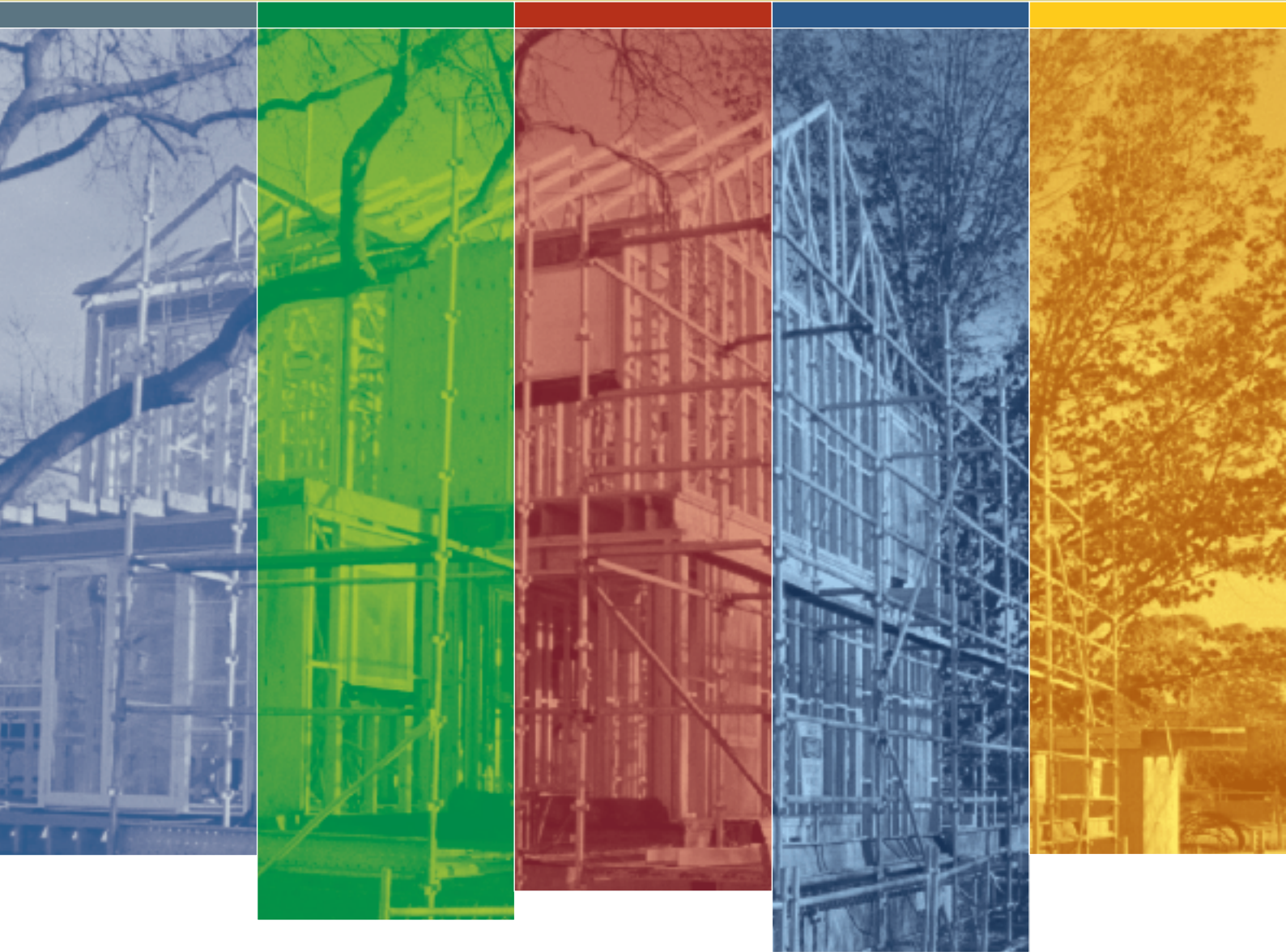


PLANNING SYSTEM REFORM PROJECT



Technical paper 3

Streamlining development assessment and building approval processes in the ACT



ACT Government



ACT Planning &
Land Authority

This is one of five documents that describe proposed reforms to the ACT planning system.
The complete series is as follows:

Directions paper

Technical paper 1 – Leasehold administration in the ACT. Its role in the planning system

Technical paper 2 – Review of the Territory Plan

Technical paper 3 – Streamlining development assessment and building approval processes in the ACT

Technical paper 4 – Review of environmental impact assessment in the ACT

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Overview of proposed reforms

This paper covers processes for the assessment and approval of development proposals and building activity in the ACT.

In the ACT, as in other jurisdictions, the development process moves through various design and assessment stages including initial concept, design proposal, development application, development assessment, completion of building plans, checking of construction standards and final building approval. These stages constitute a set of tools which ideally should encourage high quality developments which more than meet the design, planning, environmental, and safety standards required by the community and set out in different laws and plans such as the *Land (Planning and Environment) Act 1991*, the *Environment Protection Act 1997*, the Territory Plan, and the Building Code of Australia. This paper considers whether the tool set is working effectively to achieve these objectives and looks at possible improvements.

Discussions with industry, business and community groups and discussions held at a national level through the Development Assessment Forum suggest that the assessment process requires improvement in three key areas. The Report of the Auditor-General (2005) also indicated the need for improvements such as measures to reduce complexity of rules and improve timeliness. That report also noted that the small number of successful appeals to the Administrative Appeals Tribunal indicates that decisions of the ACT Planning and Land Authority (the Authority) on development applications are correct and fair to applicants and third parties.

COMPLEXITY

This paper proposes a clearer division of assessment procedures and rules into five explicit tracks that are based on recommendations from the Development Assessment Forum. One aim of this approach is to make sure that proponents have a clear understanding of which assessment track is likely to apply so that they can tailor their development proposals accordingly.

The five tracks are also discussed in *Technical paper 2 – Review of the Territory Plan*.

They include:

- exempt from development approvals
- code assessable
- merit assessable
- impact assessable
- prohibited development.

Many development processes require consultation with government agencies other than the Authority. This paper looks at ways to minimise the number of such referrals or 'trips to other government offices' and to ensure that such referrals are properly integrated into the development application assessment process so that they do not result in excessive delay or confusion. This paper also looks at ways to minimise the requirements

for proponents to consult with government agencies other than the Authority during the development assessment process. It is proposed that referrals should be limited to those agencies with a statutory role relevant to the application. It is the responsibility of proponents to get any necessary operating licences and permits, for example in connection with the operation of a health care facility such as a day surgery.

Many development processes involve both applications for development approval from the Authority and also for building approval of building plans from private building certifiers. This paper also looks at ways of better coordinating these services including measures to assist building certifiers to check and lodge development applications on behalf of the proponent and for building certifiers to access design plans in development applications through the internet. The pool of qualified persons able to perform building approval services could be extended to include suitably qualified town planners.

Also recommended is a review of existing forms, guidelines and checklists used by staff and the public. The review is to ensure that these are comprehensive, straightforward and easy to use.

TIMELINESS

One of the chief concerns of industry is the timeliness of Authority decisions and the time that is sometimes taken up by public notification and third party appeal processes.

Authority statistics indicate that while the clear majority of decisions are decided within the prescribed period, there are a number that go over time. Many of these involve public notification and objection procedures, partly because it is often the more complex matters that attract objection and they take longer to assess.

It is proposed that public notification and objection procedures continue to apply, but chiefly in connection with development applications (in the merit assessable and impact assessable tracks) that are relatively complex and require a significant element of planning judgement and discretion. Third-party appeals are to apply in connection with matters that potentially have significant third-party effects. People who are likely to be *materially* affected can lodge a third-party appeal.

Community consultation procedures for developing planning rules and policy are to continue and will provide the basis for objective rules that are generally understood and agreed to. There is also to be an assessment of the need for a set of standard practices for community engagement to build on recent improvements.

Other specific recommendations intended to reduce the amount of time required to obtain and assess additional information on development applications include:

- new powers for the Authority to refuse applications which contain inadequate or poor quality information, or to delay their consideration until more information is provided
- a new process for private, qualified assessors to check and certify that draft development applications are ready for lodgement
- a fast track process for in-principle or preliminary development approvals (intended to give proponents a clear idea of the legal viability of a proposal prior to full assessment)
- building on recent improvements to systems for electronic lodgement and tracking of development applications.

The *Building Act 2004* (the Building Act) requires the Authority to check and verify that a completed construction complies with relevant development approval conditions that apply to building work. To address delays in obtaining this check, it is proposed that qualified private assessors be permitted to perform this function.

EFFICIENCY

Adopting the five assessment tracks improves efficiency by ensuring that relatively simple development applications use up minimal time and resources (such as staff time and staff seniority) that are better spent in connection with the relatively more complex cases.

As part of this, it is proposed that more developments could be exempt from requiring development approval. In these cases, the intention is to require certifiers to check the building plans to ensure that they fall within the exempt category and that they comply with relevant Territory Plan codes. The recommendation is for this exemption to apply initially to single residences in greenfield sites.

Similar recommendations apply in connection with requirements for building approvals. More non-habitable buildings such as garages, pergolas, carports, and fences will be exempt from the requirement for obtaining a building approval from a building certifier. Instead, a licensed builder is to check that the completed building work complies with the Building Code of Australia. Large structures are to require certification from a qualified engineer.

PLANNING OUTCOMES THAT MEET COMMUNITY AGREED OBJECTIVES SUCH AS ECOLOGICALLY SUSTAINABLE DEVELOPMENT

Improvements to the development process do not of themselves guarantee high quality design and construction outcomes. Outcomes that meet or exceed community objectives require creative design and innovative proposals from developers, builders and the wider community. What the recommendations in this paper attempt to do is remove some of the roadblocks that may prevent good ideas from seeing the light of day.

High quality outcomes from the development process also require consistent decision making from the Authority in the assessment of development applications. The Authority generally does get this right, as indicated by the fact that appeals to the Administrative Appeals Tribunal typically confirm the original decision. However, there is the potential for decision making to vary when applying open ended planning policies that involve a high element of discretion.

In keeping with the recommendations of the Development Assessment Forum, this paper recommends that where practicable the planning rules should take the form of detailed objective criteria that are primarily quantitative in character and that these rules should be explicitly linked to relevant planning objectives. Some existing rules meet this requirement and some do not.

The paper recommends that the review of planning rules identify opportunities for further conversion of rules to an objective footing. This would have the effect of shifting a greater range of development applications into the code assessable track. More complex applications that involve the consideration of multiple, perhaps competing objectives will continue to require a significant element of planning judgement and discretion.

List of recommendations

RECOMMENDATIONS ABOUT OBJECTIVE RULES

- *That the review of planning rules include an assessment of opportunities to convert planning policy requirements into explicit rules and objective, largely quantitative criteria.*

RECOMMENDATIONS ABOUT DAF MODEL ASSESSMENT TRACKS

- *The Land Act should be amended to clearly identify the adopted DAF assessment tracks (i.e. 'exempt', 'code assessable', 'merit assessable', 'impact assessable', and 'prohibited') and the chief rules and procedures that apply to each track such as application fees, assessment method, government referrals and notification and appeal procedures.*
- *A self-assessment track for non-exempt development applications, which leaves no role for qualified assessors, should not be introduced into the assessment scheme.*
- *The Authority should assess the desirability of aligning administrative structures with the adopted DAF assessment tracks.*
- *The review of planning rules should determine the DAF assessment track that should apply to each type of development application.*
- *The application of the different assessment tracks to the different types of development should be made clear and set out in the regulations to the Land Act or in the Territory Plan. This allocation should be updated from time-to-time.*
- *Remove the requirement for new single residences in greenfield sites and (where not already exempt) small structures such as garages, sheds, pergolas to obtain development approval provided that they comply with relevant design and siting codes. Require building or registered planning certifiers to check that the building plans for such structures fall into the exempt category and are consistent with relevant design and siting codes.*
- *The DAF assessment track method and the allocation of development applications to the different tracks should be well-publicised, including through direct Authority advice, information brochures, and the Authority's website.*

RECOMMENDATIONS ABOUT PRE-APPLICATION STEPS

- *That the Authority monitor the pre-application process to assess the extent and nature of any difficulties with a view to making improvements as necessary.*
- *The publications relevant to design and other pre-application steps should be maintained and updated from time-to-time. In particular, the publications should be updated to incorporate any changes associated with the Planning System Reform Project.*
- *Consideration be given to the possible adoption of a pre-lodgement certification process similar to processes adopted in other jurisdictions. This should include an assessment of what qualifications, if any, should be required of the pre-lodgement certifier.*
- *That the Land Act be amended as required to permit the Authority to refuse applications which do not include sufficient information to enable the Authority to make an initial assessment of the application.*
- *That the planning review include consideration of in-principle (that is, preliminary) approvals.*

RECOMMENDATIONS ABOUT APPLICATION AND ASSESSMENT OF DEVELOPMENT APPLICATIONS

- *A stop-the-clock mechanism apply in cases where an amendment to a development application is sought, such as the preparation of an amended application (including revised plans) and any repeat public notification process.*
- *That the Land Act be amended to enable the Authority to stop the countdown of the statutory time period for assessment of development applications pending the supply of further information.*
- *Amend the Land Act to give the Authority discretion to waive the requirement for re-notification of amended applications if the Authority considers that the amendment is of benefit to third parties and does not introduce any new third-party impacts.*
- *That section 247 of the Land Act be reviewed and amended as necessary to clarify when minor modifications to development approvals can be made without further application and assessment; and to permit other modifications to be made without the need to repeat the entire application and assessment process for the whole development provided the modification does not change the purpose or character of the original development application (for example, this would not include a modification to change a single residence development to a dual occupancy one).*

RECOMMENDATIONS TO IMPROVE PROCESSING OF DEVELOPMENT APPLICATIONS

- *Review development application forms and guidelines to ensure that they are not only comprehensive but also user friendly and consistent.*
- *Material relevant to each of the adopted DAF assessment tracks should be clearly identified.*
- *Review checklists to ensure that they provide guidance to staff not only on quantitative issues but also on the method for applying principles of sustainable development and other complex issues.*

RECOMMENDATIONS ABOUT GOVERNMENT REFERRALS OF DEVELOPMENT APPLICATIONS

- *That the Authority refers only those matters that are directly related to the construction, including management of off site impacts, of the development itself.*
- *That the Authority refer matters to agencies for advice only if the matter is identified in the Land Act or regulations as requiring referral.*
- *Referrals should not be required if the proponent has already obtained the relevant advice before submitting the application for development approval.*
- *Amend the Land Act to require referral agencies to provide a response to a referral for advice within a set period, for example fifteen days. This limit may include provision for a 'stop the clock decision' where the proponent and agencies agree more time may be usefully spent in negotiations.*
- *That the Land Act continue to direct the Authority to consider advice from other Government agencies but and there should continue to be no compulsion on the Authority to accept and act on the advice.*
- *Amend the Land Act to direct a referral agency to provide legally binding advice about a licence or permit that it may issue at a later stage in the development process, and the types of conditions that may be attached.*
- *The Land Act should require referral agencies to set out the documentary requirements for seeking referral advice and the criteria on which the referral agency is to make its assessment.*

- *That the Authority continue to notify referral agencies of its decision and that the notification state whether the Authority has adopted the comments of the agency and if not the reasons.*

RECOMMENDATIONS TO IMPROVE COMMUNITY CONSULTATION ON PLANNING POLICIES AND OBJECTIVES

- *Assess the need for a set of standard practices to be developed for community engagement in planning policy development.*
- *Authority guidelines and procedures continue to encourage proponents to consult early with neighbours during the preliminary design stage. These procedures could note that in some (but not all) cases neighbours will have a right to submit comments on the proposal to the Authority.*
- *The Land Act regulations continue to determine what development applications must be publicly notified.*
- *Review the regulations so that public notification applies in connection with merit and impact assessable matters and that the review also consider the appropriate method of notification, for example, by letter or newspaper notice.*
- *Amend the Land Act to make it clear that increased commercial competition cannot constitute a valid ground for making a representation.*
- *Amend the Land Act to permit the Authority to waive requirements for public notification of applications to vary the permissible uses of a Crown lease where the application can have no significant third-party effects.*
- *Notification methods are to be assessed and improved where practical.*
- *That the Authority adopt a standard form for the making of representations. The form, in association with other information, should assist third parties to identify relevant issues and make clear the chief reasons for their representation.*
- *Amend the Land Act to remove the distinction between submissions and objections and instead have a general provision that permits representations, with the same procedures and rights regardless of their support or criticism of a development proposal.*

