

2007

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**LAND (PLANNING AND ENVIRONMENT)
LEGISLATION AMENDMENT BILL 2007**

EXPLANATORY STATEMENT

**Presented by
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Overview of Land (Planning and Environment) Legislation Amendment Bill 2007

Terms used

The following terms are used.

"the Bill" means the *Land (Planning and Environment) Legislation Amendment Act 2007* (i.e. the proposed Act that is described by this explanatory statement);

"Legislation Act" means *Legislation Act 2001*

"Principal Act" means the *Land (Planning and Environment) Act 1991* (this is amended by the Bill);

"Regulation" means the *Land (Planning and Environment) Regulation 1992* (this is amended by the Bill);

"2006 amendment regulation" means the *Land (Planning and Environment) Amendment Regulation 2006 (No 2)* (subordinate Law SL2006-13) that was notified in April 2006 (i.e. the amendment regulation that exempted or purported to exempt development in Civic, town centres and industrial areas); and

"third party appeals" means appeals made under section 276 of the Principal Act by an objector to a development application or by someone who did not make an objection but is entitled to appeal nonetheless on the basis that they had reasonable grounds for not objecting (refer subsection 276(2)(b)). Under section 276 an appeal may be made to the Administrative Appeals Tribunal (AAT) for merit review of a decision to grant an approval or include a condition in an approval.

Background

Section 282(1)(e) authorises the making of regulations "exempting development of a kind specified by regulation ..." from the application of provisions in Part 6 of the Principal Act including section 276.

Schedule 7 of the Regulation lists exemptions from third party appeals (that would otherwise be available under section 276 of the Principal Act). Schedule 7 was made under section 282(1)(e) of the Principal Act. This schedule was augmented or purportedly augmented by the 2006 amendment regulation notified in April 2006. The intention behind the amendment regulation was to widen the existing exemptions from third party appeal by exempting all development in "the Civic centre area; or a town centre area; or an industrial area." The amendment regulation did this by adding what is now item 11 of schedule 7 to the Regulation and making related amendments.

Decision of the ACT Supreme Court

The Bill makes changes to address issues raised by a decision of the Supreme Court of the ACT (Supreme Court). The issues were raised in the decision of His Honour, Justice Gray in the case of *Capital Property Projects (ACT) Pty Ltd & ors v Planning & Land Authority & ors* [2006] ACTSC 122 (15 December 2006).

In this decision, the Supreme Court considered the validity of an element of item 11 of schedule 7 of the Regulation (i.e. item 11 inserted by the 2006 amendment

regulation). The Supreme Court ruled that section 43(1) of the Regulation when read in conjunction with schedule 7 item 11(c) of the Regulation is invalid.

In summary, the Supreme Court decided that section 282(1)(e) of the Principal Act did not authorise a regulation to exempt from AAT appeal *all* development in an industrial area. The Court concluded that the phrase "of a kind" in section 282(1)(e) required such a regulation to say *what kind of* development is exempt. The Court decided that it was not sufficient in this respect for the regulation to simply specify "industrial area".

The decision did not directly apply to other provisions in the Regulation such as schedule 7 items 11(a) and 11(b) (i.e. exemptions from third party appeal of development in Civic and town centres). However, the reasons behind the decision of the Supreme Court throw doubt on the validity of these and similar provisions. The reasons also apply to section 282(1)(f) of the Principal Act which authorises the making of regulations "exempting a controlled activity of a kind specified by regulation ...".

Possible implications of decision

The decision of the Supreme Court in effect removes or places in doubt the exemptions from third party appeal that were intended to be put in place by the 2006 amendment regulation. In the Government's view this is an undesirable outcome. This is because the underlying need for the exemptions remains as compelling now as it was in April 2006 when the amendment regulation was notified.

The exemptions serve to improve the development assessment process within the Civic centre area, a town centre area and industrial areas by increasing certainty and reducing delays and costs. This should facilitate development in these areas, which is of general benefit to the Territory. Persons affected by particular development proposals are able to make submissions on individual proposals or relevant Territory Plan variations. Notification of development applications in the Civic centre area, a town centre area and industrial areas will still occur in the circumstances where notification already occurs (schedule 6 of the Regulation contains a number of exemptions to notification requirements). The exemption does not affect the ability to take action under the *Administrative Decisions (Judicial Review) Act 1989*. The exemptions are consistent with the development of a track based assessment system, in which there would be certain cases, such as town centres, where there might be notification but no third party appeal rights. This system was assessed in consultation with the ACT community through the Government's Planning System Reform Project and has been incorporated into the Planning and Development Bill 2006.

