Regulatory Impact Statement

Planning and Development Amendment Regulation 2011 (No 1)
Subordinate Law 2011-30

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

Circulated by authority of
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Minister for the Environment and Sustainable Development

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2011 (No 1)* (proposed law).

The proposed law amends the *Planning and Development Regulation 2008* (the regulation).

Executive Summary

The proposed changes respond to the problem of developments being delayed in the Kingston Foreshore area due to lengthy third party appeal processes. This delay creates uncertainty and incurs additional costs for the proponent which ultimately are passed on to the end consumer. This has negative impacts across the Canberra community including the capacity to impact on land values and housing supply.

The problem is specific to the Kingston Foreshore area because:

- the area is predominately zoned for commercial development allowing mixed use of the land i.e. residential and commercial uses. This type of land is typically developed by large companies (not home owners);
- the land is high value and developments targeted to the top-end of the market; and
- existing developments (and likely future developments) are large mixed use developments with only a small part of the area having single dwellings.

The limitation on third party appeal rights was a significant objective of the new regime which flowed from the model development assessment process proposed by the national Development Assessment Forum and which reflected misgivings in the community that ACAT appeals slowed down the process of approving legitimate development proposals.

Common terms:

Third party appeals – a reference to third party appeal is a reference to a third party who makes application to the ACT Administrative Appeals Tribunal (ACAT) for merit review of a decision to grant a development approval.

Assessment track – an assessment track matches the level of assessment of development applications to the impact and process of the proposed development. The tracks are code, merit and impact assessment and prohibited and exempt development. They are described in chapter 7 of the Act. The proposed legislation only deals with merit track development applications

Defining the problem

Third party appeals have the potential to cause significant delays to developments in the Kingston Foreshore area.

The Kingston Foreshore has characteristics which sets it apart from other areas in Canberra. These characteristics are:

- high value land -
  The cost of works (not including the value of the land) for the developments that attracted third party appeals was between $15 million – $22 million;
- extensive and intensive development across the project -
  Because of the zoning of the remaining undeveloped areas it is likely that these areas will be developed by companies with the intent to on-sell the property (which can include apartments, shops etc) at a future date (i.e. it is unlikely to be developed by individual home owners).
  To date seven of the eight developed areas have been developed by five companies and one as a joint venture. Only one area was released as single residential. The developments completed to date supply over 600 residential dwellings and 15,800m^2 of commercial floor space;
- highly changeable area;
- is predominately zoned CZ5; -
  CZ5 zoning means that it is available for commercial development and that the development can included mixed use. This means that development proposals can include a mix of residential and commercial uses; and
- has had two prominent cases brought by developers (summarised at Attachment A).

These characteristics suggest that it is likely that there is the potential for litigation in the future which will result in a delay of implementation of the Territory Plan in this area. The negative effects of this litigation are:

- creates unnecessary delay in development;
- creates uncertainty with proponents;
- impacts on delivery of the Territory Plan;
- conflicts with the objectives of the Affordable Housing Action Plan; and
- imposes additional time and costs for individuals buying into the area.

The Kingston Foreshore is different to other areas (aside from the City centre and town centre) that have similar large scale mixed use developments.

Reasons why third party appeals will have negative effects on development

- Delay

  Statistics for 2009/2010 indicate that there have been 41 third party appeals but only two in the Kingston Foreshore area. On average the appeals took 109 days but the appeals in the Kingston Foreshore area took between six to eight months to finalise. These timeframes are additional to statutory timeframes for deciding a development application.
- Uncertainty

  Proponents of these large scale commercial mixed use developments need certainty before committing to commencement of these developments. This is reasonable because the total costs of works, for one of the proposals that was appealed against in 2010, was $22,506,211
- Delivery of the Territory Plan

  The Territory Plan has been consulted on extensively with the community. In particular there were two Territory Plan variations for the Kingston Foreshore area: NI 1999-147 and 2004-279. The community was consulted on these variations. It is reasonable therefore for proponents to be allowed to develop in-line with Territory Plan requirements.
- Holding costs

  Holding costs can be considerable for developments in Kingston Foreshore. This is because of the high value of the land and the high-end market developments being completed (or proposed).

It is reasonable therefore to estimate that holding costs would be significant for proponents and that any undue delay adds to costs of the project.

Additionally proponents engaged in long appeal processes (in 2010 a third party appeal took between 109 – 111 days) would incur considerable legal costs. These costs (as highlighted by the Property Council; ACT Division[1]) are typically passed on to the end consumer or home owner.

