



Mr Andrew Barr, MLA  
Minister for Planning  
GPO Box 1020  
Canberra ACT 2601

31 March 2010

By email

Dear Minister

**Suggested amendments to review rights and other provisions of the *Planning and Development Act 2007 (ACT)***

I am writing to you to recommend amendments to the *Planning and Development Act 2007 (ACT)* (the Planning Act) to expand standing to seek merits review of decisions relating to the approval of development applications.

The EDO is of the view that a recent case involving the proposed redevelopment of the Latham Group Centre highlights the need for reform of the current review provisions in the Planning Act.

As you will be aware, a long-term Latham resident, Mr Chris Watson, applied to the ACT Civil and Administrative Tribunal (ACAT) for merits review of an ACTPLA decision to approve a development proposal relating to a proposed redevelopment of the Latham Group Centre (DA No 200914395, block 2, section 31 Latham).

Even though Mr Watson had made an objection to the original development application, was a regular user of the local centre and has been a long term advocate for preserving the community focus of the local Latham centre, ACAT recently decided that this was not sufficient to give Mr Watson standing to seek review of the decision (see *Watson v ACT Planning and Land Authority & Ors (Administrative Review)* (No. 2) 12 March 2010).

Merits review of government decisions is an integral part of good accountable decision-making. Restrictive standing provisions operate to limit the accountability of government decision-making.

The EDO is of the view that amendments are required to the Planning Act to ensure that members of the community with legitimate concerns about development that affect them can have access to this form of review.

Standing rules exist to prevent vexatious and meddlesome claims being brought before courts, a valid concern to ensure that development proponents are not unnecessarily brought before courts and tribunals. However, the EDO is of the view that these concerns are already sufficiently addressed by existing provisions in the *ACT Civil and Administrative Tribunal Act 2008*, which enable the Tribunal to dismiss vexatious applications (s.32).

As you will be aware, standing to seek merits review of decisions to approve (or refuse) a development proposal in the merit and impact tracks is available to certain people under the Planning Act (s.408 and Schedule 1, items 3-6). For third parties to have standing to seek review of a decision they must have made a representation on the original development application **and** suffer 'material detriment' as a result of the approval decision.

The EDO is of the view that the current standing requirements are unnecessarily restrictive and should be amended to allow people who have made a representation **or** have a 'special interest' in the matter to seek review of such planning decisions.

Planning laws in other Australian states and territories enable a person who has made a submission or representation on a development application to seek merits review of the decision on this application without having to show an additional special interest (see, s305 *Sustainable Planning Act 2009* (QLD) – any person who made a valid submission on an impact assessable development can seek merits review of a decision, ss98(1) and 81(3) *Environmental Planning and Assessment Act 1979* (NSW) – any person who made a valid objection to designated development can seek merits review, unless the decision was made by the Planning and Assessment Commission, s.38 *Development Act 1993* (SA) – any person who objected to a category 3 development can seek merits review, ss57(5) and 61(5) *Land Use Planning and Approvals Act 1993* (Tas) – any person who has made a valid representation may appeal against the grant of a permit, ss 49 and 117 *Planning Act* (NT) – any person who has made a valid submission may appeal against a development consent). The amendments recommended above would ensure that the ACT is consistent with other jurisdictions.

The experience in NSW and other jurisdictions has shown that open standing does not open the floodgates to litigation. Under s123 of the NSW Planning legislation (the EPAA) 'any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach'. The former Chief Judge of the NSW Land and Environment Court, Justice Jerrold Cripps, noted in a dispute resolution seminar in Brisbane in 1990:

*"It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited."*

The Hon Justice Peter McClellan (Chief Judge at Common Law of the Supreme Court of NSW) in a speech to the Commonwealth Law Conference in 2005 on Access to Justice in Environmental Law also analysed the effect of open standing in the NSW planning legislation and dismissed the floodgates argument. His Honour went further and stated that

*'the opportunity for a plaintiff to bring proceedings without having to establish standing has meant that it has been possible to use the plaintiffs, somewhat limited, resources to debate matters relating to the operation of the relevant planning laws*

*rather than debating issues of standing. Many of these cases have significantly enhanced the quality of environmental decision-making within New South Wales.'*

The suggested amendments would not allow vexatious claims to be brought before the Tribunal. As noted above the Tribunal has the power to dismiss vexatious applications. However, it would enable community members beyond direct neighbours (the most likely to satisfy the current 'material detriment' test) to seek review of certain decisions. This is particularly important for redevelopments on public land, of community facilities or local centres (such as Mr Watson's case) where people beyond neighbours may have a legitimate public interest in the proposal.

The EDO is of the view that time and money currently spent arguing about procedural issues such as standing would be better directed towards ensuring that the substance of planning decisions are meritorious.

It is important to keep the number of planning appeals in the ACT into perspective. In 2008/09 ACTPLA decided 2479 development applications. During this period less than 1% (0.3%), of applications were appealed by third party objectors to ACAT. In 08/09 the Tribunal made decisions on only 8 planning matters appealed by third parties to the Tribunal. Of these the vast majority involved the tribunal varying or setting aside the original approval, highlighting the importance of subjecting planning decisions to merits review.

The EDO is pleased that the ACT Greens MLA, Ms Caroline Le Couteur, has introduced a Private Members Bill, the *Planning and Development (Notifications and Review) Amendment Bill 2009*, which would implement these amendments recommended by the EDO.

As you will be aware, this Bill also includes amendments recommended by EDO to you and other Legislative Assembly members in September 2009 in relation to the notification of development applications (a copy of this letter is attached).

The EDO notes that all of the ACT Community Councils have passed a motion in support of these proposed amendments.

I urge you and your government to support this Bill.

In addition, in Mr Watson's case ACAT recommended that ACTPLA consider its obligations under the *Human Rights Act 2004* (ACT) and renotify the development proposal in this case. The EDO is disappointed that you and ACTPLA have been reported saying that this recommendation will not be followed.

As a public authority bound by the Human Rights Act (HRA), the EDO is of the view that ACTPLA must renotify development proposals which have been incorrectly notified. Failure to do so could result in ACTPLA breaching its obligations under the HRA. In Mr Watson's case ACAT concluded that 'public notification of development proposals is a critical component of the composite process grounding the right to fair trial under section 21 of the HRA and there is a significant likelihood that potential representors have not made a representation due to being misled about the nature of the proposal'. The Tribunal declined to make an order directing potential applicants to be notified of the decision as it considered that it may lack jurisdiction to make such an order as it found that Mr Watson lacked standing.

However the Tribunal noted that ACTPLA 'has the same obligation as the Tribunal under s40B of the HRA to give proper consideration to a relevant human right and recommends to the respondent (ACTPLA) that it considers its obligations as a public authority to preserve and foster the rights of potential affected parties under s21 of the HRA and to make arrangements to re-notify the development proposal.'

I have copied this letter to the Attorney-General as the Minister responsible for the Human Rights Act and ensuring compliance with this legislation.

I look forward to your consideration of this issue and your reply. Please do not hesitate to contact me if you or your staff would like to discuss this further.

Yours sincerely

**Environmental Defender's Office (ACT) Inc.**

Kirsten Miller  
Principal Solicitor

encl.

Cc Attorney-General, Simon Corbell  
Zed Seselja  
Vicki Dunne  
Caroline LeCouteur