poorly conceived, poorly explained and dangerous. They are unnecessarily complex and will cause confusion and uncertainty. The introduction of discretion in applying "outcomes" has the potential for corruption.

For example, the Planning Act. If you don't get the Object of the new Act right, what hope is there?

The 2007 Act had a very simple Object, which everyone can understand:

"The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—
(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
(b) in accordance with sound financial principles."

The Object of the New Act covers two full pages and does not explain what is meant by "outcome focused".
We know of no other jurisdiction in Australia where this system has been tried.

The government has not explained what is wrong with the current system that can't be rectified.

The rationale for sweeping changes should explained

The role of the community should be increased

A planning system should serve the needs of the residents. The new system abolishes pre-DA consultation, without any explanation.

Residents will not be able to review what is built next to them. Consequently, there will be less certainty as to what can be built than there is now. Residents need certainty and trust.

The new system should be based on sensible mandatory rules
There will be fewer rules in the new system. Plot ratio, solar access, mandated planting space and private open space will be abandoned. These are the essential parameters that shape the city

With fewer rules there will be less compliance . It is bad enough now. It will only get worse in the new system.
An unelected oligarchy (the chief planner and his/her colleagues) will have almost total control over what can and can't be built.

The system should be re-designed, so that there are more checks and balances

For the government to say that the new system will deliver better outcomes for the community is simply wrong.

Detailed analysis

Introduction

1. The Griffith Narrabundah Community Association (GNCA) (ABN 26503486416) is a not for profit, voluntary community based organisation operating in the Griffith Narrabundah area. The objects and purposes of the Association are "to protect the amenity and interests of the Griffith and Narrabundah communities, particularly in relation to the preservation of community facilities and open space". The Association has 450 members. The GNCA is a member of the Inner South Canberra Community Council (ISCCC).

2. The GNCA endorses the Development Assessment Forum (DAF) *Leading Practice Model for Development Assessment in Australia.* It strongly opposes the developmental vandalism envisaged in the "future investigation" areas in Griffith and Narrabundah.

Process

3. Respect for the rule of law is a bedrock of society. In the process of preparing the new planning laws, and the content of the planning documents, the government is manipulating the law. A government should act in the interests of the public.

4. The consultation on the planning documents has been insufficient for such an important change to our city.

- It is a well-known cynical tactic to release consultation documents over the holiday period to reduce the number of comments. That is what has been done here. There should be a longer consultation period.
- The documentation is 2500 pages and the explanatory documents are superficial and inadequate. A further period for consideration of such lengthy documentation is needed.
- The My Say website has not been kept up to date for comments. In any event they appear to be mainly ideological rather than substantive.
- The maps that were provided are inadequate. Further consultation with informative maps should be provided.
- Important parts of the planning system are not yet available including the design guides. Further consultation with all the material should be provided.
- Some important concepts are unclear. For example, what does "called up" mean? If the documents that can be called up have no legal effect on documents with higher status what is their role?

These changes are unnecessary

5. "If it ain't broke, don't fix it."[1] The current ACT planning system could be improved but its basic structure works well. A planning system needs to be fair, clear, consistently applied, as simple as possible and honest. The government has not shown the need for the proposed overhaul. And the community was never asked what was wrong with the current system.

6. The changes proposed are extensive and will cause inevitable confusion, disruption, loss of productivity and potentially, a lack of planning control, while the implementation is occurring.

7. In 2005 the Development Assessment Forum (DAF) produced *A Leading Practice Model for Development Assessment in Australia*. That is largely being followed at present. Why can't this continue? The proposed laws deviate from it in many respects and there is no justification for it.

8. If planning laws are seen on a pendulum swinging between free reign for developers and no change in the status quo, the government has decided to move the pendulum significantly in the developers' favour. While the discussion paper on developer regulation is welcome it will not solve the fundamental issues. Similarly changes to heritage arrangements are no panacea. The GNCA recommends adapting current laws after proper consultation.

