

2020

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PLANNING LEGISLATION AMENDMENT BILL 2020

EXPLANATORY STATEMENT

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EXPLANATORY STATEMENT

Introduction

This explanatory statement relates to the Planning Legislation Amendment Bill 2020 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

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

Background

The ACT's planning legislation (and particularly the *Planning and Development Act 2007*) provides a framework for managing the impacts of the built environment on the natural environment and the amenity of residents, amongst other things. It establishes a 'planning system' that includes:

- A 'development assessment' system to assess the potential impacts of proposed development and changes of land use
- A 'Territory Plan' against which development proposals are assessed
- A process by which the Territory Plan can be amended
- Appeal rights for some decisions made under planning legislation.

Planning legislation limits and manages environmental impacts in a number of ways. For example, development likely to have more significant environmental impacts is channelled into an 'Impact Track' assessment stream that requires additional analysis of environmental impacts through an Environmental Impact Statement (EIS).

Members of the community can interact with the planning system in a number of ways. These include:

- Objecting to development proposals during the 'public notification' process
- Making submissions on proposed changes to the Territory Plan
- In certain circumstances, appealing development approvals to the ACT Civil and Administrative Tribunal (ACAT) or Supreme Court.

Other legislation also addresses the environmental, amenity and other impacts of the built environment. For example, the *Residential Tenancies Act 1997* requires that under certain circumstances, advertisements for rental properties must include a declaration of the energy efficiency of the rental property. This has similar intent to planning legislation in that it intends to limit the environmental impact of the built environment, in this case through changing consumer behaviour.

Overview

The Bill improves the environmental outcomes of planning and residential tenancies legislation by:

- Ensuring that greenhouse gas emissions and the ACT's emissions targets, are considered during the assessment of development proposals under the 'Merit Track' and the 'Impact Track'
- Requiring development proposals that have high greenhouse gas emissions to produce an EIS and therefore also fall under the more-intensive 'Impact Track' assessment process. This recognises that the environmental impacts of greenhouse gas emissions are equally significant in their impact to a number of other matters that already require an EIS under Schedule 4 of the *Planning and Development Act 2007*
- Allowing existing energy efficiency disclosure ratings to be used in advertisements for rental properties for up to 18 months after they were created. This will increase the level of energy efficiency rating disclosure for rental properties, which is currently very low
- Introducing ACAT appeal rights for EIS Exemption approvals

The Bill improves the community's ability to engage with the planning system by:

- Extending the public notification of development applications over the Christmas/New Year holiday period to ensure community members don't miss out on a chance to make a submission.
- Restoring third-party appeal rights for development approvals that permit the removal of a tree that is a Registered Tree for the purposes of the *Tree Protection Act*, where those appeal rights have been removed by regulation.
- Increasing the availability of key information the community needs in order to effectively engage in the planning system, for example by requiring the planning and land authority to keep development application public notification plans online for five years
- Allowing the planning and land authority to trigger a second round of public notification of a development application where further information is provided by the applicant. This includes new powers for the authority to re-refer the application to referral entities (e.g. utilities) and the Design Review Panel
- Expanding pre-application consultation to major development proposals in newer suburbs in Belconnen, Gungahlin and the Molonglo Valley, so that local residents have a chance to have their say in the same way as residents in other parts of Canberra
- Making disallowable a decision to apply 'interim effect' to a Territory Plan Variation. 'Interim effect' allows a Territory Plan Variation to be temporarily brought into force prior to the usual consultation and Assembly Select Committee processes.

