

Submission to the ACT Planning System Review and Reform Project

Planning Bill and Planning
Regulations

Prepared by:
Canberra Town Planning

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Prepared by:

Canberra Town Planning

Pieter van der Walt	Michael Lee
Nichelle Jackson	Alexzandra Hull
Andrew Connor	Audrey Rahimi
Hamed Vaziri Pashkam	Jane Stakelum
Ingrid Shelton	Jacinta Gibson

Phone: (02) 6262 5091

admin@canberratownplanning.com.au

canberratownplanning.com.au

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Executive Summary

Canberra Town Planning appreciate the opportunity to provide comments on the ACT Planning Review and to participate in consultation activities associated with the review.

Canberra Town Planning is a town planning consultancy based in Braddon, ACT. We are a team of 13 professionals and support staff that collectively hold 90 years' experience in town planning, particularly across the ACT planning system. Members of our team also come from other jurisdictions interstate and overseas, bringing an understanding of the operation of other planning systems.

The majority of our work involves strategic planning advice and statutory applications, and a significant proportion of our engagements are for proposals on Territory land. Our team interacts with ACT planning legislation on a daily basis in a number of development contexts and we have extensive experience in providing planning advice on, and applying, the current *Planning and Development Act 2007* and *Planning and Development Regulation 2008*, as well as acting as an expert witness through the ACT Civil and Administrative Tribunal. Through this experience, we believe we are well placed to provide comment on the form and application of the draft legislation.

As town planners, the proposed Bill has the potential to greatly impact the work we do and the way in which we provide advice to our clients. Our role and our commitment to achieving good planning outcomes for the ACT requires us to appreciate the draft legislation and form an understanding of the potential impacts of these changes on our clients' projects, both current and forthcoming.

Since the release of the draft Bill the Canberra Town Planning team engaged closely with the materials, and have collectively spent over 180 hours reviewing the draft legislation in preparing this submission.

We commend the Environment, Planning and Sustainable Development Directorate for their extensive work on the ACT Planning Reform towards delivering an outcomes-focussed planning system, and we look forward to future consultation opportunities on changes to the Territory Plan.

In this submission, we provide comments and seek clarifications on proposed changes under the Planning Bill; and further outline opportunities for further consideration as part of the ACT Planning Review.

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Comments on Planning Bill

With the intention of reforming planning in the ACT, the Environment, Planning and Sustainable Development Directorate have undertaken a two-year review of the planning system. This review culminated in the identification of the complex and onerous nature of current statutory frameworks. The *Planning Bill 2022* and related subordinate legislation have been prepared to support an accessible system which delivers improved development outcomes. This draft legislation has been informed by recent planning reforms in other Australian jurisdictions, stakeholder engagement and policy considerations.

For the purposes of the *Bill*, policy considerations are founded upon five key principles — easy to use; certainty; flexibility; transparency; and outcomes-focussed.

Easy to use refers to user experience across the planning system as a whole; reducing current intricacy in relation to online platforms, statutory processes and legislative controls.

Systems should be suitable for the use of individuals, as well as professionals.

Certainty pertains to assurance in relation to both strategic and statutory matters. This includes clearer information as to desired outcomes of future development in different areas, as well as assurance relating to decision-making considerations and process timeframes.

Flexibility concerns the encouragement of innovative planning and design solutions. The planning system should provide reasonable, yet less proscriptive, parameters.

Being necessary to build trust and confidence, ***transparency*** relates to improves access to information throughout the planning process.

An ***outcomes-focussed*** planning system considers substantive matters which must be addressed to achieve good planning and development results, without specifying in detail how that will be achieved. Development should be consistent with the context of the site.

In the context of these principles, Canberra Town Planning provide a number of constructive suggestions to proposed legislation, as well as further opportunities for consideration in the Planning Review process.

2.1 Commendations

Summarily, the following matters are considered to espouse the key principles of the ACT Planning Review and Reform project:

- Logical structure of provisions throughout the draft legislation.

The coherent and consistent composition of the *Planning Bill 2022*, *Planning (General) Regulation 2022*, and *Planning (Exempt Development) Regulation 2022* promote ease of use and certainty.

