

Owners of Units Plan 3063
 “Metropolitan”
 Edinburgh Avenue, Gordon Street, Marcus Clarke Street and London Circuit
 CANBERRA CITY ACT 2601

Chair
 Public Works Committee
 Parliament House
 Canberra ACT 2600

Submission No. 004	
SL	(NISHI Building)
Date: 15/04/2010	

**PUBLIC WORKS—PARLIAMENTARY STANDING COMMITTEE—
 REFERENCE OF WORK— proposed fit out of new leased premises for the
 Department of Climate Change and Energy Efficiency at the new Acton Nishi
 building, Edinburgh Ave, Canberra City, ACT**

The Public Works Committee is examining a proposal by the Department of Climate Change and Energy Efficiency for office fit out at the new Acton Nishi building, Edinburgh Ave, Canberra City, ACT.

Under the provisions of sub-section 17(1)(b) of the Public Works Committee Act, the Public Works Committee is empowered to report to both Houses of Parliament, inter alia, concerning any other matters related to the work in respect of which the Committee thinks it desirable that the views of the Committee should be reported to those Houses; and, for those purposes, shall do such things and make such inquiries as it thinks necessary.

At the time of writing this submission, the proposed Nishi development was still under consideration by the National Capital Authority and the impact of the proposed development was still under consideration by the Department of Environment, Water, Heritage and the Arts...

In examining the fit-out proposal by the Department of Climate Change and Energy Efficiency, we would ask that under the provisions of sub-section 17(1)(b), the Committee inquire into and report on the following matters:

- The approved land usage on the site proposed for the Nishi development;
- Whether heritage concerns over any development on that site have been dealt with properly and in a transparent manner;
- Whether the NCA has been competent and transparent in its dealings with the development; and
- On balance should any Commonwealth department or agency occupy any future development on this site.

The approved land usage on the site proposed for the Nishi development

The Departmental proposal to the Committee states that commercial office space is permitted on the site (Blocks 5 and 6 Section 24 City). It is our contention that the Committee has been misled as the creation of commercial office space on this land is not an approved activity and was never envisaged as an approved activity.

The facts are:

- Section 10 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) states that the National Capital Plan shall set out the general policies to be implemented throughout the Territory, including “*land use (including the range and nature of permitted land use)*”.
- The proposed Nishi is to be built on Blocks 5 and 6 of Section 24 City. All of Section 24 is designated land for the purposes of the National Capital Plan.
- The National Capital Plan is central to the longer term planning of Canberra, as reflected in the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) which also states that the object of the National Capital Plan “*... is to ensure that Canberra and the Territory are planned and developed in accordance with their national significance*”.
- Amendment 26 to the National Capital Plan (1999) altered the predominant land use category for Section 24 from “social/community/education” to “residential”. The amendment for Section 24 stated that “*The objective of the land use policy for the area is to provide a range of intensive residential uses so that Civic can benefit from increased use of services at evenings and weekends*”.
- Under the West Basin Amendment to the National Capital Plan (No 61), which also includes Section 24, a vision for the West Basin precinct was established, however the permitted land usage of Section 24 remained unchanged. The National Capital Plan clearly states “*West Basin is central to the implementation of The Griffin Legacy. West Basin will be a vibrant cultural and entertainment precinct on a waterfront promenade. The area will create a new city neighbourhood, extending the city to the lake with a cosmopolitan mixture of shops, businesses, cafes and recreation and tourist activities and accommodation.*”
- During the consultation process for the West Basin Amendment, the NCA responded to pro development submissions that sought a relaxation of the land use provisions. The NCA in its written summary reinforced the position that the primary intention “is to create a new urban neighbourhood with residential uses being predominant. Permitted land uses allow for a broad range of uses, however, ‘Land Use A’ seeks to ensure that within this broad range, residential development will be a significant proportion; however, ‘Land Use B’ permits a

range of uses on Commonwealth Avenue (with active uses at ground level).” With this reference to Land Use B along Commonwealth Avenue, the NCA appears to further distinguish the separation of Land Use A (eg section 24) from a nearby area zoned for broader land use.¹

- As it currently stands, the primary land use for Section 24 is stated as 1) hotel/motel; 2) place of assembly; or 3) residential. However, as noted above, the Amendment 26 places the emphasis on residential.

