

UNCLASSIFIED

Environment, Planning and Sustainable Development Directorate

To: Minister for Planning and Land Management Tracking No.: 21/118197

Date: 9 March 2022

From: Senior Director, Territory Plan – Planning and Urban Policy

Subject: Variation 369 Living Infrastructure in Residential Zones – next steps

Critical Date: 16 March 2022

Critical Reason: To seek agreement on the commencement arrangements for DV369 prior to its approval and tabling in the Assembly.

- DG .../.../...
- A/g DDG, Planning and Sustainable Development 15/03/22

Recommendations

That you:

- Note the advice of the Standing Committee for Planning, Transport and City Services at Attachment A, that they will not undertake an inquiry into DV369;
Noted / Please Discuss
- Agree to Option 1, 2, 3 or 4 for the commencement of DV369;
Option 1 / Option 2 / Option 3 / Option 4 / Please Discuss
- Depending on the agreed recommendation from this brief, agree to the media release at Attachment D going out as soon as possible to inform industry and community stakeholders of the anticipated commencement date for DV369; and
Agreed / Not Agreed / Please Discuss
- Note that a direction letter and the approval instrument for DV369 will be provided to you in a separate brief, depending on the agreed recommendation from this brief.
Noted / Please Discuss

Mick Gentleman MLA



16/3/2022

Minister's Office Feedback

Background

1. Draft Variation 369 Living Infrastructure in Residential Areas (DV369) was prepared to incorporate living infrastructure provisions into the Territory Plan. Changes are proposed to the Single Dwelling Housing Development Code (SDHDC) and Multi Unit Housing Development Code (MUHDC) in relation to site coverage, private open space and tree planting requirements, amends the definitions in relation to site coverage and planting area controls, and introduces a new definition for deep soil zone.
2. DV369 responds to recommendations in the ACT Planning Strategy 2018 and Canberra's Living Infrastructure Plan in regard to living infrastructure and the 30% tree canopy and 30% permeable surfaces targets. It is also consistent with the recommendation in the Urban Forest Strategy to amend planning regulations to ensure suitable protection of existing trees and the establishment of new trees when planning infrastructure in new suburbs and in urban densification areas.
3. Information sessions were held for industry members on 22, 23, 24 and 28 February and on 1 March 2022. Information about these sessions was sent to the ACT branches of the Australian Institute of Architects (AIA), Australian Institute of Landscape Architects (AILA), Planning Institute of Australia (PIA), Building Designers Association (BDA), Master Builders Association (MBA), Housing Industry Association (HIA) and the Property Council of Australia (PCA).
4. The aim of these sessions was to provide a smooth transition to the amended Territory Plan requirements delivered through DV369. They also provided practitioners an opportunity to ask any questions about the implementation of the new provisions for trees and site coverage in residential areas.
5. Key issues raised during the information sessions related to:
 - a. Are trees and landscaping required at the time of the final inspection by the certifier?
 - b. How will the changes impact on blocks already sold?
 - c. How will the changes impact on blocks in estates already approved?
 - d. Can the requirements be considered at an estate level rather than per block?
 - e. Can a 1N application be used to relax the site coverage and tree planting requirements?
 - f. What if the tree dies or is removed? How will this be monitored?
 - g. Can DV369 be stopped and introduced with the new Territory Plan or when the estate development requirements are reviewed?

As these matters were also raised during the public consultation process, responses to them are included in the report on consultation for DV369 ([Attachment B](#)).

6. Discussions have also been held with stakeholders such as the MBA, HIA and PCA, as well as the Riverview Group, regarding the impact the changes proposed with DV369 will have on the development of new houses. Of particular concern was single dwellings on compact blocks (blocks under 250m²) that have been bought but not yet developed.
7. A letter from the Riverview Group ([Attachment C](#)) was also sent to MLAs on 3 March 2022 outlining their ongoing concerns regarding the introduction of DV369 draft variation 369.

This included a request to postpone the introduction of DV369 until after work on the Estate Development Code and associated TCCS standards as part of the Planning System Review and Reform Project has been completed.

