**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

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

**(Reference: Draft variation to the territory plan No 307 Griffith—change of zoning)**

**Members:**

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

**TRANSCRIPT OF EVIDENCE**

**CANBERRA**

**MONDAY, 30 JANUARY 2012**

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

**By authority of the Legislative Assembly for the Australian Capital Territory**

## WITNESSES

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*Amended 9 August 2011*

**The committee met at 9.01 am.**

**PONTON, MR BEN**, Acting Deputy Director-General, Planning Policy, Environment and Sustainable Development Directorate

**THE CHAIR**: Thank you very much, Mr Ponton, for coming in this morning to give us a briefing. You have given us a written briefing on the deconcessionalisation issues, but with regard to 307 we would like a little bit more explanation from you about how that relates, or does not relate, to what we are doing. It is also a chance for members to ask you some more questions. I think that would be helpful. We do appreciate you coming in after providing us with so much information in the past.

**Mr Ponton**: I will start by talking a little bit about the history in terms of why there is a development application for an application to remove the concession, which is easier to say than deconcessionalisation. This is in fact the first application that has undergone the public interest test. It has been going through a DA process since the act was changed in 2008. The Planning and Development Act 2007 came into effect on 31 March 2008. As I said, this is the first application under the new legislation.

**THE CHAIR**: What was the previous arrangement?

**Mr Ponton**: Previously it was a decision of the minister to deconcessionalise, and it was undertaken through a process of exchange of letters. So an applicant would write to the minister, the minister would refer that matter to the department, the department would review, provide advice to the minister, and the minister would then write to the proponent with his or her decision. If the decision was to support, the letter would advise accordingly and include details of a payout figure.

When the act was being reviewed, it was decided that it would be more appropriate and more transparent if we had community engagement and community involvement in this process, because, as you can see from this experience, the community does have an interest in deconcessionalisation of crown leases. So the government made the decision at the time that we would require a development application for deconcessionalisation. I know the terminology may then create confusion that there is a development that is occurring when in fact that is not the case. There is a process to allow that public engagement.

An alternative would have been for us to write some provisions for the legislation, for the consideration of the Assembly, that created another process, so that there could have been a separate kind of application that would have been notified. Given that we had the processes around development applications, we decided that that would be the simplest option. As I said, this is the first. There are three others that are currently going through the normal processes.

**MS LE COUTEUR**: What amount of notification happens for the deconcessionalisation? Most people involved in the Brumbies are well aware that the territory plan variation is happening, but there seems to be total confusion and a lack of knowledge as to what, if anything, is happening with deconcessionalisation. What sort of public notification is there of it?

**Mr Ponton**: It is the same as any other development application, any other merit track application, which is a sign on the block. That would be on each street frontage. It is put in the *Canberra Times*, and there are letters to interested parties and to adjoining and adjacent lessees.

**MS LE COUTEUR**: A sign on the block on all street frontages?

**Mr Ponton**: Yes.

**MS LE COUTEUR**: And in the *CT*. But you would only have had letters to the people immediately—

**Mr Ponton**: Adjoining and adjacent.

**MS LE COUTEUR**: adjoining it, which is a dozen or so. It would not have been the people on the other side of Flinders Way?

**Mr Ponton**: If they were adjacent to the site.

**MS LE COUTEUR**: They are adjacent but there is the creek.

**Mr Ponton**: Across the road, yes.

**MS LE COUTEUR**: I was wondering whether you would regard that as adjacent.

**Mr Ponton**: I would need to check, but in normal circumstances if there was a creek then we would have notified. Looking at a map—and I do not have a map before me—if there is a public road, a public place or a creek that is adjacent, in normal circumstances we would notify. Again, as I said, I would need to look at the particular circumstances of this matter, given the extent of those public places. If it is very wide—for example, if there was another oval and residences on the other side—we may not necessarily notify. There would be the normal DA processes, adjoining and adjacent.

**MS LE COUTEUR**: How many submissions did you get about this? Part of the reason I ask that is that I am wondering how many people actually realised in the relevant time frame what was happening.

**Mr Ponton**: I do not have the exact number but I believe that it is certainly not as many as were interested in the variation. It was a handful—two or three. It is not a great number.

**MS LE COUTEUR**: From memory, I heard someone say there was one. But I have been racking my memory as to where I heard that. That is the sort of number I think it is.

**Mr Ponton**: I have to say that, at the back of my mind, one is the number I am thinking of. I am saying a handful just to cover myself but I believe that it is one to three. It is not a great number.

