

## **Regulatory Impact Statement**

***Planning and Development (University of Canberra) Amendment Regulation  
2015 (No 1)***

***Subordinate Law SL2015-4***

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

**Circulated by authority of  
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Minister for Planning**

This Regulatory Impact Statement relates to substantive elements of the *Planning and Development (University of Canberra) Amendment Regulation 2015 (No 1)*. The proposed law amends the *Planning and Development Regulation 2008*.

## Terms used

The following terms are used in this regulatory impact statement:

“Act” means the *Planning and Development Act 2007*;

“DA” means a development application under the Act;

“the proposed law” means this amending regulation;

“the regulation” means the *Planning and Development Regulation 2008*;

“ACAT” means the ACT Civil and Administrative Tribunal

“Third-party appeals or review” – a reference to third-party appeal or review 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 law deals with development applications in the merit track.

## Executive Summary

The ACT Government has been in discussion with the University of Canberra (UC) on proposals to develop the land held by the UC. The UC Council has developed a ‘master plan’ that sets out the long term goals for development into the future.

To bring the master plan to life the University will need to attract significant developer interest. However, developers may be hesitant to engage in this development without a degree of certainty about assessment processes and most importantly third-party appeal rights.

Because of the proposed scale of the developments, similar to those that happen in town centres, it is justified that developers would seek some certainty before they commit time and significant resources to complete projects.

The removal of review rights by a third-party application to ACAT expedites the initial release of the Development Approval with it having effect on approval instead of at the end of the time period allowed for lodgement of applications for review (28 days), and removes a delay of a minimum of 120 days and potentially much longer periods from an application for complex or contentious matters, should an appeal be lodged.

The removal of third-party review rights retains all other elements of the assessment process. The community will still be able to make representations on any DA for the site and such representations must be considered by the planning and land authority in arriving at its decision. Importantly the right to seek review under the *Administrative Decisions (Judicial Review) Act 1989* or under Common Law is retained.

The proposed law represents a minimal legislative approach to expedite the planning process by limiting potential delays and providing greater certainty. The removal of third-party review rights, by the proposed law, is site specific and has no application in other areas.

The Assembly has the opportunity to consider this legislative response to expediting the planning process. The proposed law will be tabled in the Assembly and members will be able to move to disallow or amend the regulation (*Legislation Act 2001 s68*).

### ***Defining the issue***

The University of Canberra (UC) is seeking to progress development on land held under its Crown lease. The proposed development will allow the university to fully realise the potential of under-utilised land. This will assist the university in endeavours to become economically viable and reduce its reliance on government funding.

To attract developers the planning system will need to ensure that minimal delays are experienced by proponents. This of course needs to be balanced against the need for the community, and especially adjacent lessees, to have information about the proposed developments and a means to make comment on those developments.

One of the ways to provide 'certainty' around the time expense in the planning process is to minimise, when appropriate, the opportunity for third-party review of decisions: effectively streamlining the assessment process to the core elements as defined in the P&D Act and prescribed timeframes. This provides certainty to proponents while ensuring the community retains a right to comment on the proposal.

### **The authorising law**

The proposed law is made under section 407 and schedule 1, item 4, column 2, par (b).

#### **(a) Policy objectives of the proposed law and the reasons for them**

The policy objective is to expedite the planning process to facilitate the timely construction of developments anticipated by the UC master plan. The proposed solution will need to ensure:

- (i) the integrity of the planning and assessment process in respect of assessing and approving developments is maintained;
- (ii) *the proposed development is consistent with the Territory Plan and the Act;*
- (iii) the community has the opportunity to support, object to, or comment upon the development, with such input being assessed as part of the process;
- (iv) providing certainty to the proponent when a development consent is given.

While the policy objective is to expedite the planning process it is important that proposed developments are subject to full and proper assessment against the provisions of the Territory Plan, and that community comment is considered in making a decision on any development application lodged.

The proposed law will achieve this.

### **(b) Achieving the policy objectives**

The proposed law leaves in place the assessment of any future DA against the Territory Plan and applicable laws within the existing planning assessment framework. It imposes no statutory intervention into the Act and ensures assessment will occur consistent with the Act's objectives. The exemption of certain types of development from third-party review is integral to the operation of the Act and significant exemptions are currently in place.

The standard assessment process will be followed taking into account the Territory Plan, the Act and all relevant laws. Standard inter-agency circulation and comment will apply. A DA will be publicly notified and the community will be able to make representations in respect of the DA. The planning and land authority is required to consider such representations when assessing and determining the DA.

The proposed law removes the risk of significant time delay due to third-party appeals. At a minimum the proposed law removes a 28 day wait for the development approval to become effective, enabling construction to begin immediately that development conditions are satisfied

The right to third-party review is removed in the merit track by the proposed law. The legislative approach embodied in the proposed law achieves the key policy objectives.

### **(c) Consultation**

There has been no specific government public consultation on the proposed law. Because the UC site is contained by major roads, urban open space and a school it is not considered necessary to conduct external consultation. This is further supported by the fact that the UC site is long established, since 1967, and the adjoining community would have an established expectation that 'development' would happen on the site at some point.

The UC has stated to government that it has an internal committee that manages the forecast and delivery of development on the land and these plans must be vetted by internal approval processes before progressing to the legislated assessment processes.

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

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

Section 350 of the regulation specifies that a development application in the merit track in relation to a matter mentioned in schedule 3 part 3.2 of the regulation is exempt from third-party review.

The proposed law is within the parameters of the authorising law. There have already been significant classes of development approvals that have been exempted from third-party review. The Legislative Assembly has considered such exemptions a number of times previously. The proposed law is also consistent with the Government objectives behind making the Act and the objects stated in section 6 of the Act.