RECOMMENDATIONS ABOUT THIRD-PARTY APPEALS

- *The set of matters that may give rise to third-party appeals should be reviewed to make them consistent with the DAF model requirements, so that the process applies to only merit or impact assessment matters*
- *Only development applications that potentially have significant off-site impacts in residential areas should be open to third party appeal.*
- *For reasons of clarity, the revised set of appellable matters should be positively identified in the Land Act.*
- *The Land Act should provide that third party appeals are open to persons who (a) are likely to be materially affected by a development application decision and (b) made a representation at the assessment stage.*
- *The Land Act be amended to make it clear that increased commercial competition cannot constitute a valid ground for lodging a third party appeal.*

RECOMMENDATIONS ABOUT BUILDING APPROVAL EXEMPTIONS

- *Amend the Building Act to remove the requirement to obtain a building approval for an increased range of class 10 (non-habitable) buildings and structures (i.e. by extending existing dimension limits for exempt structures) and replace this with the following requirements:*
 - *The licensed builder in charge of the building work is to certify that construction complies with the Building Code of Australia and relevant development approval conditions;*
 - *An engineer must certify that the building work for certain large class 10 buildings and structures is structurally sound and stable; large buildings include those of more than three metres in height or with a structural member that spans more than six metres; and*
 - *The structure can only be used or occupied after the licensed builder has certified the structure.*

RECOMMENDATIONS TO INTEGRATE BUILDING APPROVAL AND DEVELOPMENT APPROVAL SERVICES

- *That the Authority, in cooperation with the building industry, examine the potential for the development of industry standard agreements and guidelines to facilitate arrangements for the building or registered planning certifier to check and submit development applications on behalf of proponents.*
- *That the Authority, in conjunction with the building industry, develop an internet facility that would enable Authority staff and building or planning certifiers to work together on a single set of building design plans in electronic format.*

RECOMMENDATIONS ABOUT COMPLIANCE

- *Amend the Building Act to require certifiers to notify the Authority within one business day of the certifier becoming aware of building work that does not comply with fundamental building or development approval requirements (for example, as to floor level or building perimeter).*
- *Amend the Land Act to require an application for a development approval, or an amendment, in circumstances where the subject building work does not comply with fundamental building or development approval requirements, to be accompanied by a plan, signed by a registered land surveyor, quantifying the non-compliant fundamental dimensions.*
- *Amend the Building Act to permit the private sector through a building certifier or registered planning certifier to assess compliance with development approval and unit title conditions for certain prescribed developments.*
- *That the Authority establish risk management principles for handling complaints and assessing the likelihood of breaches.*
- *Assess the need for development approvals to continue to apply after the issue of a certificate of occupancy in connection with new building activity.*
- *Establish an optional single application and issuing process to facilitate the concurrent processing of both lease compliance and occupancy certificates. This process is to be achieved in part through a single application form (or physically linked forms). This process to be available for use in connection with relatively simple developments.*
- *Amend the Land Act to give the Authority power to withhold the approved plans until pre-requisite conditions have been satisfied.*
- *Amend the Building Act to allow for regularisation of unlawful building work, and for occupancy on that basis*

- *To prevent exploitation of the regularisation provision, the Authority should have powers to:*
 - *refuse to regularise the work but to require demolition in warranted circumstances*
 - *require a caveat on the certificate of regularisation warning successors in land title of the unlawful nature of the building's construction*
 - *order testing of the building to help determine building code compliance (eg: detecting reinforcement in concrete elements).*

1. Introduction

This paper considers the process for preparation, assessment and approval of development proposals in the ACT, including the assessment of development applications to the ACT Planning and Land Authority (the Authority). The paper also considers elements of the building approval process.

It is part of a wider planning system reform project launched by the Minister for Planning in December 2004. The aim of the project is:

to create a contemporary planning and land administration system, processes and practices that will provide greater certainty, clarity and consistency, and which is flexible, timely, less repetitious and administratively manageable.

The need to streamline the planning and development approvals system in the ACT is well-recognised by industry, the community and government. It has been identified in *The Canberra Plan*, the Government's 2004 election platform, and in the many reviews of the process (see Appendix A).

The concerns are based around the dauntingly complex array of legislation, planning rules, guidelines administered by different government departments in relation to development and building approvals. This complexity inhibits understanding of the rules and processes with the result that some are uncertain about how an application should be tailored, how it will be assessed, and whether it is likely to succeed.

Much of the discussion in this paper reflects proposals from industry and inter-governmental discussions at a national level through the Development Assessment Forum (Appendix C). The paper also looks at a number of key issues raised in the Report of the Auditor-General, *Development Application and Approval Process* (2005). A complete account of the Authority's response to the Auditor-General Report has been tabled in the Legislative Assembly of the ACT.

This paper is designed to prompt discussion on opportunities for improvement of these processes particularly in connection with issues of timeliness, transparency and efficiency. The proposed reforms should result in processes which better reflect current national leading practice and which meet the needs of the ACT community.

The circumstances in which extended environmental assessment is currently required and issues for possible reform are not covered in this paper. These matters are set out in *Technical paper 4 – Review of environmental impact assessment in the ACT*.

2. Current development and building approval processes

Most construction projects in the ACT require a development approval from the Authority before they can proceed. This step is intended to ensure that the development proposal is consistent with the requirements of the relevant codes of the Territory Plan and associated plans and guidelines as well as relevant requirements of other government agencies. In an average year, the Authority would approve around \$780 million worth of developments.

After a development proposal is approved the proponent in most cases must obtain building approval to commence building from a private building certifier. Construction must also be checked and, after the building is completed, the developer must obtain a certificate of occupancy from the Authority before occupation can take place. These steps are to ensure that development complies with relevant structural and safety standards in the Building Code of Australia and the requirements of the development approval.

The key steps in the assessment, construction and completion process are as follows:

1. Pre-application (before lodging a development application):
 - o the proponent develops the design concepts
 - o the proponent discusses the proposal with the Authority and other government agencies (before lodging a development application)
 - o the proponent prepares the design and development documentation—including consulting neighbours and government agencies
2. Development application and assessment:
 - o a draft development application is submitted to the Authority
 - o the Authority checks that the development application is complete (a validation check)
 - o the development application is formally lodged and an application fee is paid
 - o public notification of the application (if required)
 - o the Authority assesses the application (including referral to government agencies for advice)
 - o the Authority makes a decision on the application
 - o the Authority gives notice of the outcome to the applicant and, if relevant, to third-party objectors
 - o the Authority may reconsider its decision if required by the applicant (an officer more senior than the original decision-maker must do it)
 - o application and third-party appeals may be taken to the Administrative Appeals Tribunal

3. Building certification

- the proponent applies to private building certifier for a building approval to permit construction of the building
- a building certifier checks that building plans are consistent with the development application and the Building Code of Australia
- a building certifier issues building approval
- a licensed builder starts construction
- the building certifier checks the building during and at completion of construction
- the Authority conducts a final check of compliance with development approval conditions
- the Authority issues a certificate of occupancy
- the Authority issues a lease compliance certificate if the development is on a new lease
- building is occupied or operated

4. Enforcement and compliance checks

- the Authority monitors selected developments
- the Authority investigates complaints from the public in connection with non-compliance

KEY ISSUES

Discussions with different community groups suggest that there are some serious concerns about the complexity, consistency and efficiency of development application and building approval processes.

The difficulties may be due in part to the confusing number and variety of laws, regulations, planning rules, plans, guidelines and government policy requirements that often apply to a project. It is these rules and laws that determine the criteria for assessment of a project.

For example, an application for an extension of a residential building in a residential area might require application of the Territory Plan, a master plan, a neighbourhood plan, the *Land (Planning and Environment) Act 1991* (Land Act), Land Act regulation, the *Tree Protection Bill 2005*, urban infrastructure guidelines, waste management guidelines and other government policies.

Such complexity and associated uncertainty can inhibit development, add to proponent and community costs, and exacerbate delays in assessment. It also makes it difficult for developers and the general public to understand the rules and assessment criteria that are likely to apply to a development, how it will be assessed, and whether the application is likely to succeed. This, in turn, makes it more difficult for developers to assess the viability of projects and to prepare sound design concepts and applications.

These problems of complexity apply not just to the development assessment process but also to pre-application discussions and preparation of documentation.

Consistency is clearly an issue. For example, the development industry reports that government requirements stipulated in pre-application discussions differ from requirements imposed later during the assessment stage. Different government agencies sometimes seem to make conflicting requirements and similar development applications sometimes lead to different decisions. Underlying these concerns is the belief that the complexity of the process leaves too much scope for subjective, non-transparent decision-making that can lead to inconsistent and unfair planning outcomes.

The Development Assessment Forum suggests that decision-making in an overly complex, subjective environment can inhibit the achievement of community agreed goals. In particular, inefficient processes and inconsistent outcomes can lead to poor design and assessment decisions, and poor planning outcomes. In particular, complexity can lead to outcomes that fail to promote environmentally sustainable development and other community agreed objectives.

A review of planning rules is recommended in *Technical paper 2 – Review of the Territory Plan*. The paper suggests that the rules be critically reviewed to overcome conflict and inconsistency and to ensure that they reflect best practice.

This paper looks at ways of improving the development application and building approval processes in the ACT. In particular, the following goals are addressed:

- timeliness—the process should not unreasonably delay assessment and consideration
- transparency—all parties should be able to access the relevant requirements with relative ease
- equity—clear, objective rules and tests should be developed so that decisions are as consistent as possible, and affected parties should have equal access to decision-making processes
- effectiveness—decisions should contribute to relevant policy objectives, which requires assessments to be made at the appropriate level.

3. Clearer and more objective rules

Recommendation:

- *That the review of planning rules include an assessment of opportunities to convert planning policy requirements into explicit rules and objective, largely quantitative criteria.*

Current planning rules and guidelines tend to be well-defined and objective, as is the case for most residential developments. However, some planning rules and guidelines require a level of subjectivity in their application for some types of development, such as industrial or commercial developments. This is because the rules are discretionary and open-ended in their application.

Unnecessarily high levels of subjectivity in the application of rules can have several negative effects, such as:

- unfair outcomes (such as applications being treated differently)
- uncertainty of the assessment approach and planning outcomes for industry and the wider community, which can inhibit development
- outcomes that do not consistently contribute to community agreed goals such as environmentally sustainable development
- delays in the assessment process (due to the need for subjective judgement and review of this judgement).

In practice, the Authority is as consistent and fair as possible in its decision-making, as demonstrated by the large proportion of decisions of the Administrative Appeals Tribunal that confirm the Authority's decisions. Nonetheless, the potential for inconsistency exists, as does the perception of inconsistency.

The solution proposed in this paper is that, as far as possible, planning requirements should be translated into objective explicit criteria that are quantitative, so they can be measured and consistently applied.

The advantage of this approach is that it leaves little or no room for subjective interpretation or misunderstanding. There may need to be some flexibility built into the rules where appropriate to allow for alternative means to achieving desired performance outcomes, but such flexibility should be tightly defined. Loose criteria such as *the streetscape must be preserved* should be avoided as much as possible.

This approach is consistent with the Development Assessment Forum recommendations for objective rules and tests.

It will not always be possible to reduce all planning requirements to objective explicit criteria because of the complexity of relevant policies or due to the difficulty of anticipating all likely scenarios. The realistic aim then that as many planning requirements as possible take the form of explicit rules and objective criteria.

It is expected that objective criteria, particularly criteria that are largely quantitative, would also help reduce the overall time and resources required for development assessments.

Section 7.1 of *Technical paper 2 – Review of the Territory Plan* includes a recommendation for a comprehensive review of planning rules to reduce conflict and inconsistency and ensure that they are consistent with best practice. This review will provide the opportunity for assessment of the potential for conversion of planning rules to a more objective footing.

4. Adopting track-based assessment

Recommendations:

- *The Land Act should be amended to clearly identify the adopted DAF assessment tracks (i.e. 'exempt', 'code assessable', 'merit assessable', 'impact assessable', and 'prohibited') and the chief rules and procedures that apply to each track such as application fees, assessment method, government referrals, and notification and appeal procedures.*
- *A self-assessment track for non-exempt development applications which leaves no role for qualified assessors should not be introduced into the assessment scheme.*
- *The Authority should assess the desirability of aligning administrative structures with the adopted DAF assessment tracks.*
- *The review of planning rules should determine the adopted DAF assessment track that should apply to each type of development application.*
- *The application of the different assessment tracks to the different types of development should be made clear and set out in the regulations to the Land Act or in the Territory Plan. This allocation should be updated from time-to-time.*

The basic approach of track-based assessment is that the type or intensity of assessment should be commensurate with the complexity and potential impact of the proposed development. Because this is stated up-front, applicants know how an application will be assessed and determined before they prepare and submit it.

The Development Assessment Forum (DAF) has proposed six tracks as part of its leading practice model. These tracks with suggested examples are listed in Table 1. A more detailed description of each track and the extent to which it is already operating in the ACT is in Appendix C.

Table 1: Possible development assessment tracks (after DAF)

Track	Description
Exempt	The development may proceed without approval if it meets certain conditions. Examples include single residences in greenfield sites, small sheds and pergolas.
Prohibited	The development is not permitted under any circumstances. For example, a paint factory may not be built in a residential area.
Self-assessment	The development is permitted and approved without qualified assessment because it meets certain conditions. There is no support for this track in the ACT.
Code assessment	The development is assessed under a set of quantitative rules. There is no third-party right to object. Examples include large pergolas, dual occupancies and house extensions in non-greenfield areas that fully comply with relevant codes.
Merit assessment	The development is assessed under a broader set of rules that require some judgement in their application. Public notification of the proposal is required. A large, multi-unit development in an established residential area or a new office block in a town centre that do not fully comply with relevant codes would be examples.
Impact assessment	Developments that require a formal environmental impact statement to be submitted as part of the application. Public notification is required. An example would be expanding a quarry or establishing a new one, a new wood processing plant or winery.

Track-based assessment has been widely accepted by local, state and national authorities. Some of the elements of this approach are already an integral part of the application and assessment processes for development applications in the ACT.

The proposed track assessment model has several advantages. In particular the assessment tracks provide a means to assist in the following areas:

- **Effectiveness**—the assessment tracks should assist the Authority and applicant to identify the appropriate level of assessment that should apply to a development application. This should mean that applications are assessed in a proper manner. For example, an application that falls into the code assessment stream should attract the level of assessment deemed appropriate to that stream. The tracks could determine, for example, whether a matter should be assessed by a senior officer or an Authority panel, how much investigation research is required, and what internal administrative processes apply.
- **Efficiency**—the assessment tracks should assist the Authority to identify the appropriate level of time and resources that should apply to a development application. Adoption of the tracks would ensure that applications are assessed in a timely manner.
- **Clarity**—Provided the assessment tracks are well-defined, publicised and understood, they can assist proponents and the wider community to identify what rules are likely to apply to an application. The applicant and interested parties can tailor their application or submissions accordingly. For example, the assessment tracks should help the proponent and others to identify the likely costs, procedures and time to be taken by an application and whether notification and third-party appeals are relevant.
- **Consistency**—the assessment track approach should ensure that applications in the same assessment track are subject to the same level of assessment, rules, costs and procedures.

To be effective, the DAF model assessment tracks must be more than descriptive. The tracks should determine, at least in general terms, the planning steps and outcomes such as assessment, administrative and appeal processes relevant to a particular development application.

ALLOCATION OF DEVELOPMENT APPLICATIONS INTO THE TRACKS

Implementation of the model requires the different types of development proposals to be allocated into the different assessment tracks—the exempt, prohibited, code, merit and impact tracks. The obvious way to do this is to develop a list of developments permitted under each track. This brings with it the advantage that an applicant should know from this list which track an application is likely to be assessed under.

Applications that can be assessed largely on the basis of objective, mostly quantitative rules would be in the code assessment list. Applications that require one or more (perhaps competing) policies to be considered would most likely live in the merit or impact assessment box.

A key feature of the DAF assessment track model is that there should be a standard or common set of rules and procedures that apply across all development applications in a particular track. According to DAF, this is necessary for consistency and transparency of assessment processes. A development application that falls into the code assessment track, for example, should be subject to the same set of rules and assessment procedures as every other development application assessed under that track.

ADMINISTRATIVE ARRANGEMENTS

Current administrative processes for the assessment of development applications are tailored in part to the relative complexity of the application. For example, development applications for the building of a single residence that are relatively straightforward are processed by one administrative unit; more complex matters are processed by another. An application that is the subject of two or more objections is referred to the internal decision review panel. All groups work within a single, cohesive administrative structure.

