Planning and Development (Notifications and Review) Amendment Bill 2009

Explanatory Statement

Overview and background

The Planning and Development (Notifications and Review) Amendment Bill 2009 (the Bill) amends the *Planning and Development Act 2007* (the Act) to achieve three key things in relation to development applications (DAs).

1. It ensures that the ACT Planning and Land Authority (ACTPLA) undertakes full public notification with the full information available at the outset on all merit and impact track DAs;
2. it allows ACTPLA and the Administrative and Civil Appeals Tribunal (ACAT) to consider a broader range of issues when reviewing DA decisions, such as Territory Plan Zoning and Objectives, as well as the Territory Plan Rules;
3. it increases standing for community members to appeal DA decisions.

1 Public notification of the full information of a development application

The Bill amends a current loophole in the Act. Currently, if ACTPLA fails to correctly follow the public notification requirements and notify the full information for a merit or impact track DA, this does not affect the validity of the DA.

This occurred recently in relation to a DA in Latham, where the DA was put out for public notification, but only contained a lease variation proposal. The actual demolition and development proposal was omitted completely from public notification. Despite this, ACTPLA permitted a decision on the whole proposal.

This amendment inserts a standard, so that the validity of the DA will be affected if the failure to comply with notification requirements unfavourably affected public awareness or restricted opportunities to make representations.

2 ACTPLA and ACAT to have broader reconsideration ability

Under the current Act, when ACTPLA or ACAT reviews a DA decision, they are restricted to considering the Territory Plan Rules without being able to consider the overall intent of the Territory Plan. This means that many of the important principles within the Territory Plan are not considered.

The Bill proposes that when ACTPLA or ACAT reviews a DA decision, they can give consideration to the broader range of issues that the original decision maker used – for example, the Territory Plan Zoning and Objectives, as well as the Territory Plan Rules.

3 Greater appeal rights on development application decisions

The Bill inserts a number of provisions that will increase standing to allow people to appeal DA decisions on their merits.

Currently, the Act allows only a list of ‘eligible entities’ the right to appeal a decision to ACAT. This Bill proposes expanding these standing provisions so that persons

whose interests are affected by a decision also have the right to apply to ACAT for review. This would mean, for example, that a community group that has made a submission on a development proposal, but does not have this issue within the objects of its constitution, would still be eligible to apply to ACAT for reconsideration of a decision.

This Bill proposes the removal of any references to entities suffering material detriment, and instead extends the eligibility to make an appeal to any entities which made a representation or had a reasonable excuse for not making one.

The standard is similar to the one used in the *NSW Environment Planning and Assessment Act*. The open standing standard used there has not created any issues with 'opening the floodgates to appeals' and in fact has lead to better decisions overall.

The Bill also makes some minor amendments relating to the way notices on decisions are served, as well as giving ACAT the ability to extend the review period in line with reviewable decisions under other legislation.

Notes on Clauses

Clause 1 Name of Act
This clause is a formal provision setting out the name of the proposed Act.

Clause 2 Commencement
This clause explains that the proposed Act will commence seven days after it is notified.

Clause 3 Legislation Amended
This clause is a formal provision to identify that this Bill amends the *Planning and Development Act 2007.*

Clause 4 Replacement section 121

This clause does not change the notification requirements for development proposals under the merit track. This clause removes the imperative for any review of merit track development proposals to be confined to the rules within the Territory Plan. This will allow the ACAT to have the same jurisdiction as the ACTPLA to investigate the full range of issues considered in making the original decision.

Clause 5 Remove section 152 (1), note 2

This clause has been omitted as a consequence of amendments to s 408 which expand the class of people who may apply for a review of a decision.

Clause 6 Replacement section 153 (5)

This amendment removes a loophole which means that a failure of ACTPLA to correctly follow the public notification requirements to adjoining premises to not affect the validity of a development approval.
The replacement clause ensures that the failure to correctly follow the public notification requirements is only acceptable if it has not:

- unfavourably affected the person's awareness of the existence and nature of the application; or

- denied or restricted the opportunity of the person to make representations about the application under section 156.

ACTPLA may make a declaration stating that it is satisfied that the failure to notify a person has not resulted in a circumstance as outlined above. This declaration is a notifiable instrument.

Clause 7 Replacement section 155 (5)

This amendment removes a loophole which means that a failure of ACTPLA to follow the major public notification requirements to not affect the validity of a development approval.

The replacement clause ensures that the failure to correctly follow the public notification requirements is only acceptable if it has not:

- unfavourably affected the person's awareness of the existence and nature of the application; or
- denied or restricted the opportunity of the person to make representations about the application under section 156.

ACTPLA may make a declaration stating that it is satisfied that the failure to fully notify the development application has not resulted in a circumstance as outlined above. This declaration is a notifiable instrument.

Clauses 8 and 9 Replacement notes at sections 170 (3) and 171 (3)

These clauses update the references in the notes as a consequence of the amendments to s 408.

Clause 10 Removal of section 193 (3)

This clause does not change the overall processes for reconsideration of decisions on development applications.

This clause removes the imperative for any review by ACTPLA of development proposals to be confined to considerations which were subject to the Rules within the Territory Plan, rather than any other considerations which may have been part of the original decision.

Clauses 11 to 14
Replacement notes at section 195, 257 (5), 258 (4) and 272B (3)

These clauses amend notes relating to a number of decisions which reference "s 408 (2)", as Clause 15 of this Bill removes section 408 (2) from the Act, and updates the reference in the notes to "s 408" as they will now cover the same content.

Clause 15 Replacement section 408

This amendment removes the existing restriction in s 408 that limits the people who may be given reviewable decision notices and notes the effect of s 67A of the ACAT Act. The provision at s 408A extends eligible entities for review to also include any other person whose interests are affected by the decision.

Clause 16 Replacement wording at end of section 409 (2) (a)

This clause clarifies that the approval takes effect the day the notice of the decision was received by the applicant, consistent with the Legislation Act. This removes any possible uncertainty about when someone has "been told" of a decision.

Clause 17 Replacement wording for section 409 (2) (b)
This clause amends wording to be consistent with the previous subsection.

Clause 18 Replacement wording for section 409 (3), note

The first replacement note of this provision removes the existing restriction in s 409 (3) which prevents the period for making an application from being extended. The new notes refer to the provisions of the ACAT Rules about extending time for making an application.

The second note clarifies that documents must be served according to the Legislation Act, pt 19.5.

Clause 19 Removal of section 419, Meaning of *material detriment* - Act

This clause removes section 419 from the Act, which removes the meaning of *material detriment*. This term is unnecessary, as any reference to *material detriment* in the Act has been removed.

Clause 20 Replacement of reviewable decision, schedule 1, item 3, column 2

The new text for this item in the Schedule removes reference to the need for the reconsideration of a decision on a development application in the merit track to be confined to the Rules within the Territory Plan, and not to allow consideration of other aspects of the Territory Plan such as Zoning and Objectives.

Clauses 21, 22 and 23
Replacement of eligible entities, schedule 1, items 4, 6 and 12, column 4

The new text for items 4, 6 and 12 in the Schedule extends the eligibility to appeal for review of the decision to any entities which made representations in relation to the public notification of a development application, as well as entities which had a reasonable excuse for not making a representation. Any references to entities who suffer material detriment have been removed.

Clause 24 Dictionary, remove definition

Clause 23 removes the definition of *material detriment* from the Act overall.