Issues

8. The Standing Committee (the Committee) advised on 19 November 2021 that no inquiry into DV369 would be held (Attachment A). The Committee noted that there is considerable community interest in the draft variation, in particular matters relating to implementation. The Committee agreed that it will conduct an inquiry 12-18 months after DV369 has been implemented to review how it is working on the ground.
9. As noted above, concerns have been raised by some industry groups regarding the impact of the DV369 changes on the development of housing, particularly exempt single dwelling housing in new estates. Despite the changes made to DV369 following public consultation to improve the developability of compact blocks (specifically front loaded compact blocks), there is still concern that new houses will have to be smaller or larger blocks required to accommodate the house designs desired by purchasers (or envisaged by estate developers).
10. DV369 will change the way housing is designed on blocks, particularly in new estates. This was a deliberate decision to implement the ACT Government's policy in regard to living infrastructure (as recommended in the Planning Strategy and Living Infrastructure Plan) to improve the outcomes we are seeing with new developments (both in greenfield and infill areas) in the ACT.

Matters for consideration

11. In regard to the overarching policy intent for DV369, the changes to the SDHDC and the MUHDC are the first stage in implementing improved living infrastructure provisions, with later stages looking at appropriate provisions for non-residential zones and estate development. Introducing DV369 as stage 1 enables improved outcomes for living infrastructure to be realised on residential blocks as soon as possible.
12. When other similar variations (V306 - introduced new residential codes and V346 - amended solar access requirements) commenced they applied to:
 - a. Development applications (DAs) lodged for completeness check on or after the commencement date (i.e. did not apply to DAs already in the system)
 - b. Building approvals (BAs) where the determination that the development is exempt from development approval is made on or after the commencement date. Approved DAs were not required to be amended at building approval stage to comply with the changes.
13. If prospective home builders were unable to submit their proposal for building approval (as exempt development) prior to the commencement date, they could decide whether to submit their proposal as a merit track application or redesign it to remain as exempt development.
14. Adding a clause stating that the provisions do not apply to blocks approved in a subdivision before the commencement date would mean the provisions would not apply in established areas. The intent of the policy change is to improve living infrastructure in both established and new areas.

15. Following the estate development plan (EDP) process, ongoing provisions that apply to particular blocks can be added to the suburb precinct code via a technical amendment. This can include rules that override standard provisions in the SDHDC. An estate developer has the option to lodge an amendment to the EDP that sought the original approval for the blocks.
16. It is worth noting that none of the provisions in DV369 are mandatory, except for the tree canopy coverage requirement for multi unit development in the RZ1 and RZ2 zones. This means that any encroachments into the requirements stated in the rules can be considered on their merits against the criteria through a merit application process.

Options for progressing DV369

17. Noting the comments received regarding the impacts of DV369, the following options are available for the draft variation:

Option 1

18. DV369 is approved and tabled on 22 March 2022. The commencement date is 1 July 2022 and would apply to:
 - a. DAs lodged for completeness check on or after 1 July 2022
 - b. BAs determined on or after 1 July 2022
 - c. The changes would apply to new blocks in estates, though the estate developer could apply for an amendment to the EDP to relax the provisions.
 - i. The amendment could identify any ongoing provisions to apply to blocks that will enable an appropriately sized house to be developed while being consistent with the policy intent of DV369.
 - ii. Once the EDP is approved, the ongoing provisions would be added to the relevant suburb precinct code via a technical amendment.
 - iii. This option is available to an estate even if the future urban area (FUA) overlay has been uplifted. However the amendment would not be able to adjust the block boundaries if the area is no longer in an FUA.

This option would bring in the policy changes (reflecting the recommendations in the Planning Strategy and Living Infrastructure Plan) as soon as possible while still providing a transition time for developments in the pipeline.

Option 2

19. DV369 is approved and tabled on 22 March 2022. The commencement date is 1 October 2022 and would apply to:
 - a. DAs lodged for completeness check on or after 1 October 2022
 - b. BAs determined on or after 1 October 2022
 - c. EDP amendments seeking a relaxation of provisions would be possible. The additional time would also enable active EDP DAs to be amended to demonstrate that new housing would be capable of meeting the DV369 changes.

This option would give more time for new dwellings (particularly those in house and land packages – assuming they have a lease) to go through the DA or BA process, though would delay the introduction of the living infrastructure requirements.

Option 3

20. DV369 is amended via Ministerial Direction to not apply DV369 changes to blocks approved on or after 1 January 2020 (or another appropriate date). The amended variation is approved and tabled on 22 March 2022 or 5 April 2022. The commencement date is 1 July 2022 and would apply to DAs lodged and BAs determined on or after 1 July 2022 (as per option 1 above):
- a. This would apply the changes to established areas and ‘older’ new estates.
 - b. The delayed commencement date would allow those blocks in ‘older’ new estates to finalise their development proposals.
 - c. Would not apply to estates approved recently or in the time before DV369 takes effect.
 - d. Enables other living infrastructure work being undertaken, particularly at the estate level, to be considered in the development of the provisions for new estates.
 - e. Has the potential to ‘miss the boat’ in applying provisions to developments in new estates approved over the next 12 months.