While the decision of the Supreme Court is clear, the wider implications of the decision creates a level of uncertainty for some development approvals that were covered by the 2006 amendment regulation (both granted and under consideration). Contrary to the intention of the Government and the understanding of the property sector, these approvals may now be open to section 276 third party appeals in some circumstances.

In addition, the decision of the Supreme Court in changing what was intended and understood to be the legal position, could have the effect of interrupting the certainty and continuity of the regulatory environment. The Bill is intended to

restore the legal position that was originally intended and so maintain the certainty and continuity essential to a positive climate for property investment and home building in the Territory.

The Human Rights Act 2004

The *Human Rights Act 2004* (Human Rights Act), 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 an exemption of specified development from third party appeal. However, 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 the Bill limits any rights afforded by the Human Rights Act, these limitations must meet the proportionality test of section 28 of that legislation. In this case the Bill serves to underpin certainty and continuity in the regulatory environment necessary for investor confidence in the ACT. The exemptions restored by the Bill serve to improve the development assessment process as noted above.

Bill amendments overview

The Bill amends the Principal Act to affirm the ability of the Territory to make the provision considered by the Supreme Court and similar provisions that are in doubt as a result of the reasons of the Court. The Bill does this chiefly by removal of the phrase "of a kind" from section 282(1)(e) of the Principal Act and the insertion of examples of the kind of regulations that are intended to be authorised by the section (refer to clause 6, revised section 282(1)(e)). The phrase "of a kind" is also omitted in revised section 282(1)(f).

The Bill also has retrospective effect. The amendments to subsections 282(1)(e) and 282(1)(f) of the Principal Act apply not just to future regulations but to all past regulations made under these provisions (refer to clause 7, new subsection 282(5)). As a precautionary measure, the Bill also specifically validates all past regulations purportedly made under 282(1)(e) and 282(1)(f) (refer to clause 8, new section 288A).

The amendments to section 282 of the Principal Act are intended to restore the legal position that was intended by the Government and understood to be the case prior to the Supreme Court decision. The scope of the amendments and their retrospective effect are necessary to restore certainty as to the legal position of relevant regulations and development applications.

The Bill also amends section 275 of the Principal Act to make it clear that only the applicant or the Heritage Council may apply to the AAT for a review of a decision to give a development approval subject to a condition (refer to clause 4, new section 275(1A) and revised section 275(2)). This amendment is necessary

to make it clear that section 275 cannot be used to bypass or avoid the exemptions from section 276 third party appeals. These changes are also retrospective.

The Bill also makes several minor amendments to the Regulation to ensure that relevant provisions are clearly within the scope of subsection 282(1)(e) of the Principal Act and for consistency in language (refer to Part 3 of the Bill). The underlying functions of these provisions are unchanged. These changes are also retrospective.

Amendments in detail

Part 1 – Preliminary

Clause 1 - Name of act - provides for the title of the proposed Act.

Clause 2 – Commencement of Act - stipulates that the proposed Act commences on the day after its notification. Note key clauses have retrospective effect as a result of clauses 5, 7 and 8.

Part 2 – Land (Planning and Environment) Act 1991

Clause 3 - Legislation amended-pt 2 – specifies the Principal Act to be amended.

Clause 4 – AAT review – general - section 275(2) and (3) – New subsection 275(1A) (with revised section 275(2)) specifies that only the applicant for the relevant development approval and the heritage council may apply under section 275 of the Principal Act to the AAT for a review of a decision to grant an approval subject to a condition. Others may no longer apply to the AAT for a review of this decision under section 275. Third party appeals on such a decision may still be available under section 276 of the Principal Act, subject to any exemptions that may apply. The application of section 275 of the Principal Act to other decisions listed in part 4.1 of schedule 4 of the Principal Act is not affected by this amendment. The notice provisions in revised section 275(3) are amended consistent with new subsection 275(1A).

