PREPARATION FOR TOWN PLANNING APPEALS IN THE ACT

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Introduction

In the ACT, most town planning appeals are heard in the ACT Administrative Appeals Tribunal. The decision appealed from is usually that of the Commissioner for Land and Planning. The appellants are either the developer who has been unsuccessful in a development application or an objector who opposes an approval. The Commissioner becomes the respondent. Other persons can apply to join the proceedings if their interests are affected by the decision. These persons are called "parties joined" or "joinders". Often they are other local residents who want to lend support to an objector. Sometimes the party joined is the developer who wants to support the Commissioner's decision. Sometimes there are numerous parties joined, some aligned with the Commissioner, some against.

The issues for each party are: what is involved in these cases? How best to prepare for the hearing? The purpose of this paper is to outline the essential steps for both lawyers and lay persons.

The Applicable Laws

This paper, mercifully for those reading it, is not intended to be an exposition on town planning legislation in the ACT, which has a reputation for complexity. Nevertheless, the legislation is the starting point in assessing preparatory steps.

Those unfamiliar with town planning legislation ought to look first at the Commissioner's decision, as it will recite the various laws and instruments to which regard has been had in arriving at a decision. Without being definitive, the following are the laws and instruments most commonly relevant in litigation:

- Land (Planning and Environment) Act 1991 ('the Land Act');
- The Territory Plan, and within that the most frequently litigated parts are:
  - Appendix III.1 Residential Design and Siting code for Single Dwellings
  - Appendix III.2 Residential Design and Siting Code for Multi Dwelling Developments
  - Appendix V, Heritage Places Register
  - Appendix VI, Definitions of Terms
- Draft Guidelines for Multi Unit Redevelopment Including Dual Occupancy in Residential Areas (PPN 6)
- Guidelines for Residential Redevelopment Forrest/Red Hill/ Deakin/Griffith Historic Areas (PPN 5)
- Draft ACT Parking and Vehicular Access Guidelines
- Interim Heritage Places Registers, most prominently in recent times the Interim Register for the Red Hill Precinct

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Other instruments may come into play from time to time, for example the National Capital Plan.

Guidelines, Draft Guidelines and Policy

It is a source of some frustration that development applications are often determined on the basis of compliance or non-compliance with numerous "guidelines", "draft guidelines" and "policies". Thus, in the preparation phase, the questions that arise are "what is the status of a guideline or policy, and if it has status, what evidence is required to convince the AAT to depart from it?". This can be an issue of immense difficulty for lawyers as well as lay persons.

The general propositions relating to the application of policy are as follows:

- A policy receives recognition under the Territory Plan if it is either a guideline "adopted by the Territory" or it is otherwise a published guideline.
- The meaning of "adopted by the Territory" is undefined by the Territory Plan. "Territory" is defined somewhat unhelpfully to mean “the body politic under the Crown by the name of the Australian Capital Territory”. Usually the guideline is taken to be adopted when it is adopted by the Chief Planner, or has been endorsed by the Minister. Some guidelines in the ACT have been endorsed by the Legislative Assembly.

The principles relating to the application of or departure from guidelines are:

- It is appropriate to take into account the terms of guidelines but they are not binding.[1]
- A planning appeal body must consider each appeal on its merits and not fetter is discretion by reference to some general policy considerations.[2]
- The mere existence of a policy does not preclude the exercise of discretion should special or unique circumstances arise for consideration. The weight to be given to a policy will depend on the circumstances in which the policy was developed and the appropriateness of its application to the case at hand.
- Where the formulation of an administrative policy is deficient it may be expected that the Tribunal will give little weight to it and reach its own conclusions on the merits of the individual application.[3]

The fact that a guideline is a "draft" should not be taken to indicate that it is of little weight. Some draft guidelines have been in existence and have been applied for years in the ACT. They are considered relevant by the AAT and usually have to be complied with. In practical terms a party should prepare a case on the basis that a guideline that has been applied for some time will have to be complied with in the AAT.

It should be noted there is a Draft Variation to the Territory Plan No. 155 (DV155) which contemplates that there will be a Register of Guidelines. Notification of registration will be gazetted and notified in a daily newspaper. A decision maker will take account of a guideline

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1 *Canberra Cruises and Tours v Minister for Urban Services* [1999] ACT AAT at 14; *Eric Martin and Associates v Commissioner for Land and Planning*, AAT, 17 May 2000.

