LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: Auditor-General's report No 7 of 2008:
***Proposal for a gas-fired power station and data centre—site selection*)**

Members:

MS C LE COUTEUR (The Chair)
MR B SMYTH (The Deputy Chair)
MS J BURCH

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 12 AUGUST 2009

Secretary to the committee:
Ms A Cullen (Ph: 6205 0142)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 21 January 2009

The committee met at 2.58 pm.

BARR, MR ANDREW, Minister for Planning
SAVERY, MR NEIL, Chief Planning Executive, ACT Planning and Land Authority
PONTON, MR BEN, Director, Development Services Branch, ACT Planning and Land Authority
SMORHUN, MR VIC, Manager, Communications Team, Communications and Government Services, ACT Planning and Land Authority

THE CHAIR: I now formally declare open this public hearing of the Standing Committee on Public Accounts in its inquiry into Auditor-General's report No 7 of 2008. Whilst the terms of reference are the information contained within the Auditor-General's report, our inquiry is focusing specifically on the administrative processes used for the consideration and facilitation of strategic projects.

On behalf of the committee, I would like to welcome the minister and officials. I am very confident that you all know the privilege card. Tell me if you would like a recycling of it. Before we start with questions, do you have an opening statement?

Mr Barr: No.

THE CHAIR: Minister, the most interesting part of this process was the EIS. I understand that under the old planning act you did not need to do the EIS but if it had happened under the new planning act it would have been required. Firstly, correct me if I am wrong and, secondly, can you tell me how you came to the decision to do the full EIS?

Mr Barr: In relation to the new planning system, one would assume that an application in the nature of a data centre and a power station would fall within the impact track. So an EIS would be mandatory, and is mandatory under the current planning rules.

THE CHAIR: Yes.

Mr Barr: Under the old system, the preliminary assessment of the project would then determine whether a further EIS was required, and in this instance it did, and one was commenced.

MR SMYTH: Just at a broad level first, part of the issue seems to be that site selection is done by one arm of the government and whether or not it is permissible is done by another arm of the government. Is there a dilemma in having land supply controlled by a different part of the government? Should it all be under ACTPLA?

Mr Barr: Sorry, is there a dilemma?

MR SMYTH: Yes. Was this a problem because one arm of the government was doing one thing while ACTPLA was running a statutory process? Would the overall planning of the ACT be better if land supply was also controlled by ACTPLA?

Mr Barr: I think there are pros and cons regarding any administrative system. There

are some advantages in having a separation that enables the planning authority to be completely independent. You could look at different models, and I would welcome the committee's thoughts on that.

MR SMYTH: In that case, what was the first approach that ACTPLA had in regard to the development of the power station and data centre?

Mr Barr: Mr Savery will answer.

Mr Savery: The first approach was from the Chief Minister's Department, which have responsibility, and had responsibility, for land supply and the identification of sites, not just for this one but for other projects of this nature. They were aware that we were doing work in relation to the southern broadacre study and the Hume industrial study. So, in the context of that, they asked us whether or not we could provide them with potential sites for a facility. I think there is reference to that in the Hume industrial study, where we made reference to the fact that we had been asked to identify sites. There were some characteristics in terms of site area that were identified. Within that geographic area, we provided some feedback to the Chief Minister's Department.

MR SMYTH: Right. And what is the status of the southern broadacre study now?

Mr Savery: The southern broadacre study and the Hume industrial study were two separate exercises, the southern broadacre study having been completed some time before the Hume. Neither has ever been adopted by government. The southern broadacre study was referred to government primarily for the purposes of agreeing to the setting aside of land for further nature conservation. The Chief Minister, two or three years ago, made an announcement about additional grasslands being set aside as a result of that work.

The balance of the work is from the southern broadacre and the Hume industrial study has then been picked up and incorporated into the eastern broadacre study, which is from the Federal Highway all the way down to Hume. That project is currently being packaged up for reference to government for the purposes of seeking to go to public consultation.

MR SMYTH: When is that expected to be available?

Mr Savery: We hope, subject to government process, that in September or October—this side of Christmas—we would be going to public consultation. There will be at least two months of public consultation.

MR SMYTH: So the status of the southern and the Hume industrial is that it has now all been rolled into the eastern broadacre.

Mr Savery: It all gets packaged up.

MR SMYTH: Part of what the Auditor-General says is that there is some debate over the permitted use of the site. One of the points she makes is that no advice that the audit office was shown was definitive in its confirmation that the site could be used,

or that the project was, in fact, a communications facility. Would you care to comment on that?

Mr Savery: There is always that potential, whether it is a communications facility, a DFO or something else. People contest the interpretation of the Planning and Land Authority, but that is our job. It is our role to interpret the territory plan as we see fit.

We assessed the specifications of the project. We requested further information from the Chief Minister's Department and ActewAGL to better determine what the actual nature of the use was, and we arrived at the conclusion that it was a project that could be defined as a communications facility—obviously, the gas-fired power station is a power station—and that they were uses that were permissible. It is not that you could just go and do them but they were permissible uses in broadacre land use and, therefore, we could consider a development application.

