

Standing Committee on Public Accounts
Review of Auditor General Report 2/2005

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Section 1: Background

1. This submission is made in relation to the circumstances surrounding an extension to our property at Block 10 Section 36 (39 Anzac Park) Reid.
2. The following section describes the chronology of the development.
3. The chronology is to allow the Committee to understand the events as they occurred. Following the chronology, we address each of the sections of the Auditor General's report 2/2005.

Chronology

4. The development application was lodged on or about 15 July 2002.
5. 9 Aug 02. Date for lodging objections to original Development Application (DA) closes. No objections received.
6. 13 Aug 02. One late objection lodged in relation to DA signed by two individuals. ACTPLA choose to invoke additional time to assess the application given the lodgement of the late objection.
7. 1 Oct 02. DA approval given. Application No 20023140A.
8. Dec 02. Building tenderers identify cottage render as non-original.
9. 4 Apr 03. BA approval provided.
10. Late Jul – Early Aug 03. Photo of completed wall (un-rendered) evident on Heritage Unit files. This photo was used in briefings to the Chief Minister in Nov 04. The first time this alleged non-compliant structure was mentioned by ACTPLA was 4 Jun 04.
11. Jul – Aug 03. External render on extension completed.
12. Sep 03. External render on extension painted.
13. Pre 4 Nov 03. Complaint lodged with ACTPLA that render was not as per approved plans.
14. 4 Nov 03. Letter received from ACTPLA calls for a proposal for new render finish to house.
15. 12 Nov 03. Site visit by Env ACT (Heritage unit) and ACTPLA. Site attended at 10:00 by Mr Eric Tierney Mr David Kyburz and Ms Raia Dryden. Proposition for window replacement advised by Mark Power.
16. 12 Nov 03. Mr Flannery submitted a report to the Heritage Unit indicating that there was evidence of a re-render on the house and supported smooth render. Relevant photos attached to report. Report sent to Heritage Unit.
17. 28 Nov 03. Fax of window details sent to Heritage Unit outlining proposed replacement. Copy provided to ACTPLA.
18. 30 Nov 03. Letter sent to ACTPLA expressing concerns about the lack of response in relation to render, no action in relation to the Flannery report. Power's sought guidance.
19. 1 or 2 Dec 03. Phone call from Mr Tierney of Heritage Unit. Mr Tierney advised that an on-site meeting was proposed to be conducted by the whole Heritage Council.
20. 3 Dec 03. Letter from Consulting Engineers stating that the render on the property is "drummy" and in need of replacement
21. 3 Dec 03. On site meeting attended by six people from ACT Heritage, Mark Power and Project Manager. All members of the Heritage Council plus three members of Heritage Unit in attendance.
22. 4 Dec 03. Variation 173 to the Territory Plan comes into force.
23. 4 Dec 03. Amended DA lodged with ACTPLA. Amendment based on outcomes of meeting.
24. 5 Dec 03. Minutes received from Heritage Unit confirming outcomes of meeting that included support for smooth render and replacement windows if required.
25. 5 Dec 03. DA amendment withdrawn. As at 29 July 2005, the application fees have never been refunded.

