



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

9 March 2018

Minister Mick Gentleman

Housing Choices

Planning Policy

Environment, Planning and Sustainable Development Directorate

PO Box 158

Canberra ACT 2601

By email: Terrplan@act.gov.au

Dear Planning Policy Team,

Housing Choices Discussion Paper: Environmental Defenders Office ACT Submission

About the EDO ACT

The Environmental Defender's Office (ACT) Inc ('EDO ACT') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental policy and law reform, and offer community legal educational publications and programs.

The EDO provides advice and representation to individuals and community groups regarding planning and development where it impacts on the environment in the ACT and surrounding areas. The EDO ACT welcomes the opportunity to comment on the *Housing Choices Discussion Paper* ('the Discussion Paper') and provide a number of recommendations arising from experiences in the ACT.

Whilst the policy discussion paper has set out a number of questions to which the Environment, Planning and Sustainable Development Directorate (EPSDD) wish to receive feedback, the aim of our submission is to identify key environmental issues that inform future planning decisions and to ensure consideration of the ACT's other legislative



priorities, such as its obligations under the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT). These issues include:

1. Planning and development of greenfield areas;
2. Community consultation;
3. Integrating climate change policy into housing considerations and the need to coordinate policy approaches to future housing development and planning across directorates, to ensure consistency in objectives;
4. Key legal and policy principles to take into account when developing future law and policies.

1. Greenfield land development and the need to coordinate policy approaches to future housing development

We understand that Canberra's population is growing and changing, with an ageing population, changes in household structures and a lack of housing options to meet current demand. We note the ACT Government's 2012 ACT Planning Strategy commitment to a target of 50% infill for new dwellings. However, EDO ACT is concerned with mixed policy messages regarding the development of greenfield land for housing developments in light of the strategies set out in the ACT Government's 2017-18 to 2020-21 Indicative Land Release Program, competing concerns set out in the current Discussion Paper, and the ACT Government's policy and legislative objectives with respect to climate change.

The Discussion Paper notes that greenfield development has a range of "social, economic and environmental consequences" and that "much of the ACT's remaining 'urban capable' land presents significant financial and environmental constraints due to location, terrain and environmental values (e.g. endangered species and habitats)."¹ The EDO ACT welcomes the Discussion Paper's acknowledgement that new developments on greenfield land impact ecosystems, threaten listed species, and have long-term implications for sustainability. These very issues are highlighted in Case Study 1 below.

Despite this recognition, land releases and developments in greenfield areas in the ACT continue on a large-scale. This includes recent releases in three greenfield estates across Canberra from Gungahlin in the north, to the centrally located Molonglo Valley, with

¹ ACT Government, Housing Choices Discussion Paper (November 2017), section 3.3.1.



releases on both sides of the Molonglo River, and to the west of Belconnen.² These land releases are encapsulated in the Chief Minister, Treasury and Economic Development Directorate's 2017-18 to 2020-21 Indicative Land Release Program. The Land Release Program noted the government strategy of "accelerating greenfield land releases" over the past 5 years.

As demonstrated by Case Study 1 below, greenfield developments have the potential to negatively impact sensitive ecosystems, local biodiversity, and threaten ACT, NSW and Commonwealth-listed species. Urban sprawl creates a less sustainable city and contributes directly to greenhouse gas emissions, as discussed in point 3 below.

Case study 1: Ginninderra Falls Association and development in West Belconnen

The EDO ACT provided advice to the Ginninderra Falls Association (GFA), a community group which advocates for the conservation and protection of the environment in the West Belconnen and adjacent NSW area.

The GFA has been engaged in environmental protection and advocacy surrounding the proposed Ginninderry development in West Belconnen. The proposed development covers 1000 hectares of land in the ACT bordering the Murrumbidgee River and 600 hectares across the border in NSW. It will deliver up to 11,500 new homes and take about 30 years to complete.

