Regulation Review Committee
Parliament of New South Wales

Report on the Environmental Planning and Assessment (Savings and Transitional) Amendment (Olympic Co-ordination Authority) Regulation 1999

Report No 10/52
June 2000

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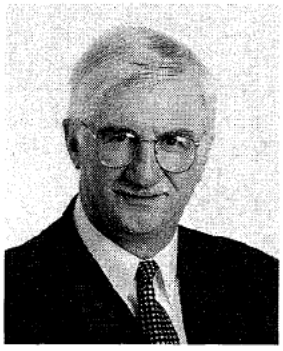

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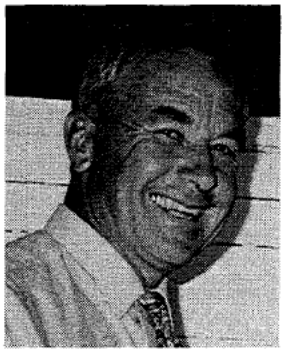

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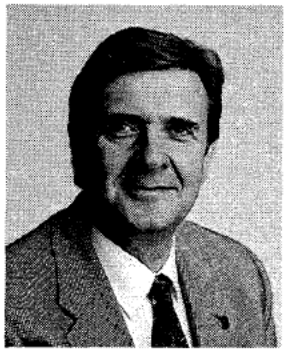

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Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987.* A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

(a) that the regulation trespasses unduly on personal rights and liberties;

(b) that the regulation may have an adverse impact on the business community;

(c) that the regulation may not have been within the general objects of the legislation under which it was made;

(d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;

(e) that the objective of the regulation could have been achieved by alternative and more effective means;

(f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;

(g) that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed.

Chairman's Foreword

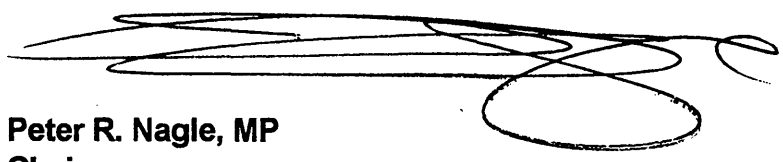
This report sets out the Committee's consideration of the *Environmental Planning and Assessment (Savings and Transitional) Amendment (Olympic Co-ordination Authority) Regulation 1999* which exempts development carried out under State Environmental Planning Policy No. 38 - Olympic Games and Related Projects, from the need for development consent under the *Environmental Planning and Assessment Act 1979.*

The Committee noted that the enabling provision in the Act did not define the term "minimal environmental impact" in the prescription of the exempt development. It wrote to the Minister for Urban Affairs and Planning questioning whether the exempt development came within the type of development, "small and domestic in nature", described by the Minister in the debate on the enabling provision.

The Minister responded that the list quoted is not exhaustive and that the section does not require that exempt development must necessarily be small and domestic in nature. The issue is one of statutory interpretation. In the event that a provision of an Act is unclear, Courts will have regard to extrinsic evidence of the purpose of the provision. In the present case the second reading speech of the Minister did indicate that the development permitted by the provision would be essentially small and domestic.

Furthermore, the ordinary meaning conveyed by the text "minimal environmental impact" in the provision would appear to indicate something much smaller than the extensive infrastructure development permitted by the SEPP and this regulation. This means that the SEPP and the regulation are arguably ultra vires as they permit more extensive infrastructure development than that intended by the Act.

The Committee reports its view to Parliament that the regulation may not have been within the general objects of the legislation under which it was made and may not accord with the spirit of the legislation under which it was made, even though it may have been legally made. It recommends, in the interests of certainty and to prevent any legal challenge to the legislation, that the matter be clarified by an appropriate amendment to the Act.



Peter R. Nagle, MP
Chairman

Environmental Planning and Assessment (Savings and Transitional) Amendment (Olympic Co-ordination Authority) Regulation 1999

The purpose of this regulation is to exempt development carried out under State Environmental Planning Policy No. 38 - Olympic Games and Related Projects, from the need for development consent under the *Environmental Planning and Assessment Act 1979*.