- Impacts on the housing supply

  The ACT has a recognised housing rental shortage (the housing rental vacancy rate is around 1.6 per cent[2]) and any delay in the release of housing stock will exacerbate this shortage.

Options to address the problem

Four options were proposed:

1. Exclude the Kingston Foreshore area in its own right

   This is the preferred option as it provides transparency and certainty for proponents looking at proposing developments in this area.

   Maintains industry confidence (and market value) in the Kingston Foreshore area.

2. Make minor changes to the existing regulations

   Certain commercial areas are already excluded from third party appeals including Kingston (refer item 7, Schedule 3, part 3.2 of the Planning and Development Regulation).

   Minor changes to the existing provision would still allow the prospect of third party appeal and would have unsought flow-on effects in other areas (short of making an overly complex provision). This would hamper industry in understanding what development the exemption applied to.

   This is not the preferred option because it would not be appropriate to amend this item as it also deals with other criteria that are not specific to the Kingston Foreshore area.

3. Rely on section 419 (2) of the Planning and Development Act to limit proponent lodging an appeal.

[1] Catherine Carter: Property Council: ACT Division; Media Release; 04 Apr 201: accessed on the web 2 November 2011 stated "Where later uncertainty arises it causes considerable delays and costs – costs which invariably at some stage get passed back to the community, often through increases in house prices."

[2] Affordable Housing Action Plan: ACT Government: 2007: page 12

Section 419 (2) provides that a entity does not suffer material detriment in relation to the land because of a decision only because that decision increases, or is likely to increase, direct or indirect competition with a business of the entity or an associate of the entity.

This is not the preferred option as it would still leave the potential for third party appeals causing delays. Where the issue of material detriment is raised, there would still be court delays while this matter is addressed.

4. Do nothing

   This would mean that:

   - There continues to be the potential for lengthy delays in the release of housing stock into the market;
   - Land values may be negatively affected because of industry confidence. If land values fall this will impact on the ACT Budget;
   - Proponents do not have certainty;
   - Proponents incur additional costs (these will be passed on to the end consumer);
   - The Territory Plan is not implemented and the Kingston Foreshore project may take considerable time to reach completion.

     This is not the preferred option as it does not address any of the issues.

<u>Cost benefits for the proposal</u>

<u>Benefits:</u>

1. Industry will benefit from the certainty that they can commence the proposal that they have development approval for;

   The Kingston Foreshore area is included in the Australian Capital Territory Indicative Land Release Program 2011-12 to 2014-15.

   Providing certainty to developers seeking to undertake proposals in the area will have the added benefit of maintaining industry confidence in the area. Industry confidence is important in maintain land values and timely development. (without this confidence land values may fall);
2. Community will benefit because developments will be completed in a reasonable timeframe. Construction can be completed and all residents (those who have been moving into the area over the last 8 years as well as

those in the adjoining Kingston area) can start to enjoy the amenity of the completed Kingston Foreshore project.

This has the added benefit of a positive flow-on effect to the ACT housing market.

Further access to areas that are going to be developed (but have not been) can, over a period of time, become the accepted norm contrary to the interests of the Territory Plan and the community expectations for the Kingston Foreshore area.

3. Government – can redirect existing limited resources to more complex and meritorious appeals. More efficient use of government funds and resources has obvious benefits for the public in general. 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].

Costs:

1. Removes appeal rights for certain developments but does not remove the right to comment on development applications (if notified).

   The existing right to seek review on legal or process issues in the Supreme Court under *Administrative Decisions (Judicial Review) Act 1989 (ADJR)* will remain.

   The retention of ADJR review will still leave the prospect of some litigation and delays as a result. However, the right of review under ADJR is limited primarily to matters of law and administrative process as opposed to ACAT merit review which is open to full merit review.

2. The Kingston Foreshore area is not historically a high third party appeal area[4] which suggests for the most part the Territory Plan and consultation processes around the Territory Plan are working therefore this removal will have limited impact for future proponents.

   The statistics suggest that the two appeals in the Kingston Foreshore area mean that disputes are between developers rather than disputes generated by the wider community. Therefore the appeals are not representative of the wider community.

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

[4] There have only been two third party appeals in the Kingston Foreshore made between 2009/2010 (there was a total of 41 third party appeals made during this period). These appeals dealt with the same block.