The National Capital Plan states that other permitted uses on Section 24 include office space provided that the office space is “ancillary” to the primary use.

It appears that the Department of Climate Change and Energy Efficiency, NCA and developer are relying on the “ancillary” use clause to justify a high rise commercial office tower on a residential block.

It is our strong view that this is a misrepresentation of the “ancillary” use clause.

Based on all reasonable definitions of “ancillary” the clear intention of this clause is to allow for (non commercial) office space associated with the range of approved uses i.e. hotel/motel, place of assembly or residential. It is our contention that this clause was to allow for the provision of office space needed to run or manage approved usages (such as a motel) and was never intended to open the door to commercial office space (ie office space leased on the open market).

As further evidence we have undertaken a comprehensive search of the term “ancillary use” and provide the following:

- Ancillary use: A use which is secondary to, but associated with, the main use (www.stedmundsbury.gov.uk/sebc/live/localplan/glossary.html)
- Ancillary Use - a subsidiary use connected to the main use of a building or piece of land (www.lawsonfairbank.co.uk/planning-glossary.asp)
- Ancillary use: a minor additional use that supports or complements the main use of a building or area of land (localplan.westoxon.gov.uk/document.aspx?document=6&display=glossary&id=2)
- Ancillary Use - a subsidiary use connected to the main use of a building or piece of land (www.haltonkelly.co.uk/glossary.shtml)
- Ancillary Use - a subsidiary or secondary use or operation closely associated with the main use of a building or piece of land. (www.bathnes.gov.uk/BathNES/environmentandplanning/planning/planningadviceguidance/Glossary+of+Planning+Terms.htm)

¹ National Capital Plan Draft Amendment 61 – consultation report
http://www.nationalcapital.gov.au/downloads/planning_and_urban_design/consultation_reports/DA61_public_submissions.pdf

- Ancillary Use - a minor additional use that supports or complements the main use of a building or area of land.
(localplan.westoxon.gov.uk/document.aspx)
- (Ancillary Use - A use which is incidental to but an integral part of the main use of a site or building and which may not in itself need planning permission.
www.e-lindsey.gov.uk/localplan/text/app4.htm)
- An Ancillary Use is an activity or use on a property that is directly related to a main use on the same property. If the main use on the property stops, the ancillary use would stop also.
(<http://wx.toronto.ca/zoning.nsf/f6b60153f0b1304d85256f3400461e35/103b13c3a3a5588985256f410055feb7?OpenDocument>)
- Ancillary use means the use of land for a purpose that is ancillary to the primary use of the land. ACT land (ACTPLA definitions)

There is a raft of precedent on what is meant by “ancillary use”. Most local government bodies in NSW use definitions similar to the above. For example, the Orange City Council planning rules state:

For the purposes of this Plan, the following principles are applied in considering if a use may be ancillary development:

- *The subordinate, dependent, incidental or ancillary purpose is on the same land as the dominant one;*
- *Building(s) erected and/or used for ancillary development are necessary for the dominant use to operate effectively;*
- *The area required for the subordinate, dependent, incidental or ancillary purposes is substantially less than the area used for the dominant use;*
- *The number of employees involved in the subordinate, dependent, incidental or ancillary use are less than the number engaged in the dominant use.*

Many Councils refer to two sources to support their approach ie:

- Grainger, Chris. 1993 “The Doctrine of Ancillary Use” in Environmental and Planning Law Journal Vol 10 pp:267-277. Law Book Company, Sydney
- Farrier, David, 1993 The Environmental Law Handbook: Planning and Land Use in New South Wales, Second Edition (p:116). Redfern Legal Centre Publishing, Sydney

