LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, PUBLIC WORKS AND TERRITORY AND MUNICIPAL SERVICES

(Reference: Live community events)

Members:

MS M PORTER (The Chair)
MS C LE COUTEUR (The Deputy Chair)
MR A COE

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 6 NOVEMBER 2009

Secretary to the committee:
Ms N Derigo (Ph: 6205 0435)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 21 January 2009

The committee met at 9.02 am.

SAVERY, MR NEIL, Chief Planning Executive, ACT Planning and Land Authority
PONTON, MR BEN, Director, Development Services Branch, ACT Planning and Land Authority

THE CHAIR: Good morning, Mr Savery and Mr Ponton. Welcome to this public hearing of the Standing Committee on Planning, Public Works and Territory and Municipal Services inquiry into live community events. I am sure you are both familiar with the privilege card. Could you indicate that you are, and that you are happy with that?

Mr Savery: Yes.

Mr Ponton: Yes.

THE CHAIR: Thank you for appearing before us today to talk about the relevant provisions of the Building Code in relation to the inquiry that we are conducting at the moment, which is live events, and the issue of order of occupancy. Would you like to make a presentation and then members will ask questions.

Mr Savery: My comments will be relatively brief, because I think it would be more useful to understand more clearly from the committee exactly the areas of interest. I will start with the Building Code, the territory plan and the Planning and Development Act. It might also be useful to note that I am the ACT's representative on the Building Codes Board, so I have a reasonably good appreciation of and expertise in the role of the Building Code.

In that respect, the Building Code of Australia has no relevance; it has no jurisdiction or authority in relation to land use planning and zones, and therefore the relationship of activities to one another—so much so that about a year ago the Building Codes Board made a very clear decision that, in relation to external noise attenuation in regard to the proximity of different land uses, that was not a role for the Building Code of Australia. In other words, the Building Code cannot set policy that says if use X is so far from use Y, or if uses change in proximity to each other, the Building Codes Board has some level of jurisdiction over that.

They wrote to the planning officials group, which I am also a member of, which comprises the heads of each of the planning jurisdictions around the country—so there are eight of those—to indicate that that was its position, and that if any of the jurisdictions were inclined to set policy in regard to this, it had to be through their planning processes.

What the Building Code does, and in fact there is some additional work being contemplated for this, is that, if two uses adjacent to each other or in reasonable proximity to each other do result in the planning authority requiring some level of noise attenuation, the construction standards exist within the Building Code.

I should also make the point that the Building Code does deal with internal noise

attenuation—in other words, between tenancies within a building. So for ceiling to floors and walls, there are minimum standards set within the Building Code of Australia. That does not mean it eliminates all noise, so you can still potentially get ambient noise. But there are minimum standards within the code for that purpose. In fact, that was largely inspired as a result of poor building work within New South Wales several years ago, where tenants of new residential buildings, multi-unit apartment buildings, were complaining about the noise from a unit below, a unit above or a unit to the side. So those standards were increased in stringency. Obviously, if there is a question about the Building Code, we can come back to that, but that is, broadly speaking, the role of the Building Code.

In terms of the principle of order of occupancy, it is not a principle that is enshrined in legislation in the ACT. It is not part of policy within the ACT. Therefore, it is not, if you like, a legislated or a subordinate requirement that we must have regard to. That is in terms of it being defined as a definition: "order of occupancy". There are other provisions, however, within the territory plan that relate to noise and the proximity of adjacent land uses. That principle therefore exists in an unwritten sense, in that we are having regard to the potential impacts of adjacent land uses to each other. If you think about it, that is essentially what land use planning is there for. Its origins were to look at the relationship of land uses. Back in the early 1900s, the garden city movement in the UK was all about segregating industrial land uses in particular, for reasons of noxious pollution and those sorts of things, from residential.

Today, because we are now a service economy, 80 per cent of our industry can actually co-locate with residential. It is only the most extreme industrial land uses that you really have to segregate. So the sorts of issues we are dealing with now are quite different in terms of separation of land uses and the potential implications of off-site impacts which do not just relate to noise. So the unwritten principle of order of occupancy is not necessarily just about noise; it could be about the generation of traffic, it could be issues about privacy—those sorts of things—if you want to take it to a literal interpretation.

When you go through the territory plan and look at all the provisions that are trying to establish what issues we should be looking at in assessing a development application in terms of the impacts of a new development on an existing development, you are putting into effect that issue of order of occupancy. My point is that it is not enshrined as a principle in law. The other thing I would note at this point is that most jurisdictions do not have a legislated principle of order of occupancy. They all operate pretty much in the same way that our legislation and our territory plan operate.

I will give an example of what I was just talking about, and this does in fact relate to noise. Within the territory plan, we have rules in relation to noise where design and construction are to comply with relevant sections of the Australian and New Zealand standards. Then there are criteria in some cases that also have to be considered if the rules cannot be achieved. That will relate primarily to residential land uses—the proximity of residential land uses. We have recent examples where new residential developments or alternatively new commercial developments—let us say a nightclub—have conditions attached to their development approvals where they have to put in noise attenuation for the purposes of making sure that the existing use is not adversely affected by a new occupancy coming in in close proximity. So that exists

now.

In relation to that, it is important to stress that the noise requirements in terms of what we are measuring—the decibel levels—are taken from environmental protection legislation. Typically, where noise is potentially an issue, it could also be, for instance, the proximity of a major road to housing and what the noise levels are that are associated with that. So if a new estate is being developed, is there a need for landscape buffers, fencing et cetera to be incorporated? Where the noise level is triggered, we refer it to the EPA because the EPA has the expertise on issues of adjudicating noise levels. If, down the track, there is a need for compliance action, the compliance action actually relates back to the EPA legislation, not planning legislation. That works quite effectively in terms of the relationship between the DA and the enforcement through the EPA process, given that the noise provisions are contained within that. As I said, we have recent examples where that has occurred.

The other thing that we need to consider that is always unique in the ACT context is the role of the lease. So where this typically is problematic is in our commercial zones. Bear in mind that we are increasingly encouraging mixed use development. We want higher density development in our town centres, our group centres, along transport corridors—obviously where we are going to have other activities, where there is a potential for noise. Our leases typically in commercial centres have multiple uses. Unlike a typical house in a suburb, in a greenfield estate, where you have residential as your land use and it is in your purpose clause, in a commercial setting, residential may be one of a series of uses.

In effect, the person who has purchased the lease believes they have an entitlement to exercise all of those uses, one or two of those uses, and they can change them through the life of their lease. So we have to have regard to that. You cannot just then say, by way of order of occupancy: "Despite the fact that you've purchased this lease that says you have the potential to do all of these things, you're not going to be able to do them. If someone sets up a residential development over there, you can no longer contemplate doing any of these other things." In effect, it could be argued that you are depriving them of some of their property rights. They have purchased that in good faith from the government. So we have to be cognisant of that as part of the process of going through encouraging higher density development and residential development within our commercial centres.

