

Regulatory Impact Statement

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

Prepared in accordance with the
Legislation Act 2001, section 34

Circulated by authority of
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Overview

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2009 (No 7)* (the proposed law). The proposed law amends the *Planning and Development Regulation 2008* (the regulation) by inserting new items 9, 10 and 11 at schedule 2 of the regulation. Items 9, 10 and 11 prescribe types of social housing developments that require public notice to adjoining premises, provided they are funded in full or part by the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Commonwealth) or other declared funding program.

In accordance with section 152 of the *Planning and Development Act 2007* (the Act), the planning and land authority (the authority) must publicly notify certain types of development applications. The authority can prescribe public notification requirements by regulation (see section 152(1)(a) and (2) of the Act). Section 27(3) of the regulation states that an application for a development proposal in the merit track mentioned in schedule 2 of the regulation must be notified by notice to adjoining premises ('minor notification').

Item 4 of schedule 1 of the Act provides that third party appeals do not apply to merit track applications that only require limited public notification. Matters that require limited public notification are listed in schedule 2 of the Regulation. A decision on an application is only reviewable by appeal to ACAT if the application requires both limited public notification under section 153 of the Act and major public notification under section 155. Notwithstanding this, if such a matter is listed in schedule 3 of the Regulation it is exempt for third-party ACAT review - item 1 of schedule 3 is any development to which schedule 2 applies.

Therefore, the addition of items 9, 10 and 11 to schedule 2 by clause 8 of the proposed law means that social housing development application for covered by these items is not subject to third party appeal.

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 provides that an application for a social housing development proposal (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.

Therefore, the addition of items 9, 10 and 11 to schedule 2 by clause 8 of the proposed law means that a development application for a social housing proposal included in these items is not subject to third party appeal.

The new items 9, 10 and 11 in schedule 2 only apply until 30 June 2012 (see Clause 7 of the proposed law). After this date, all development applications for proposals similar to those covered by the proposed law will again be subject to standard assessment under the Act (including third party ACAT review), irrespective of funding source or building type.

The proposed law will enable social housing projects funded under the Commonwealth economic stimulus package¹ to commence sooner than would otherwise be the case, thereby reducing the risk that projects may not meet the strict timelines for spending of the funds prescribed by the Commonwealth for funding.

It is anticipated that the proposed law will assist in cushioning the Territory from the current global financial crisis and economic down-turn by allowing timely commencement of construction and providing a larger and newer stock of social housing resources for the Territory. While Commonwealth funding is a large portion of funds available to schools, the ACT government has also identified additional funding for social housing projects.

Section 406 of the regulation allows the Chief Minister to declare a program to be a 'declared funding program' if it meets the specified criteria, and to make a declaration that a particular development or activity is funded by a declared funding program.

This mechanism is already in the regulation but is currently restricted to school projects. The proposed law extends this to social housing, thus allowing developments using a variety of funding sources to be declared for the purpose of the regulation, including funding under the Commonwealth's Nation Building and Jobs Plan. A project can be funded entirely from Commonwealth declared funding, ACT declared funding, or from a combination of Commonwealth and ACT declared funding.

A regulatory impact statement was prepared and tabled for the regulation and authorising law.

The following is information about the proposed law as required by section 35 of the *Legislation Act 2001*.

¹ the *Appropriation (Nation Building and Jobs) Act (No. 2) 2008-2009* (Cwth) including the \$6.4 billion funding for public and community housing

(a) The authorising law

The provisions in this proposed law are authorised by the following sections of the Act:

- section 152 (What is *publicly notifies* for ch7?);
- section 426 (Regulation-making power).

(b) Policy objectives of the proposed law

One of the primary objectives of the proposed law is to expedite the commencement of social housing projects so that the community can benefit from the funding available under the Commonwealth Government's *Nation Building and Jobs Plan* initiative (the Commonwealth Plan). The Commonwealth will provide \$102.8 million to the ACT between 2008-09 to 2011-12 for constructing around 290 new social housing units (funding of \$96.4m) as well as for the upgrading of around 240 existing public housing dwellings (funding of \$6.4m).²

In addition, the ACT Government has already identified funding through its capital works program, for substantial reforms to ease public housing waiting times. Together, the Commonwealth funding and ACT funding will provide significant flexibility in the management of the ACT's public housing property portfolio.

The Commonwealth Plan will therefore drive significant reform in social housing and provide a significant stimulus to the building and construction industry in the ACT. This will mitigate the impact the current economic downturn, and will deliver substantial social and economic benefits to Canberrans requiring social housing and to the wider community through the creation or retention of jobs.

