2009

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development Amendment Regulation 2009 (No 7)
SL2009-31

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Andrew Barr MLA

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 7)

EXPLANATORY STATEMENT

Overview

On 3 February 2009, the Commonwealth announced its $42b *Nation Building and Jobs Plan* (the Commonwealth Plan). The funding for the Commonwealth Plan is the subject of the Commonwealth's *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009*. The Commonwealth Plan is intended to provide a stimulus to the national economy to mitigate the effects of the current global financial crisis and economic downturn. The Commonwealth Plan provides funding for various projects including for public and community housing and defence housing. The funds are granted on the condition that they be spent or be committed for spending within a short time period. For example, a significant amount of the funds must be spent within 12 months of the announcement of the Commonwealth Plan or they may be lost to the Territory.

ACT Government funding will also be available for various projects. Given the time frames required by the Commonwealth Plan and the availability of the ACT government project funding, it is necessary to amend the *Planning and Development Regulation 200*8 (the regulation) in order to limit the potential for individual projects to stall as a result of delays in the development assessment or appeals process.

Public notification

Public notification of development applications allows third parties (neighbours, etc) to comment on the proposals. There are statutory requirements in relation to public notification of development applications (Division 7.3.4 of the *Planning and Development Act 2007* (the Act)). Notification can involve letters to neighbours, posting a sign on the land and placing a notice in the newspaper. Anyone can make a representation about a development application that has been publicly notified under the Act (see section 156). Such representations must be made during the relevant public consultation period which varies from 10 to 15 working days and can be extended by the planning and land authority (the authority).

Due to the time limits on the funding by the Commonwealth and the need for both the Commonwealth and Territory funding to achieve their objective of stimulating the economy, the government chose the option of expediting development applications for social housing projects which are not exempt development and therefore, require development approval, by limiting the public notification such applications to the minimum period of 10 days working days.

In accordance with section 152 of the Act, the authority must publicly notify certain types of development applications. Under section 152(1)(a), the authority must undertake public notification of merit track development applications prescribed by regulation in the manner prescribed in section 152(2). Under section 152(2), the authority may prescribe, by regulation, public notification under either section 155 (Major public notification) or section 153 (Public notice to adjoining premises) of the

Act. Section 27 of the current regulation prescribes public notification of merit track applications for sections 152(1)(a) and 152(2).

Under section 27(3) of the current regulation, applications in the merit track set out in schedule 2 of the regulation must be notified in accordance with section 152(2)(b), that is, under section 153 (Public notice to adjoining premises). Section 157 of the Act provides for the regulation to set out the length of the public notification period. Section 28 of the regulation states that a limited public (i.e. neighbour) notification matter has a public consultation period of 10 working days while major public notification matters have a public consultation period of 15 working days.

The proposed regulation includes a new section 27(4) which states that an application for a social housing development proposal (new items 9, 10 and 11 in schedule 2) is not prescribed for section 152(1)(a) of the Act. This has the effect of requiring the planning and land authority to notify the proposal in accordance with section 152 (1)(b), which means that a social housing application must be publicly notification under both section 155 (Major public notification) and section 153 (Public notice to adjoining premises).

The proposed regulation also includes a new section 28(2) which specifies that the period of public notification for a development mentioned in section 27(4) is 10 working days.

Third party appeals

The effect of bringing social housing development applications into schedule 2 of the regulation (i.e. proposals specified in Clause 8 of the proposed regulation) is that there can be no third party appeals for these projects.

The exclusion of third party appeals for the projects covered by the proposed regulation is not the first such exclusion under the Act. The Act specifically provides, through schedules 2 and 3, for a range of matters to be exempt from third party appeals.

It should be noted that the removal of third party appeals is for a limited period only (until 30 June 2012), and this exemption only applies to projects funded by a 'declared funding program', i.e. the Commonwealth or Territory economic stimulus programs.

The adoption of the minimum public notification period (10 days) and the time limited exemption from third party appeals for matters covered by Clause 8 mean that government and community housing providers will be best placed to effectively use stimulus package funding in the shortest possible time frame. This ensures that the benefits in terms of provision of increased social housing and the resultant economic stimulus to the economy can be realised sooner, and the risk of losing funding due to delays in the development application process will be minimised.

Taken together, the proposed amendments to the regulation have the effect of:

- Requiring the planning and land authority to publicly notify a merit track social housing proposal by letter to adjoining properties, by signage on the development site, and by newspaper notice;
- Setting the public consultation period at 10 working days; and
- Excluding third party ACAT review.

Human rights issues in relation to schedule 2

The *Human Rights Act 2004* (the HRA), in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by schedule 2 of the regulation.

However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of *appeal* for civil matters[1].

In relation to planning matters, human rights law has not identified a third party right of appeal as a requirement, except in relation to a particularly badly affected 'victim' of a planning decision. Instead, a combination of opportunities for input by third parties of their views on planning applications and the ability to have recourse to judicial review, has been found to be sufficient to satisfy the requirements of the right to a fair trial[2].

Furthermore, case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.

