2009

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development Amendment Regulation 2009 (No 10) SL2009-39

EXPLANATORY STATEMENT

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

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 10)

EXPLANATORY STATEMENT

Overview

This statement applies to the *Planning and Development Amendment Regulation 2009 (No 10)* (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 a $14.7b *Building the Education Revolution* funding package which is a component of the $42b *Nation Building and Jobs Plan* (the Commonwealth Plan), which is providing a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn. The funding for the Commonwealth Plan is the subject of the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth).

The ACT Government has also allocated significant additional stimulus funding for various school projects to help counter the effects of the economic downturn on the ACT economy. Among the projects to be funded are P-10 schools (i.e. schools catering for preschool to year 10 on the one campus) to be built at Harrison and Kambah. The Government previously announced these new schools as part of the *Towards 2020: Renewing our schools* policy initiative, which is bringing significant reform to the ACT's public education system, and will ensure access to a range of high quality public schools for Canberra students. The Government's '*Towards 2020'* policy and the decision to build the Harrison and Kambah P-10 schools has been the subject of extensive community consultation.

Given the availability of the ACT government project funding and the importance of the proposed school projects it was deemed necessary to amend the *Planning and Development Regulation 200*8 (the regulation) in order to limit the potential for the construction of these two major school projects to be substantially held up as a result of delays in the development assessment or appeals process.

The *Planning and Development Amendment Regulations 2009* Nos 2 and 4 introduced development approval exemptions and limited public notification for a wide range of building projects at existing schools. This was to ensure that the Canberra community could receive the substantial but strictly time-limited funding under the Commonwealth's *Building the Education Revolution* funding package and associated Territory stimulus funding measures.

The proposed law allows the Minister for Planning to declare a former school site, or a site adjacent to a school, to be an 'existing school'. This is intended to deal with a limited number of school developments – in particular the Harrison and Kambah P-10 schools, but possibly others should a need arise, to ensure that the development will be subject to the recent amendments to the regulations in relation to schools. This enables these projects to be correctly seen as maintenance of effort in relation to building programs for school campuses – failure to deliver such

programs could result in loss of Commonwealth funding under the stimulus package.

It was always intended that these schools should be covered by the *Planning and Development Amendment Regulations 2009* Nos 2 and 4. However, it has been decided that the proposed law is necessary for a very small number of schools to avoid doubt that these can be covered by the regulation. The proposed law therefore extends the existing provisions in the regulation to a school which is declared by the Minister for Planning to be an existing school.

In summary, the effect of the proposed law is as follows:

1. *For school developments subject to development approval*

   School developments which are undertaken on a school site declared by the Minister to be an existing school, and which are included in items 7 and 8, schedule 2 of the regulation will:

   - require notification to adjoining premises only, with a notification period of 10 days
   - not be subject to 3rd party appeal in relation to the DA decision
   - be time limited to expire on 31 March 2013

2. *For school developments that are exempt from development approval*

   School developments which are undertaken on a school site declared by the Minister to be an existing school, and which is a development or activity covered by subdivision 1.3.6A.2, schedule 1 will:

   - not require development approval
   - not be subject to third party appeal (as no decision on development approval is required, there is no reviewable decision under schedule 1 of the *Planning and Development Act 2007*)
   - be time limited in some circumstances (s1.99C and s1.99D expire on 31 March 2013; other exemption provisions for minor structures and activities are not time limited by the existing regulation)

Exemptions for straightforward developments

A key goal of the Government's reform of the planning system and the introduction of the *Planning and Development Act 2007* (the Act) was to enhance the timeliness, transparency and efficiency of the planning processes. One of the ways that the Act achieves this goal is by allowing straightforward developments of low significance to be exempt from requiring a development approval (DA) (see Act, s 133). This recognizes that there is little value added by requiring a DA in such cases, given that typically the DA process would simply verify that the development is compliant with the relevant codes, but would not enhance the quality of the proposed development. The Act provides for the removal of the need to obtain development approval for such straightforward or minor projects, for example, for new code compliant single residences, and minor structures such as sheds, garages and pergolas etc. Applying this approach, Division 1.3.6A (Exempt

developments – schools) of the regulation lists a range of school developments and structures that are exempt from development approval.

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 (the Act, Division 7.3.4). 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 the objective of stimulating the economy, the Government chose the option of expediting development applications for school projects which are not exempt development and therefore, still require development approval, by temporarily limiting the public notification requirements for such applications.

Under section 152 of the Act the authority must publicly notify certain types of development applications. Section 152(1)(a) requires that 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 of the Act (Public notice to adjoining premises – i.e. “limited” public notification). 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 proposed law has the effect of applying limited public notification to the school development application matters specified in items 7 and 8 of schedule 2 of the regulation to a school declared by the Minister to be an existing school under s1.96A(1)(b).

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 (i.e. limited public notification). In addition, item 1 of schedule 3 of the regulation (Merit track matters exempt from third-party ACAT review) provides that a development to which schedule 2 applies is exempt from third party appeals. Items 7 and 8, schedule 2 only apply to projects that are funded by a ‘declared funding’

program (i.e. an economic stimulus program see s405, 406). Thus, the amending regulation means development applications relating to existing schools are not subject to third party appeals.

The streamlining of the public notification requirements and the elimination of third party appeals for those matters means that schools can take advantage of the Commonwealth and Territory stimulus 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 in a timely manner, and any risk of losing access to the funds due to delays is minimised. It should also be noted that the removal of third party appeals under the proposed law is temporary and will expire on 31 March 2013

The exemption of third party appeals in relation to the school projects in this amending regulation are not the first exclusions of this sort 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 for school building projects, both under the Commonwealth Plan and Territory Government's *Towards 2020: Renewing our schools* policy, 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.

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 10)*.

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

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

Clause 4 – Schedule 1, section 1.96, definition of *existing school* – the existing definition is omitted.

Clause 5 – Schedule 1, section 1.96A – a new section is inserted:

1.96A Meaning of existing school – div 1.3.6A

Subsection (1) (a) repeats the definition of existing school as used in the previous s1.96, and adds a new subsection (1)(b) which includes in the definition of existing school to include land that

(i) either:

(A) has been a school that existed before the commencement day; or

(B) is adjacent to an existing school; and

(ii) is being developed or redeveloped to be, or be part of, a school; and

(iii) is declared by the Minister to be an existing school,

Subsection (2) provides that the Minister's declaration is a notifiable instrument.