The last point that I will make again relates to this issue of encouraging residential and higher density development in our commercial centres. The planning principle—and this would be supported by case law within tribunals across the country—is that people cannot have the same level of amenity expectation within those commercial centres that they would otherwise have if they were purchasing a property in a residential zone. Despite the fact that we are encouraging people to do it, if they make the choice to live in a residential building within a commercial setting, they cannot have the same level of amenity expectation that they would otherwise have in a residential zone. We would take that into account as part of our assessment. There may be conditions relating to those sorts of issues as well.

I am not sure if that addresses exactly what you are looking for in those terms of reference, but that is generally how it would work.

THE CHAIR: Thank you very much. I will start off with a question around what you have just said. When you say that people cannot have that expectation of that amenity and that you would be assessing that when you are assessing the development application, how does the person who is going to move into that place, who may in fact not even be in this territory at the particular time when the development was built, know that they cannot expect to have that amenity?

Mr Savery: For most people, wherever you go in the country—and as I say, it is largely backed up by case law within tribunals that most people would not even contemplate having a look at—at the time that they want to move into, let us say, an established residential building within a commercial area, if they were to make an inquiry, either through the conveyancer, their lawyer or directly to us about a couple of other activities that are occurring and ask what we are going to do about them, we would make it clear to them that they have to understand that in a commercial environment those businesses are legitimate and they have a legitimate right to continue.

I will take it down a slightly different path. If a new residential development were to come into that same commercial setting—so we are not talking about the occupants at this stage; the developer wants to put a residential building in—we would examine the other land uses that exist in the area. Having regard to the provisions of the territory plan, particularly around noise, and having regard to anything that might come back from the EPA, we may require them to put noise attenuation into that residential building to lessen the likelihood of a future occupant complaining.

Alternatively, let us say the residential building already exists within the commercial centre and someone next door has under their lease the opportunity to use it for an entertainment facility; it is currently a shop but they want to use it for an entertainment facility. They come to us to get an approval for that. We would have regard to the fact that there is a residential building there and put the onus on the developer of the nightclub, let us call it, or an entertainment facility, to put appropriate noise attenuation into their facility to safeguard the residents. But in amongst those examples—which are hypothetical, but the reality is that it happens; we can all point to examples—in all circumstances the residents cannot have the same level of expectation that some level of ambient noise will not penetrate their buildings.

One of the difficulties we have—and this comes up in other jurisdictions as well—is where the noise is not necessarily coming from the building; it is coming from people who have occupied the building. So they have left the premises, they are drunk or they are drinking, they are shouting et cetera. People want the planning authority or the EPA to take action against the owners of the building. Now there may be a case if the police can establish that they are serving people who are drunk and those sorts of things. But beyond that, it is actually impossible for us to be able to determine whether the people have come from a building next door and are making noise or they have simply wandered down the street from another building that is 200 metres away and are making a noise.

That is the thing: when you are in a commercial centre, you are going to get that sort of intermittent noise, ambient noise, that could emanate not necessarily from the

building that you want to make a case about but from many metres away. Often, the problem emerges with proximity of drinking establishments, whether they are nightclubs, restaurants, bars et cetera. The liquor licensing legislation has regard to the activities or the land uses in an area when it is issuing licences, and it can also require certain things of landlords or of lessees of those establishments, over and above what we do.

MS LE COUTEUR: What you described sounded really great, but can I just talk about a few instances that I am aware of that do not seem to have worked quite so well. I understand that the reason Toast closed was basically because of the Waldorf, and it was there before the Waldorf. Why did that happen? Then we had the Gypsy Bar close because of a restaurant a couple of hundred metres away. From what you described, I would have thought that neither of those things would have happened.

Mr Savery: They did not close because of action we took necessarily.

MS LE COUTEUR: No. I am not saying that ACTPLA said to them that they had to close down, but the impact on their neighbours was such that they were not in a position to continue operation.

Mr Savery: If they have made that choice, it is a commercial choice. Provided they were operating within the noise levels acceptable to the EPA, the only reason that they would close in those circumstances would be because sufficient pressure was applied by the residents and they have made a commercial decision that it is no longer in their business interests to continue. Planning cannot deal with that situation. What I have described to you is the circumstance or the situation that operates in the ACT, and it is pretty similar to what happens in all the jurisdictions. People make commercial decisions.

MS LE COUTEUR: I know, but in both of those cases people would argue that commercially they had no choice. I understand the Gypsy Bar spent hundreds of thousands on insulation and legal fees and that they had been operating totally legally. I am not saying that ACTPLA came and closed them; no-one is suggesting that for an instant. What seems to be the case is that the laws at present do not give the existing occupiers enough certainty to be able to withstand the pressure of changing uses around them. It costs them too much.

Mr Savery: I could use the same analogy on airports: houses get built around airports; residents put pressure on governments and all of a sudden you have got a curfew on an airport. The government has a position in relation to Tralee; it does not support development at Tralee because it is concerned about the future residents expressing concerns about industrial development on the other side of the border.

MS LE COUTEUR: The idea of not supporting Tralee is an excellent idea, but getting back to this area—

Mr Savery: I was just saying that it is the same principle: you cannot in all circumstances guarantee that an establishment that is operating legitimately does not, for commercial reasons, buckle to the pressure that is brought to bear by residents. What I am indicating, through the laws we have in place, the provisions we have in

place, is to seek to minimise the potential for residents to want to advocate or lobby for those things to be changed, but it is not going to prevent it from happening in certain circumstances.

Kingston has also been a recent example. It has gone through a fairly significant transformation from retail to more nightclubs, bars, restaurants and those sorts of things. There were complaints by residents. We strengthened some of the provisions around land usage as a result of that but in no way did we seek to reduce the entertainment and service activities that were occurring in that area.

In fact, one of the issues that arose in that case was the delivery of goods to a furniture shop and the hours that that was occurring in. It had nothing to do with nightclubs et cetera. People were complaining about the fact that a truck was turning up at some time early in the morning, 7 o'clock, to unload or pick up furniture from the back alley. In those circumstances, we said: "This is a legitimate business. There are no laws being broken. You have come in and you have to understand that by coming in after the event of those developments being in place you have to accept or tolerate a certain amount of noise." Garbage trucks are another good example.

MS LE COUTEUR: You said that the noise provisions in multi-unit dwellings had been increased in the last few years—or reduction in noise provisions; you mentioned that—

Mr Savery: No. Just to be clear, the minimum standard within the Building Code of Australia has been strengthened for walls and ceilings and floors within multi-unit buildings.

MS LE COUTEUR: So that won't make any impact on the externals? What I was getting at is: would it have made a difference to the Waldorf and its sad affairs had that all happened after those changes—

Mr Savery: No. It does not relate to external noise attenuation; it is internal noise attenuation, so between tenancies within a building.