Section 76 of the *Environmental Planning and Assessment Act* provides for exempt development and states that an environmental planning instrument may provide that development of a specified class or description that is of minimal environmental impact may be carried out without the need for development consent unless that land is critical habitat of an endangered or other threatened species, or part of a wilderness area under the *Wilderness Act 1987*. However, environmental assessment of the development may nevertheless be required under Part 5 of the Act.

This regulation applies section 76 to State Environmental Planning Policy No. 38 and is made under schedule 6 clause 20 of the *Environmental Planning and Assessment Act 1979*. That clause states that a provision of an Act as in force immediately before the amendment or repeal of the provision by the *Environmental Planning and Assessment Amendment Act 1997* continues to apply to and in respect of the Olympic Co-ordination Authority, and anything done or proposed to be done by or on behalf of the Olympic Co-ordination Authority, as if the provision had not been amended or repealed, subject to the regulations.

As section 76 was itself inserted into the principal Act by the *Environmental Planning and Assessment Amendment Act 1997*, it would not apply in respect of the Olympic Co-ordination Authority unless this regulation were made.

State Environmental Planning Policy No. 38

State Environmental Planning Policy No. 38 was amended on the same day as this regulation to provide that the following development is exempt under section 76:

1. Minor ancillary development that is of minimal environmental impact, and that is associated with the construction of an existing venue or facility, being any one or more of the following and provided the minor ancillary development will be removed before 1 September 2000:

   - temporary parking associated with construction
   - the site office for a project
   - security fencing
   - a sign that identifies such a project or gives directions for deliveries and parking
   - a compound for the storage of materials or equipment
   - workers and visitors amenities
   - waste collection facilities
   - temporary catering facilities
   - temporary roads
   - any other similar development that in the opinion of the Director-General of the Olympic Co-ordination Authority is of minimal environmental impact.

2. Change of use of a building or land for the purpose of an Olympic Games project, OCA project or test event until 31 March 2001 or such other date as is nominated by the Director-General of the Department of Urban Affairs and Planning if in the opinion of the Director-General of the Olympic Co-ordination Authority the change of use is of minimal environmental impact.

3. Development that is of minimal environmental impact and that is part of the operation of existing venues or facilities, that is consistent with an operational plan, and that will be removed and the building or land either re-instated to its previous use and condition or to a better condition by 31 March 2001 (or such other date as is nominated by the Director-General of the Department of Urban Affairs and Planning), being any one or more of the following:

   - viewing structures and seating
   - toilets
   - waste collection facilities

- fences, barricades and other facilities for crowd control and security buildings (including extensions to existing buildings), tents and caravans that provide facilities for athletes, spectators, VIPs, staff, officials and other management, emergency services, the media, sponsors, security services, and for suppliers of information, food, beverages, and retail goods
- roadworks
- telecommunications facilities and infrastructure works
- lighting
- public entertainment
- landscaping, signs, banners, bunting, flagpoles
- catering facilities
- equipment storage compounds or buildings
- temporary pedestrian bridges, and the temporary removal of existing pedestrian bridges
- Olympic-related sponsor advertising in accordance with a signage and advertising strategy adopted by the Director-General of the Olympic Co-ordination Authority
- car and bus parking areas
- works to improve pedestrian and vehicular access, separation or safety, including temporary road bridges and underpasses
- any other similar development that in the opinion of the Director-General of the Olympic Co-ordination Authority is of minimal environmental impact.
- "operational plan" means a plan to manage the operation of a venue or facility, a public road or a public place, used for or in association with the Olympic Games or Paralympic Games or test events, prepared by one or more of the following:

  (a) the Olympic Co-ordination Authority,

  (b) SOCOG,

  (c) the Olympic Roads and Transport Authority,

  (d) any other relevant body associated with the conduct of the Olympic Games or Paralympic Games or test events.