We understand that there are others who would contest our interpretation, and do not question the fact that the Auditor-General finds that there are different interpretations. That is why planning processes are also subject, at times, to judicial review.

THE CHAIR: More broadly, recommendation 2 of the Auditor-General is:

> To provide greater certainty for the business sector and the broader ACT community, ACTPLA should:
>
> clarify the purposes for which broadacre land may be used, as defined in the Territory Plan, and
>
> as far as is practical, ensure definitions are consistent with those in the National Capital Plan.

Is ACTPLA planning to do anything to act on that recommendation?

Mr Savery: Yes. We have already provided advice to the minister, who asked us to follow up on that recommendation—to provide him with advice, particularly, on where the sites exist. There are a lot of known sites—the big broadacre land use sites, such as out to the west of the city and to the east of the city. But there are a lot of island sites that sit within the city—in Curtin, in Belconnen—which many people would not be familiar with; they just take it to be their local park and they just see it as open space.

We provided some advice to the minister in terms of how they may be progressively changed through amendments that may be occurring or variations, more particularly through the territory plan review process, which at least two members of the committee may be familiar with, and as we progress through the review of all of our policies, the opportunity exists to clarify that. In terms of seeking consistency with definitions in the national capital plan, that is not entirely within our control.

THE CHAIR: No, I appreciate that. Are those pieces of land the ones that are labelled "future urban areas" that we see around or is there a different—

Mr Savery: No. In fact, I would be safe in saying that none of them are broadacre.

They were all open space. They resulted from draft variation 267, which sought to determine for government whether or not 300-odd pieces of unleased territory land should be public open space or should be made available for future development. Through that process, we recommended to government that in the order of 60 of the sites should be set aside for future development, community facility land, and that is where the signs went. The balance was confirmed as public open space.

MR SMYTH: You mentioned sites in Curtin and Belconnen. The Curtin site is the horse paddocks?

Mr Savery: The horse paddocks, yes.

MR SMYTH: And in Belconnen it is horse paddocks and—

Mr Savery: Horse paddocks, yes. It is out to the west of west Macgregor, so it is the extreme west of Belconnen.

MS BURCH: I was going to ask about recommendation 2, but with respect to letting the community know what the definition is for the use of the broadacre, you made comment that a lot of folk just see it as the open space at the end of their street. How do you let the community know that it is actually broadacre and it could be used for something?

Mr Savery: It is a fair question and it is a difficult exercise for not only this authority but jurisdictions around the country. We all have our own forms of broadacre land use and most residents do not appreciate what types of land uses are available. They may be called future urban zones, for instance. Even people who are sitting next to land that is more clearly zoned, such as commercial, but it has never been developed and it sits there looking like a park, think it is a park. That is part of the reason why we went through the exercise I was just referring to.

You can continue to educate people over time by alerting them to what the potential land uses are. The fact that the government put up the future urban signs was, in some respects, criticised. It was part of the exercise of telling people: "This is not a piece of public open space." We also have to recognise that, for people who are coming into an area, as opposed to residents who are already there, there is some responsibility on their part to familiarise themselves with what the land use capabilities are around their site. In some cases there are road reserves that are set aside within the territory plan.

We are not in a position to anticipate every resident moving in. We cannot letterbox drop every time a resident changes, to tell them what is there. There are conveyancing processes so that when people are purchasing land, through the conveyancing process, the opportunity is there for the conveyancing people to get advice from the planning authority as to what the land use zones are in and around the site. But it is not a simple thing to do.

MS BURCH: There are, as you say, conveyancing or other websites or opportunities that people can—

Mr Savery: ACTPLA employs a very powerful tool that is available on the ACTPLA

website, which makes the territory plan available online for anyone to access. I appreciate that not everyone necessarily uses the web, but it is another form by which people can inform themselves.

MR SMYTH: But that only works until the point that it changes. I know of at least one couple in Macarthur who moved into Macarthur on the basis of the research. I know they did the research. They checked the website and they told me they rang ACTPLA and said, "What's going in that area?" and were told it was horse paddocks and would remain so. How do we overcome that?

Mr Savery: If a rezoning is occurring, then you would obviously alert people to that. If a development application is happening, you alert people to the application. We are providing advice on what we know at the time. We were not aware, presumably, when those residents sought our advice, that a gas-fired power station may be contemplated for that site, or a data centre. I cannot necessarily confirm that what was said to them was that they would remain horse paddocks forever and a day, because broadacre, as I said, allows for a range of other activities.

THE CHAIR: We started off with the health impact assessment and then that became part of the EIS. How did you ensure that all the things that happened in the health impact assessment were incorporated into the EIS? Health is clearly one of the bigger issues.

Mr Savery: The first thing to do is clarify that it was never incorporated into the EIS. It formed a submission to the EIS. After the minister announced the EIS, we got in contact with the department of health to advise them and to ensure that there was an appropriate mechanism so that their running of the HIA would work effectively with our running of the EIS.

