



Environmental Defender's Office ACT Inc.



Ph: (02) 6247 9420 ♦ Fax: (02) 6247 9582 ♦ Email: edoact@edo.org.au ♦ GPO Box 574 Canberra ACT 2601 ♦
www.edo.org.au ♦ ABN 32 636 009 247

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ACT Planning and Land Authority
Sustainable Future Workshop Findings Reports Submission
GPO Box 1908
Canberra ACT 2601

By email: sustainablefuture@act.gov.au

Dear Secretariat

RE: CANBERRA SUSTAINABLE FUTURE WORKSHOPS

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the options for a sustainable Canberra.

The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

This submission considers a range of sustainability issues addressed in the workshop findings report. It also responds to the following questions posed in ACTPLA's online survey:

1. Precautionary principle: With the need for dealing cautiously with risk and irreversibility, what can ACTPLA do to ensure inter-generational equity?
5. Environmental responsibility: With the need for conservation of biodiversity and ecological integrity, what can ACTPLA do to support the protection of the natural environment in the ACT and region? and
6. Accountability: With the need for good governance, what can ACTPLA do improve its sustainability measures?

Executive Summary

The EDO recommends a single sustainability Act which requires all government agencies and authorities to consider ecologically sustainable development principles when making decisions. However, in recognition of the limits to ACTPLA's role in introducing sustainability principles the EDO makes the following recommendations which relate more directly to ACTPLA's role:

- amend the objects of the Territory Plan to include ecologically sustainable development (ESD) principles;
- require development proponents to include a comprehensive evaluation against ESD principles when submitting an application under either the merit or impact track.
- require decision-makers (either ACTPLA or the Minister) to take into account defined ESD principles when making decisions under the Planning and Development Act;
- prohibit the approval of development applications in the merit and impact track which are inconsistent with ESD principles;
- limit the use of offsets as a means of achieving sustainability;
- require higher housing energy efficiency ratings;
- amend the Residential Subdivision Code to improve the solar efficiency of block orientation; and
- require estate development plans to include an active transport plan and to promote sustainable modes of transport.

Background

The EDO commends the ACT Government and ACTPLA for initiating the sustainable future program in an attempt to make Canberra a more sustainable city and welcomes being involved in this program.

The EDO recognises that the concept of sustainability is a broad one and it is difficult to be sufficiently prescriptive to mandate and regulate action to such a degree as to guarantee success. However, the EDO is of the view that there are a range of legislative amendments which could be made to improve sustainability in the ACT. The EDO strongly supports and has consistently advocated for the adoption of sustainability measures, both in the *Planning and Development Act 2007* and more generally through a whole of government approach and the creation of legislation regulating all government action.¹

The Workshop Report includes a summary of the statutory framework within which ACTPLA operates, including a number of policies and plans which are designed to promote sustainable development. Whilst sustainability objectives can potentially be achieved within the existing legislative framework, the EDO is of the view that there needs to be amendments to include a clear and binding mechanism to ensure sustainable outcomes. In addition institutional change is required

¹ See in particular EDO's submission on options for sustainability legislation at <http://www.edo.org.au/edoact/>

to ensure that the broad principles of sustainability are given meaningful consideration and not glossed over or ignored.

As the agency responsible for the planning of Canberra's future ACTPLA is in a position to control and implement sustainability measures that will lead to a vibrant and ecologically sound city.

What is Sustainable Development?

Since the 1960s, the concept of sustainable development has achieved international recognition, culminating in the development of the Rio Declaration, a statement setting out the principles of sustainable development, and Agenda 21, a plan for sustainable development at the United Nations Conference on Environment and Development in 1991. The term 'sustainable development' encompasses a wide range of principles which aim to foster 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'² The concept recognises that environmental protection, economic development and quality of life are interrelated. Sustainable development requires a balancing of these issues to ensure that humans can live sustainably. The term 'sustainable development' has been criticised for lacking clarity and certainty.³ However, accepted principles of sustainable development include intergenerational equity, the polluter pays principle, the precautionary approach, biodiversity conservation and improved valuation, pricing and incentive mechanisms.⁴

Giving Practical Effect to Sustainability Initiatives

There are currently only three statutes in the ACT that refer specifically to sustainability:

- The *Planning and Development Act 2007* - Section 49 requires that the Territory Plan give effect to its objects in a way that gives effect to sustainability principles. Although no sustainability principles are defined. Section 6 also states that the object of the Act 'is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT...';
- The *Building Act 2004* - Section 143 requires that the Minister must make guidelines for sustainable building practices. Section 30 requires that building approval must not be given if to do so would be, amongst other things, inconsistent with the sustainability guidelines. However there are currently no such guidelines in place.
- The *Environment Protection Act 1997* – Section 2 sets out the objects of the Act to include the promotion of ecologically sustainable development.⁵

² Report of the World Commission on Environment and Development (WCED), The Brundtland Report, *Our Common Future* (1987).