- "test event" means an event conducted at an Olympic Games venue or facility, being an existing venue or facility or a venue or facility that is provided for the conduct of Olympic Games and Paralympic Games sporting events (including a public road or a public place), before those Games are held in order to test the capacity and operational functions of the Olympic Games venue or facility to provide for those sporting events.

4. Development for the purpose of an Olympic Games project, OCA project or test event that is of minimal environmental impact and that is located outside existing venues or facilities, that is consistent with an operational plan, and that will be carried out on or after 1 July 1999 (or such other date as is nominated by the Director-General of the Olympic Co-ordinating Authority) and that will be removed and the building or land either re-instated to its previous use and condition or to a better condition by 31 December 2000 (or such other date as is nominated by the Director-General of the Department of Urban Affairs and Planning), being any one or more of the following:

- the use of any public road or public place
- viewing structures and seating
- toilets
- waste collection facilities
- fences, barricades and other facilities for crowd control and security buildings (including extensions to existing buildings), tents and caravans that provide facilities for athletes, spectators, VIPs, staff, officials and other management, emergency services, the media, sponsors, security services, and for suppliers of information, food, beverages, and retail goods
- roadworks
- telecommunications facilities and infrastructure works
- lighting
- small scale street entertainment, such as buskers
- landscaping, signs, banners, bunting, flagpoles
- catering facilities
- equipment storage compounds or buildings
- temporary pedestrian bridges, and the temporary removal of existing pedestrian bridges

- car and bus parking areas
- works to improve pedestrian and vehicular access, separation or safety, including temporary road bridges
- any other similar development that in the opinion of the Director-General of the Olympic Co-ordination Authority is of minimal environmental impact.

Minor development, generally involving:

(a) the stockpiling or movement of fill material within a development site provided it does not predetermine the footprint or form of any other proposed development and the fill is not contaminated,

(b) building alterations of a permanent nature provided:

(i) the owner of the building has given approval, and

(ii) the building is not enlarged, and

(iii) if the building is identified in an environmental planning instrument as a heritage item or is on land comprising or within a heritage item so identified or an area so identified as a heritage conservation area, the alterations do not affect the heritage significance of the building,

(c) access ramps for the disabled, bus shelters, park and street furniture, playground equipment, cycle and pedestrian paths, signs, fences and walls that are consistent with the Olympic Co-ordination Authority's strategies and codes.

Exempt development under the Policy must not be carried out unless it is approved by the Olympic Co-ordination Authority as complying with the Building Code of Australia or, if that Code does not apply, any relevant Australian Standard.

However it prevails over another environmental planning instrument in the event of an inconsistency and in particular it prevails over State Environmental Planning Policy No 47 - Moore Park Showground, and State Environmental Planning Policy No 56 - Sydney Harbour Foreshores and Tributaries.

"Minimal Environmental Impact"

The Committee noted that the determination of what development is of "minimal environmental impact" is to a large degree a matter for the Director-General of the Department of Urban Affairs and Planning. Similarly the duration of these developments can be determined by the Director-General.

When Section 76 was inserted by the *Environmental Planning and Assessment Amendment Act 1997*, "Minimal environmental impact" was not defined. In the debate on the bill for that Amendment Act it was argued that the section could open loopholes and that some method was needed to account for the cumulative effect of minor developments. The Minister in reply indicated that developments which are of "Minimal environmental impact" have been exempt from development consent for some time under local approvals policies adopted by Local Councils.

He said that these policies were prepared in consultation with the community and that under them a large number of items that most people would logically conclude do not require the involvement of the local council, were exempt. He said these included pergolas, airconditioning units, canopies and awnings, clotheslines, decks, fences, flagpoles, outbuildings detached from the main dwelling such as garden sheds, cubby houses, greenhouses, aviaries, gazebos, cabanas, permanent barbeques, children's play equipment and minor internal alterations to domestic buildings.

