Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 10)
Subordinate Law 2009-39

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

Circulated by authority of
Andrew Barr MLA
Minister for Planning

Overview

This regulatory impact statement relates to the *Planning and Development Amendment Regulation 2009 (No 10)* (the proposed law) made under the *Planning and Development Act 2007* (the Act) and related policies and measures.

The proposed law amends the existing *Planning and Development Regulation 2008* (the regulation) by inserting a new section 1.96A (Meaning of *existing school* – div 1.3.6A) at schedule 1 of the regulation.

Section 1.96 at schedule 1 in the current regulation says that *'existing school'* means a government school, a non-government school or a childcare centre (i.e. a preschool) which existed at the commencement day for that provision (24 March 2009). This definition was inserted into the regulation by SL2009-8 *Planning and Development Amendment Regulation 2009 (No 2)* and SL2009-14 *Planning and Development Amendment Regulation 2009 (No 4).* Regulatory impact statements were prepared for each of these subordinate laws when they were made.[1]

The new section 1.96A retains the current definition of *existing school* but extends it by allowing the Minister to declare land to be an existing school if the land is:

- a former school site which was a school before the commencement date; or
- land adjacent to a current school site

The Minister's declaration will be a notifiable instrument. The Minister intends to declare two sites, but it is possible that a third site may be declared.

On 3 February 2009, the Commonwealth announced a $14.7b *Building the Education Revolution* funding package which is a component of the $42b *Nation Building and Jobs Plan* (the Commonwealth Plan), which is providing a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn. The funding for the Commonwealth Plan is the subject of the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth).

The ACT Government has also allocated significant additional stimulus funding for various school projects to help counter the effects of the economic downturn on the ACT economy. Among the projects to be funded are schools to be built at Harrison and Kambah. These are "P-10" schools which provide education to children from pre-school to year 10 (i.e. the integrate primary and high school functions on the one campus). The Government previously announced new Harrison and Kambah P-10 schools as part of the *Towards 2020: Renewing our schools* policy initiative, which is bringing significant reform to the ACT's public education system, and will ensure access to a range of high quality public schools for Canberra students. The

[1] The Regulatory Impact Statements are available on the Legislation Register. For SL2009-8 at http://www.legislation.act.gov.au/sl/2009-8/default.asp ; for SL2009-14 at http://www.legislation.act.gov.au/sl/2009-14/default.asp

Government's '*Towards 2020'* policy and the decision to build the Harrison and Kambah P-10 schools has been the subject of extensive community consultation.

Given the availability of the ACT government project funding and the importance of the proposed school projects it was deemed necessary to amend the *Planning and Development Regulation 200*8 (the regulation) in order to limit the potential for the construction of these two major school projects to be substantially held up as a result of delays in the development assessment or merit review processes.

For a range of developments at existing schools, the *Planning and Development Amendment Regulation 2009* No 2 (SL2009-8) exempted certain straightforward work from development approval (DA) and for developments where a DA was required, *Planning and Development Amendment Regulation 2009* No 4 (SL2009-14) provided for limited public notification. This was to ensure that the Canberra community could receive the substantial but strictly time-limited funding under the Commonwealth's *Building the Education Revolution* funding package and associated Territory stimulus funding measures.

The proposed law (and associated Ministerial declaration when made) will make it clear that the Harrison and Kambah P-10 schools will be subject to the recent amendments to the regulations and that these projects are correctly seen as maintenance of effort in relation to building programs for school campuses – failure to deliver such programs could result in loss of Commonwealth funding under the stimulus package.

It was always intended that these schools would be covered by the *Planning and Development Amendment Regulations 2009* No 2 (SL2009-8) and No 4 (SL2009-14). However, to avoid doubt that the schools can be covered by the regulation, it has been decided that the proposed law is necessary.

The proposed law therefore extends the existing provisions in the regulation to a school which is declared by the Minister for Planning to be an existing school.

The proposed law is principally intended to provide a means, through Ministerial declaration, to put beyond doubt that the planned:

- redevelopment of the Kambah High School site as a new P-10 school; and
- phased development of the Harrison P-10 school (i.e. building of facilities for the year 7-10 component)

are occurring on what were always regarded as existing school campuses, consistent with the Government's *Towards 2020* schools policy.

