



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**STANDING COMMITTEE ON PLANNING, TRANSPORT
AND CITY SERVICES**

(Reference: [Inquiry into Giralang shops](#))

Members:

MS J CLAY (Chair)
MS S ORR (Deputy Chair)
MR M PARTON

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 17 JUNE 2021

Secretary to the committee:
Dr B Lloyd (Ph: 620 50137)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

WITNESSES

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Amended 20 May 2013

The committee met at 9.30 am.

GENTLEMAN, MR MICK, Manager of Government Business, Minister for Corrections, Minister for Industrial Relations and Workplace Safety, Minister for Planning and Land Management and Minister for Police and Emergency Services

PONTON, MR BEN, Director-General, Environment, Planning and Sustainable Development Directorate

LHUEDE, MR NICK, Acting Executive Branch Manager, Building and Construction, Access Canberra

CILLIERS, MR GEORGE, Executive Branch Manager, Merit and Estate Assessment and Deed Management, Statutory Planning, Environment, Planning and Sustainable Development Directorate

THE CHAIR: I hope everyone has had a chance to have a look at the privilege statement.

Mr Gentleman: Yes.

THE CHAIR: We have decided to dispense with opening statements. If there is anything you would like to table, do so.

You no doubt know that we have already heard from the developer. You have probably had a chance to review that transcript and see what was said.

We had a lot of discussion with the developer about the lease and lease conditions. I am interested in some of the terms of the lease and at what point government might choose to enforce the lease, when government intends to do that.

Going to some of the provisions that I have noticed in that lease, there is a provision in the lease issued in 2014 that said that within 12 months from the date of the commencement of the lease, unless the authority grants approval in writing, the works need to commence. That obviously did not happen. Do you have any views on whether that lease has been adhered to and at what point government might take steps to enforce that lease?

Mr Gentleman: I might just give an overall opinion from government on lease enforcement. We do not do a great deal of lease enforcement. We look at ensuring that we can get the best outcomes for proponents and for the ACT community by assisting proponents to meet the needs in the lease. The briefing to me is that it would be a very lengthy process if you were to go down the enforcement track. At this point, we have chosen to use the opportunity to assist proponents, and assist the community as well, rather than going down enforcement tracks. That could change in the future, but at this time that is our choice. I will ask directorate officials to give you more detail on what would need to occur if we went down an enforcement track and also on the time line for that.

Mr Ponton: In terms of lease compliance issues and this particular lease, an important consideration when considering whether to take action—keeping in mind that the action that is most available would be termination, which is a fairly significant

step—and when considering whether to terminate a lease, would be first whether there has been any attempt to develop the site. In relation to this particular lease, in 2011 a DA was approved through ministerial call-in powers, by Minister Corbell at the time. So in that respect, a DA had been approved. That then went through Supreme Court and High Court challenges that took quite a number of years. I would argue that while that process was running its course, it would be unreasonable to consider taking any compliance action, because clearly the proponent had an intention to do something on the site.

We worked our way through those legal processes and other challenges that the proponent found themselves with in terms of the proposed lessee operating the supermarket, working through trying to secure that and get a tenant, if you will. Then there were some further changes to the proposal, which was the subject of a ministerial call-in by Minister Gentleman—in 2018, I believe.

If we were to look to take compliance action, the first step would be that our colleagues at Access Canberra, who manage the compliance and regulatory aspects of the Planning and Development Act on my behalf as Chief Planner, would again look at whether there was an approved DA in place. The current DA, the 2018 DA, runs through to July 2023. I would be surprised if Access Canberra would seek to take that fairly significant compliance action given that there is a current valid DA in place.

In fact, as a model litigant, one would wonder whether the courts would take a dim view of the Planning Authority, or Access Canberra on behalf of the Planning Authority, taking such action when we know that there is a DA in place, and we know that the proponent is still working trying to secure an anchor tenant.

We also need to think about what would be achieved by such action. At the moment the community has a degree of surety in that there is a DA in place. We have a proponent who has demonstrated a commitment to work with the community to achieve an outcome, even though there have been things in their way along the way to reach that outcome.

If the government were to take that fairly significant step of seeking to terminate the lease, we would need to keep in mind that that in itself is a decision that could be appealed to the Supreme Court. That could take some time to work its way through that system. Who knows? In terms of courts of appeal, and so on and so forth, it could be years—I am saying years—before we got to the point of being able to terminate that lease, assuming that we were successful.

THE CHAIR: There is not any tool between termination and talking to them? Is that correct?

Mr Ponton: Essentially. You may have heard me—certainly others may have heard me—over a number of years talking about the Planning Development Act and the tools that we have available to us in terms of compliance in the planning and leasing space. We do not have what I would call a suite of municipal tools; we have state-based tools. As a territory, that is the path that we have taken. Minister Gentleman has agreed, as part of the Planning System Review and Reform Project, that that is one of the key features we are looking to address to make sure that we fill

that gap.

