**2009**

# LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

## Planning and Development Amendment Regulation 2009 (No 1)
## SL2009-3

## EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Andrew Barr MLA

***PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 1)***

**EXPLANATORY STATEMENT**

## Overview

Most development in the ACT requires a development approval (DA). Some types of development do not require a DA. Development that does not require approval is "DA exempt" development. Often, where a change to an approved development is required, the development approval must be changed with a development approval amendment. Timing can be a critical issue in development and changes to development.

The *Planning and Development Amendment Regulation 2009 (No 1)* (the amending regulation) increases the types of development that are exempt from requiring a development approval, that is, DA exempt development. The amending regulation also increases the types of change that can be made to an approved development without requiring development approval amendment. The amending regulation achieves this by extending the time frame/circumstances in which currently exempt development can be built. The amending regulation does this by:

1. ***permitting minor changes to DA exempt development*** at the start or during construction even if the development (because of the change) would otherwise cease to be exempt. The change must, itself, be DA exempt;
2. ***permitting minor changes to a development authorised by a development approval*** at the start or during construction even if the change is contrary to the development approval of the main development. The change must, itself, be DA exempt. The change must not contravene any conditions of the development approval; and
3. ***providing the planning and land authority with discretion*** to declare that specified low impact changes to a DA exempt single dwelling, on new residential land, can be made without development approval notwithstanding that the changes are non-compliant with DA exemption requirements.

The amending regulation applies to development applications currently being processed and to any development currently being constructed under the *Planning and Development Act 2007* (the Act). This ensures homeowners and builders can immediately realise the benefits of the amending regulation.

### Why the change is needed

The DA exempt framework has been in operation since 31 March 2008 with several adjustments responding to community, industry and Government needs. This amending regulation further refines the framework so that the initial intent of the framework, that is, to provide a simpler, faster and more effective development assessment process, is achieved. It does this for development proposals that are DA exempt but also for those proposals that require development approval. Recently, Government consulted with construction industry representatives on improving the DA exempt framework and DA assessment efficiency. The amending regulation is in response to this consultation.

The amending regulation improves efficiency by reducing unnecessary DA applications. Developers will no longer be required to obtain a DA or DA amendment for developments that were DA exempt but for a minor non-compliance with requirements. Modifications that are DA exempt if they are made *after* construction of the main development will now be DA exempt irrespective of when they are undertaken. These issues impact on home-owners, builders or developers through development delays and additional costs.

## Background

### *Developments with multiple elements*

Under the Act, section 133 and 135, the *Planning and Development Regulation 2008* (the regulation) may prescribe those things that do not require development approval (refer section 20, Schedule 1 and Schedule 1A). Development that does not require development approval is DA exempt development. Section 20 and Schedule 1 of the regulation exempts specified development from requiring a development approval.

The exemptions typically apply to "designated development" as defined in section 1.2 of Schedule 1. Section 1.2 of Schedule 1 of the regulation refers to actions, the doing of activities on specified land rather than completed physical things. It is the action of building an exempt structure on specified land that is exempt from requiring a DA not the final exempt structure itself. The action of building the exempt structure is complete when the activity is complete, i.e. when the construction of the building on the land is completed. All activity relating to this construction on the specified land prior to completion forms part of a single activity/development that may or may not be DA exempt.

Existing sections 1.10 (f) and 1.16 of Schedule 1 to the regulation are relevant to activities consisting of multiple elements. These sections, in effect, provide that the construction of something cannot be DA exempt if it forms part of a development that requires development approval. For example, the addition of a skylight to a house is not DA exempt if it forms part of the construction of the house and the house (with the skylight) is not DA exempt.

Existing section 1.18 of Schedule 1 is also relevant to activities consisting of multiple elements. Section 1.18 of Schedule 1 requires that each element of a composite development satisfy each corresponding exemption requirement in Schedule 1. For example, if the development activity consists of building a house with a water tank, then the:

- "building of a house with water tank" must be DA exempt, that is, it must satisfy exemption requirements for this activity as listed in Schedule 1. In this case, the relevant exemption might be section 1.100 of Schedule 1; and
- "building of a water tank next to a house" must also be DA exempt, that is, it must satisfy exemption requirements for this activity as listed in Schedule 1. In this case, the relevant exemption might be section 1.55 of Schedule 1.

If both the house and the water tank remain DA exempt even when combined during construction (i.e. they both continue to comply with their respective exemption rules) then the whole activity of building a house with water tank is DA exempt.