Relationship of this RIS to those for prepared for SL2009-8 / SL2009-14

Given that the proposed law does not introduce any substantive element that was not dealt with by the regulatory impact statement for *Planning and Development Amendment Regulations 2009* No 2 (SL2009-8) and No 4 (SL2009-14), and that those regulations (and their associated regulatory impact statements and explanatory

statements) have recently been examined by the Scrutiny of Bills Committee[2] , the relevant earlier regulatory impact statements are attached. It is the view of the authority that relying on the detail provided in these recent regulatory impact statements – SL2009-8 was notified on 20 March 2009; and SL2009-14 notified on 23 April 2009 – is likely to provide a clearer explanation of the matters involved and the need for the proposed law will be more readily understood by the Assembly and the public if considered in the that context. This was considered a more reasonable and transparent approach than simply 'cutting and pasting' the information from the previous regulatory impact statements into a new document.

Summary of effect of the proposed law

In summary, the effect of the proposed law is to allow the application of existing provisions in the *Planning and Development Regulation 2008* as follows:

1. DA exempt school developments

School developments which are undertaken on land declared by the Minister to be an existing school, and which are developments or activities covered by subdivision 1.3.6A.2, schedule 1, will:

- not require development approval
- not be subject to third party appeal (as no decision on development approval is required, there is no reviewable decision under schedule 1 of the *Planning and Development Act 2007*)
- be time limited in some circumstances (s1.99C and s1.99D expire on 31 March 2013; other exemption provisions for minor structures and activities are not time limited by the existing regulation)

Refer to ***Attachment 1 – RIS for SL2009-8*** for detailed arguments

2. School developments subject to DA

School developments which are undertaken on a land declared by the Minister to be an existing school, and which are included in items 7 and 8, schedule 2 of the regulation, will:

- require notification to adjoining premises only, with a notification period of 10 days
- not be subject to 3rd party appeal in relation to the DA decision
- be time limited to expire on 31 March 2013

Refer to ***Attachment 2 – RIS for SL2009-14*** for detailed arguments

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*.

[2] In relation to SL2009-8, presented to the Legislative Assembly 24 March 2009, see Scrutiny Report 5 (2009); in relation to SL2009-14, presented to the Legislative Assembly 7 May 2009, see Scrutiny Report 7 (2009).

(h) The authorising law

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

- section 133 What is an exempt development?;
- section 134 Exempt development-no need for development application or approval;
- section 152 What is *publicly notifies* for ch7?; and
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

For a range of developments at existing schools the *Planning and Development Regulation 2008:*

- exempts certain straightforward work from DA; and
- for developments where a DA was required, provides for limited public notification.

This is to ensure a relatively quick and finite DA process. This is necessary to so that the Canberra community can receive the substantial but strictly time-limited funding under the Commonwealth's *Building the Education Revolution* funding package and associated Territory stimulus funding measures.

The proposed law (and associated Ministerial declaration when made) will support this policy objective and avoid doubt that schools declared by the Minister (Harrison and Kambah P-10 schools) are considered existing school and will therefore be subject to the provisions in the regulations that expedite school developments. Failure to deliver such programs could result in loss of Commonwealth funding under the stimulus package.

In summary, the reforms are consistent with the principal aims behind the authorising law to create a planning and development assessment system that is simpler, faster and more effective. For a more detailed analysis of the purpose of the authorising law, refer to pp of the RIS. For further detail as provided in the existing regulatory impact statements see pages 3-5 of the RIS for SL2009-8, and pages 4-6 of the RIS for SL2009-14.

© Achieving the policy objectives

The proposed law achieves the policy objectives by providing a mechanism for the Minister to declare specified types of sites to be an existing school thereby ensuring the regulation will:

- exempt specified building work on declared land from the need to obtain a DA; and
- for specified school developments which will still require a DA, the public notification period will be reduced from 15 working days to 10 working, and there will be no third party merit review of decisions on these types of DAs.

For further detail as provided in the existing regulatory impact statements see pages 5-6 of the RIS for SL2009-8, and pages 6-7 of the RIS for SL2009-14.