At the moment, as you said, it is having those conversations, working with proponents or terminating the lease. There is not a great deal in between. We know what needs to be done, and that is part of the consideration in our Planning System Review and Reform Project.

If we go to the minister's point about outcomes, what is the outcome we are looking for on this site? I think we would all agree that we want to see a supermarket built on that site. That is what the community is certainly asking for. Would we achieve that if we took compliance action and ended up with three, four or five years of running through the court process with no guarantee of success before we could even think about selling it to another entity, who would then start the design process, the DA process and then potentially appeals and another couple of years in court?

I think the best thing that we can all do is work with the community and the current proponent to do what we can to get them to the point of being able to commence with the DA that is currently in place as a result of Minister Gentleman's call-in in 2018.

MS ORR: Mr Ponton, you said that it was about working with the proponent who has the approved DA, although we did hear from the proponent that he plans to discontinue that DA and put in a new DA. Does that change your position?

Mr Ponton: It depends on whether it is a new DA or an amendment to the DA. It all depends on what is being proposed. If it is about the size of the supermarket, certainly, that could be considered, potentially. Again, I need to see and carefully consider any plans that are put before us. We could, I would expect, consider that through an amendment to the current DA, given that we have already approved a 1,000-square metre supermarket and a range of other GFA for retail activities. It would seem reasonable, if it is within the same footprint, that we could consider that.

If it was a substantially different development, then we might need to consider a new DA; but, as an amendment, that would be something that we would then consider and make a recommendation on to Minister Gentleman, who was the original decision-maker, in relation to an amendment. That, of course, would be subject to community engagement and consultation as well.

MS ORR: In a previous hearing I questioned the developer on whether he was changing the footprint of the design, whether he was changing the envelope of the design, or whether he was changing significant things, such as where the loading dock was placed—all of those things that would arguably have quite a big impact on the development. He indicated that he was not—

Mr Ponton: I saw that.

MS ORR: and he would just be changing the internal floor print. From what you have just said, is that something that would be a substantial enough change to warrant a new DA?

Mr Ponton: I would expect, as I said, based on what I understand, if it was not

changing the loading dock areas, in terms of egress and access points, if it was not changing the floor plan significantly—again, we could have some adjustments—from what I am hearing, and having read the transcript, it would suggest to me that that is something that would be reasonable to consider as an amendment to the DA. But I would not want to make that decision until I have seen the plans and considered those.

MS ORR: If the developer chooses to put in a whole new DA for something that can be dealt with as an amendment, how does the authority go forward with that? What is the implication in the sense of time lines, because the current DA does have a time limit?

Mr Ponton: If I understand the question correctly, if the proponent provides revised drawings that increase the size of the supermarket but do not change the other aspects, as we talked about, as an amendment that would be likely to be publicly notified. But there is an ability for us under the legislation to not publicly notify. Again, that depends on what is being proposed. I would tend to think that what we are talking about here would warrant that public notification. There is a standard, 15-working day process for that. We would then prepare a recommendation for the minister. I was going to say that it is a fairly quick process, and I am putting that in the context of this development. I would be talking about a matter of months, in terms of running through that process. If we were looking at changing what was happening on the upper levels—the footprint, integration of units, the number of units and all of those things—and it warranted a whole new DA, that would be about the same period of time. Again, with public notification, 15 working days, 30 or 45 working days, is the statutory time frame for consideration.

We would then need to turn our minds to whether or not there was a risk of appeal, and whether that was something that the government wanted to address, as it has done previously through a ministerial call-in.

MS ORR: Added to that would be pre-DA consultation requirements for a new DA, not for an amendment.

Mr Ponton: For a new DA.

MS ORR: If it is an amendment, would the expiry date for the development application change or would it stay at July 2023?

Mr Ponton: July 2023 for commencement.

MS ORR: If it is a whole new DA, what would be the time frame?

Mr Ponton: Ordinarily, it is commencement two years from the date of approval.

MR PARTON: What we are arriving at from the line of questioning is that, ultimately, it would be up to the proponent as to whether there was a completely new DA, wouldn't it?

Mr Ponton: Correct. It depends on the extent of change.

Mr Gentleman: Chair, can I caution here, too: we are talking about a hypothetical situation here. These occurrences have not yet occurred. We certainly would consider what does come forward from the proponent, if there is any change.

MR PARTON: You said right at the start, Mr Gentleman, that “we don’t do a great deal of lease enforcement”. Do we do any? Do we actually do any? Are there genuine examples of lease enforcement at that highest order here in the ACT?

Mr Ponton: There is a spectrum here. When you talk about lease compliance, that could be in terms of leasehold. Yes, there is action that our colleagues at Access Canberra would ordinarily take. It could relate to use, where somebody is using a premises for an activity that is not permitted by the lease. Absolutely, there is a whole—

MR PARTON: Can I make it a simpler question? As a government, at any stage, have you made that major decision to step in and say, “No, too long. Time’s up. We’re taking it off you. We’re removing it from you”?

