ACT Planning & Land Authority

EXPOSURE DRAFT

Guide to Planning and Development Amendment Bill 2009 (No 2)

Introduction

The *Planning and Development Act 2007* forms the basis for all development assessment in the Territory and provides the over-arching legislative framework for strategic planning including the Territory Plan; leasehold administration and compliance and enforcement measures in respect to land use.

The *Planning and Development Act 2007* (the Act) commenced on 31 March 2008 and introduced, amongst other things, a new way of assessing development applications that matches level of assessment with complexity of the proposed development.

As the Act introduced a new process, implementation has been closely monitored over the last 18 months. Government has been working with the community and industry, through the Industry Monitoring Group and other groups, to ensure that the Act delivers efficiencies and is responsive to identified needs. Since commencing the Act has been amended through the regulations and these amendments have since been regularised, through a formal Act amendment, becoming effective on 4 October 2009.

This second Bill, to amend the Act, will further enhance the operation of the Act, clarify a number of provisions and fine-tunes the legislation to reflect operational monitoring over the last 18 months.

An exposure draft of the Bill has been released for public consultation and a Guide prepared to assist community and industry to understand what the amendments propose.

Understanding the Guide

Because the Bill clarifies a number of provisions or makes editorial style changes in word usage etc not each proposed amendment is explained. When looking at this type of proposed amendment, for example clause 61 which substitutes existing section 402C (e) (ii) and (iii), the proposed amendment may seem more substantive than it is. This is because the drafting style substitutes the whole provision rather than deleting and inserting or re-ordering certain words or phrases. The actual outcome is minor and does not affect the policy outcome.

Similarly the Guide groups related provisions together such as clauses 30, 43, 45, 46, 78, 79 and 80. These clauses all relate to nominal rent. Clause 79 proposes the main change with the other amendments necessary because of this change such as clause 30 which omits "*nominal*" and substitutes it for "***a*** *nominal*".

Information sessions

ACTPLA will be holding public information sessions for those interested. Sessions are planned for Thursday 5 November and Wednesday 11 November. The sessions will start at 4pm and will be held in the ground floor north conference room, Dame Pattie Menzies House, 16 Challis Street Dickson.

If you would like to attend a session please let us know by emailing planning.systemreform@act.gov.au .

Where to get a copy and how to make comment

The exposure draft and the guide can be accessed through the ACT Planning and Land Authority's website at www.actpla.act.gov.au and an on-line survey is available so you can make comment.

You can also send an email to planning.systemreform@act.gov.au .

Or write to: ACTPLA
Legislation team section
GPO Box 1908
Canberra ACT 2601

If you are not using the on-line survey please remember to indicate which clause of the Bill you are commenting on to ensure your comments are recorded appropriately.

Comments close on 26 November 2009.

Outline of Provisions

Clauses 5, 8, 15, 27, 34, 37, 40, 44, 47, 50, 51, 53, 54, 58, 59, 61, 62, 64, 66, 68, 69, 70, 72, 73, 74, 75, 76, 77 Minor amendments, clarifications
These clauses are minor amendments only ie no substantive policy change and include minor adjustments, changes in emphasis and consistency of wording. This may mean that the provision is substituted or certain words deleted and a new word inserted or even a new section inserted such as at clause 34. The overall outcome however does not change the policy outcome.

Clause 1 Name of Act
States the title of the Act, which is the Planning and Development Amendment Act 2009 (No 2)

Clause 2 Commencement
States that the Act commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended
Notes the main part of the Bill is to amend the *Planning and Development Act 2007* (the Act). (Section references are to the Act unless otherwise indicated).

Clause 4 Minister's powers in relation to draft plan variations Section 76 (5) and (6)
The clause makes approval of a draft plan variation by the Minister under s76(3)(a) a notifiable instrument (similar to making directions for revision of variation a notifiable instrument). Also clarifies the procedure for publication of notice of withdrawal of the draft plan variation. Note the Minister must table the draft plan variation (and associated documentation) in Assembly within 5 sitting days of approving the variation (refer s79).