³ G Bates, *Environmental law in Australia* (5th Ed., 2002) 121.

⁴ For more information concerning the principles of sustainable development, the Brundtland Report, *Our Common Future* sets out the principles in greater detail. Above n 2. In particular, the precautionary principle requires that 'where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'. Bates, above n 5, 129.

⁵ 'Ecologically sustainable development' is defined in subsection 2(2) as: the effective integration of economic and environmental considerations in decision-making processes and to be achievable through implementation of the following principles:

- (a) the precautionary principle, namely, that if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

How can we improve this and what can ACTPLA do?

Writing in 1995, Professor David Farrier called for a paradigm shift in biodiversity conservation legislation:

Flexibility in the environmental context has traditionally meant placing certain conditions on projects that are allowed to proceed as distinct from simply saying 'no' to a project. The focus of regulatory systems addressing environmental problems has been how we can allow the development to proceed on a particular site, not whether we should allow it to go ahead... It is time for a paradigm shift. We need to base decisions on the level of development compatible with the conservation of biodiversity, rather than asking how we can maximize the level of biodiversity consistent with development.⁶

The EDO strongly supports this sentiment. There needs to be a much more rigorous process and a much clearer adoption and implementation of the sustainability principles in the *Planning and Development Act* and its implementation by ACTPLA.

Six principles of ESD have been identified by Chief Justice Preston of the NSW Land and Environment Court as follows:⁷

- The principle of sustainable use – the aim of exploiting natural resources in a manner which is 'sustainable' or 'prudent' or 'rational' or 'wise' or 'appropriate';
- Ecologically sustainable development requires the effective integration of economic, social and environmental considerations in the decision-making process;
- The precautionary principle: If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
 - (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - ii) an assessment of the risk-weighted consequence of various options;
- The principles of equity; inter-generational equity and intra-generational equity;
- The conservation of biological diversity and ecological integrity should be a fundamental consideration; and
- Ecologically sustainable development involves the internalisation of environmental costs into decision-making for economic and other development plans, programs and projects likely to affect the environment.

ESD principles are included in section 3A of the *Environment Protection Biodiversity and Conservation Act 1999* (Cth) (EPBC Act):

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- (b) the inter-generational principle, namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
 - (c) conservation of biological diversity and ecological integrity;
 - (d) improved valuation and pricing of environmental resources.

⁶ Farrier, David. *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* (1995) 19(2) *Harvard Environmental Law Review* 303-408.

⁷ *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [108-120].

- Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the 'precautionary principle');
- The principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and
- Improved valuation, pricing and incentive mechanisms should be promoted.

Similar principles are also included in the definition of 'sustainable development' in section 9 of the Planning and Development Act. The EDO supports the inclusion of sustainable development principles in the objects of the Planning and Development Act (through the definition of 'sustainable development' in section 9).

To ensure that ESD is an integral part of the planning process the EDO recommends that the objects of the Territory Plan (set out in s.48) should be amended to include a comprehensive statement of sustainability principles such as in section 9 of the Planning and Development Act or those outlined above. The current reference to an 'efficient environment' is not a satisfactory statement of what the Territory Plan should be aiming to achieve.

To ensure that ESD principles are effectively implemented the EDO further recommends that the Act be amended to require development proponents to include a comprehensive evaluation against the sustainability principles when submitting an application under either the merit or impact track. This will place a requirement on proponents to show how their development is sustainable and why it is that any loss will not leave the environment any poorer. This is not a significant impact test but rather an evaluation against ESD principles. This could then be evaluated by the decision-maker who should be prohibited from approving applications that are not consistent with the sustainability objectives.

Currently sections 120 and 129 set out what considerations the decision-maker should take into account when deciding a development application in the merit or impact track. Whilst there is some reference to considering environmental impacts, the EDO is of the view that these provisions should be amended to specifically refer to a requirement to consider whether the development is consistent with ESD principles.

In addition the EDO recommends that sections 119 and 128, which set out when approval must not be given, should be amended to explicitly prohibit approval of development proposals which are inconsistent with ESD principles.

To ensure that the community and development proponents have full details of how ACTPLA reaches its decisions the EDO is of the view that statements of reasons which ACTPLA provides for the approval (or otherwise) of a development application should include a full disclosure of how ACTPLA has reached a decision that a proposal is consistent (or inconsistent) with ESD principles.

