LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
Mr Jeremy Hanson MLA (Chair), Mr Michael Pettersson MLA, Ms Suzanne Orr MLA (Deputy Chair)

Submission Cover Sheet

Inquiry into Building Quality in the ACT

Submission Number: 53

Date Authorised for Publication: 5 November 2018

Inner South Canberra Community Council

ISCCC Submission to the Inquiry into the Quality of Building Construction in the ACT

Introduction

At the outset it should be noted that while some limited progress has recently been made to address building quality, e.g. the increased verification of skills and qualifications of builders, there remains much to be done. Any suggestion that the task has been substantially addressed is unrealistically optimistic or just political "spin".

The Access Canberra complaints process requires enormous effort and is emotionally exhausting with little to no confidence that complaints will be treated seriously. Plenty of talk and consultation but no action. Enforcement actions by Access Canberra would be an interesting statistic: in our experience they are rare. A failure to regulate or to even enforce existing regulations is at the core of many of the systemic issues. For those without detailed knowledge such as newly formed Executive Committees of Body Corporates or individual owners this is a daunting and ineffectual process. Complaints relating to planning and construction are likely to be understated due to the perceived hopelessness of making any headway.

To achieve high standards in the construction industry, the required bedrock is robust, impartial and independent regulation.

> *Generally, the most effective way to achieve quality is to avoid having defects in the first place. It is much less costly to prevent a problem from ever happening than it is to find and correct the problem after it has occurred. Focusing on prevention activities whose purpose is to reduce the number of defects is better.**
> **A lean journey, the quest for true north, Tim McMahon Lean Thinking*

Recommendations

1. Certifiers should be involved from the time that plans are lodged, and should be truly independent of the developer/builder (Term of Reference 1).

2. Building certifiers for projects should be selected by an independent agency established for that purpose under strict operating guidelines. This agency should be at arm's length from the ACT Government. The cost of running the agency should be borne by the developers (TOR 1).

3. Certifiers must be inspected and audited regularly to uphold high standards and more importantly to know that if they are lax they will be exposed to scrutiny (TOR 1).

4. There should be special focus on regular auditing of certification of strata developments in recognition of the higher risk factor due to the absence of the ultimate owner during the construction stage (TOR 1).

5. There should be an assessment of lessons to be learnt from the NSW government's overhaul of certifier regulation, which aimed to clarify a certifier's roles and responsibilities, improve complaints handling and facilitate proactive risk-based audits. The NSW government also accepted the need for a Practice Guide for certifiers (TOR 1).

6. There should be a requirement for a contract between an Owners Corporation and the developer to recognise rectification responsibilities for defects to common property, both building and landscape (TOR 2).

7. Class B and A builders should be subject to the builders licensing training and testing program as soon as possible, and there should be a mandatory continuing professional development training program for the building industry (TOR 3).

8. A building trust fund, which holds a mandated percentage of building construction costs to be drawn against for future building defects, should be established as a practical element to expedite remedial works (TOR 5).

9. The Access Canberra charter must make clear its obligation to achieve regulatory outcomes in accordance with relevant legislation, including the planning and development legislation and regulations (TOR 6).

10. The ACT Government should learn lessons from the experience in Sydney and Melbourne with respect to regulation of mixed-use developments. In addition, the relevance of the NSW strata building bond and inspections scheme should be considered as to its possible applicability to the ACT (TOR7).

11. It should be mandated that the first action of an Executive Committee in a multi-storeyed apartment development ought to be to obtain a Building Code of Australia Audit Report from an independent certifier (not the same certifier as employed by the developer) so as to provide assurances on the buildings compliance with the Deemed-to-Satisfy (DTS) requirements of the Building Code of Australia (BCA) as well as the ACT Building Act 2004 and Building Regulation 2008. This would be a practical way to distance the new body corporate Executive Committee from the developer/builder and to also hold to account the original certifier for his professionalism (TOR 9).

12. Unit titles mixed-use legislation must be introduced as a matter of urgency. In particular, such legislation should address the matters referred to below, which up until now have been foisted on executive committees to deal with as best they can in the absence of appropriate strata law reform (TOR 9):

    a. All commercial and residential units must have their own water meters.

    b. All commercial or non-residential units must have all electrical power consumption including remote A/C and roof top exhaust fans metered through their individual commercial unit meter. Each commercial unit must have their own air conditioning system located entirely within their unit entitlement area, except for rooftop units permitted in that location.

    c. The common area electrical meter must only ever include common area services which demonstrably service only necessary public and common area services.

d. All commercial or non-residential units must contain their code required toilet facilities within their unit entitlement.

