



Territory Plan Comments
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Dear Sirs

COMMENTS ON DRAFT VARIATION 343 - (Residential blocks surrendered under the loose fill asbestos insulation eradication scheme)

The Inner South Canberra Community Council (ISCCC) is an umbrella body representing the interests of its seven constituent resident groups in the suburbs of Yarralumla, Deakin, Red Hill, Kingston, Barton, Griffith, Narrabundah and Oakes Estate, in the Inner South. The ISCCC welcomes the opportunity to comment on Draft Variation 343 (DV343).

DV343 is intended to give effect to the Government's cost recovery attempts following the "purchase all affected Canberra houses to enable government facilitated demolition and site remediation". The action has been embarked upon under the *Loose Fill Asbestos Insulation Eradication Scheme* (the scheme), announced on 28 October 2014. The scheme is intended "to eradicate the ongoing exposure risks from the continuing presence of loose fill asbestos insulation in Canberra houses". This is to be achieved through the demolition of all affected houses and site remediation, followed by the sale of the remediated blocks to defray overall scheme costs. Although the scheme is supposedly voluntary, the Government has from the outset reminded people that it may use its powers of compulsory acquisition. It is difficult to see how the scheme could hope to achieve its ends unless it had treated all Mr Fluffy homes.

The ISCCC believes that:

1. there are major flaws in the draft variation as it now stands, and urges that it be withdrawn to allow it to be significantly revised and rewritten in consultation with the public;
2. affected houses should not be demolished unless tests undertaken before demolition indicate that the presence of loose asbestos is of such a magnitude as to pose a significant

risk to the inhabitants. The risk bar should be set at some realistic level, such as being greater than the chance of acquiring lung cancer from a one packet a day smoking habit;

3. the proposal to allow subdivision of dual occupancy blocks in the RZ1 zone threatens the integrity of the Territory Plan and that the financial gains to the Government from following this path do not justify the costs; and
4. the scheme should be modified to allow those residents who wish it to age in place. Because of the decades long latency period for mesothelioma the overwhelming majority of those who contract the disease over the next ten years will have acquired it from their exposure from some decades ago. The risk of people aged 60+ dying of an asbestos related disease acquired from exposure in the next few years is very slight.

The ISCCC wrote to the Minister for Planning, Mr Gentleman, on this issue on 16 December 2014. We advised Mr Gentleman that:

“to change the rules governing dual occupancy, even for unusual circumstances, would be a seriously retrograde step that would not add to the quality of the long term development of our city. Any subdivision or unit titling in RZ1 for areas less than 800 m² would have the effect of creating:

- 1. unplanned random re-zoning throughout a suburb, where small clusters of RZ2 would be created within an RZ1 zone. Random re-zoning is not a characteristic we should encourage in any environment and in an established garden-city area; it would more than likely adversely impact on the streetscape and character of the suburb.*
- 2. a thin edge to a wedge for developers to take advantage of in the future. The question will be: if 700-800 m² is good enough to sub-divide a Mr Fluffy block, then why not elsewhere? All the work done on this issue for Variation 306 and in relation to earlier amendments to the Territory Plan making provision for RZ2 zones would be undone and the overall result would be chaotic.*
- 3. an inequitable situation, whereby the government is allowed to sub-divide the block, but the private householder is not. In other words big brother government is riding rough-shod over the private individual to achieve a short term financial goal. Not good governance.*

The Government should recall that the rules embodied in the Territory Plan generally reflect sound social policy. We consider that any short term financial benefit to be derived from subdivision of RZ1 blocks ranging in size from 700-800 m² is outweighed by long term undesirable consequences and we urge the government not to proceed down this path.”

The ISCCC’s concerns have not been allayed in any way since the writing of that letter. We were incorrect in our assumption that the resumed properties would be rezoned as RZ2. As it turns out, DV 343 provides that affected blocks will remain zoned RZ1 but with all the attributes of RZ2 zoned land.

The ISCCC notes that although the scheme is estimated to be going to cost about a billion dollars, not a single case of mesothelioma or asbestos related lung cancer is likely to be prevented in Canberra over the next 30 years. Neither will the scheme protect Canberra tax payers from litigation related to the Mr Fluffy scheme. Some might consequently wonder whether the scheme offers value for money.

