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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Planning and Development Amendment Regulation 2009 (No 4)
SL2009-14**

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Andrew Barr MLA

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 4)

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Overview

On 3 February 2009, the Commonwealth announced its \$14.7b *Building the Education Revolution* funding package which is a component of the \$42b *Nation Building and Jobs Plan* (the Commonwealth Plan). The funding for the Commonwealth Plan is the subject of the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth). The Commonwealth Plan is intended to provide a stimulus to the national economy to mitigate the effects of the current global financial crisis and recession. The Commonwealth Plan provides funding for various projects including a significant amount of funding for new buildings or upgrading of buildings in existing schools. The funds are granted on the condition that they be spent or be committed for spending within a short time period. For example, a significant amount of the funds must be spent within 12 months of the announcement of the Commonwealth Plan or they may be lost to the Territory.

ACT Government funding will also be available for various projects. Given the time frames required by the Commonwealth Plan and the availability of the ACT government project funding, it is necessary to amend the *Planning and Development Regulation 2008* (the regulation) in order to limit the potential for individual projects to stall as a result of delays in the development assessment or appeals process.

Public notification

Public notification of development applications allows third parties (neighbours, etc) to comment on the proposals. There are statutory requirements in relation to public notification of development applications (Division 7.3.4 of the *Planning and Development Act 2007* (the Act)). Notification can involve letters to neighbours, posting a sign on the land and placing a notice in the newspaper. Anyone can make a representation about a development application that has been publicly notified under the Act (see section 156). Such representations must be made during the relevant public consultation period which varies from 10 to 15 working days and can be extended by the planning and land authority (the authority).

Due to the time limits on the funding by the Commonwealth and the need for both the Commonwealth and Territory funding to achieve their objective of stimulating the economy, the government chose the option of expediting development applications for school projects which are not exempt development and therefore, require development approval, by limiting the public notification requirements for such applications.

In accordance with section 152, the authority must publicly notify certain types of development applications. Under section 152(1)(a), the authority must undertake public notification of merit track development applications prescribed by regulation in the manner prescribed in section 152(2). Under section 152(2), the authority may prescribe, by regulation, public notification under either section 155 (Major public notification) or section 153 (Public notice to adjoining premises) of the Act.

Section 27 of the regulation prescribes public notification of merit track applications for sections 152(1)(a) and 152(2).

Under section 27(3) of the regulation, applications in the merit track set out in schedule 2 of the regulation must be notified in accordance with section 152(2)(b), that is, under section 153 (Public notice to adjoining premises). Section 157 of the Act provides for the regulation to set out the length of the public notification period. Section 28 of the regulation states that a limited public notification matter has a public consultation period of 10 working days unlike major public notification matters which have a public consultation period of 15 working days.

Third party appeals

The effect of including the school development application matters specified in Clause 5 of this amending regulation in schedule 2 of the regulation is that there can be no third party appeals for these projects. It was considered that these types of projects were likely to have minimal adverse third party impacts because they will only be carried out on existing school sites, and will be developments consistent with this existing use.

The streamlining of the public notification requirements and the elimination of third party appeals for those matters in this amending regulation mean that schools can take advantage of the government funding in a much shorter time frame. This ensures that the benefits in terms of school projects and stimulus to the economy can be realised sooner, and any risk of losing access to the funds due to delays is minimised. It should be noted that the removal of third party appeals under this amending regulation is for a limited period and expires on 31 March 2013. Also the removal only applies to projects that are funded by a 'declared funding' program i.e. Commonwealth or Territory economic stimulus programs.

Clause 5 of the regulation inserts new items 7 and 8 into schedule 2 of the regulation. This means that these items will be subject to a public notification period of 10 working days not 15.

Under item 4 of schedule 1 of the Act, third party appeals do not apply to merit track applications that need only be publicly notified under section 153 of the Act. Thus, the addition of items 7 and 8 to schedule 2 by this amending regulation means development applications relating to these developments or activities are not subject to third party appeals.

The exclusion of third party appeals in relation to the school projects in this amending regulation are not the first exclusions under the Act. There is a range of matters already in schedule 2 of the regulation which excludes third party appeals and also schedule 3 of the regulation excludes certain third party appeals.

Human rights issues in relation to schedule 2

The *Human Rights Act 2004* (the HRA), in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by schedule 2 of the regulation. However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights

legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.

To the extent that schedule 2 of the regulation limits any rights afforded by the HRA, these limitations must meet the proportionality test of section 28 of that legislation. The schedule serves to improve the development assessment process within the Territory by ensuring that only matters which have the potential to significantly impact on residential areas are open to third party appeals. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. Rights of judicial review under the *Administrative Decisions (Judicial Review) Act 1989* remain.