I think I am correct in saying that it is the first time that we have had the parallel process of an HIA and an EIS. So in some respects we were having to create a process to ensure that they worked effectively together. We agreed that the most appropriate way to achieve that was that, once the HIA was completed, it would be provided to ACTPLA as a submission that we would then take into consideration as part of the assessment of the EIS. So it took the role of the health assessment component.

THE CHAIR: Do you think that was the best way? It was one of the things asked. We asked the same question of the health minister. Would two separate ones be better or could you have a single process with both? I have no idea what the answer is.

Mr Barr: The planning legislation changed and we have a new process to deal with these matters. Had the development application been lodged a few days later, under the new system, there would have been an entirely different process.

THE CHAIR: Given your experience, I just wondered whether you had any views as to which was the better, the one or two separate ones? The question is really what the legislation is. And that is relevant. Looking further forward, what do you—

Mr Savery: The legislation was created with the expectation of an EIS being triggered for all impact track development applications where the scoping of the EIS

would reflect the types of issues that were considered significant. So if we were to have received the data centre and the gas-fired power station application under the new system, our expectation is that the health issues would have been raised as part of the scoping study and therefore the EIS was the effective or the appropriate mechanism for assessing those health issues, bearing in mind that the key government agencies that are expert in those areas are participating in the scoping exercise and would then have been involved, subsequently, in the evaluation of the material that we got back.

My roundabout answer to your question is that I think that the legislative environment that we have established, which provides for a single process, is the appropriate mechanism. It is not to say that you could not do it the other way but that is what we have got. And it has not yet been tested, of course.

MR SMYTH: There is always time. Part of the issue, tracking through the Auditor-General's report, is that paragraphs 3.5 to about 3.20 look at the legal advice from the Government Solicitor. Paragraph 3.9 says:

> ACTPLA advised CMD on 28 August 2007 that the CTC proposal may only be allowable if it was considered a scientific research facility rather than office use. More information was required …

Paragraph 3.10 says:

> Audit noted that at this stage, the possibility the data centre was a communication facility was not envisaged by ACTPLA.

Paragraph 311 says:

> After this advice was provided … ActewAGL responded … that the data centre was a communications facility.

You wrote back on 4 September that it is somewhere between a communications facility and a scientific research facility. But you finish that paragraph by saying:

> … it appears reasonably clear that the proposed use is not inconsistent with the intent as set out by the National Capital Plan.

However, there seems to be some ambiguity when you go to paragraphs 3.14 and 3.15 and that this could only be worked out if further information was provided to the solicitor. In 3.15 the auditor says:

> ACTPLA did not volunteer this additional information.

Is there a reason why more information was not given?

Mr Savery: In relation to not volunteering information, we did not want, at the time, to run the risk of prejudicing our legal advice and we were not prepared to provide that legal advice to the Auditor-General.

However, what is stated there is an accurate reflection of the fact that we went

through a process, in the first instance, of saying we did not have enough information to determine whether or not this could be classified a communications facility. More information was provided. That got us to the point of being satisfied but to reassure ourselves, knowing that this was always going to be a potentially contentious project, we sought the advice of the Government Solicitor on whether or not our interpretation was something that could be stood by if it ever went to court. That is present practice.

MR SMYTH: Is not the auditor saying in 3.15 that the Government Solicitor went on to indicate that the issue may have to be revisited once further information could be provided? But you did not provide the further information to the solicitor?

Mr Smorhun: Can I just—

MR SMYTH: Not to the auditor?

Mr Smorhun: Can I just go through it? We, in fact, took a question on notice at the annual report hearings earlier in the year on this and there is a timing issue. If I can remember rightly, the advice we did receive came after the audit report came to us. So we did not actually have the further advice until after the audit report came to us for review.

MR SMYTH: Sorry? You did not get legal advice? This report came out in—

Mr Smorhun: We sought further advice and that is reflected in paragraph 3.17. So the solicitor is saying we cannot really make a determination until we get further advice.

MR SMYTH: Maybe there is a misunderstanding of the time frame here. I read paragraph 3.15 as saying that the Government Solicitor told ACTPLA that this is what they thought it might mean but if you give us more information we can clarify it. And that request for more information back to the Government Solicitor was never provided.

Mr Savery: Yes, but that is what he is saying. The timing of that came after they had to complete their report.

MR SMYTH: The Government Solicitor sought more information in July but this report was tabled in December 2008. Are you saying no work was done on this between July and December 2008?

Mr Smorhun: I am saying that—I was referring to 3.17—we went the next step further and sought further legal advice.

MR SMYTH: From the Government Solicitor?

Mr Smorhun: No, from counsel.

MR SMYTH: Why did you not go back to the Government Solicitor?

Mr Savery: The Government Solicitor would have instructed senior counsel; so it

would have been through the Government Solicitor.

MR SMYTH: So you did provide additional information then to the Government Solicitor who instructed counsel?

Mr Savery: Yes.

MR SMYTH: And you are saying, given that was then November, the auditor had probably finished her report which was tabled in December and that is why it was never taken on board. The issue seems to revolve around the national capital plan's definition of a communications facility. The recommendation from the auditor is:

> … as far as is practical, ensure definitions are consistent with those in the National Capital Plan.

