Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 3)
Subordinate Law 2009-9

Prepared in accordance with the
***Legislation Act 2001,* section 34**

Circulated by authority of
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Overview

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2009 (No 3)* (the proposed law). The proposed law amends the *Planning and Development Regulation 2008* (the regulation) by inserting new items 7 and 8 at schedule 2 of the regulation. Items 7 and 8 prescribe the types of developments, at existing school sites that require only public notice to adjoining premises.

In accordance with section 152 of the *Planning and Development Act 2007* (the Act), and section 27 of the regulation, the planning and land authority (the authority) must publicly notify certain types of development applications. Under section 152 (1)(a) of the Act, 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 or section 153. Section 27 of the regulation prescribes public notification of merit track applications for sections 152(1) (a) and 152 (2). Section 28 of the Act prescribes the length of notification under section 153 (10 working days) and section 155 (15 working days).

The effect of item 4 of Schedule 1 of the Act is that third party appeals do not apply to merit track applications that must only be publicly notified under section 153 of the Act. Therefore, the addition of items 7 and 8 to schedule 2 by Clause 5 of the proposed law means that development applications relating to a development or activity included in these items are not subject to third party appeals.

Limiting the public notification period (to 10 working days), and the consequent effect on access to third-party appeal mechanisms, already applies to a range of development types in residential areas. Further the developments proposed by the amending regulation to be included in schedule 2, are developments or activities that would happen within the same residential environment as those developments already listed in schedule 2. As the majority of existing schools adjoin residential properties the inclusion of these new items into schedule 2 does not impose any greater or lesser rights than already applies for the residents in these areas. These provisions have been in operation since 31 March 2008 and no significant issues have arisen from members of the community or industry.

The proposed law enables school proposals to commence earlier and thereby meet the requirements of Commonwealth government funding[1] which prescribes strict timelines for proponents to adhere to. This will deliver one of the major objectives of the Commonwealth's government's policy that is 'To ensure that BER has the greatest impact on job creation, it is essential that construction and maintenance work commences as quickly as possible.'[2] The proposed law facilitates this outcome with the aim of minimising the impact of the current global financial crisis on the Territory (and Australia) while promoting the building of better educational resources

[1] *Building the Education Revolution* funding package including the *Appropriation (Nation Building and Jobs) Act (No. 1) 2008-2009* (Cwlth) and the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth)

[2] Australian Government, Building the education revolution: Primary schools, www.buildingtheeducationrevolution.gov.au , accessed 11 March 2009.

for use by all students. While Commonwealth funding is a large portion of funds available to schools the ACT government has also identified funding. Together with funds that schools may already have (in building funds etc) these two funding initiatives provide considerable scope for schools to undertake a wide range of building and development activities to the benefit of students and the wider community and industry through the commitment of expenditure.

Further the proposed law provides schools with an optimum planning tool that allows them to utilise their limited funds to achieve outcomes, such as new buildings, that deliver education outcomes as opposed to committing their limited financial resources to regulatory requirements. For example a school proposal, not prescribed in schedule 2, must be notified for 15 working days and attracts significantly higher administrative fee's for the notification process. In addition if an appeal is lodged then considerable time can be lost while the appeal process is completed and may mean that the proposal could be held-up for extended time periods. The proposed law's impact, while removing an opportunity for third-party appeal, could be considered minimal as the structure of the planning laws together with improved administrative practice has meant that the Authority's decisions have been upheld in over 97% of cases. This reflects the quality of the Authority's decision making processes, effectiveness and community approval of the planning regime. It is arguable that on balance the social and economic benefits that will flow from facilitation school building projects outweighs the minor loss of third party appeal rights.

A regulatory impact statement was prepared and tabled for the regulation and authorising law.

The following is information about the proposed law as required by section 35 of the *Legislation Act 2001*.

(a) The authorising law

The provisions in this proposed law are authorised by the following sections of the Act:

- section 152 What is *publicly notifies* for ch7?;
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

One of the primary objectives of the proposed law is to commence, as quickly as possible, construction and maintenance projects in schools so that the community can benefit from the Commonwealth governments funding initiative under the banner of the *Nation Building and Jobs Plan*: *Building the Education Revolution* (the *Commonwealth Plan*). It is understood that the *Commonwealth Plan* is intended to provide a stimulus to the national economy to mitigate the effects of the current global financial crisis and this will be delivered both in benefits to the school community but also to the greater community through the creation or retention of jobs. The *Commonwealth Plan* provides funding of various projects including a significant amount of funding for new or upgrading of buildings in existing schools.

"School" includes any primary (including pre-schools) or secondary government or non-government schools (including schools run by Churches or similar religious organisations).

The funds are granted on the condition that they be spent or be committed for spending within a short time period.

ACT Government funding will also be available for school related projects. Given the time frames required by the *Commonwealth Plan* and the availability of the ACT government project funding, it is necessary to amend the regulation in order to limit the potential for individual projects to stall as a result of delays that can be experienced if a development proposal attracts third-party appeals.

