

EIS scoping and s.211 consideration

Macedonian Orthodox Church Inc
Lease variation to change its concessional status
Block 11 Section 100 Narrabundah



Report to the ACT Minister for Planning

Prepared by ACT Planning and Land Authority

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This is an edited version of the report submitted to the Minister for Planning.
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**ACT Planning &
Land Authority**

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1 Introduction

This document is a report to the Minister for Planning on the assessment of the proposal to vary the Crown lease for Block 11 Section 100 Narrabundah by changing its concessional status. The site is currently leased by the Macedonian Orthodox Church Inc (the Church).

CB Richard Ellis (CBRE), acting on behalf of the Church, identified the need to vary the lease to change its concessional status, as a prerequisite for redevelopment of the site. CBRE has prepared an Environmental Impact Statement (EIS) scoping/s. 211 exemption application which identifies the potential impacts of the proposed development and provides information to support their request for Ministerial exemption under s. 211 of the *Planning and Development Act 2007 (the Act)*.

1.1 ACT environmental impact assessment requirements

1.1.1 The Environmental Impact Statement (EIS) process

Impact track assessment applies to proposals under s. 123 of the Act. The proposal to vary the lease to change its concessional status is a proposal that meets s. 123 of the Act as it involves a process or activity mentioned in Schedule 4 of the Act, and therefore requires an EIS. An EIS must be completed in accordance with the requirements of the Act before a development application can be lodged in the impact track. Table 1 below lists the applicable EIS triggers for the project.

Table 1 – EIS triggers in Schedule 4 of the Planning and Development Act 2007

Part 4.3	Proposal	Project component
Item 11	proposal to vary a lease to change its concessional status	Triggered by requirement to deconcessionalise the Crown lease

The EIS scoping/s. 211 exemption request application was submitted by CBRE to the ACT Planning and Land Authority (ACTPLA) on 18 February 2010. In accordance with ACTPLA requirements, the application contained information to inform the consideration of the s. 211 component of the application.

Information on the comments received from prescribed entities as part of the referral process can be found in Section 4 - Evaluation of this report. Further information on the key findings of CBRE's assessment with regards to the potential impacts can also be found in Section 4 – Evaluation.

1.2 Commonwealth environmental impact assessment requirements

The proposal has not been discussed with the Department of Environment, Water, Heritage and the Arts (DEWHA) as there are no matters of National Environmental Significance (NES) as defined by the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC)*.

2 Project details

2.1 Project description

The site is largely vacant except for the Church building located in the north-west corner of the site on the Goyder Street frontage. The site is 16,946m² in area and contains no significant vegetation. The site is intended for urban residential uses in accordance with the RZ1 suburban zone of the Territory Plan 2008 and the existing lease.

The Church wishes to establish the national headquarters for the Macedonian Church in Australia on the site. This will include the construction of a community hall, bell tower, bishop's residence, baptismal pool, and a 56-unit residential development with associated parking. Subdivision of the block is also sought to locate the Church and residential components on separate titles.

To facilitate the development intent of DA 200600518 (as amended by the ACT Supreme Court ruling dated 16 December 2009), the lease must be varied to change its concessional status.

2.2 Project proponent

The Macedonian Orthodox Church Inc. is the proponent. CBRE is the applicant.

3 EIA Process

The Environmental Impact Assessment (EIA) process is a systematic process to identify, predict and evaluate the environmental and socio-economic effects of the proposal. This process is applied before major decisions and development commitments are made. The main objective is to prevent, reduce and off-set significant negative impacts.

The purpose of the EIA process is to ensure that the statutory decision maker (i.e. ACTPLA) is fully informed of the environmental and socio-economic aspects and consequences before making a final decision on the development application (DA).

3.1 Impact track

As the project is captured by the impact assessment track the EIS process must be completed before a DA can be lodged. In this instance the EIS process must be completed and a subsequent development application to vary the Crown lease must be approved before DA 200600518 can be actioned by the proponent.