MS LE COUTEUR: Do you ever look at, in the circumstance of, say, a new residential development in one of the town centres, saying: "Okay, the Building Code says this but this is in a town centre. We know it is going to be noisy. It may not be noisy right now but it will be noisy and we will require you to put in additional external sound insulation"?

Mr Savery: I might get Mr Ponton to respond because he deals with the actual applications.

Mr Ponton: The short answer is yes, we do. Neil has described the Building Code requirements in terms of separation between the residences and commercial users within a building. The planning system deals with those external issues. There are particular rules and criteria within the territory plan, in particular the multi-unit development code, that deal with noise attenuation; for windows, double-glazing, for example, or noise attenuation within walls to deal with those external issues.

Other codes deal with it if it is a commercial use going in and there are existing dwellings. There are different provisions that relate to those commercial activities in terms of air locks and the like so that when you open doors and music is playing the noise does not emanate from the building. There is that air lock: one door closes before you open the next. So, yes, we do consider those issues.

MR COE: I might follow on. You talked about community expectations. I am curious about the role of ACTPLA after a development has been constructed. The one that springs to mind for me is the one that is current at the moment, the Lighthouse situation at Belconnen. The development application has been approved so a structure will go up. What does the term "amenity expectation" mean given that the development has been approved and residents will move into this complex nearby to the Lighthouse? What does that mean for ACTPLA? What is ACTPLA's role in making assessments about amenity thereafter? Isn't that just an EPA role?

Mr Savery: It largely is in terms of the noise issue. Once the building has been completed, any requirements around noise would result in the EPA taking any compliance action considered necessary. In regard to that particular example, in addition to the new building having to incorporate noise attenuation features to lessen the potential for residents to want to complain, the noise levels associated with the existing establishment have not changed. Just because a residential building is going in has not resulted in a new noise level being imposed on the existing establishment. In other words, it is acknowledged it exists. It is entitled to continue. It has not changed in its characteristics, so for noise levels there is no imposition on that existing building. The emphasis is on the new building having to incorporate standards to lessen the potential for noise to be an irritant to the future residents of that building.

But, as you say, if at some point down the track a complaint is made by a resident or, say, the body corporate, that would be investigated by the EPA because issues of noise are in the referral process. If a condition is imposed, it is a condition largely at the request of the referral authority. So, if it was in another circumstance, if it was a heritage matter and heritage had asked for a condition, the responsibility is for heritage to follow through. So, if you like, we become the postmaster-general for all these agency requirements and when the condition is being breached, if it is being breached, the investigation is by the relevant referral agency because they have the laws.

MR COE: I guess it gets back to the issue of amenity expectation. What is the actual relevance of this term "amenity expectation" if the EPA has defined rules and there are set things in the Building Code and then there are perhaps noise attenuation issues that are done at the development application stage. The term "amenity expectation" seems to suggest that there has to be some level of reasonableness applied or that residents have to be reasonable. But there is no scope for that to be enforced; there is no discretion, it seems, in this entire system for this amenity expectation or reasonable subjectiveness to be implemented. I am concerned by how it comes about.

Mr Savery: There are two points of discretion. That is not a defined term. It is not written in law. I am trying to give a description to, firstly, the way we would examine a development where we believe the potential exists for conflicts between land uses. So, in addition to anything that might be written in law, we have to pay some regard

to what are the potential offsite impacts and how we might be able to lessen them. If we do not believe we can effectively deal with that, we might have cause not to approve the development or we might approve it in a way that requires significant modifications. That would be in the first instance.

The second instance is if it gets to the point where someone is actually making a complaint and it goes through some sort of legal process. What I am telling you is that there is case law, particularly through tribunal processes, at a point of appeal. Let us say there is a third party appeal: then there is case law where tribunals will put some sort of measurement—but it is typically judgemental; it is not necessarily that there is an objective science to this—that says, "Okay, given that this development is happening in a commercial centre as opposed to a residential area, the future tenants are going to have to have a different level of expectation around their circumstances. You simply cannot expect that a person living in a commercial zone is going to enjoy precisely the same level of amenity as a person living in a pure residential zone.

MR COE: But there is no legislation, no regulations, that support that view? Is that in effect what it is?

Mr Savery: Yes. It is very difficult to write something to that effect. If you want to come back to law, you are going to go back to the prescriptive measures: what are the noise levels that can emanate from different land uses? And if you are putting two land uses together you have got to make some sort of judgement as to whether or not it is appropriate. If you think it is appropriate, do you need to put any conditions in place to try and lessen the potential for conflict between those land uses?

MR COE: The laws could also, could they not, appoint some sort of arbiter to assess this amenity expectation or reasonableness?

Mr Savery: The arbiter is the planning authority in the first instance. If people do not agree with that decision, they typically have an appeal right.

MR COE: That is at the DA stage, not post-construction?

Mr Savery: And at the post stage it is the different tribunal processes that exist.

Mr Ponton: Can I just jump in there to say that the noise levels that you can generate in particular areas, different zones, vary, so the amount of noise that you can generate in a residential zone is different from the amount of noise that you are able, under the law, to generate in a commercial zone. So it is addressed in that way, by virtue of those different levels. It is identifying for people what you can expect in those different zones.

MR COE: I am not across the different decibel limits. The decibel limit in, say, an area of mixed development like Emu Bank in Belconnen is different from the decibel limit in, say, Fyshwick?

Mr Ponton: That is right, yes.

Mr Savery: There are decibel limits for the land use zones, then there are potentially

decibel limits applying to particular land uses. So if you are in a commercial zone you are immediately faced with the situation where there will be a decibel limit. You then come in with a particular land use, which of course can change over time, and there could be specific requirements associated with that land use as well.

MS LE COUTEUR: And that would be a requirement that ACTPLA would put on? I should have brought it down with me; I did a couple of days ago look at the EPA limits and the last one, F, seemed to be the catch-all and had entertainment precincts and CZ5. It said it would be the same limit as the adjoining zone, which often would be residential. Are you suggesting that within the zones and the EPA limits you could say, "Okay, they are a nightclub and they can have 70 decibels or whatever." Is that what you are suggesting?

Mr Savery: As an example, if you are setting up a nightclub in an industrial zone, your noise limits are very different from setting up a nightclub in a commercial zone or a mixed use zone, because it actually has regard to the proximity of activities that might cause offence to one another.

MS LE COUTEUR: All of Civic is one zone, basically. For instance, can you have a different sound level limit for establishments within that building or is it a one-size-fits-all?

Mr Savery: You have got your baseline noise limit, by zone. Let us say there are different areas within the city where a nightclub might want to establish. We and the EPA could have regard, if we wanted to, to the proximity of other activities that might cause us to set different noise limits, even though it is within the same zone. But I think that is more likely to be a last resort. It would be more a case of whether the activity is appropriate and what sort of attenuation can be required for it to operate effectively within the noise limits that are contemplated within the EPA legislation.