The development described by the Minister is essentially small and domestic, while most of the development covered by this policy is more extensive infrastructure development which may or may not have a limited life. Under section 39 of the *Environmental Planning and Assessment Act* the Minister is required to publicise a draft State Environmental Planning Policy and to seek and consider submissions from the public before recommending it to the Governor.

The Committee wrote to the Minister on 20 September 1999 as follows:

"My Committee recently considered the above regulation, the objective of which is to exempt development carried out under State Environmental Planning Policy No. 38 - Olympic Games and Related Projects, from the need for development consent under the Environmental Planning and Assessment Act 1979.

My Committee notes this regulation applies Section 76(2) and (3) of the Act to State Environmental Planning Policy No. 38. Section 76 provides for exempt development and states that an environmental planning instrument may provide that development of a specified class or description that is of minimal environmental impact may be carried out without the need for development consent, unless that land is critical habitat of an endangered or other threatened species, or part of a wilderness area under the Wilderness Act 1987.

My Committee noted that under the policy the determination of what development is of minimal environmental impact is to a large degree a matter for the Director-General of the Department of Urban Affairs and Planning. Similarly, the duration of these developments can be determined by the Director-General.

When Section 76 was inserted by the Environmental Planning and Assessment Amendment Act 1997, "minimal environmental impact" was not defined. In the debate on the bill for that Amendment Act it was argued that the section could open loopholes and that some method was needed to account for the cumulative effect of minor developments. The Minister in reply indicated that developments which are of "minimal environmental impact" have been exempt from development consent for some time under local approvals policies adopted by local councils.

He said that these policies were prepared in consultation with the community and that under them a large number of items that most people would logically conclude do not require the involvement of the local council, were exempt. He said these included pergolas, airconditioning units, canopies and awnings, clotheslines, decks, fences, flagpoles, outbuildings detached from the main dwelling such as garden sheds, cubby houses, greenhouses, aviaries, gazebos, cabanas, permanent barbeques, childrens' play equipment and minor internal alterations to domestic buildings.

The development described by the Minister in the Debate is essentially small and domestic, while most of the development enabled by this regulation is more extensive infrastructure development which may or may not have a limited life. My Committee accordingly seeks your advice on the duration, scale and cumulative effect of the development enabled by this regulation."

Minister's Response

In his response of 9 December 1999 (see appendix 1) the Minister confirmed that the Committee is correct in saying that the phrase "minimal environmental impact" is undefined.

He says that the applicant for the development, the Director-General of the Olympic Co-ordination Authority, bears the burden of establishing that what is proposed is of "minimal environmental impact" after taking into account all the relevant circumstances, which may include the duration, scale and cumulative effect of the proposed development.

He says that the Minister for Urban Affairs and Planning does not have a role in this part of the SEPP 38 process and that the only objective criteria that applies to exempt development that is carried out under SEPP 38 is that these must be certified by the Olympic Co-ordination Authority as complying with the Building Code of Australia or the relevant Australian Standard.

The Committee considers that this could hardly be termed "objective" as the applicant is certifying its own development as complying.

On the issue of the development described in the debate, the Minister states that the list quoted is not exhaustive and that the section does not require that exempt development must necessarily be small and domestic in nature.

The Committee is of the view that the issue is one of statutory interpretation. In the event that a provision of an Act is unclear, Courts will have regard to extrinsic evidence of the purpose of the provision.

The Minister's second reading speech on the Bill for the Act is one of the primary forms of extrinsic evidence.

The Interpretation Act 1987

Section 34 of the *Interpretation Act 1987* states as follows:

"In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

(b) to determine the meaning of the provision:

(i) if the provision is ambiguous or obscure, or

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:.....

(f) the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House.

In the present case the second reading speech of the Minister did indicate that the development permitted by the provision would be essentially small and domestic. Furthermore the ordinary meaning conveyed by the text "minimal environmental impact" in the provision would appear to indicate something much smaller than the extensive infrastructure development permitted by the SEPP and this regulation. This means that the SEPP and the regulation are arguably ultra vires as they permit more extensive infrastructure development than that intended by the Act.