It is relevant to note that the proposed law does not create an entirely new class of exemptions, but a specific exemption for a specific site.

**(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 discussion below in paragraph (j) is relevant in respect of consideration of issues under the *Human Rights Act 2004*.

**(f) Mutual recognition issues**

There are no mutual recognition issues as the Act operates as a stand-alone piece of planning legislation with each State and Territory managing planning under its own legislation. There are no opportunities for mutual recognition as there are for example for building licenses

**(g) Reasonable alternatives to the proposed law**

The assessment of development applications is a legislated process. While efficiencies can be considered in administrative practices these would not have the effect of achieving certainty and reducing the possibility of time delays in commencing the approved development.

A range of legislative options were considered which included modifying the assessment requirements and removing all review rights as far as permissible by law, and exempting a development proposal from the need to seek development approval (section 133 (1) (c) of the Act).

These options were decided against as they failed to satisfy the policy objectives of the proposal. In particular specific overriding legislation may have unknown or unintended consequences and exemption would remove the proposal from the ambit of the Act in its entirety meaning no development approval would be required (though it would still have to comply with other law).

**Brief assessment of benefits and costs of the proposed law**

The proposed law is limited to development on a nominated site. While the location of the site and zoning of adjacent land means the potential for third-party appeals is minimal the impact on a proponent is significant as the proposed developments are high cost developments The amending regulation creates a balance between the likely hood of third-party appeals and the impact on a proponent.

It is important to note that while the possibility of a third-party appeal is minimal the amending regulation, by removing the right to review to ACAT, means that the only options available to a third-party would be to the Courts or under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR). ADJR review is about the administrative process of reaching a decision and cannot replace a decision (it can require that the process is undertaken again). The ADJR Act has clear and simple procedures and costs incurred can be awarded.

For a proponent the proposed law has the benefit of removing potentially significant time delays and creating certainty at the time of the development approval, while removing any potential costs in running third-party appeals and potential cost escalations, for example

holding costs on finance, should developments be delayed by a third-party appeal. It is not possible to estimate these potential costs at this stage, however the key benefit is the expedition of the construction activity.

The broader community benefits from the proposed law by the stimulus of economic activity: both within the building and construction industry, on the university campus as well as employment opportunities in support industries. Further, proposed developments will provide facilities that will be open to the public as well as providing student accommodation and other types of residential living styles.

#### **(j) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles**

The Committee's terms of reference require it to consider whether (among other things):

- (a) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - i. is in accord with the general objects of the Act under which it is made;
  - ii. unduly trespasses on rights previously established by law;
  - iii. makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - iv. contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

The matters that need to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles are that as the proposed law takes away an existing right of review, does it unduly trespass on rights previously established by law (terms of reference (a) ii) and make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions (terms of reference (a) iii). 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 (terms of reference (a) (iv)).

The proposed law can be considered to trespass on rights previously established by law as it removes an existing right to review. 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 non-reviewable. 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 DAs having significant off site impacts, particularly in residential areas, would be open to third-party appeals. Third-party appeal rights have been significantly modified during the first 6 years of the Acts operation to align the Act with its core policy objectives of increasing certainty and clarity around development processes and making the planning system "faster, simpler and more effective" (see [Attachment A](#) – Background to the policy object of the ACT Planning and Development Act 2007).

The proposed law is specific, not general in its application, and only applies to the identified site. Significant community input and consultation occurred during the creation of the new

planning system including its zoning and development provisions and the proposed development is consistent with the provisions and requirements of the Territory Plan.

The *Human Rights Act 2004*, in section 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 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<sup>1</sup> cases (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46) ACAT 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.<sup>2</sup>". In a further ACAT case (*Tran*<sup>3</sup>) the Tribunal agreed with the approach in *Thomson*. Further in (*Tran*) the Tribunal noted: "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.<sup>[53]</sup> 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]"

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 balance the need to promote economic activity and enabling the UC to become less dependent on external funding against an existing right to third-party review. The need for economic stimulus in the building and construction sectors was recognised in March 2014 when Government announced a stimulus package for the sector. The package runs for two years with the anticipation that longer term reforms will maintain and support growth in the sector and across the ACT.

The developments proposed in the UC Master Plan come at a time when it has recently been reported that the ACT is falling behind the States in building and construction activity. The UC site is large allowing a greater scale of development that is in character with surrounding areas, especially the Belconnen town centre and the adjacent technology park, a greater scale of development can be undertaken than may be available to other lessees.

Persons that may be affected by the proposed law continue to have the ability to make submissions on the DA, which the planning and land authority must consider in reaching any decision. The proposed law does not affect rights persons may have under the Administrative Decisions (Judicial Review) Act or at common law.

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<sup>1</sup> ACAT cases can be accessed at <http://www.acat.act.gov.au/decisions.php>

<sup>2</sup> Extract of Commissioner's comments. *Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at para 99

<sup>3</sup> *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT 46

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 (as 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 track from being subject to third-party review. This means the proposed law is within an express power granted by the Legislative Assembly and clearly in line with its intended purpose of focussing merit review on matters of greater impact (both onsite and offsite). The Legislative Assembly has also had the opportunity to consider several regulations made under this provision on previous occasions.

In summary the proposed law does not unduly trespass on existing rights, or, make rights unduly dependent upon non reviewable decisions and is an appropriate matter for regulation.

#### **(k) Transitional arrangements**

The proposed regulation does not have retrospective effect and applies to a single nominated site. No transitional arrangements are necessary.

#### **Conclusion**

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



Attachment A - 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. This regulation is consistent with the Act as assessment and appeal rights have developed since March 2008 and the nature and extent of third-party review rights have been modified in response to implementing the objectives of the Act.