2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development Amendment Regulation 2011 (No 1) SL2011-30

EXPLANATORY STATEMENT

Presented by
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Minister for the Environment and Sustainable Development

This Explanatory Statement relates to the *Planning and Development Amendment Regulation 2011 (No 1)* (the amending regulation) as presented to the Legislative Assembly.

The Statement must be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Common terms:

Third party appeal – 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

Background and Overview:

Schedule 1 of the *Planning and Development Act 2007* (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.

Regulations have already been made to exempt certain matters from third party ACAT merit review. These include sections 350 and 351 of the *Planning and Development Regulation 2008* (the regulation) and also schedule 3 of the regulation, particularly parts 3.1, 3.2 and 3.3. Exemptions to third party appeals currently apply to all development in industrial areas and within the geographic areas of Civic and the town centres of Gungahlin, Belconnen, Woden and Tuggeranong and in some specific commercial areas.

The amending regulation extends the exemptions to 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 (see clause 5).

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 (ACT Civil and Administrative Tribunal) merit review.

The amending regulation includes a new definition of Kingston Foreshore in Part 3.1 of schedule 3 of the regulation with reference to a new map which is new division 3.46.

To be clear, there is no equivalent exemption from third party merit review for development applications in the *impact* track – in other words, there is no change to section 351 of the regulation and no change to part 3.3 of schedule 3 to the regulation.

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;
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).

During consultation on the Planning System Reform Project community comment indicated that there was a perceived impediment to development because of the delays experienced during third party appeal processes.

The third party appeal process is a resource intensive one that can result in considerable delay to decisions on development applications. This process should be used for the review of individual proposals and not as a forum for policy debate or a means to gain a commercial advantage. A sparing and well targeted use of third party appeal process serves to consolidate a planning culture that encourages community consultation on planning policy rather than ad hoc debate on individual cases.

Statistics indicate that there were two ACAT merit review cases in relation to development in the area since 2009 and no cases between 1997 and 2008. The period of time between lodgement of the appeal and the ACAT's decision was typically 6-7 months.

While these numbers in themselves do not represent an exceptionally high number of appeals, significant court cases have the potential to create uncertainty (eg on the interpretation of the Territory Plan) not just for the immediate parties but also for other developers and residents in the immediate area. Given the high value of developments in the Kingston Foreshore area and the continuing nature of development, further litigation is likely.

The intention of the proposed law is to improve the development assessment process in the Kingston Foreshore area by increasing certainty in decision making and the reduction of delays and costs. The intent is to facilitate development in this area which is of general benefit to the Territory.

People who are affected by particular development proposals will still be able to make submissions on individual proposals or relevant Territory Plan variations. The requirements for public notification of development applications remain unchanged. The proposed law does not affect the ability to take action under *the Administrative Decisions (Judicial Review) Act 1989*.

The substantive changes to the regulation by the amending regulation improve timeliness, transparency and efficiency in the planning process. 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 A) 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[1] 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.[2]". In a further ACAT case (Tran[3]) the Tribunal agreed with the approach in *Thomson*.

Case law in relation to human rights legislation containing the equivalent of section 12[4] 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 policy for these areas. The proposed law does not affect rights persons may have under the *Administrative Decisions (Judicial Review) Act 1989*.

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[1] ACAT cases can be accessed at http://www.acat.act.gov.au/decisions.php
[2] Extract of Commissioner's comments. *Thomson v ACT Planning and Land Authority* [2009] ACAT 38 at para 99
[3] *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT 46
[4] *Smith v Hobsons Bay City Council* [2010] VCAT 66; 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

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 LP&E Regulation).

The Scrutiny of Bills Committee[5] (the Committee), 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 LP&E 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.

[5] 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 response to the Committee's comments the Minister, in his reply dated 14 July 2006, 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.[6]".

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.

[6] 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

Regulatory Impact Statement

A regulatory impact statement is required and has been prepared because the amending regulation 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.

Outline of Provisions

Clause 1 Name of regulation
Names the regulation as the *Planning and Development Amendment Regulation 2011 (No 1)*.

Clause 2 Commencement
Provides that the regulation commences on the day after its notification.

Clause 3 Legislation amended
States that the regulation amends the *Planning and Development Amendment Regulation 2008*.

Clause 4 Schedule 3, section 3.1, new definition of *Kingston Foreshore*
Inserts a new definition of Kingston Foreshore in schedule 3 for the purposes of clause 5 - 8.

Kingston Foreshore means the area outlined in bold on the plan in schedule 3, division 3.4.6. The area has been known as the Kingston Foreshore since conception of the project in 1994. The land for the project was the subject of a land swap between the Federal and ACT Government in 1995. The Kingston Foreshore Development Authority was created in 1995. A Master Plan of the area is available at http://www.lda.act.gov.au/?/kingstonforeshore/the_project/masterplan.

Clause 5 Schedule 3, part 3.2, item 4, column 2, new paragraph (d)
Inserts the words 'Kingston Foreshore'. Item 4 col. 2 already includes other things that are exempt such as the city centre, a town centre or an industrial zone. What is meant by city centre and town centre is defined through maps included at part 3.4.

Clause 6 Schedule 3, part 3.2, item 6, column 2, new paragraph (d)
Clause 6 omits city centre or a town centre and substitutes this with city centre, a town centre or the Kingston Foreshore.

This amendment is necessary because of clause 5 above.

There is no change to the areas defined at part 3.4 i.e. what is meant by the city centre or a town centre. The amending regulation adds the maps to define Kingston Foreshore at part 3.4.

Clause 7 Schedule 3, part 3.2, item 6, column 2, new paragraph (d)
Clause 7 omits city centre or a town centre and substitutes this with city centre, a town centre or the Kingston Foreshore.

This amendment is necessary because of clause 5 above.

There is no change to the areas defined at part 3.4 i.e. what is meant by the city centre or a town centre. The amending regulation adds the maps to define Kingston Foreshore at part 3.4.

Clause 8 Schedule 3, part 3.2, item 6, column 2, new paragraph (d)
The amendment is the same as that made by clause 6 and 7 in that it inserts Kingston Foreshore as a consequence of clause 5.

There is no change to the areas defined at part 3.4 i.e. what is meant by the city centre or a town centre. The amending regulation adds the maps to define Kingston Foreshore at part 3.4.

Clause 9 New division 3.4.6
Inserts a new division 3.4.6 that is a map of the Kingston Foreshore as a consequence of clause 4 above.

Clause 10 Dictionary, new definition of *Kingston Foreshore*
Inserts a new definition of *Kingston Foreshore* in the Dictionary which is defined as the area outlined on the map in new division 3.4.6 (clause 9).

Attachment A - Case Law supporting the Explanatory Statement

This attachment provides information on relevant case law from other jurisdictions as well as two cases heard by the ACT Civil and Administrative Appeals Tribunal (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 (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

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.