The Land Court in Queensland has also dealt with the definition of ancillary use in the following way: *“However it is clearly understood that if the subject property was to be seen as used for the dominant purpose of residential use, then the balance of the commercial use would in no way be interpreted as an ancillary, subordinate or subservient use of those premises. The ancillary use doctrine was defined in Shire of Perth v. O’Keefe & Anor (1964) 110 CLR 529, per Kitto J at page 535; and further discussed in South Sydney City Council v. C Maloney Pty Ltd (1996) 89 LGERA 324 per Bignold J at page 328”*. (<http://www.landcourt.qld.gov.au/decisions/PDF/VC2000-0057.pdf>)

In 2009 in Tasmania, in respect of the Brighton Planning Scheme 2000, challenges arose over the percentage of land that could be used for ancillary use and other uses. The decision by the Tasmanian Planning Commission was to direct amendments to the Brighton Planning Scheme which also impacted on definitions. In respect of ancillary use, the amendment now states “*A use or development on a site that is directly associated with and a subservient part of another use or development on the same site must be categorised as that other use or development*”.

(http://www.planning.tas.gov.au/__data/assets/pdf_file/0009/133983/BRIRZ_03-09_Delegate_Decision.pdf)

For the Department and the NCA to argue that the “ancillary” clause allows for the construction of large commercial office towers totally unrelated to the approved land use would be to totally undermine the whole planning process and indeed the intention of Government and Parliament when Amendment 26 was made to the National Capital Plan. In fact it would make a mockery of the role of Parliament in the planning of the National Capital.

Whether heritage concerns over any development on that site have been dealt with properly and in a transparent manner

Heritage protection on National land in the ACT has effectively fallen through the cracks allowing piecemeal dismantling of the heritage protection intentions.

The facts are:

- In May 1999, Amendment 26 to the National Capital Plan was approved which stated that any development of Section 24 “*shall be in accordance with the recommendations of a Conservation Management Plan agreed to by the Australian Heritage Commission*”.
- On 26 October 1999 a Register of the National Estate (RNE) listing was made for the Acton House site covering the whole of Section 24. The heritage description is “*Approximately 2.07ha, bounded by Edinburgh Avenue, Marcus Clarke Street, Parkes Way and Hales Street, Canberra*”.
- The listing recognised the important visual linkage to heritage buildings in the immediate area by stating: “*Acton House, together with Ian Potter House [formerly Beauchamp House], the Academy of Sciences and the Film and Sound Archive Building, form a precinct of low scale buildings which create an architectural pause between the Australian National University and the high rise development of the Canberra cityscape. These urban design values are a component of the heritage values of the place*”.
- The existing building landscape the heritage precinct of the Shine Dome (a place on the National Heritage List), the National Film and Sound Archive (a Commonwealth Heritage List place) and Ian Potter House and Hotel Acton (both entered in the ACT Heritage List) is sympathetic and low set to the west, north and south.

- The listing also recognised the importance of a number of trees which are located on the site of the proposed Nishi development.
- As the heritage listing postdates the Amendment 26 the intent of the listing should prevail.
- Based on Department of the Environment, Water, Heritage and the Arts website, following amendments to the *Australian Heritage Council Act 2003*, the Register of the National Estate (RNE) was frozen on 19 February 2007, which means that no new places can be added, or removed.
- The web site advised that the Register will continue as a statutory register until February 2012 and during this period the Minister is required to continue considering the Register when making some decisions under the *Environment Protection and Biodiversity Conservation Act 1999*.

Based on the above, it is our opinion that it is inappropriate for the developer to prepare a set of revised Conservation Management Plans and for the NCA to consider such plans which run totally in opposition to the RNE listing. The development of a high rise office tower, together with the destruction of RNE listed trees, in the middle of this heritage precinct is inconsistent with the heritage nature of the immediate area.

