



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND URBAN RENEWAL
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Submission Cover Sheet

Engagement with Development Application Processes in the ACT

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confidential)

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A CASE STUDY ON ENGAGEMENT WITH DEVELOPMENT APPLICATION PROCESSES IN THE ACT

Introduction

1. My suburb was settled in the 1960s. My home, built in 1965, is of similar scale and style to most homes in my street. These homes are typically two level, with garaging below and living areas above. The low rise character of existing homes generally supports solar access and protects residents' privacy and amenity.
2. A neighbouring property was sold in 2015. On 17 May 2016, I received a letter from the former Environment and Planning Directorate (the Directorate), now known as the Environment, Planning and Sustainable Development Directorate, notifying me of a Development Application (DA) for the property. The close of the public notification period (and deadline for lodging representations on the proposed development) was 30 May 2016.
3. A key perspective on engagement with DA processes in the ACT is the experience of parties adversely impacted by proposed developments. These impacts may include, for example: loss of solar access, privacy, views, local gardens and wildlife habit, and increased noise, glare, soil disturbance and water run-off.
4. This submission is an account of my engagement with DA processes: notification; post-approval; and building compliance. This DA was approved over two years ago, and I confirm that I am not seeking the Committee's intervention, advice on, or involvement in, this individual DA. Rather, I submit my experience as a factual account of what actually occurs when impacted parties engage with DA processes in the ACT. The only aspect of my experience that may differ to other citizens is that it is the perspective of someone with 20 years experience in auditing Commonwealth government administrative processes.
5. This submission is in three parts: the key stages of DA processes; supporting documentary evidence presented as attachments; and a summary of findings against the Terms of Reference for the Inquiry.

Key stages of DA process

First notification process

6. After I received the DA notification letter, I accessed the DA documentation on the Directorate's website. The proposed development included a major extension built above the upper level of the existing two storey home. This extension ran parallel to my northern boundary and potentially blocked solar access to my home - particularly by the addition of two large ornamental parapets on the top and mid-level roofs.
7. The plans had been prepared by a firm of registered architects. The DA applicant was a director of the firm, and a brother of the property's owners. The applicant was also the president of an industry association, and a member of a working group established by the Directorate to review solar access for residential developments in Canberra.¹

¹ The Conflict of Interest Declaration section on the DA form asked the following question: "Does the applicant or the lessee have any association with the Environment and Planning Directorate staff?". The applicant had answered "No". The DA form did not require the applicant to disclose related party relationships with the lessees.

8. As I worked through the DA documentation, I became increasingly concerned by the number of errors and omissions in the plans. (Although I have no training in architectural drafting, I have some experience in the forensic examination of documentation.)
9. I identified the following defects in the DA documentation:
 - the solar building envelope was drawn in reverse (i.e. showing the solar fence on the property's northern boundary instead of its southern boundary – see Attachment 1 DA)
 - this drawing purported to show compliance with criteria requirements;
 - the applicant's statement against relevant criteria contained the following declaration: "Building sits within the solar envelope and is compliant with criteria requirements"² (see Attachment 2 DA);
 - the mid-level structure was omitted in its entirety from the west elevation (see Attachment 3 DA)
 - although the mid-level parapet was lower than the top parapet, it was sited 3 metres closer to the southern boundary, with potentially major impact on solar access;
 - cross-section B was not available on the DA webpage (see Attachment 4 DA)
 - cross-section B provided a graphic representation of the scale and extent of the extension along my northern boundary, including the upper levels;
 - the heights (RLs) of critical shading elements – such as parapets, roofs and gutters – were not explicitly specified
 - while these heights can be estimated from scale drawings, critical measurements should be specified to assist the end users of the plans (including assessors, impacted neighbours, builders and compliance inspectors);
 - the redaction of the plans made them confusing – there were extensions on four separate levels, including two additional upper levels, but this was not immediately obvious due to the omission of cross-section B. This problem was compounded by the mislabeling of key drawings (for example, cross-sections B and C were both labeled "Section A");
 - the DA webpage link "Download entire DA" was linked to a zip file that contained only the site plan. The site plan was incorrectly labelled "Access and Mobility Report"; and
 - the development involved raising the height of the existing roof but this was not made clear on the plans, and was not discovered until building work was underway.
10. On 20 May 2016, I emailed the assessment officer to alert him to the defects in the DA documentation. When I received no reply, on 24 May 2016 I emailed the officer again, seeking an extension of 10 days to respond to a corrected set of plans once they were available (Attachment A).
11. The assessment officer called me later that day. However, instead of discussing my concerns with the DA documentation, the officer advised me as follows:
 - there was "no procedure to re-notify the DA";
 - any problems with DA documentation would be addressed when he assessed the DA;
 - he would send me the missing cross-section B (that I had requested on 20 May 2016);
 - I should wait until 30 May 2016 when his assessment would resolve my issues;
 - the assessors have their own tools to independently assess DAs so there was no need to be concerned about the DA documentation;
 - he re-iterated parts of the Single Dwelling Development Code (which I had read);