2 *H Lavender & Sons Limited v Minister for Housing and Local Government* [1970] 1 WLR 1231; *Smith v Wyong Shire Council (No. 2)* (1980) 41 LGRA 202 at 213.

3 Re John Holman & Co and Minister for Primary Industry (1983) 5 ALN N154.

contained in the Planning Guidelines Register (para 9.2(b) of DV 155). It is to be hoped that this alteration to the Territory Plan will go some way to clarifying the status of guidelines.

Draft Variation 114 and "Old Red Hill"

An interesting and topical illustration of the conflict that can arise between existing law and "policy" is that of Draft Variation 114 which applied to one of the most heritage sensitive - not to mention exclusive - areas in the ACT, the Red Hill precinct. Development in that area has been the subject of town planning battles for many years, usually involving issues of "heritage".

Heritage protection requirements are to be found in the Territory Plan. Amending the Territory Plan to include new areas is not straightforward. The Land Act recognises an "Interim Register" which imposes restraints to protect heritage until amendments to the Territory Plan are debated and completed. The theory is that eventually an amendment to the Territory Plan will be proposed, debated in a public consultation process and either accepted or rejected, sometimes with amendments. The Red Hill precinct - or "Old Red Hill" as some residents of the area like to call it - was the subject of an interim register which contained provisions that limited multi-unit development.

Then came DV114, the intent of which was to complete the process of transformation of the Interim Register for Red Hill to part of the Territory Plan. If the Interim Register limited building development, DV114 was even more restrictive. It proposed plot ratios far more restrictive than those previously applicable and limited development to 2 dwellings per block (some blocks in this area are 9,000m^2).

Under the Land Act DV 114 had no effect until approved. One would think that until passed by the Legislative Assembly the provisions of the Interim Register would dictate the outcome of development applications. Not so. The Department of Urban Services elevated DV 114 to the status of "policy" and applied it to reject development applications even though the public consultation process was still in train.

The status and relevance of DV 114 as "policy" and its relationship to existing instruments was considered in *Martin v Commissioner for Land & Planning* (17 May 2000) where the Tribunal said:

> Put plainly, the fact that DV114 proposes to limit multi-dwelling residential development to two dwellings per block is not of itself a valid reason to refuse a development application such as this one to erect three dwellings on a block, because the current Citation does not impose that limit. Likewise, failure to comply with the specific plot ratios proposed in DV114 is not a valid reason to refuse the development application, because they cannot at this stage be imposed in preference to the provisions relating to plot ratios in the Guidelines for Residential Redevelopment Forrest/Red Hill/Deakin/Griffith Historic Areas ("the Historic Areas Guidelines") which have been endorsed by the ACT Legislative Assembly. But in the exercise of a discretion in reaching the correct or preferable decision on the application, it is proper to have regard to current government policy which appears to favour a limitation in the number of houses per block and, through the proposed imposition of a sliding scale of plot ratios for the Precinct, of density of development.

In short, DV114 had relevance - how much weight can be attributed to it is unclear - but it could not be applied to displace the provisions of existing town planning provisions. DV114 has since become law so the immediate problem has been resolved but it illustrates the propensity of town planners in the ACT to take some liberties with "policy".

Those preparing a case are best served by establishing compliance with a guideline or "policy". Non-compliance is risky in the ACT, even if the instrument is little more than a proposed change to the law. Normally only marginal non-compliance will be tolerated.

Is Legal Assistance Necessary?

The AAT is a relatively informal jurisdiction. Parties can be self represented. If they do not want to represent themselves, s.31 of the *Administrative Appeals Tribunal Act 1989* ('the AAT Act') permits representation by some other person.

