2012

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2012 (No 3)

Subordinate law 2012-23

EXPLANATORY STATEMENT

Presented by

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EXPLANATORY STATEMENT

This explanatory statement relates to the Planning and Development Amendment Regulation 2012 (No 3) (the amending regulation) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the regulation and to help inform debate on it. It does not form part of the regulation and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Terms used

In this explanatory statement the following terms are used:

> "the Act" means the *Planning and Development Act 2007*;
> "the regulation" means the *Planning and Development Regulation 2008*;
> "the amending regulation" means the amending regulation that is the subject of this explanatory statement;
> "EIS" means "environmental impact statement". An EIS must be completed before a development application can be made for approval of a development proposal assessable in the impact assessment track (s210 of the Act); and
> "s211" means s211 of the Act which permits the Minister to waive the requirement for the preparation of an EIS.

Background

Prior to undertaking development in the ACT, a proponent must submit a development application (unless exempt under the regulation) and obtain development approval for the proposal.

Under the Act, development applications are assessable in either the:

- code assessment track – ie matters that are relatively simple and likely to have minimal impact on the local community or environment (division 7.2.2 of the Act);
- merit assessment track (division 7.2.3) – ie matters that are relatively complex with potentially significant impacts on the local community or environment; or
- impact assessment track (division 7.2.4) – ie matters that are the most complex and have the potential to have major impacts on the local community or environment.

Development proposals must be assessed in the impact assessment track if they are of a kind listed in schedule 4 of the Act, identified as impact assessable in the relevant development table of the territory plan or is the subject of a Minister declaration. Refer to section 123 of the Act and also to sections 124, 124A, 125 and Schedule 4.

An Environmental Impact Statement (EIS) must be prepared on the relevant development proposal before a development application can be made (s127 of the Act) subject to the following exception. The requirement to prepare an EIS does not apply if the Minister exempts the proposal from this requirement under s211 of the Act. The s211 exemption is a notifiable instrument (s211(2)).

Section 211 of the Act gives the Minister discretionary powers to exempt a development proposal from the requirement to include an Environment Impact Statement (EIS) as part of the development application. The exemption may be granted on the basis that the Minister is satisfied that the expected environmental impact of the proposal has already been sufficiently addressed by another study.

Section 211 of the Act and other elements of the impact track assessment process were amended by the *Planning and Development (Environmental Impact Statements) Amendment Act 2010* effective 2 February 2010. The amendment inserted section 211(3) into the Act. The new section 211(3) permits the regulation to prescribe criteria to be taken into consideration in deciding whether a prior study sufficiently addresses the expected environmental impacts of the proposed development.

The decision as to whether a previous study is adequate or not is not subject to ACAT merit review. This is because the decision is not a decision to grant or refuse a particular approval; it is rather a decision about whether a particular circumstance exists.

Overview

The amending regulation inserts new section 50A into the regulation. New s50A prescribes the criteria for section 211(3) of the Act.

The criteria in new s50A provide greater clarity and certainty for proponents and the wider community. The new section does this by setting out the matters the Minister must take into consideration in deciding whether the possible environmental impacts of the development proposal have been sufficiently examined by a prior study. The criteria also provide the Minister with guidance on matters which must be considered in assessing the adequacy of prior studies.

The new criteria require consideration of whether the:

- qualifications, expertise and experience of the person who conducted the prior study are sufficient;
- prior study contains sufficient detail to allow assessment of the likely environmental impacts of the proposed development;
- prior study has been subjected to public consultation, as part of statutory requirement;
- prior study is more than 5 years old; and
- information in a prior study is still current, as verified by a qualified person.

The prescribed criteria inserted by the amending regulation are criteria that the Minister must take into consideration when exercising the discretion under s211. The criteria do not function as a simple ‘checklist’. In other words, if all the

prescribed criteria are met it does not mean the exemption must be automatically made. The Minister can only make the exemption if satisfied that the criterion in s211(1) is met, ie that the "expected environmental impact of the development proposal has already been sufficiently addressed by another study ..." Also the prescribed criteria do not amount to an exhaustive list.

An example of a circumstance where a section 211 exemption could be appropriate is the following. A development proposal that enlivens s211 may relate to matters of national environmental significance (MNES) as defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth). In this case, an assessment may have been completed as required by the Environment Protection and Biodiversity Conservation Act. In this case then a section 211 exemption may be appropriate and one which would permit the development application to proceed quickly without having to do an EIS.

Regulatory Impact Statement

Section 36(1)(b) of the Legislation Act states that a regulatory impact statement is not required for matters that do not adversely affect people's rights or impose liabilities. This amendment is a regulation of this type and as such a regulatory impact statement has not been prepared. The amending regulation simply informs the operation of s211 of the Act. The clear and consistent operation of this provision is to the benefit of proponents and the wider community.

The amending regulation might also be considered to be one that only clarifies the operation of s211 of the Act and as such does not fundamentally affect its operation. If this is correct, then for this reason also a regulatory impact statement is not required as per s36(1)(e) of the Legislation Act.

Outline of Provisions

Clause 1 Name of the regulation

Clause 1 names the regulation as the Planning and Development Amendment Regulation 2012 (No 3)

Clause 2 Commencement

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

Clause 3 Legislation amended

Clause 3 notes that the regulation amends the *Planning and Development Regulation 2008.*

Clause 4 New section 50A

Clause 4 inserts new section 50A in the Planning and Development Regulation pursuant to section 211(3) of the Act.

New section 50A sets out five criteria (50A (a), (b), (c), (d), (e)) that the Minister must consider in exercising the discretion under s211 of the Act. In summary, under s211

the Minister can waive the requirement for an EIS on the grounds that an adequate prior study has already been done.

New section 50A (a) requires the Minister to consider whether the author of the prior study was appropriately qualified and had relevant expertise and experience in relation to the environmental values of the relevant land.

New section 50A (b) applies to the consideration of prior studies that are not directly related to the new development proposal. New s50A(b) requires the Minister to consider whether the prior study has sufficient detail to allow assessment of the likely environmental impact of the proposed development.

New section 50A (c) requires the Minister to consider whether the prior study was required to undergo public consultation under another Act or as part of government policy development.

New section 50A (d) requires the Minister to check if the prior study is more than 5 years old and if it is to consider not making an exemption on the basis that the prior study is too old.

New section 50A (e) applies to the consideration of prior studies that are more than 18 months old. New s50A (e) requires the Minister to consider whether an appropriately qualified independant analyst has verified that the information in the prior study is still current.