The amending regulation simplifies the above arrangements by providing that a home-owner, builder or developer can add things during the construction phase of a main development if those things would be DA exempt were they to be added after the construction of the main development is complete. The amending regulation achieves this by broadening the circumstances in which an existing DA exempt development can occur and deletion, because of the effect of proposed new sections in the amending regulation, of sections 1.10 (f) and 1.16 of Schedule 1 to the current regulation noted above.

***Building certifiers***

Many types of development require building approval under the *Building Act 2004* (the Building Act). Before a building certifier can grant building approval, the certifier must assess whether approval is required for the proposal under the Act or other legislation (refer section 30 of the Building Act). The certifier must then assess the relevant building plans to determine if the proposal is DA exempt. This requires an assessment of whether the proposal meets relevant DA exemption requirements in the regulation (section 20, Schedule 1 and Schedule 1A). If the proposal does not meet relevant requirements then a development application for approval must be made. Only when approval is obtained can the building certifier issue a building approval and work on the proposed development can commence (provided a commencement notice is also issued under the Building Act). The amending regulation makes the building certification process more efficient by extending the circumstances in which DA exempt development can be built and so extending the circumstances in which certifiers can authorise the commencement of building work without referring the home-owner, builder or developer to the Planning and Land Authority for development approval.

## Summary of main changes

**1. Modification to an existing exempt development – New sections 20 (3), (4), (5)**

Clause 4 inserts new sections 20 (3), (4) and (5). These new sections apply to development that is DA exempt. The amending regulation permits minor changes to be made to the main development during construction notwithstanding that the changes are inconsistent with DA exemption requirements of the main development.

New sections 20 (3) and (4) apply to scenarios such as the following. During construction of a DA exempt house, a minor modification to the slope of the roof and addition of a skylight may be sought. These changes may cause the house to be non-compliant in height or another DA exemption requirement. This could be the case even if the skylight were able to be added under a DA exemption after the construction of the house was completed. Note the different outcomes are due to the fact that in the former case (addition of skylight during construction of main

house), the construction of the whole house with skylight must be DA exempt, but in the latter case (addition of skylight after construction of house is complete), the construction of the house is complete and so no longer requires a DA or DA exemption, only the addition of the skylight needs to be DA exempt.

Under new sections 20 (3) and (4) and subject to new section 20 (6), changes can be made during construction of the main development (e.g. adding a skylight and changing slope of roof, exempt under items 1.16 and 1.24 of Schedule 1 of the regulation respectively) if the change would be DA exempt were it to be carried out after the construction of the main development was complete. Such changes can now be made without requiring a DA even though the aggregate effect of the changes, apart from this amending regulation, would mean that the main development ceases to be DA exempt.

However, new section 20 (6) provides that the DA exempt development can not be varied under new sections 20 (3) and (4) if the aggregate development would result in more than one single residence on the block, multiple dwellings or would include more that 2 exempt class 10 buildings within 1.5m of a side or rear boundary of a block. In this case, a development application, seeking development approval, would need to be lodged.

*Composite development - New section 20 (5)*
A development may include a number of elements which are individually DA exempt, but when put together as an aggregate single development constitute a development that is not DA exempt. This might be the case even though the same elements can all be lawfully built as DA exempt over a period of time. New section 20 (5), subject to new section 20 (6), provides that if a proposed project can be broken down into separate components and each component is, in itself, exempt then the aggregate of the project will not require development approval. This is defined by the term “composite development”.

However, if the composite development includes elements that do not meet the stated requirements (i.e. it would result in more than one single residence on the block, multiple occupancies or would include more that 2 exempt class 10 buildings within 1.5m of a side or rear boundary of a block), the composite development is not exempt from requiring development approval. A development application, seeking development approval, would need to be lodged in this case.

**2. Modification to development authorised by development approval – New sections 35(2), (3), (4).**
Section 198C of the Act applies to development that is not DA exempt but which has development approval. The section permits regulations to be made to specify changes to development that can lawfully be made notwithstanding the changes are not consistent with the relevant development approval. Any such changes are deemed to be consistent with the development approval. Pursuant to section 198C of the Act, clause 5 of the amending regulation inserts new sections 35 (2), (3) and (4) into the regulation. The new sections permit some changes to a development to be made notwithstanding the changes are contrary to the DA. The effect of the new sections and 198C of the Act are that the permitted changes are deemed to be consistent with the terms of the development approval.

Similar to new sections 20 (3), (4) and (5) inserted by clause 4, new sections 35(2) and (3) permit (subject to new section 35(4)) only changes that would otherwise be DA exempt were they to be carried out after the construction of the main development was completed.