- Section 7 – Object of Act.

The identification of important matters for achieving the object of the *Planning Bill 2022* advances the principles of easy to use, certainty and flexibility.

Canberra Town Planning celebrate the acknowledgement and recognition of the significance of the knowledge, culture and tradition of Indigenous peoples.

- Section 109 – Preparing draft EIS; and Section 115 – Revision of draft EIS.

Under the *Planning Bill 2022*, the territory planning authority is authorised to extend the prescribed period for submission of a draft or revised EIS. The prescribed period for each of these stages of the EIS process may only be extended once. These provisions reinforce the principles of ease of use and certainty.

- Chapter 10 – Leases and licences.

The substance and structure of the leases and licences provisions contained in the *Planning Bill 2022* are considered to support the principles of clarity and transparency.

- Section 1.72 – Street art on buildings or structures.

Murals on buildings or other structures improves the vibrancy and visual amenity of the Territory. The inclusion of street art, within set parameters, in the *Planning (Exempt Development) Regulation 2022* reduces the regulatory burden on proponents, thereby supporting the principles of easy-to-use and outcomes-focussed.

2.2 Opportunities

Canberra Town Planning applaud the efforts of the Environment, Planning and Sustainable Development Directorate to progress meaningful planning reform in the ACT. As planning professionals, we recognise the opportunity to further promote the key principles of the *Planning Bill 2022* in the following provisions:

- Object of the Act
- Division 7.5.7 – Pre-decision advice.
- Section 181 – Considerations when deciding development applications.
- Chapter 15 – Notification and review of decisions; Schedule 6 – Reviewable decisions, eligible entities and interested entities; and Schedule 7 – Matters exempt from third party ACAT review.
- Section 93 – Functions of design review panel.
- Part 2.2 – Planning principles.

Additional opportunity to foster the key principles of the ACT Planning Review also exists within Section 1.103 of the draft *Planning (Exempt Development) Regulation 2022*.

These matters form the basis of discussion in **Section 3** of this submission.

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Opportunities

3.1 *Planning Bill 2022*

3.1.1 Object of the Act

Section 7 Object of the Act seeks to create an effective, efficient, accessible and enabling planning system that is (in part) ‘outcomes focused’. It is understood that a key driver of the ‘outcomes focused’ planning system appears to be a move away from quantitative planning controls to qualitative planning consideration and the prospect of more flexibility in the assessment of Development Applications. This is a significant shift in the planning system which is likely to substantially increase the scrutiny of Development Applications, assessment processes and decision making. It is likely to have a range of implications for Proponents, the community and the authority and may result in potential submissions for review of decisions in the ACT Civil and Administrative Tribunal (ACAT) where interested parties do not agree with the initial assessments, unless the ACAT remit over planning decisions is also reviewed.

3.1.2 Division 7.5.7 – Pre-decision advice

Understanding the authority’s intent to improve transparency, the proposal to publish pre-decision advice may create complexity for approvals from a proponents’ perspective.

There may be a perception that where pre-decision advice is issued on a proposal that the proposal is ‘fundamentally flawed’, particularly in relation to design matters. This may not be the case, however if a proponent chooses not to address the pre-decision advice a proposal may be perceived as being inadequate. Indeed, even if a proponent does address the advice this perception could persist.

It is recommended where this stage is pursued as part of the new planning system, that the authority exercise caution in the wording of items in such advice as it may lead to an increased number of reviews of decision in ACAT. Further, we suggest that a proponent should be first notified that pre-decision advice is likely to be issued for their proposal.

3.2 Pre-DA Community Consultation

Community consultation within the Town Planning field is a common and vital component to ensure that we, as planners, meet the needs and expectations of the community and use their feedback and opinions in developing cities for tomorrow. The planning principles should include community consultation in order to ensure we meet the planning principles for the ACT. This is commonly an approach in the preparation of planning proposals in Australia and the western world.

Further information regarding the guidelines for consultation and what they would entail is appreciated, in order to make an informed submission with regards to the proposed changes to Pre-DA Community Consultation. It is noted that every development application is different and the nature of any proposal will dictate how the public will perceive and respond to an application.