Option 4

21. DV369 is withdrawn and incorporated into the new Territory Plan. This would enable the new requirements to take effect at the same time the new estate development controls take effect. These new estate controls will consider how living infrastructure is considered at the estate level, not just at the block level. However, the new estate controls would only apply to new EDPs lodged and not apply retrospectively, therefore the living infrastructure requirements will still apply to already approved blocks. This option
- a. Gives more time for blocks to be developed.
 - b. Would not apply to estates approved recently or in the time before DV369 takes effect.
 - c. Enables other living infrastructure work being undertaken to be considered in the development of the provisions.
 - d. Has the potential to ‘miss the boat’ in applying provisions to developments approved over the next 12 months.

Supporting work

22. The Territory Plan Section within EPSDD is working with building certifiers to establish an appropriate compliance process that can make sure the requirements of DV369 (such as the requirement to plant a tree) are implemented on site without significant disruption to the building approval and certification process. A practice note is proposed to outline the agreed approach and be made available to building certifiers.
23. An information sheet is also being prepared to provide a list of tree species that are suitable for Canberra gardens to assist home owners, designers, builders and building

certifiers. The provisions to be introduced with DV369 include the planting of a small, medium or large tree depending on the size of the block. The Territory Plan codes will contain the dimensions the particular tree needs to meet and the information sheet provides examples of tree species that meet those dimension requirements, particularly those suitable for Canberra and highlighting preferred species (for biodiversity etc).

24. The information guide is being developed in conjunction with TCCS and SLA, as well as with the Climate Change and Environment areas within EPSDD. The guide utilises information already prepared by these areas on climate wise gardens and appropriate trees for the Canberra climate.

Financial Implications

25. Territory Plan variations are covered by base funding. There are no financial implications relating to DV369.

Consultation

Internal

26. Not applicable.

Cross Directorate

27. TCCS were consulted on the preparation of the DV as part of the standard statutory processes, with discussions continuing through the development of the tree species information sheet. Discussions have also been held with SLA regarding the impacts of DV369 on future land release and sales, as well as providing information on climate wise gardens.

External

28. Not applicable.

Work Health and Safety

29. Not applicable.

Benefits/Sensitivities

30. The implementation of DV369 has generated concerns from industry representatives regarding the impact of the changes on new single dwellings, particularly those in recently approved estates. The options for progressing DV369 above outline approaches for addressing these concerns.
31. A later commencement date would give more time for development proposals (including exempt single dwellings) that are in the final stages of preparation to be finalised without the need to be redesigned. Such redesigns would add to the cost of preparing development plans and delay the commencement of construction work.
32. However, a later commencement date would delay the implementation of the living infrastructure provisions, leading to a delay in seeing increased permeability and tree canopy coverage on the ground.
1. Irrespective of the commencement date set, given the nature of the changes in DV369 it is anticipated there may be an influx of DAs lodged prior to the commencement date.

Communications, media and engagement implications

33. A draft media release on the anticipated commencement date is at Attachment D.

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Environment, Planning and Sustainable Development Directorate

To: Minister for Planning and Land Management Tracking No.: 22/38891

Date: 7 April 2022

From: Senior Director, Territory Plan – Planning and Urban Policy

Subject: DV369 Living Infrastructure – recommendations for progressing

Critical Date: 20 April 2022

Critical Reason: To advise industry and the community of the agreed approach for progressing DV369 as soon as possible.

- DG .../.../...
- DDG, Planning and Sustainable Development .../.../...

Recommendations

That you:

1. **Note** the feedback received from industry representatives regarding the implementation of DV369 Living Infrastructure in Residential Zones; and
Noted / Please Discuss
2. **Agree** to the recommendations for progressing DV369 included in this brief; and
Agreed / Not Agreed / Please Discuss
3. Depending on the agreed recommendation from this brief, **agree** to a media release being prepared to inform industry and community stakeholders of how living infrastructure provisions will be incorporated into the Territory Plan.
Agreed / Not Agreed / Please Discuss

Mick Gentleman MLA  20/4/2022

Minister's Office Feedback

Progress option A(a) - variation does not apply to certain estates/blocks, for tabling in May.
Please ensure there is clear guidance for homeowners and industry on suitable plants.
Work with TCCS on comms to ensure no confusion between DV369 and Urban Forest Bill.