² The plans for both parapets were later shown to breach the solar building envelope requirements.

- when I asked how “reasonable sunlight” was defined, he said that it meant “good penetration of sunlight”; and
 - when I asked why there had been no modelling of the development’s shading of my home, he said that if there is no encroachment of the solar building envelope, they don’t do shading diagrams.
12. The assessment officer then closed the conversation by advising me that objections could be emailed to the customer service area.
 13. The assessment officer showed no interest in investigating the defects that I had identified in the DA documentation. Further, I was led to understand that I would not be granted an extension of time to lodge my representation because my concerns about the accuracy and completeness of DA documentation would be made redundant by the officer’s assessment of the DA.
 14. At the start of my discussion with the assessment officer, I did not raise the question of re-notification because I was not familiar with the legal framework for DA processes (I was simply seeking an extension of time). With hindsight, I realised that the officer’s opening comment was contrary to a statutory requirement that mandates the re-notification of development applications in certain circumstances (see Section 153(4), *Planning and Development Act 2007*).
 15. In view of my communication with the assessment officer, and the lack of guidance on the Directorate’s website for DA impacted parties, I decided to engage a town planner to obtain independent, expert advice on DA processes.³
 16. On 25 May 2016, my planning consultant confirmed the defects that I had identified in the DA documentation, and identified further deficiencies. The consultant promptly contacted the assessment officer in this regard, and requested an extension to the deadline (Attachment B).
 17. The assessment officer declined the consultant’s request, advising: “The issues you have raised in your email have been discussed with Residential Team Manager and **considered as not major problems to extend the public notifications closing date.**”⁴ (Attachment C).
 18. Following a telephone conversation with the assessment officer, the consultant escalated the matter to the team manager (Attachment D), who responded: “I note **the plans submitted as part of the DA meet the planning and land authority’s documentation requirements...** I do not consider there are enough grounds that warrant a re-notification of the proposal. The details provided in the plans are sufficient to work out any potential impact on the adjoining neighbours’ properties.” (Attachment E).
 19. On 31 May 2016, one day after the close of the notification period, my consultant and I discovered that several new documents had been added to the DA webpage, and some existing documents had been altered.
 20. The consultant notified a senior assessment manager: “...the online documentation has changed and now includes a total of 30 files when I and other members of the public could previously only

³ I also engaged a legal advisor due to the apparent unreliability of the assessment officer’s initial advice.

⁴ My emphasis shown in bold.

view 21. The new files now online include a new application apparently lodged the morning of Friday 27 May, 3 shadow diagrams (there were none previously), a new statement against the relevant criteria under S141A which now identifies a building envelope breach (R6), 2 new elevations (there were only 2 before), a new cross-section (there were only 2 available online until my client complained that one was missing and that missing one was made available online on 26 May, so this appears to be a 4th)..." (Attachment F).

21. I notified the team manager of the alterations to the online documents (Attachment G), and sent the senior manager a list of deficiencies in the revised documentation (Attachment H).
22. The senior manager confirmed that additional and amended documents had been uploaded to the Directorate's website on or after 30 May 2016, and agreed to re-notify the DA (Attachment I).