Clause 6 What are technical amendments of territory plan? Section 87 (e) AND
Clause 7 Is consultation needed for technical amendments? New section 88 (1) (c)
Clause 6 permits technical variations to bring the Territory Plan into line with the National Capital Plan (Commonwealth) irrespective of whether the need for the variation arose out of a recent change to the National Capital Plan. And also permits technical variations to remove redundant provisions or (if involving no substantive change) to clarify language. Clause 7 requires public consultation for technical variations to clarify language. Public consultation is not required for the technical variations to bring Territory Plan into line with National Capital Plan or to remove redundant provisions.

Clauses 9, 10, 11 New sections 116A, 120A, 129A – effect of s134 on development approval AND
clause 14 exempt development – authorised use section 134, new note
Clauses 9, 10, 11 apply in the situation where:

- the use of land is authorised by a lease and as such is exempt under s134 from requiring development approval (that would otherwise be required under ss7, 199 of the Act);
- the lessee seeks to put a new building on the land the physical construction of which requires development approval; and
- construction of the new building would mean that development approval exemption under s134 for the use of the land would cease to apply.

In this case a development application and approval is required for both the new building and for ongoing use of the land. Clauses 9, 10, 11 make it clear that in assessing the development application for the use of the land the Planning and Land Authority (and therefore the applicant) is not required to revisit the existing lawful use of the land (except as context for assessing the new building). Specifically, the development application cannot be refused on the basis that a hypothetical development application solely for the existing use of the land and existing buildings (as opposed to use of the new building) would be refused. Similarly, the development application cannot be conditioned on the basis that that a hypothetical development application solely for the existing use of the land and existing buildings would be conditioned. In other words refusal of the development application or conditioning of the development approval must be required as a result of issues arising from the new building and use of the new building as opposed to the existing use of the land and existing buildings.

Clause 14 inserts a note to emphasise that once a development approval for use of land is granted a fresh development approval is not required in association with the construction of new buildings on the land (unless the scope of the existing use approval is narrow and does not cover the proposed use of the new building).

Clause 12 New section 131B – development proposal for lease variation other than in designated area

Clause 12 makes the default track for assessment of development applications for lease variations (subject to exceptions) the merit track. This default does not apply if the development tables of the Territory Plan or section 123 of the Act (impact track applicability) provide otherwise. Lease variations to add a new authorised use must be assessed in the track that applies to the proposed use as determined by the development tables of the Territory Plan. This provision does not apply to lease variations in designated areas, such variations are already covered in section 131A.

Clause 13 Section 133

Clause 13 provides that notwithstanding anything in the regulations or the development tables of the Territory Plan, a development cannot be exempt from requiring development approval if the development would breach a written express condition of an already existing development approval over the same land. This provision does not apply to the exemption of use from requiring development approval under s134 of the Act.

Clause 16 New section 154(3)

Clause 16 confirms that a failure to notify holders of a registered interest in a lease of a development application to vary the lease does not invalidate any ensuing development approval. This provision is consistent with sections 153(5) and 155(5).

Clause 17 New division 7.3.4A AND
Clause 19 Notice of approval of application Section 170)(1)(c)

The intention is to enable the Office of Regulatory Services (Registration and Client Services) to include in association with the register of land titles information on development applications and development approvals.

Clause 17 requires the Planning and Land Authority to notify the Registrar-General of all development applications including a short description and status of the application eg whether pending, approved or approved with conditions. Clause 19 requires the Planning and Land Authority to notify the Registrar-General of all development approvals (not just development approvals related to the use of land as in existing section 170(1)(c)).

Once the information is forwarded the Registrar-General is to make a record of the information (record of administrative interests under part 8A of the *Land Titles Act 1925*) in association with the relevant lease. The record does not form part of the lease title but is information that can be referred to.

