



**SUBJECT: Giralang Local Centre Development Application**

**CABINET IN CONFIDENCE**

**MINISTER FOR PLANNING**

**PURPOSE**

To convey my concerns as a statutory office bearer in respect to interference in the planning process and raise the prospect that the matter of the Giralang development application for a supermarket be determined by Government.

**BACKGROUND**

I will not go back through the entire history of the Giralang local centre and the reasons why it, like many other local centres, has struggled to provide viable services to the local community, as this would involve a very detailed and long winded description of the dynamics of consumer behaviour, changes to retail delivery, demographic influences and the like.

Suffice to say that the recent history of the site has been mired in vested interest, poor understanding of the issues affecting redevelopment of the site and the inevitable politics that arise as a consequence.

At all times ACTPLA has remained professional in its advice to all parties and maintained the impartiality necessary to examine the merits of any proposal it receives. To this end, two previous applications have been considered by ACTPLA, both of which were refused.

Following the last refusal the lessee for the site engaged in pre-application discussions to determine what may be possible. Following discussions with Mr Martin and based on anticipated outcomes of the supermarket competition work and what might be a viable scale of development in local centres, the lessee was advised that a supermarket unit of approximately 1500m<sup>2</sup> would be considered, but without prejudicing ACTPLA's position at the time of assessment.

Following lodgement of the application ACTPLA has been subjected to considerable scrutiny from the Department of Land and Property Services (DLAPS), which has no statutory role in the assessment of development applications, but who have claimed involvement in respect to the application of the Government's supermarket competition policy through administration of the Supermarket Competition Coordination Committee.

In my opinion this Committee's terms of reference do not include overlooking the statutory function of the Authority and nor do they include providing advice to ACTPLA on development applications.

## CABINET IN CONFIDENCE

Nevertheless, despite repeated requests not to do so, the DLAPS forwarded both a facsimile and draft letter indicating that the Committee did not support the proposed development at Giralang. When challenged on the role of the Committee, its standing in making any submission and the basis upon which it based its consideration, I became extremely concerned at the external influences on this matter and the lack of appreciation that this would make the Committee, through the Department, an objector to the development. Again I can not see how this would fit with the Committee's terms of reference.

Having pointed out the potential to impair the development assessment process the DLAPS continued to press for its interpretation of the developable area to be adopted by the Authority. Whilst there is no doubt there is scope for interpretation, it is the role of the statutory authority to make such an interpretation without the advice from another Department that has no administrative responsibility or capacity in the development assessment process.

### ISSUES

The Minister for Land and Property Services in a letter to you dated 30 April, has asked you to convey clearly to ACTPLA; *"...the great importance which the Government attaches to the supermarket policy and the competitive outcomes it seeks to achieve through consistent application of the policy right across Canberra."*

ACTPLA is very familiar with this policy document, which it has contributed to, participated in various committees and is seeking to help implement through the review of the Territory Plan's commercial codes next year, but like many aspects of this letter, the Minister for Land and Property Services would appear to have been poorly advised by his Department.

The supermarket policy referred to is not a planning instrument and has no force or affect under the Planning and Development Act. As such ACTPLA can not use it as the means for determining a development application as it can not rely on it before the ACAT or the Courts as a statutory document for which it must have regard. This is distinct from ACTPLA using the policy document in the context of its strategic planning work or for informing changes to the Territory Plan.

Also, as the draft response we have prepared highlights (see attached), to the extent possible within the development assessment process, we have had regard to the policy documentation and applied the methodology used to determine what is an acceptable level of retail space in this location and therefore for other local centres. This is based on reference within Mr Martin's report to the previous Giralang proposal comprising in excess of 2500m<sup>2</sup> of retail floor space, which was considered excessive, but that a development generally in the order of 1500m<sup>2</sup> being more appropriate for a local centre, noting that the retail floor space for the current proposal is approximately 1660m<sup>2</sup>.

If it is now being suggested that in one circumstance reference to floor space can be for the retail area, and then in another the total building, it becomes apparent that the inter-changeability makes applying such an approach extremely difficult, if not flawed (shades of grey).

CABINET IN CONFIDENCE

Comparison of gross floor area – current and previously refused DA

Component	DA201016972 (current DA)	DA200914054 (refused DA)
<b>GROUND FLOOR</b>		
Supermarket	1666.7	2570.0 <sup>1</sup>
Tenancies	172.5	221.2
Café	118.9	0
Entry/circulation	140.6	142.0 <sup>2</sup>
Waste enclosure	15.9	15.9
<b>Total - Ground</b>	<b>2114.6</b>	<b>2949.1</b>
<b>LOWER GROUND FLOOR</b>		
Carparking – lower (ex basement area)	2287.2	2573.0 <sup>3</sup>
Storage	554.5	585 <sup>4</sup>
Plant	128.0	184.0
Loading dock	322.4	502.0
<b>Total – Lower Ground</b>	<b>3292.5</b>	<b>3844.0</b>
<b>TOTAL GFA</b>	<b>5407.1</b>	<b>6793.1</b>

There are other aspects of the letter, however, that as the statutory decision maker are more concerning.