e. There should be no publicly accessible toilets within a mixed-use development.

f. Basement parking areas approved in the original DA should not be changed to another use.

g. If basement areas are to be used for any commercial use such as cool-rooms, food and/or beverage storage, or other restaurant related activities requiring frequent access, a separate lift service must be provided to access the commercial units on or above ground and this use or proposed use must be clearly shown in all plans so that all Unit Owners have a clear understanding of what they are purchasing.

h. The basement ventilation system must be designed to accommodate all ventilation required including car exhaust, A/C condensers, as well as any other heating source.

i. The garbage room accessible for the garbage trucks for residential units shall be separated from the commercial garbage room used by commercial tenants involved in the service of food and beverage.

j. All garbage rooms must be serviced with hot and cold water and have effective wash down facilities.

k. All garbage rooms are to be effectively ventilated to prevent any odours reaching any public or common areas.

l. The developer when still in control of all unit entitlements, must not be permitted to adopt any motion at the first Body Corporate meeting which in any way is detrimental to the interests of the eventual residential unit owners. This includes any attempt to contractually bind future expenses or services, this decision must be an unfettered one by the incoming Body Corporate.

m. The first Body Corporate meeting should contract a Certifier to review all building works for full compliance and this Certifier must be independent from the developer/builder so as to provide verification to all unit owners that all work conforms to the registered units plans.

n. ACTPLA must ensure that all applications for alterations or additions to a mixed-use development MUST be endorsed and submitted by the Body Corporate AFTER the Body Corporate has been transferred from the developer to the individual owners of the unit entitlements.

o. When determining the initial budget for the development, from which flows the quarterly levies, developers must include a reasonable estimate of the likely sinking fund contribution which will be added to the administrative levy, this will remove some of the shock of a vastly increased levy in year 2 after the sinking fund exercise has been undertaken by the owners corporation.

p. In a mixed-use development, the developer must include an appropriately engineered transition layer between commercial and residential units immediately above, even when the use to which the units will be eventually put is not known. The transition

layer should include a high degree of sound proofing and other appropriate measures to dampen sound transmission through the floor of the residential unit above. It should exceed the standard required between solely residential floors.

q. Noise management plans submitted by the developer as part of the development approval process must form part of the contract of sale of all units so that they can be enforced as part of the owners corporations' approval of commercial unit fit-out.

r. Where costs in mixed-use developments are clearly the result of commercial activity e.g. trade waste removal, grease traps only connected to commercial units and so on, they should be charged to commercial owners and not subsidised by residential unit owners. Similarly, residential unit owners should not be subsidised by commercial owners and where expenses are properly identified as being the responsibility of residential unit owners they should be paid by residential unit owners.

s. Developers are installing air conditioning units is residential apartments in very small ceiling spaces with no means of accessing/servicing these units. When they eventually need to be replaced the only way is to remove the ceiling for access, owners do not even know where these units are located. A comprehensive maintenance manual should be provided showing these details and access doors should be mandated.

t. Unit owners do not know where the water supply stop valve is located. In the case of a water leak this basic information should be known so as to prevent water damage. The above mentioned maintenance manual should include this vital information.

Response to each of the terms of reference

Term of Reference

1. The certification regime for the building and construction industry including;

- **a. Review by certifiers of the initial building plans;**
- **b. Compliance by builders with the building's approved construction plans;**
- **c. The adequacy of regulatory mechanisms to ensure compliance with approved construction plans;**
- **d. The role of inspections and audits in the regulatory process; and**
- **e. The appropriateness of current practices for appointing certifiers, including addressing the potential for conflicts of interest.**

Response

a. The real question is what minimum design documentation should be mandated? Currently, the level of required detail is minimal and treated as a guideline. In any event no one from government appears to look at this with more than a token effort from the regulatory or design approval perspective. **There is merit in a certifier being involved from the time that plans are lodged: the caveat is the level of assurance that the certifier is truly independent of the developer/builder.**

b. It's difficult to understand why there are repeated examples of plans not being followed. It's not so difficult to understand when there are increased profits that result from compromising planned works and the nature of these works is difficult for certifiers to detect. Off the plan purchases are particularly vulnerable to changes that are not communicated to buyers but clearly benefit the developer.