Clauses 18 Direction that development applications be referred to Minister Section 158(3)

Clause 18 clarifies what happens to a development application if the Minister elects to require the Planning and Land Authority to refer a development application (the Minister can decide to be the decision-maker instead of the Authority for such matters, a step that is often referred to as a "call in"). After a matter is referred to the Minister for consideration, the Authority must stop its own internal assessment and decision making processes. The amendment makes it clear that standard procedural steps are to continue, that is, public notification and referral of the application to agencies for comment - unless the Minister directs the Authority to the contrary.

Clauses 20, 21, 22, 23 When development approvals take effect

These clauses apply to decisions of the Planning and Land Authority to grant development approvals that are subject to appeal (merit review) to the ACT Civil and Administrative Tribunal (ACAT). The clauses make it clear that the development approval commences operation (takes legal effect) from the date the approval is affirmed (in whole or in part) by the original decision of ACAT irrespective of whether the decision is or might be subject to appeal (eg ACAT internal appeal under s79 of the *ACT Civil and Administrative Tribunal Act 2008*. This clause does not change in any way any existing ability of a court or tribunal to hear appeals and stay a decision pending an appeal.

Clause 24 End of development approvals other than lease variations Section 184(2)(f)

Section 184(2)(f) terminates development approvals when the due date required for completion under the relevant lease expires and does so irrespective of whether the development has been completed. This is incorrect, the termination should only occur if the development is not completed by the due date. The clause corrects this error.

Clause 25 End of development approvals for use under licence or permit Section 187(2)(d), except note

Section 134 states that development approval for the use of land is not required (subject to exceptions) if the use is authorised by a lease or a licence. Section 134(6) states that this exemption from the need to obtain use approval ceases if the relevant licence expires. The clause amends this to provide that development approval for the use of the relevant land is not required in this case if the licence expires provided the licence is renewed prior to expiry or within a 6 month period following expiry. This approach is similar to the approach taken to leases under s186(2)(a).

Clause 26 Applications to amend development approvals Section 197(1), new note

The new note is to make it clear that the processes for changing a development approval under ss197, 198 do not apply to matters (eg alterations to building design plans) that are required to be done as a condition of the original development approval. Such matters do not amount to changes to the original approval and so are not subject to the requirements of ss197, 198.

Clause 28 Section 198 (2)

It is possible to apply to the Planning and Land Authority for a change to an already existing development approval. Sections 197 and 198 set out the process for this. In summary applications can be made for minor but not major changes. In the case of a major change the lessee must apply for a new development approval. This clause applies to development approvals that were the subject of an application for merit review (appeal) to the ACT Civil and Administrative Tribunal (ACAT) and as a result include an approval condition required by the ACAT. The clause provides that sections 197, 198 for changing development approvals cannot be used to change an approval to remove or modify a condition required by ACAT.

Clause 29 Development applications for developments undertaken without approval New section 205 (1A)

This clause applies to the following circumstance. Someone builds a building without the required development approval. Sometime after the building is completed the regulations change with the result that if construction of the building were to be started afresh the construction would be exempt from requiring development approval. The clause provides that in this circumstance the original construction work is to be considered lawful as though the work was undertaken after the new exemption became available. This exemption is not to affect any compliance or other proceedings taken in relation to the construction work whether commenced before or after the new exemption regulation.

Clauses 30, 43, 45, 46, 78, 79, 80 nominal rent

Clause 79 inserts a new definition of "nominal rent" ie 5 cents per year (consistent with current practices). The regulation can set another amount provided the other amount is still nominal (ie minor). Note the nominal rent for nominal rent leases continues to be a rent that is payable on demand, that is it need only be paid if and when required (refer s273(3). The amendments in the other clauses are made as a consequence of clause 79.