The area to be cleared for development is rich in biodiversity and has high 'ecological integrity and habitat values'.³ Several ACT and Commonwealth listed endangered and vulnerable species are present in the area, including the Little Eagle, Scarlet Robin, Pink Tailed Worm Lizard, Golden Sun Moth, Superb Parrot, Swift Parrot, Flame Robin, Gang-gang Cockatoo, Spotted Harrier and Speckled Warbler.⁴ The development is likely to cause the local extinction of the Rosenberg's Goanna, Little Eagle, Scarlet Robin and Spotted Harrier. The proposal is also likely to cause significant decline or decline of six other listed ACT and Commonwealth species. Yet despite this, the development was not assessed in

² ACT Government, 2017-18 to 2020-21 Indicative Land Release Program (June 2017).

³ Preliminary Biodiversity Survey of the Ginninderra Falls Area (2016), Dr David Wong (Ecologist and Project Officer at the Ginninderra Catchment Group).

⁴ EDO ACT Submission to West Belconnen Project EPBC Strategic Assessment Report (June 2016).



the impact track (and therefore there was no environmental impact assessment completed in relation to this development).

The EDO ACT welcomes housing solutions that reduce developments on greenfield land, by creating a more compact city through urban infill. Where greenfield developments cannot be avoided, there must be comprehensive assessment by independent experts of any greenfield site to identify environmental and heritage value in these areas. It is essential for government to include sufficient buffer zones, conservation corridors and no-go development areas in development planning to reduce the environmental impact.

Recommendation 1: Development on greenfield land must be avoided. Where new developments on greenfield land are unavoidable, best practice techniques must be applied to reduce the environmental impact of these developments. This includes comprehensive assessments of greenfield sites to identify and protect environmental and heritage values, combined with proper development assessment of and consultation on any development proposal. It is most appropriate that DAs for development on greenfield land be lodged in the impact track and an EIS undertaken.

2. Community consultation in housing development

Public participation in environmental decision-making is a right enshrined in international law⁵ Environmental democracy encompasses the right to information, to public participation, and to accessible and just remedies in circumstances of demonstrated environmental harms or breaches of environmental law. Public participation is a critical process needed to inform high-quality decision-making for the conservation, protection and enhancement of the biodiversity of the ACT.

The EDO ACT welcomed the Pre-DA Community Consultation initiative and suggested several reforms in our submissions provided to the Planning and Sustainable ESDD Development Directorate in August 2017.⁶

⁵ *Report of the United Nations Conference on Environment and Development (Rio Declaration)* UN Doc A/CONF.151/26 (1992), Principle 10.

⁶ EDO ACT, Submission to Pre DA Community Consultation (August 2017).



The Discussion Paper discusses processes for community consultation with regard to housing development policy and seeks feedback on a number of issues, for example, on *"what would help you to better understand the ACT planning system?"* However, the discussion paper does not consult or seek feedback about how to better engage communities in planning and development processes. For instance, the Discussion Paper could ask *"what would help you to have your voice heard in the ACT planning system?"* Better processes around community consultations are necessary, particularly with respect to community consultation on the environmental impacts of such developments.

Over the years, the EDO ACT has assisted community groups in consulting with the government on housing developments and its likely impacts on the environment and is concerned that community views are often not genuinely considered in the decision-making process.

Opportunities for public comment in the ACT planning process arise under merit and impact track development applications ('DA'). Merit track and impact track DAs must be publically notified, and anyone may make a written comment or objection about a publically notified DA. Impact track DAs must also undergo an EIS, which allows further opportunity for public comment during the EIS process. The majority of DAs in the ACT fall into the merit track, for which there is no EIS and/or opportunity to contribute to an EIS. It is of note that in the GFA case study (below), members of the community were not given the opportunity to contribute to an EIS because the DA was lodged in the merit track, rather than the impact track despite the development impacting on biodiversity under the *Nature Conservation Act 2014* and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Where opportunities for comment do arise, in many cases it is doubtful whether comments provided by the public have any particular influence or effect subsequently, when the assessment of the final EIS documentation is undertaken by the relevant government agency.⁷ The case of GFA is an example where an engaged community group was unable to change the outcome of a development through the ordinary consultation process.

