TOWN PLANNING APPEALS IN THE ACT
PRESENTING A CASE

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The ACT Administrative Appeals Tribunal hears appeals from decisions made under the *Land (Planning and Environment) Act 1991* ('the Land Act') by the Commissioner or the Minister's delegate. Its task is to hear the matter all over again, and come to the correct or preferable decision. On the whole it is not interested in what errors the original decision maker might have made. The focus in an AAT appeal is on what the right decision ought to be.

Of course, mistakes made by the original decision maker might highlight what the right decision ought to be. But the AAT's task is not to analyse the original decision for error, but to come to its own decision on the merits instead.

For example, the original decision maker might have made a decision without giving an objector a reasonable chance to put submissions. That is a denial of natural justice. But the AAT can't overturn the original decision just because there was a denial of natural justice. The AAT would give the objector a chance to have their say. If the objector's comments don't persuade the AAT on the merits of the case, its task is to affirm the original decision, even though the original decision was made in the context of a denial of natural justice.

The AAT can only make a decision if it has some evidence. It is true that the AAT is not bound by the "rules of evidence". The rules of evidence largely deal with the manner of giving evidence, not with whether the tribunal needs evidence in the first place. For example, the AAT can refer to hearsay evidence (that is, evidence of what somebody said to somebody else), where a court of law cannot.

But the AAT cannot make a decision without evidence. Every finding of fact that it makes has to be supported by evidence somewhere in the record. If it makes a finding without having some evidence to back up that finding, it has committed an error of law and the Supreme Court would have no hesitation in quashing its decision and ordering the AAT to do it again.

Evidence in planning cases usually falls into three types:

- Descriptions of buildings and landscapes. This includes photographs, maps, and plans. It might also include a verbal description of the neighbourhood, perhaps made more meaningful by a view. In some cases where local amenity is relevant, the evidence might include a description of activities conducted in the neighbourhood. If environmental considerations are important, it might include a description of the flora and fauna in the area.
- Expert analysis. This includes shadow diagrams, computer generated pictures of how a building might look if extended, and traffic studies.
- Expert opinion. This is where experts such as architects, traffic engineers and town planners give their opinions on what ought to happen.

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It is important to understand that the AAT is not an investigator. A party must produce evidence to support its arguments. It is not enough for a party to raise an issue and expect the AAT to get its own evidence on the matter.

For example, the documents of the local department of planning and land management (PALM) might show that increased traffic was expected from a development, but no studies were done by PALM on how much traffic would be expected or what the effect might be on neighbouring streets. An objector might be concerned about the impact of increased traffic. But he or she must produce some evidence to the AAT about that: they can't simply point to the PALM documents and expect the AAT to guess what the traffic impact would be. The evidence would have to come from an expert traffic engineer. The evidence would probably include analysis of existing traffic, and the expert's opinions on what the effect the development might have on future traffic flows.

An AAT hearing proceeds in a predictable way on most occasions. The hearing begins with the formal placement of the T documents before the AAT. The T (short for "Tribunal") documents are copies of documents held by the decision maker that are relevant to the decision. Some of these will be important pieces of evidence - the development application, for example, and the plans. Others will be irrelevant - notes of discussions between officials where somebody was tasked to go and do something. The T documents also include the reasons for the decision.

The hearing then turns to the applicant to start its case. (The applicant is the person who appealed to the AAT. The respondent is the decision maker. Parties joined are other objectors, or developers, or other interested people whom the AAT has joined to the proceedings).

The applicant will often start by outlining its case. This outline is done purely to explain where the case is going, what the central facts are, and what the issues are. The outline is not evidence, and every statement of fact in the outline will have to be proved before the hearing is finished.

Next the applicant will produce the evidence it wants to rely on.

Ahead of the hearing, all parties have to exchange witness statements, which tell the other side what evidence a witness is expected to give. If the other parties don't need a witness to give oral evidence, a witness statement might be able to be tendered to the AAT without calling the witness. But if the other parties want to cross examine the witness, the witness must be called before the AAT.

Cross examination is an important part of the process of giving evidence. This allows other parties to ask questions of the witness. The purpose is to test the evidence. Sometimes the questions might be aimed at amplifying points that are obscure. Sometimes the questions might be aimed at putting different points of view and hearing what the witness has to say about them (the opinions of other experts, for example). Sometimes the questions might be aimed at trying to discredit the witness' evidence, showing it to be less strong or less credible than it first appeared.

Any witness who is called by any party may be cross examined by any other party. Cross examination cannot be avoided. For example, a witness statement can’t be tendered without calling that witness if another party wants to cross examine the witness. That would be unfair.

Once cross examination has finished, there is a right to clear up any matters in re-examination of the witness. Re-examination is usually brief, and often doesn't happen at all. It is not a chance to give some new evidence, but merely to clarify what might have been unclear.

Documents are also part of the evidence. Sometimes these can be put in evidence straight away. For example, a map of the area would be a useful document for the AAT to have at the beginning, and nobody is likely to object. But sometimes documents need to be proven strictly. This means you may need an expert to come to give evidence about their report, or some diagrams or plans they have prepared.

For example, a shadow diagram or a computer generated image of a proposed extension would probably need an expert to explain how the document was produced and what it means. Until that expert is called to give evidence, you often can't tender their documents.

Once the applicant's evidence is finished, the other parties gives evidence. The precise order of evidence from here onwards depends on the type of case. Usually the respondent's (decision maker's) evidence is next, followed by the other parties. Of course, the applicant has the right to cross-examine witnesses called by the other parties.

At some stage the AAT will probably have a view of the site. All parties have a look at the site. But it is important to understand that a view is not really part of the evidence. It helps to make sense of the evidence, but it is not evidence in itself. It is particularly important that parties do not try to introduce evidence during a view. Nobody is transcribing what is said on a view, and sometimes not all parties are within earshot. In practical terms it is impossible to give evidence on a view, and it is often unfair to other parties to try to do so as well.

Once the evidence is complete, the hearing turns to the last stage, submissions. Each party can make submissions about what decision the AAT should make.

Submissions may refer to the law, to the plan, and to the evidence. Ultimately the AAT must make a lawful decision, so it often helps to turn to the law and the Territory Plan first. Only when it is understood what a lawful decision is, can evidence to show what the decision ought to be be referred to.

Each party makes submissions. Usually the applicant goes first, followed by the respondent (the decision maker) and any other joined parties. The applicant has a right to respond to anything new in the other submissions at the end. This is not an opportunity to have another go at making submissions, but at answering particular issues that arose in the other submissions.

Once the submissions are finished, the hearing has ended. Almost always the AAT will reserve its decision. That is, it will go away and write up a decision that will be given days, weeks or (just occasionally) months later.