Could I come back to your opening comment. I think you were asking whether ACTPLA puts the requirement on the proposal. In new developments, typically, that is the case. By way of a development application, we would refer it; the EPA may say, "We believe it should be this," and we will put it in as a condition. Or it may be that it is already in the territory plan and we would require it, anyway.

A lot of the activities that exist today, of course, preceded development approvals, certainly under territory law. Many of them preceded DAs before the national capital process, because the lease used to be the DA. So there are a lot of things operating today that do not have provisions about noise. That would be protected by the EPA. Their laws would just apply. It would not be operating through the planning system at all; it would be operating through the Environment Protection Act. There are a lot of things that are out there today that have no DAs. In those circumstances, if someone is doing something that effectively is breaching the EP act in regard to noise, it does not come anywhere near the planning authority; it is dealt with directly by the EPA.

MS LE COUTEUR: Would it be possible within the planning system to have individual noise zones, live music precincts, as an overlay or something?

Mr Savery: It is possible. That is why, when I made my opening comments, I

stressed the importance of the lease. Typically, these circumstances arise in our commercial centres and our group centres, and there is an increasing propensity for us and governments to encourage residential development. But because, typically, those leases are multipurpose, in some cases we actually call them broadband leases and they cover the whole range of things that are permitted within the territory plan.

It is not a legal entitlement to go and use everything within that. You still have to get a DA, which allows us to examine the potential implications. But the purchaser has, in effect, put a price on the ability to use it for many of those different activities. If we then artificially impose, through an overlay, an area within a commercial centre that is the only place that you can put a nightclub, as an example, and yet there are many other leases in the area that you have just excluded, there is this question about whether you have denied them some of their property rights. That can be tested through legal processes.

What has happened in other jurisdictions—and certainly this is something we have looked at in regard to the city centre, for the future planning of the city centre, and some of the master planning for Woden and Belconnen town centres—is in regard to where you can encourage more of those activities. So rather than say you can or can't, it is about where you can encourage it by creating an atmosphere—say, an outdoor entertainment precinct where you have the nightclubs and cafes that want to open late at night. But the risk then is that in some respects you create a segregation within the city centre, where part of it is buzzing and the rest of it is dead. That would suit the occupants at certain times, but it might not be the best outcome for the 24-hour life cycle you want in a city centre.

The other thing we should bear in mind, if you can deal effectively with the noise issues—and I am not suggesting this is easy, and your examples are real examples—is that we actually want residents in the town centres, not only because they add activity and life but because they support the local businesses and it is good for the environment things, and I will not go into the science of that. Another reason is that they provide passive surveillance. So one of the accepted principles is that when you have a city centre that basically shuts down at 5 o'clock because there are no residents there—we have only got 1,600 people living in the city centre—things go on that would not otherwise go on if there is the fear that someone is watching you and might call the police.

We have had situations around the country where malls have been created, cars no longer go through and it creates a dead zone at night and we have antisocial behaviour. The road gets reinstated and all of a sudden some of the crime goes away, because there is always the potential that a car is going to come past. I am not sitting here and suggesting that this is an easy thing, by any means.

THE CHAIR: I can remember in 1977 when I came to Canberra you could fire a cannon down Northbourne Avenue. In the evening, on a Wednesday night, nobody was around. It was pretty desolate.

Mr Savery: I have used the same analogy with Tuggeranong. If you fire a cannon down there at night, there is not a lot of risk of hitting anyone. And we want to change that. We need to bring activity into that town centre. Inherently, that will bring

potential land use conflicts, and we have to look at that in the master planning exercise.

THE CHAIR: Going back to my original question—and we have explored it fairly well—the onus is really on the person buying into the development to find out whether the developer has taken into account that he has constructed a building next door to a nightclub. It is the "buyer beware" type—

Mr Savery: There is an element of that. I am also conscious of the fact that, in asking that question, the potential is that a person has done their homework, there is no nightclub next door, they buy it and, a year later, someone wants to come along and have a nightclub next door. What are their rights in those circumstances?

Typically, their right is that we would notify them of the fact that that is occurring and they would have the opportunity to make a submission. If we approve it, they have got the opportunity to appeal. You would expect in that circumstance that we are likely to put noise attenuation obligations on the nightclub operator, if we are disposed to approve it, to lessen the potential. But we know that, with the bass in those nightclubs, it is just the thud; the ambient thud is enough to irritate someone who is trying to go to sleep.

MS LE COUTEUR: You said that other jurisdictions did not have order of occupancy legislation. I am just looking back at my notes from when APRA came and saw us. They said South Australia has it.

Mr Savery: I did make the comment that most jurisdictions do not.

MS LE COUTEUR: Do you have any comment to make on how it is working in South Australia?

Mr Savery: I was the executive director of Planning SA when that was put in place.

MS LE COUTEUR: So you would be an expert on it.

Mr Savery: I have some understanding of it. We put it in place; I have not been there when it was operating. But I know of a couple of examples. A very important one was the Governor Hindmarsh Hotel, where there was a residential development going up behind it.

The way that the order of occupancy legislation was intended to work was not that it ruled out the potential for other land uses to emerge around it but that there should be appropriate regard for the fact that the original occupant is operating quite legitimately and has some level of right to continue to operate. You have got to put the onus and the emphasis on the new development to do everything, and if they can't then you have to seriously consider whether or not it should be allowed to be put up.

Some of it operates through conditions that are imposed. It was not the Governor Hindmarsh; it was one in the city centre of Adelaide where there was the requirement that, in addition to the noise attenuation of the residential building next to the live music venue, all of the residents, when they signed on to purchase the unit, had to

acknowledge the existence of this facility. That would occur every time the tenancy changed; if you sold it and someone else purchased it, it continued.

MR COE: Is any information given to tenants that move into mixed use areas at the moment?

Mr Savery: Not that I am aware of.

MR COE: Tenants or owners?

Mr Savery: No.

MS LE COUTEUR: You said that in our system there is some implicit order of occupancy in terms of how you approve the DAs. South Australia has a higher level of order of occupancy?

Mr Savery: It is in your face.

MS LE COUTEUR: So it is a step above what we are doing.

Mr Savery: Yes.

MR COE: And that applies after development?

Mr Savery: The point of consideration is at the DA stage, but some of the actions are taken post the DA being issued. So they are conditions of the DA or—

MR COE: Right, so if a building is built next to a nightclub, and 10 years later somebody complains, the order of occupancy is still relevant?

Mr Savery: It is relevant, particularly if that condition has been imposed where you have signed on to the fact that you know that facility is there, provided that facility is operating in accordance with any other laws or requirements.

THE CHAIR: Why do you think South Australia appears to be the only state—is that right?

Mr Savery: It is the only one that I am aware of that has gone that far. Other jurisdictions, through their EPA legislation or other types of legislation, have imposed stricter requirements on adjacent land uses. But no-one has articulated, as a principle in law, order of occupancy that I am aware of, other than South Australia.

