

2008

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

PLANNING AND DEVELOPMENT AMENDMENT REGULATION
2008 (No 2)
SUBORDINATE LAW No SL2008-27

EXPLANATORY STATEMENT

Circulated by authority of
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AUSTRALIAN CAPITAL TERRITORY
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Overview

The *Planning and Development Amendment Regulation 2008 (No 2)* is made under sections 426 and 429 of the *Planning and Development Act 2007* (the Act).

Estate Development Plans submitted for comment prior to 31 March 2008

The main purpose of the regulation is to clarify and regulate the transitional position for development applications for approval of an "estate development plan" (EDP) where processes have begun before the commencement of the Act but the application is lodged after commencement.

The process for developing new estates typically involves the submission of a draft EDP to the planning and land authority (the authority) by the developer. This submission is circulated by the authority to other Territory government agencies for comment. After comments are received, the authority prepares a consolidated whole of government response for the developer who then prepares and submits a revised EDP. Once the revised EDP has been received by the authority from the developer, and final endorsement of the revised EDP is received from all government agencies, the final EDP is lodged as a development application with the authority. The authority then assesses and decides the application.

The existing transitional provisions of the Act covered the scenario where the new estate process reaches the stage where the EDP is lodged as a development application with the authority prior to the commencement date of the Act (31 March 2008). In this case, the *Land (Planning and Environment) Act 1991* (the repealed Act), applies to the assessment of the application.

There are also cases where a draft EDP was submitted to the authority for comment prior to the commencement date but without lodgement of the development application for the EDP. Under the current transitional provisions of the Act, if such EDPs become the subject of a development application lodged after the commencement date, then the development application will, like all such applications, be assessed under the new *Planning and Development Act 2007* and the new Territory Plan, not the repealed Act.

The intention is to alter this approach so that the repealed Act and the old Territory Plan apply to the assessment of all development applications for EDPs that were submitted to the authority for comment prior to the commencement date. This is to be the case for all such applications whether lodged prior to, or after, the commencement date. This will result in a more consistent treatment of these EDPs.

Specifically, section 5 modifies the Act by inserting new section 442C. New section 442C requires the repealed Act and the old Territory Plan to continue to apply to any development application that:

- is lodged after commencement date but within six months of this date; and

- relates to or incorporates a version of a document (or set of documents) that:
 - is described as an "estate development plan";
 - included plans/proposals for subdivision of land and related infrastructure development (e.g. sewers, footpaths, street lighting);
 - was submitted to the Planning and Land Authority for review/comment prior to the commencement date – with the intention that it (or a revised version) would ultimately be the subject of a development application; and
 - when it was submitted it appeared to be a document to which the government publication *Guidelines for Estate Development Plans - Greenfield Land Subdivision – September 2007* posted on the Planning and Land Authority website at: http://www.actpla.act.gov.au/data/assets/pdf_file/0019/6382/Estate_Dev_Plans.pdf - applied.

Revised transitional arrangements for "lease and development conditions"

In addition, the regulation includes provisions in relation to "lease and development conditions". The repealed Act and the old Territory Plan permitted the creation of "lease and development conditions" to apply local specific rules to the relevant area. Under the repealed Act, lease and development conditions played a role in informing the market prior to release of land. The conditions were prepared prior to release of land and contained information to assist the prospective buyers. The lease and development conditions were able to vary the Territory Plan through local, specific planning and development conditions, planning control plans, set backs, block details etc. The authority applied the lease and development conditions to the assessment of subsequent individual projects following the release of the land.

The regulation includes new provisions which set out more clearly the transitional arrangements for these matters and confirms their application in areas covered by relevant EDPs. Section 7 modifies the Act by inserting new section 446A (a revision of existing section 446A). This new section permits the application of lease and development conditions in geographical areas that were the subject of a relevant EDP. The new section permits both the application of existing lease and development conditions (that is, conditions made prior to the commencement date) as well as the application of new lease and development conditions. Section 7 also modifies the Act by inserting new section 446 (a revision of existing section 446). New section 446 gives the authority the power to make new lease and development conditions for application as noted above.

New section 446A makes it clear that the new Territory Plan can require lease and development conditions (existing or new) to apply in the assessment of development applications in geographical areas that were the subject of an EDP submitted to the authority for comment prior to the commencement date (provided that the relevant development application for the EDP has been granted). This ability applies to all such geographical areas irrespective of whether the development application for the EDP was lodged prior to or after the commencement date. To be clear, such lease and development conditions do not apply to the assessment of the EDP but apply to the

assessment of subsequent development applications for individual projects in the geographical area that was covered by an already approved EDP.

These arrangements are for transitional purposes only. The intention is for the lease and development conditions to apply only in respect to land covered by EDPs submitted prior to the commencement date. For the future, all planning rules including local specific planning rules are to be incorporated, as necessary, into the relevant codes of the new Territory Plan.

Commencement of development approvals

The regulation also corrects an omission from the transitional provisions of the Act. The transitional provisions in the Act indicate when a development approval ends under the transitional arrangements but do not indicate when the approval commences. Section 6 modifies the Act by inserting new section 444A into the Act to make it clear that the approval commences in accordance with the repealed Act and not the Act.

Other matters

A regulatory impact statement has not been prepared for these transitional regulations on the basis that such is not required under section 36(1)(f) of the *Legislation Act 2001*.