Section 211 of the Act allows an applicant to seek exemption from the requirement to complete an EIS. The Minister responsible for the Act has discretion under this section to grant an exemption based on the information in previous studies. If an exemption is granted then the EIS process is regarded as complete and allows the applicant to lodge a DA to vary the Crown lease for assessment in the impact track.

3.2 Referral

As required by the *Act and the Planning and Development Regulation 2008* the CBRE application for an EIS scoping document was referred by ACTPLA to the following prescribed entities. While there is not a statutory requirement to refer a s. 211 exemption request, that request was included within the referral for entity consideration to:

- ActewAGL Distribution
- ACTEW Corp
- the Chief Executive municipal services
- the Conservator of Flora and Fauna
- the Environment Protection Authority
- the Emergency Services Commissioner
- the Chief Executive, health policy
- the Heritage Council

and the following non-prescribed entities:

- Old Narrabundah Community Council
- National Capital Authority.

Comments received from referral entities that responded were supportive of the project being exempted from the need to complete an EIS as there were no issues identified with the proposal that were considered to have a significant impact on the natural or human environment.

4 Evaluation

This section provides a summary of the issues identified as triggering the need for an impact assessment of the project. For each issue, the results are summarised under the following three headings:

Impacts

Details potential impacts of the project as identified by Schedule 4 of the Act.

Previous studies

Information supplied by the applicant in support of their s. 211 exemption request.

Conclusion

Result of ACTPLA evaluation of previous studies.

4.1 Schedule 4 – Part 4.3 Item 11 vary a lease to change its concessional status

Impacts

Schedule 4 of the Act does not specifically list impacts to be considered in evaluating an environmental impact statement triggered by the variation of lease to change its concessional status.

Heads of consideration in such circumstances can be found by a joint reading of Schedule 4 and ss. 213 and 261 of the Act and s. 54 of the *Planning and Development Regulation 2008*. These provisions establish the need for an EIS triggered in this manner to consider social impact, public benefit, and intent for future development. Supporting information supplied by the proponent seeks to address these concerns and justify consideration of an exemption under s. 211.

Previous studies

All documents listed below are taken to be previous studies in accordance with s. 211 of the Act.

ACTPLA Notice of Decision DA 200600518 (dated 28 Sept 2007)

This DA sought approval to:

- subdivide the subject block (16, 940 square metres) into two separate parcels — a church site (6, 700 square metres) and a multi-unit residential site (10, 240 square metres)
- a variation to the subsequent Crown leases to vary the purpose clauses to allow:
 - o the church site to be used for a place of worship and religious associated use; and
 - o the multi-unit development site for residential purposes limited to not more than 56 dwellings
- (Stage 1) - establish the National Headquarters for the Macedonian Church in Australia on the church site including the construction of a new community hall, a bell tower, a new Bishop's residence, Baptismal pool, cladding the existing dome of the church with new copper sheets, parking associated with the church and the community hall
- (Stage 2) – construction of a multi-unit residential development comprising 56 units with associated car parking
- associated landscaping, paving and other site works.

In assessing the development application ACTPLA considered all applicable provisions of the Territory Plan and the *Land (Planning and Environment) Act 1991*. This included evaluation of built form, traffic generation, landscaping, and impact on streetscape.

ACT Administrative Appeals Tribunal order AT 07/52 (dated 19 Aug 2008)

In its considerations the Tribunal found there was no inconsistency with the requirements of the Territory Plan in regard to the proposal's respect for characteristic features of the immediate vicinity. In relation to the community hall the Tribunal found that the use proposed would involve an associated religious use and was in keeping with the A3 Land Use policies in force at the time.

However this order refused the development proposal as conditionally approved by ACTPLA on grounds that the residential component would generate significant traffic impacts to the detriment of the amenity of the immediate vicinity.

The blanket refusal of all aspects of the proposal on the basis of the impacts of the residential component, was later overturned by the Supreme Court as outlined below.