THE CHAIR: Do you have a theory as to why?

Mr Savery: I think because, as I am indicating to you here, it is an unwritten principle that is in effect practised through the things that we have to have regard to when we are considering adjacent land uses.

MR COE: Who actually implements the South Australian legislation? Who is the person who actually makes a judgement as to a discretion?

Mr Savery: In the majority of cases, it would be local government. It is the planning authority, which in South Australia is local government. If there is an appeal then it would be tested through the tribunal processes, and they would have regard to any relevant laws.

MR COE: If that hypothetical place next door is complying with everything then even if the legislation was not there surely there is no leg for them to stand on?

Mr Savery: Well, there is not, but the point I was making in regard to the Waldorf is that they were doing everything in accordance with the law, yet they folded—that is probably not the right term—through pressure.

MS LE COUTEUR: I think it is a fairly accurate term. Toast just could not withstand the pressure.

Mr Savery: Even in that case—

MS LE COUTEUR: It was legal; everything was legal.

MR COE: That is right, so in a situation like that, if there was an independent person, an arbiter, who was able to use discretion in that situation, is that an avenue which might avoid such problems?

Mr Savery: I do not know that it is. If we extrapolate that example and apply it to the Governor Hindmarsh in South Australia, that order of occupancy provision has been initiated, tenants have been alerted and have signed on; 10 years later they are all lobbying, the whole body corporate is lobbying, the local council, the local member, they put pressure on the Governor Hindmarsh and the Governor Hindmarsh closes. But it has done everything right; the order of occupancy is there. The arbiter can come in, using your example—and this is only an opinion; we would need to explore it—and says, "I've looked at all the facts, the Governor Hindmarsh is doing everything right, nothing's changed except a few tenants have changed, so keep going." But it is a business decision and it is about the political pressure that might be applied.

MR COE: Yes, I guess it is about whether it is political pressure as opposed to regulations that are actually restricting the business.

MS LE COUTEUR: The other difference in the South Australian case is that every tenant had to sign and say, "I appreciate where I'm living," whereas that did not happen here. I suppose people moved from their suburban lot where it was very quiet at night and it possibly did not even occur to them what they were moving into.

Mr Savery: That is true. Again, there are examples elsewhere and I think it has even been floated with Canberra airport that if Tralee was to be developed, people who buy under the flight path would sign on to say, "I know I'm purchasing a house under a flight path and my house has got additional noise attenuation for that purpose." It will not stop them writing to the *Canberra Times*.

MS LE COUTEUR: I can remember reading an article in the *Canberra Times* a

while ago which said that Canberra has an even worse problem, because what is happening a fair bit is that people are downsizing; they are moving from a large block in the suburbs, the kids have left home and life is really quiet, and they move into their small, reasonably upmarket unit and they expect everything to be exactly as it was except they are in the middle of town. And from a sound point of view, it is not.

Mr Savery: But it works in reverse in those circumstances we all know about of multi-unit developments going into residential areas that previously have been single-storey detached houses, and there is fear. If you read the submissions that we get routinely, part of the fear is the additional noise that is going to come.

THE CHAIR: Thank you very much. It has been very interesting. We are very grateful that you came along this morning and shared your thoughts with us and allowed us to do this. We will send a copy of the transcript to you. Please get back to us if there is anything you need to notify us about.

Mr Savery: Thank you.

SINCLAIR, MR HAMISH, Vice President, ACT Division, Planning Institute of Australia
CONROY, MS SUSAN, Convenor, Social Planning Chapter, ACT Division, Planning Institute of Australia

THE CHAIR: Good morning, Mr Sinclair and Ms Conroy, and welcome to the Standing Committee on Planning, Public Works and Territory and Municipal Services inquiry into live community events. Have you read the buff card, the privilege statement, and are you familiar and happy with what is in it?

Mr Sinclair: Yes.

Ms Conroy: Yes.

THE CHAIR: Thank you. Would you like to make an opening statement and then members can ask questions?

Mr Sinclair: I bring with me experience in both the music industry, formerly and prior to becoming a planner, and 20 years worth of planning experience, trying to enforce laws. I have awareness of the ACT's planning system.

Ms Conroy: I am convenor of the Social Planning Chapter of the ACT Division Planning Institute of Australia.

Mr Sinclair: We have not yet put in a formal submission but we would like to thank the committee for the opportunity to speak today. One of the things we find concerning about the live community events issue—again picking up on what I have just heard previously from ACTPLA—is that there is a real need in the territory plan to distinguish between a daytime and a night time commercial economy. The night time economy has a very different structure and operation from a daytime economy and this is particularly relevant to commercial centres, both town centres and the city centre; to a much lesser extent with the local centre and group centre level development.

In particular, we note that the territory plan has a mixed use development code, CZ5, and in that there is an opportunity to bring mixed use development into commercial environments. We very much support this principle. The policy is a sound one but what it does is create a planning problem. The view is that the code in particular does not go far enough in recognising and differentiating between daytime and night time economic use of commercial operations. I have looked for some examples around Australia and the most useful one that I have come across is the Fortitude Valley example in Queensland. They have a plan that is still at the drafting stage but it picks up five key points that are salient here.

They are that for a commercial entertainment type precinct to be established it needs to be identified and dedicated for live events so that it is a purpose-built function. Noise attenuation has to be done from both the perspective of new development coming to that area but also for future development; that has to be recognised—that it is coming to an existing environment. Residents should expect a high ambient noise level, which is understandable. Buffer zones are to be established around the

entertainment areas and uses, and the policy should strengthen the day and night economies. Those are the key planks that the Fortitude Valley local plan is attempting to bring in there.

I see this as something similar to what has occurred elsewhere with other forms of development. In my experience previously in New Zealand there was a move to rural residential development, and in that environment there are a number of parallels. You found urbanites moving to the country for that idyllic rural lifestyle. They moved to places like Marlborough where there are vineyards, so they had this wonderful perception of a nice little block looking out across the vineyards, a stone's throw away from walking down and having a glass of wine.

The reality is that, firstly, it is noisy because around 4 o'clock in the morning in winter the helicopters fly in to dispel the frosts, and there are frost guns as well which go off regularly all day, and there are bird scarers. So explosive noise events are happening randomly, because you cannot program them in, in the sense that the birds adjust, so you get used to having a background noise of shotguns firing randomly all day and all night. Then you have the helicopters. Then you have the issue of silage and smell and odour that come from it all. Then you have the masses that descend on the area in summer to enjoy the wineries, when suddenly there are car parking problems, traffic problems and all the rest of it. So the rural idyllic retreat becomes a nightmare.