Mr Ponton: I believe that the government has pursued that on two occasions and has not yet been successful. Each time they have been appealed.

MS ORR: Can you take on notice and provide us with an overview of what those two examples were?

Mr Ponton: Yes. I might ask my colleague from Access Canberra if he could take that on notice.

Mr Lhuede: Yes.

MR PARTON: Mr Gentleman, you suggested that, if you go down the path of lease enforcement—I cannot remember your exact words—it was likely to become an extremely time-consuming process. I do not know; I guess I would reflect that if we balanced that against the process that we are inquiring into now, it has been quite a time-consuming process thus far, hasn’t it?

Mr Gentleman: It certainly has. There is no doubt about that. There has been a change in policy as well, in regard to supermarket size, that we have made, in reviewing policies that are implicated in the Planning and Development Act, for example. The advice to me is that the other two occasions—and I do not have the details here—were very time consuming and were not successful. That is why we have chosen to support proponents, and support the community as well, because they want a good outcome out of this as well.

MR PARTON: Of course.

Mr Gentleman: Those are the actions you have seen me take over recent years.

Mr Ponton: I made the comment in relation to the time frames; yes, it has been a period of time as we have worked our way through appeal processes, through the

Supreme Court, the Court of Appeal and the High Court. The point I am making here is that, if we went to the point of seeking to terminate the lease, it would be potentially years before we get to the point where we are now, with a new proponent. That is what we really need to turn our minds to, if we are thinking about the outcome.

MS ORR: I have more questions on enforcement of the lease. The lease for the development site in clauses 3(a) and (b) gives commencement of development and completion of development dates. Can you please explain how these two provisions are enforced? I note that the chair, in her line of questioning, said that it has not commenced, but technically it has commenced, and we have missed the completion date. How are they actually enforced?

Mr Ponton: In terms of the commence provision, work, of course, has occurred on site. The old building has been demolished; basement works have commenced. That was done under the previous approval, the 2011 approval. Therefore, I would argue that the commence provision of the lease has been met, because works have commenced, not under the 2018 approval but under a different approval. Obviously, that work has not been completed, so we still need to comply with the completion covenants within the crown lease. Again, there is a DA in place that is live.

It is possible to seek to extend the completion provisions in the crown lease. Ordinarily, our colleagues in Access Canberra would look at whether there had been any intent to develop the site. Clearly, there has been, and in this case there is a live DA in place. It would be reasonable, I would argue—again, not wanting to pre-empt any future decision of my colleagues in Access Canberra—that if you have a DA that is valid until July 2023, ordinarily, you work out your time to complete developments, as, say, two years, and it would be a reason to extend it to that sort of period of time.

MS ORR: Considering that the lease clause for completion would have been 12 March 2018, I assume that extensions have been granted regarding the completion date?

Mr Ponton: I would expect so. I do not know whether Mr Lhuede has an answer.

MS ORR: If you cannot answer this, can you take it on notice: what criteria had to be met for an extension to be granted?

Mr Ponton: We can take it on notice, but it is a fairly straightforward process, in that we would look at those sorts of issues that I talked about earlier. Again, our colleague from Access Canberra might have to take that one on notice.

MS ORR: Yes. Can the developer continue to seek an extension? What are the criteria for each extension sought? What is the current completion date? If there are fees involved, what are they? This will also be on notice because it goes to Access Canberra: if there have been fees paid by the developer to extend this lease, what is the date of those payments and the amount of those payments? Have any been waived, and what is the reason for any waivers or the amount that has been waived?

Mr Ponton: Yes, I suspect that that would all be taken on notice.

THE CHAIR: When Access Canberra are deciding to extend or make other decisions like that, do they take into account whether there have been controlled activity complaints? I understand that there have been controlled activity complaints, so could you confirm whether there have been controlled activity complaints and whether that impacts your decisions on extending leases or anything like that?

Mr Lhuede: Yes, there certainly have been a number of complaints received, most recently earlier this year. We will take them into consideration. In the instance that Mr Ponton has outlined, there is an active DA on the site and activity has commenced. There would not be an issue with extending the provisions of the lease for completion, from a regulatory perspective.

THE CHAIR: So it does not matter how many controlled activity complaints there are or whether they are substantiated; you would still decide to extend the lease?

Mr Lhuede: It would be treated on a case-by-case basis, with the nature of those controlled activity complaints, and how they would have been addressed and dealt with at the time.

THE CHAIR: Are we able to get the details of those complaints?

Mr Lhuede: Yes, I can take that on notice and provide the history of those complaints.

MR PARTON: Mr Gentleman, Mr Nikias asserts that if the government had not reduced the floor space allowance in the first instance, shops would be operating now in Giralang. Do you believe that that is a fair assessment?

