2015

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT (UNIVERSITY OF CANBERRA) AMENDMENT REGULATION 2015 (No 1)

Subordinate law SL2015-4

EXPLANATORY STATEMENT

Presented by

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EXPLANATORY STATEMENT

This explanatory statement relates to the *Planning and Development (University of Canberra) Amendment Regulation 2015* (No 1) (the amending regulation) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the amending regulation and to help inform debate on it. It does not form part of the amending regulation and has not been endorsed by the Assembly.

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

Terms used

The following terms are used in this explanatory statement:

"Act"	means the *Planning and Development Act 2007*
"Regulation"	means the *Planning and Development Regulation 2008*
"DA"	means a Development Application under the Act
"ACAT"	means the ACT Civil and Administrative Tribunal
"Third-party review"	is a reference to a third-party who makes application to the ACAT for merit review of a decision to grant a development approval.
"Assessment track"	means an assessment track in which the DA will be assessed. The tracks are code, merit and impact assessment and prohibited and exempt development, with each having its own assessment processes and requirements. They are described in chapter 7 of the Act. The amending regulation only deals with merit track DAs.

Background

The University of Canberra (the University), began as an institution established under Commonwealth law as the Canberra College of Advanced Education (CCAE) and reflected the status of the Australian Capital Territory as a territory managed by the Commonwealth for the people of Australia.

With self-government in 1988 the ACT established the University of Canberra under the *University of Canberra Act 1989*. The University has been sited at its present location in Bruce since its inception, as the CCAE in 1967.

From inception to the present, the University of Canberra has been evolving to respond to the needs of the community: local, national and international. This evolution has seen the University grow from a college of advanced education, to a fully fledged university; to a university that works in partnership with other educational institutions: the University is partnered with two local ACT schools UC Senior Secondary College Lake Ginninderra (formerly Lake Ginninderra Senior Secondary College) and University of Canberra High School (formerly Kaleen High School); to partnerships that reach beyond the boundaries of the ACT: from 2014,

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the university also offers its degrees at the Holmesglen Institute of TAFE, Metropolitan South Institute of TAFE, Northern Sydney Institute of TAFE and South Western Sydney Institute of TAFE.

The University of Canberra (UC) has recognised it will need to adapt its operating model not only to survive, but in order to thrive in an increasingly competitive territory education environment. The UC has outlined its plans to do this without seeking direct government investment.

The UC Council has developed a *Master Plan* for the future: a plan that fulfils the initial Master Plan developed in 1967 for the university. The Council proposes to undertake significant works that will under-pin teaching, learning and research with first rate buildings and facilities; creating a strong campus identity that engages and connects with surrounding neighbourhoods promoting an enjoyable public domain that enhances the existing bush-land setting and providing a logical, integrated circulation network for pedestrians, cyclists, cars and public transport.

The university proposes, as part of these works, the development of community health and teaching clinics; a great hall and polytechnic; indoor and outdoor sporting facilities that will promote teaching, internships and research opportunities; and enterprise buildings that can support community and government engagement with quality 24/7 conference facilities, training and exhibition facilities, and apartments for visiting academics.

The proposed developments will enable the University to capitalise on its assets to provide financial viability for now and into the future. This development will positively contribute to economic activity across the ACT. Developments undertaken as part of the UC Master Plan will require a development application (DA) under the *Planning and Development Act 2007* (the P&D Act). A DA will be assessed in the appropriate assessment track: merit or impact. Normal development assessment and notification processes will apply.

However, if a DA attracts a third-party appeal there is a very real possibility for the DA to be significantly delayed. The P&D Act allows Government the capacity to exclude certain DAs from third-party appeal when it is warranted to do so.

The Act provides, at section 407 and schedule 1, item 4, column 2, par (b), that a development application in the merit track can be exempted, by regulation, from third-party review to the ACT Civil and Administrative Tribunal (ACAT).

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.

Although the Act also provides the same capacity to exempt impact track applications, the amending regulation does not propose this: impact track DAs, in the identified area will remain open to third-party review.

Excluding third-party review rights does not remove the capacity to seek a review of a decision under the Act through the *Administrative Decision (Judicial Review) Act*

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1977 or through the Courts. Importantly, the community will still be able to make representations on a DA for the site and these will be considered by the planning and land authority in arriving at its decision on the DA.

The exclusion of third-party review rights are site specific and have no general application to other areas in the ACT. A DA in the merit track outside of the defined area, and not already exempted, will remain open to third-party review.

Overview

There is limited scope to expedite the planning process by administrative means, as assessment processes, notification requirements, entity referrals, time for responses and consideration matters are prescribed in legislation. Merit track DAs have a statutory time period of 30 working days when there are no representations and 45 working days when there are (section 122 of the Act – merit track) to decide DAs, although, complex DAs can exceed these time frames.

A significant risk to these time periods is applications for third-party review. A DA does not become effective until 28 days after the decision (i.e. in addition to the statutory time periods above), in order to allow for the potential lodgement of third-party appeals.

Should an appeal be lodged, ACAT has 120 days to determine the appeal (section 22P *ACT Civil and Administrative Tribunal Act 2008*), although this time frame is often exceeded in the case of contentious or complex matters and an appeal time of greater than six months cannot be discounted.

