



Inner South Canberra Community Council

SUBMISSION ON THE DRAFT ACT PLANNING BILL 2022

Executive Summary

The Inner South Canberra Community Council (ISCCC) is the peak body for residents groups in inner south Canberra. The ISCCC's overarching objective is to “*preserve and improve the social, cultural, economic and environmental well-being of Inner South Canberra and the Inner South Canberra community.*”

This submission examines the draft Planning Bill in the context of what inner south residents have told the ISCCC in response to our online survey, at our public forums and through their residents groups about what they value where they live and, specifically, what their views are on planning issues. The ISCCC has also benefited from access to planning expertise in our network of volunteers, such as retired planner Richard Johnston¹, who have highlighted key issues with the Planning Bill.

The ISCCC's main conclusions and recommendations are:

A. The Objects of the draft Planning Bill relating to ***climate change, resilience and sustainability*** must carry through into the rules and planning controls embedded in the Territory Plan and district strategies to ensure Canberra suburbs will be liveable under a range of climate change scenarios.

(i) Living Infrastructure provisions in its underpinning Territory Plan and district strategies must be implemented in a complementary way with the Urban Forest Bill and other relevant legislation.

B. The Planning Bill must have ***better provisions relating to community consultation***:

(i) It must include Principles of good consultation in the actual Bill, not just rely on “consultation guidelines” that the Minister “*may*” make. Consultation provisions in Planning Acts of other jurisdictions such as NSW and South Australia, and the common law Gunning Principles in the UK can provide guidance.²

(ii) The Planning Bill should include provision for Community Participation Plans, such as in NSW, to inform the public on how and when Government invites community participation.³

(iii) The Bill should retain a legislative requirement for pre-DA consultation, but with new guidelines to address any problems, and better synergy with Design Review Panels.

C. ***To ensure adequate scrutiny of the Bill***, it must be referred to the Legislative Assembly's Planning, Transport and City Services Committee in order for a public ***Inquiry*** to be undertaken.

¹ Richard Johnston was a senior executive in the ACT planning authority before his retirement. See his paper on the Planning Bill at <https://www.isccc.org.au/isccc/wp-content/uploads/THE-ACT-DRAFT-PLANNING-BILL-RJ-7-May.pdf>

² <https://adminlaw.org.uk/wp-content/uploads/18-January-2012-Sheldon.pdf>

³ https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Community+Participation+Plan/DPIE+CPP.pdf

D. To ensure **transparency about how the whole package of new legislation will work**, the ISCCC calls on planning authorities to release the draft Territory Plan and draft District Strategies for community consideration, while the Bill is being scrutinised by the Legislative Assembly, and before the Bill is finalised.

E. To engender community confidence and trust, the articulation of the **outcomes focused planning system** in the draft Bill must be accompanied by an articulation of **how achievement of the Bill's stated objects will be evaluated and reported on**:

(i) The Bill should include a requirement to report to the Minister and Legislative Assembly annually on the extent to which the new planning system is meeting its objectives.

(ii) Measurable outcomes should tie in with the ACT Government's Wellbeing Framework,⁴ and should be evidence based, for example through annual or biennial heat island mapping and tree canopy cover mapping.

(iii) There must be an evaluation of the Mr Fluffy RZ1 rezoning initiative to garner lessons for any broader application of such an approach in Canberra in future.

(iv) In determining the costs and benefits of the proposed new planning system, there must be explicit consideration of the human and financial resources that will be required to ensure compliance.

F. The **excessive discretion** provided for in the Bill, and risk to accountability, must be balanced by:

(i) The roles of Chief Planner and Director-General of the Environment, Planning and Sustainable Development Directorate to be held by different individuals, rather than by the same individual as at present.

(ii) Independent reporting by the Chief Planner direct to the Minister and Legislative Assembly, rather than through the Director-General of the Environment, Planning and Sustainable Development Directorate.

(iii) Greater involvement by the Legislative Assembly in scrutinising the planning system, including by making the Planning Strategy, Territory Plan, District Strategies and Territory Priority Projects subject to Disallowable Instruments rather than Notifiable Instruments.

