

## The Consultation Process

### The Legislative Requirements

- 4.1 Section 15 of the *Australian Capital Territory (Planning and Land Management) Act 1988* requires the National Capital Authority (NCA) to undertake a process of public consultation in relation to proposed amendments to the National Capital Plan. The NCA is required to submit a copy of each draft amendment to the Territory planning authority, and publish a notice in both the Commonwealth Gazette and the leading daily newspaper advising that the draft amendment is available for public consultation and inviting submissions.<sup>1</sup> The NCA must consider the views of both the Territory planning authority and the public and can alter the draft amendment accordingly.<sup>2</sup>
- 4.2 Following the consultation process, the NCA submits the draft amendment to the responsible Minister for approval.<sup>3</sup> The NCA must also provide the Minister with a written report of the consultations it has undertaken.<sup>4</sup>

### Consultation on Draft Amendment 39

- 4.3 The NCA placed notices in *The Canberra Times* on 18 November 2000 and in the *Commonwealth Gazette (GN 46)* on 22 November 2000 advising of the

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1 *Australian Capital Territory (Planning and Land Management) Act 1988*, Section 15 (1).

2 *Australian Capital Territory (Planning and Land Management) Act 1988*, Section 15 (2).

3 *Australian Capital Territory (Planning and Land Management) Act 1988*, Section 18.

4 *Australian Capital Territory (Planning and Land Management) Act 1988*, Section 18.

release of Draft Amendment 39 and inviting public comment.<sup>5</sup> In November 2000 the NCA wrote to all residents of Designated Area informing them of the proposed changes to the National Capital Plan. The NCA also notified ACT Planning and Land Management (PALM), the Official Establishments Trust (in relation to the Prime Minister's Lodge), the diplomatic missions and residences located in the area, and the Joint Standing Committee on the National Capital and External Territories.<sup>6</sup>

- 4.4 The Office of Regulation Review in the Productivity Commission was advised of Draft Amendment 39 in December 2000. The Office, in turn, advised the NCA that a Regulation Impact Statement was not required.<sup>7</sup> The Joint Standing Committee was briefed in relation to the proposed amendment on two occasions – 28 February 2001 and 4 April 2001 – by the NCA.
- 4.5 The NCA received 11 submissions – seven from local residents/lessees, one from the Deakin Residents' Association, and the other three from PALM, the Malaysian High Commission and the Swiss Embassy.<sup>8</sup> A further three submissions were later received from lessees of State Circle properties. Following media reports, further representations and inquiries were made to the NCA.<sup>9</sup> As a result of media speculation in January 2002 about development on State Circle, the NCA wrote to all affected residents/lessees on 25 January 2002.
- 4.6 In their submissions both the residents/lessees and the residents' association addressed the removal of the Designated Area status, the type of future land use for the area, and the proposed development controls. PALM initially supported the removal of the Designated Area status but favoured mixed-use, including non-residential, redevelopment on the State Circle sites. Following further consultation with the NCA, PALM agreed to support version two of the draft amendment, including restricting use of the State Circle sites to residential development.<sup>10</sup> The Swiss Embassy advised that it was not affected by the proposed changes. The Malaysian High Commission was concerned with the removal of the Designated Area status, but after further consultation with the NCA it was satisfied with the proposed changes.<sup>11</sup>

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5 National Capital Authority, Submissions, p. 156.

6 National Capital Authority, Submissions, p. 156.

7 National Capital Authority, Submissions, p. 156.

8 National Capital Authority, Submissions, p. 156.

9 Senate Estimates Committee Hearings, 19 February 2002, *Answers to Questions on Notice*, p. 2.

10 National Capital Authority, Submissions, p. 157.

11 National Capital Authority, Submissions, p. 157.

4.7 The NCA conducted two rounds of public consultation in relation to Draft Amendment 39 – the first between November 2000 and January 2001, the second between July and August 2001 following the release of the revised draft amendment. In relation to public consultation on Draft Amendment 39, the NCA has clearly acted in accordance with its statutory responsibilities. However, a number of residents/lessees in the area have drawn to the Committee’s attention the failure of the NCA to consult with them on another occasion. The resident/lessee of No. 21 State Circle, Mr Donald Davidson, notes the concern he has of the NCA:

not having in place proper control mechanism in administering the policies set out in the National Capital Plan in a fair and even handed manner when dealing with residential development matters.<sup>12</sup>

## A Breakdown in the Consultative Process

### The Legal Requirements

4.8 Section 12 of the Act requires that works proposals in designated areas must be submitted to the NCA, which has the authority for approval. Appendix P of the National Capital Plan sets out detailed conditions of planning, design and development that relate to dual occupancies in designated areas. Development applications are required to:

show what impact building or demolition proposals will have on adjacent properties. In particular, car access and parking areas and landscaping proposals will need to be related to adjacent development.<sup>13</sup>

4.9 The only public notification required is a particular form of neighbour consultation.<sup>14</sup> Appendix P states that:

Prior to consideration of an application for dual occupancy, the National Capital Planning Authority will require an assurance from the applicant that neighbours have been informed of the proposal. Neighbours for this purpose are considered to be lessees having a mutual boundary with the subject block. Where comments are received from neighbours they will be used to assist

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12 Mr Davidson, Submissions, p. 9.