Most objectors do not have legal representation because usually they have insufficient funds to retain lawyers. Whether developers wish to engage lawyers depends on a number of factors:

- Existing representation: A developer may already have an architect or may have engaged a town planning consultant to manage the appeal. The latter are familiar with the AAT process and know whether they can handle litigation or the matter should be put in the hands of lawyers.
- Dollar value of the project: Obviously the higher the stakes the greater the incentive to preserve the capital investment and the greater the capacity to absorb legal costs as part of the development.
- Whether the Commissioner's decision is favourable: The decision maker is usually represented by a government officer (sometimes by the ACT Government Solicitor). A party on the same side as the Commissioner may be content with going along for the ride. Historically the AAT has rarely overturned the Commissioner's decision, so a party may want to gamble that the Tribunal will endorse the Commissioner's decision, but there can be no guarantee of a favourable outcome.
- Cost of legal representation: If a town planning lawyer is engaged then, as a rule of thumb, one should budget for $5,000 for every day in the Tribunal. That is not to say that the practitioner will cost $5,000 per day. But if allowance of 1 to 2 hours of preparation for every hour at court is made, it usually works out that way. With less complex cases (eg dual occupancy developments) the cost will drop to perhaps $3,500 per day in court. For more complex cases it will rise to $6,000 per day in court. The difference is reflected in the amount of preparation time required. These are general guides only.

  If a barrister is engaged then the cost rises considerably. Another $2,000 to $2,300 just for the day in court, plus preparation time will have to be added. The preparation time may not be as great as if a solicitor were handling the case alone because much of the preparation will be done by the instructing solicitor. Senior counsel will charge $3,500 to $4,500 per day, plus preparation time plus airfares and accommodation if counsel is from interstate.

  Expert witnesses can add considerably to the cost. It is extremely difficult to anticipate those costs at the outset of the case. As a rough guide, expert fees will be 30% of the lawyers fees. If numerous experts are involved the cost of having the experts give evidence can easily match the lawyer's fees.
- T Documents: One of the first and most important documents a party will receive is the Tribunal documents ("T documents"). Under the AAT Act the decision maker is required to file all documents relevant to the review. This is essentially the Department's file relating to the consideration of the development application. The T documents will contain the objections lodged by objectors and usually a detailed assessment by the case officer as well as any comments by other agencies such as the Heritage Council. It is these documents that should be read first as they will identify very quickly the points of dispute.
- Directions Hearings: The first major step after becoming a party is the directions hearing. The directions hearing is notified to the parties by the AAT.

- The most important objective of the directions hearing is to set a timetable for the case. The timetable consists of:
- Dates by which each party is to file a Statement of Facts and Contentions;
- Date by which each party is to file its witness statements and any other documents (often the same date as filing the Statement of Facts and Contentions);
- Date by which witness statements in reply are to be filed;
- (Possibly) a further directions hearing;
- Dates for hearing.

The timing for each objective depends on the complexity of the case and the number of parties and witnesses. Each party should have at least an idea of the number and type of witnesses it is to call. The parties are not bound by this indication, nor need they name the witnesses.

Developers, for obvious financial reasons, want to proceed as quickly as possible. Objectors want the longest possible timetable because objectors often have to prepare in their spare time, which involves juggling commitments to work and family, school holidays etc. Care must be taken to ensure that too stringent a timetable is not imposed. Failure to adhere to it may result in the hearing date being vacated.

It is a perception and source of annoyance to developers that objectors are given special consideration. However, if there is a complaint in this regard, it is with the appeal regime set up by the Land Act. The AAT must give due weight to the fact that the town planning legislation confers appeal rights on objectors and those objectors cannot always be expected to understand the procedure. The Tribunal recognises the economic imperatives and is anxious to get on with a hearing especially where the proponent already has a development approval. In reality the AAT rarely gives the objectors a timetable much more favourable than that which a legally represented developer would get, but it will be more forgiving of breaches of the timetable by a self represented litigant.

On the other hand, the AAT has from time to time been the subject of quite unwarranted attack by disgruntled objectors who allege the AAT is too legalistic.
The Tribunal will usually try to set a date for hearing at the directions hearing. That will not always occur at the first directions hearing. Sometimes that will only occur later. A hearing date may be set 8 weeks to 3 months after the directions hearing, depending on complexity and the number of days required.