This means that if the DA attracts an appeal, a minimum delay of 148 days (or longer) is possible before building work can commence. During this delay the proponent has to manage the project and attempt to keep the project costs within budget. It is not unreasonable to suggest that the delay can significantly contribute to holding costs for the buildings and these costs are invariably passed on to the end user, i.e. the university. Secondly, members of the university, students and associated visitors will have access to the new facilities delayed for some considerable time.

The amending regulation proposes removal of third-party appeal rights for a merit track DA on the site of the University of Canberra, Bruce. The amending regulation operates under the express power conferred under the Act and regulation.

There are already significant classes of development approvals that have been exempted from third-party review (see section 350, schedule 3 part 3.2 of the regulation for example – merit track). Typically developments in town centres across the ACT are exempt from third-party review as is the developing region around the Kingston Foreshore.

It should be noted that the regulation does not create a new class of developments that are exempt from all assessment and review processes, rather it removes third-party review rights for development on a specified site.

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Removal of third-party review rights, for merit track DAs is considered acceptable in this instance for the following reasons:

1. The University site is approximately 117 ha and is bounded by four major roads: Ginninderra Drive to the north, College Street to the south, Aikman Drive to the west and Haydon Drive to the east. Therefore, is largely separated from adjoining urban areas.
2. Large areas of urban open space have frontage to the opposite side of these roads. For example:
   a. Land south of College Street, not part of the Belconnen town-centre, is urban open space;
   b. John Knight Memorial Park to the west of Aikmen Drive; and
   c. Urban open space to the north and south of Eardley Street, west of Haydon Drive.
3. In the southwest corner of the site adjacent to the junction of College Street and Aikman Drive, the site, shares a boundary with the Belconnen town-centre an area already exempt from third-party appeal rights. .
4. The university complements existing development in the area. For example:
   a. on the west side of Aikmen Drive are the educational institutions of UC Senior Secondary College and Arscott House, both affiliated with the UC; the Canberra Lakes Estate, a life-style living area and Kangara Village: an assisted living estate.
   b. across the 4 traffic lanes of Haydon Drive is the Fernhill Technology Park, while across the 6 traffic lanes of Ginninderra Drive is the new estate of Lawson which will allow, amongst other things, high and medium residential development, community open space and facilities and transport areas.
5. The site is located within a well established area, the University has been in operation since 1967 and areas have developed around the University. Further, the broader vicinity is well established as a hub and includes the Belconnen town-centre, government schools and colleges, sports venues including the Australian Institute of Sport, and the Calvary Hospital (located on the corner of Belconnen Way and Haydon Drive).
6. If the development proposal triggers the need for an environmental impact assessment the application will be assessed in the impact track and third-party review rights remain available.

The site is part of a vibrant and active community where existing residents choose to live. The proposed developments, anticipated through the UC Master Plan, will add to this vibrancy bringing additional employment opportunities and supporting economic growth of the District of Belconnen and the ACT.

Other types of development e.g. single residential development, certain development in commercial zones and correctional facilities are exempt from third party review. There is no evidence that these exemptions have adversely impacted on residents in these areas while the building industry benefits from being able to commence works with certainty and within time and dollar budget.

The Legislative Assembly has considered such exemptions a number of times previously and the use of the powers within the Act is considered consistent with the

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Government objectives behind making the Act and the objects stated in section 6 of the Act (see associated Regulatory Impact Statement).

In respect to the Legislative Assembly's Scrutiny of Bills Committee terms of reference, the proposed law can be considered to trespass on rights previously established by law as it removes an existing right of 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 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 six plus years of the Act's 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."

Significant community input and consultation occurred during creation of the new planning system including the Act, its zoning and development provisions and 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[1] 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.[2]"

In a further ACAT case (Tran[3]) 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.[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]".

[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

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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.

Persons that may be affected by the development envisaged in this amending regulation 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.

There remains the question of whether the amending regulation 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) and item 6 expressly allows the Executive to make regulations to exempt specified matters in the merit and impact assessment tracks from being subject to third-party review. This means the amending regulation 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 considered favourably several similar regulations made under this provision on previous occasions.

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

Regulatory Impact Statement

In accordance with section 36 of the *Legislation Act 2001,* a Regulatory Impact Statement (RIS) for the amending regulation has been prepared.

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Outline of Provisions

Clause 1 Name of regulation

Clause 1 names the regulation as the *Planning and Development (University of Canberra) Amendment Regulation 2015 (No 1)*.

Clause 2 Commencement

Clause 2 states that the amending regulation commences on the day after its notification.

Clause 3 Legislation amended

Clause 3 notes that the amending regulation amends the *Planning and Development Regulation 2008.*

Clause 4 Schedule 3, part 3.1, section 3.1, new definition of *University of Canberra* site

Clause 4 inserts a new definition of ***University of Canberra site*** in schedule 3. This is a consequence of the amendments made by clauses 5 and 6 below. The definition is necessary to give effect to the limited application proposed by the amending regulation.

Clause 5 Schedule 3, part 3.2, new item 16

Clause 5 inserts in schedule 3, part 3.2 a new item. The item covers "A development on land in the University of Canberra site."

Clause 6 Schedule 3, new division 3.4.7

Clause 6 inserts a diagram identifying the physical site to which this amending regulation applies.

Clause 7 Dictionary, new definitions

Clause 8 inserts a new definition for University of Canberra site in the Dictionary, referencing to the new definition inserted into Schedule 3, at clause 4 above.

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