

# **ACT Auditor-General's Office**

## **Performance Audit Report**

### **Single Dwelling Development Assessments**

**Environment and Sustainable Development Directorate**

**May 2014**





ACT AUDITOR-GENERAL'S OFFICE



PA 13/17

Mrs Vicki Dunne  
The Speaker  
ACT Legislative Assembly  
Civic Square, London Circuit  
CANBERRA ACT 2601

Dear Mrs Dunne

I am pleased to forward to you a Performance Audit Report titled **Single Dwelling Development Assessments** for tabling in the Legislative Assembly pursuant to Subsection 17(5) of the *Auditor-General Act 1996*.

Yours sincerely

Dr Maxine Cooper  
Auditor-General  
26 May 2014



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# 1. REPORT SUMMARY AND CONCLUSIONS

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## INTRODUCTION

- 1.1 This report presents the results of a performance audit that examined single dwelling developments which were subjected to Development Application exemption and/or Development Application assessment processes in the ACT.
- 1.2 The Environment and Sustainable Development Directorate (the Directorate) administers the ACT's planning system. The planning system, particularly residential development assessment, building regulation, and construction occupation licensing has been the subject of much community debate.
- 1.3 In 2013, concerns were expressed publicly about the probity of the planning system. On this basis, a referral was made to the Auditor-General from the then Head of Service stating:
- [A senior Public Servant] has contacted me about public comments concerning the development approval of his home in Deakin.
- Major newspaper articles and online comments have surrounded the development of his home. Whilst neighbourhood disputes about redevelopments are not uncommon the anonymous statements ... about the planning approval of the home on Riotact is a matter that gives me concern.
- ... Firstly it implies that somehow an initial approval was obtained by influence and secondly that the approval processes of ACTPLA [the ACT Planning and Land Authority in the Environment and Sustainable Development Directorate] are open to be influenced.
- I believe that such accusations cannot be allowed to remain unaddressed.
- I am referring this matter to you for consideration.
- 1.4 The Head of Service's referral included a letter, from the senior Public Servant involved in this case, that stated:
- I confirm my request that the Auditor-General be invited to consider this matter.
- 1.5 The referral was accepted and is Case Study 1 in this performance audit.
- 1.6 The Audit Office's proposed performance audit program for 2013–14 included an audit on Development Application exemption and Development Application assessment processes.

## AUDIT OBJECTIVE

- 1.7 The objective of this audit is to provide an independent opinion to the Legislative Assembly on whether the Development Application exemption and Development Application approval processes for single dwelling developments are open to improper influence.
- 1.8 As this audit focused on single dwelling developments, duplexes and high-density residential developments were not considered.

- 1.9 In conducting this audit, the Audit Office engaged an expert, Purdon Associates, to provide independent assessment of development case studies and technical advice.
- 1.10 Appendix A presents the audit criteria, approach and method.

### AUDIT CONCLUSIONS

- 1.11 The conclusions against the audit objectives are set out below.

There was no evidence of improper influence being exerted on, or by, the Environment and Sustainable Development Directorate's assessing officers, for the seven case studies examined as part of this audit. Nevertheless, the safeguards for mitigating improper influence in the Development Application exemption and Development Application Merit Track assessment processes for single dwellings need to be strengthened in accordance with the recommendations made. An important safeguard missing is the Directorate's auditing of the fundamental decision made by a certifier on whether or not to exempt a development. Safeguards are important as the ACT's complex planning framework and discretionary decision-making powers provide the opportunity for improper influence to occur.

#### Case Studies (Chapter 3)

The developments that attracted community concerns, which were reported in the media (Case Studies 1 and 2), were approved by the Directorate with this decision being confirmed by the expert. There was no evidence of improper influence in the Development Application assessment process for the application lodged by a senior Public Servant, which was referred by the then Head of Service to the Auditor-General to consider probity issues (Case Study 1).

However, transparency, which is a safeguard against improper influence, was lacking in most case studies due to insufficient assessment documentation. Nonetheless, assurance is provided in that assessment officers signed statements that they had not been the subject of improper influence, and did not know of any improper influence occurring in any of the seven case studies.

Two developments (Case Studies 5 and 6) which were approved by the Directorate, but would have been refused by the audit planning expert, were not subjected to peer reviews. These two developments however, were not the subject of community concern reported in the media.

Issues relating to certifiers were identified in four of the case studies reviewed (Case Studies 1, 2, 4 and 7). In three of these cases, the certifier was (or is currently being) investigated, with varying levels of disciplinary action taken by the Directorate.

#### Certification (Chapter 4)

Inadequacies were identified in the Directorate's safeguards to monitor the decisions of certifiers and mitigate the risk of improper influence. Importantly, there is no auditing undertaken of the fundamental decision made by a certifier on whether or not to exempt a development and therefore undertake the assessment themselves, rather than

inform a homeowner that the development should be subjected to the Directorate's Development Application process. The need for these audits is highlighted in that certifiers incorrectly assessed developments as exempt in two case studies (Case Studies 1 and 7). Other inadequacies, which need to be addressed relate to certifiers' training, Directorate communication with certifiers, insufficient public material explicitly on exemption and certification, and the need to undertake targeted audits on a range of certifier compliance issues.

As the penalties for certifiers are small, these need to be reviewed to encourage compliance with relevant legislation and provide a disincentive to improper influence. An additional disincentive would be publicly reporting the demerit points of certifiers.

#### **Development Applications (Chapter 5)**

There is inadequate documentation of the assessments made by Directorate assessing officers and peer reviews are not always undertaken for developments assessed under the Development Application Merit Track process.

Furthermore, the standard wording of the 'Controlled Activity' notification letter sent to homeowners is unnecessarily confronting; this needs to be changed as the issue that triggered it may be due to issues outside of a homeowner's control.

### **KEY FINDINGS**

1.12 The audit conclusions are supported by the following findings:

#### **Case Studies (Chapter 3)**

- All seven case studies received development approval, with varying levels of conditions applied to the approval (paragraph 3.2).
- In consideration of the Directorate's Development Application decisions, all of the case studies showed (paragraph 3.31):
  - assessment decisions were made in accordance with the relevant decision-making delegations;
  - the person who assessed the Development Application also signed off the Notice of Decision, unless it was referred to the Decision Assurance Panel in accordance with Directorate policy. The Chair of the Decision Assurance Panel signed off the Notice of Decision for two cases; and
  - each of the officers who accessed the Development Application file had a reasonable and defensible reason to do so.
- While the Directorate approved the Development Applications for the seven case studies, the expert's assessment is that two (Case Studies 5 and 6) should have been refused. These were not the subject of community commentary (paragraph 3.21).

- In Case Studies 5 and 6, the expert's assessment did not support the Directorate's decision to conditionally approve the development as (paragraph 3.22):
  - In Case Study 5, the expert identified non-compliance issues relating to the number of storeys in the development (due to a loft), and matters relating to landscaping. Given the existing approval of the loft development (and therefore non-consideration of this matter in the Directorate's 2013 Development Application assessment), the expert indicated they understood the Directorate's rationale for the decision. However, while understanding the situation, the expert still would not have granted approval.
  - In Case Study 6, the independent expert identified non-compliance issues with respect to the plot ratio, the building's set back from the block's boundaries and private open space. Given that an error was made in the initial plot ratio assessment, the expert indicated they understood the Directorate's rationale for the decision. While this is the case, the expert would not have approved the development.
- In three cases (Case Studies 1, 2 and 4), the Directorate considered (or is considering) whether or not it should take disciplinary action against the relevant certifier (paragraph 3.27)
- In five of the seven case studies, the Development Application assessment included Directorate commentary against 25 per cent, or less, of the rules under the relevant codes. Additionally, in two case studies the Directorate's documentation did not record any assessment against five rules (three instances in Case Study 5 and two instances in Case Study 6) for which the independent expert found non-compliance (paragraph 3.35).
- All assessing officers who undertook the Development Application assessment, and signed the Notice of Decision, signed statements that they had not been the subject of improper influence and did not know of any improper influence occurring in any other cases (paragraph 3.50).

### Certification (Chapter 4)

- An April 2013 transcript from an ACT Civil and Administrative Tribunal hearing identified an instance where a certifier had agreed to 'cut corners' to resolve a building matter for an owner and builder (paragraph 4.4).
- A senior Directorate officer indicated there are certain relationships between builders and certifiers that are potentially improper. This view was reiterated by three of the four Directorate building inspectors interviewed (paragraph 4.5).
- The Environment and Sustainable Development Directorate has identified a group of four certifiers that require additional management and are being monitored due to either the number of demerit points they have incurred, or the significance of the non-compliance in their particular cases (paragraph 4.7).

- The audit identified weaknesses in the Directorate's mitigation measures to address the risk of improper influence. Addressing weaknesses in the following key areas may reduce the potential for improper influence or errors in the certification process (paragraph 4.15):
  - fostering the training of certifiers;
  - better communication with certifiers;
  - increasing the community awareness of the role of certifiers; and
  - improving its regulatory activities of auditing, complaints management, investigations and the monitoring of investigations.
- While 10 per cent of Development Application exemptions are audited, the audits do not examine the fundamentally important question of whether or not the development should have been certified as exempt in the first place (paragraph 4.47).
- The Directorate has advised that audits of certifiers' activities will now be routinely targeted towards specific issues the Directorate identifies as problems in the industry. This will allow for targeted follow-up audits on specific certifiers who have been non-compliant (paragraph 4.51).
- Monitoring of investigations in response to complaints and their results is inadequate, and is not guided by a formal system which includes comprehensive policies and procedures (paragraph 4.68).
- When compared to other jurisdictions' approaches, the ACT's penalties for improperly influencing the planning system are small and may not deter offences (paragraph 4.77). For example:
  - the current maximum financial penalty for a certifier's non-compliance offence under the *Building Act 2004* is 60 penalty units, which equates to \$8,400 (paragraph 4.73); and
  - there is no publicly available information regarding certifiers who have incurred demerit points or fines (paragraph 4.78).

### **Development Applications (Chapter 5)**

- The complexities and discretionary nature of aspects of the ACT's planning system results in uncertainty and thereby creates a risk that improper influence may occur (paragraph 5.16).
- A number of the Directorate's operating procedures for Development Application assessments do not contain an identified review date, and do not appear to reflect current work practices (paragraph 5.17).
- There was no evidence that there was any peer review undertaken of the Development Application assessments for over half of the seven case studies (paragraph 5.27).

- Developments that attract a significant number of representations, 10 or more, are considered at a higher level: the Major Project Review Group (paragraph 5.44).
- Records of the basis for assessment decisions were not complete, as not all factors considered were documented (paragraph 5.58).
- Information retained on the Case Study files lacked sufficient detail to easily understand why certain elements of a development complied with a rule (paragraph 5.58). The expert advised improving documentation to address this matter 'would not be an onerous task' as it 'does not add to the assessment process, it simply requires the conclusions made by the assessing officer to be reported' (paragraph 5.63).
- There is a low risk that electronic Development Application files could be accessed or altered inappropriately (paragraph 5.67).
- Although the eDevelopment system, with its standardised documentation requirements, has resulted in improvements in the quality of entry material; there are still inadequacies in the quality of Development Application material submitted (paragraph 5.73).
- Guidance for Development Applications is inadequate for those applicants seeking development approval for work already undertaken as a certified exempt development (paragraph 5.82). Furthermore, communication with some homeowners/applicants in these cases is poor (paragraph 5.83).
- The 'Controlled Activity' notification letter is confronting (paragraph 5.86).
- The implementation of the 2011 Risk Management Plan has been staged, with an initial pilot of the branch-specific risk registers conducted in the Corporate Branch. The Directorate-wide implementation of branch-specific risk registers was not endorsed by the Executive Management Board until 19 June 2013. As a result, implementation has been slow (paragraph 5.118).
- There is no mention in the Directorate's Risk Management Plan of the risk of improper influence on Development Application assessment officers. Given the importance of such a risk, it needs to be explicitly considered (paragraph 5.115).

## RECOMMENDATIONS

- 1.13 Fourteen recommendations are made to address the audit findings in this report. High priority should be given to the implementation of recommendations seven and twelve, or parts thereof.
- 1.14 In accordance with Section 18 of the *Auditor-General Act 1996*, a final draft of this report was provided to the Director-General of the Environment and Sustainable Development Directorate for consideration and comment. The Director-General's response is as follows.

... the Environment and Sustainable Development Directorate has reviewed the proposed report and has not identified any factual errors that require correction.

1.15 The Audit Office recommendations are shown on the following pages.

**Recommendation 1 (Chapter 3)**

The Environment and Sustainable Development Directorate should modify its eDevelopment application form so that applicants indicate if their development has been assessed under the Development Application exemption process.

**Recommendation 2 (Chapter 3)**

The Environment and Sustainable Development Directorate should improve its ability to meet statutory timeframes by not accepting the lodgement of a Development Application whose material is unsuitable for conducting an assessment.

**Recommendation 3 (Chapter 3)**

The Environment and Sustainable Development Directorate should implement a process for assessing officers to communicate breaches of legislation to the Investigations Team for investigation.

**Recommendation 4 (Chapter 4)**

The Environment and Sustainable Development Directorate should identify and promote ways to improve the training of certifiers, particularly when changes occur in planning legislation and building codes, as now allowed for under Section 104B(1) of the *Construction Occupations (Licensing) Act 2004*.

**Recommendation 5 (Chapter 4)**

The Environment and Sustainable Development Directorate should require building surveyors and works assessors (certifiers) to submit a minimum level of documentation, such as a checklist, in relation to Development Application exemption assessments.

**Recommendation 6 (Chapter 4)**

The Environment and Sustainable Development Directorate should improve its publicly available information on certifiers and the Development Application exemption assessment process by:

- a) including on its website, information that explicitly defines the role and responsibilities of a certifier and states when a homeowner needs to engage a certifier; and
- b) providing certifiers with standard information to be included on their websites defining the role of certifiers.

**Recommendation 7 (Chapter 4) High Priority**

The Environment and Sustainable Development Directorate should improve its auditing of Development Application exemption assessments by:

- a) continuing to develop and implement a system for targeting audits; and
- b) including audits to determine if a certifier's decision to assess a development as exempt is correct.

**Recommendation 8 (Chapter 4)**

The Environment and Sustainable Development Directorate should assess the effectiveness of its new enforcement policy for managing complaints to determine if it has reduced the Directorate's workload. The Minister should be consulted to determine whether complaints made to him should also be subjected to the enforcement policy.

**Recommendation 9 (Chapter 4)**

The Environment and Sustainable Development Directorate should develop an investigations monitoring system, which is guided by policies and procedures, and includes a regular review of the progress and results of investigations and complaints.

**Recommendation 10 (Chapter 4)**

The Environment and Sustainable Development Directorate should review and report to the Minister on the merits of:

- a) increasing penalties for a certifier's non-compliance with relevant Acts and codes; and
- b) publicly reporting the demerit points of certifiers.

**Recommendation 11 (Chapter 5)**

The Environment and Sustainable Development Directorate should develop and implement a peer review quality control process for Development Application Merit Track assessments to help achieve correct decisions.

**Recommendation 12 (Chapter 5) High Priority**

The Environment and Sustainable Development Directorate should improve the transparency of its decision-making, by requiring that assessing officers document their considerations against key mandatory rules that a single dwelling Development Application is assessed against.

**Recommendation 13 (Chapter 5)**

The Environment and Sustainable Development Directorate should redesign their 'Controlled Activity' notification letter, which advises of a breach of the *Planning and Development Act 2007*, so that it is customer focused and acknowledges preceding events.

**Recommendation 14 (Chapter 5)**

The Environment and Sustainable Development Directorate should include risks relating to improper influence as part of its current review of its Risk Management Plan, and develop a timetable to expedite implementation of this plan.

## 2. BACKGROUND

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- 2.1 This chapter presents background information on the planning framework for single dwelling Development Application exemptions and assessments.
- 2.2 Seven case studies of single dwelling developments are discussed in Chapter 3.

### SINGLE DWELLING DEVELOPMENT – THE JOURNEY OF A HOMEOWNER

- 2.3 Understanding the ACT's processes for Development Application exemption and Development Application assessments, for single dwelling developments, can be challenging given the complexities of the planning system.
- 2.4 Table 2.1 provides a simplified overview of the journey of a homeowner who wishes to construct a single dwelling development which can be the subject of a:
- Development Application exemption assessment undertaken by a certifier; or/and
  - Development Application assessment undertaken by an assessing officer in the Government's Environment and Sustainable Development Directorate.

**Table 2.1 Single dwelling developments approval processes – the journey of a homeowner**

Step 1	Decision on whether to use the Development Application exemption or Development Application assessment process
<ul style="list-style-type: none"><li>•</li><li>•</li><li>•</li></ul>	<p>A homeowner is likely to engage a qualified builder or architect to develop the initial plans for a single dwelling house. Builders or architects are usually the initial point of contact for a homeowner to be informed of planning requirements and how these might affect their plans.</p> <p>A homeowner is likely to engage a certifier to determine if they should have their plans considered under a Development Application exemption or Development Application assessment process. However, a homeowner may lodge a Development Application if they know that their proposal is not compliant with the Territory Plan and supporting codes, refer to Step 2. This latter process generally involves more time than the former and involves formal consultation with neighbours.</p> <p>The certifier will assess the proposed development for compliance against the requirements of the Territory Plan and supporting codes. If it:</p> <ul style="list-style-type: none"><li>• complies, the homeowner can construct their dwelling, pending building approval, without needing to lodge a Development Application.</li><li>• does not comply, or the certifier is uncertain of compliance, a Development Application needs to be lodged by the homeowner, refer to Step 2.</li><li>• does not initially meet all planning rule requirements, i.e. there is a minor non-compliance issue, the Directorate may issue an exemption declaration for certain developments.</li></ul>

<b>Step 2 Development Application</b>	
<b>Lodgement and Assessment</b>	
<ul style="list-style-type: none"> <li>• A homeowner lodges a Development Application for a single dwelling development with the Environment and Sustainable Development Directorate for assessment under its Merit Track process. The Development Application will include plans of the proposed development.</li> <li>• The Development Application requires that a homeowner indicate where the proposed plans deviate from the Territory Plan and supporting codes.</li> <li>• The Environment and Sustainable Development Directorate assesses the proposed development against the Territory Plan and supporting codes. Part of this assessment process includes consultation with neighbours adjacent to the site of the proposed development.</li> <li>• The Environment and Sustainable Development Directorate can require a homeowner to amend their plans (for instance by reducing or increasing particular spaces) or it can impose conditions (such as applying screening).</li> </ul>	
<b>Development Assessment Decision</b>	
<ul style="list-style-type: none"> <li>• A Development Assessment decision will result in a Development Application being: <ul style="list-style-type: none"> <li>• approved, with or without conditions (if this occurs the homeowner can construct their dwelling, pending building approval); or</li> <li>• refused, in which case a homeowner can seek reconsideration of the Development Application assessment decision by: <ul style="list-style-type: none"> <li>▪ applying to the Environment and Sustainable Development Directorate for a review. The reconsideration will be undertaken by a senior officer who will conduct an independent assessment; or/and</li> <li>▪ lodging an appeal with the ACT Civil and Administrative Tribunal.</li> </ul> </li> </ul> </li> </ul>	
<b>Appeals and complaints by third parties (e.g. neighbours to a development)</b>	
<ul style="list-style-type: none"> <li>• Third parties are unable to lodge an appeal with the ACT Civil and Administrative Tribunal. However, they can lodge a complaint with the Environment and Sustainable Development Directorate if they feel that a Development Application exemption should not have been granted, or building works are not compliant with the conditions of the Development Application approval or the legislative requirements in the <i>Planning and Development Act 2007</i> or the <i>Building Act 2004</i> are not being met.</li> </ul>	

Source: ACT Audit Office analysis of the Environment and Sustainable Development Directorate Development Application process

## PLANNING CONTEXT

### Land use

- 2.5 In assessing a single dwelling development an important and basic consideration is whether the proposed development complies with land use requirements under the Territory Plan.
- 2.6 In the ACT, land is sub-divided into sections and blocks and is zoned for particular uses. There are 23 zones in the ACT's Territory Plan, including residential, commercial, industrial, community facility, parks and recreation, transport and services, and non-urban zones. Planning controls for each zone are in the Territory Plan and its supporting codes.

- 2.7 Single dwelling development is permitted in residential zones, being:
- RZ1 – suburban low-density zone;
  - RZ2 – suburban core zone, close to facilities and services in commercial centres;
  - RZ3 – urban medium-density zone in areas that have good access to facilities and services and/or frequent public transport services;
  - RZ4 – medium-density zone; or
  - RZ5 – high-density zone.
- 2.8 Six of the seven case studies presented in Chapter 3 are located in RZ1 with one case study being in RZ4. Some of the case studies are new developments while others are redevelopments.

### Planning codes

- 2.9 As mentioned in the Audit Office's 2012 audit of the Development Application and Approval System for High Density Residential and Commercial Developments:

The legislative framework which underpins the development application and approval system in the ACT consists primarily of the *Planning and Development Act 2007* (the Act), the Territory's planning legislation, and the *Planning and Development Regulations 2008* (the Regulations), which supports the legislation ...

Accompanying the Act and the Regulations is the *Territory Plan*, the key statutory planning document in the ACT which provides the policy framework for the administration of planning in the Territory.

- 2.10 The *Planning and Development Act 2007* and Regulations, as well as the Territory Plan, are supported by a suite of codes that provide information on planning, design and controls. Planning codes applicable to residential development include:
- precinct codes – these relate to individual suburbs or districts and contain planning provisions for specified blocks or areas;
  - development codes – these relate to planning zones, for example, the Residential Zones Development Code. The Residential Zones Development Code is supported by two development codes that specify detailed planning provisions for different development types. These are the Single Dwelling Housing Development Code which is of relevance to this audit, and the Multi Unit Housing Development Code; and
  - general codes – these relate to matters of community interest such as parking, access and mobility, crime prevention, bushfire risk management, waterways and boundary fences.
- 2.11 Additionally, the ACT's lease system can impose development conditions on particular blocks of land.

2.12 When more than one type of code applies to a development and there is inconsistency between provisions:

... the order of precedence is: precinct code, development code, and general code.<sup>1</sup>

2.13 Each code:

... has a number of elements. Each element has one or more rules, and each rule has an associated criterion (unless the rule is mandatory). Rules provide quantitative, or definitive, controls. By contrast, criteria are chiefly qualitative in nature.

In some instances rules are mandatory. Such rules are accompanied by the words “This is a mandatory requirement. There is no applicable criterion.” Non-compliance with a mandatory rule will result in ... refusal of the development ... Conversely, the words “There is no applicable rule” is found where a criterion only is applicable.<sup>2</sup>

2.14 The use of qualitative codes and rules, some of which are not mandatory, provides the ability for assessing officers to use discretion when assessing single dwelling Development Applications under the track system. While this may have advantages in terms of flexibility, when coupled with the overall complexity of the ACT’s planning framework, it can increase the already complicated nature of assessments.