13 National Capital Authority, *Consolidated National Capital Plan*, 2001, Appendix P, p. 183.

14 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 401.

the National Capital Planning Authority delegates to determine whether or not the stated performance criteria are satisfied and to establish conditions of approval so that the intentions of the policy regarding residential amenity can be met.<sup>15</sup>

- 4.10 However, this consultation is limited to notifying neighbours and providing them with an opportunity to comment on the design and siting aspects of the proposal, but not on the proposal itself.<sup>16</sup> The NCA is not itself required to consult with affected residents/lessees, only to ensure that the developer has informed them of the proposal.

### **No. 15 State Circle**

- 4.11 In April 2001 No. 15 State Circle (Lot 6, Section 6 Forrest) was sold.<sup>17</sup> Work to demolish the house and clear the site commenced in June 2001. The lessee of the adjacent block, No. 17 State Circle, Mr O'Sullivan, wrote to the NCA on 30 June 2001 concerning the redevelopment of No. 15. He received a reply from the NCA on 28 July 2001, "effectively 1 month later".<sup>18</sup> The NCA informed Mr O'Sullivan that it had "considered a proposal for a two-storey dual occupancy residential development on the subject site", that the proposal complied with the relevant provisions of the National Capital Plan, and that "Works Approval was granted on 30 May 2001".<sup>19</sup>
- 4.12 In the case of the application to build dual occupancy residences at No. 15 State Circle, the NCA failed to seek an assurance from the developer that the neighbours had been informed of the proposal. In doing so, the NCA approved that development without the benefit of being informed of the views of the residents/lessees who, in fact, did have concerns.
- 4.13 When Mr O'Sullivan wrote to the NCA seeking advice on what consultation was required of residents and neighbours about that type of development, he was informed that "assessment for Works Approval in Designated Areas does not involve public consultation".<sup>20</sup> But, in fact, the NCA incorrectly advised Mr O'Sullivan.
- 4.14 Another neighbour, Dr Norman Boardman, states that he was first aware of the dual occupancy development at No. 15 State Circle "when the bulldozers came in and knocked down the house".<sup>21</sup> He telephoned the

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15 National Capital Authority, *Consolidated National Capital Plan*, 2001, Appendix P, p. 187.

16 National Capital Authority, *Consolidated National Capital Plan*, 2001, Appendix P, p. 187.

17 Mr O'Sullivan, Submissions, p. 92.

18 Mr O'Sullivan, Submissions, p. 92.

19 Mr O'Sullivan, Submissions, p. 94.

20 Mr O'Sullivan, Submissions, p. 92.

21 Dr Boardman, Transcript, p. 45.

NCA and was informed that “under the present plan they were not required to notify neighbours”.<sup>22</sup> Only after taking the initiative to contact the NCA, did the developer inform Dr Boardman of the development. Dr Boardman points out that “there were no opportunities to see the plans”; the NCA “were not able to show us the plans, that was up to the architect”, who did not respond to Dr Boardman’s request.<sup>23</sup>

- 4.15 The error was twofold. Not only did the NCA not insist upon its own consultation guidelines being adhered to by the developer. It also advised the neighbours that there was no requirement to consult, which was technically incorrect.

### The NCA’s Response

- 4.16 In its defence the NCA attributes part of the problem to negotiations with the developer having occurred over a lengthy period and with sporadic contact between the two sides.<sup>24</sup> The error is also attributed to inexperience on the part of the NCA with this type of development - “this was only the fourth dual occupancy we have dealt with in several years”.<sup>25</sup> Mr David Wright (Director, National Capital Plan) of the NCA states:

The point at which the error occurred was at the final decision point. When everybody was satisfied that we had the best result we could hope for in that location, those final tick-offs were not made.<sup>26</sup>

- 4.17 Once the error was detected, the NCA subsequently wrote to correct that advice.<sup>27</sup> The NCA points out that:

two of the three neighbours were in fact consulted and the proponent advised that he had tried to contact the third but had been unsuccessful at that time.<sup>28</sup>

- 4.18 The problem has since been addressed by tightening up its administrative procedures, according to the NCA.<sup>29</sup> This includes the introduction of:

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22 Dr Boardman, Transcript, p. 45.

23 Dr Boardman, Transcript, p. 46.

24 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 401.

25 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 402.

26 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 401.

27 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 401.

