

**2009**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**Planning and Development Amendment Regulation 2009 (No 9)  
SL2009-38**

**EXPLANATORY STATEMENT**

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

# ***PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 9)***

## **EXPLANATORY STATEMENT**

### **Background**

Under the *Land (Planning and Environment) Act 1991* (the Land Act), there were three provisions for the direct grant of leases (sections 161, 163 and 164). Section 161 provided the general power with sections 163 and 164 providing for the direct grant of leases to community organisations and special leases respectively. Special leases were associated with the economic development of the ACT or the development of business in the ACT.

The direct grant of a lease under one of these provisions could only be done in accordance with the criteria in a disallowable instrument under the relevant section. A large percentage of leases granted by direct grant were also concessional (that is, granted for an amount less than market value). In December 2005, the Government announced its policy position on both the concessional lease review and the planning system reform project. As part of the announcements, it was recommended that:

1. there be one provision for the direct grant of leases; and
2. the criteria for the direct grant of leases should be reviewed and those criteria should be made publicly available.

As a result, section 240 (Restriction on direct sale by authority) of the *Planning and Development Act 2007* (the Act) came into being and a review of the existing disallowable instruments relevant to direct grants was undertaken with the aim of converting them to regulation. The review considered which disallowable instruments were no longer required and how the criteria in the instruments could be consolidated into general and specific and be more informative of the decision to grant a lease by direct sale. The regulations in Part 5.1 of the *Planning and Development Regulation 2008* (the regulation) are the result of that review.

In 2008, government decided that it was more appropriate to use the term “direct sale” rather than “direct grant” as the word “grant” implied that there was no sum of money involved when this was not necessarily the case.

### **Overview**

Part 5.1 of the regulation has been in operation since March 2008 and during that time various issues have arisen in relation to some of the provisions relating to the direct sale of leases. This amending regulation addresses those issues. The changes made to Part 5.1 of the regulation by this amending regulation clarify certain sections (for instance, s106 and 107) and/or ensure a section works as intended (for instance, s112 now refers to “community organisation” rather than “community use” which was limiting direct sales of leases to community organisations).

Clause 8 adds to the list of leases that are exempt from restrictions on dealings under section 251 of the Act.

Clause 13 modifies the Act as permitted by section 429 of the Act. Section 431 of the Act requires section 429 and regulations made under section 429 (including Clause 13 of this regulation) to cease two years after the commencement of the Act (i.e. two years after 31 March 2008). Section 429 and the regulations under this section are not saved by section 88 of the *Legislation Act 2001* (because of the exception in section 88(2) of the Legislation Act). As such, the modifications made by Clause 13 are temporary, however it is proposed to make the modifications permanent by amending the Act at a future time.

The amending regulation also makes some minor and technical changes as explained herein.

### **Detailed summary of provisions**

**Clauses 1 – Name of Regulation** – states the name of the regulation, which is the *Planning and Development Amendment Regulation 2009 (No 9)*.

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

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

**Clause 4 – Section 105(e) and note** – substitutes a new section 105(e) and note in the regulation. This is a consequence of the amendment of section 112 of the regulation by clause 7 of this amending regulation.

**Clause 5 – Section 106(a)** – substitutes a new section 106 (a) in the regulation. This clause amends one of the criteria for the direct sale of a lease to a territory entity for clarification purposes. Criteria 106(a) is presently “there is no other land available to the entity suitable for the proposed use of the land”. This poses a problem because it might not always be the case that no other suitable land, as such, is available but it is still appropriate that the direct sale be made. For instance, the Land Development Agency might make an application for a direct sale of land for residential purposes in West McGregor. It may be that other land suitable for residential purposes is available elsewhere in the ACT but the Agency needs the direct sale of the land in West McGregor as part of its agreed *land release program* (which is in accordance with its functions). The new wording of section 106(a) overcomes this problem by allowing the land to be “the most suitable land for the entity’s proposed use of the land, having regard to the entity’s functions”.

**Clause 6 – Section 107(a)** – substitutes a new section 107(a) in the regulation for the same clarification purposes as set out above for clause 5.

**Clause 7 – Section 112** – substitutes a new section 112 in the regulation. In the translation/refinement of provisions from the Land Act and its disallowable instruments into the regulation, the provision relating to the direct sale of a lease to a community organisation (previously section 163 of the Land Act) was inadvertently narrowed. Whereas the Land Act allowed direct sales to community organisations irrespective of the range of activities the proposal involved, the regulation only allows direct sales to a community organisation for “community use” as defined in the Territory Plan. Experience since the introduction of the regulation in 2008 has shown that this narrowing is not always appropriate and it is considered that the definition of “community organisation” in the Territory Plan provides the necessary and appropriate limitations for the type of entity that can make an application for a direct sale under section 112. Clause 7 removes the reference to “community use” in section 112 and sets out the criteria for the direct sale of a lease for community organisations.

**Clause 8 – Section 142(2)(c)** – substitutes a new section 142(2)(c) and adds paragraphs 142(2)(d) to (f) to the regulation. Section 142 exempts restrictions on dealings with certain leases. Section 251 of the Act sets out restrictions on dealings with certain leases. Section 142 was inserted in the regulation by the *Planning and Development Amendment Regulation 2008 (no 1)* and prescribes those leases that are exempt from the Act, section 251 in accordance with section 251(3) which was inserted by the *Planning and Legislation Amendment Act 2008*. Section 251 (3) specifies that a regulation may exempt a lease from section 251 whether generally or in relation to a particular dealing.