Second notification process

23. My consultant and I examined the shadow diagrams and identified errors in the juxtaposition of the architect's drawing of the extension on an aerial photograph of the site. I notified the senior manager of these errors (Attachment J).
24. On 3 June 2016, I provided the assessment officer with an updated list of deficiencies in the DA documentation (Attachment K).
25. When I did not receive a reply, on 8 June 2016, I followed up with this request: "As previously explained, the applicant's shadow diagrams are inaccurate. In order to properly assess the impact of this development on my property, I request that the applicant provides the following information:
 1. the building height, including parapets, on the edges of the proposed extension that will overshadow my property;
 2. the natural ground level at these points;
 3. the side setbacks (upper and lower levels of the additions) at these points;
 4. the rear setback from the closest point on the rear boundary;
 5. the rear setback relative to south-east corner of the site (please note that the rear boundary is not at right angles to the side boundaries, and that this information is needed to establish how far the extension runs uphill along my northern boundary).**I would also appreciate your advice on the relevant tolerances for these measurements, because any modelling needs to take into account the worst case scenario for this development, as built**"⁵ (Attachment L).

26. I did not receive any of the requested information as outlined above.
27. On 23 June 2016, the consultant contacted the senior manager, seeking a meeting with the assessors and reporting her concerns about the ongoing inadequacies of the DA documentation: "**...I wish to raise concerns about the continuing pattern of misleading, inaccurate and incomplete documentation provided. For example, the shadow diagrams supplied are virtually useless, since they purport to show the existing house plus extensions using a modified aerial photo taken from google maps, but comparison of the roof of that house with the 2016 aerial on ACTmapi shows the image of the existing house has been slid forward on the block by over 3m and the rear extension terminates at least 1m forward of the proposal. The true extent of overshadowing is therefore even**

⁵ The building tolerances later became a major issue in post-approval building compliance processes.

more unclear as a result of the shadow diagrams, so I am forced to rely on photographic evidence of where those shadows are most likely to fall and the length of those shadows at this time of year” (Attachment M).

28. The senior manager agreed to the consultant’s request for a meeting with the assessors, and the consultant and I met with two officials on 27 June 2016. After the meeting I sent an email outlining the deficiencies in the DA documentation and requesting re-notification with accurate and complete documentation (Attachment N). I sent a further email detailing superceded and misleading information that had not been removed from the DA webpage (Attachment O).
29. The requested information was not provided, the superceded files were not removed from the DA webpage, and the DA was not re-notified.

Post-notification process

30. Two weeks after the close of the second notification period, the applicant voluntarily sent me a revised set of shadow diagrams. The diagrams modelled the shading of my home with and without the proposed development (Attachment P). This was the first time that I had seen these diagrams, which were not available on the DA webpage. The diagrams purporting to show the existing shading on my home grossly overstated the existing level of shading. The effect of this error was to understate the relative solar impact of the development (see paragraph 32 below).
31. I requested the applicant to provide RLs (heights) for critical shading elements such as parapets and gutters. The applicant responded as follows: “You are way over the line on your expectations of information you are entitled to. The process is that you get given the basic information that you already have. You make comment and then you wait for the professional planners to do their assessment. By making comment you trigger a different track of assessment and it typically takes another 3 to 4 weeks. The planners won’t get back to you while they are doing their assessment. Communication will only be to me if they feel that they want additional information. They don’t otherwise contact me either. Once assessment is done they may request that I make changes. Once there is a decision they will notify you of the result unless they feel that there is an outcome to be negotiated. You don’t otherwise get any further input into the process. The information I have given you is out of courtesy to make sure that I am as accurate as reasonable and we are commenting on facts” (Attachment Q).
32. On 11 July 2016, I notified the assessors of the inaccuracies in the revised shadow diagrams (Attachment R). When I received no response, on 18 July 2016 I advised the Minister for Planning and Land Management of my concerns about DA processes and requested re-notification (Attachment S).
33. On 25 August 2016, I received a letter from the Minister declining my request for re-notification and advising me that on 20 July 2016 the development had been approved subject to conditions, **including the removal of some parapets** to reduce the impact of the development (Attachment T1). The Minister also provided a copy of the Notice of Decision (Attachment T2).
34. Meanwhile, the delegate had advised me that the DA had been approved. He said that they had initially requested the applicant remove the side parapets from the development. (These structures have no functional purpose apart from adding height and visual bulk to the upper roofs. They are also the greatest source of shading on my home.) However, instead of removing the side

parapets, the applicant had negotiated with the assessors to lower the overall heights of the parapets to avoid encroachment into the solar building envelope (Attachment U).