**THE CHAIR**: On what date were the signs put up and the letters went out?

**Mr Ponton**: I would need to check that.

**THE CHAIR**: How many weeks prior does the act say that they have to be notified?

**Mr Ponton**: The normal course of events is that the application would be lodged. Within a matter of three or four days we would notify the application and then it would be notified for 15 working days.

**MS LE COUTEUR**: We have all read the notifiable instrument. That came out from Minister Barr, because he was acting planning minister.

**Mr Ponton**: Yes.

**MS LE COUTEUR**: Is the decision made by whoever the minister may be, on the advice of ACTPLA? I have read the bit of legislation. There is a lot about public interest and alternative uses. My concern is that the legislation seems to cover a lot of good things, including social impact assessment. How does all of that actually happen and get considered?

**Mr Ponton**: You have raised an important point in that an application does require a social impact assessment to be lodged with the application. Prior to providing advice to the minister—as you would expect, the Directorate does provide advice to the minister—we first of all undertake an early assessment and also review the social impact assessment. We then provide advice to the minister in relation to the tests for consideration as to whether or not it would be in the public interest to consider the application. That is an important distinction. It is not an approval of the deconcessionalisation. The minister simply advises that he believes—in this case he believed—that it would be in the public interest for the Planning and Land Authority to proceed with considering the application.

**MS LE COUTEUR**: With the social impact assessment, this is the one that I know most about in the whole process, simply because it used to be an EIS. I remember a year or two ago that the Assembly did a process of changing EISs. We could see the point that we did not need an environmental impact assessment; you were not changing use. But we said that with a social impact assessment that clearly was the issue. EISs usually go out publicly and there are terms of reference and you see them, whereas I am not aware that anybody has seen the social impact assessment. As soon as this came out, I wrote to Mr Barr's office and asked if it was possible to see the social impact assessment. I have not had any reply yet. Normally you would have people discussing an EIS and commenting on it. What is the process with the social impact assessment?

**Mr Ponton**: The social impact assessment is prepared in accordance with guidelines that we have established which are based on what we were seeing when we were scoping these in the very early days of the Planning and Development Act. The social impact assessment is then part of the development application that is notified. So it is publicly available, and I can certainly provide the committee with a copy of that, if that would be of assistance.

**MS LE COUTEUR**: That would be useful because it is not on your website anymore.

**THE CHAIR**: That would be great, Mr Ponton, if you are able to provide us with that information.

**Mr Ponton**: I will do that. I will send that through to the secretariat today.

**THE CHAIR**: Thanks. We will let him know to expect that.

**MS LE COUTEUR**: Are you saying that the minister only has to say that there is a case for deconcessionalisation? I should go back and reread exactly what the notifiable instrument says, but I got the impression that the minister was saying that he in fact thought that all of those tests had been satisfied, rather than it was possible that they would be satisfied.

**Mr Ponton**: The minister's role is to consider the five tests, in terms of whether it would be in the public interest to consider the application. In this case he determined that the application did meet the tests and that it would be in the public interest for the Planning and Land Authority to consider the application.

**MS LE COUTEUR**: So the minister does in fact say, "I think it meets these tests; therefore ACTPLA will consider it." Implicitly, he was saying, "It probably should be deconcessionalised." That is how I read it.

**Mr Ponton**: I would not want to put words into the minister's mouth. His role is to look at the tests. We can go through those quickly—whether or not the territory wishes to continue to monitor the use and operation of the lease. Some of these tests are aimed at providing the Planning and Land Authority with guidance when it does consider the application. I think that is where you are heading with this. So in this case the minister has formed a view in relation to that first point. Whether there would be any disadvantage to the community by taking into account potential uses of the leased land that are consistent with the territory plan—again, he is giving us a pointer in relation to these matters. But, ultimately, it is for the Planning and Land Authority to make the decision.

**MS LE COUTEUR**: What are you going to do now?

**THE CHAIR**: Are there more tests to go through? Is that all the dot points?

**Mr Ponton**: No. The committee was turning its mind to item (c), which is whether the application to vary the lease to make it a market lease is, or is likely to be, part of a larger development. Obviously, this is where there is a relationship, although they are separate processes, with draft variation 307, in that the minister needed to consider what the future use of this is. What are the intentions of the lessee? Clearly, the lessee's preference is for DV307 to proceed and for them to be able to develop the site or onsell to somebody else to develop the site for multi-unit housing. Having said that, it was not the only proposal that the minister needed to consider. We also know that the proponent had recently applied for, and the Planning and Land Authority refused, a hotel on the site. So if DV307 were not to proceed, it is likely that that is an

alternative development proposal. So that was a relevant consideration for the minister in considering that test as well.