Chronology

26. 5 Dec 03. Ministerial complaint lodged with Chief Minister, Planning Minister and Heritage Minister. No acknowledgment of receipt of letter provided.
27. 11 Dec 04. Letter from local resident (original objector) quoting details of amendment to be lodged.
28. 19 Dec 03. Meeting between ACTPLA (K. Polglase) and Heritage Unit in which file note indicates advice from HU would be consistent with minutes of 3 Dec 03 meeting.
29. 6 Jan 04. Letter sent to Heritage Unit by Eric Martin, heritage architect. Mr. Martin quotes the details of the agreement of the Heritage Council to the application of smooth render, which was agreed on 3 Dec 03.
30. 3 Feb 04. Brief provided to Heritage Minister by Head Heritage Unit that includes statement that extension had been completed in accordance with approved plans and was not at issue and advice that original cottage was smooth render finish and amendment to this effect should be lodged.
31. 3 Feb 04. Unsigned, pre-dated letter allegedly sent to Power's from Environment ACT in response to complaint lodged 5 Dec 03. This letter was never received by the Power's. The electronic file properties show the letter was pre-dated. Environment ACT has never been able to produce a signed copy of this letter.
32. 10 Feb 04. Letter from Minister Wood indicating Heritage Unit would advise acceptability of smooth render and other matters would require further review.
33. 10 Feb 04. Commenced removing render and windows. ACTPLA issue a stop work order.
34. 10 Feb 04 ACTPLA advises amendment to be treated as a minor amendment and not new works.
35. 10 Feb 04. Neighbour submits letter to ACTPLA alleging non-compliance with DA. These allegations are never investigated.
36. 11 Feb 04. Power's advised to submit an amended DA and that it will be fast tracked (within 24 hours if possible) given the prior endorsement given by the Heritage Unit.
37. 11 Feb 04. Call to Dr Sandy Blair, head of Heritage Unit. During the conversation Dr Blair stated she had received correspondence in the last few days from a heritage architect that forced the advice to be re-considered; she intended taking the matter back to the full Heritage Council.
38. 12 Feb 04. Email sent to Dr Blair to request a copy of recently received correspondence from heritage architect. Mr. Eric Martin letter of 6 January 2004 ultimately provided.
39. 12 Feb 04. Replacement window installation complete.
40. 12 Feb 04. Letter from resident quoting dates of Heritage Council attendance at site and quoting details of stop work order as issued on 10 Feb 04.
41. 16 Feb 04. Phone call from Dr Blair indicating heritage unit task force had met and decided not to provide comment on the amended DA as presented.
42. 17 Feb 04. Notice of Prohibition issued for render removal.
43. 17 Feb 04. Email from Heritage (Blair) to ACTPLA (Polglase) outlining proposed advice and approach to heritage matters.
44. 17 or 18 Feb 04. Dr. Sandy Blair provides a briefing to the Reid Residents Association Incorporated (RRA Inc) and the ACT National Trust. Dr. Blair never sought our permission to discuss the development with these groups.
45. 18 Feb 04. Email from ACTPLA (Polglase) to Heritage Unit (Blair) where draft advice appears to be considered between delegate and advisory body.
46. 18 Feb 04. RRA Inc write letter to Heritage Council indicating disagreement with decision taken by Heritage Council supporting smooth render.
47. 19 Feb 04. Copy of DSB letter and engineer report sent to ACTPLA.

Chronology

48. 27 Feb 04. Notice received from ACTPLA of Heritage Unit response. Correspondence from Heritage Unit now raised concerns about the colour of the extension.
49. 1 Mar 04. Evidence provided to ACTPLA that the colour we had chosen for the extension was as per the Dulux heritage range.
50. 11 Mar 04. ACTPLA determination on amendment. Decision imposed conditions of rough cast render. Decision imposed conditions on colour. Decision required removal of windows and their re-construction. Decision of ACTPLA completely inconsistent with previous correspondence.
51. 6 Apr 04. Application for review of decision lodged with AAT.
52. 13 May 04. Mandatory mediation session fails.
53. Late May 04. RRA apply to be party joined in AAT hearing. AAT grant leave to be party joined.
54. 21 Jun 04. RRA Inc and ACTPLA evidence provided to Power's (3 days prior to hearing).
55. 22 Jun 04. AAT directions hearing where agreement reached that ACTPLA will review decision in light of Section 247 of Land Act. Suggestion for this directed by President. President quotes two previous cases that ACTPLA had failed to use the correct part of the Land Act.
56. 25 Jun 04. ACT Government Solicitor advised ACTPLA via facsimile about previous decisions referred back to ACTPLA as advised by AAT in directions hearing held on 22 Jun 04.
57. 8 Nov 04. Mr. Power met with Chief Minister's advisor (Geoff Gosling)
58. 24 Dec 04. ACTPLA write to Power's requesting amendment be lodged.
59. 20 Jan 05. Power's write to AAT advising direction given on 23 Jun 04 has not been acted upon.
60. 27 Jan 05. AAT write to Power's (copy to ACTPLA) acknowledging issues surrounding redetermination of DA amendment.
61. 8 Mar 05. ACTPLA refuse application.
62. 10 Mar 05 – 18 May 05. Power's attempt to resolve issue with Chief Planning Executive of ACTPLA (total of five hours of meetings)
63. 19 May 05. Appeal lodged with AAT for review of decision by ACTPLA to refuse minor amendment on the basis that the finish of the render on our house and the absence of windows bars would cause significant detriment to the RRA Inc.