The second primary objective is to further streamline the legislative framework in relation to more minor developments on school premises. Limited public consultation already applies to other types of development that meets the parameters set out in schedule 2 of the regulation. The current amendments respond directly to the key objectives of the Act that is to provide a planning system that is simpler, faster and more effective.

As the proposed law also reflects policy objectives of the Act, a brief summary of the pertinent policy objectives behind the Act is provided.

Policy objectives behind the Act
One of the key policy objectives of the Government in the development of the Act was to make the planning system simpler, faster and more effective. Pages 2-3 of the Revised Explanatory Statement for the Act states that:

> "The Bill is intended to make the Australian Capital Territory's (ACT's) planning system simpler, faster and more effective. The Bill will replace the existing *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002*.
>
> The objective of the Bill is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles.
>
> The most significant change under the Bill is simplified development assessment through a track system that matches the level of assessment and process to the impact of the proposed development. As well as being simpler, more consistent, and easier to use, this system is a move towards national leading practice in development assessment …
>
> The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require development approval. …
>
> The new system will have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand

what does and does not need approval, what is required for a development application and how it will be assessed. …"

One of the methods for achieving a simpler, faster, more effective planning system was for the law to permit more developments to proceed without having to go through major public notification, that is to allow more developments to have limited (10 working days) notification opposed to major (15 working days) notification. This approach was noted on page 3 of the Revised Explanatory Statement for the Act:

"The proposed reforms are:
* More developments that do not need development approval
* **Improved procedures for notification of applications and third party appeal processes that reduce uncertainty** [emphasis added]
* Clearer assessment methods for different types of development
* Simplified land uses as set out in the territory plan
* Consolidated codes that regulate development
* Clearer delineation of leases and territory plan in regulating land use and development
* Enhanced compliance powers. …"

The objective for a simpler, faster, more effective planning system is relevant to concepts of "orderly development" and "economic aspirations of the people of the ACT" which are embedded in the object of the Act (section 6):

"6 Object of Act
The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—
(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
(b) in accordance with sound financial principles."

The Act has now been in operation since 31 March 2008 and through monitoring of the operation of the Act and in consultation with industry it is evident that no significant issues have arisen around the public notice to adjoining premises process.

In summary, the reforms are consistent with one of the principal aims behind the authorising law, which was to create a planning and development assessment system that is simpler, faster and more effective.

(c) Achieving the policy objectives

The mechanism to achieve the objectives of the proposed law is the legislative framework already encompassed in the *Planning and Development Act 2008* (as highlighted in the *Overview*) which provides that the regulation can prescribe those things that require only public notice to adjoining premises ('minor notification') and therefore do not attract third-party appeal opportunities. Schedule 2 of the regulation already limits public notification of certain merit track development applications. The proposed law amends schedule 2 so add to public notification requirements for certain developments on existing schools sites to the minor notification category.

The proposed law was anticipated in announcements made by the ACT Minister for Planning on 19 February 2009 and thereafter.

The proposed law includes items in schedule 2 that through a separate regulation have been identified as exempt development if they meet certain parameters specified in the regulation including the existing general exemption criteria (Part 1.2 of the regulation). If a proposal does not meet these parameters then a development application (DA) needs to be lodged in the merit track. As part of the DA process the application is required to be notified. The effect of including the range of these development proposals in schedule 2 is twofold: the notification period is reduced from 15 working days to 10 working days and secondly the DA does not provide for third-party appeals.

The proposed law is intended to support the objectives of the exempt development regulation that allows for certain development on existing school campus' to be DA exempt, so that the major policy objective of both regulations, that is to commence construction and maintenance projects in schools so that the community can benefit from the Commonwealth governments funding initiative, is achieved in an efficient and timely manner.

Where a development dies require a DA, it is important to note that although the DA does not have any third-party appeal opportunity all other elements of the development assessment process still apply. This means that for each DA that is prescribed in schedule 2:

- representations from any person/s can be made on the DA (s120 of the Act). The Authority must consider all representations when deciding on the development application.
- if relevant, the DA must be referred to the relevant entity/s (s148). The entity has 15 working days in which to respond.
- the time in which a decision must be made remains the same that is 30 working days if there are no representations otherwise 45 working days.
- the proponent can seek a reconsideration and review of the decision (s191). The Authority must make the decision within 20 working days.

Existing individual rights applicable to developments already covered by schedule 2 are maintained and are applicable to the new items. The proposed law protects rights in two ways. First by only including those items in schedule 2 that have defined parameters that have been formulated with reference to present community facilities zoning controls in the Territory Plan and in consultation with ACT Department of Education and independent schools representatives. The main rationale for the determination of the parameters was to ensure protection of the amenity of adjoining areas (for example, minimisation of overlooking or overshadowing) and to ensure school sportsgrounds and ovals could not be built on as they are commonly used outside school hours by other members of the community. Secondly, by the automatic expiry of provisions in the proposed regulation on 31 March 2013. This means that all items included into schedule 2 by the proposed law will cease to be a matter covered by schedule 2 which only requires public notice to adjoining premises.