Providing a block of hearing time to complete the case is crucial. An adjournment can be disastrous for a developer. Thus one should be very careful in assessing duration of the hearing. There are two important factors: First, self represented people and lawyers have a propensity to underestimate hearing time. Once allowance is made for the usual skirmishing at the commencement (late notification of witnesses and documents etc) opening the case, the site inspection and submissions, one day is gone without a word of evidence being heard. Even simple cases take 2 days to complete.

Secondly, self represented people add to hearing time because of their lack of skill and familiarity with the process. That is not a criticism, simply an observation. As a general rule, if one of the parties is self represented then one should add another 50% to the estimate of hearing time that would be made if lawyers were running it. If more than one self represented person is involved then even more time should be allowed.

If there are numerous objectors the AAT often prevails upon them to nominate one spokesperson to run the case, which can save time. In reality if the others want to have a say as well then they are usually permitted to do so.

It is false economy to provide for a shorter period of time for hearing in the hope that the parties will work together to get things done. Where all parties are legally represented there is a financial incentive on both clients and lawyers to finish the case in the allotted time. Self represented parties – especially if they are objectors – will not be so constrained and, unfortunately, experience indicates that some will be quite shameless in wasting Tribunal time if it is to their advantage. There is no costs penalty in the AAT.[4]

If the case is not completed in the allotted time then it will usually not go on the next day but will more likely be adjourned for weeks or months.

Sometimes the evidence is finished in time but there is no time for oral submissions. Written submissions are often required. Written submissions at the end of a case are a poor alternative because they are expensive and generally take so long to complete that you would be better served by simply obtaining the next available date for oral submissions.

Standing

Lawyers are familiar with the concept of standing, non-lawyers far less so. A person with a sufficient interest in the outcome of the appeal is said to have "standing". The applicant for development approval, the owner of the land, the immediate neighbours and objectors will usually have standing in town planning appeals. Applications to be joined as a party are often dealt with by the AAT on the papers filed, without any submissions. Sometimes the applications are dealt with at the directions hearing.

Sometimes a party's interest in the appeal is so tenuous that its standing may be challenged. The Tribunal is unlikely to determine a challenge to standing at the directions hearing. The Tribunal may consider dealing with the issue by way of preliminary hearing in which case a full hearing may be avoided. There is a temptation to see a challenge to an opponent's standing as a quick and simple solution to the case . That is rarely so, for the following reasons:

- The test for standing is relatively easy to satisfy in town planning matters;
- Often the Tribunal has to hear most of the evidence before it can make a decision, thus it is more efficient to leave the standing issue to the substantive hearing;
- There is a real prospect that a preliminary hearing could be lost then set down for a substantive hearing months hence with all the evidence to be heard again;
- There may be more than one opponent. If other opponents have standing, knocking one of them out will not advance the case greatly.

In short, a preliminary standing issue should not be taken unless it has strong prospects of success.

4 *Candamber Pty Ltd v. Liquor Licensing Board* [1998] ACT AAT (6 November 1998).

Strike Out Applications

The AAT has the power to strike out at a preliminary hearing applications in respect of decisions that are not reviewable[5] and applications that are frivolous or vexatious.[6]

Most town planning matters raise numerous issues and involve matters of subjective opinion or assessment. For those reasons it will be rare for a case to be struck out but it does happen occasionally. Again caution should be exercised before making such an application because it may simply end up costing the client more than setting the matter down for hearing.

Site Inspection

One step that is regularly ignored until quite late in the preparation is an inspection of the development site and surrounding area. This is surprising because even the very briefest of site inspections can reveal much that is not evident in the T documents. For example, an objector might contend that the size and scale of the proposed development is out of character with the surrounding area, yet an examination might reveal that there is a wide variety of architectural styles and residential sizes and types or there is a similar development two doors away. Or that there is an overlooking problem, yet upon inspection it transpires that the overlooking problem has been exaggerated or can be easily dealt with by screening fences or planting vegetation or the objector in fact overlooks another neighbour to a greater extent, ie overlooking is an unavoidable consequence due to the topography of the area.

Statement of Facts and Contentions

Each party will be required to file a Statement of Facts and Contentions (SFC). It is best to begin by stating what the SFC is not: it is not evidence, it is not a summation of statements, it is not a final address. It is an outline of why one party says the Commissioner's decision is correct or incorrect. It is not binding but it should be prepared knowing that others will rely upon it to understand what one's case is about.