In our experience, more significant development proposals such as a commercial or high density development within an area that has existing residents and community interest tends to attract more public interest than smaller developments (or proposals in industrial areas) and this is expected given the increased potential for impact from such larger proposals. However, a single approach to consultation is needed that is consistent across District Plans, supported by consultation guidelines that in turn meets the principles of good consultation.

Section 10 of the proposed Planning Bill indicates the following principles of good consultation:

- 1) *The Minister may make guidelines about principles of good consultation and how the principles are to be implemented.*
- 2) *A person required to carry out consultation under this Act must take the guidelines into consideration when carrying out the consultation.*
- 3) *A guideline is a notifiable instrument.*

Without mandatory Pre-DA Community Consultation, we anticipate that more applications are likely to attract third party appeals where there may be a perception of a lack of community engagement on proposals. In order to circumvent matters only being raised during public notification and assessment of development applications, we recommend that Pre-DA consultation is undertaken prior to the lodgement of a Development Application. We re-iterate that, unless the grounds for review of a decision is considered as well as the ACAT's role in reviewing the decision, there is a strong likelihood that a subjective assessment that has not been scrutinised in consultation with the community may result in more ACAT reviews and more costly and less aspirational outcomes.

Again, we reiterate the new guideline retains key parts of the ACT Government Pre-DA Community Consultation Guidelines 2020 as currently in force to ensure that consultation remains an important and central tool for good planning outcomes.

Suggestions for Notifiable Instrument – Guidelines for Consultation

We seek clarification of what (2) will constitute and what developments will require consultation and the form of proposed guidelines. We suggest that the guidelines focus on the nature of the consultation, the type of communication and the results thereof.

Our experience of implementing community consultation during the COVID-19 pandemic has yielded positive results in terms of public attendance and engagement through digital platforms. This has enabled our campaigns to achieve a broader demographic reach, increase the accessibility and reduce the time and cost associated with attending face-to-face consultation events, and seek greater feedback on proposals.

Whilst face-to-face events remain important in consultation processes, the ability to offer mixed digital and face-to-face events we believe is an improvement in opportunities for public engagement on proposals. We demonstrated that it is easier than ever to undertake meaningful community consultation by utilising a mix of platforms and this approach can attract broad participation and benefit to projects.

Based on our experience developing and implementing community consultation campaigns for projects, we make the following suggestions for the new guidelines:

- Key stakeholders in proposals in relation to development sites, are identified and engaged
- Significant development, Environmental Impact Statements, Estate Development Plans, priority projects and developments that are required to go to the National Capital Design Review Panel are expected to undertake pre-application community consultation
- The public are engaged through relevant community councils, residents associations and business associations
- Letterbox drops appear to be less successful than other forms of disseminating information. Websites and adverts on the government websites, resident associations and social media can relay more information than a letter
- Proponents that genuinely engage with the community in a consultative manner, on a voluntary basis, should be commended for this initiative and be provided some benefit in the DA assessment process (e.g. time consideration in assessment) – this is to encourage this behaviour more broadly
- Further to this, as is undertaken by the planning authority during the public notification period of a development application, a proponent can place a sign on their site that can provide high level information of the proposed development and provide links / QR Codes to access additional information on a proposal. In this way interaction between proponent and community could be encouraged.

Section 181 – Considerations when deciding development applications

We note the changes to the considerations the Territory planning authority will make in determining a development application. Provided below is a comparison of the current considerations under section 120 of the Planning and Development Act 2007, against the proposed considerations under section 181 of the *Planning Bill 2022*.

Section 120 *Planning & Development Act 2007*

In deciding a development application for a development proposal in the merit track, the decision-maker must consider the following:

- (a) the objectives for the zone in which the development is proposed to take place;
- (b) the suitability of the land where the development is proposed to take place for a development of the kind proposed;
- (c) if an environmental significance opinion is in force for the development proposal—the environmental significance opinion;

Note Environmental significance opinion—see s 138AA. Environmental significance opinions expire 18 months after they are notified (see s 138AD).

