LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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

(Reference: Inquiry into draft variation to the territory plan No 302—community facility zone)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 1 JUNE 2011

Secretary to the committee:
Ms V Strkalj (Ph: 6205 0435)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

FITZPATRICK, MR TREVOR, Chair, ACT Policy Committee, Planning Institute of Australia **1**

SINCLAIR, MR HAMISH, President, ACT Division, Planning Institute of Australia **1**

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Amended 21 January 2009

The committee met at 2 pm.

SINCLAIR, MR HAMISH, President, ACT Division, Planning Institute of Australia
FITZPATRICK, MR TREVOR, Chair, ACT Policy Committee, Planning Institute of Australia

THE CHAIR: I declare open the public hearing of the Standing Committee on Planning, Public Works and Territory and Municipal Services on draft variation to the territory plan No 302, community facility zone. I welcome Mr Sinclair and Mr Fitzpatrick from the Planning Institute of Australia, ACT Division. Before we begin, we need to go through a little process here. Have you read the privileges card, which is the buff coloured card that is before you, and do you understand the privilege implications in that statement?

Mr Sinclair: Yes.

Mr Fitzpatrick: Yes.

THE CHAIR: Thank you very much. Before we proceed to questions, is there something you would like to say to the committee by way of a short presentation?

Mr Fitzpatrick: Firstly, thank you for the opportunity. Does the committee have copies of a submission that we, unfortunately, only completed a day or two ago? Our apologies for the late delivery of that.

THE CHAIR: We do.

Mr Fitzpatrick: Today, I guess the purpose of our being here and presenting to the committee is to reinforce some of the key issues that we have highlighted in that further submission. By and large, we wish to place on record that we are quite happy with how ACTPLA, in the main, have considered the raft of issues raised in the numerous submissions to the committee on the final variation. However, we still remain most concerned about some of the fundamentals which relate primarily to the structure of the code, the structure of the development tables and the general approach to development.

We are quite keen to pursue that in this instance because we see the opportunity, through the review of the community facility zone, as almost being a template for a whole raft of reviews that are either currently underway or will emerge in the near future, the obvious one being the residential zones that are subject to review at the moment. The commercial ones, we understand, are in the process as well.

We see a fantastic opportunity for the committee to review the overall structure of the development tables within the zone and look at how the code is meeting its needs for both the assessment purposes for ACTPLA as well as the industry that also needs to use the code on a daily basis.

That is the thrust of our submission, and, if you like, we can go through that. I have three or four numbered points there, on pages 2 and 3. We would like to reiterate some of those and clarify what we are meaning. We come to the table not only as

volunteers from the Planning Institute ACT Division but with the benefit that we are day-to-day practitioners that operate with the code every day. The committee of the institute have a series of representatives from the private sector as well as the public sector, so we can put on the table quite a range of experiences and examples in relation to the use of the code.

Mr Sinclair: My role here is just to support Trevor but also to draw your attention to things like the guide for the good writing of objectives, rules and tests, which is a COAG-approved document. It records some golden principles or rules, if you like, in rule writing that we think would help better inform the territory plan, provide some transparency to the community and practitioners and assist the planning authority in assessing development, particularly this zone but all of the zones, effectively. We have great concern about policy and its potential to be lost. We also have a set of development tables from the community facility zone, which we would like to provide to you, which will help clarify the issue regarding prohibited use.

THE CHAIR: I am sorry, what was the last thing you said, regarding—

Mr Sinclair: Regarding prohibited land use. It is one of the tracks that they refer to in the development tables. We believe it is well and truly over-scoped.

Mr Fitzpatrick: Just on that first point, which is essentially the development table, which is—

THE CHAIR: Should we have those now?

Mr Sinclair: We can arrange for them to be handed out.

Mr Fitzpatrick: The development table is that part of the territory plan that follows from the community facility zone objectives. It is basically the first port of call for any applicant or prospective developer. The very first thing you need to find out is whether or not your proposed development is permissible within the zone and—

MS LE COUTEUR: I have got the variation in front of me. Have you just given me a copy of what I have got or has this changed?

