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The Committee Secretary
Standing Committee on Planning, Environment and Territory and Municipal Services
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Email: committees@parliament.act.gov.au

cc Mr Shane Rattenbury MLA
Mr Simon Corbell MLA
Mr Alistair Coe MLA

Dear Secretary,

PLANNING AND DEVELOPMENT (PROJECT FACILITATION) AMENDMENT BILL 2014

The Griffith/Narrabundah Community Association (GNCA) has substantial concerns both about the revolutionary changes to the planning processes that are being proposed in the Bill and about the unseemly way in which the Bill is being rushed through.

It is vital that adequate time be allowed for public comment and hearings. GNCA urges the Committee to seek the Assembly's agreement to an extension of time for consideration of the Bill. GNCA also urges the Committee to find that the Bill in its current form is completely inappropriate and to recommend that it be withdrawn for substantial redrafting.

Changes to Planning Process

There are two major issues associated with the current Bill. The first is that it makes substantial changes to the way that ACT planning law works, and does this with little acknowledgment of these changes, let alone explaining them and their consequences, or why such changes are both necessary and desirable, or what are the major flaws in the existing planning process which this legislation will resolve. The other is the rushed nature of its introduction, without any indication of the crisis that the ACT is confronted with that requires such quick decisive action.

The sole merit of the proposed changes to the planning system (if we understand Minister Corbell's speech of 20 March 2014 correctly) is that the new approach will be more efficient, and remove from the Assembly the burden of having to pass project specific legislation in relation to planning for major projects. It is true that in the absence of this Bill the light rail project would probably require special legislation comparable to the Gungahlin Drive Authorisation Act. However, the advantages of having wide ranging planning exemptions embedded in the planning act to facilitate major projects without further legislative consideration instead of relying on project specific enabling legislation is not immediately obvious. Formerly in the ACT, and currently in other jurisdictions in Australia, the special planning needs of major projects are dealt with in project specific legislation. The benefits

and disadvantages of changing from this to a model where the legislature passes a once off omnibus bill to deal with all conceivable contingencies have yet to be canvassed by the Government. It may be that Bill's proposed approach has advantages. However, to many observers it appears likely that wider and less constrained powers would be granted under general legislation than in legislation crafted for a specific project. Whether this would be a good or bad thing is open for discussion, but many have a prejudice towards more constrained government powers.

1) The GNCA recommends that if it is decided that the light rail project is to be proceeded with, a light rail specific enabling legislation should be introduced.

Mr Corbell suggested in his speech that "*The proposed mental health facility at Symonston is an example of the type of project for which this bill is designed*". This is, at best, misleading. The Bill makes specific provision for the Symonston facility at s85J. However the Symonston precinct is to be treated quite differently to other significant precinct area variations. Unlike other projects the Assembly will not be voting on whether to make Symonston a special precinct area, because unlike other special precinct areas this will be a Notifiable Instrument and not a Disallowable Instrument. Thus the Assembly will not get to vote on it (except when they vote for or against this Bill). Thus the Government could make the Symonston facility a special precinct variation immediately upon closure of public consultation (30 working days after the publication of the consultation notice). Consequently any suggestion that this Bill is essential to fast tracking the Symonston mental health facility is only half true – the Bill does provide for removing Symonston from the planning system but only in a manner similar to the call in powers or use of project specific legislation.

This raises the issue of Ministerial call-in-powers. In his speech Mr Corbell acknowledges that the Ministerial call-in-powers allow the Government to "*to give some priority to particular projects through the use of the minister's call-in process*", but points out that the call-in-powers are still subject to judicial review in the Supreme Court. The Minister argues that the new regime to be introduced by this Bill will be more certain and considerably shorter as it specifically removes the option of such review.

However, the Ministerial call-in- powers are still available for use. One of the arguments for accepting this Bill was that it provided a transparent substitute for the call-in-powers, but it is apparent on reading the bill that this is not the case, these powers are merely supplemented. Should the Government seek to make a special precinct variation or declare a project of major importance, and have the proposal disallowed, there would be nothing to stop the proposal proceeding under the Minister's call in powers. This would be inappropriate.

2) The GNCA recommends that the Bill be amended to remove any Ministerial call-in-powers in relation to planning, heritage and environmental (i.e. tree preservation) matters.