ACT Supreme Court order 85 of 2008 (dated 16 Dec 2008)

The Supreme Court order set aside the AAT order to the extent that it conditionally allowed:

- the subdivision
- redevelopment of the church site
- variation to the subsequent Crown leases for the church site to allow use as a place of worship and associated religious use
- variation to the subsequent Crown leases for the multi-unit development site to allow use for residential purposes comprising no more than 56 dwellings.

In his findings Mansfield J ruled that redevelopment of the church site, even at the intensified scale, had minimal impact on amenity and was a continuation of the existing use.

With reference to the 56 dwelling component of the development Mansfield J identified that significant impairment to the local amenity would result from that aspect of the development. Evidence presented indicated that such impairment could possibly be reduced. However, it was determined that this was a matter to be addressed and evaluated in a future development application for construction of those dwellings.

The approval of variations of the subsequent Crown lease over the residential site to allow up to 56 dwellings neither permits nor dictates the nature and extent of the development which might be proposed at some future time, but effectively imposes an upper limit on the density of that development.

Consideration of s. 261

Section 261 of the Act establishes the heads of consideration the Minister must have regard to when determining an application to deconcessionalise a lease. The same heads of consideration must be given due regard by ACTPLA when assessing an EIS triggered by the deconcessionalisation of a lease.

These considerations relate to the future development intent/potential of the site and establishing the “community benefit” to be gained from deconcessionalising the lease. In particular no decision may be made on an application by the Minister or the Authority “*unless consideration of the public interest*” is undertaken. Specifically s. 261(2)(b) and (c) are of direct relevance to the EIS phase of the deconcessionalisation process.

Section 261(2)(b) – “*whether approving the application would cause any disadvantage to the community*” – it is considered that this is the purpose of the EIS process to assist the Minister in determining the public interest.

Section 261(2)(c) – “*whether the application to vary the lease to make it a market value lease, is or is likely to be, part of larger development and, if so what that development will involve*” - it is considered that the recent development application history of the site indicates that the proposal to vary the lease to remove its concessional status is part of wider a proposal for development of the site.

Conclusion

It is important to note that this assessment report is only evaluating if the EIS process would offer any further insight to the impacts resulting from the deconcessionalisation of the lease.

ACTPLA's assessment is that an EIS is not required for this proposal. Assessment of the individual development applications for the various components of the proposal will ensure that that recommendations and findings of previous orders are implemented.

The proponent has supplied amended plans to comply with conditions of approval for DA 200600518 that address the issues associated with noise attenuation, aesthetics and traffic flow for the church site. Additional investigations via the EIS process would not offer any new insight.

4.2 Entity Comments

Entity comments are provided below. ACTPLA responses to the entity comments follow on from each comment.

Environment Protection Authority

The Environment Protection Authority is supportive of an s. 211 exemption because a deconcessionalisation doesn't raise any direct issues for the Authority.

Regarding the previously approved DA 200600518, the Environment Protection Authority supported this DA on the basis of the Noise Management Plan being implemented. The plans were updated to incorporate the noise recommendations therefore the EPA is satisfied on the provision that these are the plans to which any future development must adhere.

ACTPLA comment

The conditions of approval required plans to be revised to indicate that recommendations of the noise assessment report have been incorporated into the design of the future development of the site. Revised plans have been received by ACTPLA and are on file.

Chief Executive, Territory and Municipal Services

No comments on the proposal.

ACTPLA comment

No comment required.

ACT Heritage Council

The ACT Heritage Council did not consider there were any issues related to the request for an exemption from the requirement to complete an EIS pursuant to s. 211 of the Act on this property, because the proposal to deconcessionalise the Crown lease does not impact on the heritage value of the area.

ACTPLA comment

No comment required.

Chief Executive, ACT Health

The Health Protection Service advised it has no objection to the request for exemption to prepare the EIS for the DA approval.

ACTPLA comment

No comment required.