Mr Sinclair: I have downloaded from the web today the current version of the territory plan.

MS LE COUTEUR: Right. This is the current version and it will be amended. Thank you.

Mr Sinclair: Our concern is particularly with the development tables component.

Mr Fitzpatrick: Starting with that development table you will see at the top of it there is exempt development, which is a series of activities that the legislation provides for. We have no contention with that. The next one down is assessable development, which are developments you need to lodge a development application for. The first is a minimum assessment track code. There are no developments there.

To me, that is sending a message that the ACT have no specific developments that we wish to encourage and facilitate directly within community facility zones. We think you can give a clear message to the community and others that there are a range of developments that are quite simple, straightforward and can be placed in there. In my submission I have used the example of a childcare facility.

If the government has a series of policies to promote some sort of activity, why not make the development process quite easy? The code track option allows a developer to design the development entirely in accordance with the rules. The assessment and consultation process is abbreviated. There is no appeal. The certainty about carrying out that development is much greater. There is still an obligation on the developer to design the development in accordance with all the rules. If they cannot design it in accordance with the rules it still becomes a merit track and subject to appeals, and there is various other scrutiny there. So on that basis, if there are developments that government, through its policy, wishes to encourage—and I used the example of childcare centres—there are options there to have a series of developments within that minimum assessment track, rather than just leave it blank.

Mr Sinclair: Essentially, where we are coming from is that we believe that with good plan making and plan writing, both within Australia and internationally, there is a principle of cascade whereby you set objectives, you then design your requirements, you specify those requirements to give certainty to everybody and then development can respond to that. What we are saying, essentially, is that if you want something to happen and you are quite certain it is appropriate to the zone then perhaps you can ensure the rules cover everything that you are concerned about. You should locate that land use in that zone as code. The onus is on the development to fully comply.

MS LE COUTEUR: I hear what you are saying and it makes a lot of sense but, based on my couple of years experience of constituents' comments, I cannot quite see how it could work. The community facility zone is very broad at present. Maybe what you are suggesting is that we actually do not have community facility zones. We have a lot of subzones. We have got things like parkland.

Mr Sinclair: No.

MS LE COUTEUR: It is not what you are suggesting, but that is the only way I could see it. We have got things like parkland and outdoor recreation facilities. There are lots of communities who, if they felt happy having a park in an area, are going to feel quite concerned if they find tomorrow that they have got a hospital. It went through under the code because hospitals fitted the use and they have limited say in it. I can understand what you are saying from a planning point of view, but I cannot understand how it could work from a community point of view.

Mr Sinclair: Firstly, subzones would not be something we would support because, essentially, a zone is a spatial location for land uses. Any of the land uses in that zone should be able to either go there or not go there, based on their site-specific limitation. In this instance what we are saying is that if you set a set of rules in place as to what this code approves, there is no impediment on you putting a rule that says, "You must have the adjoining consent of landholders within a 15-kilometre radius as one of the rules." What we are saying is that if you write the rules and your concern is public

comment, put in your rule a requirement to consult. You should put in a rule that says, "You should obtain the consent of the adjoining landholders."

MR COE: On page 2 of the document you just distributed you have the site indicator, additional development and code. Could you have a similar section in the minimum assessment track code which says that in a block and section—whatever it is—a childcare facility could go through under that system and, failing that, it would go through the merit track?

Mr Fitzpatrick: There are any number of limits that you can impose. That is basically what we are asking. As a policy review, we are suggesting that not all of those that are currently under merit track would move up. I agree entirely that hospitals and the like would have a range of impacts that I would find impossible to fit into a code track, but certainly there are a range of things. There is the minor use—whatever that might mean—the parkland, which you talked about, and the childcare centre that I mentioned before. There may only be three or four. There may also be a couple of others where you might say, "Childcare limited to 90 places"—so you cannot have a massive childcare centre—or "Developments on sites of a certain scale or size are code track ones," and then if they do not meet that limit they potentially go into a merit track.