The ISCCC's views on DV343 are set out in greater detail in Annexure A. The ISCCC's views about the *Loose Fill Asbestos Insulation Eradication Scheme* more generally are given in Annexure B

Yours faithfully

{Signed}

Gary Kent
Chairman, ISCCC

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ANNEXURE A

The Territory Plan provides for RZ2 zonings in locations that are close to shops and other amenities (ie local centres and regional centres) and located on transportation routes. The zoning was established to concentrate dual occupancy development in the areas most suitable for it rather than being spread randomly throughout the RZ1 zone. This has a compelling logic and appears to have been widely accepted in Canberra for the last decade or so.

It appears that the sole reason for attaching RZ2-like zoning rules to Mr Fluffy blocks in the RZ1 zone (particularly the right to subdivide any affected block larger than 700m²) is so that the Government can receive a better price after remediating the block. The ISCCC accepts that the Mr Fluffy buyback arrangements will be extremely costly for the Government, but submits that there may be better solutions than the proposed introduction of quasi RZ2 blocks into the midst of the RZ1 zone. Given the high mooted cost of the scheme of up to or over one billion dollars, the ISCCC believes that greater efforts should have been made, and could still now be made, to reduce the cost of the scheme by identifying those houses that present no realistic risk and exempting them from the scheme.

To weaken or abandon the existing planning arrangements to resolve a Government funding crisis would set a very bad precedent. There are sure to be other occasions when the Government will face an unpleasantly large expense and dilution of the plan should not become an accepted element of any solutions.

To enable the public to assess whether the benefits of the Government's proposed approach outweigh the costs the Government should publish its estimates of the increased value it will receive from subdividing the affected blocks. This should also separate out other costs that developers normally face such as the costs of demolition of house and outbuildings, and the costs of removing vegetation from the block (if this has been done).

Inequity in treatment of private vs government ownership

DV343 is inequitable, in that it treats different groups in different ways. Under the proposed variation, owners of Mr Fluffy blocks are permitted to demolish and remediate their blocks prior to resale just as the Government proposes, but only those blocks sold to the Government are rezoned for subdivision. Why it is appropriate for the Government to be able to recover its remediation costs this way, when private owners may not, is puzzling, and is not explained in the Draft Variation. However this omission does cast doubt on whether achieving remediation of all affected blocks as quickly as possible and at least cost to the tax-payer is really the Government's highest priority. Were the Government to allow private owners to access this benefit then we might expect developers to offer to buy affected blocks and undertake the remediation, thus spreading the risk involved in the scheme and lowering the amount of capital the tax-payers of Canberra must commit to the scheme. A refusal to countenance this option suggests that the Government feels that there is no risk and that the scheme will prove to be financially advantageous for the Territory.

Inequity in treatment of neighbours of Mr Fluffy Blocks

DV 343 is also inequitable in that it disadvantages those property owners who are neighbours to Mr Fluffy blocks. While dual occupancy capable blocks tend to sell for more than similar sized blocks that cannot be subdivided, the neighbouring blocks that are subject to higher residential density development will suffer a fall in price relative to others, as their owners lose amenity from the development next door (loss of solar access, loss of views, more noise, more traffic, the inconvenience, noise and dust of nearby construction, etc). Discussions with real estate agents suggest that this loss of amenity can cost in the order of \$50,000 to \$100,000 and possibly more per block. If this is correct then the uplift in value gained by the Government in subdividing the block is about the same as the loss in value incurred by the neighbours. If this were to be the case, what the Government is doing in effect is paying for its Mr Fluffy scheme by imposing a special tax on the owners of each block neighbouring a Mr Fluffy block. If the Government were to do this directly it would be seen as clearly unfair by the public, but how is the proposed arrangement different in outcome?