This contrasts with third party appeals against comparable developments in other areas.

This proposed legislation is not about past litigation nor is it about the merit of the cases rather it is about ensuring that development is not unduly delayed in the area.

3. It is considered that:
   - on balance the social and economic benefits that will flow to the ACT community outweigh the limited foregoing of third party appeal rights on development assessment decisions; and
   - the exemption 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.

Consultation

The Kingston Foreshore area has been developing as a project since 1994 and has undergone various forms of consultation with the community and industry. This includes a National Competition of Ideas launched in 1996 and Territory Plan Variation consultation processes.

The Territory Plan has been amended through two variation processes (1999 by NI 1999-147 and 2004) and during each of these processes extensive community consultation was undertaken.

Further, the Government in its Directions paper and technical papers for Planning System Reform Project, proposed to modify third party appeal rights, so that in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third party appeals. Following extensive consultation held between May – August 2005 there was general support for the reduction of third party appeals[5].

[5] ACT planning and Land Authority; Planning System Reform Project: Report on Outcomes of Community Consultation Program conducted between 27 May and 5 August 2005: Prepared by the Communication Link 11 August 2005; page 8.

The Government's response was to affirm its intention to continue with the development of a track based assessment system[6], in which there would be certain cases, such as town centre's (but not limited to), where there might be notification but no third party appeal rights.

This part of the regulatory impact statement deals with the information about the proposed law as required by section 35 of the *Legislation Act 2001*. A regulatory impact statement is required because the proposed law may impose a cost on certain members of the community, namely, in certain cases, the removal of appeal rights and hence the loss of the potential opportunity to challenge a planning decision which may affect the enjoyment of property or its value.

Background

A brief summary of the regulatory framework for third party appeals is provided at Attachment B.

(a) The authorising law

The provisions in this part of the proposed law are authorised by the following sections of the Planning and Development Act:

- section 407 and schedule1, item 4, column 2, par (b)

(b) Policy objectives of the proposed law and the reasons for them

The policy objectives of government action are to:

1. To provide a regulatory framework to exempt proposed developments in the Kingston Foreshore area from third party appeal;
   This will mean that the area is treated the same as other commercial intensive areas across the ACT. The Planning and Development Regulation, Schedule 3, part 3.2 items 6 & 7 provides for exemption from third party appeal in commercial areas (and includes specific criteria for the development)and includes Kingston;
2. To provide proponents of large scale mixed use developments in this area with certainty to commence development;

[6] "Track based assessment system" refers to the development assessment system under the *Planning and Development Act 2007* (the Act) that matches the level of assessment of development applications to the impact and process of the proposed development. The tracks are code, merit and impact assessment and prohibited and exempt development. They are described in chapter 7 of the Act.).

3. To maintain investor confidence in a high value land area;
4. To provide the Canberra community with the Kingston Foreshore Project (launched in 1996 and foreshadowed by Territory Plan variations in 1999 and 2004).

As the proposed law enacts the policy objectives of the Act, a brief summary of the pertinent policy objectives behind the Act is provided *Attachment C*.

The Planning System Reform Project: Technical paper 3[7] identified in relation to third party appeals the goals of:

- effectiveness – appeal resources directed to relevant issues and directions
- timeliness – unnecessary delays due to inappropriate third-party appeals are avoided
- equity – people significantly affected by the development application decisions can make appeals to protect their interests.

Government agreed[8] (in part) to the recommendation that only development applications that had the potential to have significant off-site impacts in residential areas should be open to third party review.

While the example of 'town centre' was used it was not explicit that town centres were the only areas that could be excluded from third party review for instance the regulation already provides for exemptions for certain commercial areas that are not in a town centre e.g. Kingston. The proposed policy outcome would directly respond to Planning System Reform Project goal of effectiveness and timeliness.

The two appeals in the Kingston Foreshore area were on the same block and section and took between six and eight months respectively to finalise.

A summary of these appeals is provided at Attachment A. The appeal outcomes were not positive to the ACAT applicant i.e. one was refused and the other dismissed because the development approval was surrendered (meaning there was no longer a matter to consider).

[7] Planning System Reform Project: Technical paper 3: Streamlining development assessment and building approval processes in the ACT; ACT Planning and Land Authority; May 2005; p38.

[8] Planning System Reform Project: Government response to community comments; November 2005; - *About third-party appeal;* page 44, item 8.2.