Clause 31 Meaning of concessional lease and lease—Act Section 235 (1), definition of concessional lease, paragraph (a) AND

Clause 32 Section 235(2) AND

Clause 33 Section 235 (3), new definitions

These amendments relate to the definition of "concessional lease" (leases granted for less than market value). The amendments apply to provisions that state that a lease ceases to be a concessional lease if sometime after the date of grant payment of the market value is made. These amendments make it clear that it does not matter whether this payment of market value is made to the Territory, territory entity, Commonwealth entity or the original entity that granted the lease.

Clause 35 Restriction on direct sale by authority Section 240 (2) AND

Clause 36 Section 240 (4), new definition of *grant objective*

Section 240(2) permits the Territory Executive to approve the direct grant of a lease notwithstanding the direct grant is not consistent with prescribed criteria. The Executive can only do so if satisfied that the direct grant would "benefit the economy of the ACT or region" (s240(2)(a)) or achieve other objectives as listed in s240(2). Clauses 35, 36 amend these provisions to make it clear that the Executive can only approve the direct grant if satisfied that the same benefits could not be achieved or could not be achieved to the same degree by a normal sale (ie sale through auction, tender, ballot rather than direct grant).

Clause 38 Section 247 heading AND

Clause 39 New section 247A [on lease authorised use of land]

Leases typically include provisions that permit the land to be used for specified purposes. For example, the lease may indicate that the land may be used for office or retail purposes. The question has arisen as to whether such lease provisions are prescriptive in the sense that they require the lease to be actively used for the authorised purpose(s) and cannot be left unused or vacant or whether such provisions are merely permissive, that is, they permit the land to be used for such purposes but do not require this. In other words the land can be vacant or the authorised use left unutilised. The practice to date has been to assume that such provisions are prescriptive (to some extent at least). Clauses 38 and 39 are to confirm this understanding.

New s247A(2) requires the lease to be used for a lease authorised purpose (or if multiple purposes at least one of the purposes) subject to significant exceptions. This requirement is not to apply if:

- there is already a specific condition in the lease that requires the lease to be used for a lease authorised purpose (new s247A(1)(b));
- residential leases (lease with residence as one of its authorised purposes) if there is a “dwelling” (ie residence) on the land (new s247A(3)(a). “Dwelling” is defined in new s247A(4); or
- the land or building cannot be used for an authorised purpose because the relevant building is not complete and the relevant development approval or building approval is still current (new s247A(3)(b),(c)).

Clause 41 Restrictions on dealings with certain leases New section 251 (1) (c) (iii)

Clause 41 amends section 251 so that the five year restriction on transfers that would ordinarily apply to leases sold through a direct grant process does not apply if the direct grant is made as a result of a failed auction or ballot.

Clause 42 New section 251(1A)

Makes it clear that the five year restriction on transfers under s251 does not apply to concessional leases (these are subject to separate restrictions on transfer refer sections 265, 266), rural leases (subject to separate restrictions refer s284), or residential leases.

Clause 48 Transfer of land subject to building and development provision - New section 298 (2) (b) (v) AND
Clause 49 New section 298(6)

Leases typically include clauses requiring development to be completed by a certain date. If the development is completed as required then the Planning and Land Authority must (on application) issue a “certificate of compliance”. If the development is not completed then a certificate is not issued and the lease (subject to exceptions) cannot be transferred (s298(1)). The exceptions to this transfer restriction are set out in s298(1). A transfer can still proceed if it is approved by the Authority. The grounds for approving such transfers are set out in sections 298(2)-298(5).

Clauses 48, 49 insert a new ground for approval of a transfer of a lease that does not yet have a certificate of compliance. The clauses permit Territory or Commonwealth entities to apply for transfer approval on the ground that the transfer is required as a result of a change in relevant government policy. The policy change must be a general one applying to multiple transfers not just the transfer relevant to the application. For example, this will permit the Defence Housing Authority (Commonwealth) to apply for approval of a transfer of a lease on the ground that a change to Commonwealth defence housing policy (eg to house defence personnel in a different location) has removed the need to develop the lease.