Mr Gentleman: There was quite a detailed court process, Mr Parton, that Mr Nikias went through with the government at the time of his first application and when the supermarket size limits were set. I would simply reflect on that. You would need to look through those court processes and look at the outcomes from the court.

MR PARTON: Mr Gentleman, we are in this inquiry hearing now. What I am looking for is a brief assessment from you, representing the government, of whether you believe that that is a fair assessment. If anything, the government's recent move to reverse that decision is, I would have thought, indicative that there is some basis to the claim from Mr Nikias.

Mr Gentleman: No. The decision that I made in regard to supermarket size was overarching for the whole of Canberra. It was after we had reviewed that policy and looked at some of the outcomes that had occurred. It was not specific to Mr Nikias. But I would reflect on those court proceedings. I am reluctant to make comment in relation to his statements after that very lengthy court process that he went through.

MR PARTON: You are telling me, Mr Gentleman, that the decision to reverse that floor space allowance for supermarkets had very little to do with the ongoing saga in Giralang.

Mr Gentleman: Certainly, Giralang was a component of that decision, and the advice to me to review the policy, but we have seen instances of supermarket size issues right

across Canberra. Originally, the supermarket policy was set to allow some competition from local supermarkets against the two big chains. We reviewed that policy and decided to go back to where it was before.

Mr Ponton: It is also important to note, and I would need to go back and reflect on, the exact DA. Of course, some of us have been involved in this for some time. As I said, the first call-in for this matter was in 2011. I will ask Mr Cilliers to correct me if that is incorrect. That was for a supermarket proposal and residential that the proponent felt could be delivered, with an anchor tenant. That was in 2011. The policy change to restrict the size of the supermarket was announced in 2012. So there was already a DA in place, the policy was announced and then we went through those various court proceedings. What was finally agreed through those processes was a supermarket of a smaller size that complied with that policy.

I would also note that we do not set policy; governments make policy. We, as good public servants, continue to look at how those policies are operating across the board. That is what we are currently doing in a range of areas in the planning space. You heard me talk about the planning system review and reform project. Part of that work that we are doing is looking at centres. We have already done some work in relation to that with a COVID-19 overlay, in terms of how people are utilising their local centres, as well as reflecting on some other issues around Giralang; Coombs is another matter that is often talked about. The work that we are doing more broadly has brought us to the point of having a conversation with the minister about some immediate steps that we could take in the planning space, while noting that there is still work to be done in terms of local and group centres, and that work continues.

That is a really important point. That change in policy was announced in 2012. That is almost a decade ago. I would be surprised if governments anywhere in the world would put a policy in place and not ever go back, revisit it and see how it has been working. It is just good public policy to do that. Again, I want to really reinforce that point—approved in 2011, policy change in 2012.

THE CHAIR: We are now operating in a situation where we understand that, according to government policy and announcements, there could be a 1,500-square metre supermarket there.

Mr Ponton: Limited, yes.

THE CHAIR: We have concerns that there may be other reasons why a 1,500-square metre supermarket might not be able to go ahead. Do you have any concerns or views, or do you have any information, about whether there are other reasons why there might be limitations on the size of the supermarket that could be developed with the current DA and the current developer?

Mr Ponton: Reflecting on the history of this, again, going back to that 2011 approval, I would think that, if the proponent came to us with a proposal for a 1,500-square metre supermarket, we would, as a matter of course, consider what that means in terms of traffic and parking. There are a range of things that we need to consider as the planning and land authority in assessing that and making recommendations to the minister.

I am being a little bit vague because I would not want to, in this forum, pre-empt a proposal and pre-empt, as chief planner, a decision that one of my delegates might make or the advice that we might wish to give to the minister. At face value, clearly, we have recommended to the minister a policy change, a variation of 1,500 square metres in local centres across the board, which would suggest that, at face value, that is something that is reasonable.

THE CHAIR: Do you have any information about whether, in this particular instance, there might be another reason why that supermarket could only be of a different size, a smaller size?

Mr Ponton: At face value, no. Again, I reflect on the 2011 approval, which was for a larger supermarket, which would suggest that a larger supermarket can be accommodated on that site. But until I see a proposal before us, I cannot pre-empt and make a decision in a committee hearing without having seen that. I need to maintain the independence of that statutory office.

MS ORR: Mr Gentleman, can you outline what the government has done to progress the Giralang shops development?

Mr Gentleman: Yes, we have taken a number of steps during this very lengthy process. I would highlight two call-ins—the original call-in, to give some certainty to the shop development, and the second call-in that I did a couple of years ago, to see whether we could get surety for the proponent and the Giralang community. It has been a very long process and, as yet, we still do not have a supermarket for the people of Giralang. We have tried as best we can to assist the proponent along that path. Of course, MLAs have been assisting along the path as well. I think that the communication with the community has been very good, but it has been a lengthy process and we would like to see that delivered in the best way possible.