The net effect of these two appeals has been a delay in the proposed development. This is contrary to one of the express objects of the Planning System Reform agenda noted above.

The substantive changes to the regulation by the proposed law therefore extends reforms implemented through the Planning and Development Act to improve timeliness, transparency and efficiency in the planning process.

(c) Achieving the policy objectives

The proposed law achieves the policy objectives by extending the exemptions for third party appeals to the Kingston Foreshore area. It does this by amending item 4 of Part 3.2 of schedule 3 of the regulation to include land in the Kingston Foreshore area (as defined in the proposed law). Under section 350 of the regulation, a development application in relation to a matter listed in Part 3.2 of schedule 3 is exempt from third party ACAT merit review.

The proposed law means that there will be no third party appeals to ACAT in the Kingston Foreshore area for merit track matters. This will provide certainty in decisions for investors and reduce delays which can be costly for the property sector due to the period required for the appeal process.

The existing third party appeals rights are maintained for impact track matters.

The proposed law does not affect the ability to take action under *the Administrative Decisions (Judicial Review) Act 1989*.

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

The authorising law, schedule 1, item 4 column 2, par (b) entitles the regulation to prescribe merit track decisions that are exempt from third party ACAT review.

Under schedule 1, item 4, column 2, par (b) of the Act, section 350 of the regulation specifies that a development application in relation to a matter mentioned in schedule 3 part 3.2 of the regulation is exempt from third party ACAT review.

The proposed law is within the parameters of the authorising law. It is relevant to note that the proposed law does not create entirely new categories of third party review exemptions but instead adds an exemption of a similar nature to that already included in schedule 3 of the regulation.

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.

(f) Reasonable alternatives to the proposed law

There are no reasonable alternatives that will respond to each of the policy objectives identified.

The options considered have been discussed at the beginning of this RIS.

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

The proposed law removes unnecessary regulatory burden by exempting developments in the Kingston Foreshore from third party ACAT merit review. This is in-line with the principles of the Planning System Reform Project and directly expands on the Government's response to consultation in that it supported exemption from third party review for certain types of development when it is appropriate to do so.

The benefits and costs of the proposed law have been covered at the beginning of this RIS.

(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.

The discussion below demonstrates that the proposed law is consistent with the Committee's principles.

The matters that need to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is the fact that the proposed law takes away existing rights of review, that is, does it unduly trespass on rights previously established by law and make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. There is also the issue of whether the proposed law contains matter which should properly be dealt with in an Act of the Legislative Assembly.

The proposed law can be considered to trespass on rights previously established by law. The issue is whether it does so unduly. In addition, by removing existing review rights, the proposed law makes certain rights, etc dependent on decisions that are (now) non-reviewable by ACAT. Again, the issue is whether it does so unduly.

The Planning and Development Act modified third party appeal rights, so that in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third party appeals.

The *Human Rights Act 2004*, 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 the proposed law.
However, in relation to section 21, it would appear that case law (refer to Attachment D) indicates that human rights legislation 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.

In two ACAT[9] cases (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46) agreed that some limitation on third party appeal rights is warranted when it delivers certainty and predictability for proponents. Specifically the Commissioner (in Thomson) commented that "...providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights.[10]". In a further ACAT case (Tran[11]) the Tribunal agreed with the approach in *Thomson*.

Case law in relation to human rights legislation containing the equivalent of section 12[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 the proposed law limits any rights afforded by the *Human Rights Act 2004*, these limitations must meet the proportionality test of section 28 of that legislation.

In this case, the proposed law serves to improve the development assessment process within the Kingston Foreshore area by increasing certainty and reducing delays and costs. It should serve to facilitate development in this area which is of general benefit to the Territory.
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

[9] ACAT cases can be accessed at http://www.acat.act.gov.au/decisions.php
[10] Extract of Commissioner's comments. *Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at para 99
[11] *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT 46
[12] *Smith v Hobsons Bay City Council* [2010] VCAT 668; accessed at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2010/668.html?stem=0&synonyms=0&query=title(smith%20AND%20hobsons%20bay%20); 3 November 2011

policy for these areas. The proposed law does not affect rights persons may have under the *Administrative Decisions (Judicial Review) Act 1989*.

In all these circumstances, it is submitted that the proposed law does not trespass unduly on previous rights established by the law nor does it make certain rights unduly dependent on non reviewable decisions.

There remains the question of whether the proposed law contains matters that should properly be dealt with in an Act of the Legislative Assembly (opposed to a regulation).