These arrangements should be examined to assess the benefits of aligning administrative processes more closely to the proposed assessment tracks. Possible outcomes include:

- staff of appropriate seniority assesses development applications in a given track
- one administrative group deals with code assessment matters; another deals with merit and impact matters

In this latter case, the area that receives development applications will need to decide where to send it for assessment. Any such structure would need to ensure that all administrative groups continue to work closely together.

LEGISLATIVE SUPPORT

Finally, the assessment tracks should be clearly recognised and enduring—they should not be open to administrative change. This means that the division of application types and planning rules and policies between the different assessment tracks should be made clear and set out in a statutory instrument such as the Land Act regulation or the Territory Plan. *Technical paper 2 – Review of the Territory Plan* recommends that the Territory Plan should list development under the different assessment tracks.

4.1 Adding to the code stream

DAF suggests that, in most jurisdictions, too many development applications still fall into the merit and impact assessment streams. Time and resources could be saved by shifting the less complex matters to the code stream where they can be assessed against clear quantitative criteria and there is no third-party appeal. This shift would free up time and resources for those matters that genuinely do require more complex levels of assessment.

There are limits to how far this shift can be taken. There are matters that are too complex or simply too unusual to fit within simple, predetermined quantitative criteria. In

addition, an over-emphasis on explicit quantitative criteria can rob the proponent and the assessor of opportunities to meet a performance measure through alternate means.

To achieve the right balance, it may be necessary to review current planning rules and application procedures to determine whether there is the opportunity to make a significant shift in this direction. This would be achieved by increasing the number of matters that can be treated through the code process.

4.2 Adding to the exempt stream— single residences and small structures

Recommendation:

- *Remove the requirement for new single residences in greenfield sites and (where not already exempt) small structures such as garages, sheds, pergolas to obtain development approval provided that they comply with relevant design and siting codes. Require building or registered planning certifiers to check that the building plans for such structures fall into the exempt category and are consistent with relevant design and siting codes.*

The Authority issues development approvals on around 2000 houses per year and around 500 small structures such as pergolas and decks. All of these comply with relevant design and siting criteria and are located in non-contentious areas, such as new suburbs and suburbs developed in the last few decades that have been the subject of intense planning processes. These developments are exempted from public notification requirements under the Land Act regulation.

There is little value added in requiring a development application in such cases. The development assessment process merely verifies that the development is compliant with the relevant codes, but does not enhance the quality of the proposed development. The approval process does not alter the proposed design.

Instead of the current development assessment process being required in the case of such developments, this proposal would make a legal provision that requires proposals to comply with prescribed design and siting criteria, including sustainability certification (such as that used in the NSW BASIX system). It may also possibly establish some prescribed urban design measures associated with siting and building design.

The proposed system would exempt straightforward developments of low significance from requiring a development approval, if the development complies with quantitative design and siting criteria. It would remove the requirement for development approval for those projects where the development approval process adds nothing of any significance.

The proposal is to amend the Land Act regulations to add a new exemption for single residences in greenfield sites. The Land Act already exempts a number of non-habitable structures such as sheds, carports, pergolas. The proposal is also to add to these exemptions by extending existing dimension limits for exempt structures.

Building certifiers are currently required to ensure that plans submitted to them for a building approval are not inconsistent with the respective development application. The proposal would not require building certifiers to issue development approvals. Instead, certifiers would ensure that plans are consistent with relevant design and siting criteria.

If the building certifier found that the proposals were inconsistent with relevant criteria or not within the class of exempt matters then the certifier would not be able to issue a building approval and would need to advise the proponent that a development application is required. This aspect of the proposal avoids the need for building certifiers to make qualitative judgements on development approval matters, but extends their current role on checking what is exempt from requiring a development approval.

That system would be similar to the NSW system of complying development where private accredited certifiers assess and certify the development and issue a Complying Development Certificate. The difference here is that there is no proposal to have the building certifier issue a certificate (a development approval).

The proposal ensures that projects requiring qualitative development approval judgments remain solely within the realm of government to determine if or not a development approval is granted and the terms upon which any such approval is granted. Table 2 lists a summary of the costs and benefits of the proposal.

Table 2: Costs and benefits of the proposal for complying developments

Benefit	Cost
Complying developments do not need a development assessment saving the public the cost of the assessment fee. For each house that saves at least \$340.	Certifiers are currently required to check if plans require a development approval when they assess the plans for a building approval. However, checking if a house meets complying development criteria is more complex and could add more than \$100 to certifier's fees in some cases.
At least one day processing time is saved, as government development assessments take at least 24 hours, whereas they would add less than one hour extra time to the certifier's plan assessment function.	Nil
Government would process about 2500 fewer development assessments per year, which would instead be handled as complying developments, saving government around \$160 000 per year.	Government would forego the relevant fee income for around 2500 development assessments per year (approx \$1.25m), but would need to audit a complying development to check it does not contravene requirements, at an extra cost to government of around \$40 000 per year.

The above recommendation and subsequent recommendations on the building certification process refers to 'registered planning certifiers'. There may be some benefit in expanding the class of qualified persons that are able to perform the building certification and related functions given the relatively small numbers of qualified building surveyors operating in the ACT. This relatively small pool could be expanded by permitting suitably qualified town planners who are accredited members of the Planning Institute of Australia. It will be necessary to discuss further the particular qualifications that might be required of town planners in this role.

4.3 Publicising the new requirements

Recommendation

- *The DAF assessment track method and the allocation of development applications to the different tracks should be well-publicised, including through direct Authority advice, information brochures, and the Authority's website.*

Developers and the community need to have a clear idea of which assessment track is likely to be relevant to an application. In fact, it is the only way they will be able to address the issues required by the relevant rules and assessment processes.

The DAF model assessment tracks must therefore be well-publicised and well-understood. This requires firstly that the tracks and applicable rules be developed in a logical, readily understandable way and that the tracks be covered well in the Authority's advice, information brochures, website and other information sources.

5. Pre-application processes

Recommendation

- *That the Authority monitor the pre-application process to assess the extent and nature of any difficulties with a view to making improvements as necessary.*

Pre-application discussions with the Authority and other agencies are optional. Proponents may lodge their development applications without any pre-application discussion. This flexibility permits proponents to tailor their approach according to their experience and the complexity of the proposal.

Even so, there is a view that the pre-application process, when engaged, can sometimes take too long to complete. Industry has indicated that some statements made by agencies during pre-application discussions run counter to approaches taken after the application is lodged. This contradiction makes it difficult to prepare development applications. These concerns suggest there is a need to monitor Authority involvement in the pre-application process to confirm the extent of these problems and address them as necessary.

Other proposals to improve the process are outlined below.

5.1 Information on the pre-application stages

Recommendation:

- *The publications relevant to design and other pre-application steps should be maintained and updated from time-to-time. In particular, the publications should be updated to incorporate any changes associated with the Planning System Reform Project.*

The Authority has implemented a holistic approach to development through a focus on the pre-application stages including concept design. This focus is evident in the advisory services and publications of the Authority. In particular the Authority maintains the following publications that focus on the design stage:

- *Development Application and Design Guidelines - Enhancing our Living Environment*—summarises the various steps in the development design and application process
- *Guide to Good Design*—looks at home design issues that are important to achieving a high standard of design
- *Achieving Sustainable Residential Development*—a guide for architects and building designers that outlines the critical issues in achieving high levels of respect for the environment and quality of life.

The *Development Application and Design Guidelines* focus on the design phases of development. The guidelines set out the steps involved in the development of initial ideas and budget, early contact with the Authority and other government agencies, as well as development of design concepts, consultation with neighbours and preparation of development application documentation including the design response report.

Comments from industry and the general public suggest that these guidelines are a valuable asset in the preparation of design concepts and development application documentation.

5.2 Pre-lodgement certification and validation of documentation

Recommendations:

- *Consideration be given to the possible adoption of a pre-lodgement certification process similar to processes adopted in other jurisdictions. This should include an assessment of what qualifications, if any, should be required of the pre-lodgement certifier.*
- *That the Land Act be amended as required to permit the Authority to refuse applications which do not include sufficient information to enable the Authority to make an initial assessment of the application.*

PRE-LODGE MENT CERTIFICATION

Some councils, such as Glen Eira and Bendigo in Victoria, have introduced a process of pre-lodgement certification (*Better Decisions Faster* 2003, p12). This quality assurance measure involves a draft application being checked and certified by planners or other qualified persons. After the application is checked it is lodged with the Authority with the assurance that the application is assessment ready.

The paper *Better Decisions Faster* (2003, p12) suggests that this assessment should include an assurance that:

- the application is complete and fully documented
- required pre-lodgement steps such as meeting with government agencies has occurred
- the application appears to meet the requirements of relevant planning rules.

Adopting this approach could contribute to the achievement of goals of preparedness, timeliness, effectiveness and transparency.

CHECKING THE VALIDITY OF DEVELOPMENT APPLICATION DOCUMENTATION

The Authority considers that poor quality or inadequate documentation sometimes results in a delay to the determination of development applications. The Authority applies a validation process that involves checking of documentation over several days before development application is formally lodged.

The validation process involves a check to ensure that the development application form is correctly completed and that any necessary supplementary documentation is provided. If the application does not meet these criteria then it is not accepted and no application fee is charged. In this case the assessment process, with prescribed time frames and appeal rights, does not commence. The development application is refused on the basis that the application form that is prescribed under s.287A has not been substantially complied with as required by s.255 of the *Legislation Act 2001*.

The aim of this process is to improve the quality of documentation lodged with a development application and this has been achieved especially in connection with relatively complex proposals. It has meant reduced assessment times in some cases; but the process can be improved.

The relevant law on prescribed forms as noted above does not readily permit the Authority to refuse a development application on the basis that it does not include sufficient information. In particular, s.255(4) of the *Legislation Act 2001* provides that substantial compliance with a form is sufficient. If the application is complete, and the required documentation is attached, then the development application must be accepted.

The Victorian paper *Better Decisions Faster* (2003 p13) concluded that an ability to refuse applications with insufficient information would reduce delays from further information requests and so improve the timeliness of decision-making. The situation may be improved by amending the Land Act to introduce such an ability. Perhaps s.50 of the *Dangerous Substances Act* (2004) provides a suitable model.

5.3 In-principle or preliminary planning approvals

Recommendation:

- *That the planning review include consideration of in-principle (that is, preliminary) approvals.*

The Authority currently receives many requests for assurance from applicants about whether a development application is likely to be approved. Proponents, particularly of large complex proposals, seek a level of confidence in the permissibility of a project prior to committing funds to the development of a formal application.

One option for meeting such requests is to establish a process that enables proponents to apply to the Authority for an assessment of basic planning design features such as building envelope and gross floor area. The resulting in-principle, preliminary approval would be indicative only. It would be subject to change following lodgement of a formal development application and assessment of the detailed application or following further consultation with other government agencies.

6. Lodgement and assessment of development applications

The Report of the Auditor-General (2005) expressed concern with the timeliness of some Authority decisions on development applications. The following recommendations in connection with lodgement and assessment of development applications should help the Authority to make decisions in a timely manner. In considering these issues it should be noted that the vast majority of applications are currently decided within the prescribed period.

6.1 Timeliness and stop-clocks for development applications

Recommendations:

- *A stop-the-clock mechanism apply in cases where an amendment to a development application is sought, such as the preparation of an amended application (including revised plans) and any repeat public notification process.*
- *That the Land Act be amended to enable the Authority to stop the countdown of the statutory time period for assessment of development applications pending the supply of further information.*

The Land Act sets timeframes for the determination of development applications (s.230 of the Land Act and clause 37 of the Regulation). The prescribed period is 30 working days, or 45 days if there are any objections.

An application is deemed to have been refused if the Authority fails to make a decision before the end of the prescribed period. This can happen if an application for an alteration to original application is lodged close to the end of the prescribed period. It can also happen when applicants are requested to submit additional information during the assessment process; for example, an applicant may be asked to furnish a traffic study on a major commercial proposal.

For the 2003–04 financial year 87 per cent per cent of single residence applications and 71 per cent of other applications were determined within the prescribed period. This compares with a performance target set by the Authority for that year of 85 per cent and 75 per cent respectively. The relevant statistics are set out in Table 3.

Table 3: Development applications determined within prescribed period for 2003–04

Development Type	Total	With no objections (30 day prescribed period)	With one or more objections (45 day prescribed period)
Single residence	4573, of these 87% were determined within prescribed period	Total of 4387, of these 88.6% were determined within prescribed period	Total of 186, of these 40.3% were determined within prescribed period
Other	766, of these 71% were determined within prescribed period	Total of 651, of these 76.8% were determined within prescribed period	Total of 115, of these 37.4% were determined within prescribed period

The statistics indicate that many of the applications that are determined out of time involve objections. This is partly because it is the more complex applications that often attract objections. Significant time may be required to assess the objections and discuss these with the proponent, particularly if the objections are numerous or raise further complex issues. The need to obtain further information from the proponent in connection with the original, complex proposal or objections raised can also result in delay.

An Authority request for further information must be complied with before the due date set by the Authority (no more than 28 days). If the further information is not supplied the application is deemed refused (s.233, s.234 of the Land Act).

When the statutory time limit expires, regardless of the reason, the applicant may appeal to the Administrative Appeals Tribunal, even if the development application is only deemed to have been refused. If an appeal is lodged, the Authority cannot continue to assess the application but must wait the Administrative Appeals Tribunal decision.

If a decision is not made by the end of the prescribed period and the applicant does not lodge an appeal, the Authority can continue to assess and determine the application. This is what happens in most cases after the prescribed period expires.

The prescribed period for assessment of applications can be extended at the request of the applicant only, not the Authority. The net result of these provisions is that applications are sometimes deemed to be refused simply because the statutory time limit has finished. Even though the application can still be determined, the applicant now has a right of appeal to the Administrative Appeals Tribunal, which may be unnecessary. Such a sequence of events does not seem appropriate in this circumstance and can result in Authority requests to the applicant to apply for extension of the time period to avoid a refusal or deemed refusal.

It may therefore be useful to introduce a stop-the-clock mechanism at this point, to permit the Authority to put an application on-hold pending the supply of requested further information. Subject to further review it may be appropriate for the Land Act to set out the circumstances in which the clock may be stopped to ensure that the mechanism was not used for inappropriate reasons.

6.2 Handling amended development applications

Recommendation:

- *Amend the Land Act to give the Authority discretion to waive the requirement for re-notification of amended applications if the Authority considers that the amendment is of benefit to third-parties and does not introduce any new third-party impacts.*

In some cases an applicant may seek to amend an application before it is decided by the Authority (s.226(7) of the Land Act). The amendment proposal may originate from changed ideas or from discussion with neighbours, community groups or government agencies. In many cases the proposal is in response to objections raised during the public notification period. Any public notification conducted under the original application must be repeated in full for the amended application. This means that the amended application in its entirety is notified afresh and there is a further opportunity for objections to be made.

Every amended application, whatever it's nature, must be notified again in this circumstance; there is no discretion to not proceed with the repeat notification. This means, for example, an amendment which reduces third-party impacts such as an improvement to the privacy of neighbouring properties must still go through the repeat notification process. It is suggested that such repeat notification is not warranted. Perhaps the Authority should have a limited discretion to accept an amended application without recourse to the repeat notification process.

If a stop-clock mechanism is included, a revised process might look something like the following:

- a development application is lodged
- public notification commences
- an objection is lodged with the Authority
- the Authority refers objections to the applicant and asks the applicant to notify the Authority of an intention to seek an amendment of the application in response to objections
- the applicant notifies the Authority that it will seek an amendment—at this point the clock stops, pending receipt of the proposed amendment and amended plans
- the Authority receives a request for amended application including amended plans
- the Authority decides whether there must be a repeat notification, in which case the clock will remain stopped until the notification period is concluded, otherwise the clock recommences
- the Authority determines the amended application.

In some cases the Authority is required to refer development applications to other government agencies for advice. For example, development applications that foreshadow damage to significant trees must be referred to the Conservator of Flora and Fauna. The referral systems and opportunities for efficiency gains are discussed in later sections on government referrals.

6.3 Modification of granted development approvals

Recommendation:

- *That section 247 of the Land Act be reviewed and amended as necessary to clarify when minor modifications to development approvals can be made without further application and assessment; and to permit other modifications to be made without the need to repeat the entire application and assessment process for the whole development provided the modification does not change the purpose or character of the original development application (for example, this would not include a modification to change a single residence development to a dual occupancy one).*

A developer may wish to amend a development application that has been granted by the Authority before the construction is finished. An example would be extending a verandah closer to the boundary edge.

Section 247 of the Land Act permits the Authority to amend an approval without a fresh development application only if it believes that the amendment will *not*:

- change the effect of a condition in the development approval
- cause a significant increase in detriment to anyone
- change the kind of development approved—only the activity permitted.