There are ways to do this. All I am saying is that with some of these developments on the one hand the government promotes and looks for the sites to be developed for that purpose but, on the other, the planning system does not automatically facilitate that to happen. There is a mismatching in those two things. This policy review provides an excellent opportunity to align those a bit better—maybe not perfectly. I am not saying let us go all the way, but just let us look at some of those uses.

Mr Sinclair: Again, perhaps using that childcare example—the seven-child placement—it is almost like a home occupation. The scale of that is quite different from a larger facility. It is about scaling these activities and allocating them and their table, their track, according to the scale of the development. That is the easiest mechanism. We would be quite opposed to a site-specific block and section-referenced approach, because that is really getting into a very fine grain.

If the government is of a mind to specify a block, it can do it through the lease process far more effectively. This is about spatial allocation on a broad scale. You can refine it through the lease if you need to do so, but also by setting rules at the right level. Just arbitrarily, my understanding is that childcare centres of seven children or less is quite a small-scale activity.

MS LE COUTEUR: I do not have a fundamental disagreement with what you are saying, but if you are going to go down that track, I think you are possibly almost saying that community facilities should be changed into a number of zones because there are such huge differences in uses currently permissible between our parkland at one extreme and hospitals, possibly, at the other extreme. It is hard to imagine that a piece of land would be equally well suited to both of these, which is a problem. I imagine parkland qualifies virtually as a default event; you would not need a lot of permission to make something parkland, I would not have thought.

Mr Fitzpatrick: I guess that is the policy review issue; I would argue that, yes, parkland, a childcare centre; there are issues like a public agency. The code already limits a public agency to 400 square metres. For example, in Pearce you have the Brain Injury Foundation probably occupying 400-odd square metres. If they want another five square metres, they need to go through a merit track development application. Surely, that is a fairly innocuous activity and some of these things can be brought down there. You already have the limits for some of these things in the code. So if they are beyond what the code limit is, they then come into the merit track by way of their not complying with the rule; so they are there. I am not advocating that each and every one of these merit track ones, like the hospital, gets brought into the code track—

MS LE COUTEUR: No, that was the extreme.

Mr Fitzpatrick: but just a couple of these obvious things that we are looking to support. Without getting bogged down on that, that is at one end of the development table. At the other end, I want to reinforce that there is a vast range of prohibited uses as well under the development table. We would advocate that a good number of those could be brought in as permissible developments and be subject to impact and merit-based assessments.

More and more, what we are finding is that developments that are straight-out prohibited, from a community's perspective, are being approved because they are getting approved under some other terminology—ancillary use, minor use. We in the institute believe that reflects poorly on the planning system, if you cannot tell the community what you are building.

I have used in our submission an exact one, and every member has examples—that $45 million eight-storey car park was never called a car park at the hospital. Everybody would advocate that, correctly, it was called an ancillary use because it is a car park ancillary to the hospital. But if I am just a member of the community, why couldn't I read a DA that said "car park"? They did not. They read a DA that said "ancillary use". I just think that sleight of hand does not reflect well on the planning system. If you took a lot of those out and said, "Community facilities will have car parks; by and large they will be ancillary to the activity; why not make them permissible uses?" a lot of these could become that permissible use.

Mr Sinclair: Where we are greatly concerned here is that we have, for the last four years, been pointing this out consistently as a fundamental problem with the structure of the plan. For example, road is prohibited. You cannot, under any circumstances, make a DA application for a road in a community facility zone or an industrial zone. Funnily enough, they already exist. So why is that prohibited? How hard is it to change that and bring it into the merit track? Or if you really are concerned about huge environmental or traffic problems, bring it into the impact track and make someone do a full EIS on it. It is expected that you would have a road in a zone, yet this seems to be an incomprehensible difficulty to overcome.

How you would achieve it is by the back-door, secretive way of saying, "I'm making a minor use DA," because the definitions for minor use include road, thank goodness; otherwise there would be no roads in any zone anywhere in the territory. That is just,

frankly, not good planning.