The other dot points are whether the territory should buy back, or otherwise acquire, the lease and whether the territory wishes to encourage the continued use of the land for an authorised use under the lease by retaining the concessional status. In notifiable instrument 22 of 2012 the minister has gone through each of those points and made a determination.

**MS LE COUTEUR**: What will be the process from now on? Is there any public involvement in it?

**Mr Ponton**: No. Now that the community consultation period has closed, we do have the comments, or comment, from the community. I will clarify exactly how many. I believe there was one; there may have been more that I am not aware of. The Planning and Land Authority will consider those comments. It will consider the minister's determination. It will consider the provisions of the act in terms of section 120 of the act. Section 120 of the act has a range of matters that we must consider in determining a development application. We need to look at the relevant matters. Suitability of the land in this case is not a development consideration because there is no development proposal in relation to this aspect. The Planning and Land Authority will then make its decision and notify the lessee and those parties who made a submission of its decision.

I should also point out that it is not uncommon for an application to deconcessionalise a lease to also be accompanied by a more concrete proposal. We do have others in the system, as I alluded to earlier. We have three other matters that have been considered by the Planning and Land Authority, and I believe each of those also includes lease variations to actually change the use of the land. On this occasion it is simply to deconcessionalise the lease.

**THE CHAIR**: So the actual decision by ACTPLA has not been taken; is that what you are saying?

**Mr Ponton**: That is right.

**THE CHAIR**: So you are still not—

**Mr Ponton**: We are still considering the matter.

**MS LE COUTEUR**: From a process point of view they are obviously separate processes, and ACTPLA is aware that you got in the order of 100 submissions on the territory plan variation which is for the same block of land. Those people did not put submissions in to the deconcessionalisation, I suspect, because they simply were not aware of it. Given the depth of feeling—certainly, quite a few to my office have been serial correspondents on the subject—you could be fairly confident that if they had realised that it was happening they would have put something in objecting to it, based on the tenor of most of the correspondence we have had. Do you look at that at all? It is coming in to ACTPLA; you certainly have it available to you and it is for exactly the same block of land. A lot of them have mentioned deconcessionalisation as part of the things they have problems with, even if they have put it to the wrong place.

**Mr Ponton**: We are required to consider submissions received during the notification of the development application to deconcessionalise. So if correspondence has been received through other processes then lawfully I cannot consider those. We would need to consider the submissions that have been received through the process.

**MS LE COUTEUR**: What about the minister in terms of saying if he thought it was in the public interest? Some of the public have made their views fairly clear; they just did not realise the right place to make them.

**Mr Ponton**: In terms of item (c), in his response the minister did note DV307 and also the previous proposal for the hotel as potential future uses of the land. So in that respect it would appear that the minister has considered those other matters. Importantly, as I provided in the written brief late last week, if DV307 was not to proceed, it is possible, and not unreasonable, for the proponent to expect that we would consider or continue to process the application for deconcessionalisation. The reason I say that is that if they were to proceed with the alternative proposal for a hotel, as I understand it, it makes financing the site easier in terms of obtaining finance for the hotel, and it also makes selling the site, if that is what they are wanting to do, easier. That is why I said in the brief that they are unrelated, because we are seeing a number of clubs at the moment looking to deconcessionalise so that they can redevelop—a number of them consistent with existing lease purpose clauses, but it allows them to finance the site.

**THE CHAIR**: When we were talking about the results of the social impact, I think Ms Le Couteur asked whether it was on the website, and you said no, but you would give us the information. What is on the website in regard to it? When the notices are put up around the block as you described, does a notice then go on in the same way as for the development of a building? It goes up on the DA list, you can click onto it and you can find that there is a DA for something in Spence, for instance. What goes on the website at that time about deconcessionalisation?

**Mr Ponton**: What would have gone on the website is the application form itself. There would have been a valuation certificate. We do not put on the valuation report in its entirety because there is commercial-in-confidence information. That is consistent with any other development application. So the valuation certificate would have the before and after value and the estimate of the change of use charge or lease variation charge, as it is now known. The social impact assessment also would have been included on the website for public viewing.

**THE CHAIR**: In what other way does the community at large know about this process? Ms Le Couteur expressed a view that the community at large does not really understand this process and does not understand that it is actually happening to any degree. Has ACTPLA, when the act changed, made some noise about that on their website saying, "This has changed and you will expect to see this"? In what way does the public know there is a different process?