- **(d) Consistency of the proposed law with the authorising law**

The authorising law, sections 152(1)(a) (c) and 152(2) of the Act entitle the regulation to prescribe merit track development applications that require only public notice to adjoining premises. Schedule 2 of the regulation sets out the merit track development applications that require only public notice to adjoining premises.

In accordance with section 152 of the *Planning and Development Act 2007* (the Act), and section 27 of the regulation, the authority must publicly notify certain types of development applications. Under section 152 (1)(a) of the Act, 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 or section 153. 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).

Third party appeals do not apply to merit track applications that must only be publicly notified under section 153 (see Schedule 1 item 4 of the Act). Thus, the addition of items 7 and 8 by the proposed law to schedule 2 mean development applications relating to these developments or activities are not subject to third party appeals.

The proposed law includes new matters that require only public notice to adjoining premises. As the parameters of those matters are tightly prescribed in the proposed law, the proposed law is consistent with the authorising law.

As indicated above, the proposed law is also consistent with the Government objectives behind the making of the Act and the objects stated in section 6 of the Act.

(e) The proposed law is not inconsistent with the policy objectives of another territory law.

The proposed law is not inconsistent with the policy objectives of another territory law. Although schedule 2 prescribes those things that only require public notice to adjoining premises a development application for these things must still comply with other applicable Australian Capital Territory legislation (see section 1.4 of schedule 1). For example, building approval under the *Building Act 2004* and that work is done by the holders of relevant licences issued under the *Construction Occupations (Licensing) Act 2004*.

(f) Reasonable alternatives to the proposed law

The major objective of the proposed law is to commence construction and maintenance projects in schools so that the community can benefit from the

Commonwealth governments funding initiative and to make the planning system simpler, faster and more effective.

The existing major public notification process for development applications allows all person/s, including potential third parties (neighbours etc), to comment on the proposals. Public notification allows 15 working days for comments, each representation must be considered and if representations are received then the decision making time is extended from 30 working days to 45 working days. Only third-parties who can demonstrate 'material detriment' (as defined in the Act) can consider an appeal against a decision on a DA. Consequently if an appeal is lodged against a DA then it is reasonable to expect considerable time delays to allow for the appeal process to be completed.

New legislation could have been passed but it was considered more efficient to use a legislative framework that was already in place, that is, section 152 of the Act relating to public notification requirements. By utilising this framework the proposed law removes those development applications, listed in schedule 2, from the major publication notification process.

Also utilising the existing legislative framework maximises the timeliness of the reforms and given that the funding for the matters included in the expanded schedule 2 must be spent within a set timeframe, it was considered the most expedient way of reforming the process to allow timely spending of the funds.

The parameters of the matters that can be included in schedule 2 are set out in detail in the proposed law thus ensuring the impact of the reforms is strictly applied to those matters that come under the umbrella of the special projects funding or are related to school projects.

(g) Brief assessment of benefits and costs of the proposed law

The reforms delivered by the proposed law are twofold - increased flexibility in applying the public notification framework and a reduced ability for third party appeals to disrupt development which will achieve significant benefits to the community through:

1. Reduction in timeframes and fees

The proposed law reduces timeframes by removing the need for major public notification and resultant third party appeals. Also, for a DA that requires public notification, fees are levied to cover the public notification process. Public notification fees range from $215 for minor notification to $830 for major notification. Thus, the proposed law reduces fees for those development proposals that will no longer require major notification.

2. Other general benefits

The proposed law broadens the circumstances in which minor public notification can occur.

This speeds up the development approval process and provides an opportunity for the planning and land authority to direct limited resources to the assessment of more complex development proposals. This has a flow-on benefit of delivering greater

efficiencies by allowing building to commence sooner and costs to be kept to a minimum.

The proposed law also represents a further implementation of the underlying principles of the planning reform as agreed upon by the community and Government[3], and is a timely response to the Commonwealth's $14.7b *Building the Education Revolution* funding package.

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

General principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to.

The matter that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is:

A reduction in ability to comment on proposed development

Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). The proposed law, by broadening the circumstances in which minor public notification may occur will reduce the public notification period to 10 days rather than 15 and remove third party appeal on such developments.

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

[3] For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008.*

make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas.

On balance the social and economic benefits that will flow to the ACT community from securing the substantial funding available under the Commonwealth Plan for school building projects outweigh the limited foregoing of third party appeal rights on development assessment decisions which will all relate to additions etc to existing schools and which are time limited to 4 years.

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.

Rights of judicial review under the *Administrative Decisions (Judicial Review) Act 1989* remain.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.