28 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 401.

a special application form now in place which picks up these things and provides room for a map to be located on the form with the designated neighbours identified. With that in place that error should never occur again.<sup>30</sup>

## The Right of Appeal

- 4.19 In terms of amendments to the National Capital Plan, there appear to be sufficient avenues available for consultation and appeal by disaffected parties. Parliament itself has retained the right of final approval over amendments to the Plan through the disallowance process. However, what happens with respect to decisions made by the NCA to approve or disallow development proposals? In the case of development proposals made by Commonwealth agencies, the Commonwealth is bound, under the Act, by the Plan, so “appeals are not an appropriate mechanism”.<sup>31</sup> But in the case of residents/lessees in designated areas who feel aggrieved by the actions of the NCA, such as with No. 15 State Circle, is there any course of redress available?
- 4.20 The Act does not make any provision for appeal against an NCA decision to approve or not approve works in designated areas. The National Capital Plan notes “the opportunity for recourse under the *Administrative Decisions (Judicial Review) Act 1977* to determine if a decision of the Authority is correctly made”.<sup>32</sup> Disaffected residents/lessees also have recourse to normal common law approaches such as “seeking an injunction against the Authority, again generally to ensure its decisions are taken in accordance with the Act”.<sup>33</sup>
- 4.21 Mr O’Sullivan was advised that his only opportunity for recourse was through the *Administrative Decisions (Judicial Review) Act 1977*.<sup>34</sup> Mr Davidson suggests that if he were not properly notified and consulted regarding a development on an adjacent property to his:

I would not be contacting the National Capital Authority ... I would see them in the Federal Court and the court would hear

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29 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 402.

30 National Capital Authority, Transcript, Senate Estimates Committee Hearings, 30 May 2002, p. 402.

31 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

32 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

33 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

34 Mr O’Sullivan, Submissions, p. 92.

about why it was that they did not have proper control measures to make sure the applicant had contacted the neighbours.<sup>35</sup>

- 4.22 The National Capital Plan states that “in normal circumstances, the Authority would wish to avoid situations where appropriate solutions could not be achieved through negotiation”.<sup>36</sup> However, it is acknowledged in the Plan that situations may arise where this is not possible. In such cases, legally the NCA’s “views on the merit of the proposal would stand”.<sup>37</sup>
- 4.23 The National Capital Plan notes that when the rights of citizens are affected, recourse to an appeals process may be appropriate. However, the Plan points out that, because only a very small amount of leased land is located in designated areas, there is unlikely to be “large numbers of either development proposals or consequent appeals”.<sup>38</sup> Such small numbers would “certainly not justify the establishment of any special purpose appeals mechanism”.<sup>39</sup>

## The Committee’s View

- 4.24 In approving the redevelopment of No. 15 State Circle, the NCA not only failed to ensure that the residents/lessees of the adjacent blocks were properly notified, but the Committee was not made aware of this redevelopment in a Designated Area whose status was under consideration by the Committee. The Committee came to learn of this through sources other than the NCA. Although there is no requirement in the Act for the NCA to inform the Committee of works approvals in designated areas, the Committee believes that it should have been notified by the NCA, given that it was considering an amendment to the National Capital Plan affecting the area. Such action leads the Committee to conclude that the NCA was inclined, on this occasion, to have treated the Committee contemptuously.
- 4.25 In relation to the concerns of the residents/lessees, the Committee is strongly of the view that the issue is one of principle, and that an opportunity should be offered for redress to any residents/lessees in designated areas who may have been disaffected by NCA decisions. However, in the event that the numbers do not justify the establishment of

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35 Mr Davidson, Transcript, p. 53.

36 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

37 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

38 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

39 National Capital Authority, *Consolidated National Capital Plan*, 2001, p. 143.

a special purpose appeals mechanism, the Committee believes the role of the NCA in consulting residents/lessees in designated areas on development proposals must be enhanced. It is clear that the existing public notification requirements for development proposals, as outlined in Appendix P of the National Capital Plan, are not sufficient. A greater consultative role on the part of the NCA may serve to prevent a repetition of the No. 15 State Circle case.

- 4.26 The Act makes no reference to public notification and consultation in respect of works proposals in designated areas, such as the dual occupancy development at No 15 State Circle. The public consultation provisions of the Act only relate to amendments to the National Capital Plan itself. In light of the concerns expressed by residents/lessees over consultation for development proposals in the designated area, the Committee believes the Act needs to be amended. The Act must specify the requirement for public consultation by the NCA in relation to works proposals in designated areas. In the case of the Deakin/Forrest residential precinct this is especially important if the Designated Area status is retained and the NCA continues to have works approval.

#### **Recommendation 4**

- 4.27 **That the *Australian Capital Territory (Planning and Land Management) Act 1988* be amended to require public consultation by the National Capital Authority in relation to works proposals in Designated Areas.**

**Senator Ross Lightfoot  
Chairman**