

2009

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Planning and Development Amendment Regulation 2009 (No 8)
SL2009-35**

EXPLANATORY STATEMENT

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

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 8)

EXPLANATORY STATEMENT

Overview

Background

This statement applies to the Planning and Development Amendment Regulation 2009 (No 8) (the proposed law) made under the Planning and Development Act 2007 (the Act) and related policies and measures.

On 3 February 2009, the Commonwealth announced its \$42b *Nation Building and Jobs Plan* (the “Commonwealth Plan”). The Commonwealth Plan is intended to provide a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn.

In view of the global financial crisis and its potential flow-on impacts on ACT businesses and industry, the ACT Government has engaged with industry in order to understand their circumstances and as a result of that consultation, the Government decided on a range of initiatives to address industry concerns. The policy objectives and associated initiatives were announced as part of the 2009-2010 Territory Budget and in subsequent Ministerial media statements.

The proposed law deals with amendments to legislation to facilitate the implementation of three initiatives announced in the Budget to:

1. provide a two year moratorium on fees for extensions of time to commence or complete developments, commencing 1 July 2009. The Act allows a lessee to apply for an extension of time to commence or complete building or other development required by a lease. A fee up to five times the annual land rate is charged and various conditions are set out in the regulations. These “penalties” were introduced to encourage timely developments in an environment of sharply appreciating land values, where the holding costs of land were more than offset by capital gains. The penalties were implemented under the Government’s Affordable Housing Action Plan (announced in July 2007) which included measures to deter land banking. The moratorium, which recognizes current economic difficulties, and will apply to commercial and industrial development work, and will be implemented through waivers under the *Financial Management Act 1996* with minor consequential amendments to the *Planning and Development Regulation and Act*;
2. reduce the general Change of Use Charge rate applicable to lease variations from 75 per cent to 50 per cent for a period of one year, commencing on 1 June 2009, pending the progressing of the Government’s decision to codify the charge. The reduction in the charge will be implemented by a Policy Direction made under s177 of the *Planning and Development Regulation 2008*;

3. provide a 100 per cent remission of the Change of Use Charge for lease variations associated with the redevelopment of disused service station sites, for a period of one year commencing 1 June 2009. This will help to offset the site remediation costs (which can be in the vicinity of \$1 million) and will be applicable once a development approval for redevelopment is granted and construction work on the project has reached the first inspection stage. The remission of the charge will be implemented by a Policy Direction made under s177 of the *Planning and Development Regulation 2008*;

The principal means of giving effect to these Budget policy decisions is through other instruments – a waiver under s131 of the *Financial Management Act* and policy directions under s177 of the *Planning and Development Regulation*.

Retrospectivity of some provisions and human rights issues

Section 175(6) of the proposed law has the effect of allowing a reduction in the change of use charge, announced in the Territory Budget for 2009-2010 (Budget speech - Budget Paper 1, 5 May 2009) and subsequently by Ministerial media statement (Treasurer, 8 June 2009), to operate retrospectively from 1 June 2009. The policy directions made in conjunction with the proposed law reduce the change of use charges in relation to lease variations applied for from 1 June 2009, in specified circumstances.

The *Legislation Act 2001* section 76 allows for retrospective commencement of a provision if it is a **non prejudicial provision** within the meaning of section 76 (4).

Section 76 states:

- (1) A statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively.
- (2) Unless this subsection is displaced by, or under authority given by, an Act, a statutory instrument cannot provide that a prejudicial provision of the instrument commences retrospectively.
- (3) This section is a determinative provision.
- (4) In this section:

non-prejudicial provision means a provision that is not a prejudicial provision.

prejudicial provision means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

- (a) adversely affecting the person's rights; or
- (b) imposing liabilities on the person.

Under section 76(1) of the *Legislation Act*, section 175(6) of the proposed law is not prejudicial as it reduces fees and does not operate to the disadvantage

of a person (other than the Territory or a territory authority or instrumentality) and therefore the provision may commence retrospectively.

Regulatory impact statement

The *Legislation Act 2001* section 36 states:

(1) A regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument (the proposed law) if the proposed law only provides for, or to the extent it only provides for:

- (a) a matter that is not of a legislative nature, including, for example, a matter of a machinery, administrative, drafting or formal nature;
- (b) a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by —
 - (i) adversely affecting the person's rights; or
 - (ii) imposing liabilities on the person;
- (e) an amendment of a territory law that does not fundamentally affect the law's application or operation;
- (k) an amendment of a fee, charge or tax consistent with announced government policy.

A regulatory impact statement is therefore not required for the proposed law for the following reasons:

- 36(1)(b) The proposed law does not adversely affect any rights and do not impose liabilities, but rather operates to temporarily reduce in part (general rate of CUC) or in full (waiver of fees for extensions of time to develop; 100% remission of CUC on redevelopment of service station sites) existing liabilities in specified circumstances;
- 36(1)(k) The proposed law amends a fee, charge or tax consistent with Government policy announced in the 2009-2010 Budget;
- 36(1)(a) &/or (e) The proposed laws makes a series of minor amendments to the Act and Regulation in relation to extensions of time to commence or complete development, but these amendments are not of a substantive legislative nature, but merely clarification of drafting to better reflect the policy and existing application of the affected provisions.