Mr Fitzpatrick: There are a number of examples in the territory where community sites are being, or have been, subdivided. There is one on Lake Ginninderra that comes to mind; there is another at Nicholls that comes to mind. Roads are being built. But, clearly, the applications for that form of development are not going in as, "I want to build a road there." It is, "I want to carry out a minor use," or some other terminology. We just do not think that is an appropriate process to follow.

Mr Sinclair: This comes back to the transparency issue. You look in the paper; the advert is not for a road, because it is not what you can apply for. It is for a minor use. That tells you nothing. Or it is for an ancillary use; that tells you nothing. Equally, if you go on the web and look at ACTPLA's website for DAs, and you are looking at their descriptions, a "minor use" does not tell you what it is. And you have to individually go into one and see what it is actually about.

We went through the prohibited table for a community facility zone. There are three uses that the zone already allows—agriculture, scientific research establishment and shop are already exemptions put into the impact track. Clearly, they can happen in this zone. So why are they prohibited? There are a further 28 uses, including road, that are quite acceptable and expected and that occur in community facility type zoning in Australia and internationally. Yet here they are fundamentally prohibited. Under no circumstances can you have a car park, can you have a boarding house, can you have serviced apartments or even a railway use, which I would have thought is kind of a community facility type thing.

Multi-unit housing, mobile home parks, caretaker's residence—these are all things you should expect to be able to at least apply for, and then it is up to their merits as to whether or not they pass through the planning process and the public process. But these are outright—under no circumstances is it conceivable that they would ever be approved. That is the prohibited track standard.

Mr Fitzpatrick: Just to sum that up, again, removal from the prohibited uses does not give anybody the right, as a right, to carry out that development. It still requires them to demonstrate that that development is an acceptable development on that particular block of land that they are applying for. So it just does not simply suggest that if you move it from prohibited into permissible, into the merit track, it will then be opening the floodgates for that form of development. It does not do that at all; it just presents an opportunity so that there may be a circumstance somewhere in the territory that form of development is an okay thing to happen on a community facility site.

Mr Sinclair: It is quite likely that it will be the government wanting to do it.

Mr Fitzpatrick: Yes. So if you are looking for a flexible system, reviewing that list of prohibited uses is one of the starting points for that. We have very quickly gone through and had a quick look. We are happy to put a further submission to the committee, if we have that opportunity, to suggest, "These are the sorts of uses that could be removed from the prohibited list," if the committee wants to have a further look at that. But what we are advocating is that if this policy review is about fundamentally looking at the structure of the development tables, there is a clear

opportunity to enhance the planning system and add some flexibility by reviewing that prohibited use list.

Mr Sinclair: Essentially, we are seeking the committee's support or we request that it seek some advice regarding transferring these lists of prohibited uses to a more appropriate level and scale within the actual tables that can achieve DA. Particularly with regard to community facilities, it will be the government, in all likelihood, that is probably trying to apply for these things and it is putting up an unnecessary roadblock, in that it cannot actually publicly state what it is applying for. It has to use a secretive, back-door and very obscured approach to achieving what are generally good community facility type outcomes.

MR COE: Are you aware of any development applications being appealed on the basis that they have a prohibited item?

Mr Fitzpatrick: The only way you can get an approval through the prohibited list is if a lease already has that use in your lease—

MR COE: But in terms of putting a road in—

Mr Fitzpatrick: No, we would call it a different term. We would be clever with the terminology.

MR COE: That is right; that is what I meant. Are you aware of any appeals that have been successful to cut out that cute definition?

Mr Sinclair: I am not actually aware of any appeals that have been made. Frankly, the point is that these things have been approved and are approved because they are seen as quite logical. You would expect a road, so it is unlikely that the community is going to object if the road has been approved as ancillary or as a minor use to it, and be successful in objecting to it on the grounds that it is actually a prohibited use. Once they have gone through the cost of a QC and the whole ACAT process, I would imagine it would be a nightmare to unravel. And that is what we are suggesting. It is a very simple fix. Quite literally, it took us less than 15 minutes to sit down and identify 28 circumstances where this table is wrong, in our view.