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

The proposed law is consistent with the authorising law. The detailed explanation for this is provided in the regulatory impact statements for the existing regulation. For further detail as provided in the existing regulatory impact statements see pages 6-7 of the RIS for SL2009-8, and page 7 of the RIS for SL2009-14.

(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. The detailed explanation for this is provided in the regulatory impact statements for the existing regulation. For further detail as provided in the existing regulatory impact statements see page 7 of the RIS for SL2009-8 and page 7 of the RIS for SL2009-14.

(f) Reasonable alternatives to the proposed law

The purpose of the proposed law is to put beyond doubt that declared schools are existing schools for the purposes of the existing regulation. Declaration of schools will be consistent with the Government's *Towards 2020* schools policy.

The alternative of not providing certainty in this regard is that affected school developments may be held up by the DA and merit review processes. If the projects are substantially delayed there would be a risk to the funding available under the stimulus package arrangements. For further detail as provided in the existing regulatory impact statements see page 7 of the RIS for SL2009-8 and page 8 of the RIS for SL2009-14.

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

The P-10 schools that will be the subject of a Ministerial declaration under the proposed law represent substantial budget commitments by the Government and are included in the *Towards 2020* schools policy. If the projects are substantially delayed there would be a risk to the funding available under the stimulus package arrangements. For further detail as provided in the existing regulatory impact statements see pages 7-8 of the RIS for SL2009-8, and pages 8-9 of the RIS for SL2009-14.

(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 and removal of third party merit review

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 development may occur without development approval, will impact on the ability to comment on such development. There is no public notification process for DA exempt development as it does not require development approval. This was discussed in detail in the regulatory impact statement for SL2009-8 (see pages 8-9) and considered in Scrutiny Report 5 (2009).

The proposed law will have the effect, should a site be subject to Ministerial declaration and still require a DA, of temporarily removing third party merit review on such school DA decisions. This is because under the existing regulation such developments are included in schedule 2 of the regulation.

Human rights issues in relation to schedule 2

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 merit review. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas.

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

These human rights issues were considered on pages 2-3 and 9-10 of the regulatory impact statement for SL2009-14 and dealt with in Scrutiny Report 7 (2009).

It is the Government's view that such an impact is justified in the circumstances. It is crucial that the Territory take advantage of the funding that is presently available. While the proposed law does allow for an expansion of the application of the existing regulation to sites declared by the Minister to be an existing school, the impact of the proposed law is ameliorated by the fact that this only applies to schools if the defined parameters in the existing regulation are strictly met. The proposed law is consistent with existing policy and has been proposed only to remove doubt that a few sites that were identified under the Government's schools policy for development or redevelopment are in fact 'existing schools' for the purposes of the regulation. In this respect the proposed law is not a major new policy, but a clarification of existing provisions.

As stated above, those parameters were formulated with a view to delivering acceptable community outcomes. The impacts of the proposed law are justified on the basis that the funding provided by the Commonwealth and the Territory government needs to be spent in a limited time-frame and because the use of the exemption power in circumstances such as these was envisaged at the time of making the Act.

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.

Attachment 1

Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 2)
Subordinate Law 2009-8

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 2)* (proposed law).

The changes made by the proposed law to the *Planning and Development Regulation 2008* (the regulation) are a continuation of the wider planning system reforms launched by the ACT Minister for Planning in 2004.

The main aim of the reforms was to improve timeliness, transparency and efficiency in the planning processes.

One of the ways the *Planning and Development Act 2007* (the Act) achieves this aim is by allowing straightforward developments of low significance to be exempt from requiring a development approval (DA) (see section 133). The Act removes the requirement for development approval for those projects where the development approval process adds nothing of any significance, for example, for new single residences in Greenfield sites and small structures such as sheds, garages and pergolas. This is because there is little value added in requiring a DA in such cases. The DA process merely verifies that the development is compliant with the relevant codes but does not enhance the quality of the proposed development. The DA process does not alter the proposed design.

The proposed law adds exemptions for specified building work on existing school sites. It does this by amending schedule 1 of the regulation. Schedule 1 is made under section 20 of the regulation. The exempting of a range of developments at public and non-public schools in the proposed law are in addition to a number of exemptions already set out in schedule 1 of the regulation.