New section 35 (4) provides that a development that has development approval can not be modified or varied under new sections 35(2) and (3) if the aggregate development would result in more than one single residence on the block, multiple dwellings or would include more that 2 exempt class 10 buildings within 1.5m of a side or rear boundary of a block. A further development application, seeking an amendment to the existing DA would need to be lodged in this case.

**3. Exemption declarations – New section 1.100A of Schedule 1**
Clause 11 of the amending regulation inserts new section 1.100A to Schedule 1 of the regulation. This section permits DA exempt single dwellings, on new residential land, to remain DA exempt notwithstanding a minor non-compliance with the DA exemption rules. The provision only applies if the non-compliance is minor, does not adversely affect anyone other than the lessee and does no more than minimal environmental harm. The provisions only apply to single dwellings on new blocks and only in respect to requirements related to height, setbacks or private open space.

The mechanism for achieving this is an "exemption declaration". The amending regulation gives the planning and land authority the power, on application, to make an "exemption declaration" which has the effect of declaring that a specified non-compliance of DA exemption requirements does not cause the construction of the single dwelling, on new residential land, to cease to be DA exempt. The exemption declaration role is limited only to the subject of the declaration.

## Detailed summary of provisions

**Clauses 1 – Name of Regulation** –states the name of the regulation, which is the *Planning and Development Amendment Regulation 2009 (No 1)*.

**Clause 2 – Commencement** –states that the regulation commences the day after notification.

**Clause 3 – Legislation amended** – states that the regulation amends the *Planning and Development Regulation 2008*.

**Clause 4 – New section 20 (3) to (6)**—inserts new sections 20 (3) to (6).
In summary, new sections 20 (3) and 20 (4) permit a DA exempt development to be changed in specified ways without risk to its DA exempt status, i.e. without requiring development approval. The permitted change must be:

- physically carried out before the development is complete; and

- of a type which would itself be DA exempt were it to be carried out after the current development was completed.

The proposed provisions do not limit the operation of other provisions that permit a subsequent DA exempt change being made after the development is complete.

New section 20 (3) applies to “modifications” of a DA exempt development.

New section 20 (4) applies to “variations” of a DA exempt development.

New section 20 (5) applies to development that combines notionally or potentially separable components, each of which, if constructed separately, would be DA exempt but when constructed together as a composite development are not DA exempt. New section 20 (5) provides that such a composite development is DA exempt. For example, if building a house is DA exempt in isolation, and building a garage is DA exempt in isolation, then new section 20 (5) makes simultaneously building the house and garage as a combined building DA exempt. This is the case regardless of whether or not the house and garage are built as an integral composite dwelling or as separated buildings. This is also the case despite the fact that, as an integral composite dwelling, the combined house and garage might not necessarily comply with DA exemption rules under the Territory Plan that are relevant to a dwelling.

The provision removes the anomaly that would prevent building the house and garage, as a DA exempt combined composite dwelling, but would allow the house to be built in isolation from the garage, as a DA exempt house, and then only after the house is built, allow the garage to be added as a DA exempt garage.

New section 20 (6) provides that new sections 20 (3), (4) or (5) do not apply if the result would be to construct a building that would not comply with DA exemption requirements in Schedule 1 that limit the number of DA exempt structures near lease boundaries and require there to be no more than one single dwelling on the relevant block of land.

**Clause 5 – New section 35(2), (3) and (4)**—inserts new sections 35 (2), 35 (3) and 35 (4).
New sections 35(2) and 35(3) apply to development that is not DA exempt but has development approval under the Act. These new sections permit (subject to new section 35(4)) specified changes to a development prior to completion of construction even if the changes are not consistent with the relevant development approval. Prior to this amending regulation, such changes would require an application under the Act (section 197) for an amendment to the relevant development approval. These new provisions remove the need to obtain such an amendment.

The provisions only permit changes that would be DA exempt if they were made after the construction of the approved development is completed or if the change consists of adding an element that is, in itself, DA exempt. These provisions mean that changes to a building (e.g. house) which currently can be made without development approval after construction of the main building is complete, will be

able to be incorporated into the construction of the main building itself, even if this would (but for the amending regulation) contravene the relevant development approval.

New sections 35(2), (3) and (4) are made under section 198C of the Act. Section 198C provides for the regulation to specify changes to development that are deemed to be consistent with the relevant development approval. Section 198C of the Act was inserted into the Act by a regulation modification, (section 20.1 of Schedule 20 to the regulation) and as such, will expire on 31 March 2010.