The effect of the changes

[1] Attributed to Bert Lance, Director of the Office of Management and Budget in President Carter's administration

9. The GNCA has the benefit of a case study by a former planner in which he analyses the impact of the proposed new laws compared to the current laws.[2] The GNCA has studied his analysis in relation to DA in Griffith on which it sought review by ACAT of a decision to approve. The result in that matter was that the Tribunal was not satisfied the DA was consistent with the Planning and Development Act and Territory Plan and was not satisfied that it could be made consistent with conditions.[3]

10. The proposed development was in Lockyer Street, which is one of the "significant" streets in Griffith[4] - one of the oldest suburbs in Canberra.[5]

11. The GNCA was concerned to discover from the analysis that:

- We would have had to consider 37 pages of the District Policy to eventually find it wasn't relevant; and
- We would have had to consider technical specifications, including checking whether they had been changed; and
- We would have had to consider supporting material, although this is undefined, including checking whether it had been changed; and
- We would have had to consider the 28 pages of TS1 Residential technical specifications; and
- If the supportive housing units lacked solar access or sufficient private open space to have reasonable amenity we would have had to search beyond the technical specifications to find how we might persuade the decision maker that these are important for comfortable living conditions; and
- We would had had to check the District Specifications because although, at present, they only protect the Manor House development in Griffith from further assessment they may have been changed; and
- We would have had to apply the zone policy – policy outcomes that have been changed to make it easier to change the streetscape and desired character of this significant Griffith street. Because there has been no explanation for this change we would have no supporting documents on which to rely; and
- When applying the Multi Unit Housing Development Code (MUHDC) we would look at the assessment outcomes. This would lead us to the supporting material (undefined) and design guides which are not yet available; and
- Because these are new laws, we would have had to cross check everything.

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[2] Submission by Richard Johnston 15 February 2023 Case Study 1 at p.7

[3] GNCA & Leo Cusack v ACTPLA * Commissioner for Social Housing AT 37/2022. Decision of 22 December 2022. Reasons not yet published.

[4] *Griffith Neighbourhood Plan* ACTPLA 2005 p.26

[5] *Griffith Neighbourhood Plan* ACTPLA 2005 p.5

And, in answer to those who argue that the GNCA should not have the right to seek review of a DA decision, we repeat that ACAT overturned the decision to approve the DA because, after extensive analysis, the Tribunal could not see how the DA could comply with the law, even if conditions were imposed.

Third party rights of review

12. There is insufficient protection of third party rights of review in the draft Planning Bill and the draft subordinate laws do not remedy the lack of protection. Community associations act to ensure that the law is followed and protect neighbourhoods against abuses in the planning processes. They must be assured of merits review of a decision on a DA in their neighbourhood on which they have made a representation. In addition, third party review assists in fulfilling the role of merits review in improving primary decision making.

8. Currently community associations that lodge a representation under the Planning and Development Act (PDA) have the right seek review of a decision on the DA. This is because of the operation of s.409 of the PDA. Schedule 4 of the PDA includes interested entities and also defines material detriment. In the current PDA and the draft bill there is a difference between an *eligible entity* and an *interested entity*. Community associations are interested entities: an association whose objects and purposes include protection of the local neighbourhood from planning abuse would come within the definition of interested entity.

13. The draft bill gives eligible entities the right of review of a decision (s.502 – previously s.408A). An eligible entity in relation to a DA includes the lessee and sublessee: see s.500 (previously s.407) and an entity mentioned in schedule 6, part 6.2, column 3 (previously Sched 4 col 3). The draft bill does not specifically give an interested entity a right of review. The current PDA s.409 is now replaced by s.503 headed *applications for review by third parties* and it only applies to eligible entities. However, the draft bill still has sections that imply that interested entities have rights of review:

- they receive reviewable decision notices (s.501(b))
- s.500 says an *interested entity* means an entity mentioned in schedule 6, part 6.2, column 4 (previously Sch 1 col 4)
- The definition of material detriment in schedule 6 refers to an entity that has objects or purposes (such as community association).