The proposed law includes DA exemptions for school buildings such as libraries, halls and gymnasiums and for things other than buildings such as flag poles, bike enclosures, etc.

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 133 What is an exempt development?;
- section 134 Exempt development-no need for development application or approval; and
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

On 3 February 2009, the Commonwealth announced its $14.7b *Building the Education Revolution* funding package which is a component of the $42b *Nation Building and Jobs Plan* (the "Cth Plan"). The funding for the Cth Plan is the subject of the *Appropriation (Nation Building and Jobs) Act (No. 1) 2008-2009* (Cth) and the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cth). 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. The *Commonwealth Plan* provides funding of various projects including a significant amount of funding for new or upgrading of buildings in existing schools. 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 in the development assessment or appeals process.

The proposed law exempts certain building work in existing schools from the need to obtain a development approval.

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

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 the development approval process. 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*** [emphasis added]
> * Improved procedures for notification of applications and third party appeal processes that reduce uncertainty
> * 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."

Policy objectives of the proposed law

The main policy objective of the proposed law is to ensure efficiency in the uptake of additional Commonwealth and Territory funding that is only available for a limited period of time and has the important purpose of stimulating the economy. The main objective behind the additional funding is to stimulate the economy in order to cushion the Territory (and Australia) from the current global financial crisis. Therefore, time is of the essence if the additional funding is to serve its purpose and it was imperative that development approval processes did not delay commencement of projects.

The policy objectives of the proposed law are also to further the policy objective behind the Act, that is, a planning system that is simpler, faster, and more effective. 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 greater efficiencies can be achieved ahead of broader DA exemptions. The proposed law introduces changes that enhance the operation of the existing DA exempt 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. The exempt category offers significant savings in time, effort and costs for those who were previously required to obtain development approval under the *Land (Planning and Environment) Act 1991*.

(c) Achieving the policy objectives

The proposed law achieves the policy objectives by amending the regulation to exempt specified building work on existing schools from the need to obtain a DA.

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

Schedule 1 of the *Planning and Development Regulation 2008* made under s20 of the regulation already exempts a number of matters from the need to obtain development approval (DA). The proposed law amends schedule 1 so that it also exempts certain developments on existing schools sites.

The proposed law includes DA exemptions for school buildings such as libraries, halls and gymnasiums and for things other than buildings such as flag poles, bike enclosures, etc.

The exemptions apply as follows:

1. **DA exemptions for school main buildings:**

    - Apply to both private and public schools;
    - The exemption will only apply for 4 years unless specifically extended by the ACT Legislative Assembly;
    - If a school project does not meet the physical parameters required for the DA exemption set out in this amending regulation or the project affects a regulated tree[3] or heritage site[4], a DA is required.
    - if a school project does not meet one of the general exemption criterion (set out in ss1.10-1.18 of schedule 1 to the regulation), a DA is required (eg if the proposal contravenes the Heritage Act (s1.14 of schedule 1) then a DA is required)

2. **DA exemptions for school projects other than main buildings, for example, bike enclosures, flag poles**

    - Apply to both private and public schools;
    - The exemptions will apply indefinitely but must be reviewed by the planning and land authority after 4 years;

[3] see the *Tree Protection Act 2005*
[4] see the *Heritage Act 2004*

- If a school project does not meet the physical parameters required for the DA exemption set out in this amending regulation or the project affects a regulated tree or heritage site, a DA is required.
- if a school project does not meet one of the general exemption criterion (set out in ss1.10-1.18 of schedule 1 to the regulation), a DA is required (eg if the proposal contravenes the Heritage Act (s1.14 of schedule 1) then a DA is required)

The reason for the time limit of 4 years for exemptions for main building school projects is related to the source of funding for these sorts of projects. It is anticipated that Commonwealth and Territory funding sources will be available for government school projects of this type with the intention that the funding be spent in the short term over the next 4 years for the benefit of schools and the economy of the Territory as a whole. In some cases, failure to utilise the funds could risk loss of the funds resulting in reduced benefits to schools and the economy.

The other exemptions for projects such as installing flag poles are to apply indefinitely, subject to review. Such projects are relatively minor in comparison with school main buildings and as such, it is appropriate for these matters to be exempt irrespective of the immediate issue of funding. As a result, these exemptions apply indefinitely with the proviso that their operation is to be reviewed by the authority after a period of 4 years.