It appears that reasons for decisions currently rarely discuss any consideration of the long term sustainability of development projects and provide no useful criteria against which 'sustainability' has been evaluated or assessed. Indeed a number of recent approvals have justified a departure from the Conservator for Flora and Fauna's advice on the grounds that one option that would

involve more harm than the development proposal has been considered.⁸ The EDO is of the view that this is not a satisfactory description of how all reasonable development options have been considered so as to justify the departure from expert advice.

The EDO also recommends that the *Planning and Development Act* be amended to require all decisions made under the Act to be consistent with the sustainability principles.

These recommended amendments will help ensure intergenerational equity is taken into account, that decisions are not taken in isolation and that the cumulative decline of Canberra's biodiversity and resources are taken into account when approving individual developments.

Offsets

Offsets are often put forward as a means of achieving sustainability. The EDO would like to express its reservations about the use of environmental offsets.

Gibbons and Lindemayer provide a comprehensive analysis of the limitations of offsets from an ecological perspective:⁹

1. The gain in biodiversity values that can be achieved relative to the loss:
 - a. Offsets that involve the protection of existing good quality vegetation may result in a loss equivalent to the area impacted.
 - b. Offsets that involve the restoration of habitats are subject to significant scientific uncertainty in terms of the gains that can be achieved.
2. The difficulty in measuring the equivalency of any gain in biodiversity values relative to the loss:
 - a. Ecosystems are very complex and biodiversity values are difficult to quantify. No two patches of vegetation have equal biodiversity value.
 - b. Methodologies to quantify biodiversity values must necessarily be relatively simplistic and based on a number of significant assumptions.
3. The time-lag between losses in biodiversity values and gains: offsets almost always involve a short-term loss in exchange for a long-term gain.
4. The difficulty in ensuring compliance: offsets have a poor track record of compliance and considerable resources are required to ensure compliance.

Whilst there are some measures available to improve the use of offsetting provisions and the EDO would favour such measures, there are many inherent limitations in offsets. Support for any offsetting is qualified and contingent on a number of factors:

- Offsets should only be considered after thorough scrutiny of the possibility of avoiding impacts (including the possibility of not proceeding with the action) and, if impacts cannot be avoided, only after every effort has been made to minimise those impacts. Offsetting must be a last resort strictly confined to proscribed circumstances with highly proscriptive guidelines for use;
- Offsets must be 'additional'. The 'additionality' principle is a key issue in relation to the use of offsets. Clear decision-making criteria for determining whether an offset is additional must be included. Three examples of appropriate criteria are:
 - An offset must be additional to current regulatory requirements.

⁸ See DA200915605

⁹ Gibbons and Lindenmayer, 2007.

- An offset must be additional to best practice on-site environmental management.
 - An offset must not be currently funded/potentially funded in the future under another program.
- Monitoring for compliance and guarantees of protection in perpetuity. In the absence of insistence on *a priori* implementation of offset gains, legal mechanisms such as performance bonds should be used to guarantee the delivery of environmental outcomes. A guiding principle should be that the risk of offset failure where outcomes are deferred should rest with the proponent; and
 - Consistent with WA and VIC provisions¹⁰ the aim must be for an improvement or net gain in environmental quality not just maintenance of the status quo.

Inappropriate Resource Use

The current construction of inefficient houses is a key issue for sustainability. Given the enormous amount of resources that go into building houses and the resources that will be used by the house over its lifetime it is essential that houses not only be very well built but also be built to a very high standard of energy efficiency.

The current five star rating is inadequate. We have the technical capacity to build seven star homes and this should be the minimum EER permitted. Further houses should be built using sustainable materials to a high standard that will last at least into the next century. Anything less is an inefficient use of resources. As referred to above at page 3 there are no guidelines under the *Building Act* for sustainable building practices. Despite the clear requirement that the Minister must make sustainability guidelines no such guidelines exist. There is nothing to control the unsustainable use of materials such as timber harvested through illegal or unsustainable forestry practices.

Not only is five star rating inadequate the rating system itself also appears to have significant issues. The EDO notes that all houses in Forde and Franklin, for example, should be 5 Star. A quick search through allhomes.com.au reveals that there are a number of homes currently for sale that do not have 5 star ratings. One house for sale in Franklin has an EER of only 3.5 stars.¹¹ The problem is either in the rating tool itself or in the enforcement of the current law. Either way it is a significant problem that ACTPLA must resolve.

In respect of residential subdivision developments a further issue arises in the very low requirement for the solar efficiency of block orientation. There is the capacity and expertise available to ensure much better outcomes. The current Residential Subdivision Development Code requirement for 75 per cent of block to achieve a three star rating and a minimum one star rating is inadequate. A mandatory minimum three star rating should be introduced with additional objectives for even further improvement in the near future. As outlined in Appendix c to the Residential Subdivision Development Code, solar access plays a significant role in the future efficiency of the dwelling. Failing to take advantage of the significant efficiency gains is not a sustainable outcome.