There, local councils were heavily lobbied to stop vineyards or create the car parks. They tried to inform the communities that were moving there, so as part of their purchase of a block of land they were basically told by the council to expect all these problems, and people signed up to that. They also tried to tie that back to the sale and purchase agreements so that when you signed up to say, "I am going to pay for this property," you also signed up to, "I know what I am buying." But it did not work. Whilst everyone agreed that it was a good idea and it sort of met the requirement for information and communication of the problem, the reality is that the community still objected.

As you heard from Neil Savery earlier, just because it is there does not make it go away. There is a political perspective and there is a legal one. We can try and create a legal situation where people are fully informed and make an informed decision. But the reality is that they will still access a political solution to try to change their environment, to better it. That really then forces the politicians to become very strong in their belief that they want to withstand the community's outrage about noise or the business will then have to adjust and bear the costs.

This is another point that we would like to raise. In a commercial centre you have existing development and a lot of those entertainment venues, be they cafes, restaurants, nightclubs, bars or whatever, have live music or just music generally; it does not have to be live. They are usually tenants rather than owners, so they fully invest their worth in the business and are running the business. They do not suddenly have a windfall gain of a substantial amount to introduce noise attenuation and all the rest of it and, if they have been operating for many years without problems in their environment and suddenly their neighbour is a multimillion-dollar mixed use upmarket development, the money is in that development, not in their business. The

developer has the right to build what they like, set by the code, and there is some move to try and upgrade the requirement. Neil alluded to airports: you upgrade the noise attenuation within the house.

I see no difference with commercial businesses—commercial developments—coming into an existing noisy environment, bearing that full cost of noise attenuation within the block. This principle in New Zealand is called reverse sensitivity. It is similar to the order of occupancy; in other words, the actual environment that is being affected is the existing environment. It is like residential and multi-unit, like the rural farmers and their lifestyle neighbours. The thing is that it always happens. There have been a number of techniques to try to address this.

One of them in the New Zealand context was reverse sensitivity. It has a parallel with order of occupancy. It recognises that the first in has a right, sets an ambient background environment to which that is protected. That is the baseline, not necessarily what the regulation or noise controls are for that area. Again, with commercial zones that have a standard noise requirement it is very seldom enforced. I recall that the number of noise enforcement officers in the ACT is rather small, so were they required to enforce every town centre, group centre and city centre noise control issue they would be run off their feet, I suspect.

Going back to the point, the issue with reverse sensitivity is that it really sets in place a policy that says, "We understand this is the background noise. If you are coming to this environment, and bearing in mind you are bringing a new development and you have the capital invested in that development to do it, you should bear the cost of ensuring that the existing environment is unaffected by your development." That is one of the key problems you have here with the likes of hotels and other accommodation: they move in creating residential conflict with existing uses. They do that development on site and then move away. The cost is then distributed across the adjoining neighbours and, if those neighbours are tenants rather than owners, they simply do not have the funds to suddenly reach into their back pockets and upgrade their business. As a consequence, they are forced to close.

This has happened everywhere; it is not unique to Canberra. It happened in Melbourne. It happened in Sydney. It has happened throughout New Zealand. I had the good fortune to be in London in the eighties and it happened there. It happened in Manchester. The nice thing was that in London a lot of the clubs then moved to the industrial areas. In Manchester they moved to the warehouses and you had the house movement and the rave parties. So, if anything, live music is quite adaptable. But what we really need to do is be on the front foot here and plan for this to happen, clearly and transparently map out where these areas are going to be—I see no difficulty whatsoever with precinct identification—and then encourage those uses to that location.

Planning is all about spatial separation. We separate residential from commercial and industrial. We understand that the uses are different and that there are conflicts between them. Mixed use is trying to bring two forms of previously separated development together. It is a very good idea and it does definitely create the vitality that you want in an urban centre, but equally there are problems with that and we need to recognise them, which I think we will do, and mitigate them in advance. So we

need policies that recognise that day and night times are different environments in a commercial centre; that we have defined boundaries around where those activities can and cannot occur; that we set up buffer areas so that there is a transition between locations. Those are the key things that we should be looking at here.

I see absolutely no reason why the community cannot be informed in advance of where the noisier things are going to be, and if developers choose to put mixed use in those areas they should bear the full up-front total cost of doing so. If in effect a nightclub or a restaurant has to change its operation as a result of that developer, that reverse effect or impact should be borne by the developer, not by the existing tenants and occupancies. Those were really our main notes here. Again I would reiterate that the information sheets concept is very useful as a plank to inform the community but it is completely ineffectual.

Ms Conroy: I will talk a little bit about some experiences in New South Wales. You would be aware that there has been a really high profile campaign with the City of Sydney, and it has also been with entertainment proprietors and businesses. They have had to work on a regulatory rather than planning foot because, for some places of public entertainment, there were particular licensing conditions being imposed that had been abolished, for example, in Victoria. They were putting certain conditions on opportunities for entertainment development so that, unless you were a really big business, you could not even contemplate doing it because you just did not have the resources to meet all of the conditions, pay for all the licensing and do all of those sorts of things.

The City of Sydney has had this very high profile campaign and has lobbied and worked with a wide range of people within the entertainment and music industries around Sydney. They have been successful in being able to get the change to New South Wales licensing to enable small-scale activity to be brought back into the city and to try and activate the city. It has been in reverse order, in a sense, and it is very early to tell what it is going to do, but they now have a late-night trading policy, DCP, to try and support what they are trying to do, which is that activation of the city. They are looking at the city as a whole.

One of the things that Neil was talking about was that there is a danger that, if you put in an overlay and say, "In this precinct you've got it here but it's not here," you will kill parts of the city. It is really important to think about the city or the commercial centre as a whole rather than trying to look at, say, "This'll be this bit and this'll be that bit." One of the things that are really important is that things change over time and things move over time. You get capacity happening in an area, for whatever reason, and then it migrates to some other part of the city. Sometimes it gets lost from there but sometimes it is a mushrooming effect. Again, it is supporting that mixed use of cities.

It is exactly like what Neil said: when you have virtually no-one living in the city then you do not have that activation but you also do not have those benefits that come out of crime prevention through environmental design, from having more people in the street. There are more people for a night-time economy; there are more people wanting to do things and be around. Even if they are not spending money, this is now their backyard, as opposed to a backyard in a suburb. So they are just walking in the

city; it is their environment. It is really important to try and support those things.

The thinking about precinct master plans is valuable, but it is important that you do not think about trying to define that this is going to be the obvious, logical location, because over time that logic changes. As communities change, as technology changes, it will have different impacts. So if you are going to think about land use planning, think about it as a whole area rather than trying to designate, for example, just City Walk and this area here. It is really dangerous to do those things and just think about Ainslie Avenue and City Walk, for example, and say, "That's your entertainment precinct." If you look at what has happened now, where you have got the cinemas over on the far block, that would not have been predicted 10 years beforehand. There really needs to be a whole precinct consideration if you are going to go down that line.