2.15 All Australian jurisdictions operate, to varying degrees, in a complex planning environment. A 2011 national report on Planning, Zoning and Development Assessments by the Productivity Commission stated that:

Planning systems vary greatly across the states and territories — but all suffer from ‘objectives overload’ which has been increasing.<sup>3</sup>

2.16 The report went on to further state that:

Over the last 20 years, the number of objectives within the planning system, and thus its complexity, has been continually expanding.<sup>4</sup>

### **Developments assessed under Development Application exemption and Development Application assessment process**

2.17 Single dwelling developments can be constructed following a Development Application exemption or Development Application assessment process. Regardless of which process is used, developments also need to have building approval.

2.18 Certifiers have an important role in the ACT’s planning system. In 2012-13, 68.4 per cent (2,588 developments) of single dwelling developments were progressed via the certifiers’ Development Application exemption process. The

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<sup>1</sup> Residential Zones Development Code, 17 January 2014, available at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)

<sup>2</sup> Ibid

<sup>3</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, April 2011, page xviii

<sup>4</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, April 2011, page 1

Environment and Sustainable Development Directorate considered 622 (16.4 per cent) of single dwelling developments through its merit assessment process for Development Applications (refer to Table 2.2).

- 2.19 A further 576 developments (15.2 per cent) were considered in the Directorate’s exempt declaration process; these developments still required certifier involvement.

**Table 2.2 Developments assessed by Certifiers versus the Environment and Sustainable Development Directorate in 2012-13**

Assessment type		Number of assessments	Proportion of developments
Development Application exemption assessment		2,588	68.4 per cent
Environment and Sustainable Development Directorate assessment	Exemption declaration assessment <sup>5</sup>	576	15.2 per cent <sup>6</sup>
	Development Application assessment	622	16.4 per cent

Source: Environment and Sustainable Development Directorate

- 2.20 Certifiers are licensed by the Construction Occupations Registrar. Certifiers are subject to a regulatory framework under the *Construction Occupations (Licensing) Act 2004* (and supporting Regulation) administered by the Registrar, including a demerit point system and disciplinary action provisions. A licence can be cancelled, suspended or conditioned to restrict the activities that can be undertaken by the certifier.

**Development approval**

- 2.21 Development approval can be granted by the Environment and Sustainable Development Directorate after assessment of a Development Application.

- 2.22 Development Applications are categorised and assessed through different ‘tracks’ depending on the location, scale and nature of the development. These tracks are:

- Code Track – for simple developments that are nevertheless in need of a formal assessment. Due to changes in planning laws, very few applications now fall into this track as development approval is no longer required for new dwellings or additions and alterations to existing dwellings following introduction of development approval exemptions (refer to paragraph 2.29).

<sup>5</sup> The Directorate exemption declaration procedure only considers select components of a development where there are minor deviations from planning rules, it does not consider every aspect of the development. For these developments, the certifier is still responsible for certifying that the total development is compliant with relevant planning rules.

<sup>6</sup> As these Directorate exemption declarations were not the subject of community concern, they were not considered in detail by the Audit Office.

- Merit Track – for most non-exempt development proposals assessed by the Directorate including, but not limited to, high-density residential and commercial developments. Merit Track development proposals are assessed using the rules and criteria in the code/s that apply to the proposals, and in some cases can deviate from criteria.
  - Impact Track – for large-scale developments such as estate developments, major roads, dams or transportation corridors. Impact Track development proposals are assessed using the rules and criteria in the code that apply to the proposals, relevant environmental impact statements and the Government’s strategic directions.
- 2.23 The seven case studies presented in Chapter 3 have all been through the Development Application Merit Track process.
- 2.24 In addition to issuing decisions using the three track processes mentioned in paragraph 2.22, the Directorate may issue an exemption declaration for certain developments that do not initially meet all planning rule requirements. These may be used if there is a minor non-compliance issue with rules relating to:
- ... the setback, building envelope and/or area of private open space.<sup>7</sup>
- 2.25 Development Applications are lodged via an electronic ‘eDevelopment’ system, often by builders or architects on behalf of an owner. Following lodgement of the application the Directorate conducts a preliminary review of the application’s completeness and ability to be assessed.
- 2.26 Following this, the Directorate then issues a notice regarding the payment of fees. Upon receipt of fees, the application is considered to be lodged, and the Directorate:
- consults relevant parties, including members of the community (such as neighbours) and third-party entities (such as the Conservator of Flora and Fauna, Territory and Municipal Service Directorate, ActewAGL);
  - assesses the application against relevant codes, and considers formal community representations and third-party entity comments;
  - where relevant, seeks advice from the applicant on how he or she will address issues that emerge from community representations, third-party entity comments, and code requirements;
  - issues a Notice of Decision via a letter to the applicant, with a copy to any community member who provided a comment; then
  - physically stamps the development plans to demonstrate the Directorate’s approval of the development. Where conditional approval has been granted in the Notice of Decision, the applicant must demonstrate how he or she will address any imposed conditions before plans are stamped.

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<sup>7</sup>Environment and Sustainable Development Directorate 2012-13 Annual Report, available at [www.environment.act.gov.au](http://www.environment.act.gov.au)

### **Development Application exemption**

- 2.27 Small scale developments may be exempt from needing development approval. These include: carports; fences and freestanding walls; demolition; garages; landscape gardening; pool fencing and barriers; rainwater tanks; and swimming pools. A single dwelling development may also be exempt.
- 2.28 The Environment and Sustainable Development Directorate's website states:  
Development approval is not required for new houses and additions and alterations if they comply with rules set out in the *Planning and Development Regulations 2008*.
- 2.29 To be exempt from the requirement to lodge a Development Application, a lessee (generally the home owner) engages a Government-registered certifier to assess the development, at the design stage, against relevant rules and codes.
- 2.30 Private building certification was introduced in the ACT in 1999. In 2008 the *Planning and Development Act 2007* significantly expanded the role of certifiers beyond just building works certification to also include Development Application exemption assessments of proposed developments.
- 2.31 The aim of private certification is to provide a flexible and responsive service to the community. The previous system of having Government certifiers resulted in significant delays for homeowners wishing to undertake residential construction in the ACT.

### **ROLES AND RESPONSIBILITIES OF CERTIFIERS**

- 2.32 Under Section 138B of the *Planning and Development Act 2007*, a person may apply, in writing, to a certifier for an assessment of whether a development is an exempt development. An exempt development may be undertaken without the need to submit a Development Application to obtain development approval.
- 2.33 Certifiers' powers are provided under the *Construction Occupations (Licensing) Act 2004*.
- 2.34 There are two kinds of certifiers in the ACT:
- building surveyors who, under Section 9 of the *Construction Occupations (Licensing) Act 2004*, are primarily tasked with the certification of building works and exemption assessments (the fundamental role of the building surveyor is to ensure that buildings are safe, accessible and energy efficient); and
  - works assessors who, under Section 14 of the *Construction Occupations (Licensing) Act 2004*, are tasked primarily with the role of undertaking exemption assessments, but also provide a unit title assessment report under the *Unit Titles Act 2001*.

- 2.35 Building surveyors and works assessors are appointed by the lessee of the land where building work is to be undertaken (generally the home owner); it is at this time that they become 'certifiers'.
- 2.36 Under the *Building Act 2004*, builders cannot appoint a certifier,<sup>8</sup> nor can a certifier perform their duties if they have a stake in the work to be considered for the works assessment service.
- 2.37 Information that is publicly available through the Directorate's and certifiers' business websites largely focuses the role of certifiers in conducting inspections and granting certificates of occupancy. However, building certifiers in the ACT primarily have a regulatory role and are required to ensure that assessments and building works comply with relevant Acts, building codes and minimum building standards.
- 2.38 While the certifier is paid by the lessee, the certifier's obligations are ultimately to the Construction Occupations Registrar. As a statutory officer operating in the Environment and Sustainable Development Directorate, the Registrar:
- oversees the administration of the *Construction Occupations (Licensing) Act 2004* and its operational Acts;
  - regulates the building industry;
  - audits the work of construction occupations;
  - investigates complaints against, and disciplines, construction occupation professionals; and
  - oversees inspection of building, electrical, plumbing, drainage and gas-fitting work.
- 2.39 As at 26 February 2014, there were 87 building surveyor licences but only three active work assessor licences in the ACT; only one of which had the ability to undertake exemption assessments. The majority of exemption assessments are conducted by building surveyors. Licences are issued for a period of 12 months, and may be issued to both individuals and businesses.

### Role of certifiers in exemption assessments

- 2.40 Outsourcing of certification of single dwellings to the private sector can provide efficiencies for Government and the community, but can give rise to concerns over probity. This audit examined whether an environment exists where certifiers may not be complying with legislation in order to meet the needs or wants of owners and builders for exemption from development approvals.

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<sup>8</sup> Unless the builder is also the lessee of the land, and is effectively an "owner builder".

- 2.41 Certifiers may be engaged to assess whether a development is exempt from development approval, but only building surveyors are responsible for issuing approvals for building work and ensuring that building plans and work are completed in accordance with building legislation and the Building Code of Australia. Both roles are undertaken on behalf of the Government. The Building Code contains technical provisions for the design and construction of buildings and other structures, covering such matters as structure, fire resistance, access and egress, services and equipment, and energy efficiency as well as certain aspects of health and amenity.

### Role of Certifier after exemption assessment

- 2.42 In addition to assessing development exemptions, certifiers also have a role in a range of building approval tasks. Building work can only commence without development approval if a certifier has assessed that a development is exempt through complying with all Territory Plan requirements and supporting codes.
- 2.43 Following the issuing of a building approval notice by a certifier, a notice advising of the commencement of building activity is provided to the Environment and Sustainable Development Directorate.
- 2.44 Certifiers have a continuing role throughout the construction of a building as they consider the development at key milestones. The Directorate's website advises:

During construction, your building certifier makes inspections at the completion of each of the following stages:

- completion of excavation, placement of formwork and placement of steel reinforcing for the footings before any concrete for the footings is poured;
- completion of the structural framework and, for a class 1 or class 10 building (for example, a house and garage), before the placement of any internal lining;
- for a class 1 or 10 building (for example, a house and garage), completion of placement of formwork, and placement of steel reinforcing, for any reinforced concrete member before any concrete for the member is poured;
- for a building other than a class 1 or class 10 building, completion of any reinforced concrete member before any concrete for the member is poured, stated by the building certifier in the relevant building approval; and
- completion of the building work approved in the relevant building approval.

An extra inspection will be made during construction for two-storey homes before the second-storey slab is poured.

- 2.45 After completion of the building work, the certifier will issue a Certificate of Completion to the Directorate, along with a suite of supporting evidentiary documents such as surveyor reports and information relating to electrical and plumbing work. This Certificate of Completion indicates that the building work has been finalised in accordance with approved plans.

- 2.46 If the certifier has declared that the building work and any associated electrical and plumbing work has been completed, an application for a Certificate of Occupancy and Use can be submitted by the homeowner to the Directorate.
- 2.47 Throughout this process, the Directorate retains records of the certifier's building approval, commencement notice and certification of completion of building works. On the basis of acceptable evidentiary documents supporting the Certificate of Completion, the Directorate issues a Certificate of Occupancy and Use.
- 2.48 In some cases, Directorate investigations of complaints about an exempt development have found that the original certification was incorrect, as occurred in Case Studies 1 and 2 discussed in Chapter 3. In these cases, a letter is sent to the building owner (rather than the certifier) advising of a:
- ... breach of the *Planning and Development Act 2007* ... [by] having a Building that was constructed without approval required by the Act, Chapter 7 (Development approval)
- 2.49 When this occurs the homeowner is required to submit a Development Application. The financial and psychological costs of this can be great, especially if significant further work is required.

### Certification in other jurisdictions

- 2.50 All Australian jurisdictions have some form of private certification. Outsourcing the assessment of single dwellings (that are compliant to a predefined set of rules) to certifiers is common practice in Victoria, Queensland and New South Wales. New South Wales targets outsourcing of 80 per cent of non-Merit Track assessments. Approximately 68 per cent are assessed by certifiers in the ACT (refer to Table 2.2).
- 2.51 In New South Wales certifiers assess complying developments. Complying development is a combined planning and construction approval for development that meets pre-determined development standards. Exempt developments are assessed by the owners, who are strongly advised to seek professional advice.
- 2.52 In Queensland certifiers issue building approvals for anything other than the equivalent of Class 10 buildings.<sup>9</sup> There is no need for development approval unless there is an environmental or social impact from the development.
- 2.53 In Victoria, approval for construction, extensions or alterations to single housing dwellings are generally only subject to gaining a building permit. Certifiers are responsible for issuing these.

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<sup>9</sup> For example, carports, sheds and pergolas.



### 3. CASE STUDIES

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- 3.1 This chapter examines seven single dwelling development cases which have been the subject of the Development Application exemption and/or Development Application assessment processes, discussed in Chapter 2.
- 3.2 In these cases, construction occurred prior to Development Application approval being sought. The case studies are developments for which a Development Application was lodged between July 2011 and June 2013. All seven cases received development approval with conditions.

#### Conclusion

The developments that attracted community concerns, which were reported in the media (Case Studies 1 and 2), were approved by the Directorate with this decision being confirmed by the expert. There was no evidence of improper influence in the Development Application assessment process for the application lodged by a senior Public Servant, which was referred by the then Head of Service to the Auditor-General to consider probity issues (Case Study 1).

However, transparency, which is a safeguard against improper influence, was lacking in most case studies due to insufficient assessment documentation. Nonetheless, assurance is provided in that assessment officers signed statements that they had not been the subject of improper influence, and did not know of any improper influence occurring in any of the seven case studies.

Two developments (Case Studies 5 and 6) which were approved by the Directorate, but would have been refused by the audit planning expert, were not subjected to peer reviews. These two developments however, were not the subject of community concern reported in the media.

Issues relating to certifiers were identified in four of the case studies reviewed (Case Studies 1, 2, 4 and 7). In three of these cases, the certifier was (or is currently being) investigated, with varying levels of disciplinary action taken by the Directorate.

#### Key findings

- All seven case studies received development approval, with varying levels of conditions applied to the approval (paragraph 3.2).
- In consideration of the Directorate's Development Application decisions, all of the case studies showed (paragraph 3.31):
  - assessment decisions were made in accordance with the relevant decision-making delegations;
  - the person who assessed the Development Application also signed off the Notice of Decision unless it was referred to the Decision Assurance Panel in accordance with Directorate policy. The Chair of the Decision Assurance Panel signed off the Notice of Decision for two cases; and

- each of the officers who accessed the Development Application file had a reasonable and defensible reason to do so.
- While the Directorate approved the Development Applications for the seven case studies, the expert's assessment is that two (Case Studies 5 and 6) should have been refused. These were not the subject of community commentary (paragraph 3.21).
- In Case Studies 5 and 6, the expert's assessment did not support the Directorate's decision to conditionally approve the development as (paragraph 3.22):
  - In Case Study 5, the expert identified non-compliance issues relating to the number of storeys in the development (due to a loft), and matters relating to landscaping. Given the existing approval of the loft development (and therefore non-consideration of this matter in the Directorate's 2013 Development Application assessment), the expert indicated they understood the Directorate's rationale for the decision. However, while understanding the situation, the expert still would not have granted approval.
  - In Case Study 6, the independent expert raised identified non-compliant issues with respect to the plot ratio, and the buildings set back from the block's boundaries and private open space. Given that an error was made in the initial plot ratio assessment, the expert indicated they understood the Directorate's rationale for the decision. While this is the case, the expert would not have approved the development.
- In three cases (Case Studies 1, 2 and 4), the Directorate considered (or is considering) whether or not it should take disciplinary action against the relevant certifier (paragraph 3.27).
- In five of the seven case studies, the Development Application assessment included Directorate commentary against 25 per cent, or less, of the rules under the relevant codes. Additionally, in two case studies the Directorate's documentation did not record any assessment against five rules (three instances in Case Study 5 and two instances in Case Study 6) for which the independent expert found non-compliance (paragraph 3.35).
- All assessing officers who undertook the Development Application assessment, and signed the Notice of Decision, signed statements that they had not been the subject of improper influence and did not know of any improper influence occurring in any other cases (paragraph 3.50).

### Community concerns

3.3 In 2013, concerns were expressed publicly about the probity of the planning system. On this basis, a referral was made to the Auditor-General from the then Head of Service stating:

[A senior Public Servant] has contacted me about public comments concerning the development approval of his home in Deakin.

Major newspaper articles and online comments have surrounded the development of his home. Whilst neighbourhood disputes about redevelopments are not uncommon the anonymous statements about the planning approval of the home on Riotact is a matter that gives me concern.

... Firstly it implies that somehow an initial approval was obtained by influence and secondly that the approval processes of ACTPLA [the ACT Planning and Land Authority in the Environment and Sustainable Development Directorate] are open to be influenced.

I believe that such accusations cannot be allowed to remain unaddressed.

I am referring this matter to you for consideration.

- 3.4 The Head of Service's referral included a letter, from the senior Public Servant involved in this case, that stated:

I confirm my request that the Auditor-General be invited to consider this matter.

- 3.5 The referral was accepted and is Case Study 1 in this performance audit.

- 3.6 Case Study 1 had two main concerns raised by community members. The first was that the Development Application exemption process was flawed. Criticism was levelled at this development being incorrectly certified as Development Application exempt. As outlined in Table 3.1, this development had been completed and a Certificate of Occupancy and Use issued by the Environment and Sustainable Development Directorate when, following complaints, the Directorate found that it should not have been assessed as Development Application exempt. As a result, the Directorate required the owner to lodge a Development Application and go through the standard approval process which includes public notification.

- 3.7 This gave rise to a second concern which was that Development Application approval was granted too easily by planning officials. The community concern expressed in relation to Case Study 1 raised questions about the probity of certifiers and public officials. While no explicit complaint or evidence was provided in relation to a specific incidence of improper influence, the matter was considered in this audit. This was done by considering what safeguards were in place to mitigate the risk of improper influence occurring. Expert advice was also sought from independent planning expert, Purdon Associates (the expert), who examined the seven case study files for reasonableness and evidence of improper influence.

- 3.8 In addition, assessment staff for each of the seven case studies were interviewed about their involvement in the case and whether they had been the subject of improper influence, or had witnessed improper influence in the other case studies.

## Safeguards against improper influence

3.9 The Independent Commission Against Corruption (ICAC) in New South Wales released a report on *Anti-corruption Safeguards in the NSW Planning System* in 2012, which identified key corruption prevention safeguards. These have guided the selection of the safeguards used in this audit to assess management of the risk of improper influence in the Development Application assessment process, either on a case-by-case basis or system-wide analysis. The safeguards considered were:

- certainty in decision-making, including decision-making authority;
- ensuring transparency, including adequate documentation and security of access to information by relevant officers;
- community consultation;
- balancing competing public interests;
- security of access to information by relevant officers;
- reducing complexity;
- third party appeals; and
- risk management.

3.10 Of these safeguards only the first three are considered with respect to the case studies in this chapter. The latter five safeguards relate to the overall Development Application assessment process as a system and are therefore, along with further consideration of the other safeguards, the subject of Chapter 5.

3.11 Electronic files for each of the seven case studies were examined by officers of the Audit Office and the expert. The expert performed an independent Development Application assessment for the seven case studies and, for four cases (Case Studies 1, 5, 6 and 7), specifically examined electronic files to determine if there was any evidence of improper influence. Furthermore, with respect to improper influence, Environment and Sustainable Development Directorate assessing officers involved with the seven cases and those who signed the Notice of Decision were interviewed.

3.12 For the safeguards considered for each of the seven case studies:

- certainty is examined by comparing the Development Application assessment made by the Environment and Sustainable Development Directorate with the expert's assessment. This enables consideration of the reasonableness of the Development Application decisions made by the Directorate;
- transparency is considered by analysing the documentation which supports decisions;

- security of access to information is assessed by considering if only those officers who had a reasonable and defensible reason to access files did so;
- decision-making authority is assessed by considering if the final decision-maker had the appropriate authority; and
- community consultation is considered by assessing if adjoining neighbours of an abutting development were consulted in accordance with the *Planning and Development Act 2007* Division 7.3.4, in particular Section 153 – Public notice to adjoining premises.

### Improper influence

- 3.13 No specific instances of improper influence with respect to the seven case studies had been reported to the Audit Office or the Environment and Sustainable Development Directorate. However, given that this issue was raised publicly with respect to Case Study 1, it was examined by the independent expert for this case as well as for Case Studies 5, 6 and 7. This was done as:
- in Case Studies 5 and 6, the expert would have refused the Development Application whereas these were approved by the Directorate; and
  - for Case Study 7 the expert would have withheld approval until all relevant information had been provided by the applicant.
- 3.14 The expert would have also withheld approval until all relevant information had been provided by the applicant for Case Study 4.
- 3.15 For Case Studies 2 and 3 as the expert's assessment supported the decision made by the Environment and Sustainable Development Directorate; as such, the files for these cases were not examined by the expert for improper influence. However, improper influence was considered with respect to all seven case studies as the assessing officers and those who signed the Notice of Decision were interviewed to determine if they had been subjected to, or knew of, improper influence. Following interviews, each officer signed their statement indicating that they had not been the subject of improper influence and did not know of any improper influence occurring in any other cases.

### Selection of Case Studies

- 3.16 Case Study 1 was referred to the Audit Office, as discussed in paragraph 3.3. Case Study 2 was selected by the Audit Office as it was the also the subject of media commentary. Both these case studies are for entire new dwellings.

- 3.17 The selection of the other five case studies was undertaken through screening the Environment and Sustainable Development Directorate's data. The Directorate identified 90 Development Applications, from July 2011 to June 2013 where a homeowner's Development Application indicated that building had occurred prior to lodgement of the Development Application. In the absence of other identification methods, the Audit Office considered this would include, among other developments, those single dwelling developments which had been built following Development Application exemption and later found to require a Development Application.
- 3.18 In the 90 Development Applications, 16 Development Applications were for development other than single dwellings development; therefore these were excluded. Of the remaining 74 Development Applications only five were for an entire new dwelling.<sup>10</sup>
- 3.19 Case Studies 1 and 2 were not able to be identified using the Directorate's database in this way as the applicants had not indicated on their eDevelopment application form that building work had been undertaken without development approval. As this system relies on self-reported information from applicants, the Directorate is unlikely to be aware of all cases where a Development Application has been lodged where building has been undertaken without Development Application approval. This limits the Directorate's ability to monitor which developments have been subjected to both the Development Application exemption and Development Application assessment process.