I cannot see anywhere in the national capital plan a definition. Paragraph 3.13, when it defines communications facility, seems to be saying that these are facilities that transmit, not store. By any stretch of the imagination, the data centre was not a radio mast; it was not a tower; it was not a satellite disk; it was not for Australia Post; it was not a television or a radio broadcasting facility. So under what part of the national capital plan definition is a data centre a communications facility?

Mr Savery: I have not got that at hand but we have got our interpretation. I think that was made available under freedom of information. I have not got it in front of me.

MR SMYTH: But the committee does not get FOI, so—

Mr Savery: I have not got it in front of me. We made an interpretation.

THE CHAIR: If it is available at the office we would be interested, yes.

MR SMYTH: The recommendation says "as far as is practical, ensure definitions". What work is being done to ensure that? The government response to this recommendation was "Agreed in principle". The government says, however, in planning definition terms there is always room for ambiguity. ACTPLA says they make every effort to ensure definitions are consistent. Has work been done since this report to ensure all the definitions in both plans are consistent?

Mr Savery: We are constantly working with the National Capital Authority to improve the consistency between the plans, recognising that the national capital plan is always the superior document. Our plan, even if the words are not the same, cannot be inconsistent with the national capital plan.

Obviously the work that we have been doing on behalf of the government to clarify laws and responsibilities between the National Capital Authority and the ACT Planning and Land Authority lends itself to a discussion on the relationship between the national capital plan and the territory plan. There is an intergovernmental committee being set up and we see that as the forum and the vehicle through which we can make some lasting change. But incrementally, whenever things like this come up, we will speak, and have spoken, to the National Capital Authority.

Because the national capital plan does not have a definition of broadacre or does not have the land use zones, our land use zones are the basis on which we do land use planning. And it is only when it comes down to definitions such as this that, in the absence of one being in the territory plan, we would look for anything that might apply in the national capital plan. I am not aware that we have had any particular conversation with the National Capital Authority about amending that particular definition since the Auditor-General's recommendations.

MR SMYTH: When you get a recommendation, would it not be normal to follow it through, though?

Mr Savery: Yes, but I am saying to you that our main approach has been through the work that we are anticipating we are going to be doing in reconciling the national capital plan and the territory plan, not taking that in isolation.

MS BURCH: I go to recommendation 4 which is on communication with the community. I am hoping not to read out the recommendation but there is a comment on some angst when the project was proposed, how the community would be informed, at what point they heard what was going on. Do you want to explain what our role is in communicating what is happening on a block of land?

Mr Savery: The first and, I think, the most important thing to do is advise the minister. ACTPLA does not consult on private sector projects. It is the role of the applicant to consult and we always encourage them to consult the community before their application is lodged.

That is also the case with other government agencies. Whether it is a project like this, if it was a major health facility, we encourage the applicant; otherwise we prejudice our position as an independent authority because we can be perceived to be, not in reality, more involved in the project than we otherwise are. Our job, once we receive an application, is to notify the community, be that a sign on the site, letters to adjoining residents, advertisements in the newspaper—which are the mandatory requirements under the act both at the time and currently—availability of applications on the website so that people are alert to the fact that a project of a particular nature is going on in a particular neighbourhood and inviting them to come and inspect the plans.

Obviously through the advertisement, we are trying to alert them to the nature of what that project is and then receive submissions and respond to those. We do not make any claim that that is consultation. That is notification and that is what we are required to do under the act.

THE CHAIR: One of the things that intrigue me about this is the point at which the community really had the chance to actually say something about this. If it is consistent with the territory plan, my understanding is that basically, whether it is a process that had to go through an EIS et cetera, ACTPLA basically had to approve. At what point did the community really ever have a chance to change the outcome or influence the outcome?

Mr Barr: On individual development applications or on planning policy and audit?

THE CHAIR: Not this one in particular. This is just one example but it is one of the things that highlight the issues.

Mr Barr: Given the nature of the planning system in the territory and the fact that, as an Assembly we do not consider development applications and we do not vote on them in a way that a council might in another jurisdiction, that community input largely is sought in a setting of overarching policy. It is in the territory plan and in the codes and in all of those areas. That is where there is the opportunity, clearly; and then, further to that, there is obviously a role for elected representatives to go to various committees and for the Assembly itself. But we do not have a system like a local council where every alderman votes on the development application.

I just came back from Hobart where the local city council voted against putting wind turbines on top of buildings. They do not have to give any reason; it is all political. Our system is very different. We have an independent statutory authority, the planning authority, that assesses development applications against a set of criteria and against the rules and the law that the Assembly establishes. Mr Savery might want to expand further.

Mr Savery: I particularly want to pick up on the observation you make—and I read the *Hansard* relating to Chief Minister's, where you made the same comment. ACTPLA is not necessarily obliged to approve a development just because it is consistent with the territory plan. In most of the correspondence we enter into with people who make submissions, we advise them that we have to have regard to the material submitted with the application, the provisions of the territory plan, the merits of any submissions made and, in this case, and in many cases, the views of referral authorities, who have their own issues to take into consideration.