As indicated above, schedule 1 of the Planning and Development Act, item 4, column 2, par (b) expressly allows the Executive to make regulations to exempt specified matters in the merit assessment track from being subject to third party ACAT merit review. This means the proposed law is within an express power granted by the Legislative Assembly.

Amendments to widen the exemptions in a similar way have previously been passed by regulation (see for instance SL 2006-13 being the *Land (Planning and Environment) Amendment Regulation 2006 (No.2)*.

The Scrutiny of Bills Committee (the Committee) (published in the Standing Committee on Legal Affairs (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report, 5 June 2006, Report 26, p25), in reviewing the proposed regulation raised concerns with that regulation under the Committee's terms of reference (paras (a)(ii), (iii) and (iv)) that require it to consider whether regulations unduly trespass on rights previously established by law, makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions or contains matters which should be properly dealt with in legislation.

In was the Committee's view, that while the regulation, i.e. the Land (Planning and Environment) Regulation, does trespass on previously established rights and makes rights dependent on unreviewable decisions, it does not do so unduly.

In this regard, the Committee accepted the rationale for removing third party appeal rights put forward in the Explanatory Statement (for that regulation).

The Committee had greater concern that the regulation dealt with matters that should more properly be dealt with in legislation as the regulation alters and redefines existing rights of review. The Committee, however, noted that the Land Act contains a clear power to make the regulation and that the Explanatory Statement justifies the regulation in unequivocal terms. The Committee indicated that the issue of the appropriate role of legislation and regulations will be raised by the Committee in its report on the Planning and Development Bill.

In response to the Committee's comments the Minister, in his reply dated 14 July 2006 (published in Standing Committee on Legal Affairs (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report, 7 August 2006, Report 28) commented:

> "...The Committee appears to express, however, some reservations about the appropriateness of exempting certain types of development applications from third party merit appeals, suggesting that this matter is more appropriately dealt with in legislation. As you are aware the Land (Planning and Environment) Act has long contained a power to exempt certain development applications from the application of Part 6 of the Act dealing with development assessment, including the application of third party appeal rights. As you are also undoubtedly aware, a number of exemptions from third party appeal rights have been made over the years.
>
> As the Committee acknowledges, the rationale for this regulation is provided in the regulation's Explanatory Statement. The regulation achieves an appropriate balance between the general benefit to the ACT community of facilitating development in the Civic centre area, the other town centres and industrial areas and the protection of the interests of residents and others likely to be affected by such development. As the Committee notes, persons affected by particular development proposals are able to make submissions on individual proposals or relevant Territory Plan variations and the rights

under the Administrative Decisions (Judicial Review) Act 1989 are not affected.

In light of the above, I conclude that the removal of specified rights of merit appeal is warranted, does not represent an undue trespass on existing rights and is an appropriate matter for regulation."

It is submitted that the matters are appropriately dealt with in the proposed law.

Attachment A – Summary of third party appeals in the Kingston Foreshore area

There have been two third-party appeals in Kingston Foreshore to date, both lodged in relation to Development Applications (DA) on Block 7 Section 48 Kingston.

Mainore Pty Ltd v ACT Planning and Land Authority & Canberra Investment Corporation Ltd [2010] ACAT 18

DA Number 200914754 seeking approval to erect a mixed-use building, ranging in height from three (3) to six (6) storeys, comprising offices, restaurant and 96 residential apartments with one level of basement car parking, construct three (3) awnings which encroach over the verges in Giles Street, Eastlake Parade and Eyre Street, construct 2 new verge crossings on Eyre and Giles Streets, and associated landscaping, paving and other site works. This application, was approved with conditions on 17 August 2009. A third-party appeal was lodged with the ACT Civil and Administrative Tribunal (ACAT) by Mainore Pty Ltd on 17 September 2009. The decision by the Tribunal was handed down on 16 April 2010. The Tribunal made an Order that the decision of 17 August 2009 approving DA200914754 was set aside and substituted with a decision that the development application was refused.

The decision by the ACAT was handed down eight months after the determination of the DA by ACTPLA. Total building cost specified for DA200914754 - $15,762,420.