**Mr Ponton**: At the time the legislation was changed in 2007, when the Planning and Development Act came into effect, the government introduced a development application requirement for deconcessionalisation to increase transparency. Prior to

that the process was an exchange of letters. A lessee would write to the minister. There was a lot of information around at the time in terms of what had changed in the legislation. I would need to go back and check to see whether there was anything specifically about deconcessionalisation. I suspect probably not, although there were certainly some fact sheets at the time that the Assembly considered last year the changes to schedule 4 that moved the deconcessionalisation out of impact tracking to a merit track application with social impact assessment.

I could certainly have a look and see what was provided at that time. But there were other changes as well. So the reality is that if there was information on the website, whether people would have particularly noticed it, I cannot say. It is a rather obscure process, considering all the other things that the Planning and Land Authority deals with. Development applications in terms of design and siting and lease variations are what most people look for. I would have to be honest and say that the vast majority of Canberrans probably do not even know what deconcessionalisation is.

**THE CHAIR**: Given that there is a public interest test, in the same way that a development application can be appealed, can this be appealed?

**Mr Ponton**: I would like to come back to the committee on that. I did seek some advice late last week and viewed the legislation myself. It is unclear. The initial advice is that no, this would not be subject to third-party appeals, but I would like to confirm that and get back to the committee later today, if that is okay.

**THE CHAIR**: Yes, that would be great.

**MR COE**: In terms of how the lease variation charge is determined, what is the process for that?

**Mr Ponton**: The proponents, when they submit the development application, include, as I said, a valuation report. They also include a valuation certificate with the before and after value. It is important to keep in mind with this process that we are only talking about part of the lease. The committee might recall, when you go back and look at the history of this site, that there was a lease that was deconcessionalised and then there was a small section that was not. When the leases were consolidated, by virtue of that action, the whole then became concessional again. So the valuation report considers that. It is really looking at the payout figure for that part that was not deconcessionalised previously. A figure of I think $280,000 has been quoted in the media. That figure has been put by the proponent for that parcel—not the parcel as a whole, just that part that was not deconcessionalised previously.

The next step in the process if the Planning and Land Authority were to decide to approve the application would be for us to refer the matter to the Australian Valuation Office and seek their independent review of the private valuer's report. They would then submit that back to the Planning and Land Authority and we would determine the payout amount. So in this case it is a payout amount, not a lease variation charge. The lease variation charge comes later. If the variation to the territory plan was approved and the lease is varied to allow for residential development, there would be a lease variation charge at that point.

**THE CHAIR**: So there are two charges involved?

**Mr Ponton**: That is right. The first is a payout amount, so a payout concession. The second is a lease variation charge, if and when the lease is varied.

**MR COE**: Does the minister have any option to waive that payout?

**Mr Ponton**: The minister does not but the Treasurer has the ability to waive any debt owing to the territory.

**MR COE**: Is that explicitly mentioned in the act?

**Mr Ponton**: Not in the Planning and Development Act, no.

**MR COE**: It is a broader power?

**Mr Ponton**: Financial management.

**THE CHAIR**: Just to be clear about which one we are talking about waiving, we are talking about the amount payable for the deconcessionalisation?

**Mr Ponton**: I believe that is what Mr Coe was referring to, yes.

**MR COE**: In the subsequent charge, the lease variation charge, a minister has the ability there explicitly to discount the rate; is that correct?

**Mr Ponton**: There is a power in terms of remission. I think that is what you might be referring to. That is not on a case-by-case basis. There is a regulation that would be disallowable by the Assembly in terms of remission amounts. For example, the current remission is at 50 per cent and over the next few years that will go to—

**MR COE**: There is no ability on certain developments or certain projects?

**Mr Ponton**: It is not an absolute power on a particular project, no. It is through the remission.

**MS LE COUTEUR**: There will eventually. As soon as you guys have written the regulations, there will be some that are locality based. You will be looking at transport corridors and highly energy efficient developments. Again, they are not going to be on the basis of only one site. It will be on a range of sites which meet these criteria. It would be very perverse to try to produce a regulation—

**MR COE**: For one, yes.

**MS LE COUTEUR**: I do not say it would be impossible but it would clearly not be what was intended.

**Mr Ponton**: As I said, they are disallowable.

**MS LE COUTEUR**: I do not think they can do that, apart from generally the

Treasurer's power to do whatever the Treasurer feels like.