The interesting tension was that there was licensing at a state level in New South Wales that was controlling and containing the capacity for that small-scale activity, but now the New South Wales planning department are bringing out a new SEPP, which are the broad planning codes that they do for various types of development. It is called "temporary structures and places of entertainment". They are deliberately trying to wrest control from local councils about the decision making about being able to have live activity in cities or in towns at night, because of the planning controls at the local level stopping activity occurring. So it is an interesting balance between licensing regulation and planning for land use. It is very hard to bring those things together. That is just a bit of background that might help.

MR COE: If you can't say, "This part of the city is designated for live music and this part's for something else," we still have to designate what is the city, don't we? Don't we still have to designate what the city centre is? That is going to be just as subjective, is it not, as designating which parts are going to allow live music, especially here in Canberra. There is a very poorly defined CBD, in some respects, especially with the Reid and Braddon parts of the city. How do you define where the city is without—

Ms Conroy: No, I am not arguing against not defining the city. What I am arguing against is that, once you have actually defined the city, you do not then put an overlay on that which says, "Only in this bit of the city," which is Ainslie Avenue—

MR COE: A block, yes. I understand that bit, but how do you define the city? Isn't that going to be just as difficult as not defining parts of the city?

Ms Conroy: I think the territory plan has done that, with where you have got your strata of—and you are better at answering this than me—your town centres, your city centre, your group centres, your local centres. So those things have been encoded already.

MR COE: Do you support that? Are the borders there correct? Should they be moved out in the city further? They are the same problems that you face, surely, if you try to define areas within a city—trying to define where the city itself is.

Mr Sinclair: Unfortunately, with the city planning, it is actually multilayered. There is the straightforward commercial boundary that delineates between the two, but there are also, within that, precincts already identified under the old plan that were carried

into the new plan as mixed use zones and graded levels of commercial use across a centre. Civic is actually a separately defined entity as well; it has its own boundary. We would support those boundaries being where they are, unless there is a review of them carried out by ACTPLA.

What we are really getting to here is that those boundaries that exist should also be adaptable enough to include entertainment, if you really want it in that area. We are not suggesting that you refine it so that even within one precinct you then pick a group of blocks that might be co-located and say, "That's the bit that's going to be entertainment." That will not work. That, I think, is what Neil was alluding to. If you just say that one particular group of blocks is going to be the entertainment area, that will kill off that block for anything else happening. We are not issued with crystal balls to see what future development will happen here, but it will kill off a lot of development opportunity. Equally, it will strangle the rest of the city.

I tend to look at a city centre as quite an organic form. It is very adaptable; it changes quite quickly. Whilst there is a real need here for written principles, I draw one dissenting opinion—that is, with unwritten principles they are effectively no principle at all. So unless you are choosing to write these things into the plan, you have given up control. This is a very controlled city; it is a planned city, and we should be planning for this. We should recognise that, in a city centre that already has a boundary for commercial, generally, and within that refined levels and types of interaction between what we refer to as precincts, and they are separately zoned—CZ1 through 5—even within those, there are boundaries. For example, in the CZ5 zone, it covers places like Kingston. So you can go right into the zones and the codes and be very prescriptive about what you are trying to achieve.

What we are really driving at here is that, first and foremost, you need to step back from that and set a policy platform across the whole of the city centre and the relevant town centre locations and say: "We have a daytime, we have a night-time. The night-time's going to be noisy. It's not like a suburban environment, so get used to it." Secondly, if you are coming into this environment and you happen to have a neighbour who is noisy, that is the way it is. You address the problems within your boundary and do not impose your development costs on somebody else.

Identifying that in a spatial form is a relatively easy exercise. We do not want to see it narrowly scoped; we want to see quite a broad relationship between the entertainment and the other retail commercial functions of the city and the residential function. We are very clear about and very supportive of the vitality of a city being achieved through mixed use. We understand that. We also understand the problems. What we are really driving at here is that we do not think the current framework goes far enough in recognising those problems and providing solutions.

MS LE COUTEUR: Can I ask about a concrete example that I spoke about with Mr Savery—the Toast and Waldorf example. I think everyone is clear that it seems both of those were entirely legal; nonetheless Toast went under because of pressure from the Waldorf. How would you see that changing in a way that would enable us to continue to have live entertainment?

Mr Sinclair: Again, if that was identified as an area, and it is slightly larger but

obviously including both sides, at a minimum, the policy framework would be supportive of the entertainment function in the night-time.

MS LE COUTEUR: You said if it was identified as an area, but I thought earlier you were saying you did not want to have bits of the city identified for live music. I am not sure what your position is.

Mr Sinclair: I think those two sites are across the road from each other, or in close proximity.

MR COE: Not even that.

MS LE COUTEUR: Yes, they are very close.

Mr Sinclair: I am saying that would be too small a location. You would want to extend entertainment to a much larger area. We need to sit down and plot where these things are and recognise what the existing environment is. It is only then that you can begin to map out, if you like, the spatial location that is appropriate. That is what I am driving at. I am not suggesting just those two—

Ms Conroy: I think Caroline is asking for a concrete example, and your example of the reverse legislation in New Zealand is probably a good example to go with. What I understand from what you said, because I do not know the example, is that the conditions were placed on people who were moving in to actually do something about their own development, to limit the impact from them on the existing—

Mr Sinclair: Indeed. The background ambient environment is an important one to measure and to understand what it is. It is too late at the development approval stage, because you already have the impetus around the development complying, and unless there are rules that say you also have to take care of this in policy, so you also have to address this issue, there is not a mechanism currently to really bring that change about.

The reverse seems to be that it is all about putting the onus on the incoming development, understanding that the problem is not the existing environment; it is actually the development coming to the environment. We understand that principle in all other zones and areas in town, and the urban area. We have not really got our teeth into it in a commercial framework.

Ms Conroy: I have not been able to do, for example, the homework. I know the details about the City of Sydney and I now have the officer to talk to, and we will try and put some of this into our submission. In terms of the DCP that they now have operating, and what particular issues are being created for them, there is now a DCP in place so that they are able to support, from a land use planning point of view, what they have argued in the state licensing legislation was preventing them from being able to support small-scale places of entertainment being able to pepper themselves throughout the city. I certainly cannot give you a concrete example of how that has worked at this point in time. I am hoping I can get some information to provide in the submission.

THE CHAIR: I am still not clear how it works in Fortitude Valley. We do not have

enough time to go and have a look. Sometimes when you actually walk around and look at things, you get a better sense of how it works. It is still unclear about precincts and mixed use and whether things bump up against one another or whether there is any space between or how that is managed. Listening to you, I still do not get that.

MR COE: That is right. When do you have a defined area and when do you have a precinct? What is the difference in size between a defined area like a city and a precinct? Are you talking about somewhere like Lyneham shops or somewhere like Manuka or Kingston? Surely that is a small precinct as opposed to a defined town centre or a city-type area.