35. The approved plans show that **none of the parapets had been removed**. The Minister's letter shows that he was apparently unaware of this outcome.
36. I asked the delegate if the development would have tolerances of 340mm for the critical structures. If the applicant could raise the building height by 340mm through building tolerances, it could negate most of the agreed reduction in height and solar impact.
37. On 26 August 2016, the delegate responded: "The revised information resulted in an overall height change of 370mm to the front portion of the UFL [Upper Floor Level] extension and 530mm in the rear. As previously explained the building tolerances allow for both a higher or lower height than specified on the approval. **This is not a mechanism to allow structures to be built higher than what was approved, but allows for minor discrepancies in heights and setbacks during the building process**" (Attachment V).

Building compliance process

38. Building works commenced in mid 2017. By October 2017, the frame was constructed, and the actual impact of the development was emerging. I again sought information from the Directorate about the height (RL) approved for the mid-level parapet (Attachment W).
39. I did not receive the requested information, but the delegate confirmed that the parapets (as approved) were within the required building envelope. He suggested contacting Access Canberra to make a formal submission to the Building Compliance area as my concerns were now a post-approval matter (Attachment X).
40. I contacted Access Canberra, who referred me to the ACT Fair Trading web pages relating to complaints against builders. I doubted that this was the appropriate channel, but Access Canberra had no further suggestions.
41. By December 2017, other problems had emerged, including: the upper level extension overlooked our living areas and private open space, with one window having a direct line of sight to our dining table and my desk; the ensuite window reflected strong glare into our living area in the morning; and the metal roof reflected strong glare into our living area in the afternoon (Attachment Y).
42. I contacted the Directorate again, seeking contact details for the Building Compliance Unit. I was referred back to Access Canberra.
43. I contacted Access Canberra again. A different officer was able to guide me to the appropriate web page. On 29 January 2018, I lodged a request for a compliance investigation (Attachment Z). The purpose of my request was two-fold: I wanted to establish whether the adverse impacts of the development on my home were the result of government policy (as interpreted and administered by the Directorate) or whether they were due to non-compliance with DA approval conditions.
44. Several months later, no action had been taken on my request for a compliance investigation. On 4 June 2018, I wrote to the Minister outlining the issues, and invited him to my home to inspect the impact of the development (Attachment ZA).

45. On 6 July 2018, an investigator from the Building and Planning Compliance Unit advised me that he had measured the vertical height of the mid-level parapet as 780mm, contrary to 625mm as specified in the approved plans. The investigator said that he was unable to access the top parapet to measure its dimensions, but we agreed that it appeared to have similar dimensions as the mid-level parapet.
46. The investigator mentioned that although the parapet was larger than approved, the building tolerances allowed for up to 340mm deviations (in specified circumstances). However, where any point of a structure encroaches the solar building envelope, the building tolerances are zero (see Part 1A.2 of Schedule 1A, *Planning and Development Regulation 2008*). I alerted the investigator to the possibility that the increased size of the parapet could potentially exceed the solar building envelope. The investigator said that he would seek further information from the builder.
47. The investigator acknowledged the loss of privacy caused by the upper level windows that overlooked our living areas and private open space. However, the investigator advised me that the assessors had discretionary power in this regard, and the upper floor windows had been approved.
48. Given the history of misleading information regarding the DA, I was concerned that the applicant may seek retrospective approval for non-compliant aspects of the development as built – particularly as I had not had the opportunity to arrange an independent survey of the site. I contacted the Directorate's Customer Services unit, who advised me that parties who previously lodged objections to the DA would be contacted for their input before approval for any amended DA was granted. On 16 July 2018, I requested written confirmation of this advice (Attachment ZB), which was later provided by a manager in the assessment team (Attachment ZC).
49. On 16 July 2018, I received a response from the Minister to my email of 4 June 2018. The Minister confirmed that the proposed development was modified to comply with the solar building envelope requirements, and the plans were approved in this form (Attachment ZD). The Minister also indicated that he was advised that the proposed development complied with the side setback requirements at both lower and upper levels.⁶
50. On 23 July 2018, the compliance investigator advised me that he had received a response from the builder. However, the investigator said he was referring the matter to the DA assessment team because he was unable to make an assessment on the basis of the information available to him. I have sought further advice from the assessment team in this regard (Attachment ZE).
51. This outcome underscores the concerns expressed by my planning consultant and myself about applicant's failure to specify and disclose critical measurements on the publicly notified plans. Prior to DA approval, we unsuccessfully sought specific information to enable us to assess the impact of the development and to prepare our representations. As the compliance investigation demonstrates, this information is also essential to building compliance processes.
52. I have not yet received a response to my email of 24 July 2018 to the assessment team. I seek the permission of the Committee to provide an update on my submission when further information becomes available from the Directorate.

