

SUBMISSION 85

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Senator Kate Lundy
Chair
Joint standing Committee on the National Capital
and External Territories
Parliament House
CANBERRA

Dear Senator Lundy

INQUIRY INTO THE ROLE OF THE NATIONAL CAPITAL AUTHORITY

I would be grateful if you would accept the following submission addressing the issues of administrative review of the decisions and acts of the National Capital Authority.

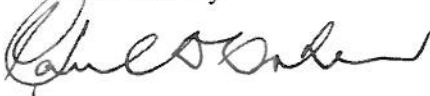
In 2003 I made a submission to the Committee on behalf of the Planning Institute of Australia that recommended *inter alia* an application of the statutory planning conventions normally found in other jurisdictions in Australia and elsewhere.

To some degree the submission below is predicated on the retention of the existing range of planning functions by the National Capital Authority. It is my opinion that the Authority should not surrender its responsibilities with respect to the planning and development of the Territory, and that the balance between the National/Territory and the Territory/Municipal functions undertaken by the Commonwealth and Territory is appropriate to both the National and Territory interests. However, there is a need to rationalise the interface of the functions where there is a joint interest in a matter.

One of the things missing from the present equation is full accountability by the National Capital Authority through statutorily defined processes and procedures and this will involve a comprehensive review of the Planning and Land Management Act and provision of appropriate levels of staffing to deal with the consequences of a more systematic approach to planning. Administrative review is one of the issues that need to be addressed

I hope that this submission will be of interest and some benefit to you in your considerations.

Yours sincerely



Paul D Cohen FPIA MURP

SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE ENQUIRING INTO THE FUTURE OF THE NATIONAL CAPITAL AUTHORITY – POTENTIAL FOR REVIEW OF DECISIONS OF THE NATIONAL CAPITAL AUTHORITY

Planning Appeals

The Act makes no provision for appeals against the decisions of the National Capital Planning Authority. Parliament has instead provided that, in terms of the plan-making responsibilities of the Authority, the final say should rest with Parliament itself. The Act provides for either House of Parliament to disallow provisions in the National Capital Plan, or alternatively, to determine that gazetted policies prepared by the National Capital Development Commission and not included in the National Capital Plan, may be included by decision of either House of Parliament.

With respect to the Authority's powers to approve or disallow certain planning and development proposals (the usual area where appeals against the decisions of planning authorities apply), there is no provision for any special appeals process relating to the merits or otherwise of those planning and development proposals. There is the opportunity for recourse under the Administrative Decisions (Judicial Review) Act 1977 to determine if a decision of the Authority is correctly made, or to normal common law processes (for example, seeking an injunction against the Authority, again generally to ensure that its decisions are taken in accordance with the Act).

Appeals normally could be expected to arise in circumstances where a lessee sought to develop his or her site in a particular way, or to use it for a purpose not consistent with the lease, and the Authority was asked to make a decision on that matter. This could only occur within the Designated Areas of the Plan, and the Authority has been careful to try to exclude leased Territory land from Designated Areas wherever possible, consistent with the intent of designation under the Act, to minimise the possibility of this situation occurring.

The Authority's decisions could generally take two forms:

- The Authority could approve the development proposal, in which case persons other than the applicant may be aggrieved by the decision and may wish to appeal.*
- The Authority may refuse to approve the development proposal, or may approve it subject to the applicant meeting specific conditions, in which case the applicant may be aggrieved by the decision and may wish to appeal.*

In normal circumstances, the Authority would wish to avoid situations where appropriate solutions could not be achieved through negotiation. However, there may be circumstances where this is not possible, and, legally, in such circumstances the Authority's views on the merits of the proposal would stand.

The Act clearly requires that the National Capital Plan binds the Commonwealth, so that appeals are not an appropriate mechanism where the Authority is dealing with works and development proposals made by Commonwealth agencies. It is only when citizens' rights are affected that an appeals process may be appropriate, and, because of the very small amount of leased land located within Designated Areas the likelihood of large numbers of either development proposals or consequent appeals is very small indeed. The number would certainly not justify the establishment of any special purpose appeals mechanism.