Drafting the SFC is the best opportunity to assess one's case against the Territory Plan, the guidelines, draft guidelines etc to determine its strengths and weaknesses. This process helps identify those areas in the case that require further evidence.

As the name suggests, the SFC consists of a statement of "facts" in one part and, secondly, a statement of "contentions". In practice it is difficult for both lawyers and non-lawyers to understand where to draw the line between "facts" and "contentions". In town planning, where there are so many subjective assessments to be made the dividing line is further blurred (eg does the application adversely affect the streetscape, does the proposed development "respect" the building line of other buildings in the street).

In the end one can only give general guidance as to what should go into a SFC:

- Keep the SFC short, dot point if necessary.
- The "facts" part is usually brief and sets the context of the dispute by:
  - identifying the players (eg. is the applicant the Crown Lessee or the architect or both);

5 Section 43(4) AAT Act.

6 Section 43A AAT Act.

- stating when the development application was submitted;
- providing a brief description of the location of the property and the proposed development;
- describing who the objectors are;
- stating when the decision was made;
- stating whether any conditions attaching to the approval have been complied with;
- where convenient, referring to portions of the T documents.

- The "contentions" part usually addresses compliance or otherwise with the Territory Plan and the various guidelines.

- The SFC should spell out at the end what it is the party wants the AAT to do - for example, to uphold the decision of the Commissioner for Land and Planning, or to have certain conditions added or varied.

Witness Statements

The AAT is not bound by rules of evidence. Nonetheless the Tribunal makes it quite clear that it requires parties to call witnesses to prove facts. The witnesses may be required for cross examination, so one must make sure they understand this. This is self-evident to lawyers but not non-lawyers. While the T documents will ordinarily go into evidence, one should not think that statements that find their way into the T documents will be accorded much weight if the maker of the statement is not made available as a witness.

It is desirable to have a statement that works methodically through the Territory Plan requirements, along with any applicable guidelines. Large portions of it may be uncontentious. Usually this will be prepared by the architect or some other person who has technical qualifications and understands the project. Often it is a town planner engaged by the developer to steer the development through the planning process. It is not essential that this be done – and it is excruciatingly boring to prepare - but it has advantages:

- The statement goes in as evidence and the contents do not have to be led orally (even more excruciating for those subjected to listening to it);

- The task of proving the mundane stuff is out of the way, leaving time to concentrate on the contentious issues;

- Sometimes small but significant matters come to light that had not previously been seen. These can often be dealt with easily in advance but may prove devastating if they crop up in the hearing or, worse still, after the evidence has closed;

- It provides an opportunity to pull together aspects of the case that are otherwise difficult to understand, eg it is common to find there have been several different plans submitted. Characteristically they are dispersed throughout the T documents and can be difficult to reconcile. It is useful in those circumstances to have the architect identify and explain the chronology of plans and the differences between the plans.

It is common to require evidence from experts in areas such as town planning/ urban design, heritage, engineering (safety and traffic), landscape design/horticulture, and architecture.

There is no formality to the setting out of witness statements. They do not have to be sworn (the witnesses take an oath or affirmation when they give evidence anyway).

Experts should always have their CVs attached to the statement.

Often people are confused about the degree of detail required in a witness statement. Essentially the statement has to let the other side know the evidence that the witness can give. Many choose to put in a brief statement, usually motivated by a desire to not give too much away. The danger is that the evidence has to be supplemented by extensive oral evidence which can be time consuming and unfair to the opposing party as it may involve an ambush.

Where a party is taken by surprise the usual remedy is an adjournment. For developers, for whom time is of the essence, this is not a viable option. And their opponents know it. Developers and their lawyers simply have to cope with the situation. One option available to the AAT is to reject the evidence but in reality that rarely occurs. This situation remains a source of considerable unfairness in town planning litigation.

Conclusions

Town planning appeals are time consuming to prepare and run, a reflection of the complex nature of the governing legislation. This is often annoying for non-lawyers as well as developers, particularly when lawyers are engaged at considerable expense. The points to remember are, first, that good preparation will usually shorten rather than lengthen the hearing time; secondly, good preparation will not win you an inherently bad case, but poor preparation can lose you a good case.