

Economic Development and Other Legislation (Temporary Use Licence) Amendment Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Cameron Dick, Minister for State Development, Manufacturing, Infrastructure and Planning provide this human rights certificate with respect to the *Economic Development and Other Legislation (Temporary Use Licence) Amendment Regulation 2020* made under the *Planning Act 2016* and the *Economic Development Act 2012*.

In my opinion, the *Economic Development and Other Legislation (Temporary Use Licence) Amendment Regulation 2020*, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Under section 275H of the *Planning Act 2016* (Planning Act) or under section 171F of the *Economic Development Act 2012* (Economic Development Act), a proponent with a lawful existing use may apply for a temporary use licence (TUL) during an applicable event to extend its operating rights. This will negate the need (also removing time and cost) for the proponent to make a change application to operate in this way during the applicable event.

The objective of the *Economic Development and Other Legislation (Temporary Use Licence) Amendment Regulation 2020* (amendment regulation) is to:

- provide the details of what needs to be included in the application for the TUL under the Planning Act or Economic Development Act;
- include in the *Planning Regulation 2017*, schedule 22, part 4, section 11, a requirement to keep a publicly available register of TULs approved by the chief executive under section 275I of the Planning Act; and
- state the information to be included in the register of TULs approved under the Planning Act.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights under the Human Rights Act that are relevant to the amendment regulation are:

- recognition and equality before the law (section 15);

- right to freedom of expression (section 21);
- property rights (section 24); and
- privacy and reputation (section 25).

For the reasons outlined below, I am of the view that the amendment regulation is compatible with each of these human rights.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

Recognition and equality before the law (section 15)

(a) the nature of the right

Section 15 of the *Human Rights Act 2019* provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination.

The Planning Act and Economic Development Act contains provisions that allow certain uses to extend or exceed existing operating rights within conditions of approval by applying for a TUL. The amendment regulation provides for the framework for TUL applications to be made, assessed and for material to be available. The TUL framework is eligible to be used by certain proponents to extend their operating rights where related to the purpose an applicable event, where otherwise they may exceed or otherwise offend existing conditions of approval.

The certain proponents able to use the TUL provisions are those where the use is related or required to the applicable event. For example, during the public health emergency of COVID-19 uses that provide essential goods and services to the community.

(b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The purpose of the limitation on the human rights of recognition and equality before the law is to protect public interest during an applicable event, such as a public health emergency. The limit to the human right is as a result of the provisions are not eligible for all approved development or existing uses but constrained to those related to the affected event.

The community expectation would be for the planning framework to respond to emergency circumstances, and that certain uses that provide a community need are able to operate during this time. The proposal ensures community needs can be met during an unexpected event.

(c) the relationship between the limitation to be imposed by the provisions if enacted, and its purpose, including whether the limitation helps to achieve the purpose.

The limitation to recognition and equality before the law of constraining the provisions to certain proponents or uses is fundamental to the TUL framework. The TUL framework is specific to certain uses where development conditions, requirements on a designation or

limitation on existing use rights impede responses to matters of social, economic or cultural need. The limit is key to achieving the purpose of the amendment regulation.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions.

Less restrictive limitations to the identified human rights would change the intent of the amendment regulation. Given the purpose of the amendment regulation is to respond to the emerging public health emergency of COVID-19, as well as other future unexpected events (e.g. natural disasters), and provide the requirements for a framework established under the Planning Act and the Economic Development Act, there are no other less restrictive or reasonably available ways to achieve this purpose.

(e) the balance between the importance of the purpose of the provisions, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The need to provide certainty, efficiency and transparency to land use planning and development systems during a time of uncertainty associated with the potential spread of COVID-2019, or similar future unexpected events, reasonable and demonstrably justifies the minor limitation to human rights.

Right to freedom of expression (section 21)

(a) the nature of the right

Section 21 of the *Human Rights Act 2019* provides that every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information of all kinds. It protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication).

The human right of freedom of expression is relevant to the TUL provisions of the amendment regulation, because it does not incorporate a process for third parties to view or comment on the application as it applies to other application types under the Planning Act or the Economic Development Act. The impact of this on the community is lessened given the TUL approval is temporary for the duration of the applicable event and will not affect the operation of a use following the end of the applicable event.