ActewAGL - Electrical

ActewAGL Electricity Networks has no objection to the deconcessionalisation of the Crown lease of Block 11 Section 100 Narrabundah.

ACTPLA comment

DA 200600518 was circulated to ActewAGL at the time of assessment. ActewAGL comments at that time indicated that developer would be required to contact ActewAGL to confirm the electrical servicing constraints and the electrical servicing requirements for the development. ActewAGL advised that it may be necessary to install an electrical substation on the site to cater for the proposed load.

The need for and location of a 315kVA padmount substation was later confirmed by Actew Distribution approx 2 metres within the block of dimensions 3000mm(L) x 960mm(W) x 1620mm(H).

This advice was captured in the conditions of approval for DA 200600518.

ActewAGL Water and Sewer

ActewAGL has no concerns regarding the proposal. There are no ActewAGL water or sewer assets on the site.

ACTPLA comment

DA 200600518 was circulated to ActewAGL Corp at the time of assessment. ActewAGL Corp comments at that time indicated they it had no concerns regarding the proposed development as there are no Actew Corp water or sewer assets on the block and it believed servicing of the site would be straight forward and will sorted out with the hydraulics consultant.

This advice was captured in the conditions of approval for DA 200600518.

Old Narrabundah Community Council

The Council does not support an exemption and believe a detailed EIS needs to be carried out for the following reasons:

Date of Effect

The date of effect for the approval to proceed with the subdivision and deconcessionalisation is the date on which Mansfield J, in the Supreme Court, handed down his findings, that is 19 December 2009. In that decision, Mansfield J gave approval for only the Church's section of the proposed subdivision to proceed, and rejected the DA for the other part of the proposed subdivision.

The date of effect is over two years after the Planning and Development Act 2007 was notified (13th September 2007).

Request for Exemption

CB Richard Ellis (CBRE) is seeking exemption under s211 of the Planning and Development Act 2007

EIS not required if development application exempted

The Minister may exempt a development application for development approval for a development proposal from a requirement to include an EIS if satisfied that the expected environmental impact of the development proposal has already been sufficiently addressed by another study, whether or not the study relates to the particular development proposal.

This section states that exemption may be sought if the proposal has "*been sufficiently addressed by another study*" which relates to the particular development.

DA

The issues relating to environmental impacts such as traffic impacts on existing residents on Goyder St or the social impacts of the loss of a concessional lease community block were not properly addressed as part of any study at the DA stage nor as far as we are aware prior to the DA, and therefore need to be visited in this process.

Given the fact that the Macedonian Church have no further need for the large concessional lease block of land they propose to develop for non-community purposes ONCC Inc consider it prudent for ACTPLA to ask the developer to give consideration to the impact of the loss of a concessional lease land and provide evidence there is no other groups likely to need the land for community purposes before it is deconcessionalised.

AAT

The issues relating to environmental impacts such as traffic impacts on existing residents on Goyder St or the social impacts of the loss of concessional lease land were not properly addressed in any study prior to the AAT, and therefore need to be visited in this process. In fact the decision of the AAT reflected the fact that the impact on traffic is likely to be significant enough to justify refusal of the residential development component of the application. No mention was made of any Environmental Impact Study, even when parties opposed raised concerns about the lack of due consideration for environmental issues at the AAT appeal. Parties opposed had to point out among other issues that Mountain View Aged Care residents would be adversely affected by noise and that local residents would be adversely affected by the extra traffic.

Goyder St is already carrying traffic beyond what it was designed for and can be described as dangerous. The additional traffic movements generated by the combined proposed residential units and community hall will make a bad situation worse. The information provided in the original Traffic Report attached to the DA was selective and self-serving. It failed to reflect the current acute traffic problems faced by residents along and feeding into Goyder St nor did it take into account the impact of additional residential proposals nearby recently completed or in the pipeline (including Magnolia Mews development on Jerrabomberra Ave, the Crestwood Motel in Goyder Street proposal for apartments and a proposed extension to accommodation at Marymead Childrens Centre will all have an impact on traffic movements).