In addition, the Authority can correct formal clerical errors in development applications (s.248 of the Land Act).

There is no third-party appeal process in connection with applications for amendment under s.247 and s.248. The Authority must give notice of the modification to everyone who made an objection to the original development application.

If the application does not meet the requirements of s.247 or s.248, then the developer must make a fresh development application for the whole development (with the modification) and repeat the full application, public consultation and assessment process.

There is no alternative to a full repeat process for amendments, even for relatively minor ones that do not meet the criteria. This all or nothing approach can result in unnecessary time and resources for the public, the developer and the applicant; it is most inconvenient for relatively minor modifications to large-scale developments.

The current situation also has the disadvantage of leading to unrealistic expectations by some in the development industry that s.247 and s.248 can be used for most modifications when in fact they can be used for only a few minor ones.

There may therefore be some benefit in reviewing these provisions. The aim would be to permit assessment (and, where relevant, public notification) of the proposed modification without the need to re-assess the whole application. There is such a provision in NSW (s96 of the *Environmental Planning and Assessment Act NSW 1979*).

This process could apply to applications that change the design of a development in ways that require changes to approval conditions but that fall short of changing the purpose or character of the development. If the amendment is of the kind that may negatively

impact on some people, and the original application was publicly notified, then the amendment should also be publicly notified. In making its decision on the amendment, the Authority should take account of any representations received. A similar approach should apply to third-party appeals.

6.4 Other development application lodgement issues

Recommendations:

- *Review development application forms and guidelines to ensure that they are not only comprehensive but also user friendly and consistent.*
- *Material relevant to each of the adopted DAF assessment tracks should be clearly identified.*
- *Review checklists to ensure that they provide guidance to staff not only on quantitative issues but also on the method for applying principles of sustainable development and other complex issues.*

FORMS AND CHECKLISTS

The Authority makes use of a number of different forms, guidelines and checklists to provide some guidance to staff during the assessment process and also for use by the public. The Report of the Auditor-General (2005) suggests that that this documentation risks being overly complex, and voluminous and that there is the potential for inconsistency and overlaps between different guidelines.

TRACKING OF DEVELOPMENT APPLICATIONS

The Authority has gone some way towards developing an electronically automated application and assessment system. Elements already in place include a facility for electronic lodgement of development applications, notification of applications on the internet, and implementation of the Integrated Document Management System (IDMS). These systems enable applications and files to be maintained and updated in electronic format. Further progress on implementation of these systems should improve the tracking and record of documents associated with development applications. In particular, it should enable the Authority to implement further improvements to internal administration practices.

In addition there has been some research done towards development of these systems to incorporate the following facilities:

- ability of proponent and Authority staff to identify the current stage of the development assessment through the internet
- quality control of procedures so that the system will prompt for the required steps and will not permit new steps until previous ones have been completed.

Electronic tracking systems with the above features have already been tested and proved successful in other jurisdictions such as in the councils of Shellharbour and Strathfield in NSW.

SUSTAINABILITY

Staff training on how to apply the principles of sustainable development should be supported as far as practical by suitable checklists and guideline material on the matters that must be considered in connection with sustainability principles.

ENVIRONMENTAL IMPACT ASSESSMENT

Part A3 of the Territory Plan requires that environmental issues (including ecological, cultural and amenity) issues be considered in all development applications. The extent and nature of this assessment depends in part on the type and location of the proposal and potential off-site effects. In most cases, the assessment will be a part of the process of preparing of the development application. A more formal, extended environmental assessment (such as a formal environmental impact study) may be required by the Government.

The circumstances in which environmental impact assessment is currently required and proposals for possible reform are set out in *Technical paper 4 – Review of environmental impact assessment in the ACT*.

7. Government referrals

Development proposals often require advice or authorisation from a government agency other than the Authority before they can proceed. Applicants are advised to seek such advice before lodging a development application. Where necessary, the Authority refers the application to relevant government agencies.

The most common referrals are for advice on:

- tree damaging activity (Conservator of Flora and Fauna through the Chief Minister's Department, refer to section 229 of Land Act and note the *Tree Protection Bill 2005* clauses 80 and 81)
- waste and storm water management (Department of Urban Services)
- in some of the more complex matters, driveway design (Department of Urban Services)
- heritage issues (Heritage Council through the Chief Minister's Department).

Some referrals are required by the Land Act—these are statutory referrals (see Appendix B for a list). Most referrals, however, are non-statutory and they are made as a matter of good administrative practice.

Advice from referrals must be received and considered before the Authority decides the development. In addition to the requirements of the Land Act, subclause 9.2(d) of Part 3 of the Territory Plan requires the Authority to consider the comments of any person or agency to which an application has been referred for comment. The Authority may refuse an application if the advice is 'fatal' in that it points to a major unavoidable environmental or heritage impact, or states that an essential agency licence or permit would not be granted.

Industry has expressed concerns with delays, complexity, and the frustration of having to deal with multiple government agencies. One feature that may contribute to uncertainty and delay is the lack of legislative underpinning of much of the referral system. The Land Act says relatively little about what referrals must be made, when advice should be provided, and how it should be acted on. The lack of legislative underpinning means that the administrative practices of the referral system are subject to administrative change from time to time and this may also contribute to uncertainty. Exceptions to this are the provisions on referrals of heritage issues to the Heritage Council, which specify the type of advice that the referral agency must provide, the timeframe for providing the advice (15 days), and how it should be considered by the Authority (s.231 of the Land Act).

DAF recognises the need to make the development application process as simple and clear as possible, partly by good management of the referral process. Three key elements are identified:

- there should be one agency responsible for assessing development applications
- referrals should be for advice only
- referral agencies should specify their requirements and criteria in advance and comply with clear response times.

There are a number of elements of the ACT referral system that work well. There is already single central authority for the determination of development approval applications, namely the Authority. Also, there is a central legislative framework for the assessment of diverse matters, namely the Land Act. In addition, the Authority has a close working relationship with other key referral agencies such as the Department of Urban Services.

However, there are a number of problems that need to be addressed. Stakeholders are concerned that the referral process is overly complex and prone to frequent changes. In addition, many consider that the work of different agencies is poorly integrated. The Report of the Auditor-General (2005) suggests that there is a need for better integration and more consistent use of referrals. The following recommendations are designed to address these issues.

7.1 Limit the types of referrals

Recommendations:

- *That the Authority refers only those matters that are directly related to the construction, including management of off site impacts, of the development itself.*
- *That the Authority refer matters to agencies for advice only if the matter is identified in the Land Act or regulations as requiring referral.*
- *Referrals should not be required if the proponent has already obtained the relevant advice before submitting the application for development approval.*

There are cases where a proponent proposes to use a new development for purposes that require a licence from different agencies to conduct ongoing business operations. For example, the Authority may receive a development application for commercial premises that might include a pub, a hairdresser, a day surgery, a brothel, a café with tables on the footpath.

In these circumstances it is not appropriate for the development assessment process to include referrals to different government agencies in connection with approvals for such activities. For example, the Authority does not refer the development application to ACT Public Health to see if it is likely to issue a licence to carry on the hairdressing shop (a public health risk activity due to potential for skin penetration).

Referrals are not appropriate in such cases because:

- they are not relevant to the design and siting issues of the development application
- in many cases the development application will be in respect to land where the lease allows not one but several uses in the same space and uses may change over time—so there is little benefit to make inquiries on a particular use when multiple uses may be involved
- proponents should not have their development application put on-hold pending finalisation of advice on these matters from other agencies.

There are some issues that are relevant to both design and siting of the development and to ongoing operations.

For example, the Land Act currently requires the Authority to refer development applications for agriculture processing (for example a winery) to EnvironmentACT. EnvironmentACT may say that the design of the winery should include certain drainage and recycling structures to minimise run off from the winery during its ongoing operations. This is arguably both a design issue and an operation issue. In this case the only conceivable use of the development of the winery is as a winery so design requirements of EnvironmentACT are critical. The referral should then be made and the Authority would need to consider comments from EnvironmentACT that an environment authorisation would only issue if the winery includes this or that design feature. Many of the matters currently referred to EnvironmentACT under the Land Act would be of this type.

For reasons of clarity, the Land Act (or its regulation) should list all matters that may potentially be subject to referral during the development assessment, so that it is consistent with the approach noted above. Referrals should then only be made in connection with matters identified in the legislation.

Legislative prescription of referrals would ensure that the ACT community is clear about what referrals are required. It would also ensure that proponents need not have their development application put on-hold pending advice on matters that are not relevant to the development application. This could speed up the overall development process. The contents of this list should be a matter for full review in consultation with community and industry groups as well as relevant government agencies.

In keeping with this proposal, it will also be necessary to ensure that the Land Act makes it clear that assessment, public notification, comment and third-party appeals apply only in connection with matters related to the development approval; they do not apply to issues related to ongoing operations of the business premises or occupation of the residence.

These proposals are in line with the leading practice model developed through the national Development Assessment Forum that suggests that referrals should be limited to agencies with a statutory role relevant to the application.

In cases where a formal referral is not required, and consistent with the whole-of-government service approach, the Authority will continue to advise applicants of the need to consult with relevant agencies on ongoing operation issues and refer applicants to the relevant agency where required.

7.2 Limit the scope and response time for referrals

Recommendations:

- *Amend the Land Act to require referral agencies to provide a response to a referral for advice within a set period, for example fifteen days. This limit may include provision for a stop the clock decision where the proponent and agencies agree more time may be usefully spent in negotiations.*
- *That the Land Act continue to direct the Authority to consider advice from other Government agencies but there should continue to be no compulsion on the Authority to accept and act on the advice.*
- *Amend the Land Act to direct a referral agency to provide legally binding advice about a licence or permit that it may issue at a later stage in the development process, and the types of conditions that may be attached.*

Referrals should be for advice only and referral agencies should comply with set clear response times. This approach is in some ways simply a confirmation of current legislation. The Land Act already prescribes the most common types of referrals, such as tree damage and heritage matters (Appendix D) but the prescribed list is not exhaustive.

Legislation of this type could improve the system in a number of ways. In particular, the legislation could reduce:

- uncertainty and complexity by clearly setting out those matters that must be referred
- delays by setting out the maximum time for a referral agency to respond to a request for advice (similar, for example, to the current 15 day time limit for heritage matters)
- uncertainty by clearly indicating whether referral advice must be acted on or not
- potential for uncertainty about whether a subsequent operating licence would be issued and on what terms

Legislative prescription of referral matters is already operating in other jurisdictions such as Victoria and South Australia. In connection with ongoing licences, the NSW integrated development assessment process provides a model for binding referral agencies to their advice (refer to section 93 of the *Environmental Planning and Assessment Act 1979* (NSW)).

The suggested gains in certainty are obtained at the cost of some flexibility. Applications connected to prescribed referrals cannot be determined until advice has been sought, obtained and considered. The proponent cannot elect to obtain advice after the application has been decided. This might be an option that might suit some applicants who wish to proceed quickly to the building stage, even though they may be uncertain of the views of a referral agency.

Proponents could elect to obtain their own advice before submitting the development application, perhaps in consultation with the Authority. This possibility is consistent with the current Authority practice and public guidelines. It is retained in this option.

7.3 Referral agencies should specify their requirements in advance

Recommendation:

- *The Land Act should require referral agencies to set out the documentary requirements for seeking referral advice and the criteria on which the referral agency is to make its assessment.*

There are advantages to be gained from referral authorities providing guidelines or criteria for their requirements. The criteria could build on arrangements and documentation already in place. It potentially makes it easier for developers to submit development applications with all the required information, and it makes the assessment process more efficient.

Technical paper 2 – Review of the Territory Plan suggests that the set of codes in the Territory Plan (that govern development assessment) could include guidelines overlooked by different government agencies. For example, a multi-unit housing code could contain provisions for the management of recurrent waste.

These provisions are currently found in a document prepared by the Department of Urban Services and adopted as a planning guideline by the Authority. The incorporation of agency guidelines into codes in this way could include relevant documentation and assessment criteria. This would give the agency requirements a higher status and greater visibility than they would otherwise have.

Implementing this recommendation by incorporating agency requirements into the Territory Plan code set would assist the aims of transparency and timeliness. The standing documentary and assessment requirements would still need to provide for a level of flexibility in handling new issues that become apparent only when assessing individual applications.

7.4 Authority replies to agency comments

Recommendation:

- *That the Authority continue to notify referral agencies of its decision and that the notification state whether the Authority has adopted the comments of the agency and if not the reasons.*

The practice of the Authority is to forward a copy of the notice of decision on a development application to referral agencies. As suggested in the Report of the Auditor-General (2005) the notice of decision should note whether agency comments were adopted and incorporated into the decision, and if not, the reasons. The Authority is to check this practice to ensure that this occurs in connection with relevant referral agency comments.

8. Community consultation on planning policy

Recommendation:

- *Assess the need for a set of standard practices to be developed for community engagement in planning policy development.*

This section refers to development of planning objectives and rules through community consultation.

There is a tradition of vigorous community debate about planning policy and about the merit of individual development proposals in the ACT. The *Statement of Planning Intent of the Minister for Planning* identifies the desirability of:

...engaging the community early in the planning process and providing appropriate safeguards for members of the community most directly affected by policy change and development applications.

Without doubt, it is most efficient and fair to seek community input into the development of general planning policy and guidelines at the start of the planning cycle. The work of DAF suggests it is fundamental, as it is more likely to deliver planning rules that are generally understood and agreed to.

In contrast, an over-reliance on community input at a later stage—during the determination of development applications—can lead to unnecessary delay in assessments and inconsistent outcomes that detract from community agreed rules. Essentially it is not fair to reopen community agreed planning policy at the development assessment stage. This is discussed further in Chapter 9.

Community consultation is also a requirement of s.9 of the Land Act, which requires the Authority to:

...ensure community consultation and participation in planning decisions and to promote public education and understanding of the planning process, including by providing easily accessible public information and documentation on the planning and land use

The ACT community and the Authority have recently put considerable effort into consultation on several landmark plans, such as *The Canberra Spatial Plan*, the Sustainable Transport Plan for the ACT, Community Facilities Needs Assessment Study, Woden Town Centre and City West Master Plans, and draft neighbourhood plans for Watson, Downer and Hackett.

Community consultation techniques can always improve, and a number of studies such as the Edwards Report (2004) and ArtCraft Research Report (2004), have identified the following issues:

- a need for clear, communicated reasons for each engagement exercise
- engagement techniques should be tailored to suit the different circumstances such as the stage of policy development and the communities participating
- all interested people should have the opportunity to give their views, not just a vocal minority
- there should be a clear statement and understanding of why consultation occurs
- clarity as to the appropriate form of consultation in connection with different types of plans such as master plans and neighbourhood plans
- a process that requires community suggestions and comments to be seriously considered and, where appropriate, incorporated into policy
- clear reasons for policy decisions and feedback to persons involved including, where relevant, reasons for ideas not being taken up.

The Government has already implemented these reforms in part through the formation of the Community Development Forum, the Planning and Development Forum, and the formalisation of the role of community councils. The Report of the Auditor-General (2005) suggests that some community groups nonetheless still perceive that community consultation, although extensive, is sometimes not as effective as it could be in part due to delays in the timing of consultation and incomplete feedback from the Authority.

An assessment would help determine whether further improvement might be had through the development of a standard set of practices for community engagement in the development of planning policy. This assessment is also necessary to ensure that current and revised practices are consistent with the Government's draft Community Engagement Manual and draft Community Engagement Service Charter that are soon to be released. This assessment should ensure that community engagement on planning policy is as effective and comprehensive as possible.

9. Third-party input to development application applications

Third-party involvement in a development application is important for balancing competing policy objectives. This situation is typical of larger and more complex projects. Less third-party input is needed in simpler projects, where the planning rules need only be applied with little judgement from the decision-maker. This section looks at whether the current balance is right in regard to this principle.

An effective and widely-accepted community consultation process is needed for the community to focus on policy development (see Chapter 8). Poor community consultation will, understandably, increase pressure for third-party involvement at the development application stage.

9.1 Pre-application consultation with neighbours

Recommendation:

- *Authority guidelines and procedures continue to encourage proponents to consult early with neighbours during the preliminary design stage. These procedures could note that in some (but not all) cases neighbours will have a right to submit comments on the proposal to the Authority.*

When developers are considering a proposal, they are encouraged by the Authority to consult the immediate neighbours on the design concept before they lodge a development application. The Authority's guidelines (the 'ebooks') state that this is a requirement for development applications in established areas, and there is a standard form they can use—the Neighbour Comment Form.