It might also be noted that the ACT Government's City West Master Plan (2005) recognised the importance of having sympathetic buildings adjacent to heritage buildings. For example, it is stated: "*The heritage significance of the area will be conserved in terms of Griffin's design intention for the setting, planning and buildings. New development will be of a scale and height that is sensitive to streetscapes and maintains the heritage importance of the area...Development adjacent to heritage buildings will have a sympathetic scale and height.*" In respect of building heights, the City West Master Plan also states that development on Marcus Clarke Street in proximity to heritage buildings should be kept at 5 floors or less.

I note with some concern that part of the Department responsible for heritage protection is in fact part of the new department seeking fitout approval to move into this contentious development. At the very least the committee should assure itself that due process and transparency has been followed within that department to ensure that there has been no inappropriate influence on those considering the very important heritage matters.

Whether the NCA has been competent and transparent in its dealings with the development

There are a number of issues which go to the competency and transparency of the NCA when dealing with developments on Section 24 City. These include:

A. Processes to vary land use:

As noted above, the current land use for Section 24 does not allow for commercial office. The facts are:

- The NCA is not permitted to deal with matters which are inconsistent with the National Capital Plan;
- The NCA has no legal capacity or delegation to amend the national capital plan;
- Any changes to uses of designated land can only be dealt with through an amendment to the National Capital Plan;
- Section 23 of the Australian Capital Territory (Planning and Land Management) Act specifies the processes required for an amendment and to date these have not been complied with;
- Despite the above, the NCA has already allowed one building to proceed on Section 24 which has a substantial office component (occupied by a Commonwealth Authority);
- The NCA has now accepted an application from the same developer for a further development involving further substantial commercial office space;
- The NCA has advised the developer that the application is consistent with the National Capital Plan despite the above.

B. Public consultation process:

It is our contention that the public notice process followed to date is fundamentally flawed and is inconsistent with the requirements of Appendix M of the National Capital Plan.

The facts are:

- As part of the West Basin Amendment to the National Capital Plan, it is stated that building heights shall have a medium rise up to 25 metres. Provision is made to consider taller buildings on the north side of Parkes Way (which would include Section 24) having regard to access to sunlight, visual and environmental amenity, and microclimate. Any proposals for buildings taller than 25 metres require consultation in accordance with Appendix M of the National Capital Plan.
- Part 4 of Appendix M to the National Capital Development Plan states in part “...*the National Capital Authority will require the applicant to notify the proposal in the principal daily newspaper...*”
- The public notice subsequently placed in the Canberra Times had Commonwealth and NCA logos
- The NCA advised me that its practice was for the required notice to be placed in the newspaper by the developer after clearance by the NCA and attaching the Commonwealth logo and letterhead.

While this may be administratively convenient, it is a misleading practice. Any reader who came across that notice would clearly be misled into believing it was a Commonwealth notice. By allowing the developer to arrange placement of the notice, the NCA has no control over the size or location of the notice. Allowing the developer to use the Commonwealth and NCA logo voids the perceived compliance with Part 4 of Appendix M.

The public consultation process also failed to identify what where the key issues ie building height, land usage and mass – all of which should have been subject to specific input by the public.

C. Development density

The proposed development significantly exceeds the general philosophy of building footprints not exceeding 30% of the land mass.

The Draft West Basin Amendment (61) to the National Capital Plan provided for the possibility of buildings above 25 metres in height north of Parkes Way, but imposed a 30% restriction on taller buildings. The removal of this 30% restriction was a concession granted by the NCA to developers as a result of the consultation process. But it would seem that, in making this concession, the NCA envisaged that the consultation process would be paramount.

The publicly available documentation on the consultation process around the Draft West Basin Amendment provides more insight.

The NCA stated that.

“The purpose of having 30% restrictions on taller buildings is to avoid bulky architectural forms, create a varied and visually interesting city skyline, reduce overshadowing of public spaces and allow views between buildings. The 25m height for the balance of development retains the horizontal emphasis of the city within the landscape setting of the Central National. It provides an appropriate urban scale to define the 60 metre wide main avenues, and not overshadow the (generally) 30 metre wide local streets. On many Canberra streets, the mature tree canopy reaches heights of 25 metres. Buildings fronting the waterfront promenade are restricted to a maximum of 16 metres. It is important to provide certainty for the community, and buildings located behind, so that sun access and views over the buildings will be retained. It is noted that buildings adjoining the Hotel Acton precinct should continue to be subject to the Conservation Management Plan and would be addressed through the National Capital Plan, Chapter 10. Heritage.”