Supreme Court

There was no mention of any Environmental Impact Statement in the Supreme Court Decision and no EIS study evidence was presented. In his findings (see s70-79), Mansfield J indicated that the amenity of the neighbourhood was a pivotal point for not approving the residential development, and traffic issues were unlikely to be solved on Dalrymple and Goyder Streets, and no solution had been offered in relation to Leahy Close.

This Application

We also note that neither EIS study nor any evidence of any other study is attached to this application.

Scoping Document Matters

We note that none of the entities prescribed under s51 (1) of The Planning and Development Regulation 2008 [reference to s26 (1) and (2)] have been consulted. S51 (3) says that the ACT Community, or part of the community can be consulted. Given the wider public interest in this matter it would be appropriate to consult with the parties to the AAT appeal.

As the Covering letter from CBRE states,

“s54 sets out the content of scoping documents. Parts (d) and (e) of s54 are particularly relevant to content of the Scoping Document for this proposal:

“(d) each potentially significant environmental impact that must be addressed in the EIS;

(e) if the scoping document relates to a development proposal to vary a lease to change its concessional status – the issues that must be addressed in the EIS in relation to the social impact of the proposal.”

The letter lists a number of social and economic impacts they identify for the scoping document. In our opinion, many of these are irrelevant and it would seem that the proposal is seeking to dilute potential impacts on the immediate area by broadening the scope to spread the impact. Even though CBRE states that both (d) and (e) are *“particularly relevant”*, they have totally neglected to address s54 (d).

Given the potentially significant impacts we have identified in relation to Block 11 Section 100 Narrabundah, the following need to be addressed in an EIS Scoping Document:-

1. Current users of the facilities – number, demographics, socio-economic data, age profile, etc to justify such a large new community hall facility and associated parking and traffic generated.
2. Given the existing lease is concessional and restricted to ‘Church and associated use only. Land granted for community purposes should continue to be used for that purpose while there is still a need. The reduction of concessional lease community land will have social impacts on the surrounding community in the long term. What is the evidence that there is no further need in the wider community for this block for church/community uses. And what is the evidence of wider community support for the proposal in it’s present form outside of a small petition from church members
3. Impact on the adjacent aged care facility and Acoustic modelling to demonstrate impact is minimal
4. Traffic and Parking impact for both the community hall (including parking and traffic management plans for peak periods such as cultural festivals, religious holy days, weddings, conferences, etc) and the residential lease approval for 56 units.

CBR Ellis would be well aware of the need for EISs and correct Scoping Documents, having been involved in preparing these recently for at least the Federal Golf Course, and the Woden Tradesmen’s Club.

In Summary, for Block 11 Section 100 Narrabundah

1. The proposed Scoping Document is flawed and inadequate.
2. The date of effect of the approval for subdivision, deconcessionalisation, and development of the MOC Inc’s Church site post dates the requirement for an EIS by two years.
3. There is no evidence that anything akin to an EIS was presented at the AAT by the proponents. To the contrary, the DA was refused on the basis that the environmental impacts identified, not by the proponent but by parties opposing the development application, are significant and are unlikely to be mitigated.
4. There is no evidence that anything akin to an EIS was presented by the proponents at the Supreme Court, and Mansfield J’s decision rejects part of the DA based on the environmental impacts, raised by the parties opposed to the DA, which are unlikely to be mitigated; and
5. No evidence has been presented with the Application for Exemption, or identified in relation to the AAT or the Supreme Court hearing to demonstrate that any comprehensive EIS study has been prepared by the proponents.

In conclusion, the Old Narrabundah Community Council Inc (ONCC Inc) strongly opposes any application for exemption from the EIS. Furthermore, the ONCC Inc urges that the Scoping Requirements listed above be added to the items to be addressed in the EIS.