THE CHAIR: Do you want to talk to points 3 and 4 in your submission?

Mr Fitzpatrick: Yes. We were conscious of the time. In the specifics of the development code, in the review this somewhat a template of a code for others to potentially follow. From the institute's perspective, we are quite conscious of significant community criticism over the planning system, whatever that may be—concerns about uncertainty for development, as well as industry calls regularly for flexibility while having a certain system as well. We think that just some minor structural changes to the code can go a long way to doing that.

The institute supports the approach that the ACT has adopted through what we call the DAF model. It certainly supports that. But there are just a couple of things that can happen to take it to the next level and to provide greater certainty without losing any flexibility. Some of those things that we think are happening at the moment are

actually a backward step to achieving that—things like the removal of the intent. We do not think that is a good idea at all. The intent from the codes was a series of statements that basically gave some guidance as to what the rules and criteria were about, where they were coming from, what we were trying to achieve. There are now a whole series of criteria that do not have rules and do not have an intent. They stand alone, and we think that the community will be lost in what they are trying to achieve and we are concerned as well for ACTPLA's assessment officers in trying to determine whether something complies with the criteria, which will now effectively be in a policy vacuum, and how that is going to give any certainty to either the community generally or the applicants making those developments. We are most concerned about that.

Mr Sinclair: If we can refer you to the other document from DAF. Page 6 in particular has a set of golden rules for writing these objective rules and tests. The first principle there, in terms of the implementation of an objective, is that it should clearly link to the intent and the requirement. Rules should be connected to their policies. Rules do not happen in a vacuum. They are the implementers of policy. The policy is the direction you are trying to achieve. The rule is the mechanism by which you should be able to achieve it. What the request to remove intent is, in fact, is to remove the policy. So you are essentially leaving rules unconnected to any kind of decision-making process or justification. For rules that is fine, because they are simple: does it comply with a height, a setback or whatever? It is a numerical assessment. It either meets it or it does not.

However, when it comes to criteria or performance measures, you need some form of justification as to why the performance measure, or the criteria, is appropriate. To go beyond the rule, what is the justification? When you take away the policy, essentially you are saying, "Because I feel like it." That is not a way to run a planning system. The community can have no respect for a decision-making process that basically says, "We don't have any regard to the policies here." The criteria are met because "they felt like it".

Mr Fitzpatrick: If we can highlight some of the examples currently in the code, in element 3 of the revised code there are rules 11, 12, 13 and 14 based on built form. The committee has highlighted before, and we agree, the diversity of blocks of land that are zoned as community facilities. If you go to criterion 11 there is no applicable rule and there is no intent. There are criteria just saying—

MS LE COUTEUR: Can you just help me in finding where it is in the draft variation?

Mr Fitzpatrick: Of the code? Unfortunately, there is no page numbering. Element 3, criteria 11, 12, 13 and 14 of ACTPLA's December 2010 code—it is part of the suite of draft variation plans.

THE CHAIR: It does not have page numbers.

Mr Sinclair: We would also ask if in future page numbers could be applied for variations; it would help everyone.

Mr Fitzpatrick: I can briefly highlight, if you are happy to—

MR COE: Perhaps talk us through it.

Mr Fitzpatrick: The criteria say, in effect, there are no rules, there is no intent. There is a criterion that requires people to comply in relation to built form which says, "A visually interesting architectural treatment." We would struggle to find what that actually means in a community facility zone. "Buildings use high quality materials"—and, again—"have a facade with visually interesting architectural treatment". These are the words that are now in total isolation from any other connecting rule, criteria, intent, objective or what have you.

Mr Sinclair: It effectively gives the planning authority no mechanism to sustain any kind of legal challenge if it decides that it does not like the architectural form, because the next question on anyone's mind is going to be: what is the intent of this rule? What are you trying to achieve if you have said that you are looking for a particular outcome? Why are you looking for that outcome? On what basis is this rule made? There is none, because you have taken the policy away.