- (d) each representation received by the authority in relation to the application that has not been withdrawn;
- (e) if the design review panel provided the proponent with design advice about the development proposal—
 - (i) the design advice; and
 - (ii) the proponent's response to the design advice;

(f) if an entity gave advice on the application in accordance with section 149 (Requirement to give advice in relation to development applications)—the entity's advice;

Note Advice on an application is given in accordance with section 149 if the advice is given by an entity not later than 15 working days (or shorter prescribed period) after the day the application is given to the entity. If the entity gives no response, the entity is taken to have given advice that supported the application (see s 150).

- (g) if the proposed development relates to land that is public land—the public land management plan for the land;
- (h) the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.

Section 181 *Planning Bill 2022*

In deciding a development application under section 180, the decision-maker must consider the following:

- (a) any applicable desired outcomes in the territory plan;
- (b) if the territory planning authority gave pre-decision advice in relation to the application—the pre-decision advice and any response by the applicant to that advice;
- (c) if the site of the proposed development adjoins another zone—whether the development proposal achieves an appropriate transition between the zones;
- (d) the suitability of the proposed development in the context of the site and the site surrounds, including the permissible uses for those areas;
- (e) the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts;
- (f) the interaction of the proposed development with any other adjoining or adjacent development proposals for which a development application has been submitted or development approval given;
- (g) any representation about the development application received by the territory planning authority and not withdrawn;
- (h) any advice given by an entity to which the development application was referred under section 166 (When authority must refer development application) or section 167 (Further entity referral—more information or amended application);
- (i) any environmental significance opinion or conditional environmental significance opinion in relation to the development proposal;
- (j) if the proposed development relates to land that is public land—the public land management plan for the land;
- (k) if the design review panel gave advice on the development proposal—the panel's advice and the applicant's response to the panel's advice;
- (l) for a development proposal in relation to which an EIS is required—
 - (i) the finalised EIS; and
 - (ii) the offsets policy; and
 - (iii) the conclusions of any inquiry about an EIS for the proposed development under division 6.3.9 (EIS inquiry panels); and
 - (iv) the EIS assessment report.

Highlighted in the table above are some new considerations under the Bill which we consider may have the potential to significantly impact on the assessment of development proposals and development outcomes, and in particular subparts c) d) and f).

Understanding the intention to move towards an outcomes-focussed planning system, we agree that a greater consideration of contextual matters is necessary however this may have the effect of limiting opportunities for redevelopment in existing areas on sites that have the greatest potential to address key planning objectives. Forcing consideration and alignment to surround (permissible) use – we assume as per surrounding leases and zoning provisions have the result to “look backwards”.

This is very relevant when considering that permissible use rights (including uses permitted in Leases) may be for single uses or and often dates back over 40 years. If the consideration is not to take into account existing use rights in surrounding leases but uses that may be considered in the zone, the Bill should clarify the requirement.

Given the ACT government target for 70% infill development, we believe it is important to ensure that redevelopment within our existing urban areas can be facilitated through the planning system where such development is appropriate to a zone and site context. It is our strong hope that new strategic planning tools will assist us to progress these types of projects that demonstrate achievement of strategic planning objectives in areas with changing and emerging neighbourhood characters.

3.2.1 Chapter 15 – Notification and review of decisions

Opportunities for review of administrative decisions are an important part of the planning system. The principle of questioning planning consent decisions by either proponents and interested parties that are materially affected by the decisions is not only a common feature of planning and land development administration systems and processes but may be argued is a right.

It is important that the opportunity for review is cognitive of the rights and interests of all affected parties and balance their respective positions for both progressing a proposal and manage adverse impacts sprouting from the decision.

The process should guard against vexatious and spurious requests for review of a decision where the aim is to cause grief, increase cost and time losses and effectively drive an interest that is not related to facilitating the object of the Plan, being good planning outcomes and an outcomes-focussed development solution.

If this is not carefully controlled, then there is a real risk that proponents may not engage with the outcomes-focussed aspiration of the Plan but simply design to a lower common denominator that will reduce project risk and secure planning approval.