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 8)*.

Clause 2 – Commencement –states that the regulation commences on the day after its notification.

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

Clause 4 – Section 175(1) – is a minor technical change of expression necessary for drafting clarity in relation to remissions of change of use charge.

Clause 5 – Section 175(1)(a) – is a minor technical change of expression necessary for drafting clarity in relation to remissions of change of use charge.

Clause 6 – Section 175(1)(b) – is a minor technical drafting change for clarity. The change makes it clear that a policy direction can recognise the remission of a change of use charge for a period of time alone without reference to any other circumstance.

Clause 7 – Section 175(2)(a) – is a minor technical change of expression necessary as a consequence of new section 175(1)(b).

Clause 8 – Section 175(6) to (8) – inserts new sections which allow a reduction in the change of use charge through a policy direction, consistent with the government policy announced in the Territory Budget for 2009-2010, to operate retrospectively from 1 June 2009. The policy directions provide, for a period of 12 months, for a remission in the general rate of change of use charge from 75% to 50%, and a 100% remission in certain circumstances relating to the redevelopment of disused services station sites, and is given effect by policy direction made by the Minister under s177 of the *Planning and Development Regulation 2008* prior to 1 July 2009.

Clause 9 – Section 202 – is a minor technical drafting change to ensure consistency with s298A (4)(a)(ii) of the Act in relation to applications for extensions of time to commence or complete building and development.

Clause 10 – Section 203 heading – is a minor technical change to heading.

Clause 11 – Section 203(2) – Table 203 is simplified consistent with the requirements of modified s298A(5) in the Act.

Clause 12 – Section 204 heading – is a minor technical change to heading.

Clause 13 – Section 204(2) – is a minor technical change of expression for drafting clarity in relation interpretation of Table 204. The table has also been simplified consistent with modified s298A(5).

Clause 14 – Section 204(4) new definition of period of extension – refers to s298A of the Act for a definition of the *period of extension*. Consistent with current legislative drafting practice, the definition has been moved to the Act (s298A (5)).

Clause 15 – Section 205 heading – is a minor technical change to heading.

Clause 16 – Section 205(2) – is a minor technical change to drafting.

Clause 17 – Section 206 heading – is a minor technical change to heading.

Clause 18 – Section 206(2) – is a minor technical change to drafting.

Clause 19 – Section 207 heading – is a minor technical change to heading.

Clause 20 – Section 207(2) – is a minor technical change to drafting.

Clause 21 – Schedule 20, modification 20.1, section 429F – The clause modifies, through a transitional regulation making power under section 429 of the Act, section 298A of the Act. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Planning and Development Amendment Regulation 2008 (No 4) - SL2008-41 modified the requirements in the Act and amended the Regulation in relation to applications for extensions of time to commence or complete development provisions in a lease to provide for a reduced fee regime; removal of a maximum extension period; to make provision for hardship; and allowed for delays in obtaining statutory approvals to be taken into account. In December 2008 the planning and land authority published a *Guide to fees for extending building and development provisions*, which provided a detailed explanation on the intended application of the section 298A of the Act and Division 5.7.2 of the Regulation. In practice, industry expressed concerns that the regulation did not necessarily provide for the scaling of fees over time in the manner intended.

The modifications make it clear that the fee for an extension of time is scaled over time (lower fee for the first 12 months extension and a higher fee for second extension, etc) and that this scaling applies whether an extension of time is sought in one or multiple applications.

Clause 21 in the proposed law makes a series of modifications, for the avoidance of doubt, to section 298A of the Act. The modifications are as follows:

- 429F (3)(b) is modified so that it makes it clear that in defining the **required fee** that this is to be worked out using the formula specified for each year, or part year, of the period of extension of time sought. A clear worked example of how the required fees should be calculated is also provided.
- 429F (4) inserts clarification about how earlier extensions of time which have been approved are taken into account in working out the required fee, in particular:

(4)(a)(i) and (ii) require the period of extension be taken to include each earlier period of extension granted, other than extensions for which the required fee was waived under s131 of the *Financial*

Management Act 1996, or an earlier extension prescribed by regulation; and

(4)(b)(i) and (ii) require the fee is to be reduced by the amount of fee paid for each earlier extension and by any amount waived for an earlier extension under the *Financial Management Act*.

Note that the removal of extensions granted where the fee is waived under section 131 of the *Financial Management Act 1996* from the calculation of fees for future extensions of time is a new element to the Act but is consistent with the approach taken to zero fee extensions of time already set under ss205,206, and 207 of the regulation.

- 429F (5) more clearly defines the variables used in the formula for calculating the required fee under 429F (3)(b) – this formula remains unchanged. (5) states that:

A is the figure, being not more than 5, as prescribed by regulation (i.e. as listed in column 3 of the Tables 203 and 204 in the regulation) for the relevant year of the period of extension (definition reworded);

B is the amount of land rates payable under the *Rates Act 2004* in the financial year of the application (definition unchanged);

D is the lesser of

(a) 365 [if extension is for a whole year]; and

(b) The number of days for which the extension is sought in the relevant year.

429F (5) also inserts the definition of ***period of extension*** in the Act (s298A) which was previously in the regulation (see explanatory note for Clause 14).