The territory plan clearly is the most significant of the documents we refer to. By and large, unless something is significantly out of order with something coming in from a referral agency or a member of the community who has picked up something that no-one could have anticipated that should be considered—maybe they raise an EPBC issue or something—then it is likely that it is going to get approved. But it is not as crystal clear as you suggest in your question.

THE CHAIR: I suppose this is getting outside the scope; it is a question that could be taken on notice. Are there any instances where ACTPLA has knocked back DAs that are consistent with the territory plan?

Mr Barr: If you listen to the various industry lobby groups, they are doing it all the time. It is all a matter of perspective. Mr Ponton, who heads this area, can respond.

Mr Ponton: An important distinction to make relates to permissible use. So when you are talking about consistency with the territory plan, permissible use is only one aspect of that; there are many other aspects. So whilst, let us say, the building of a multi-unit development is permissible in a particular zone, that is not as a right. There are other things that we need to consider in terms of the suitability of the land, servicing on the land, traffic aspects, environmental aspects—a whole range of things.

All of those combined might result in a refusal, and that does happen from time to time. When I say "from time to time", several a month are refused.

THE CHAIR: Which are consistent with the territory plan? I know you refuse DAs, but that is not the question; it is about consistency with the territory plan.

Mr Barr: On the land use issues.

Mr Ponton: Consistent in terms of land use, but it might be refused because of traffic issues, or it might be refused because they cannot provide waste facilities.

THE CHAIR: I appreciate that, yes. But land use is only one part of the territory plan?

Mr Ponton: Yes.

THE CHAIR: As long as it is consistent with all of the parts in there, you would have no reason to—

Mr Barr: If it meets all of the elements that are assessed, then you have a complying development.

THE CHAIR: Yes.

Mr Barr: Recognising, of course, that with the new system we look at different levels of complexity now, with code, merit and impact, and provide a much higher level of scrutiny, obviously, of things in the impact. We are designing the codes to ensure that those more simple development applications have a streamlined process and more resources are then available for merit and impact track assessment. It is why the new system is simpler, faster and more effective.

THE CHAIR: Thank you; we were waiting for that one!

MR SMYTH: In the section on page 46 titled "communication with the private sector", there are a number of paragraphs referring to the Hume industrial planning study. Apparently, it was available for the consortium but it was not for the community; it only became available to them when they went through the FOI process. The auditor makes the comment that the government needs to define the status of documents and, when necessary, give them the protection they deserve. She says in paragraph 4.50:

> ACTPLA stated that the study was never formally released, but it was not considered a confidential document, and was therefore available to those who requested it.

Did the community request a copy? If so, was it given to them or was it denied them?

Mr Savery: My recollection is that it was made available under FOI.

MR SMYTH: Why would we give a copy to the consortium? Did the consortium go

through the FOI process to get their copy?

Mr Savery: Not that I recall. My recollection is that it was not made available by ACTPLA.

MR SMYTH: But if, as the auditor says, "ACTPLA stated that the study was never formally released" and "was therefore available to those who requested it", is "request" in this case meaning through FOI or is it just a general request?

Mr Savery: FOI, because at the time we anticipated that the document would be going to cabinet.

MR SMYTH: What action have you taken, given that the LDA gave a copy of the report to the consortium?

Mr Savery: Going by recollection, I think we raised concerns about the document being released.

MR SMYTH: And what was LDA's response?

Mr Savery: I could not answer off the top of my head.

MR SMYTH: Would you like to take that on notice?

Mr Savery: Yes.

MR SMYTH: There does seem to be an inequity there, in that one group got access to it and the community did not. Is there a general principle regarding how documents are released? Is it only through—

Mr Savery: We would typically not release a working document, and we would not release a document that, in our expectation, is going to go to cabinet.

MR SMYTH: Okay, that is not unreasonable. But once it has been through cabinet, if it is not made public, is it public on request or is it only available through FOI?

Mr Savery: It depends on the nature of the document. If it was a study, if it had been to cabinet and unless cabinet had said, "We want this to remain a confidential document," I doubt we would seek it to be required through FOI. But in other circumstances the document may be something more significant than a consultant study and which has political ramifications. We would be far more cautious in making that document publicly available.

MR SMYTH: Is there a register of all documents that ACTPLA hold? Is this a guessing game? Does the public go on a fishing trip or is there a register?

Mr Savery: Our website contains all of our publications—

MR SMYTH: All of the public ones.

Mr Smorhun: I think it would be fair to say that we have moved more and more to making these kinds of documents available on our website and they are indexed on the website. As an example, the EIS exemption on the Cotter went straight onto the website.

MR SMYTH: So the Hume industrial study simply was not public because it had not been through cabinet at that stage?

Mr Savery: It was still in a very preliminary form. At the time, when we initiated that, we were not contemplating it being part of the eastern broadacre study. We fully anticipated that that was going to be part of the cabinet process. I would have fully expected, just as is the case with eastern broadacre, that the recommendation to government would have been, "Let's put this out for public comment." But we never got to that point because by then the eastern broadacre project had become so substantial and it was obvious that these things should be folded up into it.

MR SMYTH: So how did LDA get a copy? Were they part of the consultation process?