National Capital Plan, Part Two Administration and Implementation

Administrative review of decisions made under legislation is a normal function of Australian Governments. Within the Commonwealth Government some 400 pieces of legislation covering a wide range of matters are subject to administrative review.¹

The Administrative Appeals Tribunal Act 1975 establishes the mechanism for reviewing decisions in certain circumstances. For the Tribunal to exercise its powers:

- i The enactment under which the decision was made must provide for the decision to be subject to administrative review;*
- ii The decision must fall within the class of decisions that the enactment permits to be subject to administrative review;*

¹ see: AAT Jurisdictional List ([www.aat.gov.au/Legislation and Jurisdiction/Jurisdictional List.htm](http://www.aat.gov.au/Legislation%20and%20Jurisdiction/Jurisdictional%20List.htm))

- vi To remove any doubt, the National Capital Authority may intervene in any proceedings for a review of a decision relating to the administration of an estate in Territory Land⁹.

From the above discussion it would seem, in my opinion, that the National Capital Authority has various roles in a wide range of matters relating to the planning and development of the Territory. In a limited number of cases it is an approving authority for “works” in designated areas. Under the *Planning and Development Act 2007* (ACT), s.61, the Planning and Land Authority is required to consult the National Capital Authority about each draft plan variation being prepared. The National Capital Authority must consider the variation with regard to consistency with the National Capital Plan.¹⁰

The Authority may advise the Territory whether or not it considers the draft Plan variation to be consistent with the National Capital Plan. Its view on consistency between the two plans could alter the direction or bring to a halt a Territory planning initiative. Such an action could not be a ‘decision’ for the purposes of administrative review under present legislation, however, its actions may have an adverse impact on individuals or groups in a way not contemplated by Part Two of the National Capital Plan.

Whether the Authority should retain these wide ranging powers is an argument for another place. This paper is limited to consideration of how administrative review could be applied to those powers if they were to be retained in their present form.

As indicated above, the Commonwealth administrative appeals legislation provides an appropriate vehicle that could be applied to the PALM Act.

The administrative review process could apply to works approvals given under s.11 in the same way as development approval under the Planning and Development Act is subject to review. There is no reason not to extend review to some classes of Commonwealth works which can be specified by schedule.

Third Party Appeals

The extension of administrative review to third parties is more complex. Where the third party would suffer a direct loss of amenity or incur a measurable pecuniary loss the situation is relatively clear cut.

However, the existing Act would require extensive recasting in order to identify other matters that would be subject to administrative review. The AAT Act provides that:

unless the contrary intention appears, a reference in this Act to a decision includes a reference to:

- (a) *making, suspending, revoking or refusing to make an order or determination;*
- (b) *giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *imposing a condition or restriction;*
- (e) *making a declaration, demand or requirement;*
- (f) *retaining or refusing to deliver up an article; or*
- (g) *doing or refusing to do any other thing¹¹*

⁹ PALM Act s.29(4)

¹⁰ PALM Act s.26

¹¹ Administrative Appeals Tribunal Act 1975 s.3(3).

Subsections (a)-(f) indicate the decision to be reviewed in each case was made under a power contained in the relevant enactment. However, subsection (g) clearly broadens the classes of matters subject to review beyond the decision making process. In my view, it would be possible to devise a schedule of acts of the Authority with respect to the Authority's interpretation of what is or is not consistent with the National Capital Plan without encroaching on the role of Parliament in determining variations to the Plan.

What these 'acts' might be about is more difficult to define. Planning appeals normally relate to development approvals and refusals, and turn on matters of conformity to development codes, amenity, environmental impact, heritage and social determinant. Planning actions of a more general nature which are based on interpretation of policies are normally outside of the scope of administrative review because they do not involve a statutory decision and because they usually reflect the intentions of the elected government.

Accordingly, without a very detailed consideration of the Authority's procedures in policy and planning formulation and implementation, it is difficult to generalise about what might be in a schedule of reviewable acts.