These recommendations in the guidelines should remain; early notification of neighbours is good practice in itself and will also contribute to an effective, efficient development process. As well as giving neighbours an opportunity to make comment, it is a courtesy to inform neighbours of what is happening.

It is a cost-effective measure because early consultation of immediate neighbours takes relatively little time and it reduces the likelihood of disputes and delays from a misunderstanding later in the process. Cost-effectiveness is one of the leading practice principles identified by the Development Assessment Forum.

9.2 Rights of notification and representation

Recommendations:

- *The Land Act regulations continue to determine what development applications must be publicly notified.*
- *Review the regulations so that public notification applies in connection with merit and impact assessable matters and that the review also consider the appropriate method of notification, for example, by letter or newspaper notice.*
- *Amend the Land Act to make it clear that increased commercial competition cannot constitute a valid ground for making a representation.*
- *Amend the Land Act to permit the Authority to waive requirements for public notification of applications to vary the permissible uses of a Crown lease where the application can have no significant third-party effects.*

Community input is fundamental to the development of planning policy early in the planning cycle. At the assessment stage it can be counter-productive because—if the input is not appropriate—there is the potential for unnecessary delay, uncertainty, and inconsistency in decision-making. It is basically not fair to ask the community to help develop a planning rule and then make its application subject to third-party comments on individual applications.

As the Development Assessment Forum suggests, the right balance may be to invite third-party comment on development applications that are assessed with some measure of discretion or planning judgement—for example when competing policy objectives must be weighed-up. In such cases, third-party comments can provide invaluable input to the exercise of the discretion.

At the other end of the scale, third-party input is of little benefit if the development application is to be decided by objective, essentially quantitative rules that have been developed through community consultation in the first place. In such situations, there is little or no room for the Authority to take account of third-party input when making its decision and so there is little point in seeking public comment. In fact, *ad hoc* debate on individual development applications of this type has the potential to undermine the rules.

In terms of the Development Assessment Forum model assessment tracks, third-party input is of value in connection with merit and impact assessable matters but not in connection with code assessable matters. This conclusion is summarised in Table 4.

This approach to public notification would mean that proposals that fully comply with relevant codes would not be publicly notified. Subject to further review, this might mean, for example, that proposals to replace a single residence with a dual occupancy development would not be publicly notified if the proposal met the relevant code requirements.

Table 4: Stages of community involvement in planning and development

Stage	Type of community involvement
Early policy development	Community consultation is essential
Exempt (assessment track)	Third-party input is not warranted, because there is no development application and decisions are made against simple, objective criteria
Prohibited	As above
Code	Third-party input is not warranted, because decisions are made against specific, largely quantitative rules or codes
Merit	Third-party input may be warranted where assessment is against one or more open ended and perhaps competing policies and where significant third-party impacts are involved. Development assessment is in part policy-based rather than rule-based
Impact	As above

The Land Act (s.229) requires development applications to be publicly notified by letter and newspaper subject to exceptions in the regulations (regulation 41, schedules 4 and 5). Some development applications must be notified by letter and in *The Canberra Times* and some by letter to neighbours only. Some applications need not be publicly notified at all—for example, single residences in undeveloped land and minor developments in commercial areas.

In summary, the Land Act already makes a distinction between matters that warrant public notification and those that do not. The existing distinction is based on the size, complexity and proximity to residential areas. This position should be reviewed to make sure that public notification applies in connection with merit and impact assessable cases but not in connection with code assessable cases, that is, where applications are determined by the application of objective rules. The review could also consider whether the current mix of notification by letter or newspaper is appropriate.

Two options for moving the notification and representation procedures closer to the Development Assessment Forum model are presented in Table 5. Of the two options, the Queensland option two is more directly aligned to the Development Assessment Forum assessment track model than option one and is recommended for adoption by the ACT. A summary of public notification and third party appeal processes for different jurisdictions is set out in Appendix D.

Table 5: Options for notification and representation rights

Option	Description
Option one (the SA model)	<p>Notification and representation rights are based on three categories or levels:</p> <ul style="list-style-type: none"> • Category one proposals—no public notifications. These include minor developments that are consistent with the relevant plans and that can be assessed against specific rules (minor code assessment matters) • Category two proposals—notification of neighbours only. Anyone can comment on the proposal, but there is no right of third-party appeal. These include developments of types which are likely to have significant third-party impacts but which in the main can be assessed against existing relevant local plans (some matters may be considered merit and some code assessable) • Category three proposals—notification of neighbours and the general public through the newspaper. Anyone can comment. These include major or unusual developments of types that are not specifically anticipated by relevant plans and require some weighing up of different policies (merit and impact assessment matters)
Option two (the Queensland model)	<p>Notification and representation rights apply only for development applications in the impact and merit assessment tracks (note Queensland merges these two into the one 'impact' assessment track)</p> <p>There are no notification, representation or appeal rights in connection with development applications that fall into the exempt, prohibited or code assessment tracks</p>

Currently, most development applications for variations to leases are publicly notified and are subject to third-party appeal. *Technical paper 1 – Leasehold administration in the ACT* suggests that for some applications there is little worth in applying public notification and third-party appeal procedures because there is no change to the exterior of the building and no impact to surrounding areas. These would include applications for an additional commercial use for a building that involves no increase in intensity of development, no exterior alterations, and which fully complies with the relevant codes and guidelines. In terms of the overall approach to public notification, such applications would be code assessable—they would be entirely governed by the Territory Plan codes and as such public notification processes should not apply.

Victorian planning legislation enables the assessment authority to reject an objection that is aimed at maintaining or obtaining a commercial advantage (s.57(2A) of the *Planning and Environment Act 1987* (Vic)). This approach is consistent with a number of decisions of the Administrative Appeals Tribunal in the ACT. The Tribunal has interpreted the phrase 'may be affected' to mean that the potential effect must be one that adversely impacts upon the interests of the person and an impact in the nature of competition is not a sufficient interest. This point could be made clearer in the Land Act.

These approaches contribute to the goals of:

- effectiveness—it applies third-party rights of notification and representation to areas of where it can best contribute to the decision making process
- equity—it provides members of the community with the right to be notified and comment on development applications that are likely to have significant third-party impacts
- transparency—the Land Act regulations are to make clear what representation and notification procedures apply.

9.2.1 Notification and representation methods

Recommendations:

- *Notification methods are to be assessed and improved where practical.*
- *That the Authority adopt a standard form for the making of representations. The form, in association with other information, should assist third parties to identify relevant issues and make clear the chief reasons for their representation.*

Current notification methods include letters, newspaper notices and street signs. They could be improved by providing information on the relevant planning rules and improved methods for publicising the design.

The assessment could consider the practicalities of providing information at this stage on matters such as:

- whether a development proposal is to be considered through the code, merit or impact assessment tracks and the planning rules that apply
- if the proposal includes both code (rule based) or merit (policy based) issues, an identification of those issues that are open to third-party representation and appeal
- the design and dimensions of the proposal through perhaps:
 - computer based three-dimensional modelling, as a supplement to written plans, on the Authority's or applicant's website where such information is submitted as part of the application
 - physical onsite indicators of the proposed building's height and footprint such as through the use of pegs, poles or even life-size board displays.

In particular, notification could include information about the relevant rules that apply and what issues are open for comment.

The discussion paper *Planning in Victoria Better Decisions Faster* (2003 p18) suggests that in many cases it is difficult for the objector and the planning authority to determine the grounds of an objection. The paper suggests that the process may benefit from the use of a standard form for the making of representations. The form could help third-parties to identify relevant issues and the grounds for objection.

These techniques could contribute to the goal of transparency, in that it would help inform the community about the rules and issues that are relevant to the representation process.

9.2.2 Submissions and objections

Recommendation:

- *Amend the Land Act to remove the distinction between submissions and objections and instead have a general provision that permits representations, with the same procedures and rights regardless of their support or criticism of a development proposal.*

The Land Act gives the community the right to lodge a submission or an objection to a development application. A submission is supportive or neutral to a proposal while an objection has at least one criticism of the proposal (even if it is otherwise supportive). There is no standard or prescribed form for either. The key differences are shown in Table 6.

Table 6: Key features under the Land Act of a objections and submissions to a development application

Feature	Objection	Submissions
Who can lodge	Anyone who 'may be affected by the development' can make an objection (s.237 of the Land Act)	Anyone (s.231 of the Land Act)
Requirements	Must be written and state the grounds for the objection (s.237)	Must be written
Right to confidentiality	Objectors can request that their identity and their personal details be kept confidential by the Authority (s.239)	Cannot request confidentiality of personal details
Time limits	The objection must be forwarded to the Authority within the prescribed period (Land Act regulations state 10, 15 days or longer, depending on the public notification requirements)	None
Availability to the developer	Copies of all objections given to the developer	Copies of all submissions given to the developer
Public availability	All objections must be available for inspection by the public at an office of the Authority (s.238) (usually on the Authority's website)	No requirement for publication (but published on the website in practice)
Status	Must be considered by the Authority	Must be considered by the Authority
Notice of determination	Objectors must be notified in writing of the outcome (s.243)	No right to be notified
Appeal rights	Objectors may (unless an exemption applies) appeal a decision on any grounds	No appeal rights

It is difficult to justify retaining the distinction in the Land Act between submissions and objections. It is inequitable in terms of privacy and notification (see Table 6), and it introduces unnecessary administrative complexity as the Authority seeks to comply with the Act. The distinction is perhaps in part to restrict the scope of third-party appeals to issues previously flagged through objections in the assessment stage. However, this goal is undermined by the ability of an objector to lodge an appeal on any ground, whether or not it is in the original objection.

There is no such distinction in other jurisdictions such as South Australia, Victoria and Queensland. The discussion paper *Victoria Better Decisions Faster* (2003, p18) also suggests that the word 'object', and associated procedures, tends to assume that comments will often be adversarial and to discourage positive comments. Queensland and South Australian jurisdictions use more neutral words such as 'representation'.

This paper proposes that objections and submissions should both be treated as representations. Any person who makes a representation, whether critical or supportive, would be able to request confidentiality, and would be entitled to receive a copy of the Authority's decision and appeal a decision to grant the development application (if that option is available). It may be necessary to develop criteria for deciding whether a representation should be kept confidential.

The proposed recommendation contributes to the goals of transparency (more simple rules and procedures) and equity (no discrimination between makers of objections and submissions).

9.3 Third-party appeals

9.3.1 When third-party appeals are to be available

Recommendations:

- *The set of matters that may give rise to third-party appeals should be reviewed to make them consistent with the DAF model requirements, so that the process applies to only merit or impact assessment matters.*
- *Only development applications that potentially have significant off-site impacts in residential areas should be open to third-party appeal.*
- *For reasons of clarity, the revised set of appellable matters should be positively identified in the Land Act.*
- *The Land Act should provide that third-party appeals are open to persons who (a) are likely to be 'materially' affected by a development application decision and (b) made a representation at the assessment stage.*
- *The Land Act be amended to make it clear that increased commercial competition cannot constitute a valid ground for lodging a third-party appeal.*

Third-party appeals are an important part of the development application process in that they give affected members of the community the opportunity to seek a review of a development application decision that may have significant off-site effects. The process

can also provide a valuable mechanism for periodic review of aspects of planning systems and for identifying pressing problems that require remedy.

CURRENT ACT PROCESSES

In the ACT, s.276 of the Land Act gives the right to objectors to appeal against a decision of the Authority to grant a development application or impose development approval conditions, with some exceptions (see below). In addition, a person who did not make an objection may appeal if they can satisfy the Administrative Appeals Tribunal that they had reasonable grounds for not objecting at the assessment stage (s.276(2)(b)).

As shown in Table 6, only people who may be affected by an Authority decision may make an objection (s.237(1)). This effectively limits third-party appeal rights to those people. Associations may also make a third-party appeal in connection with Authority decisions that concern a matter relevant to the objects or purposes of the association (s.237(6), s.276(6), s.276(7) of the Land Act), regardless of whether they are incorporated. For example, community councils have standing to appeal a decision that is relevant to the formal objectives of the council.

There are a number of exceptions to the third-party right of appeal. Development application decisions on works listed in schedule 7 of the Land Act regulation do not give rise to a right of appeal by objectors. These include, for example, all new single residences in undeveloped land, rebuilt residences in developed areas (where the number of residences on the land does not increase), class 10 structures as defined by the Building Code (such as sheds, pergolas), minor earthworks and development in industrial areas (subject to size and setback restrictions), and all matters that are exempted from notification requirements (refer to Schedule 4 of the Land Act regulations).

The underlying rationale for these exceptions is that matters that have the potential to significantly impact on residential areas should be open to third-party appeals but they should have little application in other circumstances, such as in connection with small-scale projects distant from residential areas. The intention is to retain this approach.

There are approximately 80 planning appeals lodged with the Administrative Appeals Tribunal each year. For the 2003–04 financial year:

- a total of 77 applications were made including 39 applicant appeals and 38 third-party appeals.
- the Tribunal referred 48 applications to mediation (including four applications were lodged before to 1 July 2003)
- of the mediations, 33 (or 69 per cent) were successful and resulted in agreement, nine were unsuccessful and a tribunal hearing was required, and in August 2004 six matters were still pending a decision (either through agreement or tribunal hearing).

These numbers do not point to a large number of appeals; however, the raw numbers do not indicate the time and cost to applicants and the Authority.

OTHER JURISDICTIONS

None of the jurisdictions examined imposes geographical or proximity restrictions on who may appeal. In South Australia and Queensland, third-party appeal rights generally only apply to development applications in the merit and impact assessment tracks (refer above to notes on notification and representations). There is, however, no requirement for the third-party to show that they are affected by a decision. The underlying assumption appears to be that if a matter is serious enough to warrant notification in a newspaper then appeals should be open to anyone. Queensland does require the third party to have made a representation during the assessment stage.

In NSW, third-party appeals only apply to 'designated development' applications, matters which typically have significant off-site impacts such as mining operations (see Appendix D). These designated developments are matters that would fall into the impact assessment track category according to DAF. In Victoria, any person who is affected by a proposal may make an objection and lodge an appeal unless the right to object has been ruled out by the relevant planning instrument.

PROPOSED REFORMS

The third-party appeal process is valuable in some circumstances, but not all. For example, third-party appeals should not apply in cases where there are no likely third-party impacts, as is the case with small-scale developments in non-residential areas. There is also little to be gained from third-party appeals in connection with development applications where there is little or no planning discretion involved, such as development applications in the code assessable assessment track governed by objective rules.

Third-party appeals do, however, clearly afford valuable opportunity for input into matters that require judgement and discretion in the application of one or more, perhaps competing, policies. This approach is consistent with the recommendations of DAF, which recommends that third-party appeals may be appropriate unless a development application is entirely assessed against objective rules and tests.

This approach to third-party appeals would mean that proposals that fully comply with relevant codes would not be subject to third-party appeal processes. Subject to further review, this might mean, for example, that proposals to replace a single residence with a dual occupancy development would not be publicly notified and would not be subject to third-party appeals if the proposal fully complied with the relevant code rules.

It is further suggested that third-party appeals should only apply in matters that have significant potential off-site impacts. Most, but perhaps not all, merit assessment matters would be of this type.

Only people who may be affected by an Authority decision may make an objection (s.237(1) of the Land Act). Because only people who made an objection can make a third-party appeal (s.276) it follows that only persons who may be affected by a decision have standing to make a third-party appeal.

The threshold provision 'affected' has been the subject of legislative amendment in the ACT to tighten its meaning. The amendment was later reversed. The current planning reform project provides the opportunity to further review s.237 and s.276 in connection with this threshold requirement. Is this threshold set at the right level and is the meaning of 'affected' sufficiently clear? Third-party appeals, in view of their cost and potential to cause delay, should be available only to people who may be *materially* affected by an Authority decision, for example through loss of privacy, loss of car parking spaces or intrusion of noise. Community organisations whose objects of association cover issues relevant to the local area should continue to have standing to appeal.

In summary, the recommendations are that third-party appeals should be available if:

- the development application is of a type that is identified in the Land Act regulations (this list is to include merit or impact assessable applications that have the potential to result in significant third-party impacts in residential areas)
- the third party is likely to be *materially* affected if the development application is granted
- the third party made a representation during the public notification of the development application (or has valid reasons for not being able to do so).

The above recommendations could contribute to the goal of:

- effectiveness—appeal resources are directed to relevant issues and directions
- timeliness—unnecessary delays due to inappropriate third-party appeals are avoided
- equity—people significantly affected by development application decisions can make appeals to protect their interests.

9.3.2 Procedures for appeals

DAF notes that appeal applications should be assessed against the same policies, tests and rules as applied to the original decision. In other words the appeal process should in effect stand in the shoes of the Authority and decide the application on its merits in accordance with the policies and rules that applied to the Authority's decision.