### **Recommendation 1**

The Environment and Sustainable Development Directorate should modify its eDevelopment application form so that applicants indicate if their development has been assessed under the Development Application exemption process.

## **CASE STUDIES ASSESSMENT**

### **Expert assessment of Development Applications**

- 3.20 The expert's assessments of the Development Applications highlighted the discretionary nature of the decisions made through the Merit Track process, and the complexity and difficulties assessing officers' experience when applying the relevant development codes to proposed developments. It also highlighted some system issues that are considered in Chapters 4 and 5.

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<sup>10</sup> As opposed to, for example, an extension or the development of a retaining wall or shed.

- 3.21 While the Directorate approved the Development Applications for the seven case studies, the expert's assessment is that two (Case Studies 5 and 6) should have been refused. These two case studies were not ones that were the subject of community commentary. There were two case studies (Case Studies 4 and 7) which the expert would not have approved the Development Application until further supporting information was provided with respect to some non-compliance issues. However, in these cases (Case Studies 4 and 7) the expert considered that he would probably have approved the development as the issues could be resolved. For the two case studies subject to media attention (Case Studies 1 and 2), the expert would have approved the developments.
- 3.22 In Case Studies 5 and 6 the expert's assessment did not support the Directorate's decision to conditionally approve the development as:
- In Case Study 5, the expert identified non-compliance issues relating to the number of storeys in the development (due to a loft), and matters relating to landscaping. Given the existing approval of the loft development (and therefore non-consideration of this matter in the Directorate's 2013 Development Application assessment), the expert indicated they understood the Directorate's rationale for the decision. However, while understanding the situation, the expert still would not have granted approval.
  - In Case Study 6, the independent expert identified non-compliance issues with respect to the plot ratio, the building's set back from the block's boundaries and private open space. Given that an error was made in the initial plot ratio assessment, the expert indicated they understood the Directorate's rationale for the decision. While this is the case, the expert would not have approved the development.
- 3.23 The expert advised that while he found that approval was given for Case Studies 5 and 6 when they should have been refused, he did not identify any issues that would suggest improper influence had occurred in their Development Application assessments. Importantly, Case Studies 1 and 2, which were the subject of media attention in 2012 and 2013 were not the ones that he would have refused. Given the community attention on Case Study 1, the expert examined this case's files for improper influence and found no evidence that this had occurred. Case Study 7 was also examined for improper influence and no evidence of this was found. However, transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation.

## Certifiers

- 3.24 The single dwelling developments, that are the subject of the seven case studies, were considered under the Development Assessment Merit Track process for the following reasons:
- Case Studies 1, 2 and 4 – Community complaints led to the Environment and Sustainable Development Directorate identifying issues that required the submission of a Development Application. In Case Study 1, a mistake was made by the certifier regarding the assignment of the boundaries and the application was assessed as exempt when it should not have been. In Case Studies 2 and 4 the certifier did not satisfactorily oversee key milestones in the development's construction as required;
  - Case Study 3 – The lessee identified elements of the development that did not comply with the initial exemption and subsequently submitted a Development Application;
  - Case Studies 5 and 6 – The certifier identified elements of the development that did not comply with the initial exemption and subsequently submitted a Development Application; and
  - Case Study 7 – The certifier made an error and signed off on the development as exempt when it did not meet the requirements of an exempt development.
- 3.25 In three (43 per cent) of the seven case studies, no issues were identified with the actions of the certifier.
- 3.26 In the remaining four (57 per cent) case studies, it was not possible to identify, from the evidence available, whether the actions of the certifier were due to an error or improper influence.
- 3.27 In three of those four cases (Case Studies 1, 2 and 4), the Directorate considered (or is considering) whether or not it should take disciplinary action against the relevant certifier. The following outcomes were observed:
- Case Study 1 – an investigation into the actions of the certifier in this case is still underway (paragraph 3.52);
  - Case Study 2 – due to an administrative weakness, the demerit points issued in relation to this case were overturned. This weakness has since been addressed (paragraph 3.74);
  - Case Study 4 – the certifier was cautioned in relation to this case (paragraph 3.101); and
  - Case Study 7 – no action was undertaken in relation to this case. As the Directorate requires the lodgement of a Controlled Activity/Construction Occupations Complaint Form to initiate an investigation, the investigations team were unaware of the case (paragraph 3.156).

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## SAFEGUARDS AGAINST IMPROPER INFLUENCE

### Development Application decision-making authority

- 3.28 Development Application assessment decisions are made by assessing officers who are delegated with the power under the *Planning and Development Act 2007*. These delegations are allocated to positions not individuals to provide for continuity of service.
- 3.29 Delegations help ensure that Directorate assessing officers have the appropriate authority to conduct their activities and that all Development Application decisions are appropriately authorised.
- 3.30 Decision-making authority under a delegation is based on a position's classification. For example, only senior officers are able to refuse a Development Application. This is discussed in Chapter 5. Table 5.1 lists the various authorisations.
- 3.31 In consideration of the Directorate's Development Application decisions, all of the case studies showed that:
- assessment decisions were made by the relevant assessing officer in accordance with their delegated powers according to their role;
  - the person who assessed the Development Application also signed off the Notice of Decision, unless it was referred to the Decision Assurance Panel in accordance with Directorate policy. The Chair of the Decision Assurance Panel signed off the Notice of Decision for two cases; and
  - each of the officers who accessed the Development Application files had a reasonable and defensible reason to do so.
- 3.32 The Directorate's standard operating procedure for Merit Track assessments states that an assessment officer formally assesses an application for a single dwelling development and also develops the final Notice of Decision and approval conditions, which is followed by an internal peer review.
- 3.33 There was no evidence to indicate that peer review of the Notice of Decision occurred, as required by the Directorate's internal policy, for over half of the seven case studies. This is discussed further in paragraph 5.27. The Development Applications for Cases Studies 5 and 6 would have had been refused by the expert engaged by the Audit Office; this illustrates the importance of peer review.
- 3.34 While it is recognised that the Directorate's policy of having one assessing officer who undertakes an assessment and approves a Notice of Decision, facilitates continuity and transparency, the effect is undermined as the practice is not supported by a peer review of the Notice of Decision. This increases the risk of inappropriate decision making. This is discussed further at paragraph 5.25, and is addressed by Recommendation 11.

## Documentation

- 3.35 Documentation for the assessment of Development Applications is done on an ‘exceptions’ basis, that is non-compliance issues are recorded and conditions imposed to achieve compliance. While this may have advantages, a disadvantage is that there is no way of knowing whether all criteria and rules under the code have been considered. In five of the seven case studies, the Development Application assessment included Directorate commentary against 25 per cent, or less, of the rules under the relevant codes. Additionally, in two case studies the Directorate’s documentation did not record any assessment against five rules (three instances in Case Study 5 and two instances in Case Study 6) for which the independent expert found non-compliance.
- 3.36 A lack of documented assessment presents the risk that not all requirements were considered in Development Application assessments. This is discussed further in paragraphs 5.58 to 5.65 and is the subject of Recommendation 12.
- 3.37 This risk was also identified by the expert, who stated:
- The usual approach by [the Directorate] of DA [Development Application] assessment reporting ‘by exception’ (i.e. only reporting on Code requirements where the DA is inconsistent with the Rule or requires assessment against a specific criterion) does not provide any level of confidence that the DA has been assessed fully against the Code.
- 3.38 The expert observed further that not reporting on a rule could mean that the rule was not considered at all, or that the rule was incorrectly applied, or that the interpretation of the rule was based on misinterpretation of the submitted plans.

## *Timing of development approval decision*

- 3.39 Due to the number of community representations received, decision on the Development Applications for Case Studies 1 and 2 were referred to the Major Project Review Group for advice. Case Study 4 was also referred given that it involved the removal of a regulated tree.
- 3.40 Referral to this Group for Case Study 1 occurred 42 working days after the Development Application was lodged. For Case Study 2 the time was 60 days and for Case Study 4 it was 43 days.
- 3.41 It took 54 days before a decision was made for Case Study 1; 65 days for Case Study 2 and 46 days for Case Study 4. This is not within the legislated timeframe of 45 days. While referral to the Major Project Review Group may have contributed to the overall delay, given the lateness of referral to this group, it indicates that there were other issues that contributed to the delay.
- 3.42 Case Studies 3, 5, 6 and 7 were not referred to the Major Project Review Group, and were considered within the legislated timeframe of 30 days.

- 3.43 Section 148(1) of the *Planning and Development Act 2007* allows 15 working days for entities to provide their advice. In each of these cases, referred entities all contributed their advice within legislated timeframes and were, therefore, not a contributing factor to the delay.
- 3.44 Meeting timeframes was an issue highlighted in the Audit Office's 2012 report, *Development Application and Approval System for High Density Residential and Commercial Development*. The report noted that:
- Failure to meet the statutory timeframes for deciding ... development applications diminishes the certainty provided to the applicant and the community under the *Act* and can result in considerable costs to industry, Government and the ACT community. These include reputational risks for the Directorate, [and] holding and [giving rise to] transaction costs for the applicant.
- 3.45 A 2011 Productivity Commission report, discussed further in paragraphs 5.70 to 5.74) found that 'poor or incomplete development applications are a significant factor in their efficiency results – causing significant delays and costing significant amounts of staff resources'.
- 3.46 While reforms to lodgement processes have improved the quality of applications (discussed in paragraph 5.71), the fact that 43 per cent of the case studies were not assessed within the required statutory timeframe suggests more needs to be done.
- 3.47 This view was supported by the expert, who stated that:
- There is some evidence that the initial technical [completeness] check is not identifying key matters required for the application (e.g. ground levels, elevations in relation to side boundaries, area calculations and dimensions) and is focussing on matters not critical to assessment of an application (such as whether a PDF format file is oriented in landscape form).

### Recommendation 2

The Environment and Sustainable Development Directorate should improve its ability to meet statutory timeframes by not accepting the lodgement of a Development Application whose material is unsuitable for conducting an assessment.

### Improper influence

- 3.48 An examination, by the expert, of the Directorate's electronic files for Case Studies 1, 5, 6 and 7, found no evidence of improper influence in the Development Application assessment process. However, transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.

3.49 The expert commented on the Directorate’s practice of assessment ‘by exception’ (refer to paragraph 3.37) and remarked that:

Unless some commentary is provided by the assessing officer as to how they reached their conclusion that the rule was satisfied it is not possible to consider the circumstances that any errors in assessment were made.

3.50 All assessing officers who undertook the Development Application assessment and those who signed the Notice of Decision signed statements that they had not been the subject of improper influence and did not know of any improper influence occurring in any other cases.

## CASE STUDIES

### Case Study 1: Deakin

**Table 3.1: Case Study 1 chronology of events**

This development involved the demolition of an existing dwelling and construction of a new dwelling in Deakin.	
Mar 2012	The home owners used Directorate-approved forms to appoint a builder and licensed certifier, and apply for a building commencement notice. The certifier assessed that the proposed development met all applicable approval requirements so building approval could be given without lodging a Development Application.
Nov 2012	Construction of the new dwelling was completed and the certifier issued a Certificate of Completion supported by relevant paperwork. On the basis of the certifier’s assessment, the Directorate issued a Certificate of Occupancy and Use for the dwelling. Over the following two months, two complaints about the development were received from community members.
Feb 2013	These community complaints was investigated by the Directorate, which found that the dwelling should not have been assessed as exempt, as previously certified, and therefore a Development Application needed to be lodged. The Directorate sent a ‘Controlled Activity’ letter to the homeowner requiring lodgement of a Development Application.
Apr 2013	<p>A Development Application was lodged. As part of the assessment process, consultation with community members and relevant referral entities occurred. Thirteen public representations and comments from ActewAGL, the Territory and Municipal Services Directorate and the Environment Protection Authority were received. The Directorate identified that:</p> <p>One of the major issues identified in the assessment was non compliance with the side setback requirement at upper floor level and overlooking in the neighbouring block.<sup>11</sup></p> <p>Other matters identified through the assessment related to solar access to the family and dining areas, a potential trip hazard in the driveway and landscaping. While some concerns were raised about the building envelope and setback:</p> <p>the assessment indicates that the minor encroachment in the building envelope of part to the eaves can be considered an allowable encroachment.<sup>12</sup></p>

<sup>11</sup> Environment and Sustainable Development Directorate, *Notice of decision*, 8 July 2013

<sup>12</sup> Ibid

Jun 2013	Given the number of public representations, the Development Application was referred to the Directorate's Major Project Review Group for assessment.
Jul 2013	Following provision of additional information outlining how community, Directorate and entity comments would be addressed, the home owner was granted conditional approval for the development after consideration by the Major Project Review Group. The Chair of the Decision Assurance Panel subsequently signed-off on the Notice of Decision in accordance with relevant decision-making delegations and Directorate policy.
Sep 2013	Following provision of additional information to address condition requirements, development approval was granted.

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### ***Certifier involvement***

- 3.51 In this case, the certifier incorrectly assessed the development as exempt. From the evidence available it was not possible to identify whether this was due to an error or improper influence.
- 3.52 Complaints regarding Case Study 1 were still under investigation at the time this audit was tabled. The Directorate stated:
- ... the investigation is determining whether it was appropriate for the certifier to have issued a building approval. Once the investigation is finalised, if there are reasonable grounds, the matter will be referred to the Construction Occupations Registrar to consider demerit action against the certifier.

### ***Certainty – expert findings***

- 3.53 The expert's assessment of the Development Application found:

The key issues in regard to this application include:

1. Neighbourhood Character
2. Compliance with the Code (building envelope)
3. Definition of Dwelling
4. Representations

#### **Neighbourhood Character**

The issue of consistency with neighbourhood character is addressed in response to compliance with Zone Objectives.

... ACAT [the ACT Civic and Administrative Tribunal] have previously determined that compliance with Rules and Criteria is sufficient to accept that the objectives of the zone are met. On this basis, while the application proposes a significant change to the landscape character of the neighbourhood, this is not considered sufficient to warrant refusal of the application.

- 3.54 The expert noted that the development was proposed to take place in the Residential RZ1 Suburban zone.

3.55 Section 120 of the *Planning and Development Act 2007* outlines zone objectives. Zone objectives aim to ensure a development respects valued features of the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties.

3.56 However, the expert noted:

It is considered that the zone objectives should not require an additional level of assessment. The aspects of the objectives should be covered through Rules and Criteria within the Code.

3.57 In this case, the independent expert observed that the suburb in which this development occurred is:

... characterised by dwellings set back on each block with substantial vegetation ... where landscape elements dominate over built form.

3.58 The independent expert noted the proposal:

... introduced a significant change to that character. The dwelling, although compliant with front setback requirements of the Code is ... forward of adjoining dwellings and all vegetation forward of the dwelling has been removed. It is considered that the proposal [had] a significant impact on the landscape character of the immediate neighbourhood.

3.59 In response to testing compliance with the zone objective, the independent expert found:

... the application sufficiently meets the standard for streetscape character proposed under the zone objective.

3.60 The independent expert also found:

While the application is NOT considered to be consistent with the relevant objectives of the zone (specifically Objective (d)), it is not sufficiently contrary to warrant refusal of the application in isolation of any other matter (such as significant non-compliance with Code Rules/Criteria) ...

**Code Compliance**

The proposal is consistent with the Rules of the Code, other than:

- Rule R30 (Front Setback) – A minor departure of 20mm;
- Rule 31 (Side Setback) – A minor departure of 20mm;
- Rule 36 (Interface) – An existing wall forward of the building line. It is considered that this wall does not form part of the application and could be excluded from the approval; and
- Rule 39 (Driveway crossings) – Two existing driveways, one to each street, existing prior to the DA. It is considered that this driveway does not form part of the application and could be excluded from the approval.

The proposal meets the respective criteria associated with the above rules.

### Single Dwelling

The application states that it is for a “single dwelling”. The *Planning and Development Regulation 2008* defines “dwelling” as a class 1 building, or a self-contained part of a class 2 building, that includes at least 1 but not more than 2 kitchens; at least 1 bath or shower; at least 1 toilet pan; that are accessible from within the building, or the self-contained part of the building and does not have access from another building that is either a class 1 building or the self-contained part of a class 2 building. It includes any ancillary parts of the building and any class 10a buildings associated with the building.

It is considered that the proposal meets the definition of a single dwelling.

### Representations

... while there are a significant number of submissions (for a single dwelling application), the issues raised do not warrant refusal of the application.

### Conclusion

It is considered that the application should be approved.

## Transparency

- 3.61 The planning expert identified more than 20 rules, which they considered relevant to this case, that were not documented on the Directorate’s Territory Plan Code requirements Merit Track assessment report.
- 3.62 Transparency of assessing officers’ consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.
- 3.63 Nonetheless, the Audit Office notes assessment considerations presented to the Major Project Review Group were documented by the Directorate against more than 75 per cent of the planning rules. Additionally, Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).

## Community participation and consultation

- 3.64 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises.
- 3.65 Thirteen public representations were received. Each of these was considered by the Directorate in its assessment of the development.

## Security of access

- 3.66 Twenty officers accessed the Development Application documents for this case using the Directorate’s electronic database. This included assessing officers, senior management and staff from other (referred) Government agencies. Each of the officers who accessed the file had a reasonable and defensible reason to do so.

### ***Decision-making authority***

3.67 Given the number of community representations in this case, the assessing officer referred the Development Application to the Directorate's Major Project Review Group for advice. Subsequently the Development Application was referred to the Decision Assurance Panel, to ensure that the outcomes and recommendations of the Major Project Review Group were adequately reflected in the Notice of Decision. The Chair of the Decision Assurance Panel signed the Notice of Decision; this is consistent with Directorate policy.

### ***Improper influence***

3.68 The expert stated that:

The electronic file review of the Environment and Sustainable Development Directorate's 'Objective' file management data base did not highlight any unusual actions or undue influence leading the Directorate's decision. There is no evidence to suggest the initial findings are not appropriate.

3.69 The original assessing officer, as well as the Chair of the Decision Assurance Panel who signed the Notice of Decision, provided signed statements that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### ***Timing of development approval decision***

3.70 Assessment of the Development Application, took the Directorate 54 working days (from lodgement of the application to the decision date). This is longer than the 45 days required by legislation for those Development Applications that attract representations.

3.71 The referral entity advice was submitted within the prescribed 15 working days. However, the Development Application was not considered by the Directorate's Major Project Review Group until 42 working days after it was lodged.

### ***Conclusion***

3.72 For Case Study 1:

- the Environment and Sustainable Development Directorate's decision to approve this development is supported by the expert;
- files were only accessed by officers who had a reasonable and defensible reason to access them;

- the expert did not find any evidence of improper influence. However, transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation. While this is the case, the original assessing officer, and the Chair of the Assurance Decision Panel who signed the Notice of Decision, provided signed statements that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred; and
- the Directorate is considering disciplinary action against the certifier in this case.

## Case Study 2: O'Connor

**Table 3.2: Case Study 2 chronology of events**

This development involved demolishing an existing dwelling and constructing a new dwelling in O'Connor.	
Apr 2011	A certifier assessed the proposed development as meeting all applicable requirements and so building approval was issued without requiring lodgement of a Development Application.
May 2011	Demolition of the existing dwelling occurred and construction of the new dwelling commenced. In the following year (in January 2012), the building's height, plot ratio and number of storeys generated a complaint from a member of the public.
Feb 2012	The complaint about the development was investigated by the Directorate and it was found that the dwelling had been constructed 'otherwise than in accordance with the approved plans for the building work'. <sup>13</sup> The development was outside the building envelope and therefore not exempt, as previously certified. A Directorate building inspector issued a Stop Work Notice. The following month, the Directorate met with the homeowner to advise that lodgement of a Development Application was required.
Mar 2012	<p>The Development Application was lodged. As part of the assessment process, consultation with community members, and relevant referral entities, occurred. Twenty public representations were received (17 objecting to the development and three supporting it), predominantly expressing concern with the size of the building, potential for dual occupancy, demolition of trees and height of the building. Comments were also received from the Territory and Municipal Services Directorate, ActewAGL and the Conservator of Flora and Fauna.</p> <p>Key issues identified through the assessment related to: reducing the size of a deck and relocating the deck's access stairs; adding obscured glass to an upper floor window; the need for '<i>extensive landscaping ... including trees and hedges of advanced stock species ... to reduce the visual impact and scale of the development</i>';<sup>14</sup> removal of a second driveway and a laundry; installation of a water tank; and widening of a doorway.</p>
Jun 2012	<p>Following provision of additional information outlining how community, Directorate and entity comments would be addressed, the homeowner was granted conditional approval for the development. The following month, the previously-issued Stop Work Notice was ended.</p> <p>Given the number of public representations, the Development Application was referred to the Directorate's Major Project Review Group for advice.</p>

<sup>13</sup> Stop Work Notice, Environment and Sustainable Development Directorate, 29 February 2012

<sup>14</sup> Environment and Sustainable Development Directorate, *Notice of decision*, 29 June 2012

Sept 2012	Following provision of additional information to address condition requirements, Development Approval was granted by the Chair of the Decision Assurance Panel in accordance with relevant decision-making delegations and Directorate policy.
May 2013	Construction of the new dwelling was finished, with the certifier issuing a Certificate of Completion supported by relevant paperwork. On the basis of the certifier's assessment, the Directorate issued a Certificate of Occupancy and Use for the dwelling.

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### ***Certifier involvement***

3.73 The Development Application exemption decision, in relation to Case Study 2, was correct. However, the certifier did not provide sufficient oversight of the development at key certification milestones, resulting in a development being built that did not comply with the initial plans, and therefore, was not exempt as had been certified. From the evidence available it was not possible to identify whether this lack of oversight was due to improper influence.

3.74 While the certifier initially incurred demerit points in relation to this case, a weakness in administrative procedure resulted in the points being withdrawn. This weakness has subsequently been addressed and the Directorate advised:

Demerit points were determined in-principle as an appropriate sanction for the breach. The sanction was not implemented as a consequence of a review of the demerit points show cause procedure and template. The show cause process was amalgamated into one procedure and notice for all potential sanctions after considering the issues of natural justice and evidence required for the Tribunal for cancellation of licence on the basis of demerit points. The new process was trialled in 2013 with positive results. Consequently, demerit only matters, including this one, were not completed given the unfairness that may be perceived by the period of time that had elapsed and the fact that points expire three years after the date the breach is identified.

3.75 The certifier involved in this case was not the same as in Case Study 1.

### ***Certainty – expert findings***

3.76 Similarly to Case Study 1, the expert found:

The key issues in regard to this application include:

1. Neighbourhood Character
2. Compliance with the Code (building envelope)
3. Definition of Dwelling
4. Representations

#### **Neighbourhood Character**

... While the application proposed a significant change to the landscape character of the neighbourhood, this is not considered sufficient to warrant refusal of the application.