Standing

The issue of standing is probably more complex in the case of decisions of the National Capital Authority than in other jurisdictions because while the planning and development of the National Capital is carried out on behalf of the Australian population at large, the impact of the Authority's decisions are more likely to be of interest to and impact on the local Canberra community.

In cases where a decision would directly impact on the residential amenity of a person, and that person has a pecuniary interest in the affected property, the case is relatively clear cut. Where a landholder or occupant could show a material detriment through diminution of amenity, or pecuniary interest in the affected land, reasonable grounds would exist for standing in an application for administrative review. Whether the proposed development is by or for the Commonwealth would only be relevant if the proposed development was of a class reserved by the Commonwealth from appeal because of the weight of a particular national interest such as defence or security.

However, many issues attract the attention of special interest and resident groups who could not demonstrate material detriment in the sense that the decision will have an adverse impact on them in a practical or physical sense. They will more likely present as representing the public interest in situations where the public domain is likely to be affected.

The Planning and Development Act (PDA) defines material detriment as the result of a decision that would have an adverse impact on an *entity's* use of enjoyment of land or the decision relates to an entity's objects or purposes. The PDA distinguishes between an entity, an applicant (for development approval) and an interested person. Under Schedule 1 there is no test of material detriment for interested persons, nor is it clear whether a group having an object or purpose relating to the decision is an interested person in classes of decision not covered by material detriment provisions.

It is suggested that in a Commonwealth system a more stringent test should apply to third party appeals than that adopted by the Planning and Development Act. The

PALM Act is intended to ensure the planning and development of the Territory is in accordance with its National significance.

Special interest groups in the Territory can be expected to be concerned about municipal issues although these may at times run parallel to national concerns. Special interest groups may not understand the wide scope of the Commonwealth's enduring interest in the Territory and its status with respect to the ownership of land in the Territory. Hence the extension of appeal rights to special interest groups would need to be approached with some caution.

Third party appeals can and do serve an important purpose. First, the capacity to be involved in public participation in planning, rather than be consulted about planning, increases the sense of community ownership and pride in the National Capital. This sense of ownership ought to be encouraged in the wider Australian community and not confined to those whose interests are prompted by an accident of location.

Second, third party scrutiny often identifies issues overlooked in planning and provides a valuable independent review of proposals, and third (but not unrelated) the prospect of third party review keeps planners focussed on detail because third parties tend to drill down through the layers of work seeking weaknesses that ought not to be there in any case.

In the scheme of third party standing in administrative review that I am contemplating in this submission, the test of standing should be that applied by Gibbs CJ in *Australian Conservation Foundation v The Commonwealth*¹² at 558:

"A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public; if no private right of his is interfered with he has standing to sue only if he has a special interest in the subject matter of the action."

Gibbs J explained what was meant by "*special interest*" at 530:

"... an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs if his action fails."

However, there will still be cases where a legitimate right to appeal may exist, but the inherent delay caused by the appeal process may not be in the public interest. In such circumstances the Minister should have call in powers on applications relating to defence, national security, or significant public benefit.¹³

Conclusion

It has been the object of this paper to demonstrate that the *Australian Capital Territory (Planning and Land Management) Act 1988* could be made subject to the

¹² *Australian Conservation Foundation Incorporated v Commonwealth of Australia* [1979] HCA 1; (1980)

¹³ See Planning and Development Act 2007.s.159. The Minister may call in an application where there is a major policy issue, there is a substantial effect on the achievement of the Territory Plan object or there is a substantial public benefit

Administrative Appeals Tribunal Act 1975 and that technically the PALM Act could be amended to accommodate the requirements of administrative review.

Further it would be appropriate to make development decisions subject to appeal both for original applicants for development approval and in some cases, third parties.

However, third party appeals would be complex because it could be expected that the National Capital significance of the National Capital Plan might be blurred or unduly influenced by strong groups pushing local issues.

Notwithstanding, third party scrutiny is valuable in ensuring good quality urban planning provided that the debate doesn't sideline the main issue.

Major tasks would be amending the PALM Act so as to identify, in much greater detail, matters that would be subject to review, providing stringent but fair criteria for standing, and providing the resources to a system that can respond to the right of review competently and helpfully.

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