(iv) Reducing reliance on Ministerial "guidelines" and regulations that have limited community input.

(v) The ACT should investigate the model of Local Planning Panels in NSW, which have three independent members with relevant expertise plus one local community representative, to consider major developments. The intention would be to provide some desirable separation of powers and improve transparency and accessibility of decision-making, to assist in rebuilding trust in the planning system.

G. As expressed by an overwhelming percentage of inner south residents surveyed, there must be provision in the Bill for **neighbours to have a say on knockdown-rebuilds** of single dwellings, so-called "exempt developments".

⁴ <https://www.act.gov.au/wellbeing>, accessed 8 June 2022.

(i) There ***must remain some key rules relating to assessment of development applications that reflect what residents have said they care about most***, namely access to sunlight and natural light, building height, zoning changes, the amount of green space on the block, and protection of the character of heritage precincts.⁵

1. Does this draft Planning Bill respond to climate change, resilience and sustainability challenges?

The ACT Government announced a Climate Emergency in 2019, stating that:

“The ACT Government is committed to doing everything it can to solve the global challenge of climate change, in the interests of securing a liveable and healthy future for our community, all species and for future generations.

The Strategy reflects the need for urgent action and work is underway to investigate opportunities for embedding climate emergency considerations across Government operations and decisions.”⁶

The Objects of the draft Planning Bill relating to climate change, resilience and sustainability must carry through into the rules and planning controls required in the Territory Plan and district strategies to ensure that Canberra suburbs will be liveable under a range of climate change scenarios.

There is a necessary interdependency between the draft Planning Bill, the draft Urban Forest Bill and the proposed new Living Infrastructure section of the Territory Plan (Variation 369), and relevant provisions in the proposed district strategies, in addressing climate change, resilience and sustainability objectives. ***In order to ensure that the objectives of these proposed new laws are achieved, it is critical that they and other relevant legislation are implemented, monitored and evaluated in a complementary way.***

2. Does the draft Planning Bill respond to what Inner South residents want?

At the commencement of the Planning Review three years ago, the ISCCC decided to seek the views of inner south residents on what they valued in their suburbs and in the inner south generally, and on a range of planning issues, to inform our advocacy to the ACT Government. We letterboxed inner south households to inform them of our online survey, and received 555 responses by early 2020.

The overwhelming majority of respondents (85%) stated that they wanted to have a say about what is built next door or nearby. They made particular reference to their ongoing access to sunlight and natural light, proposed building height, proposed zoning changes, the amount of green space retained on the block, and protection of the character of heritage precincts.

Knockdown-rebuilds of single dwellings are now generally classified as “exempt developments”, not requiring a development application, even though they may seriously erode neighbourhood character by taking up most of the block and having almost no green space.

The Planning Bill does not, but should, deliver a right for neighbours to have a say on such “exempt developments.”

⁵ ISCCC online survey. <https://www.isccc.org.au/final-report-on-isccc-online-community-survey-2019-20>

⁶ <https://www.environment.act.gov.au/cc/act-climate-change-strategy/climate-emergency-declaration>

The ISCCC's online survey found that residents of Canberra's inner south value most highly the amenity provided by its urban forest and green open spaces.

- Streetscape (street trees, vegetation, gardens, width of streets) - 70.63%
- Open spaces (parks, ovals and bushland for recreation) – 69.01%⁷

The draft Urban Forest Bill and the Living Infrastructure provisions in the Territory Plan (Variation 369) are intended to promote, and ensure protection of, canopy trees on public and private land, and to ensure there is adequate plantable area on residential blocks.

As noted under section 1 above, it is critical that Living Infrastructure provisions in the Planning Bill's underpinning Territory Plan and district strategies are implemented in a complementary way with the Urban Forest Bill and other relevant legislation.