Mr Fitzpatrick: We are suggesting that if the intent is currently there, for whatever reason, these criteria need some form of guiding principle. We have just used an example of a few there. Another example is "elements of the development that interface with the street and promote an attractive streetscape". If you think about many community facility sites, such as former school sites and the like, they are on vast sites. How does the Canberra Hospital, for example, comply with that? How does it have a streetscape in that level if there are no guiding principles as to what we are trying to achieve here?

There is no associated rule and there are no intents. It does not directly relate to the objectives. Those sorts of criteria now add to the confusion of the code. They do not add to any level of certainty and, certainly, they do not provide any degree of flexibility for the development industry themselves.

Mr Sinclair: So we have identified the problem.

Mr Fitzpatrick: We were concerned about the intents and how they worked in the first place. We felt some more work was needed in this direction. ACTPLA's response has been, "Let's grab those intents"—they're presumably a problem—"and throw them in the bin." Now we are saying, "Wow, that was in the exact opposite direction as to what we were suggesting needed to happen."

MR COE: These problems must be consistent across the territory plan, not just in the CFZ.

Mr Sinclair: Exactly. The consequences of this are dramatic.

Mr Fitzpatrick: They will become more—

Mr Sinclair: You are stripping all of the policy of all of the governments of the day since self-government that have put through variation processes and public

consultation—every variation to date: all 300-plus of them. You are throwing all of that policy out. That is the decision that is underpinning this removal of intent. It is a significant policy change. It fundamentally destroys the territory plan. We are opposed to it.

Mr Fitzpatrick: Associated with that we are also advocating that there always, as far as practicable, should be a rule associated with the criteria. Give some grounding point—

Mr Sinclair: That is a basic plan-making position of any statutory body anywhere.

MR COE: Do you think as a result of this that it does open up grounds for more appeals?

Mr Sinclair: Absolutely. We are already seeing this with things like the Kingston Foreshore where the policies that related to the specific location of Kingston Foreshore were picked up and put into the code, some of them as performance criteria and some of them as intent policy. ACAT did not know what to do with all of that stuff. In fact, most of us did not know what to do with it, to be honest. By removing it, you are not actually adding clarity at all—quite the opposite. You are simply saying: "We don't want to have any regard to policy. We'll just be arbitrarily on a case-by-case basis making a decision which, when someone appeals, we are going to really struggle to try and defend because we have got no policy underpinning our decision-making process."

This is not just the thin end of the wedge. This is a fundamental restructure of the planning system, and it is coming from the code—not the legislation. What we are aware of and what ACTPLA is also aware of, in correspondence to the planning institute, is that there is a disconnect between rules and criteria, which are identified in the legislation, and intent, which is not.

An administrative mechanism to enable ACTPLA to consider the intent of codes when assessing the criteria would, in our view, be the minimum amount of change that is needed. We think there is a significant restructure of the plan to actually pick up these intent policies and reapply them, and have ACTPLA able to apply them. The mechanism to fix that is twofold. One is an actual change to the planning act. We recognise that that takes some time and may not be achievable. A far more effective and simpler solution is to include within these codes a requirement that, if you are assessing the criteria, you must have regard to the intent related to that criteria. This is not rocket science. I am sorry; it is really not. We have made this point repeatedly for four years now and we are very frustrated.

Mr Fitzpatrick: If the intent was not as clear as it could have been, our response would have been: make those intent statements more succinct, more direct, as to what you are trying to achieve there—not throw them in the bin. That is what we are suggesting.

Mr Sinclair: The other side is that if the concern is not that these things are clear but there is no mechanism to consider them because you need legislative change, we disagree. We think you can actually do it through these codes. It is not quite as

significant as removing all policy consideration throughout the plan, which is the current solution. Our solution is to suggest that you just put something in the plan that says, "When you are looking at criteria, have regard to the intent." It is that simple.