The Government might assert that it has guarded against the potential loss of amenity by the insertion of Criterion 49A, which provides that *“The design of buildings encourages high quality architectural standards that contribute to a visually harmonious streetscape character with variety and interest, whilst not detrimental to, or overtly detracting from the existing streetscape character.”* The ISCCC notes that this is a criterion, and therefore not mandatory. Also the criterion itself is so full of subjective terms (eg “high quality”, “harmonious”, “variety”, “interest”, “not detrimental”, “overtly detracting”) as to collectively deprive the criterion of any real meaning. Even if it had meaning it would not necessarily help, as it would require the building design to “encourage” high quality architecture. A more positive approach would require the building to “display” or “exemplify” good design.

Inequity in its impact on older residents

Finally, DV 343 is inequitable in that it will impose a demographic change in the affected areas, and deprive at least some residents of the right to live in their chosen community. Consider the economic impact of the Scheme. Owners of affected houses have the opportunity, until 30 June 2015, to sell to the Government their house at its value as a non-Mr Fluffy property as at 28 October 2014. This might be regarded as fair, other things being equal, but they are not equal. Suppose in your suburb there are typically five houses for sale at any one time. Now however, as well as the usual buyers chasing these five houses, there are also all those Mr Fluffy owners in the suburb who wish to remain in the same area. Naturally the price of all houses will rise compared with 28 October 2014, because demand is higher. But prices will fall again when the extra demand from Mr Fluffy buyers has cleared, you might argue. This is so, but those who hold off buying in the current market also have to face the slow but steady upward creep of market prices taking place independently of the Mr Fluffy price surge, and may also have to pay rent for accommodation in the interim. The result is that those who cannot afford to pay the Mr Fluffy premium must move to areas where house prices are within their affordable price bracket. These would be the retired, and those close enough to retirement to not be bankable for a mortgage. The consequence will be a change in the compositions of the suburb, with fewer older

(and slightly poorer) residents, and more younger (and slightly wealthier) residents. While minor on the macro scale, this would be a social disaster for those forced to move.

Future reopening of the Scheme

The scheme is supposed to cover all homes ever treated by Mr Fluffy, as the Government believes that *“the demolition of all affected homes and subsequent site remediation is the only enduring solution to the health risks posed ... by the continuing presence of loose fill asbestos insulation”*. However, there must be a significant possibility that there are some Mr Fluffy treated homes (possibly partly remediated in subsequent years) that have not yet been discovered. If and when such homes are discovered, will the Government reopen the scheme? If the answer is no this would suggest that the Government’s current response is an overreaction. If however it is yes, then an opportunity might exist for an unscrupulous person to plant loose fill asbestos in a house on a block which, for whatever reason, they wished to see redeveloped.

Challenges for ACTPLA

DV343 will create problems for ACTPLA. At present RZ2 zones are bounded by streets or lanes, so the RZ2 zones do not abut RZ1 zones over a back or side fence. As a consequence of the Draft Variation, blocks with RZ2 type planning rules will be intimately intermixed with ordinary RZ1 blocks, and it may even be that an ordinary RZ1 block is surrounded by Mr Fluffy blocks. What will happen when a developer wishes to merge a Mr Fluffy RZ1 block with an ordinary RZ1 block next door? Or even worse, wishes to merge a standard RZ1 block with Mr Fluffy blocks on either side. Would the merger be refused? Why and on what grounds? After all, both blocks are still RZ1, as the Government is insisting. If the merger is permitted to proceed, which planning rules will apply? The Government has provided no guidance about the new zoning beyond the desire to maximise revenue from remediated block sales, so there is little help offered to the public servant, or subsequently the ACAT and the Courts, required to make a decision on this issue. Given that the right to subdivide is believed to enhance the value of a block it seems likely that at least some developers might feel litigation over this issue was worth a try.

Other Social Impacts

Much of the social impact of the Draft Variation cannot be foreseen at present, because we will not know where the Mr Fluffy blocks are until 30 June 2015 (although there are persistent rumours that at least some real estate agents know where these are –if this were true it would be very disturbing, as there might be scope to take economic advantage of this restricted knowledge). However we do know that Mr Fluffy houses occur in clusters, partly because of the door to door marketing undertaken by Mr Fluffy when working in an area. Consequently it is possible that relatively small areas may be intensely affected, creating little RZ2 zones within the surrounding RZ1 zoning. The negative social impacts on some areas could be significant. We are being asked to make a decision with inadequate information. The ISCCC regards this as inappropriate.