14. In any event, merits review of administrative decisions focusses on the application of the law to the facts. With the introduction of the exercise of discretion by decision makers it is likely that dispute resolution litigation will occur in the courts – as history has shown in other jurisdictions. As yet, it is unclear how much merits review will be available.

Accountability of discretionary decisions to guard against corruption

Discretion, when applied by a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful but legal and regular[6]

15. If the system is going to move to discretionary decisions based on outcomes there will need to be a significant shift in accountability measures and training of decision makers. Discretion plus secrecy plus money inevitably lead to corruption. The GNCA recommends steps to guard against corruption.

16. The proposed outcomes-based system of decision making introduces discretion. The full panoply of discretions have not yet been revealed and the rules and guides for their exercise are still unknown. What is known is that there is limited trust in planning decision making.[7] In these circumstances, to maintain respect for the rule of law in civil society the GNCA recommends:

i. Guidelines on the exercise of discretion in determining whether a DA satisfies outcomes.[8]
ii. A system of internal review of complaints about decisions on outcomes. For example, a complainant who suffers material detriment from a decision based solely on outcomes should be able to seek internal review; and
iii. A record in the *Annual Report* of how many complaints were made and the number of complaints each decision makers received (without personally identifying the decision maker; and
iv. An undertaking from the government that a review of the system of decision making based on outcomes will be undertaken after eighteen months of the operation of the new system;

INNER SOUTH DISTRICT STRATEGY (ISDS)

17. The ISDS is manifestly inadequate:

- There is very little infrastructure for the benefit of Inner South communities
- It purports to convey what is special about the Inner South but does not adequately address heritage. The Blue Green Network concentrates on the environment and heritage listed sites without acknowledging, in any way, the heritage in the streetscapes of Griffith and Narrabundah
- In the maps the description "community facilities" includes schools. This has implications for traffic, pedestrians, safety, housing, parking, shops and other

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[6] Lord Mansfield (1858) Ch, 25 Beav 140.151. Since Lord Mansfield said this about courts decision making by administrative bodies has significantly increased. The words are equally applicable to administrative decision making. Nathan Isaacs 'The Limits of Judicial Discretion' Yale Law Review 32(4) Feb 1923 p.339-352

[7] Inner south .

[8] E.g. WA Ombudsman Guidelines on the exercise of Discretion in Administrative decision making.

facilities. It is incomprehensible that planning documents do not recognise schools. There are at least 15 schools[9] in the Inner south with almost 10,000 students ranging in age from 3 to 18. There are also at least 10 childcare centres.

- It is impossible to adequately comment on the Draft Strategy in relation to the East Lake development which is obviously a key part of the strategy but a the details are unknown.

18. The GNCA endorses the ISCCC Inner South Canberra District Planning Strategy of 2021 which does a much better job of providing a locally aware strategy.

Heritage

15. The ISCCC has made a submission to the Legislative Assembly Committee inquiry into ACT heritage arrangements.

16. The Strategy begins with a future vision for the Inner South. The future vision should start by saying the goal is to preserve the unique features of the Inner South and they include its heritage. The document shouldn't start with East Lake.

17. The Strategy discusses cultural, natural and ecological heritage but there are two main problems. First, heritage is not included as a "driver" and is insufficiently recognised in the drivers that are listed. Secondly, the Inner South's heritage is insufficiently described (see p. 87).

18. The five drivers include heritage only within the blue-green network (pp 74,145) but heritage should also be recognised in the strategic movement, sustainable neighbourhoods and inclusive centres and communities.

