

Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 4)
Subordinate Law 2009-14

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 4)* (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 only require public notice to adjoining premises provided they are funded in full or part by the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth) or other declared funding program.

Clause 4 of the proposed law provides that the provisions only apply until 31 March 2013. After this date, all development applications for proposals covered by the proposed law will need to undergo the current normal assessment processes, irrespective of funding source or building type.

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.

The proposed law enables school projects to commence earlier and thereby meet the requirements of Commonwealth government funding¹ which prescribes strict timelines for spending of the funds. The proposed law will facilitate the achievement of one of the major objectives of the Commonwealth government's policy, that is, 'To ensure that BER² has the greatest impact on job creation, it is essential that construction and maintenance work commences as quickly as possible.'³

It is anticipated that the proposed law will assist in cushioning the Territory from the current global financial crisis and economic down-turn by allowing timely commencement of construction in schools as well as promoting the building of better educational resources for the use of all students in the Territory. While

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

² BER – Building the Education Revolution

³ Australian Government, Building the education revolution: Primary schools, www.buildingtheeducationrevolution.gov.au , accessed 11 March 2009.

Commonwealth funding is a large portion of funds available to schools, the ACT government has also identified additional funding for school projects.

The proposed law introduces a 'declared funding' program mechanism which will enable schools to develop proposals using a variety of funding sources including funding under the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth). For example, schools may fund a project entirely from Commonwealth 'declared funding', or use a combination of Commonwealth 'declared funding' and ACT 'declared funding', or Commonwealth 'declared funding' and/or ACT 'declared funding' together with their own building funds. If the proposal is funded in part from either another Commonwealth funding program and/or ACT funds the Chief Minister may declare that the work is a 'declared funding' program.

If a project is funded by a declared funding program the proposed law would then apply to any relevant development application by a school, that is, the application would require only minor public notification and third party appeals would be excluded from the decision on the application.

The declared funding program mechanism provides considerable scope for schools to undertake a wide range of building and development activities, without unnecessary delay, for the benefit of students and the wider community and industry. For example, a school proposal, not prescribed in schedule 2, must be publicly notified for 15 working days and attracts significantly higher administrative fees for the notification process. If a third party appeal is lodged against the decision on the development application, considerable time can be lost while the appeal process is completed and the proposal may be delayed for an extended time period.

The proposed law does remove the opportunity for some third party appeals. The impact of the proposed law, on planning outcomes, could be considered limited as the structure of the planning laws, together with improved administrative practice, has meant that the authority's decisions have been upheld by the Administrative Appeals Tribunal (now ACAT) in over 97% of cases. This reflects the quality of the authority's decision making processes, and the effectiveness and community approval of the planning regime. It is arguable that, on balance, the social and economic benefits that will flow from facilitating school building projects outweigh the loss of third party appeal rights in this case.

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 expedite the commencement of construction and maintenance projects in existing schools so that the community can benefit from the Commonwealth government's funding initiative under the banner of the *Nation Building and Jobs Plan: Building the Education Revolution* (the Commonwealth Plan). Those benefits include not just better educational facilities but also the stimulation of the economy.

The Commonwealth Plan is intended to provide a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn. This will be delivered both in benefits to the school community and also to the greater community through the creation or retention of jobs. The Commonwealth Plan provides funding for 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.

Historically school developments attract very few third party appeals, nevertheless the proposed law will ensure school projects are not unduly delayed through often lengthy appeal processes, and will provide greater certainty that the Commonwealth Plan timeframes can be met.

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 of the proposed law 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 and related third party appeal 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 2007* (as highlighted in the *Overview*) which provides that the regulation can prescribe those DAs that require only public notice to adjoining premises ('minor notification') and therefore, do not attract third party appeals. Schedule 2 of the regulation already limits public notification of certain merit track development applications. The proposed law amends schedule 2 to add certain developments on existing school sites that are funded in full, or part by the Commonwealth's BER plan or other declared funding program, 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 may be exempt development under schedule 1 of the regulation provided they meet certain parameters specified in the regulation. If, however, a development proposal does not meet a required parameter for some reason (e.g. a building does not comply with the specified height limitation), a development application must be lodged in the merit track. As part of the DA process, the application is required to be notified.

The effect of clause 5 of the proposed law by inserting new items 7 and 8 in schedule 2 is twofold: the public notification period is reduced from 15 working days to 10 working days for these types of development and secondly, there are no third party appeals from decisions on these types of DAs. Historically, development proposals on existing school sites have attracted minimal third party appeals.

The proposed law is intended to work alongside an existing range of DA exemptions for school developments all of which have the objective of expediting the commencement of construction and maintenance projects in schools so that the community can benefit from the Commonwealth Plan.

Where a development does require a DA and is listed in schedule 2, it is important to note that, although the DA does not have any third party appeal rights, 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/ies (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 a decision on the review within 20 working days.

The proposed law protects rights in two ways: firstly, by linking the development to declared funding sources, thus ensuring that projects deliver identified outcomes to schools and the community. And secondly, the provisions expire automatically on 31 March 2013. This means that all items included in schedule 2 by the proposed law will cease to be a matter covered by schedule 2 on that date.

(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. Merit track development applications listed in schedule 2 only require public notice to adjoining premises.

In accordance with section 152 of 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* is required and work is to be done by the holders of relevant licences issued under the *Construction Occupations (Licensing) Act 2004*.

(f) Reasonable alternatives to the proposed law

The two objectives of the proposed law are to expedite the commencement of construction and maintenance projects in schools so that the community can benefit from the Commonwealth Plan and other declared funding initiatives, and to make the planning system simpler, faster and more effective.

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. Utilising this framework, the proposed law for a limited time removes third party appeal rights from decisions on certain development applications by removing those types of applications from the major publication notification process.

The major public notification process under the Act allows all person/s, including potential third parties (neighbours etc), to comment on a proposal. Public notification allows 15 working days for comments and each representation must be considered by the authority. If representations are received, the authority's 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 which requires major public notification. Consequently, if an appeal is lodged against a DA then it is reasonable to expect considerable delays to the final outcome of the development application while the appeal process is completed.

Utilising the existing legislative framework maximises the timeliness of the reforms. Commonwealth funding for the items included in schedule 2 by the proposed law must be spent within a set timeframe and amending the regulation was considered the most efficient and expedient way of reforming the process to allow timely spending of those funds.

The parameters of the matters to be included in schedule 2 by the proposed law are set out in detail thus ensuring the impact of the reforms is strictly applied to those matters that come under the umbrella of the Commonwealth Plan and other declared funding initiatives.

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

The reforms delivered by the proposed law are twofold – less onerous public notification requirements 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 applies to the specified school building projects.

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 Government⁴, and is a timely response to the Commonwealth Plan.

(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 appeals on such developments.

Human rights issues are discussed above in the **Overview**.

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 projects on existing school sites 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.

⁴ For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008*.

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.