

2021

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PLANNING AND DEVELOPMENT AMENDMENT BILL 2021

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
Mick Gentleman MLA
Minister for Planning and Land Management**

PLANNING AND DEVELOPMENT AMENDMENT BILL 2021

INTRODUCTION

This explanatory statement relates to the Planning and Development Amendment Bill 2021 (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The 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 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.

BACKGROUND

The ACT Government is introducing a prohibition on the establishment of waste facilities in Fyshwick following consideration of development proposals for two major waste facilities. The prohibition will prevent the two proposals, and future proposals, from proceeding to lodge a development application and/or obtain development approval for waste facilities in Fyshwick.

The ACT Government has also indicated that it will be undertaking a planning policy and waste policy review of the need for land for waste facilities in the ACT in the future and the appropriate locations for such facilities. The outcome of the policy review will potentially lead to regulations being made to carve out certain types of waste facilities from the Fyshwick prohibition.

OVERVIEW OF THE BILL

The Bill amends the *Planning and Development Act 2007* (the Act) to prohibit the establishment of waste facilities in Fyshwick. The ban on new waste facilities, or expansion of existing facilities, is given effect through provisions inserted into the Act relating to *prohibited waste facility development applications*.

The Bill has the following features:

- Introduces the concept of a *prohibited waste facility development application* which means establishing a new waste facility or increasing the amount of waste handled at an existing waste facility.
- Provides that the planning and land authority (the authority) must not accept a *prohibited waste facility development application*, and if one has already been lodged, then provides that the authority must refuse the application.
- Provides an ability to make regulations so that sites or classes of waste facilities can be carved out from the prohibition in the future.
- Introduces a compensation safety net provision to ensure that any acquisition of property arising from the Bill is compensated on just terms.

Prohibition

The prohibition inserted into the Act prevents the authority from accepting a *prohibited waste facility development application* and requires the authority to refuse a *prohibited waste facility development application* if it has already been made to the authority.

Given the framework for development approval set out in the Act, the prohibition is targeted to the development application and approval process. The particular features of the ACT's leasehold system and exempt development provisions means that there is the potential for some minor facilities on particular blocks to being operations without being caught by the prohibition as they will not require a development application and approval.

Given the prohibition is targeted to major waste facilities in Fyshwick, which will almost certainly require works to be undertaken to establish, and these works will require development approval, it is considered the prohibition will be effective in achieving its purpose.

Regulation

The Bill also inserts an ability to make regulations into the definition of *waste facility* to allow for sites to be prescribed as not falling under the definition. This ability to make regulations has been inserted to allow for sites, or classes of facilities, to be 'carved out' from the general prohibition. It is envisaged that the regulations will be used to allow for small-medium facilities to be established in Fyshwick in the future, consistent with the industrial zoning of the division. A policy review into the types of facilities which could be allowed to be developed in Fyshwick in the future is underway.

Compensation safety net

The Bill includes compensation safety net provisions to ensure that the Bill meets the requirements of s 23 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*. Section 23 of the Self-Government Act provides that the Territory has no power to make a law in relation to an acquisition otherwise than on just terms. The Bill provides that if the Bill results in an acquisition of property, then reasonable compensation must be paid to the person.

HUMAN RIGHTS IMPLICATIONS

The Bill is drafted to be compatible with human rights as set out in the *Human Rights Act 2004* (HRA). The protection of human rights by the HRA applies to individuals and not corporations. At the time of drafting, the ACT Government is not aware of any individuals who will be negatively affected by having current development applications under assessment with the planning and land authority which must now be refused, with no right of review.

It is acknowledged that there may be a regulatory impact for lessees in Fyshwick who are individuals and who will no longer be able to lodge prohibited waste facility development applications. However, as these leases are in an industrial zoning area (not residential), this regulatory prohibition does not limit rights of individuals protected by the HRA.

SCRUTINY OF BILLS COMMITTEE PRINCIPLES

The prohibition on the establishment of new waste facilities in Fyshwick means that the planning and land authority cannot accept a prohibited waste facility development application, and if one has already been lodged, then it must be refused.

The existing scheme in the *Planning and Development Act 2007* (the Act) allows applicants to make an application to the planning and land authority (the authority) for development approval. There are various types of development described in the Act and the Territory Plan, including prohibited development and assessable development. The Act provides that the authority must decide a development application but does not confer a right to an approval to the applicant. The Act also provides that some applications must be refused (see ss 114(2)(b) and 162(3)).

The existing provisions of the Act and *Planning and Development Regulation 2008* provide the framework for the review of decisions, including which types of decisions are reviewable and matters exempt from review.

The provisions of the Amendment Act are in accord with the existing framework of the Act, where some types of development are prohibited, and certain applications must be refused. As the Act does not confer a right of development approval to an applicant, the provisions of the Amendment Act do not unduly trespass on rights previously established by law. By expanding the types of development which are prohibited in a particular area, the Amendment Act is consistent with the general framework and object of the Act, being the orderly and sustainable development of the Territory. Given that there is a clear legislative intention to prohibit the establishment, or expansion, of waste facilities in Fyshwick and the terms of a prohibited waste facility development application are clearly defined, coupled with the fact that the Act does not confer a right to development approval, it is not considered necessary to attach review rights to these decision-making powers.