Mr Fitzpatrick: And following on from that—it is possibly our last point—as far as possible, every aspect should have both a rule and criteria mentioned and, associated with that, some explicit guiding principles. If there is a rule there, and a departure, to a certain extent, through assessment against the criteria, it is some acceptable level.

At the moment, more and more, we see applications where, if there is a rule that says buildings in community facility zones shall be set back six metres from the residential boundary when a residential property adjoins it, that is associated with a criterion that says, "Buildings shall be sited to ensure privacy and the like." So that six metres just gets thrown out. We can therefore be right on the boundary if we need to be. So the design progresses on that basis. There is no connection between the rule and the criteria.

There needs to be some sort of principle to say, "If the rule is saying six, we're prepared to accept a departure." Is that departure five metres, four metres or 5½ metres, or is it nought? That is what is not happening at the moment. That rule is just being tossed away and the focus is on the criteria. There is no connection needed between the two. It would be our view that a rule is establishing a number and the criteria provide for flexibility. So the rule provides the certainty we are looking for by saying, "We want you to be back off the boundaries," and the criteria are providing some degree of flexibility by saying, "Well, we accept there will be some circumstances where you can't be six metres from the boundary and, provided you can demonstrate the good planning outcome, the good design outcome, we'll let you be less than six metres from the boundary." But what is happening now is that six metres has been tossed in the bin and nought is the starting point, and it has worked from that.

We think that is the wrong way and the wrong approach. The approach should be: "Here is the rule. We're going to impose the rule, unless you as the applicant can demonstrate exemplary design outcomes as to why we should vary that rule. And in varying that rule we will consider what the criteria are trying to achieve." We think that should be the fundamental approach to the interpretation of the code, but that is not happening.

MR COE: Surely, that sort of uncertainty would drive up the cost of planning and the cost of assessing the plans, and ultimately would delay the time for approvals.

Mr Sinclair: As well as giving the community a great deal of angst about certainty. As much as it is a cost on developers in terms of reworking their project to fit whatever they are actually having to fit with, as opposed to what they think they can get away with, equally, the community has a level of certainty of expectation that is simply not being met. And it has to then go through the process of challenging, writing submissions and objecting to what should be very straightforward positions. So it is a cost that is shared across the whole planning environment, and it is equally shared by the planning authority, because they have to be able to defend their decisions, either from other developers or from the community or whoever. If they do

not have the flexibility and the ability to rely on these things, they are in as much difficulty as everybody else in the system. So it becomes a bit of a soup.

Mr Fitzpatrick: It is about that minor—these are not major issues here—adjustment to the codes and those guiding principles and the connection between the rule and the criteria so that the codes can achieve exactly what they set out to do. They can provide that certainty. It is basically telling the community and the development industry, to use my six-metre setback example, "Six metres is the number; comply with it." There is the certainty. So an applicant complies with it and they should have a high level of confidence that that is okay through that process: "I've complied with that rule and that part of it should be okay." There is development industry certainty; the community is saying, "I live next door; I know the building's going to be six metres away from me; there's my level of certainty."

But it also provides that other aspect; when the development industry says, "But we want flexibility as well," you can say, "Okay, come along and highlight some exemplary design outcome, talk to your neighbour and then come back and talk to us as to how much closer to six metres we can come." There is your flexibility. You have that opportunity. It is not hard and fast; if there is something spectacular that you want to put on this site that is going to be closer, that number then can be closer but will be subject to that sort of evaluation. There is the flexibility. It can be both ways. It can have that certainty and that flexibility. At the moment I think the community are mostly concerned because those rules are being thrown away and the design process starts at a point which is quite vague, having regard to these criteria.

Mr Sinclair: The thing we would like to reiterate most of all, though, is that if you ask the planning authority whether they have regard to the intent and by what mechanism do they do so when assessing any development application, I think you will find they will struggle. Equally, if you ask them whether the intent policies from the former plan—that is, the one that has been created by previous governments, through the planning process and through the Assembly—are ratified policy, and they affirm that, and under this current structure of codes they are now seeking to remove that, in effect they are removing all policy that has gone before. It appears that they are unable to apply current policy, not just in the community zone but in all zones. To me, that is a significant concern, and we are raising it here today.