c. The number of complaints is testament to the fact that current regulatory mechanisms are ineffective and inadequate. At the conclusion of the construction process there is not even an onsite check to verify compliance with approved construction plans. It should be no surprise that years later as faults become obvious the builder/developer is long gone and the owners are left to foot the repair bills. **There should be an audit process of the certification of strata developments in recognition of the higher risk factor due to the absence of the ultimate owner during the construction stage.**
d. Governments are notorious for cost-cutting and predictable for advocating self-regulation. There is simply no replacement for regular inspections and audits to truly monitor what is happening. The business world knows that, "People do what you inspect, not what you expect". Outsourcing this task to private certifiers is only part of this solution, **certifiers must also be regularly inspected and audited to uphold high standards and more importantly to know that if they are lax they will be exposed to scrutiny.**
e. The theory is certifiers are appointed by the building owner and act on behalf of the owner's interests. However, in the case of strata title the initial owner is the developer who is far more likely to be concerned about costs rather than building quality. He will select a compliant certifier, likely to be one he has dealt with on other projects. The developer also knows he's very temporary and intends to sell as quickly as possible leaving building quality concerns to be discovered years later by the new owners and the developer has already liquidated his company to avoid any obligations. So, the new owners are left to foot the bill. It is noteworthy that **the NSW government has overhauled certifier regulation to clarify a certifier's role and responsibilities along with better management and oversight through improved complaints handling and new mechanisms to facilitate proactive risk-based audits. The NSW government also accepted the need for a Practice Guide for certifiers.**

Term of Reference

2. The merits of standard contracts or statutory requirements in contracts covering build quality.

Response

There must be a relentless commitment to quality with minimum building standards that prescribe zero tolerance for defects. The warranty period should recognise that some building defects take many years before they become apparent. It is unrealistic to expect new Owners Corporations to be building experts, developers rely on this lack of knowledge to avoid responsibility.

Consideration of a contract between an Owners Corporation and the developer is necessary to recognise rectification responsibilities for defects to common property, both building and landscape. Developers, builders and other professionals have the ability to obtain this insurance for building defects, but strata owners do not.

Term of Reference

3. Industry skills accreditation and ongoing professional development including;

a. The breadth of the occupational licensing regime in the ACT; and

b. The suitability of ongoing skills education and practices within the industry.

Response

a. The recently announced builders licencing testing is a positive step in expecting higher knowledge levels from builders. **Class B and A builders should also be subject to this training program as soon as possible.** Many workers on construction sites are trade contractors who do not appear to be required to have a licence in the ACT. These gaps should be addressed.
b. High rise buildings are being constructed in the ACT in greater numbers than ever before yet basic issues such as water ingress constantly arise. This underscores the **need for a mandatory continual professional development training program for the building industry.** Technology changes can be a problem solver and continual known defects should be formally advised as unacceptable.

Term of Reference

4. Processes and practices for the identification and rectification of defects including;

a. Current mechanisms available for defect identification and redress;
b. The effectiveness of those mechanisms to ensure rectification in instances where standards have not been met;
c. The adequacy and accessibility of those mechanisms especially for individuals or body corporates; and
d. The effectiveness of efforts to address "phoenixing" – the transfer of assets from an indebted building company to a new one to avoid paying its liabilities.

Response

a. Getting defects rectified is a slow and painful process. The builder will obfuscate and delay and, in many cases, not even respond. He knows for defects of under $2000-$3,000, the system is on his side. It simply costs too much to take remedial action and he hopes that they will simply go away. In many cases they do, and the builder wins without doing a thing.
b. The builders' game is simply delay doing anything knowing that few will pursue action as they don't know what to do and how to do it. Access Canberra has no appetite to do anything other than listen and log the complaint, perhaps even do a site visit. Then do little or nothing, job done.
c. Defects remediation processes are hopelessly inadequate, accessibility is fine but satisfactory outcomes are non-existent. Body corporates cannot act effectively without an AGM or SGM vote, many owners do not want to go legal as the costs are horrendous and the outcomes are uncertain.
d. For ACT developers and builders "phoenixing" is now standard practice. It's an effective and low-cost way to avoid future obligations and it should be a national disgrace. Even more insidious is when builders use a trade name of high profile and disguise the actual project developer as "X venture no 1" where X is the well-known builder. The next project becomes "X venture no 2". They thus retain the marketing clout of a known company but quickly liquidate the project developer entity after each project is completed. Amazingly, these well-known developers and builders continue to have close links to the ACT government and then do it all over again!

Term of Reference

5. The cost effectiveness of current building compliance and defect rectification practices for industry, government, individuals or body corporates and the potential for the introduction of alternative dispute resolution mechanisms.

Response

It is always more cost-effective to get things right at the initial construction stage than face the extra costs of remedial works at a later stage. Poor initial documentation is widely recognised as a major factor causing defects.