The Bill also improves the outcomes of the planning system for the wider community by:

- Giving the planning and land authority a power to reject a development application where the application, or further information submitted later in the development assessment process, contains false or misleading information
- Making disallowable a decision by the Minister to ‘call-in’ a development application for Ministerial decision. A ‘call-in’ essentially over-rides normal assessment processes, which do not permit Ministerial involvement
- Making disallowable a ‘public interest’ decision by the Minister to allow the planning and land authority to consider a development application to de-concessionalise land. De-concessionalisation of community and recreation land has been controversial over many years. Many in the community feel that a steady stream of approvals for de-concessionalisation is running down the supply of low-cost land available for community and recreation purposes, with no net community benefit
- Widening the scope of the Design Review Panel to cover large retail developments
- Addressing a shortcoming in arrangements for Legislative Assembly Select Committee inquiries into Territory Plan Variations. Currently, where the Planning Minister refers a Variation to the Standing Committee late in the term of the Assembly, election timing may mean it is impossible for the Committee to hold an inquiry on a Variation that warrants one.

Human Rights

This Bill has minor impacts for the ‘right to freedom of expression’ and the ‘right to take part in public life’. The Bill:

- Provides several expansions to the ability of community members to engage in the planning system, including greater appeal rights – see Clauses 15, 19, 22, 25 and 27
- Provides easier access to information held by the ACT Government about planning system matters – see clause 4
- Makes a minor expansion to an existing restriction on the contents of advertisements for residential rental properties – see Clause 28.

No other human rights are impacted.

Outline of Provisions

Clause 1 Name of Act

This clause names the Act.

Clause 2 Commencement

This clause provides that the bulk of the Act will commence on the day after its notification day, however clause 4 and part 4 have a delayed commencement to allow the Government to advise industry and undertake other implementation (e.g. regulatory and information technology changes).

Clause 3 Legislation amended

This clause states the legislation that is to be amended: the *Planning and Development Act 2007*, the *Planning and Development Regulation 2008* and the *Residential Tenancies Act 1997*.

AMENDMENTS TO THE *PLANNING AND DEVELOPMENT ACT 2007*

Clause 4 Inspection etc of public register and associated documents

Section 29 (1)

The existing section 29 requires the planning and land authority to make the public register and associated documents available for public inspection and to allow people to make copies or take extracts from the register and associated documents.

The public register and associated documents contain information such as plans submitted with a development application and whether or not a development application has been approved.

This clause requires parts of the public register and associated documents to be made available on the planning and land authority's website. It also specifies the time period for which documents must be kept on the authority's website.

This is new availability and is additional to current availability, which is by inspection at the authority's offices only.

Clause 5 Public consultation—notification

New section 63 (1) (ca)

This clause is consequential to clause 6. It relocates an existing provision from section 64 to section 63.

Clause 6 Section 64

The existing section 64 of the Act sets out requirements for the public notification of a draft Territory Plan variation, and includes the trigger for interim effect. Interim effect temporarily bypasses normal consultation and Assembly scrutiny processes by bringing the variation into force immediately.

Section 64 is the first of two points in the draft plan variation process that the planning and land authority can bring interim effect into force.

The clause changes the trigger mechanism for interim effect from a statement in the 'consultation notice' to a separate 'interim effect declaration', which is a disallowable instrument. This will ensure that interim effect cannot be used to bypass the will of the Assembly.

Clause 7 Effect of draft plan variations publicly notified

Section 65 (1)

This clause is consequential to clause 6.

Clause 8 Section 65 (2)

This clause is consequential to clause 6.

Clauses 9 to 11

These clauses have the same effect as clauses 5 to 7, but at the later 'public availability notice' stage of the draft plan variation process.

Clause 12 Committee fails to report promptly on draft plan variations

Section 75 (1) (c) (i) and (ii)

This clause addresses a shortcoming in arrangements for Legislative Assembly Standing Committee inquiries into draft plan variations. Currently, where the Planning Minister refers a draft plan variation to the Standing Committee late in the term of the Assembly, election timing may make it impossible for the Standing Committee to hold an inquiry on the variation. The new Committee formed after the general election would also not have time to inquire due to the time elapsed between the referral and the first sitting of the new assembly. (Typically, the Standing Committee has 6 months to report on the Variation if it chooses to accept the referral.)