3. Does the draft Planning Bill provide for Good Community Consultation?

An examination of the Planning Acts of other jurisdictions such as New South Wales and South Australia indicates that they list specific principles of good consultation. The draft ACT Planning Bill only has a heading for “Principles of good consultation” and says that **the Minister “may make guidelines”** about good consultation. In other words, good consultation can be rendered optional. The ISCCC and other stakeholders have raised concerns about this omission already with the Planning Authority and the Authority has undertaken to include principles of good consultation in the Planning Bill.

The draft Bill also removes, inappropriately, the current requirement for Pre-DA consultation on more significant developments, arguing that the current pre-DA process is not working effectively. Is this a reason to abandon pre-DA consultation or an opportunity to fix identified problems?

The ISCCC considers that the draft Planning Bill should:

- ***Set out Principles of good consultation in the Bill itself, drawing on consultation provisions in Planning Acts of other jurisdictions such as NSW and South Australia, and the common law Gunning Principles in the UK (eg. early consultation, sufficient reasons must be put forward for proposal, adequate time for consideration and response, result of consultation taken into account by decision maker conscientiously⁸)***
- ***Include provision for Community Participation Plans, such as in NSW, to inform the public on how and when Government invites community participation.⁹***
- ***Retain a legislative requirement for pre-DA consultation, but with new guidelines to address any problems, and better synergy with Design Review Panels.***

4. Will the proposed outcomes focused planning system be effective and deliver trust, clarity and certainty?

The Planning Bill proposes a major shift from a rules-based to an outcomes-focused planning system. In theory, this sounds like a good idea, but as presented in the Bill, it does not engender **confidence**,

⁷ <https://www.isccc.org.au/isccc/wp-content/uploads/FINAL-Report-ISCCC-Survey-12May2020.pdf>, accessed 30 May 2022

⁸ <https://adminlaw.org.uk/wp-content/uploads/18-January-2012-Sheldon.pdf>

⁹ https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Community+Participation+Plan/DPIE+CPP.pdf

certainty and clarity, nor **trust and transparency**.¹⁰ There is no clarity yet about what those outcomes are, the principles and measures needed to deliver the outcomes, how they will be evaluated and reported on, and to whom, to ensure they are meeting the Bill's objectives. We understand the detail will be in the Territory Plan, and the District Strategies, but it is not satisfactory that they will be released for community consultation only later in the year, perhaps after the Bill is finalised.

The ISCCC and other stakeholders have advocated for the Legislative Assembly's Planning, Transport and City Services Committee to scrutinise the Planning Bill and the Committee's Chair, Jo Clay, announced in the Assembly on 3 June that the Committee stands ready to scrutinise the Planning Bill carefully.

To ensure transparency about how the whole package of new legislation will work, the ISCCC calls on planning authorities to release the draft Territory Plan and draft District Strategies for community consideration while the Bill is being scrutinised by the Legislative Assembly, and before the Bill is finalised.

We are concerned that the shift to an outcomes focus is occurring in the context of a planning authority that, for some years, has not demonstrated a track record of evaluating relevant initiatives. For example, we are not aware of any evaluation of the planning outcomes of the Mr Fluffy initiative, which rezoned Mr Fluffy blocks 700 sq m and above in RZ1 zones, to allow dual occupancies. Such an evaluation would have been a perfect opportunity to learn from a program that cost the ACT Budget several hundred million dollars:

- What proportion of the eligible blocks actually had dual occupancies built on them?
- Was adequate plantable area left on those blocks to enable the planting of canopy trees?
- Did the redevelopments comply with plot ratio, solar access and other requirements, and
- Were the redevelopments in character with their neighbourhoods?

There must be an evaluation of the Mr Fluffy RZ1 rezoning initiative to garner lessons for any broader application of such an approach in Canberra in future.