Possible Ambiguity in relation to Heritage Blocks

It appears that the Draft Variation changes do not apply to any heritage blocks which may be surrendered. Some explicit statement in DV343 as to what would be permitted on any such block after remediation might serve to allay concerns.

Scope of Vegetation Clearance during Remediation of Blocks

It has been suggested that remediation of surrendered blocks will include full clearance of all vegetation on the block (and that the current owners should therefore propagate any plants they wish to take with them before leaving their homes). If this is the case the Conservator of Flora and Fauna's assurance that "*any regulated trees on blocks will be taken into consideration during the assessment of the development applications*" appears to be seriously misguided. In that it seems unlikely that major trees on a surrendered block will be contaminated with loose asbestos the justification for removal of any regulated tree appears weak. Any block by block approach involving testing trees argues that a policy of individual testing of blocks before house demolition would be the correct approach.

Possible Changes to Improve DV343

What could be done to ameliorate the adverse impacts of Draft Variation 343?

Option A: Test houses before deciding to demolish

The Government could introduce testing of houses prior to demolition, to ensure that only houses presenting an unacceptably high level of asbestos fibres be demolished and their blocks remediated, reducing the size and cost of the whole scheme. . We understand that some houses are being demolished even though no traces of asbestos were found during the most recent testing. Adoption of this option could significantly reduce the size of the scheme and its impact on the budget, whilst also reducing the potential loss of amenity and all the difficulties of having significant number of RZ2 like blocks scattered through the RZ1 zone. The ISCCC strongly recommends that this option be adopted.

Option B: Allow long term residence after sale

The Government could also explore modifying the scheme so that Mr Fluffy house owners who wished to age in place could sell their house to the Government but continue to live there (at what rent?) until they are ready to move to a retirement home. As several owners might be 60 now the Government might have to wait 20 years before the house could be demolished, but realistically this would add little to the risk, as discussed in the covering letter. Adoption of this option would also have the advantage of spreading the costs of the scheme over a decade or more, reducing its impact on the Territory budget.

Option C: Withdraw the subdivision provision

A desirable option would be for the Government to accept that there is some logic to planning zones and consequently to remove the proposal to permit subdivision of affected blocks. This would reduce the flow of revenue to the Government following block remediation. However, this

would be offset, at least to some extent, by the reduced loss of amenity to neighbours, and by the benefits of preserving the integrity of the planning system.

Option D: Allow private owners the right to subdivide

If the Government is determined to proceed with the option of subdividing compliant remediated blocks, then it should also allow private owners to do the same. This would have the advantage of reducing the impact of the scheme on the Territory budget, and would share any risk with the private sector. On the other hand it would not reduce loss of neighbourhood amenity or maintain the integrity of the Territory Plan. The ISCCC would not support adoption of this option.

ANNEXURE B

Is the *Loose Fill Asbestos Insulation Eradication Scheme* good policy?

While beyond the scope of the specific provisions of DV343, this seems to be an appropriate place to ask the more general question of whether the proposal to acquire and demolish all affected Canberra houses is the best/cheapest/quickest way to “*eradicate the ongoing exposure risks from ... loose fill asbestos insulation*”?

With an expected cost to the Territory in the order of a billion dollars one might be excused from wondering if an approach involving rigorous inspection of affected houses, with the intent of identifying those with a remaining loose asbestos fibre that posed a real and significant risk to health, might have been better. This would have permitted resources to be devoted to those dwellings where acquisition and subsequent demolition would have potentially changed health outcomes in the community, while leaving those dwellings where the residual asbestos posed little or no hazard unaffected. The cut off could be for example those dwellings say with loose asbestos fibre readings of less than 0.1 fibres/ml, which is the National Occupational Health and Safety Commission’s national exposure standard for chrysotile asbestos, adopted in 2003. Alternatively the Government could choose a cut off level where the risks were no greater than other commonly accepted risky behaviours, such as smoking a packet of cigarettes a day.