Although not made explicit in Mr Corbell's speech of 20 March, the Bill also significantly changes the way planning in the ACT operates by involving the Minister more in planning matters. To simplify dramatically; when the planning system was established on self-government the Planning and Land Authority was set up as an autonomous body independent of the Government to make planning decisions in accordance with rules set out in the Territory Plan. This was done quite deliberately to remove politics from the planning approval process. The legislation reflects this so that most initiatives and most decision making powers, particularly in relation to Development Approvals, rest with the Planning and Land Authority (PLA). Occasionally the PLA shared these powers with the Minister or

transferred authority to the Minister to cater for issues where it is felt appropriate that the Minister has the final say.

A consequence of the changes introduced by this Bill is that not only will the Government have the power to decide on special precinct variations and the declaration of projects of major significance, but the Minister will be the decision maker (displacing the PLA) in a whole range of decisions in relation to the granting of development approval following on from the declaration of a project of major significance, or in relation to a development application that the Minister has decided to call in.

The net result of all these changes is that planning in the ACT will become much more politicised. Given the difficulties that the introduction of politics into planning has caused in other jurisdictions one might have hoped that a public discussion of the pros and cons of such a step might have been considered desirable.

Rushed Nature of Bill

There is no doubt that the Bill is being rushed through. The Bill was introduced by the responsible minister, Mr Corbell, on 20 March 2014, the last day of the Assembly's sittings in March. The Government then attempted to have the Bill passed into law on 8 April 2014, the first day of the Assembly's April sittings. It was only because of Mr Rattenbury's intervention that the Bill was referred to the Standing Committee on Planning, Environment and Territory and Municipal Services for consideration. As has been pointed out by many, the time allowed for consideration of the Bill by the Committee is absurdly short, with the Committee required to report by 6 May 2014; the first day of the May sittings.

No explanation of the need for this haste has been offered by the Government. While this sort of speed may be appropriate when responding to the impact of the GFC in 2009, no such once-in-80 year's global financial crisis appears to be upon us. True, an Abbott Government has been elected, and it appears that (perhaps as a consequence) the ACT economy is slipping into a recession. Certainly the Government has told us so, and has linked this legislation to its response to a recession. No doubt it is desirable that the Government take action to stimulate the economy in the face of the downturn, but one has to question whether a complete revolution in the planning system is the appropriate response. Hurried and ill-considered development now could well result in sub-optimal economic growth later.

In addition, if the recession is due to cut backs in employment by the Federal Government, then constructing additional housing and office accommodation is not going to do much for the economy, as it seems unlikely that the workers to occupy these dwellings and offices will not be coming to Canberra. Ultimately, local economic conditions will depend more on federal macroeconomic policy (exchange rates, interest rates, fiscal deficit) than what happens in Canberra. The problem is exacerbated by the fact that Canberra is not a closed (autarkic) economy, because it is linked closely to Queanbeyan and other regional towns.

The cynical might suspect that the rush to get the legislation passed was an attempt to establish an atmosphere of crisis, so that people would be more prone to accept the legislation without examining it, or its rationale, in any detail.

The Assembly regularly sends the more difficult issues to Committee for consideration. However, for this process to work well there must be sufficient time allowed for public discussion, the preparation of submissions, the taking of evidence, consideration by the

Committee and the preparation of the Committee's report. The most recent major change to the planning rules was Draft Variation 306. This was referred to the Standing Committee on 23 March 2012. The Committee publicly advertised for submission in mid April 2012, setting the closing date for these as 1 June 2012. The Committee held hearings on seven separate days during July, and released its Report on 19 September 2012. Thus there was a period of 180 days between the reference to the Committee and the release of its report. Even if it were argued that the current Bill is significantly less complex than DV306, and the matter has some urgency, the current time-frame for the Committee is obviously far too short. A reasonable compromise would be 90 days.

- 3) The GNCA recommends that the Standing Committee on Planning, Environment and Territory and Municipal Services urges the Committee to seek the Assembly's agreement to an extension of time for consideration of the Bill until 7 July 2014 (allowing 90 days for consideration etc.).**

Weak and Ill Defined Criteria for Variation Making and Project Declaration

One of the shortcomings of the Bill is that the criteria that the Executive must satisfy itself are met to make a Special Precinct Variation or to declare a project a Project of Major Significance are both vague and not particularly challenging. This is particularly so in the case of a Special Precinct Variation.