Section 2: Development application and approval process

Issues

Records management

64. In our matter, there have two examples of letters allegedly sent, yet the electronic file properties do not match the printed version of the letters. In both cases signed copies of the letters have never been produced. The letters were allegedly sent by Dr. M Cooper Head of Environment ACT and Ms. Cheryl Vardon, Commissioner for Public Administration.
 65. There are other examples of correspondence where the dates on the letters do not match claims made by public officials.
 66. There is evidence of the same correspondence provided by two separate departments under the use of FOI where the information is materially different.
 67. In our case, ACTPLA refused our minor amendment in March 2005 (application lodged February 2004) on the basis that the RRA Inc would suffer significant detriment. However, through the FOI process, there was not one piece of correspondence (written or electronic) on any ACTPLA file from the RRA Inc.
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Pre-application process

68. We were subjected to the HQSD process.
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Fees on lodgment of DAs

69. we are led to believe that fees paid for an amended application in Dec 03 that was withdrawn have never been refunded, even though requests have been made for a refund.
-

The DA approval process

70. In our case it appears a single delegate has liaised with the Heritage Unit (HU), was asked to meet with the committee of the RRA Inc (though this has never been recorded), and other non-objectors, when assessing our amendments. However, in the same period, he never once sought a meeting with us to understand our position. Further, from mid 2004 onwards, there appears to have been significant involvement by the ACT Government Solicitors in relation to our amendments.
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Notification and objections

71. Our DA complied with all rules defined in the Territory Plan and was endorsed by heritage. Yet, because of size, we were subject to public notification. We find this particularly difficult to fathom. If the rules have been complied with, why should others be allowed to review our plans? Further, providing access to plans in this way degrades security in the home. We also question whether making plans available to the general public breaches the Privacy Act and the Human Rights Act.
 72. There were no objectors to our DA within time. However, ACTPLA chose to extend the period they could process the application on the basis of one late objector.
 73. ACTPLA chose to notify the late objector of the amendment lodged in Feb 04, even though they were not entitled to be notified.
 74. The local residents association seems to have unfettered access to ACT Government officials.
-

Issues

Assessment processes

75. We believe there has been gross unfairness in assessing our amendment, lodged at the request of ACTPLA. In our case:
- A referral agency (Heritage Unit (HU)) provided briefings to the committee of the local Residents' Association (RRA Inc).
 - ACTPLA and the HU liaised and discussed "strategies" as to handle our amendment.
 - Neither the HU or ACTPLA ever contacted us to discuss any aspect of our development.
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Timeliness of the DA assessment process

76. The period of determination relating to our original DA was acceptable.
77. The period to assess our amendment lodged in Feb 04 was within the required timeframe (determination made 11 Mar 04).
78. Having appealed the initial determination and attended the AAT, ACTPLA was told to re-determine our amendment in accordance with Section 247 of the Land Act. ACTPLA took a further 8 ½ months to re-determine the minor amendment (23 Jun 04 – 8 Mar 05). The determination was to refuse the amendment. The re-determination coincided with the introduction of the new Heritage Act 2004 and occurred within seven days of ACTPLA being presented with a raft of questions in relation to our development from the Ombudsman.
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Data analysis and reporting

79. In our case, ACTPLA have alleged further breaches of our DA. In each case, the allegations mirror a complaint from one neighbor.
80. In this case, based on material obtained through FOI, the allegations have never been investigated: rather, the assumption is that the complainant is correct. The complainant is effectively being allowed to act as a compliance unit employee.
-

Data management

81. In our case ACTPLA were notified that several of the alleged breaches could be countered by an examination of the building file. The delegate in our matter seemed to refuse to review the building file, and continued with the allegations.
82. Through FOI, there is no evidence of any investigation being done on the claims made by a neighbour.
-