MS ORR: Mr Gentleman, what more can the government do? You have cited two call-ins, which I realise is not insignificant. In isolation, is there anything on those two things that the government can do to progress the Giralang shops development?

Mr Gentleman: At this point, no; we would have to wait and see what the proponent intends to do. If they are able to get a key anchor tenant, of course, they will be able to progress. If they are able to make changes—we have had that conversation here today, about seeing whether the independent planning authority would be able to look at that DA and then give advice to me—we would certainly assist the proponent where possible.

Mr Ponton: We have also extended the commencement date for works in terms of the DA that would otherwise have expired. Ordinarily, as I said, it is for two years, so we have extended that, being mindful of COVID and challenges around securing a tenant. That is a decision of the planning and land authority, again, to provide a degree of certainty; otherwise we would be right back at the beginning of a new DA.

That is something that we have done; as the minister said, there have been two call-ins, in terms of the government. Of course, we understand that the recent decision of the

minister to vary the Territory Plan, with interim effect, to increase the size of supermarkets in local centres has been of assistance to the proponent.

MS ORR: Could you confirm that there is nothing under the current legal or regulatory framework that the government can do, beyond what it is already doing?

Mr Gentleman: There is nothing that I have explored further that we could do. If something occurs that gives advice that we could, we will certainly have a look at it.

MS ORR: From the responses you have just provided, the government sees no role for itself in helping to attract a supermarket tenant; that is the responsibility of the developer. Okay.

MR PARTON: Mr Gentleman, you just told us that there is nothing more that the government could do; you have done all that you can do and you have gone to some great lengths. Mr Nikias also sat in this room and said that, at this point, although he is moving forward, things were out of his control and there was nothing more that he could do at this point to move things forward. Is this saga an indication that it is far too difficult to build things in the ACT? Is it an indication that there are too many hoops to jump through, too many processes, too many fees and charges, too much red tape and that it is too difficult to progress a project like this, given that everyone, in theory, is moving towards the same outcome but, for whatever reason—and there are many reasons—we have not been able to achieve it?

Mr Gentleman: Evidence would suggest, once you have a look around, Mr Parton, that that is not the case. The city has grown dramatically over the last number of years, in different ways. I think it has been a very good planning outcome to see density start to occur in our local centres and along our transport corridors. We have seen some of the most successfully planned cities across the world focus on density in that case, and therefore draw commercial activity and commercial investment along those areas.

You have seen that occur here in the ACT. We have seen a transformation in areas such as Braddon, which were simply low-level commercial warehouses, into modern, vibrant, residential areas with mixed use—incredibly successful outcomes. So I would say no.

MR PARTON: If the planning process is so successful, why are we scrubbing the board clean and starting from scratch again?

Mr Ponton: Can I interject here, Minister? Going back to the first part of the question, Mr Parton, in relation to the time that it has taken, I would like to highlight the fact that the primary reason that it has taken a decade or so to get to this point has been because of third-party appeals. Those third-party appeals have been to the Supreme Court and the Court of Appeal. Minister Gentleman, through his call-in, and Mr Corbell, previously to that, removed the ability to appeal to the local tribunal. Some might say regrettably but I think that others would say thankfully, the Constitution does not allow us to remove Supreme Court challenges. Unless you have a proposal to amend the Constitution, we have to allow those processes to run their course, and they take time. By the time you get through the Supreme Court, the Court of Appeal and the High Court, as I said, based on the Constitution, I would argue that

that is not a reflection on the planning process. In effect, the planning process has done all that it can to get us to this point, through the call-ins, facilitating the approvals, the extension of the approvals and all that we have talked about previously in this hearing.

The next part of your question was: why are we undertaking the planning system review and reform project? Again, I go back to that point: we should never put policy in place, and plans in place, and never think about it again. Good public policy, I would argue, is to reflect on what has worked and what has not worked so well. In fact, the Planning and Development Act itself has an inbuilt mechanism for us to do that. The Assembly obviously thought that it was good public policy to require the government to consider, every five years, whether to review the planning strategy, and for the planning and land authority and/or the government to reflect on the Territory Plan and its operation every five years.

The government, in 2017, made the decision to review the planning strategy that was released in 2018. Five years after that date, there will be another decision point for government to again think about a review. In 2017, I made the decision, as chief planner, to review the Territory Plan. As we have worked through those reviews, it became apparent to us that, over time, the act has not become as efficient as we would like; and that is simply the nature of legislation. If you look at the Planning and Development Act in 2007, when it was considered by the Assembly, and the various amendments that have occurred for various reasons, it makes it a bigger, less clear piece of legislation. It is good policy, I would argue, to review that and think about how we can make that more efficient.