MS LE COUTEUR: You made the offer of giving us a list of things that you thought should be out of the prohibited list.

Mr Fitzpatrick: We can do it more formally. Our preference would be, as a voluntary group, we have a committee and generally things that are presented are circulated amongst the committee. We would like that opportunity to make sure that we are presenting the institute's viewpoint and not just personal—

Mr Sinclair: As a piece of work, we do not think it would be particularly difficult for the planning authority itself, with our assistance. We are happy to provide that—and anybody else, like community groups—and to sit down and work through this, just the prohibited, and say, "Are there any circumstances under which you would categorically allow for this to occur?"

MS LE COUTEUR: Is there anything that you would always be happy to have?

Mr Sinclair: It is not so much "happy", but to contemplate whether it may be allowable. Prohibited should under no circumstances ever be allowed or contemplated. If you take that sort of "under no circumstances" approach here, and you ask yourself the question: "Hold on, agriculture: isn't Pegasus riding school a facility that fits under agriculture, yet you're saying you can't have that as a community facility? Surely, you can. So maybe you can have agriculture in the zone. In fact, your table actually says you can."

Mr Fitzpatrick: Another example I can put forward is a much more innocuous one: in the former Spence primary school there is a little church coffee shop that bakes little muffins and the like. They operate outside church hours, so they operate independently. If you applied that to the code, that little facility would be called a restaurant, and therefore prohibited. These church ladies are providing a fantastic service where people can just come along, do their knitting, have a chat for an hour and have a cup of tea and a scone. Presumably that is actually a prohibited land use. They are presumably—well, maybe they have consent under some other form of terminology that I am not aware of. Again, that reiterates to us—

THE CHAIR: Let's hope they are not going to stop doing what they are doing.

Mr Fitzpatrick: Yes. It reiterates to us that there is something astray with the planning system if something like that is not only not able to be considered as a direct merit consideration but is actually determined to be a prohibited land use. I agree that not every community facility site should be turned over to a large-scale restaurant. We would certainly not advocate that at all. But you can see that there is a whole range of these land uses that fit quite well in amongst the whole range of other community facilities that happen on particular sites.

Mr Sinclair: It is fundamentally a confusion of scale.

THE CHAIR: If you are able to give us the additional information by the end of the week; if that is not possible, could you talk to the secretary about that.

Mr Fitzpatrick: Yes.

THE CHAIR: I think the brain injury place is now over in Holt; that is my information.

Mr Fitzpatrick: It may well be. It is some years since—

THE CHAIR: I think they have moved into one of the new hubs. And I do not actually think that Pegasus is what you would call "agriculture".

Mr Sinclair: Actually it is; yes, it is. It is "agriculture" under "horse agistment", which is an agricultural use.

Mr Fitzpatrick: The riding of the horses may not be but the stables—

Mr Sinclair: The agistment-type stuff.

THE CHAIR: Having them agisted there is called—

Mr Sinclair: So is holding the horses there for somebody who wants to use the horse—

THE CHAIR: Now I have learnt something. I just wanted to make sure that we were being accurate.

Mr Sinclair: It is a very devious back way of working it all out.

MR COE: You are spot-on about St Paul's Ginninderra, though.

Mr Sinclair: I guess that is what we are saying: we would like some transparency. I think the community is demanding it, and it is really quite easy to achieve if you put your mind to it.

THE CHAIR: Thank you very much. The secretary will be in touch if there is any additional information that we require. Thank you for offering to give us that feedback. Thank you for appearing before us this afternoon. If there are any further questions, we will get those to you as soon as possible. Could you get that other stuff to us by the end of the week? There are no other questions on notice.

Mr Fitzpatrick: No problem at all.

Committee adjourned at 2.42 pm.