19. The cultural heritage emphasis is confined to "heritage sites" (see pp 87,112,127). The Inner South has more heritage than the national institutions and railway heritage (p.87). More of the ISCCC Strategy heritage description should be used including:

- The precincts of Barton, Kingston, Griffith and Forrest that are some of the oldest in Canberra
- The earliest large permanent building (Kingston Powerhouse)
- The earliest shopping centres (Kingston and Manuka)
- Walter Burley Griffin's street layouts (include his name)
- Charles Weston's plantings (include his name)
- 1950's/1960's architecture, houses with heritage design elements

[9] Using the 2018 schools census: Forrest primary (550); French Australian pre school (143); Red Hill primary (725) (2nd largest in Canberra);Yarralumla (460); Telopea Park High (853); Alfred Deakin High (877) (2nd and 3rd largest in Canberra); Narrabundah college (939) (3rd largest in Canberra); Canberra Grammar primary (911) (highest in Canberra independents); St Bedes (300); St Benedict's (143); Canberra Girls Grammar Junior (596) Canberra Grammar senior (754) Girls Grammar (682) St Edmunds (441) and St Clare's (720).

Facilities

Once again, the Strategy perpetuates the myth that Inner South residents are "close to higher order facilities and services in the City and Woden Town Centre" (p.89). Higher order facilities include Access Canberra shopfronts and public libraries with proper facilities such as several computer terminals. To reach these services Griffith and Narrabundah residents and those who work in a quarter of ACT jobs (p.87) have to cross the physical barriers of a lake or a hill - by car or bus.

Traffic

Traffic is modelled at 80-90% capacity in parts (p.89). How is traffic modelled? That is, if there is an increase of 12 thousand more dwellings and more businesses how much more traffic can be expected?

District Specification DS 4 Inner South

1. Supporting Material that can be "called up" includes District Specifications contained in Volume C.

2. The Manor House I Griffith at Block 6 Section 31 is singled out with its own special specification. It is preceded by the words:

The following specifications provide possible solutions that should be considered in planning, placing, designing and using buildings for proposed development in …

3. These words, when read with the introductory words to the specifications, show that the carve out is designed to facilitate the compliance of this listed developments. The introduction states:

District specifications contain provisions that support compliance…These provisions assist proponents to prepare their development proposals…

4. There is no explanation in the planning documents for the special treatment of this block in the middle of an RZ1 zone in the suburb. Of course, the GNCA is aware of the background to the demonstration housing initiative that has involved the allocation of significant resources for, apparently, the "outcome" of one development so far, so it assumes that this planning document is designed to achieve another "outcome."

5. A proponent demonstrating compliance with the Plan will cite the control (general issue) and specification (that has been given to them as a possible solution).

6. These specifications are also said to have the following roles:

- They are used in conjunction with the Inner South District Policy
- They provide solutions for aspects of DA's or certainty

- They may be used as a reference or benchmark for technical matters when preparing DAs
- It seems that entities may cite them to the Authority to provide support to a DA

7. The GNCA suggests that the need for these extraordinary special measures in the proposed planning laws highlight the unusual nature of the proposal that was opposed by many local residents. The development is clearly more suited to the nearby RZ2 zone – not the middle of a settled RZ1 zone adjacent to a school. It is never desirable to manipulate, or disregard, or ignore, the law to achieve a single outcome.

William Roper: So, now you give the Devil the benefit of law!"
Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?"
William Roper: Yes, I'd cut down every law in England to do that!"
Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"[10]

The Future

We live in the age of value-for-money. In a value-for-money environment, citizens take the rule of law and the democratic authenticity of the state largely for granted. … Instead they judge their rulers on their perceived contribution to their own prosperity and well-being. Public leadership in such a world becomes … transactional. Citizens pay taxes, vote in legislatures and, mostly, obey the law. They are perfectly willing to do all that, so long as they feel their efforts are met by governments keeping their part of the bargain: providing safety, prosperity, care, sustainability and all the many other things they say they will. In a value-for-money society, we judge government first and foremost by its results.[11]

The new planning system will deliver better outcomes for communities, the environment and people across Canberra. The reforms include a new Planning Act, new district strategies and a new Territory Plan."

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[10] Robert Bolt *A Man For All Seasons*

[11] Paul 't Hart, "Epilogue: Rules for Reformers" in E.A. Lindquist, S. Vincent and J. Wanna, Delivering Policy Reform, Anchoring Significant Reforms in Turbulent Times, (ANU E Press, 2011) one at 201 at 201-2.