Section 85H provides that the Executive may only make a special precinct variation if it considers the variation would achieve:

- s85H (1) (d) (i) "...a substantial public benefit: and"
s85H (1) (d) (ii) "1 (sic) or more of the following objectives:
(A) implementation or progress towards implementation of the planning strategy or elements of the planning strategy;
(B) progress towards sustainable development of the Territory;
(C) economic, social, cultural or environmental progress for the Territory; and
s85H (1) (e) "the Executive considers that the territory plan as varied by the special precinct variation will give effect to the objects of the territory plan."

As noted, this scarcely sets a high bar. Provided the Executive believes the variation would achieve a substantial public benefit, AND would give effect to (presumably at least one) objective of the territory plan, AND could plausibly be argued to have made progress toward implementing at least one element of the planning strategy, OR progress towards the sustainable development of the territory, OR the economic OR social OR cultural OR Environmental progress of the territory, then the variation may be made a special precinct variation. Not many developments would seem likely to fail to meet at least one of these tests, particularly if the Executive was feeling relaxed in its interpretation of "substantial public benefit."

Still, just to make sure that no proposal is ever turned down for not meeting the criteria, the Bill goes on to provide in s85H (2) that
"However, the Executive may make a special precinct variation in a revised form to the draft special precinct variation if, ... the Executive considers it appropriate to do so."

Section 137I specifies the criteria for the declaration of a project of major significance. This provides that the Executive may only declare a project of major significance if it considers that the proposal:

- (a) *would achieve a substantial public benefit; and*
- (b) *is of major economic, social, cultural or environmental significance to the Territory*

These criteria are somewhat tougher than those for a special precinct variation, as any qualifying project would have to offer “a substantial public benefit” AND be of “major” economic, social, cultural or environmental significance. However, these terms are still undesirably vague.

None of “*substantial public benefit*”, “*objects of the territory plan*”, “*planning strategy*”, or “*sustainable development*” are defined in the Bill. However, the latter three are defined in the *Planning and Development Act 2007* (PDA). No doubt it is believed that the meaning of “*substantial public benefit*” is self-evident. Some objective definition would however be desirable, but it is clear that placing a dollar amount on the desired public benefit before the variation or project of major significance is approved, let alone commenced, is problematical. It is difficult to justify a choice of any specific figure. If one were to do so it would be desirable to provide for some appropriate form of adjustment for inflation. On balance it appears preferable to stick with the public interest test (in the way it is already used in public policy already for example by the Productivity Commission in competition policy). This means that the benefits to the community must exceed the costs. However, under this approach it is essential to specify the need for:

- (a) A rigorous social cost-benefit analysis, and
 - (b) Publication of the analysis and underlying data to provide accountability
 - (c) Maintenance by the government of a permanent, publicly accessible database of past analyses to enable ex post examination of the success or otherwise of decisions made.
- 4) The GNCA recommends that both s85H (1) (d) (i) and s137I (a) be amended to read “...a substantial public benefit demonstrated by:**
- (a) *A rigorous social cost-benefit analysis, and*
 - (b) *Publication of the analysis and underlying data to provide accountability*
 - (c) *Maintenance by the government of a permanent, publicly accessible database of past analyses to enable ex post examination of the success or otherwise of decisions made”*

In relation to the other terms mentioned in the PDA:

Section 48 of the PDA provides that:

“The object (NB not objects) of the [territory plan](#) is to ensure, in a manner not inconsistent with the national capital plan, the planning and development of the ACT provide the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation.”

Similarly the Planning Strategy is defined at s105 which provides that:

“The Executive must make a planning strategy for the ACT that sets out long term planning policy and goals to promote the orderly and sustainable development of the ACT, consistent with the social, environmental and economic aspirations of the people of the ACT.”

Sustainable Development is defined at s9, as:

“For this Act:

sustainable development *means the effective integration of social, economic and environmental considerations in decision-making processes, achievable through implementation of the following principles:*

- (a) *the precautionary principle;*
- (b) *the inter-generational equity principle;*
- (c) *conservation of biological diversity and ecological integrity;*
- (d) *appropriate valuation and pricing of environmental resources.*

the inter-generational equity principle means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

the precautionary principle means that, if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

Clearly a proposal would have to be fairly novel, in the Yes Minister sense of the word, to fail to accord with these rather general criteria. Others have also noticed the difficulty in extracting any guide to action from these definitions. At a fairly recent ACAT hearing the Senior Member observed:

“As to the meaning of sustainable this is a word that has come widely into use in recent decades, ... The Territory Plan includes, at part 2.1, a Statement of Strategic Directions, of which section 1 is entitled Principles for Sustainable Development, which stresses the need for planning processes to balance economic vitality, community well-being and environmental quality. While the word has a clear meaning in relation to development of human societies, it seems to us that it (has) no clear meaning in relation to residential housing.”