The clause addresses this shortcoming by commencing the timeframe to report on the first sitting day of the Assembly after the general election, where the referral is made within 4 months before a general election.

Clause 13 Merit track—considerations when deciding development approval

New section 120 (ga)

The existing section 120 sets out considerations a decision maker must take into account if deciding a development application in the 'Merit Track'.

This clause ensures that the greenhouse gas emissions emitted by a development are considered during the assessment of a 'Merit Track' development application. It does so by introducing a requirement to consider the impact of the development on the ability of the ACT to meet its targets for greenhouse gas emissions reduction under the *Climate Change and Greenhouse Gas Reduction Act 2010*.

Clause 14 Impact track—considerations when deciding development approval

New section 129 (ga)

The existing section 129 sets out considerations a decision maker must take into account if deciding a development application in the 'Impact Track'.

This clause ensures that the greenhouse gas emissions emitted by a development are considered during the assessment of an 'Impact Track' development application. It does so by introducing a requirement to consider the impact of the development on the ability of the ACT to meet its targets for greenhouse gas emissions reduction under the *Climate Change and Greenhouse Gas Reduction Act 2010*.

Clause 15 New sections 141A and 141B

This clause introduces a new power and a new requirement for the planning and land authority during the development assessment process, if further information to a development application is received under s141 of the Act.

New section 141A provides that:

- if the application was previously referred to referral entities, the authority may re-refer the application (including the further information) to those referral entities; and
- if advice was previously provided by the design review panel, the authority may provide the panel with another opportunity to consider the application (including the further information).

New section 141B requires the authority to re-notify the community of the development application (including the further information) if certain conditions are met.

The approach taken in the new sections is substantially the same as existing powers and responsibilities of the authority when amending development applications.

Clause 16 Section 142

The existing section allows the planning and land authority to reject a development application where the applicant fails to provide further information that is requested. The clause extends this power to also cover rejecting a development application in cases where the development application or further information provided is false or misleading. This is in addition to, and intended to supplement, existing powers under the Criminal Code.

Clause 17 Direction that development applications be referred to Minister New section 158 (1A)

The existing section 158 of the Act allows the Planning Minister to direct the planning and land authority to refer a development application to the Minister for decision. This is known colloquially as a ‘call-in’.

A call-in is a substantial departure from normal assessment and decision by the independent planning and land authority. There is a risk that call-ins can be seen to politicise the planning process or lead to conflicts of interest in decision making. This risk has eventuated in another Australian jurisdiction.

This clause makes the ‘call-in’ direction disallowable, which will allow the Assembly to restrain any future excessive or improper use of the power.

Clause 18 No decision on application unless consideration in public interest Section 261 (4)

The existing section 261 of the Act specifies that a development application to convert a Crown lease from a concessional lease to a market value lease cannot be decided before the Minister decides whether considering the application is in the public interest. Concessional leases are Crown leases that were granted for below market value for an activity with community benefit such as a recreation or community facility.

This clause requires a decision by the Minister that considering the application is in the public interest to be made in a disallowable instrument. A decision that it is not in the public interest remains notifiable.

Clause 19 Regulation-making power

New section 426 (6)

The existing section 426 sets out the powers for making regulations under the Act.

This clause would have the effect of removing the power to make regulations that exempt certain planning approvals from third-party ACAT review rights – i.e. in those cases, the review rights will revert to those specified in the Act.

The practical effect of this clause is to invalidate certain exemptions from ACAT review currently granted by the *Planning and Development Regulation 2008*, where the exemptions apply to planning approvals in the Merit Track or the Impact Track that allow the removal of a tree that is a registered tree for the purposes of the *Tree Protection Act 2005*.

Note that removal of a registered tree also requires a separate approval under the *Tree Protection Act 2005*. This separate approval is unaffected by this Bill.

Clauses 20 and 21

These clauses are consequential to clause 19.

Clause 22 Schedule 1, item 15, column 2

The existing chapter 13 of the Act provides for the review of decisions made under the Act. The existing section 407 provides a definition of reviewable decisions by reference to items in schedule 1, column 2.

