

Submission to the ACT Legislative Assembly
Standing Committee on Public Accounts

**INQUIRY INTO THE AUDITOR-GENERAL'S REPORT
(No 2/2005) ON THE DEVELOPMENT APPLICATION
AND APPROVAL PROCESS IN THE ACT**

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July 2005

Preliminary comments

I am making this submission in a private capacity as an individual member of the community.

I would be happy to appear before the Committee as a witness.

In the submission I have referred specifically to a number of development applications and approvals in Section 22, Kingston to highlight shortcomings in the various stages of the development application and approval process.

While I have made some comments about proposals being put forward as part of ACTPLA's Planning System Reform Project in the *Directions Paper* (and associated *Technical Papers*), I am assuming that the Committee will be assessing the findings of the Auditor-General's report against these proposals, particularly in respect of ACTPLA's undertaking that many of the report's specific recommendations would be addressed as part of the reform project.

I have also attached for your information a copy of my submission to ACTPLA on the Planning System Reform Project.

Quality control in the DAA process

I support Recommendation 5 that ACTPLA 'should review the practice of a single officer assessing and approving a DA'. Where the same ACTPLA officer has also assisted the applicant at the pre-application stage in preparing information to accompany lodgement of a DA or preparation of a PA and/or when the same officer has been party to the applicant seeking an extension of time, any quality assurance is further compromised. I find ACTPLA's advice that 'It is not practicable within the resources available, cost-effective or necessary for all such decisions to be checked and reviewed before the development approval is issued' quite unacceptable. Such measures are necessary if the Canberra community is to have any confidence in the DAA process. Further, when no cost analysis is provided, the appeal to costs and/or resources as a reason for not doing something is just a way of dismissing the issue without any argument. The implications of the absence of any monitoring or review of assessments and approvals will be even greater if, as is proposed in the Planning System Reform Project, the number of DAs exempt from public notification increases and private certifiers are given a greater role.

Notification and objections

My personal experience does not support the Auditor-General's conclusion in paragraph 2.33 that ACTPLA's public notification processes are 'of a high standard'. The following instances of ACTPLA's failures in the public notification process have occurred in a single Section of Kingston over a period of less than two years:

Case 1: While the Regulations list certain DAs as exempt from public notification, serious anomalies can arise if the officer fails to take account of all the criteria applying to particular exemptions (eg the criteria applicable to 'minor developments'). By way of illustration, the DA to refurbish the former National Australia Bank premises in Jardine Street, Kingston as a drinks establishment/restaurant was not publicly notified despite

being less than 25 metres from adjoining residences and despite the associated DA to vary the lease purpose clause being subject to a mandatory PA. Even notification of the DA to vary the lease purpose clause to allow the new (high impact) land uses did not extend beyond the minimal legislative requirements and the availability of the PA was not notified. Further, although the PA was triggered by the application to vary the lease, the recommendations arising from it focussed on details of the refurbishment.

Apparently the refurbishment DA was not publicly notified because it related to 'minor internal and external changes to the premises'. The Regulations specifically state that 'minor development' means 'development in relation to land that a reasonable person would consider to be of a minor nature, having regard to the following matters':

- (a) the views to and from the adjoining land
- (c) the privacy of the adjoining land
- (d) the likelihood of the adjoining land being detrimentally affected by noise at the time the development is carried out or at any time in the future
- (e) the local streetscape
- (f) any other potential loss of amenity
- (g) the nature, scale and any possible environmental effects of the development, including potential pollution of any sort'.

Given these criteria, it is extraordinary that any 'reasonable' person could justify exempting the redevelopment of a bank (a low intensity use) as a drinks establishment (a high intensity use) immediately opposite and only some 25 metres from residents' bedrooms. The 'minor internal and external changes to the premises' involved removing a large section of the rear wall thus exposing residents to the full extent of noise and building activity generated six days a week – initially, seven days a week and after hours until enough complaints were made to Environment ACT - for some four months. I would also point out that, once the drinks establishment commenced operations, the adverse effects on all the other 'matters' which the assessing officer did not have 'regard to' came to pass.

Whether this lack of notification occurred as a result of the assessing officer's unfamiliarity with the Regulations or as a result of administrative discretion, in my view, it suggests a significant error in process.

Case 2: Residents whose property boundary is less than seven metres from the boundary of a commercial establishment did not receive formal correspondence about a DA to vary the lease of the former Commonwealth Bank premises in Giles Street, Kingston to allow for a wide range of commercial uses. I appreciate that this was probably because the boundaries of the two sites are not, technically speaking, 'physically contiguous'. However, given the proximity of the sites, I believe ACTPLA should have exercised its discretion to advise other parties who would clearly be affected, even if they fell outside the definition of 'adjoining lessees'.