Clause 5 – New section 275(5) to (7) – New subsection 275(5) gives new subsection 275(1A) and related amendments retrospective effect. The amendments in clause 4 are deemed to have been in place and to always have been in place in connection with any decisions covered by new section 275(1A) (decision to grant an approval subject to a condition). New subsection 275(7) provides that new subsections 275(5) and 276(6) (retrospective and transitional provisions) expire after 12 months following commencement of 275(7). However, 275(6) applies section 88 of the Legislation Act (repeal does not end effect of transitional laws).

Clause 6 – Regulations for part 6 - Section 282(1)(e) and (f) – revised section 282(1)(e) affirms the power to exempt development from all or part of Part 6 of the Principal Act. The revision is to make it clear that the exemption may apply to a range or class of development and that this range or class may be identified by reference to any matter. This is achieved in part by the omission of the phrase "of a kind". The revised section includes non-exhaustive examples of the type of exemptions that are envisaged. These include the exemption of development in a specified area. The examples make it clear that a class or range of development can be specified by reference to conditions, circumstances, location, land use policy and/or other matters. Revised section 282(1)(f) (exemption of controlled activities from provisions in Part 6 of the Principal Act) is amended in a manner similar to the changes made to section 282(1)(e).

Clause 7 – New section 282(5) to (7) – New subsection 282(5) gives the amendments made to section 282 of the Principal Act retrospective effect. The amendments are deemed to have been in place and to always have been in place in connection with any regulations that were made or purported to be made under subsection 282(1)(e) or 282(1)(f) of the Principal Act. New subsection 282(7)

provides that new subsections 282(5) and 282(6) (retrospective and transitional provisions) expire after 12 months following commencement of 282(7). However, 282(6) applies section 88 of the Legislation Act (repeal does not end effect of transitional laws).

Clause 8 – New sections 288A and 288B – New section 288A specifically validates the regulation found to be invalid in part by the Supreme Court and also any other regulations made or purportedly made under subsections 282(1)(e) or 282(1)(f) of the Principal Act. New subsection 288A(4) provides that this new section expires after 12 months following its commencement. However, new subsection 288A(3) applies section 88 of the Legislation Act (repeal does not end effect of transitional laws).

New section 288B means that amendments to the Regulation made under Part 3 of the proposed Act (refer below) are retrospective as well as prospective. Transitional and expiry provisions similar to those in new section 288A apply.

Part 3 – Land (Planning and Environment) Regulation 1992

Clause 9 – Legislation amended-pt 3 – states that this Part 3 amends the Regulation.

Clause 10 – Exclusion of appeals – general - section 42(1) – The new wording in revised subsection 42(1) of the Regulation is intended to clarify this provision. The revised wording is to put it beyond doubt that this provision exempts specified development from a provision of part 6 of the Principal Act (i.e. section 275) and as such is authorised by section 282(1)(e) of the Principal Act. The underlying function of subsection 42(1) of the Regulation remains, that is, to provide that section 275 of the Principal Act does not apply if the relevant decision is in relation to development listed in schedule 6 of the Regulation.

Clause 11 – Exclusion of appeals – by objectors and third parties – Act, section 276 section 43(1) The new wording of revised subsection 43(1) of the Regulation is intended to have an effect similar to the amendments to subsection 42(1) made in clause 10. In summary, the revised wording is to make it clear that 43(1) is authorised by section 282(1)(e) of the Principal Act.

Clauses 12-17 of Part 3 - clauses 12-17 of Part 3 of the proposed Act are to delete the phrase "a development" and replace it with the phrase "development" (i.e. without the "a") in relevant provisions of schedule 6 and 7 of the Regulation. These amendments are made to make these provisions more clear. The amendments are to make it immediately apparent that the relevant provisions apply not just to specific, single development proposals but also to a (specified) range of development. The changes are also to ensure consistency of language:

- (a) with the revised section 282(1)(e) of the Principal Act which refers to "exempting development" rather than "exempting a development"; and
- (b) between sections 42(1) and 43(1) of the Regulation and the schedules that they refer to.

Section 145(b) of the Legislation Act continues to apply to these revised provisions as well as to other provisions of the Principal Act and the Regulation. Section 145(b) provides that "words in the singular number include the plural and words in the plural number include the singular".