**Code Compliance**

The key issues in regard to this application include:

- Rule 3 (Building Envelope) – A minor departure<sup>15</sup>

The proposal meets the respective criteria associated with the above role.

**Single Dwelling**

... It is considered that the proposal meets the definition of a single dwelling.

**Representations**

... In summary, the main issues raised (other than those relating to 'process') seek to protect a streetscape character to a level that the Code and Zone Objectives do not provide. The Code clearly allows for a change in character and does not address aesthetics of buildings.

It is not considered the issues raised in the representations warrant refusal of the application.

**Conclusion**

It is considered that the application should be approved.

**Transparency**

- 3.77 Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).
- 3.78 However, internal Directorate documentation of its Development Application assessment provided commentary against less than 25 per cent of the assessable planning rules.
- 3.79 Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.

**Community participation and consultation**

- 3.80 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises.
- 3.81 Twenty public representations were received and were considered by the Directorate in its assessment of the Development Application.

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<sup>15</sup> The independent planning expert noted the development 'Does NOT comply with [the Building Envelope] Rule [R3]. Part of the building slightly encroaches beyond the building envelope. This is a very minor departure and is considered to meeting the criterion [C3].'

### ***Security of access***

- 3.82 A significantly larger number of officers accessed the electronic database for this case than for the other audited cases. In this case, 44 officers accessed the electronic Development Application file including: assessing officers, senior managers, building inspectors (due to the compliance action relating to the Stop Work Notice), customer service officers and staff from other Government referral agencies. Each of the officers who accessed the file had a reasonable and defensible reason to do so.

### ***Decision-making authority***

- 3.83 As in Case Study 1, given the number of community representations in this case, the assessing officer referred the Development Application to the Directorate's Major Project Review Group for advice. Subsequently the Development Application was referred to the Decision Assurance Panel, to ensure that the outcomes and recommendations of the Major Project Review Group were adequately reflected in the Notice of Decision. The Chair of the Decision Assurance Panel signed the Notice of Decision; this is consistent with Directorate policy.

### ***Improper influence***

- 3.84 The original assessing officer, as well as the Chair of the Decision Assurance Panel who signed the Notice of Decision, provided signed statements that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### ***Timing of development approval decision***

- 3.85 Assessment of the Development Application files took the Directorate 65 working days, longer than the 45 days allowed by legislation for those Development Applications that attract community representations.
- 3.86 The referral entity advice was submitted within the prescribed 15 working days. However, the Development Application was not considered by the Directorate's Major Project Review Group until 60 days after it was lodged.

### ***Conclusion***

- 3.87 For Case Study 2:
- the Environment and Sustainable Development Directorate's assessment to approve this development is supported by the expert;
  - files were only accessed by officers who had a reasonable and defensible reason to access them;

- the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing occurred; and
- ultimately no certifier action was taken in relation to this case.

### Case Study 3: Casey

**Table 3.3: Case Study 3 chronology of events**

<p>This development involved building a two-storey dwelling as part of a terrace-style townhouse complex in Casey. There was a separate lease for every dwelling in the complex. While most of the complex's dwellings did not require a Development Application, the corner blocks needed Development Application approval because its footprint was larger than 250m<sup>2</sup>.</p>	
<p>May-Jul 2011</p>	<p>The lessee lodged an application for a Directorate-issued exempt declaration to commence development on the corner block. This application was rejected on the grounds that the deviations from the Single Dwelling Housing Development Code were not minor. Subsequently a Development Application was lodged. As part of the assessment process, consultation with community members, and relevant referral entities, occurred. No representations were received from the community. The Territory and Municipal Services Directorate provided specific comments on this proposed development regarding the driveway.</p> <p>The main issue that required resolution through the Development Application was that parts of the roof encroached into the adjoining block. It was decided that this encroachment was consistent with the Territory Plan because the lease required an integrated building on this block.</p>
<p>Sep 2011</p>	<p>The certifier issued a Building Approval and a Building Commencement Notice, therefore building work could commence.</p>
<p>May 2012</p>	<p>The certifier issued a Certificate of Completion and applied for a Certificate of Occupancy. Based on the documentation provided, the Directorate issued a Certificate of Occupancy and Use.</p>

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### *Certifier involvement*

- 3.88 A Development Application exemption was sought through the Directorate in this case, rather than through a certifier. The certifier's involvement in this case focused on the certification of building works.

### *Certainty – expert findings*

- 3.89 The expert assessed that there were no significant issues in relation to this application and that it should be approved. However the expert remarked that:

Rule 32A (addressing encroachments into building setbacks) and Rule 82 (allowing articulation elements to encroach into setback area) highlight an ambiguity in the code.

3.90 Furthermore, the expert stated that:

The proposed development includes rooms above the garage. This area is separate to the main dwelling. While the definition of a 'dwelling' under Section 5 of the *Planning and Development Regulation 2008* is quite broad, it is considered to have been a 'flexible' interpretation of the definition by [the Directorate] in approving this DA [Development Application] as a single dwelling.

### **Transparency**

3.91 Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern as well as referral entity advice (Part 3).

3.92 However, as in Case Study 2, there was limited documentation to support the Directorate's assessment. Internal Directorate documentation was recorded against less than 25 per cent of the assessable planning rules.

3.93 Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.

### **Community participation and consultation**

3.94 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises. No community representations were received.

### **Security of access**

3.95 Fourteen officers accessed the Development Application documents for this case, including assessing officers, Customer Services officers and a staff member from the Occupational Licensing branch. Each of the officers who accessed the file had a reasonable and defensible reason to do so.

### **Decision-making authority**

3.96 In accordance with Directorate policy, the Notice of Decision advising of the Development Application assessment outcome was issued and signed by the same assessing officer who conducted the assessment. This practice was also observed in Case Studies 5, 6 and 7. In each case, the assessing officer had appropriate decision-making delegations.

### **Improper influence**

3.97 The assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### **Timing of development approval decision**

3.98 Assessment of the Development Application files took the Directorate 28 working days which is within the legislated 30-day assessment timeframe.

### **Conclusion**

3.99 For Case Study 3:

- the Environment and Sustainable Development Directorate's assessment to approve this development is supported by the expert;
- files were only accessed by officers who had a reasonable and defensible reason to access them; and
- the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### **Case Study 4: Deakin**

**Table 3.4: Case Study 4 chronology of events**

This development involved demolishing an existing dwelling and constructing a new two-storey dwelling with a swimming pool and gazebo in Deakin.	
Nov 2008	Development approval was granted for the demolition of an existing dwelling and the development of a new dwelling. This included approval to remove regulated trees on the property.
Aug 2011	The design for the building was altered to a smaller development so that it could be built as an exempt development. Based on the revised plan, the certifier issued a Building Approval and work on the premises commenced.
Oct 2011	The Directorate received a complaint regarding the development. A site inspection showed that, while the building was constructed as an exempt development, a regulated tree had been removed and there were concerns about the building's dimensions.
May 2012	The Directorate issued a Stop Work Notice after a survey showed that the building height was not in accordance with the plans approved by the certifier. In response to this Stop Work Notice, the builder lodged an application for an exemption declaration with the Directorate. This application was rejected, and subsequently a Development Application was lodged.
Jun 2012	As part of the Development Application assessment process, consultation with community members and relevant referral entities occurred. One representation was received, expressing concern about the lack of communication, overshadowing issues and a regulated tree. The builder responded by explaining the communication issues and expressing his view that there were no overshadowing issues. The Territory and Municipal Services Directorate and ActewAGL both provided specific comments which were incorporated in the conditional approval. The Conservator of Flora and Fauna advised that the development was not supported as a regulated tree was removed without consent.

Aug 2012	<p>As the development included removal of a regulated tree, Directorate policy required referral to the Major Project Review Group. Following the Group's consideration, the development was conditionally approved stating that diagrams did not show an impact on solar access for the next door neighbour and there was pre-existing approval for removal of the regulated tree. A landscape plan was lodged showing the placement of hedges to protect the privacy of neighbouring residents.</p> <p>In response to the Stop Work Notice the builder requested the Directorate allow for minor works to proceed. The Stop Work Notice was lifted in August after the development received approval.</p>
Sep 2012	<p>The certifier issued a Certificate of Completion and applied for a Certificate of Occupancy. Based on the documentation provided, the Directorate issued a Certificate of Occupancy and Use.</p>

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### ***Certifier involvement***

3.100 The initial Development Application exemption decision, in relation to Case Study 4, was correct. However, the certifier did not provide sufficient oversight of the development at key certification milestones, resulting in a development being built that did not comply with the initial plans, and therefore, was not exempt as had been certified. From the evidence available it was not possible to identify whether this lack of oversight was due to an error or improper influence.

3.101 The certifier was cautioned in relation to this case and no further disciplinary action was taken. The Directorate advised that:

The certification work on this property was originally conducted by Certifier X. Following a disciplinary application to the Tribunal Certifier X consented to an order that he hand his licence in and not apply for a further licence.

The certification work was inherited by Certifier Y. Certifier Y made the error of considering Certifier X's initial assessment in approving the BA [Building Approval]. Investigation of the issue had to consider failings in the plans or whether the builder did not build in accord with the approval.

Ultimately it was found that the builder built the slab about 1.7 metres higher than on the approved plan, a fact not reported in the survey. The Surveyor General addressed the matter with the surveyor in question and a new survey was provided which proved the floor heights, and therefore proved that the building was built too high and required a DA [Development Application]. The error was principally the builder not the certifier. A Stop Work Notice was issued and remained in force while the owner's application for a development approval was assessed. A development approval was granted.

Certifier Y was cautioned and conceded that he should not have relied upon Certifier X's assessment. No disciplinary action was undertaken against Certifier Y.

### **Certainty – expert findings**

3.102 With respect to the single regulated tree, the expert noted:

... the approval, in effect, sanctions the alleged breach of the *Tree Protection Act*. It is concluded that the Directorate should have sought further advice from the Conservator as to whether the Conservator was going to take action in relation to the alleged breach of the *Tree Protection Act*. If legal action was to be initiated by the Conservator, the application should have been held in abeyance pending the outcome of such action. Approval of the Development Application affects the options available for the Conservator to seek remedies for the breach (e.g. replanting of trees in the same location as the trees that were removed).

3.103 A previous recommendation from the Audit Office, made in the *Development Application and Approval System for High Density Residential and Commercial Developments* report, tabled in June 2012, addressed the Conservator consultation issue identified by the planning expert. That audit recommended that:

... the Environment and Sustainable Development Directorate should ... further consult ... with those referral entities who do not support a development application or whose conditions are not proposed to be included in the Notice of Decision, by ... the referral entity being invited to attend the Major Projects Review Group when the application is considered.<sup>16</sup>

3.104 The expert noted that the assessment was affected by the fact that the site plan and the elevations map were not at a scale that would allow for a full and accurate analysis of specific aspects of the development.

### **Transparency**

3.105 The planning expert identified more than 20 rules, which they considered relevant to this case, that were not documented on the Directorate's Territory Plan Code requirements Merit Track assessment report.

3.106 Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.

3.107 Nonetheless, the Audit Office notes assessment considerations presented to the Major Project Review Group were documented by the Directorate against more than 75 per cent of the planning rules. Additionally, Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).

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<sup>16</sup> ACT Auditor-General's Office, Report number 4/2012, *Development Application and Approval System for High Density Residential and Commercial Developments*, available at [www.audit.act.gov.au](http://www.audit.act.gov.au)

### ***Community participation and consultation***

- 3.108 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises.
- 3.109 One public representation was received and was considered by the Directorate in its assessment of the Development Application.

### ***Security of access***

- 3.110 Twenty-three officers accessed the Development Application documents for this case, all of whom had a justifiable reason to access the file. This included assessing officers, Customer Service staff, as well as staff from other (referred) Government agencies.

### ***Decision-making authority***

- 3.111 In this case, due to the removal of a regulated tree, the assessing officer referred the case to the Major Project Review Group. The Notice of Decision was issued and signed by the same officer who conducted the assessment. This Officer had the appropriate decision-making delegation.

### ***Improper influence***

- 3.112 The assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### ***Timing of development approval decision***

- 3.113 Assessment of the Development Application took the Directorate 46 working days to assess this application which is longer than the 45 days provided for under legislation.
- 3.114 The referral entity advice was submitted within the prescribed 15 working days. However, the Development Application was not considered by the Directorate's Major Project Review Group until 43 working days after it was lodged.

### ***Conclusion***

- 3.115 For Case Study 4:
- the Environment and Sustainable Development Directorate's assessment to approve this development is supported by the expert;
  - files were only accessed by officers who had a reasonable and defensible reason to access them;
  - the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred; and

- the certifier was cautioned in relation to this case.

### Case Study 5: O'Malley

**Table 3.5: Case Study 5 chronology of events**

This development involved building a dwelling, tennis court and swimming pool in O'Malley. Although initially approved in 2006, progress has been slow and by 2013 the development had not been completed.	
Dec 2006	A Development Application was approved, after various amendments.
Jul 2007 – Sep 2013	Due to slow progress of the project, the homeowner did not comply with the requirement to commence construction within 12 months, or complete construction within 24 months of the issue of the lease. On three separate occasions, the homeowner requested an extension. Each extension was granted by the Directorate after payment of associated fees.
Aug 2008	Following inspection in response to a complaint by the Tree Protection Unit regarding removal of a protective barrier around a tree, a Stop Work Notice was issued until a new tree management plan was developed.
Jan 2009	Amendments to the original application were approved, including addition of a loft.
Feb 2011	A further Stop Work Notice was issued as the certifier observed considerable deviations from the approved plan.
Dec 2011	After the original building firm went into liquidation, the owner appointed another firm and certifier.
Jan 2012	The new certifier also issued a Stop Work Notice stating that no work was to proceed until the project complied with all approval requirements.
Feb 2012	The new certifier arranged for a Building Approval and Building Commencement Notice. The approval was based on the 2006 development approval, although this approval had already lapsed.
May 2013	<p>A designer was appointed to liaise with the Environment and Sustainable Development Directorate to finalise development. This designer lodged a Development Application for the remainder of the project, noting assessment of the whole development was not required given previous approvals. In finalising the project, the Development Application covered items such as plastering of internal linings, water proofing of external cladding, landscaping elements such as a driveway, paths and clotheslines, and installation of garage doors.</p> <p>As part of the assessment process, community and referral entities consultation occurred. No community representations were received. The Territory and Municipal Services Directorate found that the road verge was substantially altered and required reinstatement.</p> <p>The development was conditionally approved in May 2013, followed by the release of the approved building plan in June 2013. Conditions imposed primarily related to ensuring the tennis court lighting complied with Environment Protection Authority requirements and rebuilding the driveway (including reinstating the road verge).</p>
Aug 2013	The project manager for the development requested a reconsideration of the verge reinstatement decision, as the cost was estimated to be over \$50,000. The Directorate advised this matter needed resolution through the Territory and Municipal Services Directorate directly, rather than through reconsideration of the planning decision. <sup>17</sup>

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

<sup>17</sup> At the completion of the Audit Office's fieldwork, a decision on this matter had not yet been made.

### *Certifier involvement*

- 3.116 This case involved a Development Application submitted to the Directorate, not an exemption assessment. The certifier’s involvement in this case focused on the certification of building works.
- 3.117 In this case, two different certifiers were involved with the development at different times and identified issues of non-compliance in construction. These were brought to the attention of both the homeowner and Directorate.

### *Certainty – expert findings*

3.118 The expert found:

The key issues in regard to this application include:

1. Compliance with the Code
2. Definition of Dwelling

#### **Code Compliance**

... The proposal is NOT consistent with the Rules of the Code, including:

Rule 2	Height	The building is considered to be 3 storeys
Rule 30	Front setback	Upper floor level is within required setback
Rule 31	Side setbacks	Building is less than required setback on both the eastern and western side boundaries
Rule 32	Side setbacks	Building is less than required setback
Rule 38	Interface	Tennis court proposes a 6m high chain wire fence
Rule 44	Garage Opening	Doors are wider than 6m
Rule 47	Private Open Space	POS provided is less than the minimum required
Rule 50	Planted area	Less than 50% of landscape area is planted

#### **Single Dwelling**

The application states that it is for a “single dwelling”. The Planning and Development Regulation 2008 defines “dwelling” as a class 1 building, or a self-contained part of a class 2 building, that includes at least 1 but not more than 2 kitchens; at least 1 bath or shower; at least 1 toilet pan; that are accessible from within the building, or the self-contained part of the building and does not have access from another building that is either a class 1 building or the self-contained part of a class 2 building. It includes any ancillary parts of the building and any class 10a buildings associated with the building.

The proposed building generally complies with this definition. However, part of the building including the second kitchen and associated rooms is effectively a separate dwelling with no connection via ‘living’ areas of the dwelling.

The BCA [Building Code of Australia] defines a “Sole Occupancy Unit as ... a room or part of a building for occupation ... to the exclusion of any other (tenant) ... The rooms above the garage are only accessible via the garage (Class 10 structure) and can be occupied to the exclusion of other occupants of the main part of the dwelling. While the proposal meets the definition of the two sole-occupancy units under the [Building Code of Australia], it also meets the definition of a single dwelling under the [Planning & Development] Regulation.

#### **Conclusion**

It is considered that the application should be refused.

- 3.119 The Development Application assessment by the Directorate and the assessment made by the expert were different. The independent expert assessed that the development should have been refused.
- 3.120 A senior Directorate official and the independent expert were interviewed together about this case.
- 3.121 In essence the differing assessments predominantly related to the building's loft:
- the Directorate official agreed with the independent expert that the development should have been assessed as a three-storey building, which would result in non-approval through Merit Track assessment; and
  - due to an existing approval of the loft development (and therefore non-consideration of this matter in the Directorate's 2013 Development Application assessment), the expert indicated they understood how the development may have been approved; the expert indicated they still would not have granted approval.
- 3.122 The loft was actually approved in 2009, with the 2013 Development Application only covering minor matters such as plastering of internal linings, water proofing of external cladding, landscaping elements such as a driveway, paths and clotheslines, and installation of garage doors.
- 3.123 The expert found:
- There was no assessment report for the 2009 Amendment Application. As such, it is not possible to determine whether there were any unusual circumstances relating to the assessment and determination of that 2009 amendment application ... However, it is clear that the approval of this 2009 Amendment Application was in error, due to the 3 storey component of the dwelling.

### **Transparency**

- 3.124 Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).
- 3.125 However, internal Directorate documentation of its Development Application assessment provided commentary against less than 25 per cent of the assessable planning rules. Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.
- 3.126 Importantly, the Directorate's development assessment documentation did not record any assessment for three rules of which the independent expert found non-compliance.

### ***Community participation and consultation***

- 3.127 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises. No public representations were received.

### ***Security of access***

- 3.128 Seventeen officers accessed the Directorate's electronic database. This included assessing officers, Customer Service officers and staff from other Government referral agencies. Each of the officers who accessed the file had a reasonable and defensible reason to do so.

### ***Decision-making authority***

- 3.129 As mentioned in paragraph 3.96, in accordance with Directorate policy, the Notice of Decision advising of the Development Application assessment outcome was issued and signed by the same officer who conducted the assessment. This officer had the appropriate delegation to make the decision.

### ***Improper influence***

- 3.130 Given the Development Application assessments by the Directorate and the assessment made by the expert were different, further examination of the Directorate's electronic files for this Case Study was conducted by the expert.

- 3.131 The expert stated that:

The electronic file review of the Environment and Sustainable Development Directorate's 'Objective' file management database did not highlight any unusual actions or undue influences leading to the various Directorate decisions, particularly the 2013 Amendment. There was a different assessing officer for each amendment application. The assessment for the 2013 amendment was consistent with usual practice within the Directorate in that it reported matters 'by exception' and determined that changes to the previously approved application were minor amendments of minimal significance.

- 3.132 The assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### ***Timing of development approval decision***

- 3.133 Assessment of the Development Application took the Directorate 30 working days which is within the legislated 30-day assessment timeframe.

## Conclusion

3.134 For Case Study 5:

- the Environment and Sustainable Development Directorate's assessment to approve this development is not supported by the expert. Furthermore, the Directorate's official agreed with the expert that the development amendment in 2009 should have been assessed as a three-storey building and not approved as though it was a two-storey development;
- files were only accessed by officers who had a reasonable and defensible reason to access them;
- although an incorrect decision was made, the expert found no evidence of improper influence in the files for this case study. As in most cases, however, transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation; and
- the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

## Case Study 6: Forde

**Table 3.6: Case Study 6 chronology of events**

This development involved the construction of a single storey dwelling in Forde.	
Jan 2012	The appointed certifier assessed that the proposed development did not meet all applicable approval requirements; subsequently a Development Application was lodged. As part of the Development Application assessment process, consultation with community members and relevant referral entities occurred. No community representations were made regarding this development.
Feb 2012	The development was approved with conditions related to sediment and erosion control, waste management. Advice from ActewAGL and Territory and Municipal Services Directorate was also incorporated.
Feb 2012 – Oct 2012	The certifier issued a Building Approval and a Notice of Commencement in February 2012. In August 2012 the certifier issued a Certificate of Completion and applied for a Certificate of Occupancy. Based on the information provided, the Directorate issued the Certificate of Occupancy and Use in October 2012.
Oct 2012	A complaint was made by a member of the public and a site inspection revealed that backfill from construction and a retaining wall had caused a drainage issue for adjoining blocks.
Jan 2013	The Directorate issued a 'Controlled Activity' letter to the homeowner/lessee advising that a Development Application for the retaining wall was required.

Jun 2013 The Development Application was lodged. As part of the Development Application assessment process, consultation with community members and referral entities occurred. One representation was received stating that various components of Rule 18 had not been met and also highlighted the drainage issue/encroachment of the easement.

The Territory and Municipal Services Directorate observed that the retaining wall ran along and across a stormwater easement and therefore advised that the proposal could not be supported.

The Directorate therefore refused the application for the erection of a retaining wall and associated site works, despite the earlier 2012 approval being given for the entire development.

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### ***Certifier involvement***

3.135 As the certifier originally found that this was not an exempt development, their involvement in this case focused on the certification of building works.

### ***Certainty – expert findings***

3.136 The expert assessed that the key issue in regard to the initial Development Application was code compliance.

#### **Code Compliance**

Rule 6A	Plot Ratio	The proposal does not comply with the maximum plot ratio, which is a mandatory rule. The application cannot be approved.
Rule 46	Solar Access	The main daytime living area does not achieve 3 hours sunlight
Rule 82	Front Setback	The building is not set back the required 4 m to the front boundary
Rule 84	Rear Setback	The building is not set back the required 3m to the rear boundary
Rule 86	Private Open Space	The site does not achieve the required area for Private Open Space

... it is concluded that the non-compliance with each of the above rules suggests that the application proposes to construct a dwelling that is too big for the nominated block

#### **Conclusion**

It is considered that the application should be refused. Alternatively the applicant should have been provided with an option to amend the plans to reduce the size of the dwelling to ensure compliance with plot ratio, setbacks and private open space.