Schedule 1, item 15 of the Act establishes ACAT appeal rights for a decision on an EIS exemption under s211H of the Act. Currently, it specifies that appeal rights only apply in the case the application for exemption is rejected. This does not permit environmental groups and members of the community to appeal to ACAT when an exemption is granted.

This clause expands the appeal rights to the grant of an EIS exemption. The existing appeal rights remain in place.

Clause 23 Development proposals requiring EIS—areas and processes

Schedule 4, part 4.3, new item 9

Schedule 4 of the *Planning and Development Act 2007* specifies which types of development proposals must be assessed under the Impact Track because the proposal's impacts are potentially significant enough to require an EIS. This clause adds a new type of development to this schedule – those proposals that are likely to result in greenhouse gas emissions of more than 1kt per annum.

The units and calculation methodology of emissions for the purposes of this clause are those used in the *Climate Change and Greenhouse Gas Reduction Act 2010* (see clause 24).

Clause 24 Dictionary, new definition of *greenhouse gas emissions*

This clause includes a new definition relevant to the Bill.

AMENDMENTS TO THE *PLANNING AND DEVELOPMENT REGULATION 2008*

Clause 25 Prescribed development proposal for community consultation— Act, s 138AE

Section 20A (2) (b)

The existing section 20A of the Regulation specifies which development proposals are required to undergo pre-application community consultation.

Proposals in some areas of Canberra are excluded through reference to plans in Schedule 1B of the Regulation. These areas are predominately either unbuilt land that is designated for future suburban development by the Future Urban Area Overlay or are areas that had this status until recently but are now new suburbs.

Community members in new suburbs have argued that the exclusion of their areas from pre-application community consultation is an unfair restriction of their ability to engage in the planning system. Further, the need for the Directorate to update the plans periodically and the infrequency of doing so has led to a situation where development proposals in some newer suburbs are required to undergo pre-application consultation while other proposals do not need to despite being very similar in respect to environmental and amenity impact.

This clause addresses these problems by amending the reference to the plans in Schedule 1B so that development proposals less than 100m from a dwelling are no longer excluded by the plans.

Clause 26 Section 20B

The existing section 20B of the Regulation specifies which development proposals are required to undergo pre-application consultation with the design review panel. This clause expands this requirement to cover larger retail developments in common urban zones. Industrial zones have not been included as retail developments in industrial zones have a lower amenity impact on the community.

Clause 27 Public notification period—Act, s 157, def *public notification period*, par (a)

New section 28 (2)

The existing section 28 of the Regulation sets the length of public notification of development applications under existing section 157 of the Act.

This clause excludes working days between 20 December and 10 January (inclusive) from the public notification period for development applications. Its effect is to extend the public notification period of development applications released on public notification during and immediately before the Christmas/New Year period.

AMENDMENTS TO THE *RESIDENTIAL TENANCIES ACT 1997*

Clause 28 Energy efficiency rating—advertising

Section 11A (1) (b)

When a residential property is advertised for rental, any current, valid and complete 'existing energy efficiency statement' must be disclosed in the advertisement (the existing section 11A of the *Residential Tenancies Act 1997*). The technical specifications determining currency, validity and completeness of the statement, for both rental disclosure and sale of premises disclosure, are determined by the *Construction Occupations (Licencing) Act 2004* and the *Construction Occupations (Licencing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2016*.

Section 12 of the Code of Practice states that currency means that:

“(iii) the energy efficiency rating is not older than 6 months since it was issued;
or

(iv) if the energy efficiency rating is older than 6 months since it was issued, it is accompanied by a statutory declaration...”

This clause extends the currency period without a statutory declaration, for rental disclosure only, to 18 months. The currency period for the sale of premises is not changed.

Clause 29 Section 11A (7), definition of *existing energy efficiency rating*

This clause is consequential to clause 28.