Mr Sinclair: In the case of Kingston, I believe it is about three different precincts within the one zone. The basis of the territory plan is that it has already identified the overlay of a commercial framework and within that sit the different kinds and relationships of development within that broader commercial area. It recognises the retail component, the services component, and tries to put some controls around those.

MS LE COUTEUR: I am just confused about exactly what your view is as to whether or not, within these existing precincts or zones, there should be another smaller distinct overlay for live music—noisy bits—or whether you think it actually should be the whole of either the CBD or Lyneham or whatever, because that gives flexibility for movement. I think I have heard both of these views. You do not necessarily have to have a finished view.

Mr Sinclair: It is difficult to explain without a map, unfortunately. I would love to have drawn something for you.

THE CHAIR: That is just what I was thinking—something to look at might have helped us.

Mr Sinclair: The simplest way probably of looking at it is as a doughnut: you have the outer boundary of, say, Civic, which has a buffer requirement. So you have residential, high density residential and then commercial uses. Similarly, in the central area you might want to then say, "Well, this is quite removed from the residential component so in this area here you would expect entertainment, and that in turn will be noisy." Then you have the issue of buffers between those transitions.

MS LE COUTEUR: And you have the issue of what happens if you stick a residential into the middle, which is what happened—

MR COE: Like a City Walk.

MS LE COUTEUR: City Walk or the Toast and Waldorf example—slap in the middle. There is no way you would call it a buffer zone.

Mr Sinclair: That is right.

MS LE COUTEUR: Do you suggest that should not have happened?

Mr Sinclair: No, that is perfectly fine if that was able to be attenuated within the

development.

THE CHAIR: So in Fortitude Valley's case did they have a doughnut or something different from that?

Mr Sinclair: They have quite a big, more of a rectangle. I would just note that the Fortitude Valley one, as I understand it, is only a draft at this stage, as at July, so they are still working through it.

Ms Conroy: But again it is a response to things that have been going on for some time. They have been encouraging mixed use development. They are increasingly getting people moving into that area. It has become a very strong entertainment/restaurant/night time precinct. There is a quite strong daytime/night time economy activity happening in the area. Without detailed knowledge of the Fortitude Valley I think it is like what the City of Sydney have done with its night time trading DCP; they are trying to do the same thing, to protect that area as being able to do those things, but at the same time there are ways of providing some better amenity for residential.

When I first moved into this town, the new development—it is no longer new—down at the end of Ainslie Avenue, in front of the Canberra Centre, and the James Court building went up without consideration of changes to building so that there would be improved noise attenuation. I remember sitting in meetings in the planning authority and trying to deal with the complaints that were coming in, because there were basic things that had not been dealt with, the thinking about these buildings as being city central buildings that have high levels of noise around them. So there does need to be an assurance that the BCA is keeping up with those expectations as well.

Mr Sinclair: Just on the issue of noise, it is not just about the business and, if you like, the "doof-doof" music or whatever else; it is also the bars clearing out at midnight or whenever. It is the rubbish trucks. It is the heavy industry or heavy vehicles that come and reverse. They may not have anything to do with entertainment—they might be delivering office supplies or office furniture—but their hours of operation are late at night. At the end of the day a city centre should be 24/7. Rubbish trucks are a constant complaint. I understand from Kingston there are many complaints about the hours at which the bars, clubs and restaurants empty out their bottle skips.

All of that stuff is the background noise. It is actually as loud as in an industrial area in real terms. When you get this transfer of a community to this environment, the inconvenient truth in this situation is that it is a very noisy and loud environment that is awake and so you cannot turn off the lights, you cannot unplug the stereo and you cannot close the streets. That is what a city centre has to have as a minimum environment to be functional. Mixed use development as it currently stands is not regulated enough and we run the grave risk of killing the very vitality we are trying to achieve, and that is of great concern to the institute.

MS LE COUTEUR: It sounds to me as though you are suggesting that reverse sensitivity is the way to go. Would you see that as a separate piece of legislation or would it be a principle that was enshrined in the territory plan? How would this happen?

Mr Sinclair: The easiest way, and it is very simple, is to simply put it in the territory plan; make it a policy within the plan, clarify in the plan and in the codes how it should be implemented. We have criteria and rules in the codes. Place it as a policy in the centre and place underneath that some rules around what should be done, how it should be done and to what level and also some criteria around "if you cannot meet the rules, what is the best way forward?" The fundamental principle has to be that the existing occupancies should be secure in their tenancy and occupancy and not be imposed on in terms of additional development costs, which they clearly do not have the capacity to cover in terms of capital, when a new development, a multimillion dollar development, happens to establish next door.

THE CHAIR: So we need to get some information from New Zealand?

Mr Sinclair: I am not just saying that it is in New Zealand. I came across this in London in the eighties. I had the good fortune to study it in France and in the Netherlands in the early 2000s. We are coming up to 2010 and it has reached our shores. There are many examples around the world where it has been addressed—some successfully, some not. Obviously, Fortitude Valley is an easily recognisable entity within the context of the entertainment precincts in Australia but there are similar ones we could learn from in Melbourne, Sydney and, again, South Australia as to how these town centres have gone about protecting their vitality. Again, I would stress that the fundamental principle here is that if it is unwritten it does not happen. As much as we might understand that it is a general principle and it is how the world should be, unless it is written down a developer will not respond.

Ms Conroy: It is also easy to challenge a decision if it is not written down.

THE CHAIR: Yes.

Ms Conroy: If a principle is not articulated—

Mr Sinclair: It doesn't exist.

THE CHAIR: It is interesting what you say about Europe. I made a comment at our other hearing that Europe has had inner-city living and apartment living for much longer than Australia, of course; we are catching up, as you say. They learned this lesson a long time ago, to a certain extent.

Mr Sinclair: Civilisation keeps relearning the lessons. Europe has been rebuilt a number of times as well. But it still happens today. There are still developments. Even in the Midlands, where you would expect the planning environment to be rather advanced, it still happens. It is not unusual; it is human nature. If you are used to one form of environment and you move to another, there is a readjustment that has to happen. It happens over time; it does not happen quickly. The intervening time is when the damage can be created, when you are lodging complaints or seeking changes to your environment and imposing it on others.

THE CHAIR: It is difficult to legislate when you are talking about human nature.

Mr Sinclair: Very, but you can set parameters in place, and again I would strongly recommend that the principles be written down.

THE CHAIR: As there are no more questions, thank you very much, Mr Sinclair and Ms Conroy, for appearing before us today. You will get a copy of the transcript.

Mr Sinclair: I just want to clarify: have the submissions closed or are they closing at the end of this month?

THE CHAIR: We did close them at the end of October, but we would love to have your submission if you could give it to us as soon as possible.

Mr Sinclair: Yes, we will endeavour to get it to you within the next two weeks, if that's all right.

THE CHAIR: Thank you very much.

The committee adjourned at 10.32 am.