Mr Savery: LDA, Chief Minister's Department and possibly TAMS are part of the groups that we consult with. I do not know that we necessarily had a formal steering committee, a government agencies steering committee, but we were engaging with all those agencies, so they were all involved in working with the consultants. Typically, as part of the process of advancing a project like that towards government, you send out draft copies of documents. This would have reached the stage of a draft working document.

MR SMYTH: And that is the document that LDA released?

Mr Savery: So they had a copy of it. It is not unusual that they would have one, as a government agency involved in that process.

MR SMYTH: Sure, but the release to a private sector organisation would be unusual?

Mr Savery: That is not for me to comment on. We did not release it.

MR SMYTH: But normally ACTPLA would not release a draft working document?

Mr Savery: I would not have released that document at that stage. That would not be normal ACTPLA policy.

MS BURCH: On communication with communities on such a significant site: recognising ACTPLA might be seen as a promoter of a proponent, if a project is of such a size that you think the community should be aware of it, is there a balance or are you considering how you better draw people's attention to something without being seen to cross the line of needing to be independent?

Mr Barr: The new planning system does contain a range of new provisions in relation to consultation, things on the size of signs. Regular readers of the *Canberra Times* would see that there is a column pretty much in every day's paper now that lists

the development applications. There is an email that goes out every week, on a Friday afternoon, to community councils and other interested folk. There is the *Community Zone* newsletter and of course on the ACTPLA website is the full A to Z, by suburb, of all of the development applications received. There is more emphasis on that as a result of our new system.

Of course, in moving to the new system—and we are having more development applications in the code track—there is no notification in that context because they are complying with the code. So, with all of those removed, the more significant applications then have, I believe, a higher profile in terms of their notification.

One of the things that may be worth contemplating, given that there is a proportion of Canberrans who do not read the *Canberra Times*, who do not look at signs of that nature, is that you might get into the commercial media in a way that it might get to them. We have a community notice board type format for commercial FM radio and it is certainly worth contemplating in that context whether development applications and the impact tracks that have significant impact on the community could be identified there. You have certainly seen how much detail you can provide in a 60-second radio ad but you could at least alert people that such an application exists and see whether they want more information.

But this is human nature. In any society there will be people who will say it is the responsibility of elected representatives to look after their interests and they will only focus particularly if something is next door to them. Anyone who has been around ACT politics for any length of time will of course have experienced that. I think there has been an improved effort in recent times. There are more innovative ways of further getting information to them.

Mr Savery: Could I make an observation too? None of this is unique to the ACT. These are questions in every jurisdiction routinely. I think it is fair to say that the public notification process of any planning system is not intended to be foolproof. There is no expectation within the legislation that every person who may have an interest in that project will find out through the initial notification. It is not structured that way and it would be very difficult to make it that way.

There is an understanding within the framework that it is ensuring that those who are most likely to be immediately impacted at least are given the opportunity to be notified and, broader than that, it is understood that it will be through word of mouth and no-one can claim that people did not find out about this. I would say the system worked because people found out about it. They may not like the way they found out about it but the objective is to get it out there and let it be known.

The other thing is, particularly when it comes to drawing boundaries for who gets notified and who does not, the letter to the adjoining neighbours. You start saying: "Should we make it 50 metres distant? Should we make it 100 metres distant? Should we make it the first road intersection?" Wherever you draw that boundary, the person across the road will say, "Why did you not notify me?" That will always happen.

MS BURCH: To follow on, what instructions or guidance do you give to proponents about what are their obligations? Is there any role for ACTPLA to advise what their

obligations are?

Mr Savery: There is no statutory obligation. That is the first thing to say. On the basis that they participate in a pre-application process and that is not a mandatory requirement, we will always encourage them to engage with the community. Because we also have, what I would call, routine applicants—there are people who tend to do a lot more development than, let us say, the mums and dads—we educate them through our regular contact that it is in their best interests to engage the community, other interests and, particularly when it is another government department, that they should consult on their projects, particularly where they are likely to be controversial, rather than wait for the public notification process, for precisely the reason I said before, not to confuse people with the view or the thought that ACTPLA is actually engaging in consultation, because it is not.

THE CHAIR: Can I go back to a statement you made. There is no expectation that the public notification process is going to enable everyone who is interested to find out about something.

Mr Savery: Through the formal application process.

THE CHAIR: Through the formal notification process. This is not a question particularly about the data centre but, given that, why do we have a situation that if you want to go to the next step, to go to ACAT, you had to have put in a submission in the first process? Given that you have acknowledged that not everyone is going to find out about it immediately, why do you restrict the people that find out about it afterwards?

Mr Savery: The expectation of the legislation is that the individual who is appealing has to be able to demonstrate material detriment. As part of demonstrating material detriment, the intention of the legislation is for the individual to demonstrate, through the process, that they have a material interest in the project.

THE CHAIR: But you are saying that you know that the process will not make sure that everybody who is interested finds out about it.

Mr Savery: I am just saying it cannot be a foolproof exercise.