3.137 The Development Application assessment by the Directorate and the assessment made by the expert were different. The independent expert assessed that the entire development should have been refused and not just the retaining wall, as was refused by the Directorate.

3.138 A senior Directorate official and the independent expert were interviewed together about this case.

- 3.139 The senior Directorate officer acknowledged that there were errors in the assessment. These occurred as:
- Case Study 6 was part of an estate development. Some estate developers allow individual buyers of blocks to deviate, to a certain degree, from the overall estate development plan. In this case, the buyer wanted to deviate from the overall estate development plan, and applied for this deviation with the estate developer;
  - the estate developer approved this proposed deviation. However it remained the buyer's responsibility to secure Development Application approval; and
  - the Directorate's assessment document indicated that an approval by a private developer<sup>18</sup> was sufficient to support allowing a considerable deviation from the plot ratio.
- 3.140 In some cases greenfield developments can be granted approval for variations to lease conditions, including plot ratio requirements. In this case, a search of the Directorate's Lease and Development Conditions Register did not identify any lease conditions for the particular block on which Case Study 6 is located. While the expert indicated that they understood the Directorate's rationale for the decision, given an initial plot ratio assessment, the expert would not have approved the development.

### **Transparency**

- 3.141 Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).
- 3.142 However, internal Directorate documentation of its Development Application assessment provided commentary against less than 25 per cent of the assessable planning rules. Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.
- 3.143 Importantly, the Directorate's development assessment documentation did not record any assessment for two rules of which the independent expert found non-compliance.

### **Community participation and consultation**

- 3.144 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises.

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<sup>18</sup> Forde Developments

- 3.145 One public representation was received and was considered by the Directorate in its assessment of the Development Application.

#### ***Security of access***

- 3.146 Thirteen officers accessed the Development Application documents for this case via the Directorate's electronic database, all of whom had a justifiable reason to access the files. This included assessing officers, building inspectors and staff members from Customer Services and Lease Administration.

#### ***Decision-making authority***

- 3.147 In accordance with Directorate policy, the Notice of Decision advising of the Development Application assessment outcome was issued by the same officer who conducted the assessment.
- 3.148 There was limited documentation to support the Directorate's assessment. Directorate documentation provided commentary against less than 25 per cent of the assessable planning rules. Importantly, the Directorate's documentation did not include any assessment for two rules against which the independent expert found non-compliance.

#### ***Improper influence***

- 3.149 Given the Development Application assessment by the Directorate and the assessment made by the expert were different, further examination of the Directorate's electronic files for this Case Study was conducted by the expert.

- 3.150 The expert stated that:

There is no evidence, based on review of the 'Objective' electronic file management system, that there was any undue influence in relation to this application. The assessment of the application was clearly limited in its scope, and ultimately erroneous, however, the application process and overall timeframe is consistent with other single dwelling applications.

- 3.151 The assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

#### ***Timing of development approval decision***

- 3.152 Assessment of the Development Application took the Directorate 30 working days which is within the legislated 30-day assessment timeframe.

## Conclusion

3.153 For Case Study 6:

- the Environment and Sustainable Development Directorate’s assessment to approve this development is not supported by the expert. Furthermore, the Directorate’s official acknowledged that there were errors in the assessment;
- files were only accessed by officers who had a reasonable and defensible reason to access them;
- although an incorrect decision was made the expert found no evidence of improper influence in the files for this case study. As in most cases, however, transparency of assessing officers’ consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation. While this is the case, the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced or were not aware of any cases where improper influencing had occurred; and
- approval of a rule deviation by a private developer should not be considered by the Directorate when assessing a Development Application. It is the role of the assessing officer in the Environment and Sustainable Development Directorate, rather than a private developer, to make a decision on whether a deviation complies with relevant planning criteria.

## Case Study 7: Harrison

**Table 3.7: Case Study 7 chronology of events**

This development involved the construction of a single dwelling in Harrison.	
Aug 2012	The certifier assessed that the proposed development met all applicable exempt development approval requirements. Following this assessment, the certifier issued a Building Approval and a Building Commencement Notice.
Aug 2012	Once construction had commenced, the builder observed that (unlike previously certified) the proposed development was not compliant with the Single Dwelling Housing Development Code’s rule 83 (relating to the setback from property boundaries) in two instances.  As a result, the builder (who had been appointed by the owner) lodged an exempt declaration with the Directorate. This was subsequently approved by the Directorate.
Nov 2012	The builder lodged another exempt declaration once it was identified that further elements of the construction did not comply with the Single Dwelling Housing Development Code’s rule 49 (relating to the amount of private open space). The Directorate refused this exempt declaration application on the grounds that they were not minor deviations, and therefore it required full Merit Track Development Application assessment.  As a result, the builder lodged a Development Application. As part of the Development Application assessment process, consultation with community members and relevant referral entities occurred. No representations were received. The referral entity, Territory and Municipal Services Directorate, indicated that there was a need to have specific conditions for the road verge.

Dec 2012	The Development Application was approved, with conditions relating to the material used for metal roofing (and/or metal walling) and for the road verge.
May 2013	The certifier issued a Certificate of Completion and applied for a Certificate of Occupancy and Use. Based on the information provided the Directorate issued the Certificate of Occupancy and Use in May 2013.

Source: ACT Audit Office analysis of Environment and Sustainable Development Directorate documentation

### **Certifier involvement**

- 3.154 In this case, the certifier assessed the development as exempt when it should have been refused as a result of deviating from the Single Dwelling Housing Development Code's Rule 83. From the evidence available it was not possible to identify whether this was due to an error or improper influence.
- 3.155 The certification firm involved in this case was not the same as in Case Studies 1, 2 or 4.
- 3.156 The Directorate stated that they were 'unaware of any issue at that property'.
- 3.157 The Directorate also advised that:  
... investigations are triggered through the lodgement of a Controlled Activity/ Construction Occupations Complaint Form under either the *Construction Occupations (Licensing) Act 2004*, or the *Planning and Development Act 2007*. The complaint form is a notified [instrument] and as such no investigation is currently underway. This is our general trigger for investigating complaints, although exceptions are made for matters of life safety (such as asbestos), or otherwise under specific instruction from either the Manager Utilities, land and Lease Regulation Section, the Construction Occupations Registrar, or the Director Construction Services Branch.
- 3.158 There was no evidence that the Directorate had taken, or proposed to take, disciplinary action against the certifier.
- 3.159 Given that assessing officers may be aware of breaches of legislation by certifiers that do not attract complaints from parties external to the Directorate, it would seem prudent to promote better internal Directorate processes to ensure all matters that may attract disciplinary action are communicated to the Directorate's Investigations Team for investigation.

### **Recommendation 3**

The Environment and Sustainable Development Directorate should implement a process for assessing officers to communicate breaches of legislation to the Investigations Team for investigation.

### **Certainty – expert findings**

- 3.160 The expert would not have approved the Development Application until further supporting information was provided with respect to some non-compliance issues regarding bushfires, side setbacks and the provision of private open space.

The expert however concluded these issues were resolvable and would not have warranted a refusal of the Development Application.

- 3.161 Key issues identified in regard to the initial Development Application were the provision of insufficient information and non-compliance with the Single Dwelling Housing Development Code.

#### Code Compliance

Rule20A	Bushfire	The application states that the bushfire requirement has been met. However, there is no information to confirm what construction measures are to be implemented to achieve compliance
Rule 83	Side Setback	The meals room encroaches into the setback area
Rule 86	Private Open Space	The site does not achieve the required area for Private Open Space

#### Conclusion

... further supporting information [should be] provided in regard to the non-compliance of the side boundary setback rule and the area of Private Open Space. The site is an unconstrained vacant block in a greenfields area and it is likely that the non-compliance would have an adverse impact on a potential future adjoining dwelling and also limit the use of the subject site by future occupants of the dwelling. However, the criterion for POS [Private Open Space] is so broad a refusal on this basis alone could not be substantiated.

### Transparency

- 3.162 Part 2 of the final Notice of Decision for this Case Study identified and commented on key areas of Directorate concern, as well as issues raised through public notification and referral entity advice (Part 3).
- 3.163 However, internal Directorate documentation of its Development Application assessment provided commentary against less than 25 per cent of the assessable planning rules. Transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to this lack of assessment documentation. This is an important matter for the Environment and Sustainable Development Directorate to address.

### Community participation and consultation

- 3.164 As required under Section 153 of the *Planning and Development Act 2007*, public notices were sent out to all adjoining premises.
- 3.165 One public representation was received and was considered by the Directorate in its assessment of the Development Application.

### Security of access

- 3.166 Six officers accessed the Development Application documents for this case using the Directorate's electronic database. This included the assessing officer and staff from Customer Services. Each of the officers who accessed the file had a reasonable and defensible reason to do so.

### ***Decision-making authority***

3.167 As mentioned in paragraph 3.96, in accordance with Directorate policy, the Notice of Decision advising of the Development Application assessment outcome was issued by the same officer who conducted the assessment. This officer had appropriate decision-making authority.

### ***Improper influence***

3.168 Given the expert indicated they would not have approved the Development Application until further supporting information was provided with respect to some non-compliance issues (refer to paragraph 3.160), further examination of the Directorate's electronic files for this Case Study was conducted by the expert.

3.169 The expert stated that:

The assessment of the Development Application was effectively limited to Rule 83 (side boundary setback). The assessment report in relation to the private open space issue [was] simply a 'cut and paste' of the sentences from the applicants submission. There was no independent assessment by the assessing officer.

3.170 The assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred.

### ***Timing of development approval decision***

3.171 Assessment of the Development Application took the Directorate 19 working days which is within the legislated 30-day assessment timeframe.

### ***Conclusion***

3.172 For Case Study 7:

- while the Environment and Sustainable Development Directorate's assessment to approve this development is supported by the independent expert, there was an issue with respect to the Development Application being approved based on insufficient information;
- files were only accessed by officers who had a reasonable and defensible reason to access them, and standard operating procedures were followed;
- although there were issues of insufficient information, the expert found no evidence of improper influence in the files for this case study. As in most cases, however, transparency of assessing officers' consideration of the application, which is a safeguard against improper influence, was compromised due to a lack of assessment documentation;
- the assessing officer who signed the Notice of Decision provided a signed statement that they had not been improperly influenced and were not aware of any cases where improper influencing had occurred; and
- disciplinary action has not been considered against this certifier.

## 4. CERTIFICATION

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- 4.1 This chapter examines issues related to certifiers which the Environment and Sustainable Development Directorate can affect.
- 4.2 Certifiers perform a regulatory function on behalf of the Environment and Sustainable Development Directorate. This chapter examines the Directorate's safeguards to mitigate the risk of improper influence on certifiers in conducting this function.
- 4.3 Chapter 2 outlines the roles and responsibilities of certifiers in detail.

### Conclusion

Inadequacies were identified in the Directorate's safeguards to monitor the decisions of certifiers and mitigate the risk of improper influence. Importantly, there is no auditing undertaken of the fundamental decision made by a certifier on whether or not to exempt a development and therefore undertake the assessment themselves, rather than inform a homeowner that the development should be subjected to the Directorate's Development Application process. The need for these audits is highlighted in that certifiers incorrectly assessed developments as exempt in two case studies (Case Studies 1 and 7). Other inadequacies, which need to be addressed relate to certifiers' training, Directorate communication with certifiers, insufficient public material explicitly on exemption and certification, and the need to undertake targeted audits on a range of certifier compliance issues.

As the penalties for certifiers are small, these need to be reviewed to encourage compliance with relevant legislation and provide a disincentive to improper influence. An additional disincentive would be publicly reporting the demerit points of certifiers.

### Key findings

- An April 2013 transcript from an ACT Civil and Administrative Tribunal hearing identified an instance where a certifier had agreed to 'cut corners' to resolve a building matter for an owner and builder (paragraph 4.4).
- A senior Directorate officer indicated there are certain relationships between builders and certifiers that are potentially improper. This view was reiterated by three of the four Directorate building inspectors interviewed (paragraph 4.5).
- The Environment and Sustainable Development Directorate has identified a group of four certifiers that require additional management and are being monitored due to either the number of demerit points they have incurred, or the significance of the non-compliance in their particular cases (paragraph 4.7).

- The audit identified weaknesses in the Directorate’s mitigation measures to address the risk of improper influence. Addressing weaknesses in the following key areas may reduce the potential for improper influence or errors in the certification process (paragraph 4.15):
  - fostering the training of certifiers;
  - better communication with certifiers;
  - increasing the community awareness of the role of certifiers; and
  - improving its regulatory activities of auditing, complaints management, investigations and the monitoring of investigations.
- While 10 per cent of Development Application exemptions are audited, the audits do not examine the fundamentally important question of whether or not the development should have been certified as exempt in the first place (paragraph 4.47).
- The Directorate has advised that audits of certifiers’ activities will now be routinely targeted towards specific issues the Directorate identifies as problems in the industry. This will allow for targeted follow-up audits on specific certifiers who have been non-compliant (paragraph 4.51).
- Monitoring of investigations in response to complaints and their results is inadequate, and is not guided by a formal system which includes comprehensive policies and procedures (paragraph 4.68).
- When compared to other jurisdiction’s approaches, the ACT’s penalties for improperly influencing the planning system are small and may not deter offences (paragraph 4.77). For example:
  - the current maximum financial penalty for a certifier’s non-compliance offence under the *Building Act 2004* is 60 penalty units, which equates to \$8,400 (paragraph 4.73). In New South Wales, the maximum financial penalty for misconduct by a certifier is \$110,000. In Queensland this is over \$183,000 (paragraph 4.75); and
  - there is no publicly available information regarding certifiers who have incurred demerit points or fines (paragraph 4.78).

### IMPROPER INFLUENCE OF CERTIFIERS

- 4.4 An April 2013 transcript from an ACT Civil and Administrative Tribunal hearing identified an instance where a certifier had agreed to ‘cut corners’ to resolve a building matter for an owner and builder. The transcript stated that:

He [the certifier] was under pressure from the Stop Work Notice and the fact that no work had been done for some months. The owners and builders wanted the matter resolved. He agreed he cut corners and approved the variances himself rather than making the appropriate written application to ACTPLA.

4.5 A senior Directorate officer indicated that there are certain relationships between builders and certifiers that are potentially improper. This view was reiterated by three of the four Directorate building inspectors interviewed during this audit.

4.6 In a survey undertaken in November 2012 by the Environment and Sustainable Development Directorate of building surveyors, 67 per cent of respondents considered that they had lost business as a direct result of refusing to approve an application which had insufficient information. One respondent commented that:

I have been advised that if the documentation was good enough for a planning approval it should be good enough for the issue of a BA [Building Approval], therefore they will go elsewhere.

4.7 The majority of the issues the Directorate identify in relation to certifiers relate to the certification of works and not Development Application exemption assessments. The Directorate identified that 11 certifiers had incurred demerit points over the 2010 to 2013 period. Four of these certifiers require additional management and are being monitored due to either the number of demerit points they have incurred, or the significance of the non-compliance in their particular cases. The majority of incurred demerit points relate to certification of larger-scale/multi-unit developments rather than single dwelling developments.

**COMPLAINTS**

4.8 Complaints can provide valuable information about a certifier. However, there is no way of identifying how many complaints lodged with the Directorate relate to certifiers, other than going back through each individual complaint and assessing what it related to. Building inspectors estimate that in 2012-13 roughly 10 per cent of their investigations related to certifiers, and less than 10 per cent of these related to exempting developments from Development Applications.

4.9 Records on the number of complaints made in relation to certifiers were maintained in the period 2008-2011 (refer to Table 4.1). Complaints regarding builders are included to provide context.

**Table 4.1: Number of complaints regarding certifiers and builders (2008-2011)**

Financial year	Complaints regarding certifiers	Complaints regarding builders
2008-09	11	126
2009-10	14	108
2010-11	17	313

Source: Environment and Sustainable Development Directorate Annual Reports

- 4.10 Complaints about certifiers covered a range of issues including improper associations with builders, refusal to issue a Certificate of Occupancy and Use, poor business practices and breach of planning laws. During 2008-2011 only one certifier had their license disqualified (for exceeding the maximum number of demerit points). This certifier has not subsequently returned to the industry.
- 4.11 A January 2013 briefing to the Minister for Environment and Sustainable Development noted a sharp rise in the number of complaints regarding Class 2 (multi unit) buildings.<sup>19</sup> Of the 12 examples used to demonstrate the issues involved in these complaints, five related to the same certification firm, and three of those involved the same certifier and builder. The certifier and builder responsible for these businesses have been subject to a number of disciplinary actions. This certifier was involved with Case Study 7; with sign-off on a non-compliant plan being the key issue. The Environment and Sustainable Development Directorate is monitoring this certifier (refer to paragraph 4.7).
- 4.12 As discussed in paragraphs 3.24 to 3.26, for the seven case studies assessed in this audit, while there were issues with some certifiers, it was not possible to identify, from the evidence available, whether the actions of the certifier were due to an error or improper influence. In Case Study 1 the certification appears to be based on a genuine misunderstanding of the placement of boundaries for a corner block.
- 4.13 Furthermore, as stated in paragraph 3.27, in three of the four cases (Case Studies 1, 2 and 4), the Directorate considered (or is considering) whether or not it should take disciplinary action against the relevant certifier.
- 4.14 As stated in paragraph 5.16, the 'complexities and discretionary nature of aspects of the planning system results in uncertainty and thereby creates a risk that improper influence may occur'. Given this, it is important that the Environment and Sustainable Development Directorate mitigate the potential for improper influence of certifiers.

### **SAFEGUARDS TO MANAGE IMPROPER INFLUENCE OF CERTIFIERS**

- 4.15 The Environment and Sustainable Development Directorate has the ability to better manage improper influence of certifiers and improve the Development Application exemption assessment process through:
- fostering the training of certifiers;
  - better communication with certifiers;
  - increasing the community awareness of the role of certifiers; and
  - improving its regulatory activities of auditing, complaints management, investigations and the monitoring of investigations.

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<sup>19</sup> Class 2 means a building containing two or more sole-occupancy units, each being a separate dwelling.

- 4.16 Further, penalties need to be assessed in terms of their effectiveness as a deterrent, as they are currently low.

### Training and communication

- 4.17 In a 2000 paper on challenges for regulatory compliance, the Organisation for Economic Co-operation and Development (OECD) stated that:

The responsibility of policymakers does not end with publication of the rule. New rules may need to be accompanied by information campaigns to ensure that they are brought to the notice of and made comprehensible to the target group.<sup>20</sup>

- 4.18 The lack of guidance in a complex and discretionary system, such as the ACT's planning system, provides the opportunity for undue influence to occur.
- 4.19 The publicly available factsheet, titled 'Certifiers' Responsibilities', developed by the Directorate for the information of certifiers and other building surveyors, and updated as required, discusses licensing, insurance, advertising and legislative requirements, but makes no mention of their role in exemption assessments.
- 4.20 No comparable factsheet is available for works assessors who are also certifiers. When building surveyors were surveyed in November 2012, regarding whether they felt their training and qualifications had equipped them to undertake their role as an assessor of exempt development and works assessment, 42 per cent stated that they did not believe they had received the necessary training. Responses also provided commentary about what their role should be, with the majority making linkages to building approvals and compliance functions. Few made reference to development assessments.
- 4.21 Contact between certifiers and Directorate officers before, during and after a development is limited and usually initiated by certifiers seeking technical advice, or occurs as a result of an investigation or disciplinary action.
- 4.22 There is strong industry support for greater consultation between certifiers and the Directorate, particularly relating to having greater guidance from the Directorate's Construction Occupations Registrar. In the November 2012 survey, 67 per cent of responding building surveyors indicated they should be receiving additional guidance from the Registrar and his delegates in relation to the interpretation of legislation, standards, codes and good practice.
- 4.23 When surveyed, 67 per cent of responding building surveyors indicated they believed there should be a requirement to undertake continuing professional development; 58 per cent of respondents supported targeted professional development that specifically addressed ACT issues.

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<sup>20</sup> Available at [www.oecd.org/gov/regulatory-policy/46466287.pdf](http://www.oecd.org/gov/regulatory-policy/46466287.pdf)

- 4.24 Under Section 104B(1) of the *Construction Occupations (Licensing) Act 2004*'s supporting Regulation:

The Registrar may determine a course of training for a construction occupation or occupation class if the registrar is satisfied on reasonable grounds that the training is reasonably necessary for the development or enhancement of the skills or knowledge of licensees in the construction occupation or class.

- 4.25 While the Directorate provides industry notes to update certifiers on changes to building codes, the 2012 survey responses indicate that more training may be needed.

### Recommendation 4

The Environment and Sustainable Development Directorate should identify and promote ways to improve the training of certifiers, particularly when changes occur in planning legislation and building codes, as now allowed for under Section 104B (1) of the *Construction Occupations (Licensing) Act 2004*.

- 4.26 While minimum documentation standards for building approvals were introduced for certifiers in August 2013, no similar standards exist for exemption assessments. For example, there are no standard checklists provided by certifiers to demonstrate how a Development Application exemption decision was arrived at.
- 4.27 While some certifiers have created a checklist to support their exemption decisions, the majority of certifier's submit no paperwork to support their decisions. Certifiers are only required to lodge an assessment notice with a copy of the plans and documents used in the exemption assessment of the building work provided. The exemption must be marked on, or attached to, or partly marked on or partly attached to, each page of the plans used by the certifier in the assessment. This information is reviewed for completeness by the Directorate as part of its audit process, as discussed at paragraph 4.43.
- 4.28 Without the submission of supporting documentation, it is difficult to determine whether an accurate exemption assessment has been made by the certifier. It is also difficult to identify if errors have occurred. While the Directorate can request information from a certifier in relation to an exemption assessment decision, the Directorate's ability to monitor, or audit, certifiers' assessments is limited without supporting information.
- 4.29 The requirement to submit minimum documentation to the Directorate may assist:
- certifiers to make accurate exemption assessment decisions, by ensuring they have considered all relevant areas; and
  - in holding certifiers accountable for their exemption assessment decisions.

### Recommendation 5

The Environment and Sustainable Development Directorate should require building surveyors and works assessors (certifiers) to submit a minimum level of documentation, such as a checklist, in relation to Development Application exemption assessments.