The appeal process referred to here is about the merits of the case, not about issues of procedural rights or legal process. Review of the latter can be sought by application to the Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989*. DAF has reported that government and industry representatives agree that review mechanisms should be less costly, quicker and less formal than a legal review and should allow for the use of mediation in suitable situations.

Objectors may appeal by application to the Administrative Appeals Tribunal for a review of an Authority decision. The application must be made within four weeks of the date that the objector received notice of the Authority's decision.

The applicant can request that a decision of the Authority be subject to reconsideration, which is a second assessment by staff more senior than the maker of the original decision. This process of reconsideration is not available to objectors.

The Administrative Appeals Tribunal may direct the parties to attend a pre-hearing conference. In addition, the Tribunal must consider whether mediation is appropriate in the appeal and may refer the application to a registered mediator (s.49D of the *Administrative Appeals Tribunal Act 1989* (AAT Act)). The parties may also themselves elect to pursue mediation.

The land and planning division of the Administrative Appeals Tribunal determines appeals under the Land Act (s.49 of the AAT Act). The Tribunal is able to determine the appeal on the merits of the issue; it has all the powers of the original decision-maker (s.41 of the AAT Act).

The Administrative Appeals Tribunal must make its decision within 120 days of the lodgement of the appeal application (s.49C of the AAT Act) and must endeavour to give its decision within 14 days of the completion of the hearing (s.44(2)). The Tribunal may affirm or set aside the Authority's original decision. If the Administrative Appeals Tribunal sets aside the decision it may substitute its own decision or send the matter back to the Authority for reconsideration.

The Administrative Appeals Tribunal may dismiss applications that it considers are vexatious or frivolous (s.43A of the AAT Act). It may also, on application of one of the parties to the appeal, bar an applicant from making further applications to the Tribunal (s.43A(1)(b)).

The Tribunal may require a party to proceedings to pay costs if the party contravened a direction of the Tribunal (s.49E of the Land Act). In deciding whether to make such an order the Tribunal must bear in mind, among other factors, the community interest in making tribunal proceedings relatively affordable (s.49E(3)(c)).

10. Exemptions from building approval requirements

Recommendations:

- *Amend the Building Act to remove the requirement to obtain a building approval for an increased range of class 10 (non-habitable) buildings and structures (ie by extending existing dimension limits for exempt structures) and replace this with the following requirements:*
 - *the licensed builder in charge of the building work must certify that construction complies with the Building Code of Australia and any relevant development approval conditions*
 - *an engineer must certify that building work for certain large non-habitable class 10 buildings is structurally sound and stable*
 - *the structure can only be used or occupied after the licensed builder has certified the structure.*

The Building Act requires a proponent to have the construction plans of proposed developments checked and certified by a building certifier before starting construction. The certifier must ensure that the construction plans are consistent with any relevant development approval and the requirements of the Building Act. After construction the proponent must arrange for a building certifier to inspect and certify that the completed building complies with the building approval and associated construction plans. In addition, the Building Act requires the proponent to obtain a certificate of occupancy from the Authority before the proponent (or client) can occupy the building.

These measures represent significant individual and community investment in time and resources to ensure the structural integrity and physical safety of the new building. There is the time and cost involved in drafting construction plans and arranging for a building surveyor to certify them (around two days and at least \$400). There is also a significant level of procedural complexity in the different prescribed roles of proponents, certifiers, builders and Authority staff. Past experience has shown that these investments in time and resources are worthwhile where major issues of public safety are involved. Examples include the construction of new residential premises or commercial buildings.

However, there may be room to reduce the expenditure in time and resources in connection with relatively simple, non-habitable buildings such as carports, garages and garden walls where public safety is not such a significant issue. Small structures of this type are already exempt from Building Act requirements if they do not exceed certain dimensions, for example, fences under 1.8 metres are already exempt as are many non-habitable buildings under three metres in height, provided the structures do not exceed other exemption thresholds. This proposal seeks to build on these existing exemptions by extending the dimension limits of exempt structures. The revised limits are a matter for further discussion.

In summary, the proposals involve replacing building approvals for minor buildings with checks by a licensed builder. In this regard, the minor buildings are non-habitable class 10 buildings and structures that are not already exempted from Building Act requirements under clause 5 of the regulation.

The term 'class 10' is defined in the Building Act to have the same meaning as in the Building Code of Australia:

- (a) *Class 10a—a non-habitable building being a private garage, carport, shed, or the like; or*
- (b) *Class 10b—a non-habitable structure being a fence, mast, antenna, retaining or free-standing wall, swimming pool, or the like.*

Under this definition the relevant kinds of buildings and structures could include outdoor deck, carport, shed, garage, pergola, porch, veranda, shelter, gazebo, shade structure, fence (not part of a pool fence), pond (not a swimming pool), and retaining wall.

In connection with these building types, the proposal is to dispense with the requirement for building approval by a building certifier (or registered planner) and instead rely on checks by the licensed builder. Note this proposal only applies to building work that is required to be done by a licensed builder under s.84 of the *Construction Occupations (Licensing) Act 2004* and s.42 of the Building Act. The proposal is for the licensed builder to certify that the construction work complies with the Building Act and in particular the structural integrity and safety requirements of the Building Code of Australia. This process would require the licensed builder to make a written record of the location and nature of the construction and that it complies with these standards, and to forward the record to the Authority.

Larger buildings that are to be exempted from the requirement for building approval from a building certifier may present particular issues about structural integrity and public safety. For these reasons it is proposed to require an engineer to check and certify buildings of more than three metres in height or with a structural member that spans more than six metres—most prefabricated double garages have structural members spanning six metres or less. The requirement is for the engineer to check and certify that the building is structurally sound and stable.

This proposal reduces costs and time associated with construction of carports, sheds and the like by removing the additional role of building certifier in a limited number of cases. Before the builder certification function was privatised in 1999, builders were required to certify that their work complied with relevant requirements, but this requirement was abolished with the privatisation measure. The proposal somewhat resurrects the requirement for builders to self-certify compliance and thereby formally take responsibility for their work.

11. Improved coordination of building approval and development application services

Many building proposals require both a development approval from the Authority and later a building approval from the building certifier.

Before 1999, the ACT Government provided site inspection and certification of building work for most single residential developments—for building and development approvals. In late 1998, the ACT Legislative Assembly passed legislation that removed the Government's entitlement to provide plan approval services under the Building Act. That effectively created a two-stage process for the required plan approvals—a stop at the Authority to obtain a development approval and a stop at a private sector certifier to obtain a building approval.

This reform facilitated the privatisation of building construction approval, inspection and certification regimes, with the aim of reducing costs to the public using those services. The costs of some building construction approval has reduced as a result of this measure but the cost of small building work, such as pergolas, decks, carports and garages has increased markedly.

While the privatisation of the building approval process has introduced a level of flexibility and choice, it has also made the process more complex because of the need to make two applications through to different agencies. There is the potential for poor coordination between the two processes. For example, a building certifier will reject plans that do not comply with the Building Code of Australia, even if the proposal has already won a development approval. Subsequent modifications to the building plans to meet the building code requirements may require re-application to the Authority for a development approval.

This section considers ways to improve the coordination of development and building approval services with savings in time and a reduction of procedural complexity.

The potential for coordination difficulties will be reduced by the recommended increase in the range of development proposals that are to be exempt from the requirement for a development application and also the recommended additional exemptions from the requirement for a building approval.

Nonetheless there will remain a significant number of developments where both development and building approvals are required, including single residential premises in established areas. The following comments include recommendations for measures to better coordinate the development and building approval functions in these cases.

11.1 Extension of building certifier services to the development approval stage

Recommendation:

- *That the Authority, in cooperation with the building industry, examines the potential for the development of industry standard agreements and guidelines to facilitate arrangements for the building or registered planning certifier to check and submit development applications on behalf of proponents.*

Under current laws of contract and agency it is possible for a building certifier to lodge a development application and liaise with the Authority through the development approval process. This is a role that some building certifiers perform now under agreement with the proponent. This service might involve the proponent providing a draft development application to the building certifier who checks the completeness and suitability of the application and forwards it to the Authority. If agreed, the building certifier might liaise with the Authority through the validation and assessment stages on behalf of the proponent. On completion of the validation process, the building certifier might pay the lodgement fee to the Authority on behalf of the proponent. This may be done through private agreement between the proponent and building certifier.

This approach could be facilitated through industry-approved agreements and guidelines that help inform the proponent, the certifier and Authority staff of how development and building approval services can be partly integrated. The agreements and guidelines would also advise the roles of the various parties in such a situation, and perhaps also significantly reduce procedural complexity. The proposal in section 4.2 to extend the range of qualified persons who may perform building certification functions to town planners may also assist in this area. The measure could increase the opportunity for the private sector to assist with both development and building approvals.

These cooperative arrangements may need legislative support to be effective. An option is to amend the Building Act to confirm the ability of the building certifier to receive and check development applications, hold lodgement fees in trust (pending validation by the Authority), and submit the application and fee and to liaise with the Authority on behalf of the proponent. The legislation could also provide for a single application form to cover both development and building approval matters and provision to require the building certifier to perform its functions in this regard in a timely manner.

Such legislative prescription of the role of the building certifier could, however, represent a significant intrusion into the private arrangements between building certifier and proponent, which may not be warranted. Perhaps the preferred course is to encourage private arrangements in this regard and to assess the effectiveness of these arrangements with a view to revisiting this issue if required.

11.2 Improvements to the assessment of building designs and plans

Recommendation:

- *That the Authority in conjunction with the building industry develops an internet facility that would enable Authority staff and building or registered planning certifiers to work together on a single set of building design plans in electronic format.*

As noted above, there is the possibility that plans incorporated in an approved development application may be rejected later by the building certifier for the reason that it does not comply with the Building Code of Australia. Subsequent modifications to the building plans to meet the building code requirements may require re-application of the amended plans to the Authority for development approval.

The Authority, in conjunction with building certifiers, has sought to improve this situation by liaising with the certifier during the validation and assessment stages to ensure that the development approval does not end up with plans that are likely to fail the building approval assessment stage and require resubmission. However, this process still requires in some cases a good deal of to-ing and fro-ing of physical draft sets of plans between the relevant offices. This can lead to mistakes, delays, mislaid documents, and confusion over latest versions.

The process could be improved if the Authority and the certifier (possibly including registered planning certifiers) could view and comment on the same set of building plans that were lodged with the development application. The intention is that the parties be able to access the same document over the internet, provided there is good version control and safeguards. This approach could reduce the time and processes involved in developing building plans that meet both development and building approval requirements.

12. Compliance

The Authority undertakes various compliance activities to ensure as far as practical that building activity is consistent with relevant development approval conditions and building approval requirements.

The Compliance Unit of the Authority responds to requests for compliance actions, which may result in pursuing breaches and enforcement of the Land Act. Examples include unauthorised developments, breaches of Crown lease, and unsatisfactorily maintained land. The Unit also monitors selected developments for early detection of land and planning breaches and to ensure adequate site management including tree, built infrastructure and environmental preservation. In the financial year 2003–04, the compliance unit handled 1277 requests for compliance action. This represents a 27 per cent increase compared with the previous financial year (*ACTPLA Annual Report 2003–04*, p18).

The Authority is also responsible for the regulation of the building and construction industry. Specifically, the Construction Occupations Section of the Authority is responsible for the administration of the *Construction Occupations Licensing Act 2004*, operational Acts (the *Building Act*, *Electricity Safety Act 1971*, and the *Water and Sewerage Act 2000*), and the *Architects Act 2004*. All contribute to the regulation of the building and construction industry.

The ACT Government sponsored significant amendments to the compliance and enforcement provisions of the Land Act in 2002. The Authority now has powers to effectively deal with a range of actual and potential illegal activities large and small. In summary, the Authority is able to:

- respond to complaints by investigation and if necessary make orders to prevent a controlled activity (illegal activities such as developments without a development approval), or restore damage done as a result of such activity (s.254, s.254A of the Land Act)
- issue orders on its own initiative (s.256)
- issue orders for the rectification of damage and arrange for rectification itself if the order is ignored
- issue prohibition notices to require the immediate cessation of damaging activities (s.260)
- apply to the Supreme Court for an injunction to prevent a person from contravening an order (s.260C)
- inspect premises in connection with suspected controlled activities (s.266–273), with the consent of the owner or pursuant to a warrant issued by a magistrate (s.273).

When the Authority issues an enforcement notice under s.254 or s.254A of the Land Act the Authority must also inform other relevant agencies, as listed in Table 7.

Table 7: Circumstances in which agencies must be advised of an enforcement by the Authority

Agency	Circumstances
The Registrar-General	In all cases
The Conservator of Flora and Fauna through the Chief Minister's Department	If the order concerns control of pests or the pruning of a significant tree under the Tree Protection Bill (2005)
The Transport Authority in the Department of Urban Services	If the matter relates to the parking of a heavy vehicle on residential land
Other people or organisations	If the Authority believes the organisation may be affected by the order

12.1 Compliance before construction

ENSURE WORK COMPLIES WITH APPROVALS DURING CONSTRUCTION

Recommendations:

- *Amend the Building Act to require certifiers to notify the Authority within one business day of the certifier becoming aware of building work that does not comply with fundamental building or development approval requirements (for example, as to floor level or building perimeter).*
- *Amend the Land Act to require an application for a development approval, or an amendment, in circumstances where the subject building work does not comply with fundamental building or development approval requirements, to be accompanied by a plan, signed by a registered land surveyor, quantifying the non-compliant fundamental dimensions.*

Privatisation of the building inspection and certification approval function placed that role entirely with the private sector. Consequently, the Authority has reduced opportunities to enforce compliance upon unlawful work before construction is complete, as certifiers are not required to inform the Authority of non-compliant construction in many circumstances.

Although government has strong compliance powers, including licence demerit points, stop-work notices, compliance orders and rectification orders, they are mostly used after unlawful construction is complete. The result is that some proponents build in breach of building or development approvals with the intent of seeking amendments afterwards to legitimise the unlawful work. Instead, they should have sought those amendments beforehand.

A better outcome would result if compliance action were taken while non-compliant work is being undertaken, rather than after completion of a building. It is often easier to change a building feature during construction rather than after.

The problems will be partly addressed by the Authority successfully exercising compliance and rectification orders, and widely publishing successful outcomes. Other proposals aim to improve compliance by allowing the early detection of building work that contravenes fundamental building or development approval conditions.

The workload of the Authority's compliance area will increase as certifiers report more unlawful work. The benefit is that it could reduce incidents of non-compliance in the long term. The extra survey plan will add to the time and cost required, but that in itself may be a disincentive from building unlawfully, especially if the process of reporting on the breach is considered. It will also save the Authority some of the cost of investigating the extent of non-compliance. The surveyor plan would also provide primary evidence of the unlawful work in disciplinary proceedings.

WITHHOLDING OF APPROVED DESIGN PLANS

Recommendation:

- *Amend the Land Act to give the Authority power to withhold the approved plans until pre-requisite conditions have been satisfied.*

Some projects currently receive a development approval that is conditional upon amended drawings being submitted to the Authority or a specialist's report being submitted on some other aspect of the development such as disabled access and mobility or noise management. A few proponents take advantage of this and ignore the pre-requisite conditions by commencing construction on the basis of the plans that, although they are approved, require amendment to fulfil the approval condition. At present the Authority is not entitled to wait for the amendments, it must release the plans because they are technically approved.

The proposed solution is to provide an entitlement in law for the Authority to withhold the approved plans until pre-requisite conditions have been satisfied.

The potential cost to some proponents is that they may encounter longer site holding times, which will cost them more money; but the length of time plans are withheld depends on the developer complying with the development approval conditions. The solution does make the system fairer, because it no longer rewards those few proponents who avoid site holding-costs by initial non-compliance with the law.

Apart from the costs, withholding plans would not be detrimental because a written notice of decision can still be given for the developer to use. The limitation is that the approved plans cannot be given to a building certifier until released. That will prevent the issue of a building approval prior to compliance with pre-requisite development approval conditions, thereby prohibiting construction.

12.2 Compliance after construction

AUTHORITY VERIFICATION OF COMPLIANCE WITH DEVELOPMENT APPROVAL AND UNIT TITLE APPROVAL CONDITIONS

Recommendations:

- *Amend the Building Act to permit the private sector through a building certifier or registered planning certifier to assess compliance with development approval and unit title conditions for certain prescribed developments.*

Currently, the Building Act (48(2) reg 22(a)) requires building certifiers to obtain approval from the Authority for compliance with conditions attached to a development approval. However, it only applies in relation to aspects of the development that come under the Building Act's definition of building work, which does not include most kinds of off-site work, such as verge and footpath treatment, nor does it include landscaping and environmental protection work.