Clause 52 Section 298A(3) to (5) AND
Clause 55 New section 298C AND
Clauses 71, 85, 86, 87, 88, 89, 90, 91, 92

These amendments apply to provisions dealing with applications for extension of time to build under a lease (a lease may require specified development to start and finish by a specified date). Clauses 52 and 55 make it clear (consistent with current practice) that the required fee for the extension of time

(set out in existing s298A(3) shifted to s298C(1) by this amendment) is only required to be paid if and when the application for extension of time has been approved. New section 298C(1) requires the fee for extension of time to be paid as a condition of the granting of the approval of the application for the extension. Clearly if the application is not approved the required fee is not required to be paid.

Clauses 71, 85, 86, 87, 88, 89, 90, 91, 92 are made as a consequence of clauses 52, 55.

Clause 56 Content of controlled activity orders
Section 358 (3) (c) AND
Clause 57 New section 358(3)(m)

A controlled activity is an action of a kind listed in existing schedule 2 (for example breach of a lease is a controlled activity). Sections 356 – 364 set out the circumstances in which the Planning and Land Authority can issue a controlled activity order to stop a controlled activity or require rectification and related procedures. Clauses 56, 57 make it clear that a controlled activity order can be issued to:

- require compliance with a condition of a lease (or associated agreement requiring completion of development (new s358(3)(c));
- restore land or buildings damaged as a result of breach of a lease condition or development agreement (new s358(3)(ca)); or
- stop or not undertake any controlled activity (new s358(3)(m)).

Clause 60 New section 395B

New section 395B permits the Planning and Land Authority to obtain lessee name and contact details from the Commissioner for Revenue in the ACT Revenue Office. This information is used for notifying neighbouring lessees of nearby development proposals and for compliance purposes. The new section will permit such information to be provided whether the request relates to one lease or to all leases in the ACT. In other words, the section will permit the Commissioner for Revenue to make available a full data set for all ACT leases as well as periodic updates. This information will enable the Planning and Land Authority to maintain an up to date record of lessee contact details, essential for notification and compliance functions. The requests (including updates) cannot be made more frequently than once every three months (or such longer period as the regulation provides). The Planning and Land Authority will be able to use this information only for purposes and functions set out in the Act. Use and care of the information will be covered by the secrecy provisions set out in s418.

New section 395B will apply in addition to section 395A which already permits the Planning and Land Authority to obtain such information from the Commissioner for Revenue but only for individual leases on a case by case basis and only if it is apparent that a specific record is out of date or incorrect.

Clause 63 New section 404A AND
Clause 93 Securing things seized under the Act, pt 12.3
Section 403

Clauses 63 and 93 apply to the provisions dealing with assets seized under a search warrant for compliance purposes. The clauses shift these provisions from the regulation to the Act.

Clause 65 Section 431

This clause covers transitional matters. The revised transitional section 431 will extend the period during which transitional regulations to modify the transitional chapter of the Act will be able to be made. Such regulations will be able to be made up to 31 March 2013 (five years after commencement of the Act). Under the existing Act the power to make such regulations expired on 31 March 2010. To this end, Part 15.1, Part 15.5 and section 467 dealing with plans of management will now expire on 31 March 2013 (five years after commencement day). The remainder of the transitional chapter will expire on 31 March 2011 (three years after commencement day).

Clause 67 Transitional—status of leases and licences New section 456 (1A)

New section 456(1A) is a clarification intended to be read in conjunction with the definition of "concessional lease" in section 235. The new section in conjunction with section 235(3) makes it clear that the term "concessional lease" includes consolidated, subdivided, further or regranted leases where one (or more) of the original leases was a "concessional lease" as defined in the repealed *Land (Planning and Environment) Act 1991* irrespective of whether the original lease(s) was current at the time of commencement of the Act.

Clause 81 Dictionary, definition of variation, paragraph (a) (iv)

New definition of variation (iv)(B) is to make it clear that lease variations do not include changes to a deed that are anticipated by and in accordance with the relevant lease.

Clauses 82 – 95 Consequential amendments to Planning and Development Regulation