Case 3: Recent advice from ACTPLA about public notification of yet another DA to vary a lease to allow 'restaurant' use close to my property indicated that owners of apartments in the complex in which I live - and the neighbouring apartment complex – had received formal correspondence from ACTPLA. Neither I nor my owner-occupier neighbours received any such correspondence. In response to correspondence to Mr Savery raising my concerns about this matter, I have received advice that a letter was

sent to the proprietors of my apartment complex (as a matter of courtesy). The post office box address to which I am advised the letter was sent is not that of the Owners Corporation nor that of the Managing Agent. The advice also confirmed that the lessee of Block 33, as an immediately adjoining neighbour, had been formally notified. Block 33 is unleased public land comprising an unnamed road reserve and a public car park! My understanding is that the residential lessees whose properties abut the car park/road reserve are the 'adjoining lessees' for notification purposes and each lessee should therefore have received formal correspondence from ACTPLA.

Case 4: Similarly, public notification of Draft Variation No 256 to the Territory Plan which the Minister directed ACTPLA to prepare in response to the outcomes in Case 1 above and which is concerned specifically with Section 22, Kingston was limited to a leaflet letterbox drop. Only one of the many Kingston residents to whom I spoke had received the leaflet, despite advice from ACTPLA that the leaflet had been delivered to all properties in Section 22, neighbouring residential sections and the Section 21 commercial area. In addition, the fact that the explanatory statement for DV 256 contained numerous errors of fact (and that ACTPLA declined to correct these) does not reflect well on the standard of ACTPLA's notification procedures.

These examples suggest, at the least, serious problems of quality control, dissemination procedures and/or record keeping in relation to public notification.

I also believe there is a need to review the appropriateness of other elements of the public notification process in terms of their effectiveness in informing the wider community of DAs (ie notification via public notices in the *Canberra Times* and the erection of 'a sign that specifies the development proposal'). How many ordinary Canberrans regularly read the public notices in the *Canberra Times*? The 'signs' advising of DAs are basically A4 or A3 printed paper notices. In commercial areas particularly, they are hardly eye-catching amongst other commercial signage and or advertising on building facades and can only be read close up. Notification via ACTPLA's website is not easily accessible for those members of the community who do not own computers.

Consideration of objections

I strongly support the recommendation that ACTPLA should formalise and document its 'careful consideration' of objections and the assessing officer's comments should relate directly to those objections. I would also like to see 'careful consideration' defined in the legislation or regulations.

Use of checklists to assess DAs

I agree that all DAs should be assessed using standard checklists regardless of the type or scale of the DA. Such checklists should provide for assessment against all relevant aspects of the legislation, regulations and Territory Plan as well as all relevant planning guidelines. Any decision not to apply particular legal or regulatory provisions or planning guidelines should also be documented.

While the Auditor-General's report suggests that there may be advantages in involving 'selected external stakeholders' in the revision of checklists, it is not clear to whom it is referring. Certainly, there would appear to be advantages in the mandatory referral

agencies playing a major role in devising checklists to assess compliance with planning guidelines relevant to their particular areas of responsibility (eg Environment ACT or the Environment Protection Authority in relation to the Noise Management Guidelines and Location Guidelines). The non-mandatory referral agencies could also participate in the development of similar checklists for their respective areas of responsibility (eg Department of Urban Services in relation to the Waste Management Code of Practice, Parking Guidelines, etc).

Shortage of qualified planning staff

The shortage of qualified planning staff and lack of formal training is a major source of lack of confidence in the consistency and fairness of the system. Decisions made early in the DAA process by inexperienced or unqualified staff, eg about public notification processes or the complexity of particular proposals, have ramifications for the outcomes of the process. ACTPLA's reliance on on-the-job training is not sufficient to upgrade assessing officers' competency levels.

Extension of time for determination of DAs

I agree with the concerns expressed by the Auditor-General about extension of time for determination of DAs. The example provided in paragraph 2.52 of the report is of a fairly formal approach by ACTPLA to the applicant. What is disturbing is when the request takes the form of a chatty e-mail from the assessment officer asking an applicant to help 'sort out' a little 'legal, technical problem'.

Appeals against decisions

I have strong reservations about the Auditor-General's statements that 'This small number of appeals suggests that the vast majority of participants do not have major objections to the fairness of decisions' and that the fact that 'The majority of AAT decisions find in favour of the Authority ... suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny'.

This is a huge leap of faith particularly as the Auditor-General 'did not examine whether the appeal process is complex or costly and may discourage applicants to appeal'. The complexity and the cost (both in terms of time and legal representation) at the least 'discourage' and, probably more commonly, put the appeals process out of reach for most ordinary members of the community, regardless of whether they are applicants or objectors.

I would suggest that, without seeking the views of those who have been adversely affected by planning decisions and examining the documentation, including transcripts of AAT proceedings, this assumption should not be made. Further, while the Land and Planning Division of the AAT is separate from the ACT Government, it is nevertheless an integral part of the ACT planning and development system. I appreciate that scrutiny of a sample of AAT cases is unlikely to occur, given the resource-intensive and costly nature of such an exercise. There is, of course, provision for scrutiny of AAT decisions through appeal to the Supreme Court on a matter of law. I would suggest, however, that, unless they are extremely wealthy, individual private citizens are effectively excluded from this course of action not only by the cost of engaging legal representation to argue their case but also by the possibility that the costs of all parties to the

proceedings may be awarded against them – a fact well known to all parties to appeals (including ACTPLA) and to the AAT itself.