It would be desirable for the Government to listen to what those who have make decisions on planning issues have to say, and to move to provide these terms with clear meaning.

- 5) The GNCA recommends that clear, explicit and testable definitions of these terms be inserted into the PDA, so that any reasonable person could determine if a project did or did not meet any of these criteria.**

Failing this, as there appears to be no policy reason why the criteria for a special precinct variation should be significantly more relaxed than those for a special project, it would be desirable for both sets of criteria to match. Consequently,

- 6) the GNCA recommends that the criteria for proposed s137I should be copied into proposed s185H and replace proposed ss85H (1) (d), 85H (1) (e) and 85H (2).**

If the Assembly feels disinclined to implement either of the two preceding recommendations,

- 7) the GNCA recommends that s85H (1) (g) (ii) be amended to provide that the Executive may only make a special precinct variation if it considers the variation would achieve ALL of the objectives detailed in (A), (B), and (C), rather than just one.**

We note that there is no avenue of appeal against any decisions taken under these new provisions. Clause 53 will alter s407 of the PDA to make any decision in relation to a special project area or any decision in relation to a project of major significance beyond review by either the ACAT, and Schedule 1 will amend the *Administrative Decision (Judicial Review) Act 1989* (AD(JR)) to make such decisions non reviewable by a Court. One might wonder why anyone should bother about the criteria, as the question of their appropriateness or relevance becomes merely academic.

This situation is unsatisfactory.

- 8) The GNCA recommends that the Bill be amended to provide for appropriate review of decisions, while ensuring that these can be speedily resolved, and providing that appeals that are pestiferous, vexatious or without merit are excluded.**

This latter aim could be achieved, for example, by providing for a preliminary quick review by a judicial officer who would be required to reject all appeals that in his view did not have at least one chance in five of being upheld. No doubt some legally trained people would be appalled at the crude application of such a quantitative test, but welcome to the digital millennium. While sympathetic with the frustrations that bureaucrats and politicians must feel when their well-conceived proposals are held up or derailed by inappropriate objections,

- 9) the GNCA feels that placing executive decisions in the planning area completely beyond any appeal or review rights is ill judged and would set a most unfortunate precedent.**

The GNCA would encourage the Government to develop mechanisms to discourage businesses (particularly those involved in property development) from using the appeal provisions in the planning process as a commercial weapon to slow down their competitors developments and/or impose unreasonable costs on them. The undesirability of such conduct should not be used as a justification for remove legitimate appeal rights from the general population.

The GNCA also notes that the likelihood of any appeal being successful could be reduced by an insistence by the Government that all the rules and criteria used to guide decision making within the planning system be completely objective and quantitative, with the scope for individual qualitative judgements reduced to the absolute minimum. The Government should also ensure that all decisions are completely and appropriately structured so that an observer can see what decision was being taken under what power in the legislation, what matters were thought relevant and were taken into account, and how these different factors were weighed up in making the resulting decision. A more structured decision process would reduce the likelihood of successful challenges.

While on the matter of definitions, the term “Executive” is used some 37 times in the Bill, but is never defined. Unlike the terms discussed above, it is not defined in the PDA. However, it is defined at s39 of the *Australian Capital Territory (Self-Government) Act 1988*, and we presume that this definition is intended to apply in the current bill.

- 10) The GNCA recommends that the Bill be amended to include a pointer to the definition of Executive in the *Australian Capital Territory (Self-Government) Act 1988*, or better still has a provision to the effect “*Executive has the same meaning as in the Australian Capital Territory (Self-Government) Act 1988*”.**

Inconsistencies in drafting

The Bill is inconsistent in its drafting, and in places appears quaintly old fashioned. It gives the impression that the PLA (the authority) is not prepared for the digital age. For example, ss85C, 85D, 85E, 90, 137E and 137F (dealing with consultation) refer to public inspection, and in some sections purchase, of documents at specified places. While it is no doubt desirable that copies of relevant Government documents, and public comments about these, are made available for public inspection, in this day and age these would reach a wider audience more easily if published on the authority’s website. It also appears anachronistic to have public documents available for purchase. Again publication on the authority’s website would offer an almost costless way of making such documents available to the public. In

addition, to charge for access to Government information would seem out of step with modern ideas of open government and freedom of information.