The last paragraph represents a clear attempt to influence the Authority's decision by saying if you don't refuse the application, the Government will use other means at its disposal to stop it. Whilst I don't question that there may be other ways the development can be prevented by the Government, this level of interference would not be sanctioned if encountered by other statutory office bearers, such as the Auditor General, the Privacy Commissioner, the Chief Magistrate, etc.

Earlier in the Minister's letter there is reference to the Supermarket Competition Coordination Committee appointed by the Government to implement the supermarket competition policy. Its inclusion in the letter is written in a way so as to convey that through ACTPLA's membership it has sanctioned the position being expressed in the letter (that is a position that would not support the current development application).

I am greatly troubled by this because at the time that the Committee was established I indicated some doubt about ACTPLA's participation due to the potential for a conflict of interest with its statutory function and was reassured that this would not be the case. Yet here it is being used for exactly the type of reason I feared.

I have spoken to ACTPLA's representative who has advised me that he has not participated in a conversation at the Committee level where the position being articulated in the letter from the Minister for Land and Property Services was discussed.

<sup>1</sup> Excludes stairs 1, 2, 3 but includes Lifts 2 and 3 and adjoining stair

<sup>2</sup> Includes entry, Lift 1, travelator and disabled toilets

<sup>3</sup> Excludes travelator

<sup>4</sup> Excludes Lifts 2 and 3 and adjoining stair

## CABINET IN CONFIDENCE

As a result of this letter I believe I am now required to withdraw ACTPLA's membership of this committee in order to avoid the potential for our participation to be used as a means of directing our statutory decision making process.

As our draft letter of response discusses, we contest the advice that the Minister for Land and Property Services has been provided in respect to Territory Plan floor space definitions, but am troubled that at a stage in the process where we are still meant to be independently assessing the application, I am forced into a position of having to defend how we might interpret the Territory Plan against how another Department or indeed a committee of officers from other agencies is interpreting it<sup>1</sup>. Who is the planning authority in this jurisdiction?

Finally, whilst no reference is made to Woolworths, who is widely anticipated to tenant the building if it is constructed as proposed, we again see reference in the Minister's letter to the proposal being operated by one of the major supermarket chains, which indicates that the opposition to this proposal by the Minister for Land and Property Services is at least in part driven by a concern about the tenant.

As we have repeatedly stated, who operates the activity is not a planning concern and there is no basis through statutory planning instruments to determine an application on this ground. If for example we all had an understanding that it was to be a Supabarn or Franklins store, would we have the same concern? If not, people have to appreciate that at some point down the track the operator could change and become one of the major supermarket chains.

As a result of the Minister for Land and Property Service's letter to you, and the other interferences from the DLAPS, it is my view as the statutory office bearer that this process is now so compromised that the prospect of it being taken over by the Government needs to be raised. This is because any decision taken by ACTPLA will result in an appeal where the views that have been expressed by the Minister for Land and Property Services and the DLAPS will be used in evidence and may both be called as witnesses, which if the application was to be approved by ACTPLA, would make them hostile to our position.

You will understand that I find this level of interference, which in the case of the DLAPS is occurring on an ever more frequent basis, although not always as obviously as in this case, has the potential to make the role of ACTPLA as a statutory authority for a range of tasks increasingly difficult and puts the Government at risk. It also means that one part of your 2010 Statement of Planning Intent is difficult to deliver, namely 'keeping politics out of planning':

*To ensure development assessment is undertaken without political or commercial interference, the Government will continue to keep the politics out of planning. It will remain a statutory function handled at arm's length from government, providing the community and industry with confidence in the separation of power between policy making and decision makers.*

*The Government's planning intent to:*

- maintain the statutory independence of development assessment.*

---

<sup>1</sup> It is my understanding that, subsequent to the preparation of this brief, the Supermarket Competition Coordination Committee has met (absent ACTPLA's representative) and decided that the retail unit proposed is not inconsistent with the policy.

## CABINET IN CONFIDENCE

I don't commit to these words lightly and appreciate that this creates a very awkward situation for you, but this is not of the Authority's doing and if anything illustrates why the Government established a statutory authority in the first instance, but appears to be incrementally eroding.