The proposed outcomes-focussed approach to planning is not new in other jurisdictions. The Queensland experience with this approach has not been positive. A report on the Queensland performance based planning system by Jennifer Roughen found "a lack of certainty, inconsistent decision making and (at least perceived) lack of transparency." She suggested re-evaluation of whether all planning aspects deserve the same level of flexibility or whether some aspects could be treated with more certainty, and certain standards could be treated as requirements unless there are special circumstances.¹¹

The experience with an outcomes based approach in another sector, the aged care sector, also highlights possible unintended consequences in the planning sphere. In his presentation to the ISCCC public forum on 10 May 2022, Tim Field said that the shift to an outcomes focus in the residential aged care sector created the incentive to cut costs, for example by reducing the number of nursing hours, and led ultimately to substandard care. The Royal Commission into Aged Care Quality and

¹⁰ The planning authority ran four major 'stakeholder' meetings in 2021, the results of which are summarised in the AC *Planning Review and Reform Working Series Listening report 17 December 2021*. It identified three 'key feedback themes', namely the need for: 1. Confidence, certainty and clarity; 2. Trust and transparency in the planning system; and 3. Good consultation

¹¹ Jennifer Roughan, *Performance Based Planning in Queensland*, 2016, page ii.

Safety recommended bringing back measurable input controls such as 24 hour nursing care. The lesson is loud and clear. Outcome focussed principles need to be underpinned with measurable controls.¹²

On the overarching, all-important issue of compliance, the ACT Government must make provision for human and financial resources to ensure effective implementation and compliance with the new planning system.

In summary, to engender community confidence and trust, the articulation of the outcomes focused planning system in the draft Bill must be accompanied by an articulation of how achievement of the Bill's stated objects will be evaluated and reported on.

The Bill should include a requirement to report annually to the Minister and Legislative Assembly on the extent to which the new planning system is meeting its objectives.

Measurable outcomes should tie in with the ACT Government's Wellbeing Framework¹³, and should be evidence based, for example through annual or biennial heat island mapping and tree canopy cover mapping.

In determining the costs and benefits of the proposed new planning system, there must be explicit consideration of the human and financial resources that will be required to ensure compliance.

5. Is there appropriate governance?

At the commencement of the Planning Review, the ISCCC and other stakeholders were told that governance was “off the table” in the Review. In our view, the shift of the planning system to an outcomes focused system, which gives much more discretion to the Planning Authority to make decisions on what meets desired outcomes, puts governance “back on the table.”

The draft Planning Bill takes call-in powers away from the Minister and gives them to the Chief Planner. The draft Bill also says that the Chief Planner will be the decision-maker with respect to Territory Priority Projects, although the Minister will be responsible for making the initial declaration of such projects.

Unlike other jurisdictions like New South Wales and South Australia, which have two houses of parliament, an independent State Planning Commission, local councils and regional/local planning boards or panels, the ACT has a single chamber parliament and no local government. In addition, the Territory Planning Authority has a wide range of powers vested in one individual - the chief planner. Furthermore, the Chief Planner occupies the role of the Director-General in the Planning Directorate. This dual role presents a real risk of a perceived conflict of interest. It is also not clear in the Planning Bill to whom the Chief Planner is accountable.

The roles of Chief Planner and Director-General of the Environment, Planning and Sustainable Development Directorate must be held by different individuals, rather than by the same individual as at present.

There must be independent reporting by the Chief Planner direct to the Minister and Legislative Assembly, rather than through the Director-General of the Environment, Planning and Sustainable Development Directorate.

¹² Tim Field, see presentation attached to Summary Record of ISCCC Public Forum, 10 May 2022, at www.isccc.org.au

¹³ <https://www.act.gov.au/wellbeing>, accessed 8 June 2022.

There needs to be greater involvement by the Legislative Assembly in scrutinising the planning system, including by making the Planning Strategy, Territory Plan, District Strategies and Territory Priority Projects subject to Disallowable Instruments rather than Notifiable Instruments.

There should be reduced reliance on Ministerial “guidelines” and regulations with limited community input.

6. Development Assessment and Consent

As noted under section 4 above, the shift from a rules based to an outcomes based approach brings many potential adverse consequences at the system level, especially in the context of a lack of commitment to the evaluation of relevant programs, as exemplified by the loosening of RZ1 planning rules to allow dual occupancies on Mr Fluffy blocks without any evaluation of the outcome.