The Commonwealth Government has also approved funding of around \$252 million for Defence Housing Australia to construct 802 new homes across Australia, and it understood that approximately \$3 million of this will be spent in the ACT on the construction of additional defence housing.³

The Commonwealth funds are granted on the condition that they be spent or committed for spending within a short time period. For example, in accordance with the COAG National Partnership Agreement⁴, 75% of new houses should be completed by December 2010. Further the Federal Government has recognised that funding patterns over the last number of years has resulted "...in a reduced capacity on the part of governments to provide affordable housing to those most in need."⁵ Therefore, the proposed

² 2009-10 Budget Paper no.5 page 21

³ 2009-10 Budget Paper no.5 page 21

⁴ Parliament of Australia, Bills Digest "Nation Building and Jobs Plan Bills – Interim Bills Digest", No: 92:6 February 2009, pp17

⁵ Parliament of Australia, Bills Digest "Nation Building and Jobs Plan Bills – Interim Bills Digest", No: 92:6 February 2009, pp18

law responds to Commonwealth and Territory commitments to provide more affordable housing. It has been estimated that the initiatives have the capacity to possibly reduce waiting times for those most in need by up to 50%.⁶

The proposed law will ensure that social housing projects are not unduly delayed through often lengthy third party appeal processes, and will provide greater certainty that the Commonwealth Plan timeframes can be met.

Given the very tight time frames imposed by the Commonwealth Plan, and the availability of the ACT Government project funding, it is necessary to limit the very real potential for individual projects to suffer significant delays should a social housing proposal attract third party appeals.

Policy objectives behind the Act

The proposed law is consistent with the policy objective of the *Planning and Development Act 2007*. Section 6 of the Act states:

- “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 proposed law will also contribute to implementing the Government's objective of improving access to affordable housing under the *Affordable Housing Action Plan 2007*. In particular, it will assist those members of the community who access community housing, such as that managed by Community Housing Canberra (CHC) and others. CHC currently manages a large volume of stock in established areas of the ACT. However Canberra has undergone significant demographic change over the years, with the current community housing stock becoming less well matched to client needs. The proposed law will help the Territory take advantage of the opportunities afforded by the significant new funding to address the need for improved provision of community housing.

(c) Achieving the policy objectives

The mechanism to achieve the objectives of the proposed law is the legislative framework already encompassed in the *Planning and Development Act 2007* (as highlighted in the *Overview*) which provides that the regulation can prescribe matters that do not attract third party ACAT review. The proposed law was anticipated in announcements made by the ACT Minister for Planning on 19 February 2009 and thereafter.

⁶ Press Release, John Hargreaves, MLA, “Package will deliver unprecedented boost for public housing”, released 16 February 2009, accessed on the internet 12 March 2009.

Schedule 3 of the regulation already specifies a range of merit track matters exempt from third party ACAT review. The proposed law amends schedule 2 to add certain social housing developments that are funded in full, or part by the Commonwealth plan or other declared funding program. Item 1 of schedule 3 includes developments to which schedule 2 applies.

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 notification (section 153) matter has a public consultation period of 10 working days, while major public notification (section 155) matter has a public consultation period of 15 working days.

The proposed law (section 27(4)) provides that an application for a social housing development proposal specified in items 9, 10 and 11 of schedule 2 is not prescribed for section 152(1)(a) of the Act. This has the effect of requiring the planning and land authority must 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 law (section 28(2)) specifies that the period of public notification for a development mentioned in section 27(4) is 10 working days.

The main effect of clause 8 of the proposed law, by inserting new items 9, 10 and 11 in schedule 2, is that there are no third party appeals from decisions on these types of development applications. In addition, the public notification period is reduced from 15 working days to 10 working days for these types of development.

The declared funding program mechanism provides considerable scope for social housing projects to undertake a wide range of building and development activities without unnecessary delay, to the benefit of the community and local industry. If a third party appeal is lodged against the decision on the development application, significant time will be lost while the appeal process is completed and the proposal may be delayed for an extended time period. This can have a considerable cost, including the potential loss of Commonwealth funding if the project cannot be delivered within the specified timeframes.

Where a development does require a development application (DA) and is listed in schedule 2, it is important to note that although there are no third party appeal rights, all other elements of the development assessment process continue to apply. Thus under the proposed law, for each DA involving social housing:

- Any person can make a representation on the DA (s120 of the Act). The authority must consider all representations when deciding on the development application.

- If relevant, the DA must be referred to the relevant entities (s148). The entity has 15 working days in which to respond.
- The time in which a decision must be made remains the same, that is, 30 working days, if there are no representations, otherwise, 45 working days.
- The proponent can seek a reconsideration and review of the decision (s191). The authority must make a decision on the review within 20 working days.

The proposed law thus preserves all of the essential elements normally associated with a DA other than a moderately shortened public consultation period (reduced from 15 to 10 days) and the exclusion of third party appeal rights. However, the loss of appeal rights is for a limited period, with the provisions expiring on 30 June 2012. This means that all the social housing items included in schedule 2 by the proposed law will cease to be a matter covered by schedule 2 on that date.

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

Section 152 of the authorising law provides for merit track development applications to be publicly notified. The authorizing law also sets out certain circumstances in which third party appeals do not apply to merit track applications:

Schedule 1 of the Act (Reviewable decisions, eligible entities and interested entities), item 4 of the Act provides that third party appeals on a DA decision apply only where:

- (a) the application was required to be notified under s 153 and s 155, whether or not it was also required to be notified under s 154; *and*
- (b) the application is not exempted by regulation

Schedule 3 of the Regulation, Part 3.2 (Merit track matters exempt from third-party ACAT review) includes developments to which schedule 2 applies. Schedule 2 (Public notice to adjoining premises) already contains a range of school DA matters that are subject to economic stimulus measures under the Commonwealth Plan and other declared funding programs.