Involving the community should go beyond traditional 'inform and consult' models, and encourage best practice engagement that delivers more widely acceptable outcomes.

⁷ Australian Panel of Experts on Environmental Law, Environmental Governance (Technical Paper 2, 2017) p 61.



Genuine consultation should begin at the earliest possible stage (and at every stage) of the planning process, prior to the approval stage. Traditional approaches to community consultation shut out communities and individuals without the resources to write formal submissions. Communities should be given engaging, innovative and earlier opportunities to influence the planning process for the future of their environments. This should harness new technology and go beyond orthodox approaches of 'consultation by written submission'. Specific groups, including Aboriginal people, should be asked about their preferred ways to engage and be able to have meaningful input in those ways.⁸ Models for culturally appropriate consultation should be developed in partnership with local Aboriginal communities.

Case study 2: Community consultation of the Ginninderra Falls Association

In the case of the GFA (described above), this community-based organisation engaged with the ACT government, the NSW government, and the proponent at all available levels. This included through submissions to the EPBC Strategic Assessment, representations to the DA and attending community meetings and regular consultations. The DA was lodged in the merit track, so the GFA was prevented from contributing to an EIS (an opportunity that would have been available had it been lodged in the impact track).

Despite the GFA's engagement with community consultation processes and the concerns raised by the community group on the impacts on unique biodiversity in the area, the DA was not altered and concerns were dismissed. For example, in response to community concerns and expert advice that the proponent had not taken adequate steps to protect the Little Eagle (an ACT listed threatened species), the proponent referred to the previously issued EPBC assessment report and stated that foraging areas outside the development area would be available for the species. This response did not address the concerns raised by the community group, including that the proposed buffer zone was inadequate to protect the Little Eagle according to academic research and expert opinion.

This case study demonstrates that poor community consultation can leave communities feeling disempowered, or force them to take costly and time-consuming action through the legal system.

⁸ EDOs of Australia, Submission to Inquiry on the future of Australian Cities (Committee on Infrastructure, Transport and Cities, House of Representatives, August 2017).



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AUSTRALIAN CAPITAL TERRITORY

Recommendation 2: The Discussion Paper should consider more robust community consultation processes, taking into consideration a range of community concerns (including environmental concerns) with respect to housing developments and the planning process, especially during approval of large developments, most particularly when these large developments involve the development of greenfield land. DAs should be processed through the “impact track”, in order to facilitate community consultation through environmental impact assessments, and ensure biodiversity and ecological features are protected.

3. Integrating Climate Change Strategies into Housing Policy

The ACT Government's Climate Strategy to a Net Zero Emissions Territory Discussion Paper (December 2017) provides an opportunity to integrate housing development and climate change policy. The EDO ACT remains concerned that there is limited coordination between government directorates on environmental goals and policies.

Environmental effects of activities are cumulative and inter-related, and governance systems and project-specific development approval processes often fail to address the cumulative and inter-related impacts of development activities.⁹ A comprehensive approach to landscape-scale planning by the Minister for Planning and Land Management and Minister for Climate Change and Sustainability is necessary to address these issues.

The ACT Climate Strategy Discussion Paper notes the importance of sustainable land use, including designing cities that increase the natural uptake of carbon and increasing 'living infrastructure.' The Climate Strategy also notes the importance of limiting deforestation, which goes to limiting greenfield developments (discussed above). Despite this (and similar discussions in the Discussion Paper noted under point 1 above), land clearing for development has directly contributed to greenhouse gas emissions. The ACT Greenhouse Gas Inventory 2016-2017 indicated that last year was the first time that land use in the ACT was a net contributor to GHG emissions,¹⁰ partially due to land clearing for development.