Again, we are not unique in this respect. Every jurisdiction, I would say, around the world regularly looks at its planning system and looks at whether there are better ways of doing things. I would argue that it is good public policy to undertake this review.

Mr Gentleman: Mr Parton, going back to your question, if the issue was the planning system and approvals, you would not have an approved DA. We have an approved DA; it is the market that is actually the issue in this case. I think the proponent said that, too; he is having trouble getting an anchor tenant, similar to some other places as well. Those areas where the market has worked and the planning system has made approvals have grown quite quickly. We can do the best we can. The DA was approved. He is allowed to go and do it, but he is having trouble finding an anchor tenant. There is a commercial reality in that sense.

THE CHAIR: There are two main strands to the community concerns about this site. There is the strand where they want the shop, they want the supermarket—and we have talked a lot about that—and the lease and what tools there are to deal with that. The second strand is where they are really upset about the state of that site in this very lengthy interim period. We have spoken to the developer about that at length. I am really glad that we have Access Canberra here because I think this is all in your patch. I understand that there are at least two intersects for the government in this.

There are conditions in the lease. There is a condition in the lease that the lessee shall, at all times during the said term, maintain and repair and keep and repair the premises

to the satisfaction of the authority. There is that, and there are controlled activity complaints. There are probably other tools for the government to ensure that that site is fenced and kept clean. We gather from public hearings that there may have been other undertakings about what the developer may or may not do. I do not know the legal status of that, but those things have not happened. What can the government do to make sure that this site is maintained in a way that does not upset the community, is safe and is providing amenity until such time as it is redeveloped?

Mr Lhuede: In investigating those complaints, we did look at the unclean lease provisions associated with that site. At the time of the inspection, my understanding was that the site was secured and it was in an appropriate state. It did not meet our provisions for unclean leaseholds in this instance.

MS ORR: What would be the threshold for an unclean leasehold?

Mr Lhuede: We look at a range of measures. We look at the amount of what, I suppose, you would term rubbish or debris that would be visible from the public space. In equivalent situations, if there is more than 30 per cent of rubbish, litter, debris—and it might be machinery, materials or cars on a site—then we may look at taking action. That would be most likely through engagement with the leaseholder in the first instance, to achieve compliance. Subsequent to that, if that was not successful, we could look at further regulatory action, and we do. That may be a controlled activity order or a show cause notice for a controlled activity order.

THE CHAIR: Is your inspection prompted via a public complaint? Is that how that process starts?

Mr Lhuede: Yes.

THE CHAIR: You have already taken on notice, I think, to give us a history of the public complaints and what occurred.

Mr Lhuede: Yes.

THE CHAIR: So we will be able to see how often you went to inspect and what you found when you inspected?

Mr Lhuede: Yes. That would be covered in that.

THE CHAIR: That is on the litter. What about some of the other issues? We have heard about broken footpaths and fences. There are quite a lot of other amenity issues with that site.

Mr Lhuede: We look at the lease, and the private lease, in that context. Whilst we will not ignore other issues in a municipal sense, we will refer those to TCCS if it is in the public realm. My recollection—I will take this on notice and clarify it in our response—is that there were no safety concerns identified at the time of the last inspection.

THE CHAIR: Again, that would have been prompted by a public complaint?

Mr Lhuede: Yes. We respond to complaints in these matters.

THE CHAIR: If a developer is making private undertakings to the community, the government probably has no role in that. If the developer is out there saying, “I will do the following things,” does that have any legal status of any kind? It is not in the lease.

MS ORR: Sorry; what are some of the things?

THE CHAIR: We heard from the developer, and I know that there were concerns about repairing fencing and footpaths. These are not things that are set out in the lease. We heard from the community that the community does not feel that the developer has done the things that he said he would do to maintain this site to the standards of the community. I do not know how those dealings occurred. I imagine that they occurred between the developer and individual members of the community. We have heard evidence in public submissions that the community does not feel that the developer has done what he said he would do to maintain the site in an adequate way. Has any of that information come to you? Does the government have any involvement in that?

Mr Lhuede: I think that we would need to look at the specific provisions of the approval with regard to both leasehold and public realm and whether there were specific conditions. I will take that on notice, unless my colleague Mr Cilliers has anything to add?

Mr Cilliers: Once a development commences, it becomes part of the conditions in the development approval. There are conditions, for example, in this decision for verge management, sediment and erosion control, waste management and those sorts of things. Once a development commences, it is fairly easy to control those things. The site fencing around it can be supported under the current exemption provisions for temporary fencing for a site; so that can be dealt with. Any verge works need to get approval from TCCS, if he wishes to reinstate a verge.

Mr Gentleman: There is also site maintenance underneath our workplace and health and safety regulations, so it is on the proponent to ensure that the surrounding areas are safe. They would be inspected by WorkSafe ACT as well.