ACTPLA comment

DA 200600518 was circulated to the Old Narrabundah Community Council Inc. (ONCC) at the time of assessment. At that time the ONCC objected to the proposal on numerous grounds as evidenced by the documents submitted in support of this application.

The need for an EIS was not required at the time of the original DA 200600518 assessment and subsequent appeals as this requirement has only been in effect since the introduction of the Act. The requirement for an EIS is triggered by the need for the lease to be deconcessionalised in order for the proposal in DA 200600518 NOD to be realised. This is a condition of approval of DA 200600518 NOD, refer to **Attachment A**.

Completing the EIS process is the first step in the deconcessionalisation process. Following on from the EIS process the proponent will need to submit an impact track DA for determination under s. 261.

A previous application to deconcessionalise the lease was approved on 8 July 2003 by the then Minister for Planning, Simon Corbell MLA. However this approval was not acted upon by the proponent and the lease was not paid out to its current market value. In considering the application the Minister determined that the application,

"...meets a number of positive indicators, including:

- *Land being within the residential land use policy area and not community facility land use policy area under the Territory Plan;*
- *The site being grossly underutilised; and*
- *Payment of the concession will afford the opportunity to increase the facilities on the church site to serve the wider community".*

Given that there are no transitional provisions in the Act this prior approval made under the *Land (Planning and Environment) Act 1991* has not been carried over. Therefore as indicated above, a new impact track DA must be made and considered under s. 261 by the Minister.

The Supreme Court order made by Mansfield J did not reject part of the DA based on the environmental impacts, raised by the parties opposed to the DA. The order approved both the church and residential component of the development and imposed an upper density limit of no more than 56 dwellings on the residential portion of the site. However, the development of the residential portion of the site will be subject to a future separate development application. The assessment of the future DA will include assessment of the environmental issues at the merit assessment level.

5 Development applications

Development application 200600518, as amended, remains valid. However, to realise this development potential a lease variation to change the concessional status of the lease must first be lodged and determined.

Any subsequent lease variation application must have regard to the ACT Supreme Court order of 16 December 2009. To give effect to the Supreme Court order any subsequent development application to vary the lease to change its concessional status is dependent upon the church site continuing to be used for a place of worship and associated religious use.

Development applications required to progress development of the site as envisaged by the proponent are as follows:

- development application to vary a lease to change its concessional status (impact track); and
- development application for multi-unit housing (merit track).

6 Recommendation

ACTPLA has assessed the EIS scope/s. 211 exemption request as meeting the requirements of Chapter 8 of the Act.

Previous decisions and orders have demonstrated that the issue which triggered the requirement for an EIS, and the heads of consideration, have been satisfactorily identified and addressed.

The supporting documentation has provided sufficient information to the ACT Government to allow an informed evaluation of potential environmental and socio-economic impacts which could be attributed to the proposal. It has been demonstrated that any potential adverse impacts can be adequately addressed through the implementation of the findings of the Supreme Court, the AAT and the conditions specified in DA 200600518 notice of decision dated 28 September 2007 at **Attachment A**.

ACTPLA's recommendation is that the information submitted with the application has adequately identified and considered those matters of potentially significant impact and that further environmental assessment via the EIS process is not required.

ACTPLA's recommendation is that the Minister:

1. grant exemption from the requirement to complete an EIS in accordance s. 211 of the *Planning and Development Act 2007*
2. advise the proponent that they can make an impact track development application to vary the Crown lease to change its concessional status. This must be approved and the lease paid out to its current market value before DA 206000518 can be actioned and before a DA can be submitted for the residential component of the site
3. note that s. 261 lists those matters that must be considered in determining a development application to vary a lease to change its concessional status
4. note the church site must continue to be used for a place of worship and associated religious use to maintain the level of community facilities in the suburb
5. advise ACTPLA to vary the Territory Plan to rezone the church site from the RZ1 Suburban Zone to the Community Facility Zone to ensure continuity of worship and associated religious uses.

7 Attachments

ATTACHMENT A: DA 200600518 Notice of decision