### Community awareness of the role of certifiers

- 4.30 Information on the role of certifiers and how they are appointed is not readily available to the community. Without this, homeowners may not be aware of how important a certifier's regulatory role is in protecting their interests. This is of concern for single residential dwelling developments as the Environment and Sustainable Development Directorate requires that homeowners appoint the certifier, rather than relying on a builder to appoint one.
- 4.31 When surveyed about the extent of contact they have with the owner of a site, certifiers stated that:
- they rarely met the homeowners unless they were also the builder; and
  - homeowners were uncertain of the certifiers' role in the building process.
- 4.32 Four certifiers publicly describe their role on their business websites as:
- ... Essentially we are a privatised extension of the ACT Government and our purpose is to facilitate the approval, inspection and certification of building work in the ACT, ensuring building work complies with the Building Code of Australia, its referenced Australian Standards and all applicable legislation.
- ... The Certifier's task is to ensure that work is carried out in accordance with the referenced documents, such as the engineers designs and the Building Code of Australia.
- ... [The business] performs the role of "certifier" under the *Building Act 2004* which was introduced by the ACT Government. This involves the assessment of projects against the Building Code of Australia and building regulations, inspection of work during construction to ensure compliance and, on completion of the work, the recommendation for the issue of a certificate of occupancy or use. For single residential building projects, it also includes verifying whether the project is exempt from Development Approval.
- ... Certification fees vary depending on the complexity and size of the project. These fees are for the provision of auditing and processing of the plans, including documentation and inspections of the building work.
- 4.33 Only one of the four businesses mentioned development approval exemptions. This variation in the description of services creates ambiguity regarding the role of certifiers.
- 4.34 Information on the hiring of certifiers for exemption assessments is located under the 'Design and Build' section of the Directorate's website. Reference is made to building surveyors and not works assessors, yet both are able to conduct exemption assessments.

- 4.35 The Directorate has a publicly available factsheet, for the information of the community, on the employment of building surveyors, located under the 'Hiring of professionals' section of the Directorate's website. This factsheet discusses a building surveyor's role in certifying works, but makes no mention of their role in exemption assessments. No comparable factsheet is available for works assessors who are also, as mentioned in paragraph 4.34, able to conduct exemption assessments. The Directorate's website, with respect to Development Application exemption assessment processes for single dwelling developments, does not provide:
- ready access to information about the roles and responsibilities of the various professionals involved in exemption assessment; or
  - information to assist in understanding the differences in approach for development assessments that are:
    - i. generally exempt from Development Applications such as fences and antennae;
    - ii. single dwelling developments that are exempt from Development Application as they comply with all the mandatory rules under the relevant code and can therefore be assessed under the Development Application exemption process;
    - iii. seeking an exemption declaration from the Directorate for single dwelling developments that slightly deviate from the mandatory rules and cannot, therefore, be considered under the Development Application exemption assessment process; and
    - iv. using exempt notices issued by the works assessor for existing dwellings that need a certificate of compliance to certify that a particular structure was exempt under the legislation when it was built; or
  - an understanding of the difference between developments which would be exempt by regulation (class 10 structures) or under the Territory Plan.
- 4.36 As a result of this lack of publicly available information, it is likely to be unclear to homeowners how an exemption assessment should be undertaken and what the role of the certifier is in this process.

**Recommendation 6**

The Environment and Sustainable Development Directorate should improve its publicly available information on certifiers and the Development Application exemption assessment process by:

- a) including on its website, information that explicitly defines the role and responsibilities of a certifier and states when a homeowner needs to engage a certifier; and
- b) providing certifiers with standard information to be included on their websites defining the role of certifiers.

**Improving regulatory activities**

4.37 The Directorate's Construction Services Branch has two distinct business units which relate to the regulation of certifiers, the:

- Construction Occupations Section, which is responsible for the administration of the *Construction Occupation Licensing Act 2004*. It responds to requests for compliance services which may result in pursuing breaches and enforcement of land and planning regulations, and undertakes compliance monitoring of targeted developments for detection of land and planning breaches; and
- Utilities, Land and Lease Regulation Section which is responsible for the investigation of complaints and enforcement action regarding breaches.

4.38 In investigating complaints, case tracking occurs weekly for cases deemed difficult or long-term. Cases are considered by the case tracking team. This team is comprised of the Construction Occupations Registrar and senior staff from the Construction Occupations and Utilities, Land and Lease Regulation sections. The team reviews individual cases to decide management strategies and the allocation of these to staff members. Case tracking also continues once enforcement action commences.

**Audits**

4.39 The Directorate's Construction Auditing Policy, first developed in 2011, states that the Directorate is committed to ensuring:

... that licensed building surveyors, builders and building assessors are discharging their legislative responsibilities under relevant legislation so that completed buildings are safe and healthy for human occupation and, also that buildings possess attributes associated with minimum building code provisions such as equitable access and energy efficiency features.

- 4.40 According to the Construction Auditing Policy, audits are intended to provide a means of measuring the effectiveness of the decision-making skill of building certifiers, builders and building assessors. The audits aim to identify where the system is failing, as well as where individuals are failing, so that corrective measures can be considered.
- 4.41 In addition, the purpose of auditing certifiers is to ensure that licensing requirements are met and that the certifier demonstrates sound judgement and decision-making skills when administering the *Building Act 2004*.
- 4.42 Audits are classified into two main categories: administrative (or desktop); and on-site.
- 4.43 Administrative audits of certifiers consist of checking information on building approvals, supporting documents and plans for compliance with relevant regulatory and code requirements and for consistency with industry standard practice for nominated construction types.
- 4.44 These audits aim to identify systemic errors or departures from administrative, legislative or code requirements and are used to provide feedback to certifiers on areas of non-compliance and to recommend areas for improvement. It is on the results of these audits that industry notes are developed.
- 4.45 The Directorate has set an internal target of auditing 10 per cent of the Development Application exempt building approvals issued by building certifiers. As mentioned, in the Directorate's 2012-13 Annual Report this target has been achieved.
- 4.46 This has been confirmed in correspondence to a constituent on 7 June 2013, where Minister Corbell advised:
- Each year ESDD [the Directorate] audits at least 10% of all building approvals including audits of developments exempt from requiring a development approval. Part of the audit is to confirm whether the building certifier for the work has complied with their responsibilities under the *Planning and Development Act 2007*.
- 4.47 While 10 per cent of Development Application exemptions are audited, the audits do not examine the fundamentally important question of whether or not the development should have been certified as exempt in the first place. Only certifier-submitted documentation is reviewed to ensure that all relevant documents have been submitted.
- 4.48 A small number of exemptions each year should be audited to ensure that the correct decisions have been made and that the developments have been Development Application exempt assessed appropriately. This should provide the Directorate and community with increased assurance that these assessments meet legislative requirements, and should also identify areas for potential improvement via training of licensees. It may also deter action of improper influence.

- 4.49 While the Construction Auditing Policy states that audits are carried out on target groups and/or all certifiers on an annual basis, this does not appear to be occurring. A review of audits identified that they were selected in a predominantly random way, and do not expressly target certifiers for which there are specific concerns.
- 4.50 More effective results could be achieved by targeting areas identified by the number of complaints raised on particular issues or recidivist certifiers. The identification of these risk areas could be achieved through better communication between the Directorate's investigation and audit teams in the Utilities Land and Lease Regulation Section.
- 4.51 The Directorate is currently drafting a new audit policy to address this matter. It has advised that audits of certifiers' activities will now be routinely targeted towards specific issues which the Directorate identifies as problems in the industry. This will allow for targeted follow-up audits on specific certifiers who have been non-compliant. Finalisation of this revised policy is anticipated in 2014.

#### **Recommendation 7 High Priority**

The Environment and Sustainable Development Directorate should improve its auditing of Development Application exemption assessments by:

- a) continuing to develop and implement a system for targeting audits; and
- b) including audits to determine if a certifier's decision to assess a development as exempt is correct.

#### **Complaints**

- 4.52 The Directorate has developed a factsheet which outlines the Directorate's policy on feedback, including complaints. Complaints regarding planning and development issues must be submitted to the Directorate in writing, unless they relate to an issue where life is at risk.
- 4.53 Once received, complaints are classified as either planning and development or construction issues. Complaints are triaged by a Compliance Manager into one of several priority categories, category one being those that are a risk to life and thus of the highest priority.
- 4.54 At this stage, complaints are recorded by the Compliance Manager on a spreadsheet and allocated to individual inspectors for investigation. This allocation is based on balancing the complexity of the issue with the skill set of the individual inspector.
- 4.55 At present, the policies and procedures guiding the triaging of complaints and allocation of complaints to inspectors are inadequate.

- 4.56 The triage process is currently reliant on the knowledge and experience of the Compliance Manager and is not formally documented in any policies or procedures in the Directorate.
- 4.57 The Directorate has developed a standard operating procedure for complaints handling. This operating procedure does not represent current practice. For example, no mention is made in the operating procedure of the criteria for the triaging of complaints or the process undertaken to allocate complaints to the most appropriate inspector.
- 4.58 In addition, unless a complaint progresses to the case tracking process discussed at paragraph 4.38, there is no managerial oversight of the progress of a complaint to completion. This leaves the process open to manipulation, and gives both the compliance manager and the inspectors the ability to not investigate a complaint without detection.

### **Investigations**

- 4.59 Under the complaints policy, the Investigation Team is required to investigate all formal complaints under planning and construction laws. Investigations are only commenced in response to complaints.

**Table 4.2: Number of complaints investigations completed (2010-2013)**

Financial year	Investigations completed	New complaints lodged
2010-11	849	412
2011-12	647	684
2012-13	668	787

Source: Environment and Sustainable Development Directorate annual reports 2010-11, 2011-12 and 2012-13

- 4.60 Historically, certifiers have not been targeted for investigation, with the majority of Directorate oversight activity instigated due to complaints from the public. Table 4.2 shows that, while the number of overall investigations completed has remained relatively steady (around 650) from 2011-13; the number of complaints received has risen sharply from 412 in 2010-11 to 787 in 2012-13.
- 4.61 It is difficult to determine whether this increase in complaints is due to an increase in the number of issues identified, an increase in the number of developments (which would make the percentages the same) or an increased awareness in the community regarding how to make a complaint.
- 4.62 In addition to those submitted via the Directorate’s complaint process, a number of complaints are submitted to the Minister and referred to the Directorate for investigation. These complaints do not undergo the Directorate’s triage process. They are responded to as high priority complaints regardless of the nature of the complaint. It may be more equitable and effective if the system for managing complaints made to the Minister is the same as that used for managing complaints made to the Directorate.

- 4.63 The investigations team is made up of eight investigators and one unit manager. At present each inspector manages an average of 50 active investigations at a time. The high number of cases has resulted in a lack of monitoring and peer review. This workload is considered unsustainable by the Directorate.
- 4.64 A 6 September 2013 brief to the Directorate's Director-General discussed the workload of the investigations team and proposed a new enforcement policy that would decrease the number of complaints that required investigation by the Directorate. The brief stated that there were currently 481 active investigations, many of which related to Class 2 multi-unit buildings and required increasingly complex evidence gathering. A new enforcement policy, agreed to by the Minister and undergoing implementation from March 2014, aims to reduce the number of complaints investigated. The new policy requires that if the resources required to investigate a complaint are determined to be disproportionate to the alleged offence, the Directorate may choose not to investigate or seek enforcement action. The approach is a similar investigation strategy to that taken by the Australian Federal Police and the Director of Public Prosecutions.
- 4.65 Those complaints that would not be investigated included minor maintenance and cleaning issues that could be addressed via private legal action. This approach was predicted to result in a 20 per cent reduction in the team's workload.
- 4.66 It is difficult to assess the likelihood of the predicted reduction in the area's workload, as the result is dependent on a number of factors, including the nature of the complaints that are lodged with the Directorate.
- 4.67 A senior member of the investigations team advised that the Directorate would consider conducting a review of the effectiveness of this policy in reducing workload. This type of review is critical to ensuring that the intended aim of the policy is achieved.

### **Recommendation 8**

The Environment and Sustainable Development Directorate should assess the effectiveness of its new enforcement policy for managing complaints to determine if it has reduced the Directorate's workload. The Minister should be consulted to determine whether complaints made to him should also be subjected to the enforcement policy.

### ***Monitoring of investigations***

- 4.68 Monitoring of investigations in response to complaints and their results is inadequate, and is not guided by a formal system which includes comprehensive policies and procedures. Due to the current workload in the investigation team, no routine review of investigations, or their results, is conducted outside of the case tracking process discussed at paragraph 4.38. Without monitoring, there is potential for investigators to not investigate complaints about certain certifiers, or to respond to complaints inappropriately, without this being detected.

- 4.69 While it is not necessary to review every investigation, conducting a sample-based audit of investigations and their results could enhance monitoring and provide the Directorate with assurance that the results from investigations are compliant with legislation.

### Recommendation 9

The Environment and Sustainable Development Directorate should develop an investigations monitoring system, which is guided by policies and procedures, and includes a regular review of the progress and results of investigations and complaints.

- 4.70 On 27 September 2013 the Directorate's Information Management/ICT Executive Committee agreed to the purchase, installation and use of an investigations software program to improve documentation and reporting by the investigations team stating:

The software program does not replace any existing software used by the investigations and breach management team but rather introduces a new efficient way in managing investigations at a criminal standard to support breach management functions.

- 4.71 This system had not been implemented by the completion of the Audit Office's fieldwork. However, correspondence from the Directorate of 8 May 2014 advised the:

... investigations management system has been deployed within the Construction Investigations Team.

### Penalties

- 4.72 As mentioned in paragraph 2.20, a certifier may have disciplinary action taken against them, including the issuing of demerit points. Their licence can be cancelled, suspended or conditioned to restrict the activities that can be undertaken.
- 4.73 While certifiers are liable via civil action for any rectification works that occur as a result of non-compliance offences, the current maximum financial penalty for a certifier's non-compliance offence under the *Building Act 2004* is 60 penalty units, which equates to \$8,400.
- 4.74 In comparison, the *Construction and Energy Efficiency Legislation Amendment Bill 2013 (No.2)*, passed on 25 February 2014, revised the maximum penalty for builders for non-compliance with building code to 300 penalty units, equating to \$42,000.
- 4.75 In New South Wales, the maximum financial penalty for misconduct by a certifier is \$110,000. In Queensland, a certifier may be fined up to 1,665 penalty units at \$110 each for not acting in the public interest. This equates to over \$183,000.

- 4.76 The transcript from one ACT Civil and Administrative Tribunal trial involving a certifier indicated that the certifier's gross income was approximately \$100,000 a month, prompting the Registrar's solicitor to state that a maximum \$1,000 fine, as was relevant for that particular offence, and a one-month license suspension, was 'ridiculously' small.
- 4.77 Compared to other jurisdictions' approaches, the ACT's penalties are small and may not deter offences. The Directorate should review the penalties for a deliberate breach of relevant Acts and codes.
- 4.78 In addition, there is no publicly available information regarding certifiers who have incurred demerit points or fines. This is available in other jurisdictions such as New South Wales and Queensland.
- 4.79 While the Directorate has considered the introduction of a publicly available demerit point register, it did not progress this due to the possible unwarranted effect on a certifier's income, if demerit points were publicly notified, but later removed.
- 4.80 In comparison, the Health Directorate is authorised to publish proven offences against the *Food Act 2001*, unless the court has made an order preventing publication, the case is within the appeal period, or an appeal has been lodged.
- 4.81 A public demerit points register of certifiers and increasing penalties may further deter improper behaviours.

#### **Recommendation 10**

The Environment and Sustainable Development Directorate should review and report to the Minister on the merits of:

- a) increasing penalties for a certifier's non-compliance with relevant Acts and codes; and
- b) publicly reporting the demerit points of certifiers.



## 5. DEVELOPMENT APPLICATIONS

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- 5.1 This chapter describes the safeguards used by the Environment and Sustainable Development Directorate to mitigate the potential for improper influence.
- 5.2 As mentioned in paragraphs 3.9 and 3.10 the safeguards used in this audit to assess the management of the risk of improper influence in the Development Application assessment process either on a case by case basis or system-wide include: certainty, adequate documentation; community consultation; security of access to information by relevant officers; decision-making authority; balancing competing public interests; reducing complexity; third party appeals and risk management.

### Conclusion

There is inadequate documentation of the assessments made by Directorate assessing officers and peer reviews are not always undertaken for developments assessed under the Development Application Merit Track process.

Furthermore, the standard wording of the 'Controlled Activity' notification letter sent to homeowners is unnecessarily confronting; this needs to be changed as the issue that triggered it may be due to issues outside of a homeowner's control.

### Key findings

- The complexities and discretionary nature of aspects of the ACT's planning system results in uncertainty and thereby creates a risk that improper influence may occur (paragraph 5.16).
- A number of the Directorate's operating procedures for Development Application assessments do not contain an identified review date, and do not appear to reflect current work practices (paragraph 5.17).
- There was no evidence that there was any peer review undertaken of the Development Application assessments for over half of the seven case studies (paragraph 5.27).
- Developments that attract a significant number of representations, 10 or more, are considered at a higher level: the Major Project Review Group (paragraph 5.44).
- Records of the basis for assessment decisions were not complete, as not all factors considered were documented (paragraph 5.58).
- Information retained on the Case Study files lacked sufficient detail to easily understand why certain elements of a development complied with a rule (paragraph 5.58). The expert advised improving documentation to address this matter 'would not be an onerous task' as it 'does not add to the assessment process, it simply requires the conclusions made by the assessing officer to be reported' (paragraph 5.63).

- There is low risk that electronic Development Application files could be accessed or altered inappropriately (paragraph 5.67).
- Although the eDevelopment system, with its standardised documentation requirements, has resulted in improvements in the quality of entry material; there are still inadequacies in the quality of Development Application material submitted (paragraph 5.73).
- Guidance for Development Applications is inadequate for those applicants seeking development approval for work already undertaken as a certified exempt development (paragraph 5.82). Furthermore, communication with some homeowners/applicants in these cases is poor (paragraph 5.83).
- The 'Controlled Activity' notification letter is confronting (paragraph 5.86).
- The implementation of the 2011 Risk Management Plan has been staged, with an initial pilot of the branch-specific risk registers conducted in the Corporate Branch. The Directorate-wide implementation of branch-specific risk registers was not endorsed by the Executive Management Board until 19 June 2013. As a result, implementation has been slow (paragraph 5.118).
- There is no mention in the Directorate's Risk Management Plan of the risk of improper influence on Development Application assessment officers. Given the importance of such a risk, it needs to be explicitly considered (paragraph 5.115).

### CERTAINTY

#### 5.3 The Independent Commission Against Corruption's (ICAC) Anti-corruption Safeguards and the NSW Planning System report states that:

In planning, there has long been a conflict between legal certainty and a desire for flexibility to adapt to unusual or unforeseen circumstances. Flexibility has typically been delivered by providing greater discretionary powers to decision-makers. Such discretion is often not subject to a clear set of criteria.

#### 5.4 The report further states that:

Excessive discretion in the planning system creates uncertainty about planning rules and how decision-makers apply such rules when determining development and planning proposals.

The lack of certainty surrounding planning rules and planning decisions can lead the community to believe that controversial decisions have been corruptly made. A system that is, or is widely perceived to be, conducive to corrupt conduct can reduce public confidence in the integrity of ... government.

#### 5.5 Clear criteria to guide decisions and the existence of a consistent decision-making are necessary to reduce the risk of improper influence in decision-making, as evidenced by the ICAC's recommendation to the New South Wales Government:

... ensure that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.

## Discretionary and qualitative planning criteria

- 5.6 In the ACT, Development Applications are assessed against the relevant precinct, development and general planning codes which support the *Planning and Development Act 2007*, its regulations, and the Territory Plan.
- 5.7 As mentioned in paragraph 2.13, each precinct, development or general planning code:
- ... has a number of elements. Each element has one or more rules, and each rule has an associated criterion (unless the rule is mandatory). Rules provide quantitative, or definitive, controls. By contrast, criteria are chiefly qualitative in nature.
- 5.8 For single dwelling developments, these requirements:
- guide assessment of proposed developments against mandatory planning rules; and
  - allow discretion by decision-makers by having a set of criteria against which deviations from mandatory rules can be assessed.
- 5.9 The discretionary and qualitative nature of the ACT's planning criteria is at odds with ICAC's call for mandated sets of robust and objective criteria, and therefore limits the certainty relating to planning requirements.
- 5.10 For example, many of the planning criteria in the Single Dwelling Housing Development Code require that a development achieve 'consistency with the *desired character*'. However, there is a lack of clarity on the definition of '*desired character*'.
- The Territory Plan provides that:  
Desired character means the form of development in terms of siting, building bulk and scale, and the nature of the resulting streetscape that is consistent with the relevant zone objectives, and any statement of desired character in a relevant precinct code.
  - Precinct codes provide some level of guidance on the character of selected individual suburbs or districts. However, there is no clarity on how achievement of '*consistency with the desired character*' is to be assessed. These assessments are at the discretion of Environment and Sustainable Development Directorate assessing officers.
- 5.11 In commenting on the nexus between planning rules and criteria, the Audit Office's independent expert stated that:
- The rule outlines numerical requirements whereas the criterion allows for a value judgement. However, there is no connection between the two. There is no indication as to how far beyond the numerical standard outlined in the rule is possible before the criterion will not be satisfied.
- 5.12 As stated by ICAC:
- The existence of a wide discretion to approve projects ... creates a corruption risk and community perception of lack of appropriate boundaries.

- 5.13 As evident by the community representations considered by the Environment and Sustainable Development's Major Project Review Group in relation to Case Studies 1 and 2, the ACT community perceives that there is a lack of appropriate boundaries due to the discretionary nature of planning criteria; particularly in relation to *Element 2: Building and Site Controls* of the Territory Plan which seeks:
- ... to ensure buildings are compatible with, and complement, the built form, siting and scale of surrounding properties and area of an appropriate residential character.
- 5.14 The lack of certainty is exacerbated by the volume of planning laws, regulations and supporting codes which address a growing number of policy requirements, and have been the subject of numerous amendments.
- 5.15 Since its notification on 13 September 2007, the overarching *Planning and Development Act 2007* has undergone 41 revisions (some of them minor), while the Territory Plan has been republished for variations 125 times between February 2008 and January 2014.
- 5.16 Assessing a Development Application involves understanding the complexities of the Territory Plan and its supporting codes and rules. The complexities and discretionary nature of aspects of the ACT's planning system results in uncertainty and thereby creates a risk that improper influence may occur.