⁹ Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017), Recommendation 3.1 p 17.

¹⁰ ACT Greenhouse Gas Inventory 2016-2017 (October 2017) section 3.7.



The *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) sets emissions reduction targets for the ACT. Housing policy should be developed with regard to the more favourable of Territory and national emissions trajectories and targets. The planning process needs to consider the level of greenhouse gas emissions generated by proposals as grounds for refusal of development applications. The level of greenhouse gas emissions should also be relevant when considering whether a proposal is likely to have a significant adverse environmental impact as defined under the *Planning and Development Act*.

In addition, best practice techniques should be applied to proposed developments to decrease their environmental impact.¹¹ The *Energy Efficiency (Cost of Living) Improvement Act 2012* (ACT) and provisions in the *Building Act 2004* (ACT) mandate energy efficiency requirements. New buildings should have high 'star ratings' under the nation-wide energy rating scheme.

Recommendation 3: Climate change strategies should be integrated as a key aspect of ACT housing and planning policies, with the same aims of reducing the ACT's environmental impact and making more liveable cities.

4. Key principles to be taken into account in future ACT housing policy

Housing policy and laws should be designed to be consistent with the following principles, as discussed in the Australian Panel of Experts on Environmental Law (APEEL) Blueprint for the Next Generation of Australian Environmental Law (2017):

- 'smart regulation' principles¹² (such as the policy mix principle,¹³ the parsimony principle¹⁴ and the escalation principle¹⁵);

¹¹ See for instance, EDO NSW, Planning for climate change: How the NSW planning system can better tackle greenhouse gas emissions (2016).

¹² See Neil Gunningham, Peter Grabosky & Darren Sinclair (1998) *Smart regulation: designing environmental policy*. Oxford University Press.

¹³ The principle that a complementary range of instruments is desirable to address an issue. These should include regulatory tools, economic measures, information-based measures, self-regulatory alternatives (for low impact, low risk activities) and voluntary measures. See Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).

¹⁴ The principle that less interventionist instruments or approaches should be applied first to achieve desired environmental outcomes (for example, it would make little sense to deploy scarce enforcement resources on those who are willing to comply voluntarily under less interventionist approaches). See Australian Panel of



- *principles that promote particular economic measures, for example, that polluters pay for their environmental impacts;*
- *principles that endorse particular tools or mechanisms for environmental management (for example, environmental impact assessment (EIA) - both project and strategic);*
- *principles related to environmental democracy such as access to environmental information, public participation and access to justice (as discussed at point 2 above);*
- *a principle of responsive and flexible environmental governance;*
- *a principle of environmental restoration; and*
- *a principle of non-regression.*

Policy-makers should also be directed by the precautionary principle and the prevention of harm principle. In addition, the following two new and relevant principles should be incorporated:

- *a principle of achieving a high level of environment protection, which requires that decisions and actions aim for an optimal level of environmental protection and biodiversity¹⁶*
- *a principle of applying best available techniques by mandating up-to-date tools and methods suitable for protecting the environment and conserving biological diversity¹⁷*

Maintaining the ACT's character of the 'bush capital' of Australia, and ensuring the heritage of these areas are important principles uniquely relevant to the ACT. These should be at the forefront of policies, especially in the creation of a more compact city. For instance, these ACT-specific principles must be applied to the proposal to combine RZ3 and RZ4 or the proposal to increase building height and plot ratios in both zones.

Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).

¹⁵ The principle that regulatory measures should ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals. See Australian Panel of Experts on Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, 2017).

¹⁶ For more information, see Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017) p 45.

¹⁷ Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017).



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

Recommendation 4: The environmental principles outlined above should be explicitly set out in the *Planning and Development Act 2007* as well as future housing policy.

If you have any questions or wish to clarify any of the above, please do not hesitate to contact the EDO ACT on (02) 6243 3460 or Stephanie.booker@edoact.org.au.

Yours faithfully,

Stephanie Booker

Principal Solicitor