A five year transfer restriction is applied by section 251 of the Act because of the policy view that anyone receiving a competitive advantage by acquiring a lease of land by direct sale should be bound to develop and use that land for the purpose for which it was granted. A period of 5 years was decided as the appropriate period within which that could be expected to occur. After that 5 year period, leases can be transferred, subject to other provisions of the Act (eg: concessional lease restrictions).

Clause 8 adds to the list of leases that are exempt from restrictions on dealings under section 251 of the Act. New paragraph (f) is in the same terms as the present paragraph (c). New paragraphs (c) and (d) exempt leases granted over contiguous land, both public land and unleased land other than public land.

However, the 5 year restriction on transfer is problematic for the direct sale of contiguous land leases. This is because the offer of a lease of contiguous land always contains a condition that it be consolidated with the applicant’s existing lease. When the consolidation occurs, the consolidated lease inherits the 5 year restriction on transfer which is an unintended and unreasonable consequence of a direct sale in these circumstances.

Unlike other types of direct sales, the direct sale of contiguous land may be considered where it would resolve an encroachment to allow unit titling, or it would facilitate the achievement of a good planning outcome, and the site is not viable for separate lease (for example, the site is too small or is land locked).

The direct sale of land, as contiguous land, occurs for all types of leases. Current proposals for contiguous land direct sale include an estate development (North Watson) where a substantial track of land is not suitable for separate lease and the best planning outcome would be to incorporate the land into the estate for development. In any of the possible contiguous land scenarios, to restrict the transfer of land (i.e. the consolidated parcel including the existing lease and the contiguous land) for 5 years after the grant, would unreasonably impede the processes that the contiguous land is being granted to support (for example, unit titling resulting in the sale of units, estate development resulting in subdivision and the sale of individual blocks, commercial trade in an existing commercial lease).

The Act contains other provisions which restrict dealings in relation to concessional leases. No change is proposed to these provisions which will remain and appropriately continue to regulate dealings in concessional leases.

New paragraph (e) exempts a lease granted by direct sale under section 238(1)(d) of the Act if the lease is mentioned in section 130(1)(a) (b) or (c) of the regulation and sold for market value. Leases in section 130(a) to (c) include a lease offered at ballot or auction and not sold, and a lease sold at ballot but the contract of sale is ended before the lease is granted under the contract. For similar reasons to above, these types of direct sales were inadvertently caught by the restrictions imposed by section 251 of the Act. It is not appropriate that such leases have a restriction on their dealings when they are sold for market value.

**Clause 9 – Section 204(1)** – substitutes the words “community organisation “ for the words “community organisation for community use” as a consequence of the amendment of section 112 by clause 7 above.

**Clause 10 – Section 210(1)(b)** – substitutes a new section 210(1)(b) and note to remove the reference to “community use” as a consequence of the amendment of section 112 by clause 7 above.

**Clause 11 – Section 211(1)(b)** – substitutes a new section 211(1)(b) to remove the reference to “community use” as a consequence of the amendment of section 112 by clause 7 above.

**Clause 12 – Schedule 1, section 1.99C etc** – inserts the words “a block in” after the words “the boundary of “ in sections 1.99C, 1.99F, 1.99K, 1.99Q, 1.99U and 1.99V of Schedule 1 of the regulation. Clause 12 is a technical amendment which ensures consistency of language in Schedule 1. Other sections in Schedule 1 refer to the boundary of a *block* and not just the boundary. The change has no practical effect on the way the provision is currently applied.

**Clause 13 – Schedule 20, modification 20.1, new section 429EAA and 429EAB** – modifies the Act as permitted by section 429 of the Act. Section 431 of the Act requires section 429 and regulations made under section 429 to cease two years after the commencement of the Act (i.e. two years after 31 March 2008). Section 429 and regulations under this section are not saved by section 88 of the *Legislation Act 2001* (because of the exception in section 88(2) of the

Legislation Act). As such, the modifications made by this clause are temporary. It is proposed to make these Act modifications permanent by future Act amendment.

Clause 13 modifies the Act to insert new section 429EAA and 429EAB.

#### Section 429EAA Modification - s 246 (Payment for leases)

Modifies the Act to insert new paragraphs (b) and (c) in section 246(3). Under section 246 the planning and land authority must not grant a lease other than for payment of an amount that is not less than the market value of the lease. New paragraphs (b) and (c) of s246(3) clarify when an entity is taken to have paid not less than the market value for a lease. The present s246(3) makes it clear that payment for a lease can include a combination of money and infrastructure or works. However, the infrastructure or works must be provided on the sale lease and not another lease. New paragraphs (b) and (c) expand section 246(3). Under modified s246(3) an entity pays an amount that is not less than the market value of a lease if:

(a) the entity pays less than the market value of the lease (the **monetary component**) ; and

(b) the entity provides another component (a **non monetary component**) comprising:

- (i) infrastructure or other work in relation to the lease or another lease; or
- (ii) 1 or more of the following under a deed or agreement with the Territory or Territory authority:
  - (A) goods;
  - (B) services;
  - (C) works; and

(c) the total value of the monetary component and the non monetary component is not less than the market value of the lease.

#### Section 429EAB Modification – s246 (Payment for leases)

Modifies the Act to insert section 246(3A) in the Act for similar reasons to those mentioned above for section 429EAA. Under section 246(2)(e), s246(1) does not apply to the grant of a lease prescribed by regulation for which the amount prescribed by regulation has been paid. New section 246(3A) makes it clear that the amount prescribed by regulation can be comprised of a monetary component and a non monetary component as described in new s246(3A)(b).