To the extent that schedule 2 of the regulation limits any rights afforded by the HRA, these limitations must meet the proportionality test of section 28 of that legislation. The schedule serves to improve the development assessment process within the Territory by ensuring that only matters which have the potential to significantly impact on residential areas are open to third party appeals. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these

[1] In *I.P v Finland* CCPR/C/48/D/450/1991, the UN Human Rights Committee noted that the right to an appeal is a right with respect to criminal proceedings and is not guaranteed in civil proceedings: 'The Committee notes that whether matters relating to the imposition of taxes are or are not "rights or obligations in a suit at law" does not have to be determined, because in any case the author was not denied the right to have his claims concerning the decision by the Tax Office heard before an independent tribunal. As for the author's claim that he was denied the possibility of appeal, even were these matters to fall within the scope ratione materiae of article 14, the right to appeal relates to a criminal charge, which is not here in issue.'

[2] See, for example, *R (Alconbury Developments Ltd and others) v. Secretary of State* (2001) 2 W.L.R. 1389 and (2001) 2 All E.R. 929; *Tower Hamlets LBC v. Begum* (2002) All E.R. 668; *R (Adlard) v. Secretary of State for the Environment* (2002) EWCA Civ 735*; Regina (Aggregate Industries) v. English Nature and Secretary of State* (2002) EWHC Admin 908. See also *Bryan v United Kingdom*, (1996) 21 EHRR 342

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

On balance, the social and economic benefits that will flow to the ACT community from securing the substantial funding available under the Commonwealth Plan for social housing projects outweigh the limited foregoing of third party appeal rights on development assessment decisions. This is especially the case given that the exemption is time limited to 30 June 2012; only applies to projects that funded under declared funding programs (i.e. Commonwealth or Territory economic stimulus programs); and there will be major public notification of all proposals and there will still be the opportunity to make representations to the planning and land authority.

The proposed amendments achieve 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. In all these circumstances, the proportionality test of section 28 is met.

Detailed summary of provisions

Clause 1 – Name of Regulation – states the name of the regulation, which is the *Planning and Development Amendment Regulation 2009 (No 7)*.

Clause 2 – Commencement – states that the regulation commences on a day after its notification day.

Clause 3 – Legislation amended – states that the regulation amends the *Planning and Development Regulation 2008*.

Clause 4 – New section 27(4) – states that an application for a development proposal for the following items:

- schedule 2, item 9
- schedule 2, item 10
- schedule 2, item 11

is not prescribed for section 152(1)(a) of the Act, which as the effect of requiring the planning and land authority to notify a proposal for the items in accordance with section 152(1)(b).

Clause 5 – New section 28(2) – states that an application for a development proposal in section 27(4) the prescribed period of public notification is 10 working days.

Clause 6 – Section 406 (1)(a) - includes social housing programs and developments in matters that the Chief Minister may declare to be a declared funding program (this is currently limited to funding for development activities in schools).

Clause 7 – new section 407(1) - states that following provisions expire on 30 June 2012:

- section 27(4)
- section 28(2)
- schedule 2, item 9
- schedule 2, item 10
- schedule 2, item 11
- dictionary definition of multi-unit housing

The limited period of operation will ensure the Territory can take advantage of the extra funding available for social housing as a result of the Commonwealth and Territory economic stimulus programs which it is anticipated will cease be available by 30 June 2012.

Clause 8 – Schedule 2, new items 9, 10 and 11 – inserts new items 9, 10 and 11 in schedule 2 of the regulation. Schedule 3 of the regulation lists merit track matters exempt from third-party ACAT review – item 1 of schedule 3 is any development to which schedule 2 applies.

New item 9 – adds to schedule 2 the building of single or multi-unit dwellings (and associated activities) by or for the Territory, where:

- the development is funded under a declared funding program;
- the dwelling is built on land leased by the Territory, a territory authority, or under an agreement to transfer the land back to the Territory once the dwelling is built;
- the dwelling will be provided by the Territory under an approved social housing program or transferred to a community housing provider

New item 10 - adds to schedule 2 the building of single or multi-unit dwellings (and associated activities) by or for a community housing provider, where:

- the development is funded under a declared funding program;
- the dwelling is built on land leased by a community housing provider, or under an agreement to transfer it to a community housing provider once the dwelling is built;
- the dwelling will provide community housing

New item 11 – adds to schedule 2 the building of single or multi-unit dwellings (and associated activities) for defence housing, where:

- the development is funded under a declared funding program;
- the dwelling is built on land leased by Defence Housing Australia;
- the dwelling will provide defence housing

Note: The Commonwealth Government has also approved funding of around $252 million for Defence Housing Australia to construct 802 new

homes across Australia. It is expected that approximately $3 million of this will be spent in the ACT on the construction of defence housing.

Clause 9 – Dictionary, note 2, new dot point – inserts *territory authority* as a new dot point under note 2 in the dictionary, which gives examples of terms defined in the *Legislation Act*. A *territory authority* is defined in that Act as "a body established for a public purpose under an Act, but does not include a body declared by regulation not to be a territory authority."

Clause 10 – Dictionary, new definition of *multi-unit housing* – inserts a definition of *multi-unit housing* by calling up the definition in Territory Plan dictionary, which defines *multi-unit housing* as "the use of land for more than one *dwelling* and includes but is not limited to *dual occupancy housing* and *triple occupancy housing*."