This regulation modifies the Act as permitted by section 429 of that Act. Section 431 of the Act requires section 429 and regulations made under section 429 (including this regulation) to cease two years after the commencement of the Act (ie two years after 31 March 2008). Section 429 and the regulations under this section are not saved by section 88 of the Legislation Act (because of the exception in section 88(2) of the Legislation Act). As such the modifications made by this regulation are temporary. The wording of the regulations include time frames that would apply if the regulations were preserved by Act amendment, should this be considered necessary in the future. If the provisions were incorporated unchanged into the Act in this way, then:

- new section 442C (inserted by section 5) would expire two years after commencement of the Planning and Development Act but section 88 of the Legislation Act (Repeal does not end effect of transitional laws, etc) would apply;
- new section 444A (inserted by section 6) would expire two years after commencement of the Planning and Development Act but section 88 of the Legislation Act would apply;
- new section 446 (inserted by section 7) would expire entirely after five years post commencement of the Planning and Development Act, that is, section 88 of the Legislation Act would *not* apply; and
- new section 446A (inserted by section 7) would expire five years post commencement of the Planning and Development Act but section 88 of the Legislation Act would apply.

Detailed notes on the regulations

Section 1 – Name of regulation – names the regulation as the *Planning and Development Amendment Regulation 2008 (No 2)*.

Section 2 – Commencement – provides that the regulation commences on the day after its notification day.

Section 3 – Legislation amended – states that the regulation amends the *Planning and Development Amendment Regulation 2008*.

Section 4 – Schedule 5, new modification 5.1A – modifies the Act by inserting new sections 431(2) (a) and (b) to reflect the changes in headings made by this regulation.

Section 5 – Schedule 5, new modification 5.3A – modifies the Act by inserting a new section 442C.

This section applies to a development application that relates to an Estate Development Plan (EDP) that is lodged on or not later than 6 months after commencement day and the EDP was given to the authority before commencement day for consideration.

The development application may be made and decided in accordance with the repealed Act as if that Act had not been repealed.

If the development application is approved, the approval is taken to be under the Act and unless extended under the Act, continues in force until the time when it would have ended under the repealed Act. The development application is taken to be a merit track proposal for section 198(2) (Deciding applications to amend development approvals) of the Act.

Under section 5(4), the repealed Act applies in relation to any application for reconsideration, or of review, of the decision on a development application to which this section applies.

Section 5(5) sets out what the authority must consider in deciding whether a document is an EDP. The authority must consider whether the document is identified, by itself or another document, as an EDP; the document appears to be a document to which government publication *Guidelines for Estate Development Plans- Greenfields Land Subdivision-September 2007* applies; and whether the document includes plans or a proposal for the subdivision of land and related infrastructure development.

Section 5 (6) states that an EDP (the final plan) is taken to have been given to the authority for consideration if the EDP (the initial plan) was given to the authority and the final plan is identifiable as a revised version of the initial plan.

Section 6 – Schedule 5, new modification 5.4A – modifies the Act by inserting new section 444A. This section applies to development approvals under section 442, 442B, 442C, 443 or 444 of the Act unless the development approval commenced before commencement day.

The development approval in relation to these types of approvals commences, or is taken to have commenced, when the development approval would have commenced under the repealed Act, if the repealed Act had not been repealed.

Section 7 – Schedule 5, new modification 5.5A – modifies the Act by inserting new sections 446 and 446A.

New section 446 - Power to make lease and development conditions

This section gives the authority the ability to make new lease and development conditions in certain circumstances. The authority may make such conditions in relation to the following geographical areas, that is, land that:

- is covered by an EDP that is the subject of a development approval given under new section 442C (that is, EDPs submitted prior to the commencement date but the development application for the EDP was not lodged until after this date - see section 5 above); or
- is covered by an EDP that is the subject of a development approval given under the provisions of the repealed Act in relation to an "earlier application" whether the approval was given before or after the commencement date (that is, EDPs submitted prior to the commencement date and the development application for the EDP was also lodged prior to this date).

On or after the commencement day, the authority may make a lease and development condition in relation to the above land, or part of the land.

Section 7(3) sets out definitions for the section.

"An earlier application" means an application for development approval if the application –

- (a) was made under the repealed Act before the commencement day; and
- (b) relates to land that was defined land (which means land identified in the old territory plan for the repealed Act subdivision 2.3.4); and
- (c) is for approval to subdivide whether or not it is also for approval of something else.

"An earlier approval" means a development approval under the repealed Act of an earlier application.

"Lease and development condition" means a lease and development condition that could have been made under the repealed Act, but for its repeal.

"Old Territory plan" means the territory plan under the repealed Act.

Section 7(5) states that this section expires 5 years after the commencement date and section 7(4) states that section 88 of the Legislation Act (Repeal does not end effect of transitional laws, etc) does not apply. As noted in the overview, these time frames would apply only if this provision were to be incorporated into the Planning and Development Act by Act amendment. In the absence of such an amendment, this regulation will cease to apply two years post commencement of the Planning and Development Act.

New section 446A – Transitional - application for development approval if lease and development condition

This section provides for existing lease and development conditions to be considered when assessing some development applications. The section applies to a development application if the application is:

- (i) not in the code track; or
- (ii) for development on land to which a lease and development condition -
 - a. under section 446 applies; or
 - b. made under the repealed Act applied immediately before the commencement day.

The authority (or the Minister, if the Minister has exercised the power to "call in") must consider the lease and development condition in making a decision under section 162 (Deciding development applications) in relation to the application if-

- (a) the territory plan provides that the lease and development condition may vary the plan; and
- (b) the condition is relevant to assessing the application and granting the approval.

This section expires five years post the commencement date. Section 88 of the Legislation Act (Repeal does not end effect of transitional laws, etc) does apply to this section. As noted in the overview, these time frames would apply only if this provision were to be incorporated into the Planning and Development Act by Act amendment. In the absence of such an amendment, this regulation will cease to apply two years post commencement of the Planning and Development Act.