MS ORR: Chair, I think that this is an interesting line of inquiry and I just want to delve a bit deeper into it. I know that the proponent has made a number of, I think it is fair to say, commitments or indicated that he will undertake certain activities in the area. There is certainly keeping the site safe, secure and clean, and I think that we have interrogated those a bit. Some of the other bits that the chair might be going to are the things that we have heard about, such as the auxiliary developments for the local community, the changes to the school car park, the addition of a bike shed to the school, car parks for the community park and footpaths in the surrounding area.

The developer, in the hearing last time, would not give a commitment for a time for those to progress, but they have been done as part of the DA. I believe that there have been conversations, perhaps not with planning but certainly with TCCS and the school.

I think this goes to what the chair was getting at. In making those commitments and undertakings, it sets an expectation. What levers do we have under the regulatory system to enforce them?

Mr Ponton: In terms of those additional things that you have referred to, I suspect that it would depend on whether they were captured in the development approval. I am not sure that they necessarily were. We could certainly take that on notice and have a look.

If it was part of the approved plan for the development and part of what the proponent said they would do in order to support their proposal, we would be able to address that through the DA. But, again, that would have to be dealt with once the DA commences. Otherwise, I think that it would be quite challenging for us to require things to be done outside of any regulatory framework.

MS ORR: Can you take on notice what commitments have been made in relation to the additional provisions—the car parking, the additional paths, the school car park and the bike shed in particular—how they have been progressed and whether or not it was through a DA? Are there any time frames on those? What regulatory provisions are there? I appreciate that some of this might require you to speak to either Education or TCCS to get the answers.

Mr Cilliers: I can answer part of that question. The new driveway into the off-street car parking on Menkar Close, the reconfigured car park—

MS ORR: This is around the community park.

Mr Cilliers: and a drop-off arrangement to Giralang Primary School are all part of the development approval that was granted. So the same time frames will apply to that as a substantial development. Once the substantial development commences, that has to take place.

MS ORR: Is it usual for public realm improvements, because I do not think we can argue that these are public realm improvements, to be handled as part of a private DA?

Mr Ponton: It happens from time to time. I can certainly think of examples where the proponent sees that it is in their best interests to do this type of additional work and puts that to the Planning and Land Authority as part of their proposal. There are other circumstances where it is a requirement of the approval to do certain things; so where the Planning and Land Authority has said, “As a result of this development, you are going to have a certain impact and, therefore, we want things to be done.” I can think of examples in the past where that has occurred. Also, proponents see that it is in their best interests to say, “We will do this to help our proposal.”

THE CHAIR: In your experience, when that happens do those public realm improvements usually occur in a good way? Does it work?

Mr Ponton: I am trying to think of examples. As to the ones that I can think of, I would say yes.

MR PARTON: Good answer.

Mr Ponton: I am just reflecting over the last decade or so.

THE CHAIR: You do not normally get an answer on that, do you?

MS ORR: These are improvements that the proponent takes on of their own initiative and cost; is that correct?

Mr Ponton: Yes.

MS ORR: There is no input from government to deliver those in any way?

Mr Ponton: Other than to agree—

MS ORR: Approve, of course.

Mr Ponton: and to approve the detail.

MS ORR: Where I am going with this, Mr Ponton, is that the community is quite keen to see those additions, particularly, I think, to the park and the school. There is no commitment from the government or no way for the government to step in and provide those in lieu of the developer having no set time frame and being unwilling to give a commitment to deliver them?

Mr Ponton: That is probably beyond my remit in terms of planning. That would be a separate decision, I would suspect, for the government in terms of public works. We do have an approval in place where a proponent has said, “We will do this work.” For the development to proceed, we would expect that that work would proceed.

THE CHAIR: I would love to circle back to WHS. You mentioned that there is a protection framework there. Have there been any WHS inspections or concerns about that site?

Mr Gentleman: I would have to check with the commissioner. I might take that on notice and get back to you.

THE CHAIR: That would be great, and if we could get the details?

Mr Gentleman: Yes.

THE CHAIR: I have one further question that came up in community. Somebody mentioned that there is an ACT government refurbishment program for shopping centres going on at the moment. Is there any reason that Giralang should or should not be involved in that? How does the ACT government decide which shops should be included in that refurbishment program? What is involved if you are listed?

Mr Gentleman: It is a matter for TCCS. We can ask them, if you like?

THE CHAIR: Yes. If you could take that on notice, that would be good.

Mr Ponton: We are happy to take that on notice and coordinate with our colleagues in Transport Canberra and City Services.

THE CHAIR: How the government decides which shopping centres get put into that program and whether Giralang would or would not be suitable? There might actually be arguments on both sides of that that I would be interested to see.

MS ORR: I have a number of questions that have been sent in by members of the community that I would just like to read through and get responses to, if that is all right, Chair?

THE CHAIR: That is fine. Mark?

MR PARTON: Yes.