The fact that, following the two recent cases in which I was a joined party to the proceedings – *Ergas & Bird and ACTPLA & Ors [2004] ACTAAT 18 (18 May 2004)* and *Stryver Pty Ltd and ACTPLA & Ors ACTAAT 42 (13 December 2004)* – the Minister directed ACTPLA to prepare a Draft Variation (No 256) to the Territory Plan in itself raises some questions about ACTPLA's decisions and the AAT's endorsement of those decisions.

Consultation

Having attended ACTPLA's consultation session with the Inner South community on 5 July, I can only agree with the findings of the 2004 report of the National Institute for Governance, *Review of Stakeholder Engagement in ACT Planning*, that 'consultation occurs too late in the process ...' and that consultation processes are 'perfunctory' and 'heavily controlled'.

People expect the Government (and especially ACTPLA) to develop and administer land use and environment protection policies taking due and proper consideration of the rights of all members of the community. Limited consultation with only a small number of citizens attempting to represent community interests through unresourced or under-resourced community groups does not constitute public consultation – and certainly does not promote community engagement.

The Statement of Planning Intent of the Minister for Planning purports to provide a commitment to '... providing appropriate safeguards for members of the community most directly affected by policy change and development applications'. Without locality based controls and mechanisms, this is not possible. Where are the safeguards?

The community has a right to accurate and intelligible information as part of the consultation process. I would suggest that the quality of documentation provided for public consultation purposes often leaves a lot to be desired. For example, there is very little that can be described as 'technical' in the *Technical Papers* provided for the Planning System Reform Project. The papers endorse a viewpoint with an inherent bias and ideological perspective unsupported by fact, valid arguments or serious analysis and are merely an expansion of the rhetoric, assertions and generalisations contained in the *Directions Paper*. They contain virtually no technical detail.

Sustainability

Paragraph 4.1 notes that 'there are no comprehensive guidelines and processes [for consideration of ESD] for the individual DA level'. While appreciating that there may be difficulties in translating the concept of 'sustainability' to administrative practices and procedures, Environment ACT's EPPs and those planning guidelines concerned with particular aspects of environmental impact would appear to provide a suitable basis for the development of interim guidelines and checklists to be applied in the assessment of DAs. This task should be undertaken by experts with formal tertiary qualifications and expertise in environmental management and sustainable development.

The Auditor-General's report recommended that ACTPLA make better use of environmental assessments for consideration of ESD and review the requirements for PAs (and other assessments) so that adequate information is obtained on social, economic and environmental issues. ACTPLA's response to criticism of its management of environmental elements of the DAA process is to abandon PAs and further assessments, give ACTPLA the discretion to waive the requirement for proposals to be subject to an EIS, remove the requirement for EISs to be tabled in the Legislative Assembly, remove the power for the Minister for the Environment to trigger environmental inquiries and allow ACTPLA to endorse its own EISs!

While the abandonment of PAs and further assessments in favour of planning studies scoped by ACTPLA and provision for EISs to be triggered at a higher level may well provide developers with 'greater clarity and certainty of process', it will also reduce safeguards for the community – especially developments which may be comparatively small in scale but which may impact on a particular section of the community.

I would suggest that there are strong arguments for separation of the EIS process from ACTPLA's DA decision-making process and believe it should be administered by Environment ACT. I also believe that even if the Legislative Assembly has no power to endorse, modify or reject an EIS, there is nevertheless the opportunity to debate the issues and bring them to public attention.

Statutory timeframes

ACTPLA advised that the specific recommendation in the Auditor-General's report would be addressed as part of the Planning System Reform Project. ACTPLA's response to criticisms about its failure to meet statutory timeframes is to remove what checks and balances there are, eg by reducing the number of DAs which will be publicly notified, minimising the number of referrals to other agencies, not notifying amendments to DAs, etc.

Referral to agencies

The Auditor-General's report recommended that the referrals process be improved by formalising and standardising methods of referral and the provision of advice, better integrating referrals into the DAA process and specifying an agreed timeframe for responses by agencies – all of which seem eminently sensible and not overly onerous. ACTPLA's response is to minimise the number of referrals, to waive any requirement that it should accept or act on any advice and to dismiss 'non-specific' agency comments as not being 'valid planning considerations'.

Concluding comments

The Auditor-General's report is highly critical of the DAA process. I trust that, as part of its inquiry into the report's findings, the Committee will give due consideration to:

- ACTPLA's failure to address the Auditor-General's recommendations for improvement to its processes and procedures, leading to a perception of disregard for adherence to proper governance principles
- the increasing isolation and lack of transparency of ACTPLA's decision-making

- proposals put forward in the Planning System Reform Project which appear to be designed to minimise public scrutiny and accountability and are therefore not in the public interest.