The various parameters set out in this amending regulation were 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 because they are used outside school hours.

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

The authorising law, section 133(c) of the Act (What is an exempt development?), entitles the regulation to prescribe development that is exempt from requiring development approval.

Under s133 of the Act, section 20 of the regulation (Exempt developments—Act, s 133, def exempt development, par (c)), specifies development that is DA exempt. In summary, under s20 of the regulation schedule 1 lists exempt development. Development may also be exempt notwithstanding non-compliance with schedule 1 provided the non-compliance meets criteria in schedule 1A. Note: the development tables of the Territory Plan may also specify development that is DA exempt (refer s133) and development specified in s134 of the Act is also DA exempt.

The proposed law includes new DA exemptions for certain building works in existing schools. As the parameters of the exemptions 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 1 describes circumstances in which development may be exempt from requiring development approval, the schedule does not remove the requirement for development to comply with other applicable Australian Capital Territory legislation (see section 1.4 of schedule 1). For example, if the schedule provides that certain dwellings may be constructed without a development approval under the *Planning and Development Act 2007*, it may be that other authorisations are needed under other laws, such as a building approval under the *Building Act 2004*. Work may also be required to be done by the holders of relevant licences issued under the *Construction Occupations (Licensing) Act 2004*.

(f) Reasonable alternatives to the proposed law

There were 2 alternatives to the proposed law.

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 133 of the Act relating to exempt development.

Alternatively, the authority could have modified the DA process administratively. Reforms to the DA process to make it more efficient are continuing but the greatest time can be gained by removing the DA process altogether by exemption. DA changes cannot change the time taken to go through the processes associated with the DA process.

Utilising the existing exemption legislative framework maximises the timeliness of the reforms and given that the exemptions only apply to existing school campuses, the risk of adverse impacts on the public is contained.

(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 DA exemption framework and a reduced need for obtaining a DA for development achieving significant benefits to the community through:

1. Construction cost benefits

The regulation, through removal of DA requirements will permit construction work to commence relatively earlier in the relevant project. This will improve timeliness of construction work and reduce related costs.

2. Reduction in DA application fees and timeframes

Schools can save application fees that would be incurred if they had to lodge a development application for development approval. Further, by not requiring a development approval, the proposed law allows development to commence sooner, thus reducing the overall timeframe for the development.

However, these cost savings may be reduced if there is an increase in fees charged by building certifiers to determine if the building/s are DA exempt when the certifier is assessing the development for building approval (BA) under the *Building Act 2004*.

Development approvals have statutory timeframes, may require public notification, referral to other agencies and formal amendment if there is an existing DA. The proposed law reduces timeframes by removing the need for a DA and reduces associated costs, other than the application fee. For example, 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. The proposed law removes the need for these fees for development proposals that will no longer require development approval.

3. Other general benefits

The proposed law broadens the circumstances in which DA exempt development can occur and ensures consistency in the application of the exempt development framework.

Further, the proposed law, by ensuring greater certainty, 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[5], 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).

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

The proposed law, by broadening the circumstances in which development may occur without development approval, will impact on the ability to comment on such development. There is no public notification process for DA exempt development as it does not require development approval.

It is the government's view that such an impact is justified in all the circumstances. It is crucial that the Territory take advantage of the funding that is presently available. Furthermore, the impact of the proposed law is ameliorated by the fact that an exemption only applies to existing schools and if the defined parameters in the proposed law are strictly met. As stated above, those parameters were formulated with a view to delivering acceptable community outcomes.

The impacts of the proposed law are justified on the basis that the funding provided by the Commonwealth and the Territory government needs to be spent in a limited time-frame and because the use of the exemption power in circumstances such as these was envisaged at the time of making the Act.

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.

Regulatory Impact Statement

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

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Minister for Planning

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 funding[6] 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 BER[7] has the greatest impact on job creation, it is essential that construction and maintenance work commences as quickly as possible.'[8]

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

[6] *Building the Education Revolution* funding package including the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwlth)
[7] BER – Building the Education Revolution
[8] 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 Government[9], 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.

[9] 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