The other question I have is that, in contemplating what we might recommend on 307, we have been thinking of some things which, it would seem to me—and I am obviously not as expert as you—would be things that would potentially be in a precinct code. We have been talking about where we think that development might best be sited on a block. If we were minded to make recommendations along those lines, is a precinct code where it would go? We are not really clear about how precinct codes come into existence. I have read a bit of 308, which is proposing to put a precinct code as part of its territory plan variation, and community facilities, 302, had precinct codes. How do they come about? If we are so minded, can we recommend that a precinct code should say whatever?

**Mr Ponton**: There are other types of codes. There are development codes and precinct codes. In terms of the hierarchy, the development code sits at the lower level and the precinct code sits above. The precinct code overrides a development code. So in the normal course of events, we would hope that our development codes include all development requirements. The relevant code here would be the multi-unit housing code as a development code. So I suggest that it relates to a particular type of development across the territory.

The reason that we have precinct codes is that there are occasions when the government or the Assembly would like to see things occur that are different in a particular locality than what is contained in that development code that relates to all of Canberra. DV308 is one such example where there were certain things that the proponent was wanting to achieve in relation to that particular site. That is where you introduce a precinct code. As I said, that sits above; therefore if there is any inconsistency between the two, the precinct code would take precedence.

It is certainly possible, if the committee were of a mind to recommend and if the government and the Assembly in turn supported a precinct code for the site, to incorporate that at this point in time. It would be a process of preparing the precinct code and incorporating that with the territory plan variation when it was referred to the Assembly. So a precinct code needs to consider things over and above what a development code would consider.

**MS LE COUTEUR**: What we have been considering has been how best to locate any potential development on that site. It is site-specific, so it would not be in the multi-unit development code. It just would not make sense.

**Mr Ponton**: Technically it is certainly possible.

**THE CHAIR**: The minister would then consider all the recommendations that we would make to him, along with that precinct code. Are you saying that because it takes precedence, if he was going to accept the recommendations that we are making in relation to the variation, he would also need to take into consideration the precinct one at the same time?

**Mr Ponton**: He would not. Any subsequent development application would need to have regard to the precinct code. The process would be that if the committee were to

make a recommendation that the minister include a precinct code, I am guessing that the committee would then say, "In that precinct code we would like to see these matters addressed."

**THE CHAIR**: Yes.

**Mr Ponton**: The minister then has a number of options available to him. He can refer the matter back to the Planning and Land Authority with a direction to do certain things, he can refer it back to the Planning and Land Authority to consider the committee's advice or he can make a decision on the variation as it stands. If he were of a mind to accept the recommendation and refer the matter to the Planning and Land Authority, he could direct us to prepare a precinct code. Of course, the minister has a number of other options available to him: firstly, exactly what that precinct code might contain; secondly, whether he would then want to approve the variation at that point, once it went back to him; or whether he would want to seek further review of the amended variation that now includes a precinct code. They would be decisions for the minister.

If it was a case of a precinct code being prepared and the minister approved that, that sits in the Assembly for five days, I believe—

**MS LE COUTEUR**: Six days.

**Mr Ponton**: for disallowance, if the Assembly believed that the recommendations had not been actively addressed or whatever the case may be. So there are a number of options available to the minister, once the recommendation was made, in terms of proceeding.

**MR COE**: In terms of this process which was in effect set up in 2007, how many other situations have you worked through?

**Mr Ponton**: This is the first since 2008. Under the 2007 legislation, which came into effect in 2008, this is the first development application that we have considered. There are three others that are nearing finalisation in terms of referral to the minister for his advice in relation to the public interest test.

**MS LE COUTEUR**: Where are the deconcessionalisation issues?

**Mr Ponton**: There is a club at Stirling. I cannot recall the nature of the club. There is the Woden Tradesmen's Union Club.

**MS LE COUTEUR**: It was few years ago that they were lobbying us about that.

**Mr Ponton**: The other one escapes me at this point in time. But I am more than happy to send that through to the committee, if that would be of assistance.

**MS LE COUTEUR**: It is not totally relevant but it is interesting.

**Mr Ponton**: I will send it through.

**THE CHAIR**: Thank you very much, Mr Ponton, for undertaking to get that other information back to us. There were two bits of information, the one you have just taken now and the other was with regard to the social impact assessment.

**Mr Ponton**: And third-party appeals.

**THE CHAIR**: So there are three, including the sites of the other deconcessionalisations that are currently before you in this round. Thank you very much for your time. We trust that we have all of our questions answered.

**Mr Ponton**: If not, let me know.

**THE CHAIR**: The secretary will certainly be in touch.

**The committee adjourned at 9.40 am.**