DA Assessment – consultation with other agencies

83. The consultation with the HU in our case has been the greatest concern. An examination of Hansard (Estimates Committee) 2005 will reveal the Planning Minister agreed we were unfairly treated.
84. Having agreed there was a basis to our complaints, ACTPLA did not withdraw or reverse their decision, and we were forced to take our appeal to the AAT a second time, even after the admission by the Minister.
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Use of expert advice

85. In our case, there appeared to be selective use of heritage experts. Reports prepared by Heritage Council members that supported the proposition that the original cottage was finished in a smooth render were ignored and never tendered in AAT proceedings. Briefings to the Heritage Minister by the head of the HU (copies of which were on the ACTPLA files) in which Dr. Blair stated our original cottage had smooth render were never tendered in AAT proceeding by ACTPLA.
86. We believe the exclusion of this document was in direct contravention of Section 37 (1) (b) of the AAT Act.
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Issues

Appeals against decision

87. We have appealed two decisions in relation to our amendment. The first appeal resulted in ACTPLA being told to re-determine the amendment in accordance with Section 247 of the Land Act (they had been told this on two previous occasions by the AAT).
 88. The second appeal is pending.
 89. The appeals process is very expensive. In our case, due to the resources available to the ACT Government, particularly through the ACT Government Solicitor, we needed to expend large amounts of money on legal fees and other costs. Further, the financial costs due to lost productivity in addressing the claims of ACTPLA have caused significant costs in terms of lost productivity. The emotional cost is immeasurable. However, the absence of this degree of commitment would have weakened our ability to mount a strong case. We believe the link made in the report (page 17) that decisions of the AAT reflect a view of fairness may have inappropriately forgotten about the resource capacity of applicants to mount effective challenges to decisions due to limited financial capacity.
 90. When asked to re-determine in accordance with the Land Act, ACTPLA took 8 ½ months to respond. After seven months we wrote to the AAT complaining about the delay. In their response, the AAT advised that they did not have the authority to force a Government Agency to comply with a direction they gave. This effectively means that a Government Agency could continue to make erroneous claims, have a person present to the AAT, and then have the matter referred back. There is a potential endless loop.
 91. We believe in our case there has been a deliberate attempt to maximize the financial burden against us. Further, there is evidence that ACTPLA may have sought the involvement by a consultant barrister over a minor amendment.
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Section 3: Legislation and Guidelines

Recommendation

Legislation

92. There were no objectors to our development in time. However, having ended up at the AAT twice, on both occasions, the RRA Inc was able to join against us, not through the Land Act, but rather, the AAT Act. Thus, they are potentially able to influence a planning matter even though they did not object.
93. We contend we would never receive the same degree of access if we failed to object to a development.
-

Guidelines on processes and procedures

94. There do not appear to be any guidelines made available to the public on the processes to be used by the Heritage Unit or Heritage Council.
95. In our case, the Heritage Council changed its mind after providing consistent advice supporting the application of smooth render on five separate occasions over a three month period.
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Checklists, assessments, and approvals

96. We offer no specific comments.
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Notification, objections, and comments

97. Refer to the chronology and comments in Section 2 Notification and objections.
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Development conditions

98. We offer no specific comments.
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Compliance

99. ACTPLA alleged several non-compliances with out DA. However, tracking back through the files of ACTPLA and HU (accessed via FOI) it becomes apparent that the allegations link directly back to one neighbour.
100. There is no evidence on any ACTPLA or HU file of any investigations being undertaken of the allegations: rather, they appear to have been taken as correct.
101. Inspectors and HU staff visiting our property never complied with the requirements of the Land (Planning and Environment) Act 1991 in terms of providing proof of identify or advising us of our rights to refuse them access.
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Communication and consultation

102. We believe the requirements of the Land (Planning and Environment) Act 1991 were not complied with by ACTPLA or the HU.
103. HU and ACTPLA communicated with committee members of the RRA Inc in relation to our development, yet they failed to ever consult with us.
104. Letters we sent to ACTPLA were ignored and never answered.
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Section 4: Ecological Sustainable Development