⁶ The compliance investigator subsequently advised me that he had not measured the building's setbacks.

53. I thank the Committee for the opportunity of making this submission.

Ruth Cully



3 August 2018

Attachments:

Attachment 1 DA Solar building envelope - drawn in reverse
Attachment 2 DA Declaration of compliance with solar envelope
Attachment 3 DA West elevation - omission of mid-level parapet
Attachment 4 DA Cross-section B - not loaded on DA webpage
Attachment A Emails to assessment officer re DA defects
Attachment B Consultants email to assessment officer re DA defects
Attachment C Assessment officers response to consultant
Attachment D Consultants email to manager
Attachment E Managers response to consultant
Attachment F Consultants email to senior manager re altered online documentation
Attachment G Email to manager re altered online documentation
Attachment H Deficiencies in DA documentation
Attachment I Senior managers decision to re-notify DA
Attachment J Email to senior manager re inaccurate shadow diagrams and altered documentation
Attachment K Email to assessor re updated list of deficiencies in documentation
Attachment K Updated list of deficiencies in documentation
Attachment L Email request for information on shading structures
Attachment M Consultants email to senior manager re inadequate documentation
Attachment N Email follow-up from meeting with assessors
Attachment O Email re superceded files on DA webpage
Attachment P Applicants revised shadow diagrams
Attachment Q Applicants refusal to provide heights of critical structures
Attachment R Email to assessors re errors in revised shadow diagrams
Attachment R sun photos living area
Attachment S Email to Minister re defective DA process 18 July 2016
Attachment S Photo of shading in living area
Attachment T1 Ministers response to allegations of defective DA process 24 August 2016
Attachment T2 Notice of DA Decision dated 20 July 2016
Attachment U Enquiry to delegate re DA approval conditions and building tolerances
Attachment V Delegates response re approval conditions and tolerances
Attachment W Enquiry about height of ensuite parapet
Attachment X Delegates response re approved parapet height
Attachment Y Photos showing glare and loss of privacy
Attachment Z Request for investigation by Building Compliance Unit 29 Jan 2018
Attachment ZA Email to Minister re potential breach of approval conditions 4 June 2018
Attachment ZB Email to Customer Services re non-compliant structure 16 July 2018
Attachment ZC Email from manager re potential amendment application
Attachment ZD Ministers reply to potential breach of approval conditions 16 July 2018
Attachment ZE Email to assessment manager re compliance inspection outcomes 24 July 2018