### Consistency in decision-making

- 5.17 The Directorate has developed a suite of standard operating procedures and work instructions to guide planning officers' decision-making. A number of the Directorate's operating procedures for Development Application assessments do not contain an identified review date, and do not appear to reflect current work practices. For example, the requirement to electronically submit all Development Applications through the eDevelopment system, introduced in 2012, substantially changed the processing of documents and naming conventions but it is not yet reflected in the work instructions.
- 5.18 Furthermore, the June 2013 internal audit review of the Directorate's corruption and fraud prevention measures found adherence to standard operating procedures and work instructions could be improved, stating:
- ... despite the detail in the work instructions for merit and impact track development applications, policies and procedures were not being strictly enforced for all development applications.
- 5.19 The same internal audit review also conducted a desk-top scan of 22 Development Applications under the Merit Track process and found that:
- 10 (45 per cent) did not have a completed 'legislated requirements - merit track' forms;
  - seven (32 per cent) did not have a completed 'Territory plan code requirements merit track' assessment report; and

- thirteen did not have required information retained on their electronic files regarding issues such as approvals or Notices of Decisions.

5.20 Adherence to standard operating procedures and work instructions facilitates a consistent approach to assessments and decision-making. In addition, it can act as a safeguard against improper influence. The Directorate's poor observance of standard operating procedure requirements therefore exposes it to improper influence.

### **Quality assurance**

5.21 While consistency in Development Application assessment decisions can be increased by adherence to standard operating procedures and work instructions, it can also be further enhanced by subjecting Development Application decisions to quality assurance.

5.22 As stated in the Australian National Audit Office's March 2007 guide on *Administering Regulation*, structured and systematic quality management procedures provide assurance that decisions are: made in accordance with defined procedures; of the highest quality; and are lawful. Accordingly, quality assurance is a safeguard.

5.23 The Australian National Audit Office guide suggested consideration of a range of quality management tools such as:

- Appointing a quality manager;
- Using quality control techniques in key processes;
- Publishing a quality manual;
- Subjecting key regulatory processes to peer review;
- Conducting quality assurance reviews of regulatory activities; and
- Measuring, analysing and reporting on quality outcomes, including setting targets and using benchmarking techniques.

5.24 The Directorate's internal quality assurance program was recognised in the Audit Office's 2012 performance audit of *Development Application and Approval System for High Density Residential and Commercial Developments*. At that time, one officer undertook selected reviews to ensure compliance with standard operating procedures and work instructions thereby providing oversight of the development assessment process. The Directorate ceased routine quality assurance processes for single dwelling developments in early 2013.

- 5.25 The Directorate's standard operating procedure for Merit Track assessments states that an assessing officer assesses an application for a single dwelling development and signs the final Notice of Decision. The standard operating procedure requires that:
- Whenever the Case Officer is permitted to make a decision the NOD [Notice of Decision] should be reviewed by same or higher level Case Officer to ensure all issues have been addressed and there are no errors in the NOD.
- 5.26 However, no further guidance is provided on how such a review should occur or what the focus of it should be.
- 5.27 There was no evidence that there was any peer review undertaken of the Development Application assessments for over half of the seven case studies. The Directorate's Major Project Review Group reviewed Case Studies 1, 2 and 4, but there was no documentation of any peer review in any of the other case studies.
- 5.28 In Case Study 3, there was evidence that a senior officer had accessed the electronic file before the Notice of Decision was signed. However, in two of the cases (Case Studies 5 and 6), no senior officer accessed the electronic file until after the Notice of Decision was signed; and in one case (Case Study 7), no senior officer had accessed the electronic file at any point.
- 5.29 This lack of peer review increases the risk of inconsistency in decision-making. For Case Studies 5 and 6 (refer to paragraphs 3.119 and 3.137), the expert would have refused the developments, even though these developments were approved by the Environment and Sustainable Development Directorate. A peer review process may have identified the issues that informed the expert's view. While a review of the inconsistencies between the expert and the Directorate did not reveal improper influence with respect to the seven case studies, this may not always be the case.
- 5.30 The June 2013 internal audit review of corruption and fraud prevention in the Directorate's planning approval process stated that:
- ... there was a lack of clarity on what the trigger is for identifying complex and non-complex development applications, when and how this triggers peer or management review and how this review should be documented. It was also unclear when the trigger is for the assessor not being able to be the approver of the application for complex development applications.
- 5.31 Given this, the review recommended that:
- ... work processes be updated to clearly define complex and non-complex development applications and how this triggers peer/management review and when the assessor cannot be the approver. It should also document how this review should be recorded.
- 5.32 The Directorate agreed to the above recommendation. Implementation was initially planned to be completed by 31 December 2013. However, the Directorate is still in the processes of amending its policies and procedures to include an internal peer review process.

- 5.33 A peer review process should provide a safeguard against inappropriate decisions and guide consideration of reasons for inconsistent decision-making including exploring if the inconsistency was due to improper influence.

#### **Recommendation 11**

The Environment and Sustainable Development Directorate should develop and implement a peer review quality control process for Development Application Merit Track assessments to help achieve correct decisions.

### **BALANCING COMPETING PUBLIC INTERESTS**

- 5.34 The ICAC's Anti-corruption Safeguards and the NSW Planning System report states:

There will always be community debate over whether an adequate balance has been maintained between competing economic, social and environmental dimensions. Nevertheless, it is important that planning legislation addresses this issue by recognising and providing guidance on the weight to be given to competing public interests. Disregarding or placing undue weight on relevant public interest objectives leads to perceptions of bias and corruption.

- 5.35 The report further states:

Any decision to make a particular objective pre-eminent is a prerogative of the government and not the concern of the Commission; however, such an approach ought to be clear on the face of the legislative requirements.

- 5.36 In the ACT, Section 6 of the *Planning and Development Act 2007* states that the:

... object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT consistent with the social, environmental and economic aspirations of the people of the ACT.

- 5.37 The Act's supporting Territory Plan and codes seek to achieve this by, for example, requiring limits on building heights and size, setting minimum set-backs from property boundaries, in order to balance an applicant's development interests with social concerns such as the privacy of neighbours.

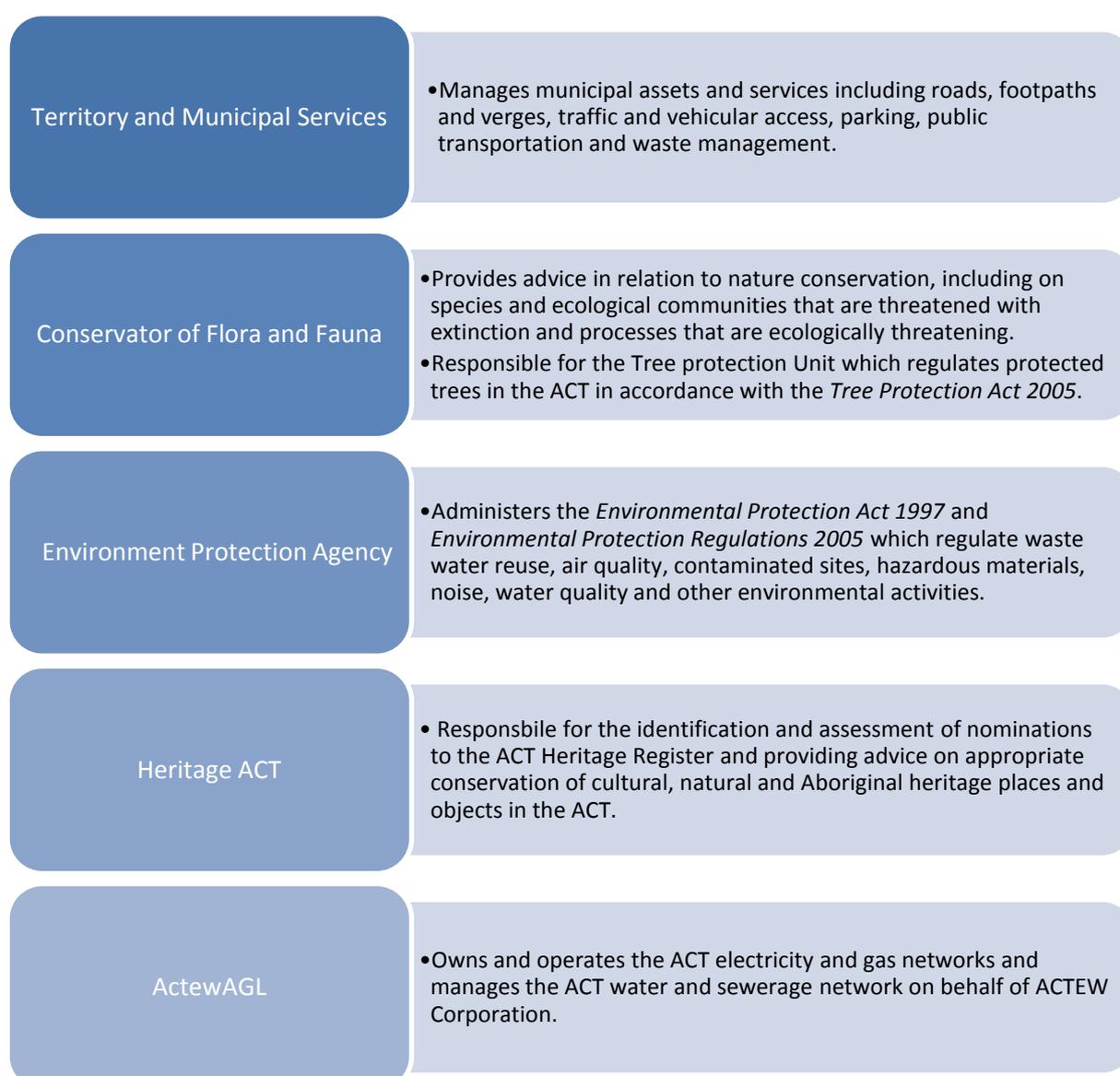
- 5.38 However, the *Planning and Development Act 2007*, Territory Plan, and codes<sup>21</sup> sometimes have inherently competing social, economic and environmental interests. As noted in paragraph 2.12, there is a hierarchy or order of precedence of Territory Plans and codes. However, there are also other Acts that interact with these planning requirements and can present competing interests.

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<sup>21</sup> Or, for that matter, internal instructions to assessing officers.

- 5.39 While entity referrals and community representations are two mechanisms in the Development Application assessment process that are used to identify, and seek to balance, competing interests, it was not obvious how priority was given to the competing interests. For example, it was not clear why the development application for Case Study 4 was approved, despite the Conservator of Flora and Fauna’s objections to the removal of a regulated tree (refer to paragraphs 3.102 and 3.111).
- 5.40 Where relevant, referral entities are invited to consider the impact of a proposed development. Key referral entities in the Development Application assessment process are shown in Figure 5.1.

**Figure 5.1 Responsibilities of key referral entities**



Source: ACT Auditor-General’s Office, *Development Application and Approval System for High Density Residential and Commercial Developments Report No. 4/2012*, 2012

5.41 The Directorate considers the responses of all referral entities:

... development approval must not be given for a development proposal in the merit track if approval would be inconsistent with *any advice* [emphasis added] given by an entity to which the application was referred ... unless the person deciding the application is satisfied that –

- a) the following have been considered:
  - i) any applicable guidelines;
  - ii) any realistic alternative to the proposed development, or relevant aspects of it; and
- b) the decision is consistent with the objects of the Territory Plan.

5.42 Identification of community stakeholder interests relating to each Development Application is sought through direct invitations sent to neighbours adjacent to the proposed development.

5.43 Most single dwelling Development Applications do not receive representations. Where community interest in a particular development increases, the Development Application is dealt with by more senior officers, as shown in Table 5.1.

**Table 5.1: Classification to make a decision in the Merit Assessment track**

Classification level <sup>22</sup>	Number of representations	Decision Type				Internal Referral
		Approve	Conditional Approve	Refuse	Reconsider	Major Project Review Group
ASO 3	0	X	X	X	X	X
ASO 4	0	✓	✓	X	X	X
ASO 5	≤1	✓	✓	X	X	X
ASO 6	≤2	✓	✓	X	X	X
SOG C	≤9	✓	✓	✓	X	✓
SOG B and above	10+	✓	✓	✓	✓	✓

Key: X An officer at this level is not permitted to make this type of decision

✓ An officer at this level may make this type of decision, subject to delegation under the *Planning and Development Act 2007*

Source: Adapted from Environment and Sustainable Development Directorate Work Instruction *Classification to make a decision* – Revision 3.0

<sup>22</sup> The Executive Director, Planning Delivery must determine the application if the Development Application form includes a declaration of a conflict of interest.

- 5.44 The Directorate's 'Internal Referral' work instruction requires developments that attract a significant number of representations, 10 or more, to be considered at a higher level: the Major Project Review Group. Internal referral of a development proposal to the Major Project Review Group is also required for single dwelling developments if:
- the application is required to be referred to the Executive Policy Committee; or
  - there is Ministerial interest in the development proposal; or
  - it is proposed to grant an approval that would be inconsistent with any advice given for regulated trees and/or heritage. This occurred in one of the single dwelling developments considered in this audit (Case Study 4); or
  - it is proposed to grant an approval that would be inconsistent with any advice given by an entity to which the application was referred under Division 7.3.3 of the *Planning and Development Act 2007* (this does not include non-mandatory referrals); or
  - the relevant section manager determines that the development proposal should be referred to the Major Project Review Group.
- 5.45 Other triggers for referral to the Group relate to Estate Development Plans, proposals that are in the Impact Track, declared as a major project, or that raise a major policy issue. These triggers are not likely to be relevant to single dwelling developments.
- 5.46 Case Studies 1, 2 and 4 were referred to the Major Project Review Group. Although this occurred, it was done without there being any clear guidance on the weighting to be given to competing interests from community representations when assessing a Development Application. Guidance would assist in achieving consistency in decisions.
- 5.47 Applications receiving 10 or more representations are also referred to the Directorate's Decision Assurance Panel. The Directorate's 'Internal Referral' work instruction states:
- The primary role of the Decision Assurance Panel (DAP) is to ensure the outcomes/recommendations from MPRG [Major Project Review Group] and EPC [Executive Policy Committee] referrals have been suitably addressed in the assessment process and reflected in the draft Notice of Decision and/or to decide whether a decision needs amending.
- 5.48 The Chair of the Decision Assurance Panel will then sign the Notice of Decision. This is a safeguard against an inappropriate decision being made.

- 5.49 A 2012 performance audit by the ACT Audit Office, Development Application and Approval System for High Density Residential and Commercial Developments, stated that:

Although considered a valuable mechanism for providing assurance over development applications decisions by senior Directorate stakeholders, the internal referrals to the Major Projects Review Group and Executive Policy Committee can lead to delays in the development application approval process.

- 5.50 As recommended by that audit, the Directorate agreed to review the Major Project Review Group and Executive Policy Committee, with the Directorate's 2011-12 Annual Report advising that:

The Directorate acknowledges that better and more strategic use could be made of both the Major Projects Review Group and the Executive Policy Committee and has begun work to review both their scope and operation.

- 5.51 However, the 'Internal Referral' work instruction has not been updated since May 2012.

### ADEQUATE DOCUMENTATION

- 5.52 The ICAC's Anti-corruption Safeguards and the NSW Planning System report notes:

Transparency is an important tool in combating corruption and providing public accountability for planning decisions. A transparent planning system ensures the public has meaningful information about decision-making processes as well as being informed about the basis for decisions.

- 5.53 ICAC promoted:

- transparency surrounding professional advice and decision-making;
- 'provision of publicly available information so that members of the public understand what is being proposed, why decisions have been made, what has influenced those decisions, and the processes involved in making a decision'; and
- 'community guidelines on development processes as an important means of explaining the planning system and informing the public about established systems and protocols.'

### Documenting decisions

- 5.54 Clear documentation of the rationale for Development Application decisions is an essential safeguard to manage the risks identified by ICAC. Transparent documentation of decisions can inform stakeholders of the basis of a decision, enable monitoring of consistency in decision-making processes and provide an informed response when a decision is challenged.

- 5.55 In support of this, the Australian National Audit Office's better practice guide on administering regulation recommends retention of:
- records of discussions and meetings held regarding the decision;
  - correspondence with the entities involved;
  - any technical (or other) advice used in arriving at the decision;
  - evidence that the decision was made in accordance with relevant legislative powers and established decision-making procedures; and
  - reasons for a decision.
- 5.56 The Directorate maintains an electronic file for each Development Application. The Directorate's standard operating procedures and work instructions require assessing officers to retain the documentation recommended by the Australian National Audit Office, except with respect to records of discussions.
- 5.57 For each of the seven case studies presented in Chapter 3, there was evidence of the following documentation:
- correspondence seeking comment and advice from relevant referral entities;
  - correspondence advising neighbours/stakeholders of the Development Application and providing opportunity for them to make a representation;
  - checklists relating to assessments of the Development Application's completeness and adherence to Directorate processes (such as proper lodgement);
  - a form-based assessment of the Development Application's compliance with 'Territory Plan Code Requirements' and with 'Legislated Requirements'. Where advice from referral entities and community representations had been received, the Legislated Requirements form also included commentary on how entity advice had been considered and addressed. These forms are discussed further in paragraph 5.60 below; and
  - a Notice of Decision documenting the outcome of the Directorate's assessment and reasons for a decision.
- 5.58 However, records of the basis for assessment decisions were not complete, as information retained on the case study files assessed lacked sufficient detail to easily understand why certain elements of a development complied with a rule. As discussed at paragraph 3.35, in reviewing the seven case studies, except for Case Studies 1 and 4, assessment considerations for a Development Application were only documented for 25 per cent or fewer rules. This lack of transparency leaves the Directorate vulnerable to criticism regarding the adequacy of its Development Application assessments.

- 5.59 Information recorded on the Territory Plan Code Requirements Merit Track and Legislated Requirements Merit Track assessments report the basis of Development Application decisions. Therefore, officers should be able to use these forms to understand why a development meets relevant criterion or rules. However, these forms do not always contain sufficient information to allow this to occur. For example, in reviewing Case Study 6, the expert assessed that the development did not meet all necessary planning criteria as it did not comply with two rules.<sup>23</sup> The Directorate's documentation did not provide any assessment against these two rules.
- 5.60 It is understood that the Territory Plan Code Requirements Merit Track assessment report focuses on reporting by exception, and commentary is provided to clarify why a particular criterion or rule is either met or not met. This becomes problematic when trying to assess if the correct decision has been made or if there has been improper influence. For five of the seven case studies (Case Studies 2, 3, 5, 6 and 7) the only information provided related to when the development did not meet the criterion or rule. This was provided to explain why a condition was imposed. For three of the seven cases reviewed (Case Studies 3, 6 and 7), the information documented on this form was insufficient to enable an understanding of why decisions were made in these three cases.
- 5.61 The Legislation Assessment Report form covers the legislated requirements of the *Planning and Development Act 2007*, specifically Section 119 and Section 120 and was not fully completed in two of the seven cases (Case Studies 4 and 7).
- 5.62 The Development Applications for Case Studies 1, 2 and 4 were all referred to the Major Project Review Group for review. In Case Studies 1 and 4, this resulted in the need to complete additional documentation; the Single Dwelling Housing Development Code Assessment Checklist. This checklist contained detailed information relating to more than 75 per cent of the applicable planning rules, and it provided an assessment of each rule's relevance to the case and, where appropriate, stated whether the case was deemed compliant. It is unclear why there is a need for the checklist as all relevant assessment information can be included in the Territory Plan Assessment Report.
- 5.63 The expert who assessed the case studies stated that:

**DA [Development Application] Assessment Reporting "by exception"**

The usual approach by [the Directorate] of DA [Development Application] assessment reporting 'by exception' (i.e. only reporting on Code requirements where the DA is inconsistent with the Rule or requires assessment against a specific criterion), does not provide any level of confidence that the DA has been assessed fully against the Code.

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<sup>23</sup> Rule 32 - Rear setback, Rules 38 - Interface, and Rule 50 - Private Open Space.

The exception reporting approach fails when review of a decision considers that a proposal does not meet the requirements of a particular rule. If the assessing officer considered that the rule was met, there is no documentation to confirm how such decision was arrived at. The assessment process would require the assessing officer to consider the rule, so it is considered that documenting how it complied would not be an onerous task (for example, Rule 2 in relation to storeys – an assessment report could – hypothetically – include words such as “complies with rule as the level above the garage is less than 1m above ground level and the garage is therefore a basement, meaning the dwelling is 2 storeys”). This would allow others – including assessing officers for subsequent applications – to consider this assessment. By necessity, the assessing officer would have undertaken this assessment, so the above does not add to the assessment process, it simply requires the conclusions made by the assessing officer to be reported.

At present the exception reporting could mean that the rule was not considered at all (meaning the assessment was deficient), or that the rule was incorrectly applied (possibly resulting in improved training for officers) or that the plans submitted were misleading (possibly resulting in better communications with applicants). Unless some commentary is provided by the assessing officer as to how they reached their conclusion that the rule was satisfied it is not possible to consider the circumstances that any errors in assessment were made.

### **Consistency of [the Directorate] assessment officer reporting**

The applications reviewed demonstrated a significant difference in the extent of commentary provided by assessing officers in concluding where a Code criterion was met. In some case the consideration was reasonably documented. However, in other cases there was no real evidence documented as to why the application met the requirements of the Code criterion.

- 5.64 The Directorate should improve the transparency of its decision-making by requiring that assessment officers document their considerations against each applicable criterion or rule. This documentation should be succinct yet still enable an understanding of why a particular rule was met, why a rule was assessed as not applicable, or why a condition was imposed before approval.
- 5.65 Assessing officers are assigned cases, depending on workload. This is a safeguard against improper influence as it reduces the opportunity for an applicant to direct an application to a particular assessing officer for a more favourable assessment.

### **Recommendation 12 High Priority**

The Environment and Sustainable Development Directorate should improve the transparency of its decision-making, by requiring that assessing officers document their considerations against key mandatory rules that a single dwelling Development Application is assessed against.

### **Security of documentation**

- 5.66 The security of documentation held by the Directorate was assessed.

- 5.67 The electronic files are unlikely to be accessed or altered inappropriately, without detection, as the following safeguards are in place:
- access to the systems is password protected;
  - Customer Services' receipt of applications is separate from development approval assessment;
  - applicants are required to provide proof of identity before a Development Application can be lodged; and
  - the version control function of the central storage system enables the Directorate to identify who entered a particular file and if change to the file was made.
- 5.68 The Directorate's information management system retains information on when, and by whom, Development Application documentation has been accessed. Directorate staff members are aware of this functionality, which acts as a deterrent against improper alteration of files. However, no regular audits of file access are conducted unless fraud is suspected.
- 5.69 The file access log indicated that for the seven case studies no files were accessed by officers of the Directorate (or referral entities) who did not have a valid reason to do so.

#### **Quality of documentation submitted by applicants**

- 5.70 A 2011 national report on Planning, Zoning and Development Assessments by the Productivity Commission<sup>24</sup> found that the most important factor impacting on the ACT Government's ability to manage the planning process was the poor quality of applications entering the system.
- 5.71 In response to the report, in January 2012 the Directorate made a number of changes, including using a two-staged process to ensure documentation provided by the applicant is adequate and sufficient to allow an assessment to be made. The two-staged process involves:
- an initial check conducted by Customer Service staff that ensures all required paperwork is submitted and valid; and
  - a completeness check conducted by an assessing officer who checks that there is sufficient information.<sup>25</sup> This is followed by an assessment of which referral entities need to be consulted before a decision can be made.

