



Environmental Defender's Office ACT Inc.



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Mr Andrew Barr, MLA
Minister for Planning
GPO Box 1020
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22 September 2009

By email

Dear Minister

Re: Public notification requirements in the *Planning and Development Act 2007* (ACT)

I am writing to you to recommend amendments to certain provisions in the *Planning and Development Act 2007* (ACT) (the Planning Act), relating to the failure to correctly notify development applications.

As you may be aware, in May this year the ACT Planning and Land Authority (ACTPLA) failed to correctly notify a development proposal relating to a proposed redevelopment of the Latham Group Centre (DA No 200914395, block 2, section 31 Latham). The notification described the development proposal as a variation to a lease to allow residential development but failed to notify that the development proposal was also for the erection of 13 two storey apartments.

Concerned residents have contacted the EDO advising that only one person had made a submission but indicated that other residents would have made submissions in relation to the proposal if they had been aware of the full extent of the proposed redevelopment. Consequently this inadequate notification has had the effect of denying affected residents an opportunity to provide comments on the proposal.

As you will be aware, development proposals in the merit and impact tracks must be publicly notified under the Planning Act (ss121 and 130). The notification requirements are set out in s153 (for minor notifications) and s155 (for major notifications). These notification requirements are essential to ensuring appropriate community consultation occurs for certain proposed developments.

However, as you may be aware, subsections 153(5) and 155(5) of the Act provide that development approvals will not be invalidated even if ACTPLA has failed to notify the public of the development application in accordance with the statutory requirements.

The EDO believes that these provisions have the potential to operate in a harsh and unjust manner. It may deprive concerned citizens and community groups of the opportunity to make

representations about certain developments. This may also affect their right of appeal against development decisions that were made without sufficient public consultation as the appeal rights rely on a person having made a representation.

This was highlighted recently in the proposed development of the Latham Group Centre which I have outlined above.

The EDO notes that subsections 153(5) and 155(5) of the Planning Act are inconsistent with public notification provisions in planning legislation in other Australian jurisdictions. As far as the EDO is aware, no other Australian jurisdiction specifically provides that development approvals will not be invalidated even if the public has not been notified in accordance with the relevant statutory notification requirements.

Indeed, the planning legislation of several states stipulates that specified development approvals are **invalid** if the public has not been appropriately notified and given the chance to make representations or submissions. For example:

- In NSW, under sections 79-79A of the *Environmental Planning and Assessment Act 1979* (NSW), a development application to carry out designated development or advertised development must be publicly exhibited for a certain period of time. Section 102 states that this requirement is mandatory and that failure to comply with it will render the approval invalid. While these provisions only relate to certain State significant developments, the NSW Courts have generally found that a failure to correctly notify a development approval in relation to other types of development will invalidate the approval (see *Boral Resources (County) Pty Ltd v Clarence Valley Council & Avarid; Cemex Australia Pty Ltd v Clarence Valley Council & Avarid* (No 2)2009 LEC 133);
- In Victoria, under section 87 of the *Planning and Environment Act 1987* (Vic), the Victorian Civil and Administrative Tribunal can cancel or amend a planning permit if there has been any failure to give public notice in accordance with the legislation.

Other jurisdictions provide that a failure to observe public notification requirements will only be acceptable in very limited circumstances. For example, section 3.4.8 of the *Integrated Planning Act 1997* (QLD) stipulates that non-compliance with notification provisions is only acceptable if it did not:

- a) adversely affect the awareness of the public of the existence or nature of the application; or
- b) restrict the opportunity of the public to make properly made submissions.

I note too that the current ACT planning provisions are significantly wider than the equivalent provision in ACT's previous planning legislation (the *Land (Planning and Environment) Act 1991*). Under this previous Act, ACTPLA was required to publicly notify development applications, including erecting a sign specifying the development proposed to be undertaken (s.229(6)). Subsection 229(9) specified that the validity of an approval is not affected by a failure by ACTPLA to comply with subsection (6). This is a much more limited validation provision than that contained in the current legislation. It only provides that an approval is not invalidated if a minor defect in the notification requirements (ie failure to erect a sign) occurs, not any failure to comply with the notification requirements eg an incorrect description of the proposal or a failure to notify at all.

The EDO recommends that the Government amend the Planning Act to remove subsections 153(5) and 155(5) and to expressly provide that the ACT Civil and Administrative Tribunal can cancel or amend a development approval if there has been a failure to comply with the public notification requirements.

By giving a discretion to the Tribunal, this will ensure that minor defects in the notification requirements would not necessarily invalidate an approval. However, it would enable an approval to be invalidated for example where it adversely affects the awareness of the public of the existence or nature of the application; or restricts the opportunity of the public to make submissions.

These recommended amendments would ensure that good decision-making is not compromised by a failure to follow correct statutory procedures and deprive the community of an opportunity to comment on important development proposals, whilst ensuring that minor technical deviations do not invalidate an approval.

I look forward to your consideration of this issue and your reply.

Please do not hesitate to contact me if you or your staff would like to discuss this further.

Yours sincerely

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