I have serious doubts whether ACTPLA can now independently and impartially assess this application on its merits. As a result I believe the option of the application being called in, following the provisions of the Planning and Development Act, needs to be considered.

This option would do two things in respect to the Minister for Land and Property Service's letter. Firstly and most importantly, provided it can meet the tests under the Act for call-in, it would enable consideration of matters beyond the statutory planning instruments (ie the supermarket competition policy). Secondly it removes the potential for a future test of ACTPLA's decision to be lost on what is now, in my view, an impaired process.

You will be aware that calling the application in will also remove it from any appeal rights (first and third), but it would still be subject to ADJR through the supreme court, which following any examination of the material that is likely to be revealed through FOI, is conceivable on a point of law.

If this option were to be considered acceptable there are two ways in which it could be done. The first is the orthodox arrangement, which is by the Minister for Planning, the second, which is obscure and as far as I am aware never before used, is that the Chief Minister could also call the application in.

Given the Chief Minister's obvious interest in this matter (and given his responsibility for the supermarket policy) this may be considered to be appropriate, but it raises issues of precedent, impartiality and which Department would advise him. I would propose that the advice of the ACT Chief Solicitor be sought if this option is to be considered.

### COMMUNICATIONS

You are aware that the development of this site has attracted significant media, community and political interest for some time, with the catch 22 that if it is not developed it will continue to be of interest to those within the community who are aggrieved by not having access to local shopping services as well as the derelict state of the site, which we continue to monitor, but are limited in what we can do.

Clearly as a result of this letter and other material that has been produced by the DLAPS, whatever decision is made now will ultimately be the subject of public scrutiny and debate, all of which will diminish the reputation of planning in the ACT.

### CRITICAL DATE

Any decision by you or the Chief Minister to either call in the development application or to direct the Authority needs to be made prior to the a decision being made by ACTPLA, which is imminent.

## CABINET IN CONFIDENCE

It should be noted that any direction to ACTPLA needs to be considered against the specific provisions of the Act:

### 14 Ministerial directions to authority

- (1) The Minister may give a written direction to the planning and land authority—
  - (a) about the general policies the authority must follow; or
  - (b) requiring the authority to revise the territory plan, or a provision of the plan, or review the plan.
- (2) Before giving a direction the Minister must—
  - (a) tell the planning and land authority about the proposed direction; and
  - (b) give the authority a reasonable opportunity to comment on the proposed direction; and
  - (c) consider any comment made by the authority.

My view is that a Ministerial direction to ACTPLA to take certain action in respect of the Authority's statutory responsibility ('at arm's length from government') for assessing a DA does not fit within the meaning of the above provisions of the Act.

Finally I have raised the matter of agency involvement in ACTPLA's statutory processes such as the assessment of DAs. I am concerned that officers in the Department of Land and Property Services, in particular, appear to repeatedly over-step the mark when it comes to their interference, perceived or otherwise, in statutory processes which have served the government well.

The Government responses to the recent recommendations of the Public Accounts Committee in relation to the Auditor-General's report on the site selection for the gas-fired power station, as agreed by Cabinet, are relevant to this issue. The Committee's recommendations included the need to clearly define the respective responsibilities between LAPS, LDA and ACTPLA:

4.4 The Committee recommends that Government clearly defines the respective responsibilities of the Department of Land and Property Services, the Land Development Agency and the ACT Planning and Land Authority in regard to project facilitation to avoid confusing overlap. The Government should also clearly outline how these agencies will interact with each other.

*Response – Agreed.*

*The respective roles of the Department of Land and Property Services, the Land Development Agency and the ACT Planning and Land Authority are clearly defined in relation to project facilitation.*

7.59 The Committee recommends that, as part of the establishment of the Department of Land and Property Services and the creation of an ACT Planning Strategy, the Government critically examine the current roles played by agencies in strategic planning in the ACT with a view to establishing a sustainable strategic planning framework.

*Response (part) – Agreed in part.*

*As stated in response to Recommendation 15, the ACT has a Planning Strategy.*


*In establishing the Department of Land and Property Services, the Government has examined the roles played by the respective agencies in strategic planning in the ACT and for the purposes of strategic land use planning, which includes the review and monitoring of the planning strategy. This function remains with the ACT Planning and Land Authority.*

**CABINET IN CONFIDENCE**

**RECOMMENDATION**

That you

1. write to the Minister for Land and Property Services about the issues I have raised along the lines contained in the draft attached; and
2. consider the option of calling in the development application under the Planning and Development Act.



Neil Savery  
Chief Planning Executive

17 May 2010

**AGREED/NOT AGREED/NOTED/PLEASE DISCUSS**

Andrew Barr MLA  
Minister for Planning