The proposed shift in planning law placing more emphasis on discretion in assessing development applications presents risks. As retired NSW Auditor-General Tony Harris has stated:

“The administration of discretionary government programs, including grant programs, shows that there is a strong correlation between discretion and corruption. By its nature, discretion involves decision making that is not based on rules or binding legislated guidelines. It follows that discretionary decisions are beyond effective scrutiny because there are no clear criteria against which they can be judged.”¹⁴

Mr Harris has also highlighted that:

“Increasing the discretionary powers of government officials weakens the ability of communities to help determine the binding characteristics of different parts of the developed environment. For example, there are important living advantages (light, wind effects and other characteristics) that derive from strict limits to the heights of city buildings. Washington, Paris, Madrid, London and many other cities have such restrictions in broad areas of their cities. Allowing discretionary decisions on such fundamental issues requires the community to agitate on every proposed development to ensure that these basic characteristics are not infringed.”

In line with the government's own Climate Change Emergency declaration, every DA must be examined with respect to the adequacy of the materials used in the building and its surrounds, plus the heat likely to be created by the occupants by way of air conditioners, and the amount of green space on the block to determine the dwelling's capacity to provide comfortable shelter under forecast climate change scenarios.

There must remain some key rules relating to assessment of development applications that reflect what residents have said they care about most, namely access to sunlight and natural light, building height, zoning changes, the amount of green space on the block, and protection of the character of heritage precincts,¹⁵ and also to ensure the developments do not contribute to the heat island effect.

In addition to the issue of discretion, several matters that are currently dealt with under the Territory Plan, will, according to the draft material, be covered by regulation in the draft Planning Bill. No

¹⁴ Comments provided to the ISCCC by Tony Harris

¹⁵ ISCCC online survey. <https://www.isccc.org.au/final-report-on-isccc-online-community-survey-2019-20>

public consultation will be required. This includes “prohibited” and “exempt” development. In addition, the draft Bill introduces Environmental Significance Opinions, which will not require public notification.

Under the draft Bill, the decision-maker can give development approval contrary to advice from relevant entities such as the Heritage Council and Conservator, if “satisfied that acting contrary to the advice will significantly improve the planning outcome to be achieved” (s. 185).

In relation to matters protected by the Commonwealth, the Planning Bill states that “if the Commonwealth Minister does not give the decision-maker advice about the proposed decision within 10 working days...the decision-maker may approve the application.” This 10 business day period seems manifestly inadequate. Is such a deadline reflected in relevant Commonwealth legislation? If not, what justification is given for such a tight timeframe?

The issues raised reinforce earlier concerns about governance. For example, how would key relevant entities such as the Heritage Council and Conservator for Trees, both positions within the Planning Directorate, be able to provide frank and fearless advice to the Chief Planner and Directorate CEO, were both roles to be occupied by the one individual?

The ACT should investigate the model of Local Planning Panels in NSW, which have three independent members with relevant expertise plus one local community representative, to consider major developments. The intention would be to provide some desirable separation of powers and improve transparency and accessibility of decision-making, to assist in rebuilding trust in the planning system.

7. Proposed changes in the draft Planning Bill which appear to hold merit

- The draft Bill indicates that information about development applications will be kept on the planning agency website indefinitely, and that associated documents will be available online for 5 years. In the interests of transparency, this is a welcome and long overdue move. However, will this level of transparency apply to exempt developments?
- There is a level of support for the proposed district strategies, which would provide a more nuanced approach to planning in Canberra, rather than a one size fits all approach. However, this is dependent on meaningful community participation in the development of the individual district strategies.

Note: The ISCCC produced and circulated an Inner South District Planning Strategy, based on community feedback, in order to contribute to the ACT Government’s review of the ACT’s Planning system. See: <https://www.isccc.org.au/isccc/wp-content/uploads/Inner-South-Canberra-District-Planning-Strategy-ISCCC-2021.pdf>

The ISCCC would be happy to elaborate on the issues raised in this submission.

Yours faithfully,



Marea Fatseas

Chair

15 June 2022