On balance, the social and economic benefits that will flow to the ACT community from securing the substantial funding available under the Commonwealth Plan for school building projects outweigh the limited foregoing of third party appeal rights on development assessment decisions. This is especially the case given that the restrictions are limited to projects on existing school campuses; time limited to 31 March 2013; and restricted to projects that are funded by declared funding programs (i.e. Commonwealth or Territory economic stimulus programs).

Schedule 2 achieves an appropriate balance between the general benefit to the ACT community of facilitating development and the protection of the interests of residents and others likely to be affected by such development. In all these circumstances, the proportionality test of section 28 is met.

Detailed summary of provisions

Clause 1 – Name of Regulation –states the name of the regulation, which is the *Planning and Development Amendment Regulation 2009 (No 4)*.

Clause 2 – Commencement –states that the regulation commences on a day fixed by the Minister by written notice.

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

Clause 4 – New sections 405, 406 and 407–
New section 405 Meaning of *declared funding program*-regulation - specifies the meaning of *declared funding program* for the regulation. A *declared funding program* means—

(a) the Commonwealth's *Appropriation (National Building and Jobs) Act (No 2) 2008-2009* (Cwlth); or

(b) a program declared by the Chief Minister to be a declared funding program under section 406.

New section 406 Declaring programs and developments - specifies that the Chief Minister may declare a program administered by the Territory or Commonwealth to be a declared funding program if satisfied that the program provides funding for development or other activities in schools.

If satisfied a development or other activity is funded entirely or partly funded by 1 or more declared funding programs, the Chief Minister may make a declaration to that effect. If the Chief Minister makes such a declaration, the development or other activity is taken to be funded completely or partly by 1 or more declared funding programs. This can be significant because items 7 and 8 inserted by clause 5 below require that the development or activity be funded completely or partly by 1 or more declared funding programs.

A declaration under section 406 is a notifiable instrument.

New section 407 Expiry - states that the section and the following provisions expire on 31 March 2013:

- (i) sections 405 and 406;
- (ii) schedule 2, item 7;
- (iii) schedule 2, item 8;
- (iv) dictionary, definition of ***declared funding program***

The reason for the limited period of operation is to take advantage of the extra funding available to schools as a result of the Commonwealth and Territory economic stimulus programs which it is anticipated will no longer be available after 31 March 2013.

Clause 5 – Schedule 2, new items 7 and 8 – inserts new items 7 and 8 in schedule 2 of the regulation. Schedule 2 sets out the merit track development applications that require only limited public notification.

In accordance with section 152 of the Act, the authority must publicly notify certain types of development applications. Under section 152(2), the authority may prescribe, by regulation, public notification under either section 155 (Major public notification) or section 153 (Public notice to adjoining premises) of the Act. Under section 27(3) of the regulation, applications in the merit track set out in schedule 2 of the regulation must be notified in accordance with section 152(2)(b), that is, under section 153 (Public notice to adjoining premises).

Under item 4 of schedule 1 of the Act, third party appeals do not apply to merit track applications that need only be publicly notified under section 153 of the Act.

Thus, the addition of items 7 and 8 to schedule 2 by this amending regulation means development applications relating to these developments or activities require only minor public notification under section 153 and are not subject to third party appeals. Both items must meet the criteria, amongst other things, that they are funded completely or partly through 1 or more declared funding programs. If there is any doubt about whether the development or activity is funded by a declared funding program, the Chief Minister can make a declaration under section 406 (2).

New item 7 – specifies what type of buildings, or alterations of buildings, on an existing school campus the provision applies to providing that the project is funded in part or completely by a ‘declared funding’ program. That is:

“Building a new building or altering or demolishing an existing building (and carrying out any related earthworks or other construction work on or under the land) if—

- (a) the building is on an existing school campus; and
- (b) the building is—
 - (i) a class 3 building; or
 - (ii) a class 9b building; and
- (c) the building, alteration or demolition is funded completely or partly under 1 or more declared funding programs.”

New item 8 – specifies the type of development or project that the provision applies to, that is:

Any of the following activities in relation to an existing school campus (including carrying out any related earthworks or other construction work on or under the land) if the activity is funded completely or partly under 1 or more declared funding programs:

- building or installing an entrance to a school;
- building or installing a verandah, including a balcony, awning, portico or landing;
- putting up, attaching or displaying a sign or altering or removing a sign;
- building or installing a playground and exercise equipment;
- building or installing a fence;
- building or installing a shade structure;
- building or installing a covered walkway;
- building or installing a flag pole;
- building or installing a water tank;
- landscape gardening;
- building or installing a car park;
- building or installing a bicycle enclosure;
- building or installing a toilet facility or change room facility;
- sealing or resealing a driveway;
- building or installing a demountable or transportable building;
- building or installing a class 10b structure.

Examples of class 10b structures include a retaining or freestanding wall, mast or antenna, swimming pool.

Clause 6 – Dictionary, new definition of *declared funding program* – inserts the new definition of *declared funding program* into the dictionary.