Alternative Dispute Resolution is a necessary mechanism where it is timely, equitable and has enforceable outcomes. **The creation of a building trust fund which holds a mandated percentage of building construction costs to be drawn against for future building defects is considered a practical element to expedite remedial works.**

Term of Reference

6. The role of Access Canberra.

Response

While Access Canberra is the organisation responsible for compliance management in the ACT, there is little evidence to show positive outcomes. Conversations with staff reveal they feel stronger legislation is needed, legal conflicts they believe are too costly and resources are lacking. When they try and pursue a complaint there have been instances when their boss has simply said, forget this one it's too hard.

If Access Canberra is to fulfil its regulatory obligations, its customer service charter reproduced below needs to include more than just revenue activity. It needs to directly commit to getting regulatory outcomes.

What you can expect from us

- We will respond to your enquiries and process your transactions accurately, thoroughly and promptly
- We will serve you in a professional, courteous and friendly manner
- We will listen carefully to you to ensure we can assist you effectively
- We will act with honesty and integrity
- We will listen to and acknowledge your comments and feedback, so we can continue to improve the quality of our service
- We will respect and protect the privacy of your information
- We will make it as convenient as possible for you to contact us and to do business with the ACT Government
- We will strive to resolve your enquiry or complete your payment within one phone call
- We will aim to serve you within 12 minutes every time you use an Access Canberra Service Centres - Belconnen, Gungahlin, Tuggeranong & Woden
- We will aim to make our websites available 99% of the time
- We invite feedback and conduct regular customer satisfaction surveys

Term of Reference

7. The regulatory setting or practices in other jurisdictions that could inform consideration of any of the above.

Response

Consideration of legislative experiences in NSW, Victoria and Queensland would be helpful. **Mixed-use developments regulation is already mature in Sydney and Melbourne and it seems unnecessarily costly to re-invent the wheel for a jurisdiction as small as the ACT.** There is every reason to consider the benefits of the significant work that larger states have put into reviewing their strata title legislation and to adopt the parts for the ACT that can be utilised.

The NSW strata building bond and inspections scheme is also a useful reference for consideration as to its possible applicability to the ACT.

Term of Reference

8. Personal experiences that could inform consideration of any of the above.

Response

The ACT government in a laudable effort to improve revenue generation and maximize building density on valuable land holdings has allowed mixed use or a combination of residential apartments and commercial space to co-exist under strata title legislation. These mixed-use developments result in higher prices for valuable inner-city land releases; this is a potential revenue positive for the community.

However, the Unit Titles Management Act 2011 does not have a single reference to “Mixed-Use” so is utterly incapable of providing any legislative framework for this sector.

The government has maximized its revenues but comprehensively failed to address legislative change necessary to effectively allow for mixed use developments safeguarding the rights of both residential and commercial lot owners. An example of this is the absurdity in one mixed-use development of having just one water meter for 69 residential apartments and 10 commercial units. When one of the commercial tenants opened, the water consumption almost doubled in one month with all owners massively subsidising commercial operations. Icon water and the Chief Minister resisted any efforts to have commercial water meters installed in this case and they were content for a continuation of this bureaucratic absurdity to continue. It took almost two years and many hundreds of hours, with absolutely no help from government, to finally get commercial water meters installed.

The reality of mixed-use living has demonstrated there are major issues resulting from the failure of appropriate legislation to regulate effectively and fairly in the interests of all owners. There is a chronic lack of transparency when buying apartments “off the plan”.

As an example, a Kingston Foreshores development with mixed use, a combination of residential apartments and commercial owners, has identified the following:

1. Commercial air conditioning units connected to common power so that residential apartment owners (who already pay for their own air conditioning) also pay 83% of commercial owners’ air conditioning, being their share of the unit entitlements. The developer saved money by having one power cable instead of 10. Remedial

works costs are some $130,000. Of note is the fact that the developer sacked the original electrical engineer as a cost saving measure and then embarked on ways to reduce electrical costs.

2. In addition, air conditioning units are inexplicably (but this saved the developer money) shared between different owners of commercial units so remedial works must include providing individual air conditioning units to each unit so user pays electrical supply charges can apply.
3. Basement car parking as shown on the registered units plan has been changed unilaterally to allow commercial owners to use their car parks for industrial machinery running 24/7 and storage. The developer, apparently, offered this as an inducement to commercial buyers.
4. Two common property areas (i.e. owned by all unit owners) have been "gifted" by the developer to commercial owners as toilets, one area entirely within a commercial owner's unit, the other area shared by 2 commercial owners. No information on these two actions was ever provided or approval sought from all unit owners.
5. Body Corporate Levy Fees for the first two years were hopelessly under-estimated, fees by year 3 had increased by almost 275%. There are no obligations on developers for the accuracy of these fees and there should be.
6. Services penetrations indicating fire seals/stopping not installed in the basement thus incapable of preventing fire spreading unabated. Yet the certifier who appears not to have read the plans or inspected the works or both, approved all works?
7. The developer was liquidated, at their own request, another example of "Phoenixing" that conveniently prevents any defect obligations from being pursued. The directors of this company are well known and continue to operate in Canberra.