Several ACT building certifiers have suggested that the Authority does not always respond in a timely manner in providing the various checks of development conditions, and they seek changes to the approval system to enhance its responsiveness.

Past experience suggests that the Authority has difficulty in responding quickly to requests for inspection and verification. The task of providing inspection services at short notice to all ACT areas for all kinds of development approval conditions is perhaps an inherently difficult one for a single government organisation to achieve. There may be advantages in permitting the private industry to perform this role. This approach would be in keeping with the 1998 privatisation of the building approval and construction certification functions.

It is proposed that the private sector should be permitted to assess compliance with development approval and unit title conditions, subject to certain safeguards. This could give the certifier the flexibility to select a development approval compliance assessor from a range of private industry providers and so improve the prospect of a prompt response. In some cases, a suitably qualified certifier may be able to perform both the development approval condition verification check and the building approval compliance check. This approach then arguably has a number of advantages in terms of speed, flexibility, and reducing regulatory complexity.

The possible disadvantage is the potential for an actual or perceived loss of impartiality. Under the current system, the Authority performs the verification function at no cost to the proponent or certifier. In these circumstances an impartial and independent assessment is assured. If the assessment is performed by a private sector person who is paid by the proponent or certifier, there is a risk that the service may be perceived to be biased towards the views of the proponent. However, there are already a number of areas where private industry is successfully fulfilling such a compliance role, including in connection with the assessment of building approval plans. The following measures should also minimise the potential for bias.

The Government should be able to prescribe by regulation the types of development approval conditions or works that still require verification by the Authority. There should be a monitoring and audit program to ensure the impartial and correct assessment of development approval and unit title conditions.

There should also be appropriate measures to ensure that the private sector person completing the checks has the appropriate qualifications and expertise. One approach would be to require the building certifier to obtain a compliance certificate from other persons if she or he did not have the requisite qualifications. For example, the certifier could obtain a compliance certificate from a third person with botany, landscape or horticultural qualifications for landscaping, verge restoration or flora protection matters.

The qualifications required for checking specific items could be listed by the Construction Occupations Registrar. This approach has some similarities to current procedures that provide for the building certifier to require the landowner to obtain a structural engineer's certificate in certain circumstances (refer to s.47 of the Building Act). Another option would be to establish a new category of building surveyor under the *Construction Occupations Licensing Act 2004*, which would authorise the certifier to perform any and all checks of development approval and unit title conditions.

SINGLE PROCESS FOR THE ISSUING OF A LEASE COMPLIANCE CERTIFICATE AND CERTIFICATE OF OCCUPANCY

Recommendation:

- *Establish a single application and issuing process to facilitate the concurrent processing of both lease compliance and occupancy certificates. This process is to be achieved in part through a single application form (or physically linked forms). This process to be available for use in connection with relatively simple developments.*

In relation to a new Crown lease (for example undeveloped land on a greenfield site), the Authority shall issue a compliance certificate under s.179 of the Land Act. The certificate confirms that the building and development provisions have been fully complied with. In general terms, the lease cannot be transferred without the consent of the Authority until a lease compliance certificate has been issued. Before the Authority can grant such consent it must be satisfied that the purchaser intends to meet the lease condition requirements and may require financial security for this purpose (s.180 of the Land Act).

The Construction Occupation Registrar of the Authority may issue a certificate of occupancy to the lessee when the building is finished (s.69 of the Building Act). The Registrar must first be satisfied that the construction complies with the requirements of the Building Act, including the building plans of the building approval. In making this assessment the Registrar must consider the documentation to this effect supplied by the building certifier (refer to s.48, s.66-69). It is an offence to occupy a building that is not covered by a certificate of occupancy (s.76).

There is the potential for the certificate of occupancy and lease compliance certificates to be assessed and issued by the Authority concurrently. This course may be appropriate in

connection with single residences. It would, however, not be practical in connection with relatively more complex developments such as multi-unit housing when in practice there can be several months between the processing of the two certificates.

Where relevant this measure could reduce the number of regulatory hoops that proponents must jump through. It may also address perceptions of needless red tape and may reduce the call on Authority staff resources.

BRINGING NON-COMPLIANT BUILDING WORK INTO COMPLIANCE

Recommendations:

- *Amend the Building Act to allow for regularisation of unlawful building work, and for occupancy on that basis.*
- *To prevent exploitation of the regularisation provision, the Authority should have powers to:*
 - o *refuse to regularise the work but to require demolition in warranted circumstances*
 - o *require a caveat on the certificate of regularisation warning successors in land title of the unlawful nature of the building's construction*
 - o *order testing of the building to help determine building code compliance (e.g. Detecting reinforcement in concrete elements).*

The Building Act requires building work to be done in accordance with a building approval, inspection and certification regimes before lawful occupation is allowed. But buildings are occasionally built in breach of the regime, leaving the land-owner with a finished building unable to be lawfully occupied.

The remedy in law is to demolish the building and rebuild according to the statutory approval process, but that is rarely enforced because it is too severe. Instead the Government issues a certificate of occupancy for the unlawful construction to allow its occupancy, with no mechanism to warn successors in land title of the unlawfully constructed building. This may also disadvantage affected neighbours.

The recommended amendments to the Building Act will add to the cost of work, but only to unlawful work, and then only to the extent necessary to subject the work to the kinds of inspection it should have received if constructed lawfully.

CONTINUED APPLICATION OF DEVELOPMENT APPROVAL CONDITIONS

Recommendation:

- *Assess the need for development approvals to continue to apply after the issue of a certificate of occupancy in connection with new building activity.*

Past experience suggests that there are occasions when new building activity takes place after the issuing of a certificate of occupancy, but it is inconsistent with the conditions of a development approval. In this situation it may be necessary to take compliance action to ensure continued compliance with the development approval conditions.

It is suggested that the current Land Act provisions be reviewed to assess whether there is a need for existing powers to be enhanced to enable the Authority to take this action.

The intention is for this approach to apply only in connection with new activity that takes place after a certificate of occupancy is issued.

There are also cases where it is necessary to impose conditions for the ongoing management of a new development site, for example the monitoring of water quality impacts of a new mining facility, or traffic impacts of a new multi-level development. This review should also consider necessary enhancement of Authority powers to permit such conditions to attach to development approvals.

12.3 Complaints handling

Recommendations:

- *That the Authority establishes risk management principles for handling complaints and assessing the likelihood of breaches.*

The Authority's compliance unit handles more than 1500 complaints per year. Many complaints are valuable pointers to possible breaches of planning laws and are subject to appropriate follow up action. However, it is estimated that a substantial number are unrelated to Authority planning matters and are instead generated by neighbour disputes. Some are simply frivolous or unsubstantiated.

The establishment of principles and procedures for determining which complaints and issues require Authority action and which require referral to mediation or other process should assist in ensuring effective compliance action and efficient use of Authority resources. This measure is in keeping with recommendations in the *Report of the Auditor-General* (2005) for a more systematic approach to compliance matters and improved documentation of compliance actions.

Glossary

AAT	Administrative Appeals Tribunal
ACT	Australian Capital Territory
the Authority	The ACT Planning and Land Authority
Building Act	<i>Building Act 2004</i>
Building application	Application to a private builder certifier for a building approval to carry out building work
Certificate of occupancy	A certificate issued by the Construction Occupations Registrar under s.69 of the Building Act. The certificate must be obtained before occupation or use of the building (see s.76 of the Building Act)
Development application	Application for an approval to undertake development (s.226 of the Land Act)
Land Act	<i>Land (Planning and Environment) Act 1991</i>
Lease compliance certificate	Certificate issued by the Authority to confirm that construction work complies with the building and development conditions of a lease. A property cannot be sold without the consent of the Authority if a lease compliance certificate has not been issued. This applies particularly to new developments in greenfield sites, for example (ss.179 and 180 of the Land Act)

Appendix A—Planning and land management reviews

Significant studies and reviews on planning and land management since self-government in 1988 include the following:

A further report on the planning system for the ACT, John Mant, PFS Consultants Pty Ltd, Sydney, 1989.

ACT Auditor-General's Office Performance Audit Report - Development Application and Approval Process, ACT Auditor-General, ACT Government, Canberra, 2005 [Auditor-General Report].

Communications Survey for ACT Planning and Land Authority, Artcraft Research, ACT Government, Canberra, 2004 [Artcraft Research Report].

Customer Survey, Orima Research, unpublished report for Planning and Land Management, Department of Urban Services, Canberra, 2002.

Development Applications and building approval – Alternative approaches for compliance – internal report for Planning and Land Management, Urban Services ACT Government, Canberra ACT, 2001.

Development Assessment Review – Summary Report, Sansom, G (UTS), unpublished report to Planning and Land Management, Canberra, 2000.

Inquiry into Possible Changes to Planning Legislation in the ACT, Report No 35 of the Standing Committee on Planning, Development and Infrastructure, ACT Legislative Assembly, Canberra ACT, 1994.

Model of the New ACT Planning System, John Mant, PFS Consultants Pty Limited, Sydney, 1989.

Planning and Development in the ACT - A status report – Cousins, R, unpublished report to ACT Planning and Land Management, 2001.

Planning Legislation Joint Report, Standing Committee on Planning, Development and Infrastructure et al), Legislative Assembly for the ACT, ACT Government, 1991.

Red Tape Task Force Report – From Red Tape to Blue Print for Regulatory Reform, ACT Department of Business, Arts, Sport and Tourism, ACT Government Printer, Canberra, 1995.

Report on the Review of Legislative Provisions, Administrative Arrangements and procedures in ACT Land and Planning Enforcement, Smith Kostryko Cohen Pty Ltd, unpublished report to ACT Planning and Land Management, Canberra, 1999.

Report into the administration of the ACT Leasehold, Stein P, Troy P, Yeomans, R, ACT Government Printer, Canberra, 1995.

Review of ACT Planning Functions and Structures John Mant and John Collins, ACT Government Canberra, 1995.

Review of Stakeholder Engagement in ACT Planning Report on Consultancy for the ACT Government, National Institute for Governance Review Team, University of Canberra (Meredith Edwards, Robyn Seth-Purdie, Russell Ayres), unpublished report to ACT Government, Canberra, 2004. [Edwards Report].

Recent reviews in other jurisdictions and at a national level include:

A Leading Practice Model for Development Assessment in Australia – Unpublished Draft Report of the Development Assessment Forum, Commonwealth Government, Canberra, 2005.

Better Decisions Faster – Opportunities to improve the planning system in Victoria – discussion paper, Planning Systems Unit, Department of Sustainability and Environment Victorian Government, Melbourne Victoria, 2003.

Improving Local Development Assessment in NSW, Report by the Regulation Review – Local Development Taskforce to the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration), Department of Industry, Planning and Natural Resources, Sydney NSW, 2003.

Appendix B—Summary agency referrals

STATUTORY REFERRALS REQUIRED UNDER THE LAND ACT

The Land Act contains three statutory referrals in the areas of:

- heritage (development in areas noted in the heritage register, or interim register, must be referred to the Heritage Council—s.229(4) of the Land Act)
- protection of flora and fauna (activity likely to cause damage to protected trees must be referred to the Conservator or Flora and Fauna through the Chief Minister’s Department—s.229(4) of the Land Act and clauses 80, 81 of the Tree Protection Bill (2005))
- environmental impacts (specified activities must be referred to the Environment Protection Authority through the Environment Management unit of Environment ACT—s.229(5) of the Land Act).

In each case the Authority is required to refer information on the development application to the relevant agency for advice, however there is no statutory requirement for the referral agency to accept the advice. There is no statutory time frame for the response of the referral agency.

DEVELOPMENT-RELATED LICENCES OR PERMITS THAT IMPACT ON DEVELOPMENT OR BUILDING APPROVAL

These matters include licences or permits required by other agencies without which physical construction of the proposed development cannot commence. Referrals of this type include:

- approval for a damaging a registered tree—issued by the Conservator of Flora and Fauna in the Chief Minister’s Department
- approval of Waste Management Plans issued by ACT NoWaste in the Department of Urban Services (DUS)
- approval of Traffic Management Plan through Asset Acceptance in DUS
- approval of activity in road reserves such as driveway verge crossings through Asset Acceptance in DUS.

LICENCES OR PERMITS REQUIRED FOR ONGOING OPERATIONS

These include permits for the ongoing business or other activity that is to take place in the new premises. These include such matters as a licence to:

- use public land (road reserve)—for example, for a cafe with outdoor tables; issued by Asset Accept in DUS
- carry on a public health risk activity—for example, for a hairdressing business or a medical facility; issued by ACT Health under the *Public Health Act 1997*.

The Authority refers matters connected to these licences or permits prior to determination of an application because the advice may:

- be relevant to the design of a building, for example, a licence to discharge non-domestic waste into the sewer system, may include requirements for structures such as grease traps installed within the building
- affect the ability of the proponent to carry out the proposed operations at all.

GUIDELINES AND CODES OF PRACTICE WHICH MAY HAVE PLANNING OR BUILDING IMPLICATIONS

There are a number of statutory codes and guidelines that may be relevant to consideration of development applications and conditions of approval. For example conditions of approval may require compliance with noise limits set out in the noise guidelines of ACT Health.

REFERRALS SEEKING GENERAL ADVICE

On occasions the Authority seeks advice from agencies not in fulfilment of statutory requirements or standing administrative arrangements but to obtain expert advice on an unusual or particularly complex matter. This may include advice from DUS on traffic management, road design, landscaping on public land, pedestrian safety, public transport and stormwater management, or from EnvironmentACT on nature conservation issues.

ONGOING RIGHTS OF ANOTHER AGENCY THAT CANNOT BE OVERRIDDEN BY A DEVELOPMENT CONSENT

These include the rights of supplier agencies (e.g. Actew-AGL) to enter land to maintain a service network for gas, water, electricity or sewerage. Development consent cannot override these ongoing rights. Referral may be required in some cases both complex and minor (including some house extensions) to ensure that these rights are maintained.

STATUTORY REFERRALS REQUIRED UNDER THE LAND ACT

Approval	Administrating Body	Legislation	Description	Stage
Heritage Advice The Authority must take account of the advice and relevant heritage guidelines, design alternatives, possible measures to minimise impacts, etc. The Heritage Council may apply to the AAT for review of Authority decision	Heritage Council through the Chief Minister's Department	Land Act s.229(4) <i>Heritage Act 2004</i> ss.60, 61	development applications that relate to a place registered or nominated to be registered under the Heritage Act	Land Act requires a copy of the development application and related documentation to be forwarded for comment
Development likely to cause serious environmental harm	Environment Protection Authority through Environment Management Unit of Environment ACT	Land Act s.229(5)	Schedule 1 activities listed in EPA Activities that have the potential to cause serious or material environmental harm as defined in the EPA	Land Act requires the development application to be referred to the appropriate government agency
Development involving tree damaging activity	Conservator of Flora and Fauna through the Chief Minister's Department	Land Act s 229 and clauses 80, 81 of the <i>Tree Protection Bill 2005</i>	Advice on tree protection requirements for protected trees. Note a development approval issued by the Authority may authorise activity in connection with regulated trees under clause 17(1)(d) of the Tree Protection Bill 2005	Land Act requires a copy of the development application to be forwarded to the conservator for comment

APPROVALS, LICENCES PERMITS DIRECTLY RELATED TO DEVELOPMENT AND BUILDING

Approval	Approval issuing Body	Legislation	Description	Stage
Development Approval	ACT Planning and Land Authority	Part 5 of the Land Act	Covers:· – Design and Siting of buildings – Crown lease variations – Home Business	Development application stage
Development involving tree damaging activity	Conservator of Flora and Fauna through the Chief Minister's Department	Clauses 8, 9, 10, 15, 17, 20, 23, 27 of the Tree Protection Bill 2005	A development approval granted by the Authority may permit damage to a regulated tree as defined in the Tree Protection Bill An approval issued by the Conservator of Flora and Fauna is required to permit damage to a tree that is registered under the Tree Protection Bill	Development application stage
Licence to handle dangerous goods	ACT Workcover	<i>Dangerous Substances Act 2004</i> s.52	Licence	Building approval stage
Permit to dig up public land eg driveway verge crossing	Asset Acceptance, DUS	<i>Roads and Public Places Act 1937</i>	Permit	Building approval stage
Building approval	Private Building Certifier	<i>Building Act 2004</i>	Covers: – Building class – Construction – Finalisation of conditions of development approval	Building approval stage
Environmental Authorisation or Environmental Protection Agreement	EnvironmentACT	<i>Environment Protection Act 1997</i> s.42, Schedule 1	Covers: Developments over 0.3 hectares – Acceptance of >100m ³ of soil in specified areas	Development application stage
Waste Management Plan approval	ACT Nowaste	<i>Building Act 2004</i>	Sets out intentions with regard to waste generated in the course of construction	Building approval stage
Traffic Management Plan approval	Asset Acceptance, DUS			
Approval of off-site works	Asset Acceptance, DUS		Where offsite works are a part of a development approval or deed, they must be formally accepted by the Territory before handover	Completion