Findings against Terms of Reference

	Reference	Finding
1. a)	<p>Community engagement and participation in the Development Application process including: the accessibility and clarity of information on Development Applications and Development Application processes, including Development Application signage; the Development Application finder app; and online resources;</p>	<p>The Directorate notified the immediate neighbours of the proposed development via post. I received a notification letter dated 12 May 2016, on 17 March 2016. The DA notification letter advised residents, inter alia, how to access publicly available DA documentation, and the closing date for representations on the DA (30 May 2016).</p> <p>The Directorate posted inaccurate and incomplete DA documentation on its DA webpage. Some of this information was grossly misleading in terms of the proposed development's impact on the solar access of a neighbouring property.</p> <p>Additional and amended documents were uploaded to the Directorate's DA webpage on or after 30 May 2016 (the closing date of the first notification period). Potentially impacted parties were not advised of the alterations to online DA documentation.</p> <p>Although major defects in the documentation were reported to the Directorate on 20 May 2016, the Directorate did not decide to re-notify the DA until 2 June 2016.</p> <p>The Directorate was advised of deficiencies in the revised documentation prior to the start of the second re-notification period, and during the second notification period. These deficiencies were not corrected.</p> <p>Inaccurate and superceded documents from the first notification period were not removed from the Directorate's DA webpage.</p> <p>A consultant town planner and I requested specific information to inform ourselves of the impacts of the proposed development, and to assist in the preparation of our representations. The Directorate generally did not respond to our information requests.</p> <p>Despite the deficiencies in the DA documentation, including evidence of gross inaccuracies in the applicant's shadow diagrams provided in the second notification period, the Directorate did not respond to our requests for re-notification of the DA.</p>
b)	pre-Development Application consultation and statutory notification processes;	<p>I was not included in any pre-Development Application consultation.</p> <p>See above findings relating to statutory notification processes.</p>
c)	the availability and accessibility of current and historical Development Applications and decisions in relation to Development Applications, including reasons for Development Application approvals, conditions or rejections.	<p>I unsuccessfully sought advice on the interpretation and application of criteria requirements from the assessment officer. I was not provided with any information on the reasons for DA approvals, conditions or rejections, of relevance to this DA. Such information would have assisted in the preparation of our representations.</p>

	Reference	Finding
2.	The accessibility and effectiveness of Development Application processes, including:	DA documentation submitted by the applicant was inaccurate and incomplete. It is not clear that better information provided to applicants in relation to the requirements for DAs would have addressed this problem. A basic quality assurance check of DA documentation would have identified defects in the DA documentation prior to public notification.
a)	the information provided in relation to the requirements for Development Applications;	
b)	the current development assessment track system;	The DA triggered Merit Track public notification requirements because the proposed garage did not comply with side setback requirements. The development had greater adverse impact on its southern neighbour (through loss of solar access and loss of privacy) but these elements did not trigger Merit Track because the applicant's declaration was incorrect (with respect to solar building envelope requirements) and there are no criteria requirements for privacy.
c)	the Development Application e-lodgement and tracking system, e-Development;	Not assessed.
d)	processing times for Development Applications;	Not assessed.
e)	retrospective Development Applications;	I seek the permission of the Committee to provide an update, contingent on advice from the Directorate.
f)	reconsideration and appeal processes; and	I was advised that I did not have appeal rights in the ACT Civil and Administrative Tribunal (ACAT) in relation to the decision to approve this DA. Based on my experience of this DA process, I am unable to identify any effective disincentive to discourage applicants from providing false or misleading information. In contrast, DA applicants have ACAT appeal rights, which provides a perverse incentive for assessors to err on the side of the applicant rather than conduct a fully impartial and objective assessment.
g)	Heritage, Tree Protection and Environmental assessments.	Heritage, Tree Protection and Environmental assessments did not prevent the clearing of most of the vegetation from the property, including native plants, fruit trees, berries and vegetable gardens. The former garden is being replaced with built structures, concrete paving, retaining walls and a swimming pool.
3.	Development Application compliance assessment and enforcement measures.	The lack of specific and comprehensive information complicated the building compliance investigation, which resulted in certain information being referred back to the assessment team. I seek the permission of the Committee to provide an update, contingent on advice from the assessment team.
4.	Development Application practices and principles used in other Australian jurisdictions.	Not assessed.

5. Any other relevant matter.	<p>Over 30 objections were lodged to this DA, including a representation by a qualified town planner asserting the proposed development was inconsistent with seven of the nine RZ1 zone objectives. The only resulting change to the proposal was to require the design to be modified to comply with solar building envelope requirements. In the original DA the applicant had wrongly attested the design was compliant with solar building envelope requirements, and supported this claim with inaccurate plans and diagrams. The monetary cost to the impacted party of obtaining professional planning and legal advice was some \$5000. As built, the development has had severe adverse impact on the southern neighbour's solar access and privacy. To date, building compliance processes have not been able to determine whether the loss of solar access is due to the DA approval process or non-compliance with the DA approval conditions.</p>
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