Background

1. Draft Variation 369 Living Infrastructure in Residential Areas (DV369) was prepared to incorporate living infrastructure provisions into the Territory Plan. It proposes changes to the Single Dwelling Housing Development Code and Multi Unit Housing Development Code in relation to site coverage, private open space and tree planting requirements, amends the definitions in relation to site coverage and planting area controls, and introduces a new definition for deep soil zone.
2. Brief 21/118197 providing commencement options for DV369 was signed on 16 March 2022.
3. On 24 March 2022 you made a statement in the Assembly on DV369. In this statement you noted that you had asked officials to consider how industry and homeowners can best transition to the new requirements before finalising and tabling the draft variation.
4. Discussions have been held with various industry groups such as the Master Builders Association (MBA), Housing Industry Association (HIA), Property Council of Australia (PCA), Australian Institute of Architects (AIA), Australian Institute of Building Surveyors (AIBS) and the Planning Institute of Australia (PIA).

Issues

5. In the discussions with MBA, HIA, PCA, AIBS and AIA, as well as written correspondence from PIA, concerns have been raised regarding how the provisions in DV369 will be applied, particularly to new blocks in greenfield estates. Various suggestions were made regarding what blocks the provisions should apply to, with the focus being on undeveloped blocks.
6. The general view was that there needed to be adequate time for people to prepare their development proposal (exempt or merit track) before any changes to the requirements take effect. This is particularly the case for lessees who purchased land with the intention to build a specific house/development. It was considered to be unfair that the 'goal posts change' while they are going through the design phase for their development.
7. In addition to transition considerations when DV369 is implemented, industry representatives also raised concerns about the provisions and the unintended consequences. These matters included:
 - a. The provisions are problematic for compact blocks (up to 250m²) and smaller large blocks (i.e. blocks just over 500m²). The drop from 60% site coverage on midsized (under 500m²) blocks to 40% on large blocks is significant.
 - b. The deep soil zone definition is problematic for multi unit development (particularly in RZ4 and RZ5) that can have the basement car parking cover the whole site.
 - c. Tree requirements are problematic, with concerns that any future issue with damage to buildings from the trees will be the certifiers responsibility. The building code has requirements for footings where a tree is near a building, making it difficult to find suitable locations on the site to plant trees, particularly if there are any easements.
 - d. Given site coverage and planting area restricts the size of house permitted, can basements plus 2 storeys be allowed in RZ1, or 3 storey single dwellings?

Options for progressing DV369

8. Options suggested for bringing the provisions proposed with DV369 into effect were:

Option A - DV369 not apply to blocks in approved estates.

9. This could be achieved by stating the changes

- a. do not apply to blocks in an estate approved from a set date (such as 1 January 2020 or vacant/never-developed blocks (no date specified)).
 - This would mean DV369 would apply to established areas, but not apply to recently approved blocks
- b. only apply to blocks in estates approved from the commencement date of DV369
 - this would mean DV369 would not apply to established areas as well as vacant greenfield sites
- c. do not apply for 2 years for blocks sold before the commencement date
 - this would be difficult to check or for certifiers to determine the purchase or settlement date.

10. To enforce this option, the requirements (e.g. the estate approval date) would need to be written into the provisions, making them overly complicated to understand. In addition, information about block approval dates or purchased dates can be difficult to find for building designers, builders, certifiers and home owners.

Option B - DV369 to apply to developments where the DA is lodged for completeness check or BA is assessed as being exempt on or after a set date (but a date much later than 1 July 2022)

11. This is the approach most commonly used for commencing Territory Plan variations (particularly those that impact many sites) as it does not apply the changes to current DAs (i.e., those already lodged in the system) and provides a set period of time for new DAs to be lodged prior to the changes taking effect.

12. However, it creates difficulties where the changes apply to exempt single dwelling development that only go through the BA process. Unlike the lodgment of a DA (that has a formal and trackable lodgment process), determining when a BA is lodged is difficult. This then means it needs to relate to the BA decision, rather than lodgment, which would put greater pressure on the workload of building certifiers.

13. The most significant concern with this option is that a later commencement date would start to get close to when the new Territory Plan may take effect. This would make it confusing for industry and community about what changes were applicable to their development and from when. This would be particularly confusing if the changes commenced when the draft new Territory Plan was open for public comment.