Recommendation

Expert advice and consultation

105. No specific comments are offered.

ESD guidelines for development assessment staff

106. No specific comments are offered.

Use of environmental assessments

107. No specific comments are offered.

Guidelines and training for ESD

108. No specific comments are offered.

Section 5: Additional Issues

Issue

Role of residence associations

109. We believe that the RRA Inc has been allowed to unduly influence our matter.
110. We contend that ACTPLA, the HU and the AAT have never asked the committee of the RRA Inc to validate the views being presented by them as being the views of their membership. There has been an inherent assumption that the views they present as a committee are the views of their membership.
111. We were able to obtain signatures from over 53 residents of the suburb of Reid, some of which were members of the RRA Inc, who completely disagreed with the reason for ACTPLA refusing our amendment and disagreed that they would suffer significant detriment in relation to our amendment. We obtained a further 82 signatures from Canberra and local residents that our amendment did not affect the heritage of the suburb of Reid.
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Powers of the AAT

112. The AAT indicated in writing they could not force a Government agency to comply with a direction they give. We find this incredible as the mechanism offered to all who wish to challenge a decision of Government is the AAT. Potentially, someone could be caught in an endless loop of appeals against a department, return of the decision to the decision maker, appeal, etc.
113. In our case, we are before the AAT for a second time over a minor amendment, and arguing over the finish on a rendered wall, where the finish is not a mandatory requirement.
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Preparation of AAT documents

114. The AAT Act requires decision makers to present all documents they consider relevant to a decision. This is required under Section 37 (1) (b) of the AAT Act. In both our appeals, the ACTPLA delegate failed to provide what we considered relevant material when preparing the T documents for the appeal. A brief to a Minister directly related to the subject of the appeal was excluded from the T documents on the two occasions we have gone to the AAT. Had we not undertaken an FOI, we would have never discovered the document.
115. A further problem with AAT documents is material developed by referral agencies. Technically, the AAT Act does not require referral agencies to lodge relevant documents. In our case, several critical documents to our appeal were only discovered through the FOI process on Environment ACT files.
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Breaches of the Public Sector Management Act

116. We believe there have been significant and sustained breaches of the Public Sector Management Act by ACT Public Servants.
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Breaches of the Federal Privacy Act

117. We believe there have been significant and sustained breaches of the Federal Privacy Act.
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Failing of FOI

118. In our case, we have utilized the FOI process to gain access to records of our matter. On several occasions, materials present on two department files have been provided by one agency, but not another.
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Advising members of the community outside of the provisions of the Land Act

119. We believe in our case the HU liaised with the RRA Inc and members of the community in breach of the Land (Planning and Environment) Act 1991, the Privacy Act 1991 (Cth) and the Public Sector Management Act 1991.
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Section 6: Recommendations

Recommendations

120. No residents association should be allowed to lodge an objection to a development unless they can provide evidence of majority support of members of the stance the committee is proposing to take, and that the position proposed to be taken is consistent with their constitution.
121. The AAT should not allow residents associations to be a party joined to a proceeding unless the AAT is presented with evidence of majority support of members of the stance the committee is proposing to take in relation to the matter. Further, the AAT should require confirmation that the position proposed is consistent with their constitution.
122. ACTPLA and referral agencies should not be permitted to liaise with residents associations that have failed to lodge an objection to a development application.
123. Any late objector should not be entitled to be informed about a development or subsequent amendments.
124. Complaints lodged about alleged non-compliance to a referral agency or ACTPLA should be formally investigated and reported on prior to any correspondence being issued by ACTPLA. The party against whom the complaint was lodged should be entitled to contribute to the investigation.
125. Complainants should be required to lodge a bond when making a complaint. If the complaint is proven unfounded, the bond is lost.
126. There should be a fee to apply to be a party joined in an AAT matter. The fee should be at least \$500.00 to discourage frivolous claims. This fee should be non-refundable.
127. Any correspondence presenting a formal position of the Heritage Council on a development or subsequent amendment should require all members of the Council to sign the letter providing the advice, or evidence should be furnished that the majority of the Heritage Council support the position proposed.
128. The AAT should have the power to enforce compliance by Government agencies of decisions the AAT makes.