Planning and Development Amendment Bill 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Planning and Development Amendment Bill 2021**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Planning and Development Amendment Act 2021* (the Act).

Clause 2 Commencement

This clause provides that the Act will commence on the day after its notification day.

Clause 3 Legislation Amended

This clause is a formal provision identifying that the Act amends the *Planning and Development Act 2007*.

Clause 4 New part 7.2AA

Part 7.2AA Prohibited waste facility development applications

Clause 4 inserts a new part 7.2AA into the Act. New part 7.2AA gives effect to the ban on waste facilities in Fyshwick by introducing the concept of a *prohibited waste facility development application*. Under the provisions of the part, the planning and land authority must not accept a *prohibited waste facility development application*. This will prevent prohibited applications from being lodged with the authority for assessment.

New section 516 below deals with applications which have already been lodged for assessment with the authority and will become a *prohibited waste facility development application*.

New Section 137E Object of part

This section provides an object for new part 7.2AA to make the legislative intention of the provision clear. The object describes the intention of the part to limit the development of new waste facilities in Fyshwick.

New Section 137F Certain development applications for waste facilities prohibited

New section 137F(1) provides that the authority must not accept a *prohibited waste facility development application*.

New section 137F(2) provides definitions of key terms for the purposes of the provision, some of which are explored further below.

The term *prohibited waste facility development application* is defined as meaning an application for the development and use of a new waste facility, or for development at an existing facility which would increase the amount of waste handled on the land each year.

The term *waste facility* is another key term and is defined generally by reference to a site used for handling waste and further defined by Territory Plan terminology relating to different types of waste facilities. A site where waste handling occurs as an ancillary use, but

it is not the primary use of the site, is not included in the definition of *waste facility*. Examples are provided to assist the reader.

The definition of *waste facility* also includes a regulation-making power which allows for sites to be prescribed as not falling under the definition of *waste facility*. This regulation power has been inserted to allow for sites, or classes of facilities, to be ‘carved out’ from the general prohibition. It is envisaged that the regulation power will be used to allow for small-medium facilities, which are low impact, to be excluded from the prohibition following the completion of a policy review into the types of facilities which could be allowed to be developed in Fyshwick in the future.

Supporting definitions are provided for the following terms: *division*, *handle* and *waste*.

New Section 137G Compensation—safety net

This section is a saving provision to ensure that the provisions of new part 7.2AA do not offend s 23 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*. Section 23 of the Self-Government Act provides that the Territory has no power to make a law in relation to an acquisition otherwise than on just terms.

While the Bill does not provide that an acquisition of property will occur, it provides savings provisions if the operation of new part 7.2AA results in an acquisition.

New section 137G(2) provides that the Territory must pay a person reasonable compensation for the acquisition in accordance with the other provisions set out in the part.

New section 137G(3) provides that the Territory and a person may agree on the amount of compensation or other terms to satisfy the Territory’s obligation under (2).

New section 137G(4) provides that if no agreement is reached, the person may commence proceedings in a court of competent jurisdiction and recover from the Territory the reasonable compensation that the court decides.

New section 137G(5) provides guidance to the court in considering what reasonable compensation might be. The provision limits the heads of compensation to only those that would amount to reasonable compensation. In considering what is reasonable, the court must consider any payment or other terms already made by the Territory to the person and may also consider: the reasonable costs and losses incurred by the person in relation to a *prohibited waste facility development application* and the costs already incurred of developing land for that purpose.

The provision also provides that the court must not have regard to any loss of opportunity or future profit claimed by the person because of the acquisition as this is considered beyond the scope of what is reasonable compensation for the acquisition.

Prohibited waste facility development application is defined by reference to s 137F(2) and has the same meaning as for other provisions of the Amendment Act.

Clause 5 New chapter 27

Chapter 27 Transitional – Planning and Development Amendment Act 2021

Clause 5 inserts a new chapter 27 into the Act which deals with transitional matters relating to the introduction of the Bill. This chapter provides for development applications which have been made to the authority prior to the commencement of the Amendment Act but have not yet been decided by the authority.

New section 515 Meaning of commencement day—ch 27

This section provides that chapter 27 commences on the same day that the Amendment Act commences.

New Section 516 Prohibited waste facility development applications made before the commencement day

This section provides for development applications which have been made to the authority prior to the commencement of the Amendment Act but have not yet been decided by the authority or withdrawn by the applicant.

The section provides that the planning and land authority must refuse a *prohibited waste facility development application*. This is not a reviewable decision.

Prohibited waste facility development application is defined by reference to s 137F(2) and has the same meaning as for other provisions of the Amendment Act.

The effect of this provision is to require the planning and land authority to refuse a development application which has been made and is currently under assessment with the authority and becomes prohibited because of the Amendment Act.

New Section 517 Expiry—ch 27

This section provides that this chapter will expire five years after the commencement day. This means that they will no longer be visible in the Planning and Development Act after that time, however, the provisions will continue to have legal force and effect after expiry consistent with the general rule in s 88 of the *Legislation Act 2001*.

Clause 6 Dictionary, note 2

This clause inserts a reference in the Dictionary to the Self-Government Act as being a term defined in the Legislation Act. This is a consequential amendment to the reference to the Self-Government Act in new section 137G above.