Another issue is the requirement for garages to be built based on the number of bedrooms. If home owners do not want to build garages and are not reliant on cars they should be encouraged and rewarded rather than being forced to spend money and consume resources on something they do

¹⁰ Environmental Protection Authority (WA) '*Environmental Offsets*', Position Statement No. 9, (January 2006) p6; Department of Sustainability and the Environment, *Victoria's Native Vegetation Management: A Framework for Action* (2002).

¹¹ See: <http://www.allhomes.com.au/ah/act/sale-residential/20-nancy-cato-street-franklin-canberra/1316740639411>

not want. Rule 70 of the Residential Zones – Single Dwelling Housing Development Code in the Territory Plan mandates the provision of car parking spaces, one for a one bedroom and two for two or more bedrooms. This requirement is limiting productive garden space and using up valuable materials that could be better used elsewhere and as discussed below we need to be moving away from a private car dominated culture rather than reinforcing it.

Public Transport

Australian cities have largely been constructed around the car, creating a culture heavily reliant on private car use. Some of the negative impacts of car dependence include:

- Environmental – such as loss of public space (natural areas and open space) and agricultural land, smog, and air pollution;
- Economic – from providing urban infrastructure across a more dispersed geographical area;
- Social – including isolation, economic stratification of areas and reduced access to public services; and
- Health – including reduced daily physical activity contributing to many chronic diseases such as obesity, heart disease and stress.

Integrating sustainability into our transport systems is especially important in the face of climate change and a low-carbon future. The transport sector is a significant contributor to Australia's greenhouse gas emissions.¹² Road transport is by far the largest contributor to transport emissions,¹³ accounting for 88 per cent of total emissions in 2005. Of this, passenger car emissions are the largest source of road vehicle emissions, making up 62 per cent of road emissions in 2005 and are projected to grow to 40 per cent of 1990 levels by 2020, unless trends are reversed.¹⁴ The EDO supports a range of other complementary measures to support emissions reduction and address the other adverse environmental (social and economic) impacts of car dependency. The EDO strongly supports investment in active transport and public passenger transport infrastructure and services that address all the negative impacts of car dependence by promoting sustainable modes of transport such as walking, cycling and public transport.

Frequently and particularly in respect of new housing developments and new suburbs trees are removed and the environment damaged to make way for roads with little to no thought of the viability of road transport. Whilst today, without the additional services and government facilitation for many people it is difficult to participate in the community without using a private car, there is no reason for this to be the case. Active and public transport options should be mandatory at the design stage. For example, it could be made a requirement of estate development plans that they include an active transport plan and provisions for public transport which must be prioritised over private car use.

With regard to transport investment, a whole of government approach would help to:

¹² Transport is Australia's third largest source of emissions (14 per cent of total emissions). See Department of Climate Change, Transport Sector Greenhouse Gas Emissions Projections 2007, February 2008, p1. Available at: www.greenhouse.gov.au/projections/pubs/transport2007.pdf

¹³ Road transport includes emission from passenger cars, light commercial vehicles, rigid trucks, articulated trucks, buses and motorcycles.

¹⁴ Department of Climate Change, Transport Sector Greenhouse Gas Emissions Projections 2007, February 2008, p17. Available at: www.greenhouse.gov.au/projections/pubs/transport2007.pdf

- Develop targets and objectives with regard to public passenger transport;
- Prevent other government policy decisions from counter-acting sustainable transport initiatives (such as tax and housing policies); and
- Reward other government agencies for actions with positive sustainability outcomes that do not contribute to that agency's core role (e.g. planning policies that have public health benefits, housing policies that have transport benefits) to ensure that other government sustainability initiatives are taken which are complementary to the promotion of public passenger transport (and vice-versa).

Conclusion

The EDO is very supportive of a move towards greater implementation of recognised sustainability principles. However given the general and aspirational nature of the principles it is essential that they be accompanied with specific, measurable goals and policy outcomes. The principles should be factored into each stage of the decision making process, both in respect of policy development and application assessment. Adherence to the principles should be a binding requirement.

ACTPLA is in a unique position to recognise the need for conservation of biodiversity and ecological integrity and support the protection of the natural environment in the ACT. The greatest threat to the ACT environment comes from inappropriate and unsustainable development. As the decision-maker determining whether or not that development goes ahead ACTPLA plays a key role in the future sustainability of Canberra.

Please do not hesitate to contact me if you wish to discuss this submission further.

Yours sincerely

Environmental Defender's Office Ltd

Kirsten Miller

Principal Solicitor