All the above issues arise from practical completion certification which invariably relies on self-certification. It appears that visually sighting works does not always take place and a phone call is often relied on and that works are "deemed to comply". When questionable/defective construction, at odds with the registered units plans is identified, compliant and appropriate construction claims must fail. But there is no appetite for pursuing these claims from ACT regulators or indeed enforcing almost any of the current laws.

When these clear failings were brought to the attention of Access Canberra and despite a site visit, they showed no interest in addressing any of the issues.

Term of Reference
9. Any other relevant matter.

Response
Buying a house or apartment is the largest and most complex purchase decision that a person or couple will ever make. There is a compelling need to better understand the considerable gaps between planning aspirations, construction, purchasing and the reality of day-to-day living.

The government of the day has a responsibility to regulate construction activity in such a way that there is a high confidence level as to minimum standards, and there is transparency of information for buyers to make an informed purchasing decision. Protection

from unscrupulous builders and developers and the safety, well-being and health of the public should be of paramount importance.

There is a very different risk profile from a single house construction to a multi-storied apartment development. The former is a relatively simple construction, the latter is considerably more complex with much greater risk and need for specialist expertise. It also requires more rigorous oversight from regulators as the consequences of poor-quality work are not only life-threatening but also impact viscerally on the community.

The current practice of private certifiers is hopelessly conflicted. The developer employs a certifier who is hardly going to risk his/her employment by contradicting his employer as that would mean risking employment for the next project. It is common industry knowledge that some certifiers adopt a very lax attitude because there are no recriminations and it ensures employment on the next project. Conflicts of interest must be managed and assuaged, currently there is manifestly inadequate regulatory oversight of this vital service.

The private certifier regime needs regulatory checks and balances that would lead to higher quality standards. There is a direct correlation with performance improvement when conflicts of interest are subject to an independent review. There has been inadequate audit/review of private certifiers in the ACT. This is a critical failing of regulators.

Self-regulation by the building industry may be a convenient cost-reduction option to relieve the government of work but it provides no comfort that necessary standards are being rigorously met in the absence of an independent review process. Auditing of private certifiers should be part of the regulatory process.

The following quote from a builder on certifiers is instructive:

> "The less the owners know about the process the better, what if we end
>
> up working with certifiers we don't know that could cost us the job."
>
> *Improving the ACT Building Regulatory System Consultation Report,* 2016, pg 17

The prevailing record gives no reason for confidence in the veracity of private certifiers.

The simple facts are that builders and developers have a comprehensive understanding of the building construction and sale process, the buyer has very little and is therefore highly vulnerable because of this inexperience and therefore needs consumer protections.

Buyers' awareness of the costs and ramifications of strata title purchases particularly with mixed use in the ACT are at a very low level and clouded by a lack of transparency and abject failure of legislation, (particularly with respect to mixed use developments) to protect the community.

For those buying off the plan, the developer has considerable latitude to make changes without being obligated to inform purchasers of the nature, extent and impact of these changes on already committed buyers. This lack of transparency is exploited by developers fully aware of the legal loopholes but leaves the buyer disadvantaged, vulnerable and unaware of these changes sometimes for years.

It is important to note that the developer is actually the first owner of the property when a strata titled development is built. As the first owner they appoint the certifier who therefore works for the owner. On handover to the newly formed Executive Committee (EC) of the Body Corporate, there are many responsibilities that the EC must quickly come to grips with. **It should be mandated that the first action of the EC ought to be to obtain a Building Code of Australia Audit Report from an independent certifier (not the same certifier as employed by the developer) so as to provide assurances on the buildings compliance with the Deemed-to-Satisfy (DTS) requirements of the Building Code of Australia (BCA) as well as the ACT Building Act 2004 and Building Regulation 2008. This would be a practical way to distance the new body corporate Executive Committee from the developer/builder and to also hold to account the original certifier for his professionalism.**

The government has a responsibility to the ACT community to ensure that building laws and regulations are being adhered to by all participants in the building industry.

The government receives massive revenues from land sales to developers, stamp duty from unit buyers, rapidly increasing rates and land taxes that unit owners pay and the contribution to the ACT economy from the residential building sector. **Unit owners deserve better support from the government and the absence of unit titles mixed-use legislation is an injustice that must be urgently remedied.**