APPROVALS, LICENCES, PERMITS RELATED TO ONGOING ACTIVITY

Approval	Administrating Body	Legislation	Description	Stage
Licence to carry on a Public Health risk activity	ACT Health	<i>Public Health Act 1997</i> Public Health Regulation 2000, Part 6 General Sanitation	An initial licence is required to carry on such an activity at a particular premises (s.29(3)) A person who is licenced in this manner may not alter their premises without an approval of an activity premises alteration (s.25)	Any stage, but if there are impacts on building may relate more closely to building approval stage.
Licence to discharge waste to the sewer.	ActewAGL	<i>Utilities Act 2000</i>	Licence	Operating stage
Environmental Authorisation or Environmental Protection Agreement	EnvironmentACT	<i>Environment Protection Act 1997</i> s.42, Schedule 1	Covers various, such as: – sterilisation of clinical waste – operation of commercial landfill facility. – operation of dairy or feedlot	Operating stage
Licence to use public land (road reserve)	Canberra Urban Parks and Places, Quality Coordination	<i>Public Roads Act 1902</i>	Licence	Operating stage

GENERAL ADVICE FROM AGENCIES ON UNUSUAL OR COMPLEX MATTERS

Advice	Administrating Body	Legislation	Description	Stage
Public Transport	Public Transport in DUS	Not applicable	Expertise sought on an unusual or complex development application	Development application stage
Traffic Management and Pedestrian Safety	Road Transport in DUS	Not applicable	As above	Development application stage
Landscaping on public land	Canberra Urban Parks and Places in DUS	Not applicable	As above	Development application stage
Pedestrian Safety	Road Transport in DUS	Not applicable	As above	Development application stage
Stormwater management	Roads ACT in DUS, Water Resources Management Environment ACT	Not applicable	As above	Development application stage

GUIDELINES AND CODES OF PRACTICE WHICH MAY HAVE PLANNING OR BUILDING IMPLICATIONS

Guideline or Code of Practice	Agency	Legislation or Instrument	Description	Stage
ACT Cooling Towers and Warm Water Storage Systems Code of Practice 2000	ACT Health	Disallowable instrument 200-288 (<i>Public Health Act 1997</i>)	Code of practice for the management of ACT cooling towers and warm water storage	Building approval Ongoing
Code of Practice for the management of disease risk from public health facilities	ACT Health	Disallowable instrument 2001-187 (<i>Public Health Act 1997</i>)	Involves an inspection of plans and or premises to ensure the physical environment is appropriate Ongoing assessment may be required	Building approval Ongoing
Noise guidelines	Environment ACT	<i>Environment Protection Act 1997</i>	Noise	Ongoing

ONGOING RIGHTS OF AGENCIES

Right	Agency	Legislation or Instrument	Description	Stage
Right to enter land to install telecommunications equipment.	Any telecommunications carrier	<i>Utilities (Telecommunications Facilities) Act 2001</i> ss.6-7		Ongoing
Right to enter land to install or maintain a service network for gas, water, electricity or sewerage (under certain conditions)	Any supplier	<i>Utilities Act 2000</i> s.104-111		Ongoing

Appendix C—Leading practice model for development assessment

Following a meeting of key stakeholders in 1998, the Development Assessment Forum (DAF) was formed to bring together the relevant parties to reach agreement on ways to streamline the processes used for development approval and cut red tape—without sacrificing the quality of the decision making. DAF’s membership includes:

- the three spheres of government: Commonwealth, state/territory and local government;
- the development industry
- related professional associations.

The model proposes six assessment tracks based on project complexity and impact. The planning ordinance or regulatory instrument assigns classes of use or development to a track. An applicant therefore knows in which track their application will be assessed and determined before they make the application. These are:

- exempt
- prohibited
- self-assessment
- code
- merit
- impact.

Currently five of the six categories operate in the ACT. The exception is the self-assessment track.

TRACK 1: EXEMPT

This assessment stream applies to relatively minor development actions that have negligible impacts beyond the site and does not affect the achievement of any government policy objective and as such should not require development approval.

There is a distinct ‘exempt’ stream operating in the ACT. As for most jurisdictions, there may be no need to obtain a development approval for one of two reasons:

- the action does not constitute a development as defined in s.5 of the Land Act
- notwithstanding that the action is development, it is specifically exempted from the requirement to obtain an approval by operation of Part 6 of the Land Act, that is, it is referenced in clause 40 and schedule 1 of the Land (Planning and Environment) Regulation.

The DAF proposals suggest that exempt development that does not require development approval should be simple to identify. ACTPLA has provided a list of the most common exempt categories in the ACTPLA Information Series brochures (specifically brochure 4). Further details are readily obtainable by contacting the Authority.

TRACK 2: PROHIBITED

Prohibited development is development that is considered to be inappropriate in a given zone under any circumstances. The DAF model suggests that prohibited matters should be clearly identified so that the proponent can readily determine whether a proposal is prohibited without making an application to ACTPLA, although the proponent should have the right to do this to confirm the status of the proposal if desired.

There is a distinct prohibited category in the ACT. The Territory Plan (Part B) lists all permissible uses (as defined in Part D) in a schedule for each Land Use Policy area in the ACT. Section 7 of the Land Act sets out those uses that may be written into the Plan as permissible uses. Development that does not constitute a permissible use is prohibited unless it is exempt as noted above or it is permitted under an existing Crown lease use provision.

The Territory Plan Discussion Paper includes recommendations to improve community and government understanding of what is/is not prohibited. The recommendation is for the Territory Plan to list both permissible and prohibited uses.

TRACK 3: SELF-ASSESSMENT

By its nature self-assessable development allows for a party other than the Authority (or the Administrative Appeals Tribunal) to assess and determine a development application. In this context another party could be an applicant or a private certifier. There are currently no self-assessable proposals.

There is currently no support either in Government or the Authority to allow for the assessment and determination of development applications by other parties.

DAF suggests that this track could be appropriate for developments that can be assessed against clearly articulated quantitative criteria. It is always true that consent will be given if the criteria are met, so self-assessment by the applicant could provide an efficient assessment method. In such cases, the criteria will be set out in advance so that an applicant can prepare an application that conforms to the criteria and submit the application with suitable documentation to show that the application meets the criteria.

If the assessment indicated that the criteria are not met, then the applicant would need to contact Authority to determine whether an application to the Authority is required. This stream is not unlike the exempt one except the applicant must conduct an assessment process and accept that this process may be audited by the Authority at a later date.

For monitoring and compliance audit purposes, it might be appropriate to require a copy of the documentation to be lodged with the Authority. Obviously in this situation there is no need for merit review provision.

There is currently no support in ACT Government for this track. The risk with this approach is that the removal of qualified, impartial assessment personnel from any role could reduce the ability of the community to keep developments to an acceptable standard. If this measure of quality control is considered unnecessary for certain applications, then perhaps the more efficient course is to exempt such development from requiring an approval altogether.

TRACK 4—CODE ASSESSMENT

Code assessment involves the assessment of relatively simple development approval applications against criteria that are objective and straightforward. The criteria are essentially quantitative rules about such matters as materials, dimensions or procedures (such as notifying neighbours). Some criteria may be in the form of more flexible outcome criteria provided that these are objective and relatively simple. The DAF model suggests that it could be possible for certified private assessors to perform the assessment of these matters.

The Territory Plan uses a form of code and merit assessment. Each land use policy area contains a quantitative set of codes (the performance measures), which if followed will produce a result which satisfies the higher-level qualitative aims (the performance criteria and objectives) of the policy. A proposal that meets these codes should have a speedier assessment, and is considerably easier to defend should the decision be appealed.

Code assessment is already used for the majority of relatively simple proposals that meet all relevant planning rules. Examples are houses in new estates and minor additions such as carports and pergolas. All code matters are permissible development.

TRACK 5—MERIT ASSESSMENT

Merit assessment is used for more complex proposals that require the decision-maker to make a judgement in the application of planning rules. Typically this occurs when there is at least one departure from performance-based planning rules. Examples include:

- a development proposal under the Residential Design and Siting Code for Multi-Dwelling Developments at Appendix II.2 to the Territory Plan
- a development proposal in a sensitive area
- a development proposal that has impacts on multiple community groups.

In these and other cases requiring merit assessment, the proposal is assessed against criteria relating to quality, performance, and on-site and off-site effects. Balancing of competing policy objectives may be required. Expert assessment will be required by professional assessors. In specified circumstances, the views of other parties or agencies may need to be sought before making a decision.

Approval is likely to require the formulation of set of consent conditions specific to the application. Generally, an applicant will be provided with the opportunity to seek a review

of conditions or of a refusal to consent. In specified circumstances, an opportunity for third parties to seek a review of the decision may be appropriate.

TRACK 6: IMPACT ASSESSMENT

This track provides for the assessment of proposals that require assessment against complex technical criteria, generally relating to effects on the on-site or off-site environment and requiring prediction of future impacts. This track expects the applicant to prepare an impact assessment as part of the application and that there will be pre-set criteria for the content and quality standards of that impact assessment.

Developments requiring impact assessment are:

- developments that attract a mandatory preliminary assessment under Part 4 of the Land Act
- other proposals for which assessment is triggered by a relevant minister
- development (including a variation to a Crown lease) that is neither exempt, permissible, nor prohibited, but could be approved subject to rigorous impact assessment.

These proposals may or may not proceed to full assessment. The list of proposals that attract mandatory preliminary assessment is found in Appendix II of the Territory Plan.

Expert involvement is required to prepare the application, generate predictions, assess impacts, and to assess the accuracy predictions.

Assessment of these proposals is likely to benefit from the views of a range of parties and agencies and a decision about the need for and extent of public notice will usually be required. Generally, assessment will require the evaluation of the applicant's documentation and the views of other parties by an expert assessment panel.

This track provides for the assessment of proposals that require assessment against complex technical criteria, generally relating to effects on the on-site or off-site environment and requiring prediction of future impacts. Expert involvement is required to prepare the application and generate predictions. Expert involvement is required to assess impacts and the accuracy predictions.

Technical paper 2—Review of the Territory Plan—proposes a new impact assessment stream consisting of uses that are neither permissible, nor prohibited, that can be applied for through the development application process without having to obtain a plan variation.

Appendix D—Public notification in jurisdictions other than the ACT

VICTORIA

In Victoria development applications are decided under the *Planning and Environment Act 1987 (Vic)*. The relevant local planning instruments can set out what type of applications must be publicly notified and who must receive notification (s.52(1)(c)). In addition, the council must notify all persons who may suffer material detriment if the proposal were to go ahead (s.52(1)(d)). Anyone who may be affected by a proposal may lodge an objection. Anyone who is affected by a decision to grant the relevant development application may appeal the decision. An appeal may be made irrespective of whether the appellant lodged an objection, provided that at least one objection was lodged by someone. The council may refuse to accept an objection if the objection appears to be based on purely commercial grounds (s.57(2A)).

QUEENSLAND

In Queensland development applications are determined under the *Integrated Planning Act 1997 (Qld)*. In this jurisdiction notification and appeal rights are explicitly aligned with assessment tracks. Public notification applies only for development applications that require impact assessment or seek a variation of the relevant planning instrument (s.3.4.2). This essentially includes merit or impact assessment; there is no merit track in Queensland. There are no third-party notification or appeal rights for proposals that fall into the exempt, prohibited, self-assessment or code assessment tracks. In cases where a development application involves both code and impact assessment then any third-party appeal is restricted to consideration of issues relevant to the impact assessment only (ss.3.5.14 and 4.1.28).

In these cases, there must be notification in the local newspaper as well as direct notification of owners of adjoining land (s.3.4.4). Notification periods are 15 business days or 30 business days if government referral is required (s.3.4.5). Either the applicant or the relevant authority (with the applicant's permission) may arrange for notification.

If a development application is notified (i.e. it is an impact assessment matter) then anyone may make a submission irrespective of whether they received notification. There is no requirement for a person making a submission to show that he or she may be affected by the proposal. There is also no statutory distinction between representations that approve of or object to the proposal, they are both simply submissions.

Anyone who made a submission may appeal a decision to grant the development application. There is no additional requirement for a third party to show that they are affected by a decision to approve the development application.

SOUTH AUSTRALIA

In South Australia development applications are determined under the *Development Act 1993 (SA)*. This legislation recognises different levels or types of notification. Unlike the Queensland legislation, the procedures do not explicitly refer to assessment tracks; however, it is possible to see how these could apply. The legislation recognises the following categories:

1. **Category one proposals**—the local council makes no public notifications and there is no right of third parties to comment or appeal. These include minor developments that are consistent with the relevant plans and that can be assessed against specific rules (these might be described as minor code assessment matters).
2. **Category two proposals**—the local council notifies neighbours. Anyone (anywhere) has the right to comment on the proposal, but there is no right of third-party appeal. These include developments of types which are likely to have significant third-party impacts but which in the main can be assessed against relevant planning rules (code assessment matters that have third-party impacts).
3. **Category three proposals**—the local council notifies neighbours and the general public. Anyone has the right to comment on the proposal and to lodge a third-party appeal. These include major or unusual developments that are not specifically anticipated by relevant plans and require some weighing up of different policies (merit and impact assessment matters).

The planning legislation regulations list those matters that fall into each of the above three categories. This list may be varied by the relevant local development plan.

The South Australian legislation makes no distinction between submissions that approve or object, they are both simply representations. There is no requirement for third-parties to show that they may be affected by a proposal in order to make a representation or to lodge a third-party appeal.

Consultation with Planning SA suggests that the above system works well and is well understood. There is no proposal to substantively change this approach in the current review of SA planning systems.

(Source: Officer level discussions with Planning SA).

NEW SOUTH WALES

In NSW development applications are determined under the *Environmental Planning and Assessment Act 1979 (NSW)*. The NSW process is similar to that of South Australia in that it has different categories of applications with different notification and third party appeal provisions. In summary, the processes are as follows:

- **complying development**—can be certified by an accredited private assessor, is not publicly notified and is not subject to third party appeal. Local planning instruments may determine what is complying development. Refer in particular to s. 76A(5) of the Act;
- **advertised or notified development**—is publicly notified for such time and by such method as required by the relevant local planning instrument. Anyone may comment on the application. Third-party appeal rights do not apply. The regulations and planning instruments may determine what is advertised or notified development. Refer in particular to ss.4 and 79A of the Act and clause 5 of the regulations.
- **designated development** (such as developments with significant potential off-site impacts such as mines, intensive feedlots, electricity generation facilities, wineries, marinas)—must be publicly notified for a period of at least 30 days through notice in the local newspaper and on the property itself. Adjoining landowners and others whose properties may be affected must be notified. Any person may make a submission on the application. Third-party appeal processes are available to people who made an objection. The regulations and planning instruments may determine what is designated development. Refer in particular to ss.79 and 98 of the Act and clause 4 of the regulation.

Appendix E—Current notification rights

Section 229(1)(a) of the Land Act requires the Authority to send a letter to neighbours of land that is the subject of a new development application. The letter is to inform the neighbour of the fact of the development application and of their right to make an objection on the proposal to the Authority. Schedule 4 to the Land Act sets out a number of exemptions from this requirement.

These exemptions include, for example:

- single residences in undeveloped land subject to block size and setback limits
- single residences in developed land provided there are no net increases in the number of dwellings on the land and subject to block size, floor size, single storey and setback limits
- multi-unit development in undeveloped land that is authorised by an existing lease.

The Authority also takes steps to notify the wider community. These steps include a notice in *The Canberra Times* in fulfilment of s.229(1)(b) of the Land Act and publication of the development application on the Authority's website. The Authority also erects a sign on the relevant land as required by s.229(6). There are several exemptions from the requirement to erect signs and place notices in the paper, these are set out in schedule 5 to the Land Act. The exemptions include, for example, the:

- construction or alteration of a single dwelling on a single block
- construction of class 10 structures as defined in the Building Code, that is, non-habitable structures such as sheds and pergolas
- solar water heaters and airconditioning units.

If the development application is for a variation of a lease, the Authority notifies all persons who have an interest in the lease registered on the land title, such as a bank if there is a mortgage involved. This is required by s.229(3).