Section 152 of the Act, provides for the authority to 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 Regulation prescribes public notification of merit track applications for sections 152(1)(a) and 152(2).

Under section 27(3) of the 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 law includes a new section 27(4) of the Regulation which provides that an application for a social housing development proposal in relation to 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 notified under both section 155 (Major public notification) and section 153 (Public notice to adjoining premises).

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

Thus, the addition of items 9, 10 and 11 by the Regulation (the proposed law) to schedule 2 means development applications relating to these developments are not subject to third party appeal, while section 27(4) means that these applications will be subject to notification under both section 153 (Public notice to adjoining premises) and section 155 (Major public notification), and section 28(2) sets the public consultation period at 10 days.

As the parameters of those matters are tightly prescribed in the proposed law, the proposed law is consistent with the authorising law.

As indicated above, the proposed law is also consistent with the Government objectives behind the making of the Act and the objects stated in section 6 of the Act.

(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. Although placing the matters in schedule 2 exempts the development application from third party appeals, they must still comply with other applicable Australian Capital Territory legislation (see section 1.4 of schedule 1). For example, building approval under the *Building Act 2004* is required and work is to be done by the holders of relevant licences issued under the *Construction Occupations (Licensing) Act 2004*.

(f) Reasonable alternatives to the proposed law

The two main objectives of the proposed law are to facilitate social housing construction projects so that the community can benefit from substantial funding available under the Commonwealth Plan and other declared funding initiatives, and to provide greater certainty in the planning system that once an

application is determined the project can proceed as quickly as possible without the potentially long delays that would result from third party appeals.

New legislation could have been passed but it was considered more efficient to use a legislative framework that was already in place, that is, section 152 of the Act, relating to public notification requirements. Utilising this framework, the proposed law will for a limited time reduce the period of public consultation from 15 to 10 days and remove third party appeal rights from decisions while still retaining the major public notification process.

The major public notification process under the Act allows all persons, including third parties (neighbours etc) to comment on a proposal. Major public notification allows 15 working days for comments and each representation must be considered by the authority. If representations are received, the authority's decision-making time is extended from 30 working days to 45 working days.

Third parties who can demonstrate 'material detriment' (as defined in the Act) can consider an appeal against a decision on a DA which requires major public notification. Consequently, if an appeal is lodged against a DA then it is reasonable to expect considerable delays to the final outcome of the development application while the appeal process is completed.

Utilising the existing legislative framework maximises the timeliness of the reforms. Commonwealth funding for the items included in schedule 2 by the proposed law must be spent within a set timeframe and amending the regulation was considered the most efficient and expedient way of reforming the process to allow timely spending of those funds.

The parameters of the matters to be included in schedule 2 by the proposed law are set out in detail thus ensuring the impact of the reforms is strictly limited to those matters that come under the umbrella of the Commonwealth Plan and other declared funding initiatives.

(g) Brief assessment of benefits and costs of the proposed law

The reforms delivered by the proposed law are twofold – a shorter public notification period and a removal of ability for third party appeals to ACAT to delay developments which will achieve significant benefits to the community through:

1. Reduction in timeframes and legal costs

The proposed law reduces timeframes by adopting the shorter public notification period normally associated with 'minor notification' (public notice only to adjoining premises) and removing the potential for third party appeals to ACAT. This will reduce the substantial costs associated with appeals.

2. Other general benefits

The proposed law broadens speeds up the development approval process and provides an opportunity for the planning and land authority to direct limited resources to the assessment of more complex development proposals. Greater certainty that projects will not be delayed by appeals has a flow-on benefit of delivering greater efficiencies by allowing building to commence sooner and costs to be kept to a minimum.

The proposed law is not inconsistent with underlying principles of the planning system reforms as agreed upon by the community and Government⁷, and is a timely response to the Commonwealth Plan which is designed to give a substantial economic stimulus to employment and the economy generally.

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

General principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to.

The matter that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is:

A reduction in ability to comment on proposed development

Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). The proposed law will reduce the public notification period to 10 days rather than 15 and remove third party appeals on such developments. Thus, the proposed law will impact on the ability to comment on certain developments.

However, the impact of the proposed law on planning outcomes could be considered limited as the structure of the planning laws, together with improved administrative practice, has meant that the authority's decisions have been upheld by the Administrative Appeals Tribunal (now ACAT) in over 97% of cases. This reflects the quality of the authority's decision making processes, and the effectiveness and community approval of the planning regime.

The proposed law retains the key elements of major public notification and any person will still have the opportunity to make representations to the planning and land authority on development applications.

⁷ For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008*.

The exclusion of third party appeals in relation to the developments in the proposed law is not the first to be exempted under the Act. There are already range of matters already in schedules 2 and 3 of the regulation which exclude third party appeals.

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 which relate to social housing projects and which are also time limited to 30 June 2012.

Placing the social housing matters in schedule 2 achieves 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.

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

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.