In a similar vein, ss85C, 85F, 85L, 85P, 85R, 89, 90, 137D, 137G and 137K refer to publication of information in a daily newspaper. Such provisions may be out of date within a few years if daily newspapers cease to publish, which at least some feel is a very real possibility. To do the drafters justice, ss85C, 85P, 137K and 137L also refer to publication on the authority's website. This demonstrates that the drafters are aware of the existence of the internet, and raises the question of why publication on the authority's website has not been provided for in the other sections cited.

Interestingly while an extension of the period that a "restriction declaration" (restricting the operation of either or both of the Heritage Act 2001 or the Tree Protection Act 2005 in relation to the development of a special precinct area) is in force must be published in a notice of extension in a daily newspaper and on the authority's website, there appears to be no such requirement to publish the original "restriction declaration". Possibly this is because the original restriction declaration must be made at the same time as the making of the special precinct variation that it applies to, and is a notifiable instrument as is the special precinct variation. However, the extension of the restriction declaration is also a notifiable instrument. This is anomalous and should be fixed.

11) The GNCA recommends that the PDA be amended to require that all notifiable instruments, notices, declarations, variations, draft declarations, draft variations and consultation comments be published on the authority's website.

The time provided for public consultation in relation to a draft special precinct variation (s85C (1) (a) and a draft significant project declaration s137D (1) (a) (30 working days in both cases) is too short, as is the 15 working day period allowed for the inspection of consultation comments specified in ss85 (1) (c) and 137D (1) (c). If the Government wishes to be able to claim that its proposals have been through a public consultation process then it must allow adequate time for proper consultation.

12) The GNCA recommends that the proposed periods for public consultation in subsections 85C (1) (a) and 137D (1) (a) in relation to a draft special precinct variation and a draft significant project declaration be amended to 60 working days, and for inspection of consultation comments in subsections 85C (1) (c) and 137D (1) (c) be amended to 30 working days.

In s89 (2) the authority is given the discretion to decide whether a plan variation, which the authority is satisfied would be a technical or special amendment, should be put in writing. Subsection 89 (3) however provides that any such plan variation is a notifiable instrument. One wonders how a plan variation can be notified if it has not been put in writing. This section should be clarified.

In s89 (5) the authority is required to publish in a daily newspaper a description of a plan variation and the date of effect of the variation, and, but only if the authority considers it necessary or helpful, indicate where the plan variation and information about the plan variation is available for inspection. It seems undesirable to permit the PLA to withhold information about any element of ACT planning, and this applies to plan variations. The GNCA recommends that this section be amended to make publication on the authority's website of details of the plan variation mandatory.

Parts 1.2 and 1.4 of the Bill relate to amendments to the Heritage Act 2004 and the Tree Protection Act 2005 respectively. While Mr Corbell suggested in his speech that the introduction of restriction declaration powers following the making of a special variation precinct would remove the need for Ministerial call in powers in the Heritage Legislation Amendment Bill 2013. However, nothing appears to have been done to remove such powers from that Bill.

The Bill as drafted introduces 17 new sections in relation to special precinct variations, viz ss85A to 85I, and ss85K to 85R. In the middle of all this, and only tenuously related to the preceding and following sections is a provision, s85J, providing that any special precinct variation in relation to the Symonston mental health facility is not a Disallowable Instrument but is a Notifiable Instrument. It does not appear to be good drafting to bury specific, one off, time limited provisions amid a mass of more generally applicable provisions to which the anomalous section is only distantly related. The cynical may even think that this provision was deliberately hidden away here.

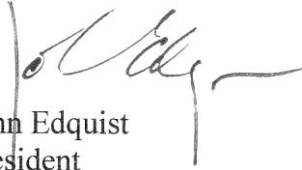
Clause 63 of the Bill introduces a new Schedule 6 to the PDA. This consists of a simple sketch map of the vicinity of the Symonston site with the site itself outlined in bold. The scale appears to be 1cm to 66.666m. The site appears to comprise portions of at least two blocks. No coordinates are given for any points on the chart, nor are any compass directions or distances specified. Given the easy availability of modern GPS equipment it seems likely that PLA can do better than this and define an area of interest with somewhat greater precision.

Given the number of problems identified in the Bill

13) the GNCA reiterates its first comment and recommends that the Bill be withdrawn for extensive redrafting and then reintroduced with appropriate time allowed for public and parliamentary consideration and debate.

As indicated above we would welcome the opportunity to discuss further with you any issues in relation to the bill.

Yours faithfully



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