Given the emergency or urgent nature of circumstances relating to an applicable event, provision for third parties to view or comment on a TUL application is not appropriate.

The amendment regulation will require the provision of a register to be kept by the Department of State Development, Manufacturing, Infrastructure and Planning that will identify all TULs issued during an applicable event under the Planning Act. This will support the provision of the freedom to seek and receive information.

(b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The purpose of the limitation on the human rights of freedom of expression is to protect the broader public interest during an applicable event, such as a public health emergency.

The community expectation would be for the planning framework to respond to and not be restrictive during emergency circumstances. The proposal ensures community needs can be met during an unexpected event.

(c) the relationship between the limitation to be imposed by the provisions if enacted, and its purpose, including whether the limitation helps to achieve the purpose.

The limitation to freedom of expression by not incorporating provision for third parties to view or comment on an application for a TUL is justifiable to respond to urgent situations, such as natural disasters, or the emerging public health emergency. To provide protection for freedom of expression in the TUL provisions would be contrary to the intent for urgent action and certainty for proponents and the community.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions.

Less restrictive limitations to the identified human rights would change the intent of the amendments. Given the purpose of the amendment regulation is to respond an applicable event, there are no other less restrictive or reasonably available ways to achieve this purpose.

(e) the balance between the importance of the purpose of the provisions, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The need to provide certainty and efficiency to the land use planning and development systems during a time of an applicable event, reasonably and demonstrably justifies the negative impact to the human right to freedom of expression.

Property rights (section 24)

(a) the nature of the right

Section 24 of the *Human Rights Act 2019* provides that all persons have the right to own property alone or in association with others and a person must not be arbitrarily deprived of the person's property.

The amendment regulation contains provisions that makes amendments to the planning framework under the Planning Act and the Economic Development Act, which will have an effect on people's rights to develop land and property during an applicable event.

- (b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The purpose of amendment regulation's provisions may impact people's right to property during an applicable event by broadening development rights for certain uses under the *Planning Regulation 2017* and the *Economic Development Regulation 2013*.

- (c) the relationship between the limitation to be imposed by the provisions if enacted, and its purpose, including whether the limitation helps to achieve the purpose.

The amendment regulation does not restrict the right to own property or development land. A person's right to property rights is not deprived of any legal or proprietary interests or ability to use or develop land in accordance with the planning framework by the Amendment Regulation.

Privacy and Reputation (section 25)

- (a) the nature of the right

Section 25 of the *Human Rights Act 2019* provides that a person has the right not to have the person's privacy, family, home, or correspondence unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked.

- (b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The proposed amendments in the amendment regulation create the potential to obtain a TUL. It is possible that these changes may impede upon a person's privacy in the event that they live in proximity to a property the subject of a TUL.

- (c) the relationship between the limitation to be imposed by the provisions if enacted, and its purpose, including whether the limitation helps to achieve the purpose.

While it is possible that these limitations may occur as a result of a TUL, the changes relating to TUL's are subject to considerations such as having regard to the nature of the applicable event and whether there are reasonable grounds for the change. TULs may also be issued subject to conditions.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions.

Applicable events, by their nature, are time limited to respond to particular situations, such as natural disasters, or the COVID-19 public health emergency. There are no other powers available in the Planning Act or the Economic Development Act that would allow a timely response to address applicable event scenarios.

- (e) the balance between the importance of the purpose of the provisions, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

While there may be the potential for these new powers to impact temporarily on a person's privacy (for example if a TUL grants approval for 24 hours operation of a use in proximity to residential uses), the power is only available for a limited time to address the applicable event. It is considered that the benefit of the proposed changes outweighs the potential impact upon the human right.

Right to health services (section 37)

- (a) the nature of the right

Section 37 of the *Human Rights Act 2019* provides that every person has the right to access health services without discrimination.

The amendment regulation contains requirements that support access to essential goods and services are not hindered during an affected event. Many uses, such as supermarkets or pharmacies for example, have conditions limiting hours of operation and other operational requirements which may need to be suspended temporarily to support the community through this unprecedented time.

- (b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The human right of access to health services is not limited by the amendment regulation; rather it is supported by the allowance uses such as health services to exceed their standard operating requirements.

Conclusion

I consider that the *Economic Development and Other Legislation (Temporary Use Licence) Amendment Regulation 2020* is compatible with the *Human Rights Act 2019* because it does not limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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