Presumably the Government felt that as even a single asbestos fibre can cause mesothelioma and other asbestos related diseases (asbestosis, lung cancer, no house that has ever had asbestos insulation could be regarded as safe, and that the measured approach suggested above would therefore be unconscionable. This appears confused. While a single particle of radiation, or molecule of carcinogenic chemical can give one cancer, Governments do not ban the use of bricks (which contain traces of radioactive uranium), or the smoking of cigarettes, because it is generally felt that the risks of cancer from such causes are generally low. The risk of getting cancer from radiation or carcinogenic chemicals is dose dependent – the higher the exposure the greater the risk. This is also true of asbestos - the risk to health increases with the number of fibres inhaled and with frequency of exposure.

There is generally a considerable lag between first exposure to asbestos and the onset of disease. For asbestosis the lag is between 15 and 25 years, for lung cancer from 20 to 30 years, and for mesothelioma between 20 and 40 years, but may be longer. Smoking significantly increases the risk of lung cancer in people who have been exposed to asbestos (or alternatively exposure to asbestos significantly increases the risk of lung cancer in people who smoke).

Asbestosis is a chronic rather than fatal disease, and it appears that asbestos related lung cancer is perhaps half as common than mesothelioma, although specific figures for Australia are hard to find. Mesothelioma is relatively rare, with annual deaths in the ACT being about half as frequent as motor vehicle accident deaths. The difference is that the latter tend to be young, while mesothelioma is overwhelmingly a disease of older men – 84% of deaths are male, and 94% of male deaths over 60 years. Consequently the social cost of motor vehicle accident deaths is significantly larger.

Under the circumstances it might have been best as a first step for the Government to commission an academic study to collect what information was already known about the incidence of asbestos related diseases, and to identify areas in which further research was desirable. Alternatively it could have established a Royal Commission similar to the Fox Inquiry into Uranium mining in the 1970s to identify what was known and make suitable recommendations. Unfortunately these more considered approaches were not adopted.

This is unfortunate. While no doubt the Government's intentions were good, it needs to be recognised that the expenditure of a billion dollars will not prevent a single mesothelioma death due to asbestos exposure in the 1960s and 1970s. As noted earlier Mesothelioma appears to have a latency period of 35 to 40+ years, so cases emerging now are due to exposure incurred years ago. It is not at all clear whether new cases of mesothelioma are being seeded by present greatly reduced exposures to asbestos, but various models predict that mesothelioma cases will peak in 2014, 2017 or 2021. So the scheme seems unlikely to prevent any new cases, and if so these would have occurred between 2035 and 2055. Nor will the scheme protect the ACT from litigation. While home owners who take advantage of the scheme must waive their rights to sue for damages, this waiver explicitly excludes any sickness or health claims from exposure to asbestos (whether this waiver would be upheld if challenged in court is also moot). So it remains unclear what the taxpayer gains from the scheme.

Policy proposals must be measured against their efficacy, efficiency and equity in achieving their stated goals. The ACT's Mr Fluffy response does not score well. There is no doubt that the response is inequitable as it treats different groups (eg government property owners vs non-government property owners) differently, may adversely affect the less well off, and treats neighbours of Mr Fluffy blocks unfairly. The expenditure of a billion dollars to acquire and demolish all potentially affected houses, prior to any testing to determine whether there is a need to demolish, cannot be characterised as efficient. Finally, given that the programs will neither prevent very many, if any, deaths from asbestos related diseases (the Government has been very quiet on the actual number of lives saved by this proposal), nor protect the ACT from litigation by suffers of such diseases, it also does not appear to be efficacious.

All expenditure has an opportunity cost, and one must wonder how many fatal traffic accidents, or deaths from other diseases, could be avoided by the expenditure of a billion dollars? This is the question that the Government must answer.

References

1. Mesothelioma in Australia: Incidence (1982 to 2013) and Mortality (1997 to 2012), Safe Work Australia, 2015 found at <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/mesothelioma-in-australia-2015>
2. Asbestos-related Disease Indicators, Safe Work Australia, May 2014, found at <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/asbestos-related-disease-indicators-2014>