Ministerial Briefing Note

The Department of Urban Affairs and Planning has provided the Chairman with a Ministerial Briefing Note dated 7 June 2000 (see appendix 2). This states in part that "whilst the Second Reading Speech does give a flavour for what constitutes "minimal environmental impact" as being small and domestic in nature, it is unlikely that a Court would be constrained to apply this test so narrowly".

This indicates that the Department itself is in some doubt as to the meaning of the provision and as stated above the Interpretation Act must be relied upon to resolve the ambiguity. The Court would of course not be constrained to consider the second reading speech alone but it would find it persuasive. In those cases where the exercise of the discretion adversely affects personal rights or vested property rights it would most likely apply the test narrowly.

The Briefing Note goes on to say that the Director General in determining whether a development has minimal environmental impact must exercise the discretion reasonably. While this is certainly the case the Committee believes that it would be in the interests of the Minister to have the legal limits of that discretion clarified by an appropriate amendment to the Act in order to forestall any future legal challenge to the regulation.

Recommendation:

The Committee reports its view to Parliament that the regulation may not have been within the general objects of the legislation under which it was made, and may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

The Committee recommends, in the interests of certainty and to prevent any future legal challenge to the legislation, that the matter be clarified by an appropriate amendment to the Act.

Appendix 1

Letter from the Deputy Premier, Minister for Urban Affairs and Planning, Minister for Aboriginal Affairs and Minister for Housing, dated 9 December 1999

NEW SOUTH WALES

DEPUTY PREMIER
MINISTER FOR URBAN AFFAIRS AND PLANNING
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OUR REF: RML 083845

-9 DEC 1999

The Hon Peter R Nagle MP
Chairman
Regulation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED
15 DEC 1999
REGULATION REVIEW COMMITTEE

Dear Mr Nagle

I refer to your letter of 20 September 1999 wherein you raised questions regarding the application of the "exempt development" provisions of section 76 of the Environmental Planning and Assessment Act 1979 to State Environmental Planning Policy 38 – Olympic Games and Related Projects.

You are correct in that the phrase "minimal environmental impact" is not defined in either the Environmental Planning and Assessment Act 1979, the Regulations made pursuant to the Act, or in SEPP 38 itself.

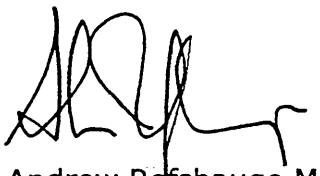
For the purpose of SEPP 38 the applicant for the development (which in practice is the Director-General of the Olympic Co-ordination Authority) bears the burden of establishing that what is proposed is identified in Schedule 1 and is of minimal environmental impact after taking into account all relevant circumstances. These may include issues such as duration, scale, and cumulative effect of the proposed development.

The only objective criteria that applies to exempt development that is carried out under SEPP 38 is that these must be certified by the Olympic Co-ordination Authority to comply with the Building Code of Australia or the relevant Australian Standard. The Minister for Urban Affairs and Planning does not have a role in this part of the SEPP 38 process.

The list of items which you quoted from the then Minister's speech in Parliament is not exhaustive of all the types of matters that may constitute exempt development. Section 76(2) and (3) of the EP&A Act does not require that an exempt development must necessarily be "small and domestic" in nature. It only provides that "an environmental planning instrument may provide that development of a specified class or description that is of minimal environmental impact is exempt development". This is what SEPP 38 set out to do.

I trust that the above clarifies the position for the Regulation Review Committee.