Mainore Pty Ltd v ACT Planning and Land Authority & Canberra Investment Corporation Ltd [2011] ACAT 24

DA201018265 sought approval for a new mixed use building of four storeys with upper building components to six storeys consisting of 98 apartments and approximately 2210m^2 of office and restaurant. This application was approved with conditions on 17 September 2010. The DA received two representations, one being from the same person who lodged an appeal at ACAT on the earlier proposal. A third party appeal was lodged with ACAT on 15 October 2010 by Mainore Pty Ltd, the same applicant who lodged an appeal at ACAT on the earlier proposal for Block 7 Section 48 Kingston, subject of AT79 of 2009.

A preliminary conference was held on this matter, however, without any resolution. Hearing on the matter was scheduled to commence on 21 February 2011. The lessee of Block 7 Section 48 Kingston (CIC Australia Ltd), who was the party joined in the appeal proceedings, decided to surrender the approval of DA201018265 and submitted a Notice of Surrender of Development Approval pursuant to S184(2)(d) of the *Planning and Development Act 2007* to ACTPLA on 21 February 2011. Mainore Pty Ltd also applied to the ACAT for costs. ACAT made a determination on 17 March 2011 that the party joined, CIC Australia Ltd, should pay the costs incurred by the applicant, Mainore Pty Ltd. ACAT also dismissed the application.

The decision by the ACAT was handed down six months after the determination of the DA by ACTPLA.

On 11 April 2011, CIC Australia Ltd filed appeal documents in the Supreme Court, appealing the decision to order costs against CIC. Total building cost specified for DA201018265 - $22,506,211.

Number of representations for significant DAs determined since March 2008
DA200914754 (Block 7 Section 48 Kingston) – 2 representations
(Appeal by Mainore)

DA201018265 (Block 7 Section 48 Kingston) – 2 representations
(Appeal by Mainore)

DA201017819 (Block 2 Section 62 Kingston) – 3 representations
(No 3rd party appeal)

DA201017840 (Block 3 Section 62 Kingston) – 3 representations
(No 3rd party appeal)

DA201018066 (Block 2 Section 51 Kingston) – 2 representations
(No 3rd party appeal)

DA201018204 (Block 1 Section 63 Kingston) – 9 representations
(No 3rd party appeal)

DA200915919 (Blocks 1&2 Section 58 Kingston) – 19 representations (
1st party appeal) - (this DA, for lease variation, was refused consistent with the community expectation and decision was upheld by ACAT)

DA201019217 (Blocks 1&2 Section 58 Kingston) – 13 representations
(this DA was refused consistent with the community expectation)

Attachment B - Regulatory framework for third party appeals

In the mid 2000s, the Government, in its Directions paper[13] and technical paper,[14] for the planning system reform project, proposed to modify existing third party appeal rights so that, in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third party appeals.

The Act sections 152 - 155 provides for when and how development applications are required to be notified. Schedule 1 of the Act, item 4, column 2, par (b) creates a power to make regulations to exempt specified matters in the merit assessment track from being subject to third party ACAT merit review. The regulation can list those matters that are exempt from third party review.

The regulation exempts certain matters from third party ACAT merit review. These include sections 350 and 351 and schedule 3 of the regulation, parts 3.2, 3.3 and 3.4. Part 3.2 deals with merit track matters and includes the city centre or a town centre or an industrial zone.

Part 3.3. deals with impact matters and part 3.4 includes maps that define what is meant by city centre and town centre i.e. the geographic areas of Civic and the town centres of Gungahlin, Belconnen, Woden and Tuggeranong. In particular part 3.2 item 6 & 7 deals with matters in commercial zones and specifies certain criteria for the development. Item 7 also deals with exemptions from third party appeal in Kingston (opposed to the area known as the Kingston Foreshore).

[13] Planning System Reform Project: Directions paper; ACT Planning and Land Authority; May 2005.
[14] Planning System Reform Project: Technical paper 3: Streamlining development assessment and building approval processes in the ACT; ACT Planning and Land Authority; May 2005.

Attachment C - Background to the policy object of the ACT Planning and Development Act 2007

As the proposed law enacts the 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 provide improved procedures for notification of development applications and third party appeal processes.

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 policy objectives of the proposed law are 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. The proposed law enhances the operation of the planning system by adding developments that should be exempt from third party appeals because of their nature and location.

Attachment D – Case Law supporting the RIS

This attachment provides information on relevant case law from other jurisdictions as well as two cases heard by ACAT (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46). ACAT is the body that deals third party appeals in the ACT.