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<sup>24</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, April 2011, Volume 1 Figure 9.2, page 380

<sup>25</sup> If an applicant repeatedly fails to lodge the required information, a fee is imposed by the Directorate. This fee is currently \$166.20 for the first failure notice issued, and increases up to \$2,488.30 for the fourth failure notice. Each additional notice beyond this incurs a fee of \$1,320.60.

5.72 In January 2012 the Directorate also introduced the eDevelopment system and mandated that lodgement of Development Applications occurs using this system. This has resulted in a single point of entry for all Development Applications and has forced applicants to support their application with standardised documentation in terms of naming conventions, lay-out and scaling requirements.

5.73 The eDevelopment system, with its standardised documentation requirements, has resulted in improvements in the quality of entry material. However, there are still inadequacies in the quality of Development Application material submitted. For example, in Case Studies 5 and 6 of the reviewed case studies, the expert assessed that not all the plans and associated diagrams submitted by applicants were suitable to conduct an assessment, stating that:

The plans submitted often present measurements (sometimes to the third decimal place) to demonstrate compliance with the Code. However, the plans themselves are drawn to a scale that [does] not allow review of the stated measurements. Inaccuracies were often identified in calculations provided on the plans. Some plans stated ... *"Dimensions approximate only"*. It is considered such plans ... should be immediately rejected.

5.74 The expert also stated that:

Many plans did not provide all the dimensions and calculations to undertake a full assessment against the Code. It is considered beneficial if applicants/designers were made aware of the calculations an assessment officer is required to make under the Code and include such information on the plans. This issue might also be addressed if [the Directorate] required more comprehensive Statements against Criteria or required Statements against Rules where applicants were required to demonstrate why they considered a Rule was met.

5.75 This issue is addressed by Recommendation 2.

### Provision of information about decisions

5.76 For each Development Application, the Environment and Sustainable Development Directorate issues a Notice of Decision. This is sent to the applicant and any person who made a representation.

5.77 The Notice of Decision has four parts:

- part 1 – conditions of approval (if any);
- part 2 – reasons for the decision;
- part 3 – public notification and entity advice; and
- part 4 – administrative information.

5.78 Part 2 of the Notices of Decision in the seven case studies clearly identified why decisions had been made. Furthermore, by identifying and commenting on key issues raised, through public notification and referral entity advice (Part 3), the Notice of Decision demonstrates what has influenced the decisions. Accordingly, the Notices of Decision provide transparency.

### Communication with homeowners/applicants

- 5.79 A way to increase transparency is to ensure that the community and homeowners/applicants are well informed about planning requirements.
- 5.80 The Directorate provides a range of factsheets about the Development Application process.
- 5.81 In its 2012 audit of the Development Application and Approval System for High Density Residential and Commercial Developments, the Audit Office found that:

The Directorate's website provides a complete source of information on the development application approval system in the ACT, providing the public and industry with comprehensive information on planning legislation and codes, public notification mechanisms and the entity referral process. The eDevelopment system is supported by online demonstrations and guidance material. The Directorate's customer service centre is considered a valuable facility in servicing those members of the public who require further assistance and information, or who do not have private access to the internet.

- 5.82 Chapter 4 on certification identified inadequacies in the Directorate's guidance on exempt developments which do not require Development Application approval. There are also inadequacies in the material sent to applicants seeking Development Application approval for work already undertaken as a certified exempt development. While these are a small number of the total Development Applications, they can be complicated, stressful for property owners and their neighbours, and a cause for community concern.
- 5.83 Furthermore, communication with some homeowners/applicants in these cases is poor. Where the Directorate determines that a certificate for an exempt development should not have been issued, the homeowner may receive a notification of a 'Controlled Activity'. This notification states that, amongst other things:

This letter is to advise you that on ... officers from the Utilities, Land and Lease Regulation Section of the Environment and Sustainable Development Directorate (ESDD) conducted an inspection of the above block. The inspection identified that you are undertaking a controlled activity. A controlled activity is a breach of the *Planning and Development Act 2007* (the Act) and can incur a penalty of \$6,600 for individuals and \$33,000 for corporations. Alternatively you may be issued with an infringement notice of \$1,200.

The controlled activity being undertaken is; having a Building that was constructed without approval required by the Act, Chapter 7 (Development approvals). Specifically ...

To regularise this matter you will need to, within 30 working days from the date of this letter, lodge a complete development application (DA) for the building. Further information on the DA process is available for the ESDD website, [www.actpla.act.gov.au](http://www.actpla.act.gov.au) or by contacting a technical officer on telephone ... Please be advised that you will only be deemed to have lodged a complete development application once your lodgement has passed a completeness check and you have paid the application fee.

Failure to comply with this request may result in a show cause notice being issued. A show cause notice is written notice of the intention to make a controlled activity order against you under Division 11.3.2 of the Act. You have the opportunity to provide written reasons explaining why a controlled activity order should not be made against you. You may also be issued with an infringement notice.

You may also apply for additional time to comply with this request. Applications for additional time must be made in writing prior to the expiration of the 30 working day period. Your application should outline the reasons why you are seeking the additional time including the amount of time you require to comply with this request. The reasons you put forward will be considered in making the decision.

5.84 In Case Studies 1 and 6, the notification of a 'Controlled Activity' did not acknowledge that:

- the homeowner had their development assessed through the Development Application exemption process;
- there was a specific issue that generated the notice, for example, that the granting of the certification exemption should not have occurred;
- building approval (Building Commencement Notice) had been received prior to the commencement of work; or
- that a Certificate of Occupancy and Use was issued by the Directorate's Construction Occupations Registrar at the conclusion of work. The Certificate of Occupancy and Use states that the listed building work 'has been completed substantially in accordance with the prescribed requirements' and carries the names of the Planning and Land Authority, Environment and Sustainable Development Directorate and ACT Government.

5.85 For owners, a letter stating their building 'was constructed without approval' may cause confusion and alarm. The confusion may be heightened by the need to 'lodge a complete development application' for building work that already exists and which the owner believes has been correctly assessed. This may explain why for Case Study 1, the box indicating that building work had been undertaken without approval was not ticked.

5.86 The 'Controlled Activity' notification letter is confronting. It should be redesigned to be customer focused and worded so as not to give the impression that the Directorate believes the homeowner has acted improperly, as the issue which generated the letter may be due to issues outside of the homeowner's control. Any redesigned letter should therefore:

- acknowledge that a homeowner has had their development assessed under the Development Application exemption process;
- identify the issues with the certification;
- explain why the Directorate issued a Building Commencement Notice and Certificate of Occupancy and Use and what the status of these are, given the notice; and
- include the legal information in the current 'Controlled Activity' notification letter.

**Recommendation 13**

The Environment and Sustainable Development Directorate should redesign their 'Controlled Activity' notification letter, which advises of a breach of the *Planning and Development Act 2007*, so that it is customer focused and acknowledges preceding events.

**REDUCING COMPLEXITY**

5.87 The ICAC's Anti-corruption Safeguards and the NSW Planning System report states that:

A straightforward regulatory structure assists in the detection of corrupt conduct and acts as a disincentive for individuals to undermine the system. The risk of error, which can provide a convenient cloak for corrupt conduct, is also reduced when established processes are clearly defined and understood.

5.88 The report also stated that:

Complexity creates opportunities for manipulating the system by encouraging "workarounds" and the establishment of alternative systems. Consequently, it is difficult to detect corrupt activities in a complex system, as any lack of clarity in a system provides an opportunity for corrupt actions to succeed. The inconsistent decision making that results from a complex system also makes it difficult to establish that correct processes are being followed.

5.89 As mentioned in the ACT Auditor-General's June 2012 report, Development Application and Approval System for High Density Residential and Commercial Developments:

Jurisdictional planning and development systems by nature are complex as they have multiple legislative and regulatory requirements, need to achieve many objectives, involve an array of Government and non-government entities, need to meet high community expectations and require efficient processes to support industry investment.

5.90 The risk of influence, or non-compliant decision-making, grows with increasing system complexity; it also grows in the absence of clear documentation. Undue complexity can also decrease voluntary compliance, as noted by the Organisation for Economic Co-operation and Development:

... the burden of assimilating and complying with many complex and technical rules can be unreasonable and undermine confidence.<sup>26</sup>

5.91 Consideration of planning documents, relating to the seven case studies selected by the Audit Office, to assess compliance with the Territory Plan, took the Directorate between 19 and 65 days. Such resource requirements, for what are relatively small-scale developments, reflect the complexity of the planning system.

<sup>26</sup> Organisation for Economic Co-operation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, 2000, available at [www.oecd.org/gov/regulatory-policy/46466287.pdf](http://www.oecd.org/gov/regulatory-policy/46466287.pdf)

- 5.92 As discussed in Chapter 3, the Audit Office engaged an expert to assess seven Development Applications for compliance with the relevant Acts and building codes. For Case Studies 5 and 6, the expert concluded that the applications should have been refused, contrary to the Directorate's decision to approve.
- 5.93 A key finding of the expert's report discussed the complexity of the single dwelling code:
- The code has numerous Rules/Criteria expressed in a range of different ways for similar outcomes (e.g. setbacks & building envelopes; or private open spaces provisions). In addition, interpretations of the rule is often quite difficult (e.g. building envelope) or can be interpreted in different ways by different assessors (e.g. what is included as private open space). There are a number of Rules which do not clearly express the reason/intent for the Rule (e.g. Building Envelope is actually a solution required to achieve spatial separation, solar access and privacy).
- 5.94 In public consultation on variations to the Territory Plan, a key industry body<sup>27</sup> expressed concerns about the complexity of the planning system stating:
- The industry is confronted with yet another complex document. Given that we are always led to believe that guidelines must be clear and unambiguous, this document certainly does not achieve the objective of being clear and concise; it is both confusing and complex in its intent ...
- It is likely that DV306, if implemented in its current form, will create an environment of uncertainty, continuing the culture of decision by appeal to ACAT.
- 5.95 The complexity of the ACT's planning system poses risks to the probity of decision-making. It is therefore important to have the safeguards discussed in this audit in place.

### COMMUNITY CONSULTATION

- 5.96 The ICAC's Anti-corruption Safeguards and the NSW Planning System report stated:
- Meaningful community participation and consultation in planning decisions helps ensure that relevant issues are considered during the assessment and determination of plans and proposals. It also allows the community to have some influence over the outcome of decisions.
- Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.
- 5.97 The Directorate's website advocates community consultation prior to a Development Application, stating:
- If your development is located in an established area you are strongly encouraged to consult with your neighbours during the design stage to ensure the development proposal considers all of the issues that might arise. Even though neighbour consultation is not statutory it is encouraged and should occur before a DA [Development Application] is lodged with the Planning and Land Authority.<sup>28</sup>

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<sup>27</sup> Master Builders Association of the ACT

<sup>28</sup> [www.actpla.act.gov.au/topics/design\\_build/da\\_assessment/development\\_applications\\_-\\_a\\_quick\\_guide#](http://www.actpla.act.gov.au/topics/design_build/da_assessment/development_applications_-_a_quick_guide#)

- 5.98 Development Applications that are lodged under the Merit or Impact track processes require some level of notification. Exempt developments are not included in this public notification process, but homeowners/applicants are still required to consult with neighbouring properties.
- 5.99 As of 29 May 2012, single dwelling developments can only be demolished and a new dwelling erected without development approval if, amongst other things, written information including contact details, elevation and site plans and a covering information sheet has been supplied to adjoining residents before the building work commences. In late 2013 the legislation was also amended to ensure that a Development Application is required for the demolition, alteration or rebuild of a duplex house.
- 5.100 A similar process applies to exempt developments. To demonstrate that adjoining neighbours have been informed of a proposed development, homeowners are required to provide the certifier with a summary of the information supplied to adjoining neighbours as part of the application for building approval.
- 5.101 There are currently two types of public notification processes for Development Applications:
- minor, where letters are sent to adjoining neighbours, who have 10 working days in which to make a representation; and
  - major, where a sign is placed on the property, a notice placed in a daily newspaper and letters sent to adjoining neighbours, who have 15 days in which to make a representation.
- 5.102 In this context, 'adjoining neighbours' means those touching or separated only by a road, reserve, river, watercourse or similar division and these people receive a notification letter. Therefore not every resident in a street receives a letter of notice.
- 5.103 The minor notification process is most commonly used for single dwelling Development Applications and only directly notifies owners of adjacent blocks. This is unlikely to trigger many representations. However, both minor and major notifications are publicly available on the Directorate's website, with the latter available for public comment.
- 5.104 All of the seven case studies assessed as part of the audit followed the prescribed minor notification process. In each case, community consultation processes were undertaken in accordance with the *Planning and Development Act 2007*. The Environment and Sustainable Development Directorate consultation processes respond one of the key corruption prevention safeguards identified by the ICAC, refer to paragraph 3.9.

### THIRD PARTY APPEALS AND COMPLAINTS

5.105 The Productivity Commission's report on Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment stated that:

Third party (that is, non-applicant) appeals may improve the quality of decisions by reducing the scope for deals between developers and regulators and by catching poor decisions. Furthermore the ability to appeal an unpopular development can protect neighbourhood amenity and enhance community trust in the system. However, this comes at the cost of increased delay for developers and possible frivolous or anti-competitive claims.

5.106 Each Notice of Decision issued by the Directorate advises the applicant, and those who made representations, of the possibility of review by the ACT Civil and Administrative Tribunal.

5.107 However, the ACT's *Planning and Development Regulation 2008* specifically excludes third party appeals for single dwelling developments, stating that:

Merit track matters exempt from third-party ACAT [ACT Civil and Administrative Tribunal] review [...include] The building, alteration or demolition of a single dwelling, if the development would not result in more than 1 dwelling being on a block.

5.108 In support of this, the ICAC's 2012 report states that:

In order to balance the need to curb the potential for real corruption with the need to avoid unnecessary delays in the planning system, the Commission believes that third party appeals should be limited to "high corruption risk" situations. This could include limiting third party appeals to significant and controversial private sector developments ...

5.109 Opening third party appeals for single dwelling developments would likely result in significant delays and costs for homeowners/applicants. There is a 28 day time limit (from the date of a Notice of Decision) for an ACT Civil and Administrative Tribunal appeal to be requested. This time limit can be extended in some circumstances. The *Civil and Administrative Tribunal Act 2008* then allows a period of 120 days for the appeal to be decided. Furthermore, several extensions to this time can be granted.

5.110 Furthermore, the success of an appeal is likely to be exceptionally low as historically the ACT Civil and Administrative Tribunal has upheld a high proportion of Directorate decisions. As mentioned in the Environment and Sustainable Development Directorate's 2012-13 Annual Report, the Tribunal upheld over 90 per cent of the Directorate's planning related decisions (or 16 out of 17 appeals).

5.111 Members of the public, as third parties, can lodge a complaint if they consider that a development is not compliant with the legislation. These complaints are investigated by the Directorate's Investigations Unit, as discussed in paragraphs 4.58 to 4.66.

## RISK MANAGEMENT

### Risk management plan

- 5.112 The Directorate's 2011 Risk Management Plan could be used to assist in identifying and implementing safeguards against improper influence. However this is not done.
- 5.113 The Directorate's 2011 Risk Management Plan objectives are to:
- Minimise Environment and Sustainable Development Directorate's exposure to significant risk through the identification, assessment, management and reporting of risk; and
  - Enhance Environment and Sustainable Development Directorate's ability to capitalise on opportunities through minimising risk and improving overall performance.
- 5.114 Additionally, the Directorate has advised that:
- While the Plan provides an effective overarching framework for the management of risk by the Directorate, it is recognised that there are some significant gaps, particularly in terms of the strategic identification, management, monitoring and escalation of risk within the Environment and Sustainable Development Directorate.
- 5.115 For example, there is no mention in the Risk Management Plan of the risk of improper influence on Development Application assessment officers. Given the importance of such a risk, it needs to be explicitly considered.
- 5.116 In light of these gaps, the Directorate engaged PwC in December 2013 to conduct a:
- ... comprehensive review of the Environment and Sustainable Development Directorate's risk management plan.
- 5.117 Completion of this review is expected by 30 April 2014.
- 5.118 The implementation of the 2011 Risk Management Plan has been staged, with an initial pilot of the branch-specific risk registers conducted in the Corporate Branch. The Directorate-wide implementation of branch-specific risk registers was not endorsed by the Executive Management Board until 19 June 2013. As a result, the implementation has been slow.

### Recommendation 14

The Environment and Sustainable Development Directorate should include risks relating to improper influence as part of its current review of its Risk Management Plan, and develop a timetable to expedite implementation of this plan.

### Fraud and corruption prevention plan

- 5.119 The Directorate's Fraud and Corruption Prevention Plan was last reviewed in March 2013. The Plan is linked to the ACT Integrity Policy. This Plan supports governance arrangements for overseeing fraud and corruption prevention. It indicates that the Directorate should:

- undertake a formal Fraud Risk Assessment on a regular basis (at least every two years);
- staff should be offered training sessions in fraud and corruption control, ethics and the code of conduct as part of their induction (and on an ongoing basis); and
- review all of its delegations and other authorisations to ensure that they are appropriate.

5.120 The Senior Executive Responsible for Business Integrity Risk provides regular updates on the impact of organisational changes to the fraud risk profile. The new Fraud and Corruption Prevention Plan does not discuss how the Directorate mitigates specific risks associated with the oversight and regulation of the construction industry, as it is focussed on the awareness and reporting aspects of fraud and corruption prevention.

5.121 The Directorate's June 2013 internal audit on Corruption and Fraud Prevention in the Directorate's planning approval process identified that:

The fraud risk assessment was generic and did not specifically identify key fraud and corruption risks relating to the planning approval process.

5.122 The internal audit found that fraud risks due to a conflict of interest or collusion had not been adequately addressed by the Directorate noting, for example, that the Directorate's processes for management of a conflict of interest was reactive and relied on staff to make a declaration. The report also noted that the Directorate did not have a final conflict of interest policy, nor were Development Application assessment procedures and processes documented clearly.

5.123 The Directorate agreed to address these issues in its formal response to the internal audit recommendations, stating that:

The Planning Delivery Leadership Group will undertake a review of the identified gaps, establish if there are other mitigating controls and if so document these. If risks are not adequately addressed current policies will be finalised, work processes update and these will be brought to the attention of staff.

5.124 The Directorate's implementation of this recommendation was scheduled for implementation by 31 December 2013, but is currently overdue.

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## **APPENDIX A: AUDIT CRITERIA, APPROACH AND METHOD**

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### **AUDIT OBJECTIVE**

This audit sought to provide an independent opinion to the Legislative Assembly on whether the Development Application exemption and Development Application approval processes for single dwelling developments are open to improper influence.

### **AUDIT CRITERIA**

Key considerations and criteria for the audit are outlined below:

- can certification of exempt houses be improperly influenced?
- can track-system Development Applications be improperly influenced?
- are complaints-handling processes (regarding certification and Development Application assessments) effective? and
- is mitigation activity against improper influences effective?

### **AUDIT APPROACH AND METHOD**

The performance audit was conducted under the authority of the *Auditor-General Act 1996*, and in accordance with the principles, procedures, and guidance contained in Australian Auditing Standards relevant to performance auditing. These standards prescribe the minimum standards of professional audit work expected of performance auditors. Of particular relevance is the professional standard on assurance engagements, ASAE 3500 Performance Engagements.

The audit approach and method consisted of:

- reviewing the Environment and Sustainable Development Directorate's public websites;
- interviews and discussions with key agency staff from the Environment and Sustainable Development Directorate and other stakeholders;
- identifying and reviewing Environment and Sustainable Development Directorate-held information and documentation including:
  - i. governance/accountability frameworks and related operating procedures;
  - ii. research documents and relevant reports;
  - iii. certifier registration databases; and
  - iv. Development Application assessment databases;

- identifying and documenting Environment and Sustainable Development Directorate's controls and procedures used to give effect to policies and guidelines and to ensure compliance; and
- independent planning expert assessment of the Development Applications for a selection of seven case studies.

Auditing Standard ASAE 3500 requires that an audit considers events up to the date of the report. This will be achieved by providing Environment and Sustainable Development Directorate opportunities to inform the audit team of any significant events affecting audit findings between completion of fieldwork and finalisation of the audit report.

## AUDIT REPORTS

Reports Published in 2013-14	
Report No. 2/2014	The Water and Sewerage Pricing Process
Report No. 1/2014	Speed Cameras in the ACT
Report No. 8/2013	Management of Funding for Community Services
Report No. 7/2013	2012-13 Financial Audits
Report No. 6/2013	ACT Auditor-General's Office Annual Report 2012-13
Report No. 5/2013	Bushfire Preparedness
Reports Published in 2012-13	
Report No. 4/2013	National Partnership Agreement on Homelessness
Report No. 3/2013	ACT Government Parking Operations
Report No. 2/2013	Executive Remuneration Disclosed in ACTEW Corporation Limited's (ACTEW) 2010-11 Financial Statements and Annual Report 2011
Report No. 1/2013	Care and Protection System
Report No. 10/2012	2011-12 Financial Audits
Report No. 9/2012	Grants of Legal Assistance
Report No. 8/2012	Australian Capital Territory Public Service Recruitment Practices
Report No. 7/2012	ACT Auditor-General's Annual Report 2011-12
Report No. 6/2012	Emergency Department Performance Information
Reports Published in 2011-12	
Report No. 5/2012	Management of Recycling Estates and E-waste
Report No. 4/2012	Development Application and Approval System for High Density Residential and Commercial Developments
Report No. 3/2012	Early Childhood Schooling
Report No. 2/2012	Whole-of-Government Information and ICT Security Management and Services
Report No. 1/2012	Monitoring and Minimising Harm Caused by Problem Gambling in the ACT
Report No. 6/2011	Management of Food Safety in the Australian Capital Territory
Report No. 5/2011	2010-11 Financial Audits
Report No. 4/2011	Annual Report 2010-11
Reports Published in 2010-11	
Report No. 3/2011	The North Weston Pond Project
Report No. 2/2011	Residential Land Supply and Development
Report No. 1/2011	Waiting Lists for Elective Surgery and Medical Treatment
Report No. 10/2010	2009-10 Financial Audits
Report No. 9/2010	Follow-up audit – Courts Administration
Report No. 8/2010	Delivery of Mental Health Services to Older Persons
Report No. 7/2010	Management of Feedback and Complaints
Report No. 6/2010	Annual Report 2009-10

Details of reports published prior to 2010-11 can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's Office homepage: <http://www.audit.act.gov.au>.

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