THE CHAIR: I agree it cannot be foolproof; I agree that is humanly impossible. But given that, if you list that two-week period of commentary, why cannot you then be engaged?

Mr Savery: You can still seek—correct me if I am wrong, Mr Ponton—to be a party joined. If you miss that opportunity and then you subsequently find out about it—and it is at the discretion of ACAT—if you, for instance, said, "I was away on holiday so I did not see the notice; I did not participate," but—

THE CHAIR: But people do come and say things like that.

Mr Savery: But if you can demonstrate to ACAT or make a submission to ACAT that says, "I will be materially affected," at their discretion you can seek to be a party

joined if an appeal has been lodged.

THE CHAIR: But if no-one appealed then—

Mr Savery: If no-one has appealed then there is no appeal.

THE CHAIR: It is all over. Interesting.

Mr Savery: Yes, it does happen.

Mr Barr: For every serious objection in development applications, the history in this town has been, particularly amongst commercial rivals, and that is particularly the case in town centres, of vexatious appeals that intend to stymie commercial advantage or seek to disrupt. And that was commonplace prior to legislative changes that made the point on material detriment. If you had no relationship at all to a particular development application and you were just wanting to stop it because it would advantage your business in stopping it, that was happening all the time.

THE CHAIR: That was happening all the time?

Mr Barr: Yes.

THE CHAIR: Also continuing on about consultation, the government's reply to the Auditor-General's report made a few extra comments about consultation. It said that any sensitive or complex strategic proposal be required to submit a formal community engagement strategy with Chief Minister's Department. How do you see that happening and working? You said earlier that there was no requirement on people to do any consultation in advance. You thought it was a good idea but it was not required. How would this work if ACTPLA was doing it? Or is it totally not what—

Mr Barr: No, it is not related to ACTPLA. ACTPLA, as Mr Savery said, can provide advice in pre-lodgement meetings and certainly can use the megaphone, whenever the media will report and whenever hearings like this occur, to send a very clear message to private sector components that it is worth their while to undertake significant consultation prior to lodging a development application.

But there will always be some players in industry who dismiss that process. They then take their luck in the development application and potential appeals processes. The smart operators engage with the community in advance and tend not to have problems with their development applications.

THE CHAIR: The government also said it was updating the community engagement manual. Has ACTPLA been involved or is it being involved in updating that?

Mr Savery: Just picking up on that and your previous question of whether we are aware of the comments that the Chief Minister and Mr Dawes made to you in respect of some of the processes that have been put in place for major projects and the relationship back to consultation, that is not something for me to comment on. But in terms of the broader community engagement processes, we are heavily involved in working through a whole-of-government process on that exercise. In some cases our

processes are being taken on board as potentially being part of best practice, or better practice, within the ACT.

On administration, we have an engagement matrix for those projects for which we are responsible, which are strategies, master plans. The minister today was involved in announcing the consultation for the Dickson and Kingston urban design framework projects; so we are starting the consultation process. Mr Smorhun has just given me ACTPLA's guide to community engagement and consultation. So all the agencies who had similar sorts of documents are feeding that into the whole-of-government process, picking the eyes, the best parts, of these processes out. We will, if necessary, revise our document to accord with the whole-of-government process.

MR SMYTH: On site selection, does ACTPLA have a role in site selection? Are they consulted by the LDA or Chief Minister's?

Mr Savery: It is more when it becomes part of the process of direct sale of land. So my answer would be, in part: it is not necessarily always the case that we would be consulted. We may be requested to provide advice on site selection but when that process goes to the stage of a direct grant, or a direct sale, then we are engaged in a more formal, internal government review process. And, in fact, we have a coordination committee that brings all of the agencies together to discuss the relative merits.

THE CHAIR: Can you tell us a bit more about your role on that committee?

Mr Savery: We chair it. Our main role is to ensure that there is a forum within the ACT administration where agencies can collectively discuss the relative merits of direct sale proposals. Sometimes that will precede an actual request, so it may be that a government agency has an interest in land for a future community facility or something. We might be involved in trying to identify a site for that government agency for a facility.

THE CHAIR: You might, at that stage, say that you are thinking about this one but that one would be better?

Mr Savery: Yes, absolutely. Obviously, we have a register of sites, particularly community facility sites. When requests are made, from NGOs, government agencies or in some cases the private sector, such as sporting groups or licensed clubs, we will go through that process.

MR SMYTH: In that process is there any attempt to assess and rank the sites to ensure the greatest benefit to the ACT—not just financial but social and planning?

Mr Savery: No. Again, referring to an earlier *Hansard*, it was essentially the responsibility of the Chief Minister's Department to determine the relative merits of the sites. So, given the characteristics of the proposal, we look at what sites are available.

MR SMYTH: So ACTPLA was comfortable with the issuing of this site, too?

Mr Savery: It was a potential site because it met the geographic area, the site area, the fact that, in our view, the land use was possible.

THE CHAIR: So you do not look at each site, with direct sales, having regard to the best and highest use of that site? You just say it could be one of those, and the fact that it might be even more brilliant if used for something else is not part of the considerations here?