***Extract - Thomson v ACT Planning and Land Authority* [2009] ACAT p38**

83. However, the House of Lords in *Runa Begum v Tower Hamlets LBC*[58] found that a limited right of review on questions of fact is sufficient. Lord Hoffman indicated that limitations 'on practical grounds' to the right to a review of findings of fact was not only clear from the case law of the Strasbourg Court[59] but also supported good administration.[60]

84. In *Bryan v the United Kingdom*[61] the European Court of Human Rights found that in assessing the sufficiency of the composite process it is necessary to have regard to matters such as:the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.[62]

85. The Commissioner submitted that the availability of a partial merit review under s 121(2), relating primarily to issues of fact, and the assessment of specific criteria where rules have not been met, would be consistent with the right to a fair trial, when considered in the context of the whole planning approval process constituted by the Planning Act. This includes an administrative decision making process by ACTPLA, a statutory corporation independent from the Minister, and some procedural safeguards, such as the notification of affected parties and the opportunity for third parties to make representations regarding the development proposal. Importantly, the decisions of ACTPLA are also amenable to judicial review at common law and under the ADJR.

86. Counterbalanced with this are the limited rights of review under the ADJR, the disparity between the partial rights of review that ACAT can exercise under s 121(2) of the Planning Act and the respondent's obligations under s 120 of the

Planning Act and the considerable cost associated with litigating issues in the Supreme Court.[63]

99 The Commissioner submitted that providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third party review rights, while still preserving some aspects of merits review of important factual matters and the entitlement to judicial review. Therefore it was submitted that s 121(2) of the Planning Act might be a proportionate means to achieve that end.

100 Dealing with the factors set out in s 28(2) of the Human Rights Act, the Tribunal must firstly consider the nature of the right affected. As discussed above, the human right under consideration is the right to a fair hearing which is limited by the full or partial removal of merits review by the passage of the Planning Act. More broadly speaking, in the public debates which accompanied the passage of the Planning Act, the right was characterised as a third party appeal right in planning issues. The purpose of the limitation was to create a national leading practice model for land development in the ACT.[65] The limitation on third party appeal rights was a significant objective of the new regime which flowed from the model development assessment process proposed by the national Development Assessment Forum[66] and which reflected misgivings in the community that AAT appeals slowed down the process of approving legitimate development proposals. Although there was considerable debate as to whether the appeals were a major impediment to development in the ACT, the Minister advised the relevant Standing Committee that 'even a small number of appeals can be significant for developers and households given the costs, uncertainty, caution, hesitancy and loss of time caused by appeals'.[67] Therefore, applying s 28(2)(b) and (d) of the Human Rights Act, the purpose of the limitation was important and was regarded as necessary to achieve significant policy goals.

102 The overarching consideration in s 28 of the Human Rights Act is that human rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. The views of many stakeholders were taken into account in the consultation process which preceded the passage of the Planning Act and the 2008 Territory Plan and many of the stakeholders expressed views about desirability or otherwise of removing third

party appeal rights. The Planning Act was subject to scrutiny as to its compatibility with human rights[69] and the question regarding the composite administrative process which may be necessary for long term compliance with s 21 of the Human Rights Act (as discussed above) was raised in Scrutiny Reports by the Standing Committee on Legal Affairs.[70]

103 In conclusion the Tribunal considers that the limit created by s 121(2) Planning Act to the right to a fair hearing in s 21 of the Human Rights Act is reasonable considering the broad objectives of the Planning Act, the public consultation that occurred prior to the passage of the Planning Act and the 2008 Territory Plan and ongoing opportunities for certain people to make representations about development proposals in combination with access to judicial review.

Extract - *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46

55. Pursuant to s28(2)(b) of the HRA, the purpose of the limitation in this case is the need for certainty and predictability for applicants for development approval and the need to ensure a timely approval process. The present Tribunal agrees with the approach in *Thomson* that these objectives are sufficiently important to justify some constraints on third party review rights.[52]

The present Tribunal agrees with the reasoning in *Thomson* regarding proportionality as it applies to the Planning Act and Planning Regulation. Certainly it is not unusual in Australian planning law for the rights of third party objectors to be limited or removed by legislation or other instruments.[53]

[53] See generally G McLeod (ed) *Planning Law in Australia* and for examples, note the restrictions in New South Wales at [1.180], Queensland at [1.2059] and Victoria at [2.740].