However, despite this, the NCA totally reversed its position in proceeding to a final plan without any apparent further reference back to the public. The following was the included in the actual National Capital Plan amendment:

Amend Appendix T.9 (Building Height and Form) : delete the words “ ... taller building elements may be considered on sites fronting Main Avenues and north of Parkes Way where they do not exceed 30% of the site area ... ” and replace with the following:

- *“Buildings heights will generally be medium rise up to 25 metres, taller buildings elements may be considered on sites north of Parkes Way having regard to:*
 - *access to sunlight;*
 - *visual and environmental amenity; and*
 - *microclimate.*
- *“Consultation in accordance with Appendix M shall be required for buildings taller than 25 metres north of Parkes Way.”.....2*

As noted previously, the consultation process for the proposed Nishi development was fundamentally flawed and failed to identify to the public what were the key issues for consideration.

D. Height and mass

The NCA has advised the developer that the application is consistent with the National Capital Plan.

The facts are:

- Section 24 is part of the Central National Area
- While the West Basin Amendment allows taller buildings to be considered on the proposed Nishi site (subject to a public consultation process), section 24 is still subject to the broader planning principles for the whole of the Central National Area;
- The National Capital Plan in Section 1.7 (ix) states: *“New development should seek to respect the design and character of adjacent buildings in terms of scale, colour, materials, massing and frontage alignment”*.
- The proposed development does not respect the heritage buildings immediately adjacent to the site and fails to meet the requirement of design and character of adjacent buildings in terms of scale, colour, materials, massing and frontage alignment

On balance should any Commonwealth department or agency occupy any future development on this site.

We believe that the planning principles set down in Amendment 26 and the broader planning principles for the Central National Area have been ignored in the proposal. Equally important is that the heritage protection issues have been overridden for the sake of a high rise development.

^{2 2} National Capital Plan Draft Amendment 61 – consultation report
http://www.nationalcapital.gov.au/downloads/planning_and_urban_design/consultation_reports/DA61_public_submissions.pdf

The amendment to the National Capital Plan which left the door open for this inappropriate development, was in fact questioned by the Joint Standing Committee on the National Capital and External Territories in March 2007 in its review of the Review of the Griffin Legacy Amendments which included Amendment 61, the West Basin Amendment. The then Chairman of the Joint Committee reported

“Amendment 61 – West Basin is notable for its size and scope. It is proposed that part of the lake be reclaimed using infill taken from the proposed Parkes Way and Kings Avenue tunnel. The amendment provides for a land bridge over a section of Parkes Way for streets to extend to the lake. A waterfront promenade will be created and stepped back from that will be a series of buildings. Building height on the waterfront promenade will be limited to 8 metres (maximum of two storeys). The parapet height of buildings fronting the promenade will be a maximum of 16 metres, and taller building elements to a maximum of 25 metres, and not exceeding 30 per cent of the site area may be considered. Taller buildings may be considered on sites north of Parkes Way. In considering this matter further, the committee examined the NCA’s 2004 report, The Griffin Legacy, Canberra – the Nation’s Capital in the 21st Century. In that report, the NCA set out a plan for West Basin which is moderate in tone, less dominated by development and much more inclusive through the use of extensive green area. Evidence to the committee suggested that the scale of development for West Basin should configure more closely to the NCA’s 2004 proposal.

As a result of the committee’s findings, the committee has recommended that Amendments 56, 59, 60 and 61 be disallowed so that the NCA has the opportunity to further refine the amendments taking into account issues raised in the committee’s report.

This fine tuning is necessary and in the interests of Canberra and the nation.”

The Government of the day chose to ignore these recommendations.

Executive Committee of Units Plan 3063
On Behalf of the Owners Corporation
15th April 2010