Mr Savery: Again, it depends where a project is coming from and who is sponsoring the project. With a major project such as this, where the Chief Minister's Department is involved, they are taking on that broader responsibility. Other projects will come immediately to us; they are not declared major projects. So it will come to us; a community group will be looking for something and we will go through some level of evaluation. Importantly, the government had always said, in respect of this particular site and the project itself, that the direct sale was contingent upon a range of things being done. In our case, it was ensuring that it met all the environmental requirements, met the land use requirements et cetera. There had never been a guarantee that the thing could actually proceed on the site.

MR SMYTH: Did ACTPLA offer or suggest alternative sites to the one that the government—

Mr Savery: I cannot tell you precisely. I think that, when the original approach was made and the Hume industrial study was being done, we identified more than one site.

MR SMYTH: Could you take that on notice and find out what they were?

Mr Savery: Yes. I think we were asked: are there sites in this area? I think we identified more than one.

MR SMYTH: But when we got to the committee stage, where it was being decided, did ACTPLA propose an alternative site or were they agreeable to the site?

Mr Savery: I was not there so I might have to refer to the minutes, but if, through that process, the Chief Minister's Department and the applicant, as I understand it—and it was primarily the applicant—had said, "Out of the sites, that's the site we'd prefer to go with," the role of that group is simply to ensure that that site cannot be ruled out for other reasons. In other words, it is available for the government to consider that site.

MR SMYTH: Could the committee have a copy of the minutes of that meeting?

Mr Savery: If I can get them, yes.

MR SMYTH: Whom will you have to get them from?

Mr Savery: I just have to make sure they are available.

MR SMYTH: Why would they not be available?

Mr Savery: I do not know.

Mr Barr: Yes, he will get them for you.

Mr Savery: I will get them for you.

MR SMYTH: The status of the project: are there still two DAs active?

Mr Savery: For?

MR SMYTH: For the construction of the data centre?

Mr Savery: No. There are no DAs active.

MR SMYTH: There are no DAs active?

Mr Savery: One has lapsed.

MR SMYTH: Yes. So the—

Mr Savery: Has it lapsed?

Mr Ponton: One has lapsed and the other is for the alternative site.

MR SMYTH: So 1671 has now lapsed?

Mr Savery: Yes, and the other one has been issued.

MR SMYTH: Going to the legal advice, and picking up what Mr Smorhun said, you said that you got advice in November 2008, as outlined in paragraph 3.17:

> Counsel, although commenting on the vague description of data centres available to him, concluded that the data centre was a communications facility. Counsel also suggested that ACTPLA 'get some clearer understanding of the kinds of activities which may be conducted on the site to give itself some greater comfort that the proposal fits the definition of 'communications facility'.

Did ACTPLA take that advice and get a clearer understanding?

Mr Savery: Yes, I am pretty sure we did.

MR SMYTH: Could you provide that to the committee?

Mr Savery: If we did. I am saying I am pretty sure we did.

MR SMYTH: That is fine.

THE CHAIR: Ms Burch?

MS BURCH: No, I am fine, thank you.

THE CHAIR: We have got three minutes left. Did you want to say something?

Mr Savery: Yes, just going back to one of Mr Smyth's earlier questions about the release of the Hume industrial study, if I can, I would like to come back on that in terms of whether we did require it to be released under FOI. I am just thinking that, once we became aware it had been made available, we would have required it to go out under FOI, but then I think that we may have actually released it, having found out that it had been released.

MR SMYTH: It was already out in the marketplace, yes.

Mr Savery: Yes.

MR SMYTH: If you could clarify that, that would be fine.

Mr Savery: If I can clarify that, yes.

THE CHAIR: As a general question, this project and other projects like it obviously have involved working with other agencies. Have you got any reflections on how that works? Does it work well? Are you thinking to yourself, "I am ACTPLA and an independent agency and my job is to look after planning," or do you try to take more of an ACT government view? How do you approach these sorts of projects?

Mr Savery: It would depend on the project. If it is a strategic project, then we will take a broader, whole-of-government view because we believe we play a role as the strategic planner for Canberra. On a particular or specific project like this, depending on when we are engaged in that process, increasingly, we will revert to thinking that we are the statutory planning authority and we have got to be kept at arm's length from this because we are going to have to assess this thing.

With respect to the size of the ACT government, and where agencies have multiple roles, you cannot effect that. As I said, we were involved in identifying potential sites. We were involved in the process of moving this thing up into the potential for a direct grant. But throughout all of that process, we were cautioning other agencies that they needed to respect our role, ultimately, as a statutory agency in assessing the development application.

So we are fairly clear and discrete with respect to how we exercise that role. But as I say, a project like this may have come in in the form of the government looking at providing alternative energy supplies for the ACT, one of which is a potential gas facility. ACTPLA, as a strategic planner, might be asked: "Where would you be looking at this?" Then we would take on a broader strategic planning role. That is not how this came to us.

THE CHAIR: Thank you very much for your attendance, gentlemen. I do not believe we have any supplementary questions. A copy of the proof transcript will be available shortly and you can correct any errors of fact. I now formally close this hearing.

The committee adjourned at 3.58 pm.