Should this happen, the Canberra community will lose the benefits that may sprout from the intent of the new planning system. The provisions in the Act pertaining the grounds for making decisions in an outcomes-focussed system is also very broad and, unless some consideration is given as to the grounds for which a third party may seek review of a decision, there is a real risk that many more requests for review may be submitted to the Tribunal. In order to support a subjective, outcomes-focussed planning system the scope for seeking review of a decisions should be limited and fenced to interested parties that are materially affected by the decision.

We note that the Bill provides opportunities for review of planning decisions by both applications of proposals and third parties (except for specific exemptions as documented). The timeframe for making such an application is also specified. These outcomes are commended to increase certainty in the administration of this part of the decision process.

We urge the consideration of the ACAT Act and powers of the Tribunal in review of decisions in conjunction with the planning legislation insofar as it pertains to the administering of an outcomes-focussed planning system. Without this consideration, there is a real likelihood that the review process can increase uncertainty and time delays for gaining planning consent.

3.2.2 Section 93 – Functions of design review panel

The Planning Bill proposes to retain the National Capital Design Review Panel (NCDRP) but does not appear to make changes to the manner in which the Panel operates. We consider that expanding the types of proposals that are addressed by the NCDRP would assist in delivering outcomes-focussed strategic planning outcomes.

The NCDRP could provide valuable design advice on Territory Plan variations, Estate Development Plans, District Plans and precinct level developments.

Further, under an outcomes-focussed system we consider that the NCDRP should be empowered to have a greater influence in planning outcomes and where support for an outcomes-focussed initiative is supported, the power to require the assessment to accept this as a desirable or key feature of the proposal for assessment.

3.2.3 Part 2.2 – Planning Principles

We welcome the introduction of the eight principles of good planning as underpinning an outcomes-focussed planning system, and look forward to the opportunity to progress proposals that demonstrate achievement of these principles as being the types of development we want to have for the ACT.

3.3 *Planning (Exempt Development) Regulation 2022*

On review of the *Planning (Exempt Development) Regulation 2022*, this represents a missed opportunity to expand the categories for exempt development as proposed under Part 1.4 of the draft Regulation. Our experience in determining whether proposals are likely to be assessable development and therefore require development approval reveals a lack of clarity in the exempt development categories, particularly for larger projects. This lack of clarity often necessitates submission of a development application for minor works. Particularly where such minor works relate to amendments to development applications, this involves both cost and time delays on projects that are underway, as well as requiring additional planning authority resources.

In our view, exempt development was a good area of opportunity to review. Making the exemption process make accessible and decipherable should be a key aim for the Authority so the general public have a greater understanding of whether planning approvals are required for any works no matter how small.

3.2.1 Section 1.103 – Single dwellings where declaration authorises minor non-compliance

The *Planning and Development Regulation 2008* has combined 1.100A Otherwise non-compliant single dwelling – old residential land and 1.100AB Otherwise non-compliant single dwellings – new residential land into one section — 1.103 Single Dwelling where declaration authorises minor non-compliance.

Section 1.103 new provisions shown below :

1)a) iii) beyond any solar building envelope that applies, under the defined provision, to the block where the dwelling or alteration is being built.

b) for an encroachment under paragraph a) iii) – the encroachment would not cause shadowing to any habitable room or principal open space of another block;

The threshold for exemption based on the definition above seems to be high, given the specified performance standards for solar access to daytime living areas and principal private open spaces, and this provision could have the effect of significantly increasing the number of Development Applications for single dwelling housing proposals.

4

Conclusion

Canberra Town Planning again thank the Environment, Planning and Sustainable Development Directorate for their work on the *Planning Bill 2022* and we look forward to a better, more efficient, outcomes-focussed planning system.

Through our review of the Bill, we consider the changes proposed will improve transparency and the administration of planning in the Territory and we hope that this will lead to increased efficiencies in the planning process. However, we see that the proposed changes will likely bring some complexities to planning processes that confirm the need for proponents to seek good planning advice from planning professionals to inform their projects.

We welcome the introduction of good planning principles through the expansion of the object of the new Act which we see as embedding the importance of planning professionals as part of the development process.

Finally, we trust that our submission on the ACT Planning Review provides insight on the issues faced by planning professionals working in the ACT planning system and that our suggestions are of value to this process.