MS ORR: What controls over and above normal will the government impose to ensure that the shops et cetera are completed in a timely manner and to a standard that enhances Giralang?

Mr Gentleman: According to the DA approval, we have a time line for them to do their constructions, so that would be the time line associated with those.

MS ORR: I think that this one is more of a statement by the looks of it: a restart of the whole process for use of the site with genuine government leadership, in consultation with the community and the developer, would be good. That is definitely a statement. Assuming that the government can set strict deadlines for a resumption of the development, what happens if the developer does not deliver?

Mr Ponton: Again, this comes back to the DA. They must commence by 2023 and they need to complete in two years. Of course, depending on the circumstances, we do not know what will happen in that two-year period. It is possible for an extension to that period of two years for completion.

MS ORR: Why has the government put up with the developer's delaying tactics for so long?

Mr Ponton: If I may just refer to my previous answer in relation to the Constitution and the rights of appeal to the Supreme Court and suggest that maybe that question could be directed to the third parties that were party to those corporate settings, as opposed to me and the minister.

MS ORR: Why has the land not been resumed and resold to someone else? I believe that we have already covered that one.

Mr Ponton: I would suggest that we have.

Mr Gentleman: We have covered it.

MS ORR: What is the extended delay in the development of the shops? I dare say that we have covered off on that one too.

Why has this government, which has been in power for most of the period since the shops closed, not acted to facilitate the redevelopment? I believe we have touched on that.

Mr Gentleman: We clearly have, yes.

MS ORR: Yes. Have the rates been paid on all the years that the development has been in abeyance? We actually confirmed that in the last hearing. They have; so that is fine.

THE CHAIR: I have one more question. The department has explained that it is a shame that this project is not going ahead when the government and the developer are furiously agreed that the best outcome is the best outcome. We have heard that it is difficult. There are market forces; the developer has been unable to attract a suitable anchor tenant due to market forces. There is actually a third element at play, which is, what if it is not market forces? What if, for some reason, this particular developer is unable to develop that site; this particular developer is unable to attract an anchor tenant, but some other developer might be able to? Does government ever make an assessment about whether that is what is at play, or do we just sit back and say, "Government has done what it can do and market forces mean that it is simply not possible to go ahead"?

Mr Gentleman: We have a legal requirement under the act and it is one that has been prosecuted through the courts—

THE CHAIR: Yes.

Mr Gentleman: to provide this proponent with every opportunity that we can for them to go ahead with the DA. If they make a commercial decision to do something else with it, then that would be a matter for our decision later on, I would imagine.

THE CHAIR: If this particular developer is unable, for whatever reason, to commercially do what they say they would like to do but another developer might, we simply wait for the process to play out?

Mr Ponton: I would just say this: there is only so much that the planning system can do.

THE CHAIR: Yes.

Mr Ponton: We provide the framework to allow proponents to invest and make those contacts and negotiations. In terms of planning, I cannot see that we could intervene in those commercial discussions.

THE CHAIR: I was not suggesting that.

Mr Ponton: That is certainly not a role for planning. At the moment, I would again

go back and reflect on the discussion that we have had. We have a proponent who has demonstrated that he is having those conversations and has indicated recently that, with the change that the minister has put in place in relation to the 1,500 square metres, he thinks that will make his negotiations easier. Therefore, I think we need to let that run its course, as opposed to going straight to that point of a compliance action that could result in another decade of—

THE CHAIR: So you are probably putting quite a bit weight on the fact that the developer has indicated that he is in commercial negotiations based on the 1,500 square metres. That is part of why you feel that it is progressing at the moment?

Mr Ponton: Yes.

THE CHAIR: Okay.

MS ORR: I have just been reading through these questions. I think you have answered most of them, to be honest, in the quite lengthy discussion that we have had. If I come up with any others that I do not have an answer to, I will put them on notice for you. I do have one more question, though. It goes to—and I think it is in one of the questions here—when is this situation going to be resolved? I think it is fair to say that no-one can give us a deadline. For whatever reason, we cannot get a deadline. The question I have, and I think most people have, is: how do we break the status quo and actually progress this?

MR PARTON: That is the key question, isn't it, really?

Mr Ponton: Again, I reflect on the conversation that we have had. We have been through various court proceedings. We are at the point now that we have a DA that is current. Work can commence up until July 2023. We know that the proponent has indicated that the change to policy that the minister has announced is of assistance. So I think we just need to keep pushing that, as opposed to going straight to other regulatory action at this point, because it is so extreme that it could result in a worse outcome. Given that we are at that point, perhaps through our colleagues at Access Canberra making regular contact with the proponent to see how that is progressing, my suggestion would be to just keeping working through it, given that we have seen a shift in recent times as a result of that policy change announced by the minister.

MS ORR: Those are my questions, Chair.

THE CHAIR: Thank you very much for your appearance today. That concludes our hearing.

The committee adjourned at 10.26 am.