Smith v Hobsons Bay CC[15] (includes Summary) (Red Dot) [2010] VCAT 668 (12 May 2010)

Last Updated: 16 June 2010

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST	VCAT REFERENCE NO. P2562/2009 PERMIT APPLICATION NO. PA09118391
IN THE MATTER OF	Rodger Smith (on behalf of Gary Stooke) v Hobsons Bay City Council
BEFORE	Mark Dwyer, Deputy President

NATURE OF CASE	Application of *Charter of Human Rights and Responsibilities Act 2006* in a planning context
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LAW, PRACTICE OR PROCEDURE – issue of interpretation or application	*Charter of Human Rights and Responsibilities Act 2006;* application of Charter; whether cl 54.04-6 of planning scheme dealing with overlooking compatible with **human right to privacy** ; whether decision to delete a condition requiring a balcony screen would breach Charter; interpretation and application of ss 13 & 7(2) of Charter.

SUMMARY

[15] Accessed at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2010/668.html?stem=0&synonyms=0&query=title(smith%20AND%20hobsons%20bay%20); 3 November 2011

This decision relates to the application of the *Charter of Human Rights and Responsibilities Act 2006* in a planning context, particularly the **human right to privacy** protected under s 13 of the Charter. An objector claims that a decision to delete a permit condition requiring a balcony screen would interfere with that right and be in breach of the Charter, and has raised this as a question of law requiring separate determination. The decision also considers, albeit more briefly, the potential impact on property rights protected under s 20 of the Charter.

The decision notes that:

- the right to privacy under s 13 is qualified. A person has the right not to have his or her privacy or home unlawfully of arbitrarily interfered with.
- s 7(2) of the Charter also recognises that reasonable limits may be placed on a protected right, having regard to relevant factors including the nature of the right and purpose and extent of the limitation.

In considering whether cl 54.04-6 of planning schemes, dealing with overlooking, is compatible with the **human right to privacy** protected under the Charter, the decision applies the 3-step process recently endorsed by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50. Having regard to the structure of the planning regulatory framework in Victoria, the relevant clause is considered not to be either unlawful or arbitrary and, even it was, it imposes a reasonable, proportionate and justifiable limitation on the right to privacy.

In considering whether a decision to delete or modify the condition requiring a balcony screen would breach the Charter, the decision adopts and applies a somewhat similar 3-step process.

- Step 1 is to consider if a human right protected under the Charter is engaged by the planning proposal for which a decision must be made. In considering this, the scope of that human right must be considered, including any specific qualifications or limitations on that right in the Charter.
- Step 2 is to consider whether any particular decision or outcome would be incompatible with that human right. If so,

- Step 3 is to apply s 7(2) of the Charter to determine whether any limitation or restriction on the right is justified as part of the decision. This may include a consideration of alternative decisions that have a lesser impact on the human right under consideration.

The overall objective of these steps is for the decision maker (i.e. the Tribunal in a review proceeding) to comply with s 38 of the Charter by giving proper consideration to any relevant human right as part of the decision making process.

Although the Charter right to privacy is potentially engaged in this case, any decision in relation to the condition that has proper regard to the the planning regulatory framework would not be unlawful or arbitrary. Even if there was a potential interference with the right to privacy, the proper exercise of a planning discretion in accordance with that framework will likely reflect a reasonable, proportionate and justifiable limitation on the right to privacy.

The decision also makes some general observations on the application of the Charter in a planning context. The Charter does not manifestly change the role and responsibility of the Tribunal. Implicitly, the Tribunal already considers the reasonableness of potential infringements on a person's privacy and home in its day-to-day decision making, in dealing with issues such as overlooking (as in this case), overshadowing, noise, environmental constraints and a variety of other issues and potential amenity impacts within the planning regulatory framework. That framework recognises that reasonable restrictions may be placed on the use and development of land, and that there may on occasion be reasonable and acceptable off-site impacts on others. There is an emphasis on performance based policies, objectives and guidelines that deal with a range of potential amenity impacts on a person's privacy and home. Provided these issues are properly considered, it would be a rare and exceptional case where the exercise of a planning discretion in accordance with the regulatory framework is not Charter compatible. Each case however turns on its own facts and circumstances.

The planning regulatory framework seeks to balance public and private rights, and seeks to provide for the fair, orderly and sustainable development and use of land by

imposing certain restrictions on the use and development of land that most would consider justified in a free and democratic society.

The Planning Act and the 2008 Territory Plan both came into effect on 31 March 2008 and established a five track planning approval scheme with different considerations for approval and review rights for different tracks - code, merit, impact, prohibited and exempt.