Option C - Withdraw DV369 and incorporate living infrastructure requirements into the new Territory Plan

14. This option provides time for homeowners and industry to finalise any imminent approval processes and allows time for future developments to start incorporating the changes into their early design work (and therefore are ready for when the living infrastructure requirements take effect).

15. This option also enables any agreed adjustments to be made to the provisions before implementation in response to recent concerns raised by industry representatives.
16. Option C provides the simplest way of putting in place living infrastructure provisions while addressing the concerns relating to providing adequate time for current development proposals to proceed without needing to be redesigned. It means that complex provisions that stipulate that it only applies to a block that meets certain conditions (such as when it was approved) are not required. Instead, the provisions can be clear and simple to read and apply.
17. A concern with this option is that if DV369 is withdrawn, there may be a perception that the living infrastructure provisions have been abandoned. However, this is easily mitigated by providing a clear statement to the community that while DV369 is being withdrawn, the proposed living infrastructure requirements will instead be incorporated into the new Territory Plan that will take effect in 2023.
18. In addition, the draft new Territory Plan will be released for public consultation later in the year so stakeholders would be able to see where the living infrastructure provisions will be added to the new Territory Plan.
19. Option C is the preferred approach for MBA, HIA, PCA, AIBS, AIA and PIA.

Compliance concerns

20. Separate to how DV369 should take effect, concerns were raised by the building certifiers about the ability (or lack thereof) to check if the required trees are planted on the block, particularly for single dwellings. MBA and HIA were also concerned that any delay with issuing the final certificates for a development would delay final payments for builders and impact the standard contracts builders use for their clients.
21. The *Building Act 2004* only requires certifiers to check the building aspects of a development. For them to check more than the building (i.e. planting) the Building Act will need to be amended. Landscaping is also exempt development under the *Planning and Development Regulations 2008*, therefore a tree can be removed without approval after the house is constructed (unless tree protection legislation applies)
22. After investigating options suggested by industry representatives, it seems the only way of checking if trees are planted for a single dwelling is for Access Canberra to undertake site audits. This would have resourcing implications for them.
23. Multi unit development is different however as there is an opportunity during the unit titling stage of a development for the landscaping to be checked for compliance with the approved landscaping plan.
24. Given the difficulty in checking compliance with the tree planting requirements for single dwelling development, consideration needs to be given as to whether this control remains. The planting area and site coverage requirements would provide adequate space on a block should the home owner wish to plant trees and other incentives could be considered to encourage trees to be planted on blocks.

Recommendation

25. It is recommended that
- a. DV369 is withdrawn and the living infrastructure provisions are added to the new Territory Plan.
 - b. Community and industry are advised that the provisions will still be part of the Territory Plan, but just at a later date (i.e. that the changes aren't 'disappearing' completely). This will avoid the situation when the new Territory Plan takes effect that people claim they were unaware of the changes and request a further transition period.
 - c. In the drafting of the new Territory Plan, the policy matters raised in recent meeting are considered further. This may mean the current wording of the provisions will be adjusted.
 - d. Consideration be given to removing the requirement for a tree to be planted on single dwelling blocks, due to the difficulty in verifying it has been planted at the end of the construction process as well as liability concerns regarding future damage caused by trees.

Financial Implications

26. Territory Plan variations are covered by base funding. There are no financial implications relating to DV369.

Consultation

Internal

27. Not applicable.

Cross Directorate

28. Not applicable.

External

29. Discussions were held with MBA, HIA, PCA, AIBS, AIA and PIA on their thoughts for grandfathering clauses for DV369. The option preferred by all groups was Option C.

Work Health and Safety

30. Not applicable.

Benefits/Sensitivities

31. The implementation of DV369 has generated concerns from industry representatives regarding the impact of the changes on new single dwellings, particularly those in recently approved estates. The options for progressing DV369 above outline approaches for addressing these concerns.
32. Incorporating the living infrastructure provisions into the new Territory Plan would give more time for development proposals (including exempt single dwellings on vacant greenfield blocks) to be finalised without the need to be redesigned. Such redesigns would add to the cost of preparing development plans and delay the commencement of construction work.

33. With the imminent release of the Urban Forest Bill for public consultation, it would be beneficial having a decision on whether the tree planting requirement will be removed for single dwellings as this will be raised by community members.

Communications, media and engagement implications

34. A media release on the proposed approach for DV369 can be prepared.

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