Yours sincerely



Andrew Refshauge MP
Deputy Premier
Minister for Urban Affairs and Planning
Minister for Aboriginal Affairs
Minister for Housing

Appendix 2

Department of Urban Affairs and Planning Briefing Note dated 7 June 2000

Department of Urban Affairs & Planning – Ministerial Briefing Note

Subject: Exempt Development – Olympic Games

[Date: 7 June 2000]

Purpose of the Briefing Note

Peter Nagle MP, the Chairman of the Regulatory Review Committee has raised concerns about whether the EP&A Act (Savings and Transitional) Amendment (Olympic Co-ordination Authority) Regulation 1999 is within the general objects of the EP&A Act or within the spirit of that Act.

Background

- State Environmental Planning Policy No 38 - Olympic Games and Related Projects (SEPP 38) was made on 5 November 1993.
- In July 1998, OCA sought an amendment to SEPP 38 to enable a range of activities to become permissible without consent.
- Issues were raised by OCA's solicitors concerning the application of Part 5 of the EP&A Act to these activities. OCA proposed that, as they were minor development, they could be "exempt development" under the amended EP&A Act and therefore subject to neither Part 4 nor Part 5 of the EP&A Act.
- However, the 1998 amendments to the EP&A Act, and in particular s76, which introduced the concept of "exempt development" did not apply to OCA activities. This meant that the concept of "exempt development" could not apply to OCA.
- Accordingly, a Regulation was made on 19 February 1999 to enable OCA activities to be "exempt development". This was the EP&A Act (Savings and Transitional) Amendment (Olympic Co-ordination Authority) Regulation 1999. A copy of this Regulation is attached and marked "A".
- SEPP 38 was also amended on that day. The amendment set out the categories of OCA activities which could be "exempt development" under the EP&A Act. The SEPP also provides that "exempt development" must not be carried out unless it is approved by OCA as complying with the Building Code of Australia or, if that Code does not apply, any relevant Australian Standard. A copy of the SEPP 38 (Am No 3) is attached and marked "B".
- SEPP 38 was further amended on 26 November 1999. The amendments refined the types of Olympic Projects that could comprise "exempt development" and extended the operation of the SEPP across the State rather than just applying it to the Sydney Region.

Regulation Review Committee

- The EP&A Act and SEPP 38 provide that only development which is of "minimal environmental impact" can be "exempt development".

- The responsibility for deciding whether an OCA activity listed in SEPP 38 is of "minimal environmental impact" lies with the Director-General of OCA.

- The Regulatory Review Committee of Parliament wrote to the Minister on 20 September 1999 raising concerns about the potential ambit of what development could constitute "exempt development" under SEPP 38.

- The Committee noted that in the debate on the EP&A Amendment Bill which introduced the concept of "exempt development" into the Act, the Minister gave the impression that "exempt development" would be "essentially small and domestic". The Committee contrasted this with the potential for "exempt

development" under SEPP 38 to be "more extensive infrastructure development".

- As indicated in the Minister's reply dated 9 December 1999, no development falling within the categories listed under SEPP 38 can be characterised as "exempt development" unless the Director-General of OCA has formed an opinion the particular development is of "minimal environmental impact".

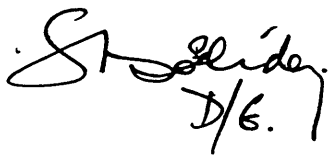
- The Committee raises the issue of whether "exempt development" can be more than small and domestic in nature and in this regard refers to the Interpretation Act.

- Neither the EP&A Act nor SEPP 38 defines what constitutes "minimal environmental impact". This will be determined on a case by case scenario and will depend on the particular facts for each development. Whilst the Second Reading Speech does give a flavour for what constitutes "minimal environmental impact" as being small and domestic in nature, it is unlikely that a Court would be constrained to apply this test so narrowly.

- It is a matter for the Director-General of OCA to determine whether or not a development has "minimal environmental impact" and therefore can be characterised as "exempt development" under SEPP 38. The Director-General of OCA must exercise this discretion reasonably.

- The Regulation is not ultra vires. The Parliamentary Counsel's Office issued an opinion that it could be legally made.

Christine Hanson
Director, Legal Services Branch



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