New section 35 (2) provides, subject to new section 35 (4), that a change to an approved development is deemed to be in accordance with the relevant development approval if the change, itself, would not need development approval were it to be made after the development was completed.

New section 35 (3) provides, subject to new section 35 (4), that a change that consists of adding a thing to the approved development is deemed to be in accordance with the development approval if the thing is, itself, DA exempt.

New section 35 (4) provides that new section 35 (2) and (3) do not apply if the result would be to construct a building that would not comply with DA exemption requirements in Schedule 1 that limit the number of DA exempt structures near lease boundaries and require there to be no more than one single dwelling on the relevant block of land.

**Clause 6 – New section 404—**inserts new section 404 (Application of Planning and Development Amendment Regulation 2008 (No 5) and Planning and Development Amendment Regulation 2009 (No 1)).

New section 404 is a transitional provision. The new section makes it clear that the *Planning and Development Amendment Regulation 2008 (No 5)* and the amending regulation apply to developments and development applications commenced/made before or after the commencement of the *Planning and Development Amendment Regulation 2008 (No 5)*. This makes it clear that the efficiency benefits of these regulations are to apply to existing developments as well as new.

**Clause 7 – Schedule 1, section 1.10 (f)** – omits section 1.10 (f) of Schedule 1 of the regulation as a result of clause 9 omitting section 1.16 of the same schedule.

**Clause 8 – Schedule 1, new section 1.15 (2)** – inserts a new section 1.15 (2) to Schedule 1, (Exemptions from requirement for development approval) of the regulation. The provision clarifies the intention that section 1.15 only apply to a DA that is issued subject to a condition. The clarification avoids confusion about what constitutes the 'condition' mentioned in section 1.15 by expressly indicating that development approval is given subject to a condition.

An intended outcome is to clarify that nothing mentioned in DA plans or in a DA decision statement amounts to a condition to which section 1.15 applies, unless the plans or decision expressly indicate that the DA is given subject to the condition.

It is intended that such conditions could be applied under the Act, s 165 (Conditional approvals), for example, and such conditions could be used if necessary to prevent a particular DA exemption from conflicting with a particular aspect of a development in a DA.

However, a DA that only covers the development phase of constructing a building does not regulate further development once development under the DA is completed. Therefore, once the building's construction is completed in accordance with such a DA, that DA is spent, and will not prevent other development from subsequently altering the initial development.

**Clause 9 – Schedule 1, section 1.16 –** omits section 1.16 (development approval not otherwise required) from Schedule 1 (Exemptions from requirement for development approval). Section 1.16 is omitted because new sections 20 (3), (4) and (5) make existing section 1.16 redundant.

**Clause 10 – Schedule 1, section 1.100 heading** – replaces the existing heading with a new heading—Compliant single dwellings—new residential land. The new heading distinguishes this section from new section 1.100A inserted by clause 11.

**Clause 11 – Schedule 1, new section 1.100A**— inserts new section 1.100A (Otherwise non-compliant single dwellings—new residential land) into Schedule 1 (Exemptions from requirement for development approval).

In summary, new section 1.100A permits DA exempt single dwellings, on new residential land, to remain DA exempt notwithstanding a minor non-compliance of the DA exemption rules during construction. The provision only applies if the non-compliance is minor, does not adversely affect anyone other than the lessee and does no more than minimal environmental harm. This facility only applies to single dwellings on new blocks and only in respect to DA exemption requirements related to height, setbacks or private open space.

The mechanism for achieving this is an "exemption declaration". The amending regulation gives the planning and land authority the power, on application, to make an exemption declaration. An exemption declaration can declare that a specified non-compliant element with a DA exemption requirement does not cause the construction of the single dwelling to cease to be DA exempt. The declaration only applies to the non-compliant element described in the declaration.

For a single dwelling, to be DA exempt, it must satisfy the DA exemption requirements of section 1.100 of Schedule 1, which requires compliance with the applicable rules of the relevant Territory Plan code. If the single dwelling does not satisfy all of the DA exemption requirements of section 1.100, the home-owner, builder or developer may apply for an exemption declaration or, alternatively, apply for development approval. If an exemption declaration is applied for, under new section 1.100A of Schedule 1, and granted, the dwelling may still be DA exempt.

In addition, under the amending regulation, the dwelling may also be DA exempt if it consists of multiple elements that are each DA exempt, even if the

composite whole is not DA exempt. For example, a dwelling comprised of a house and garage might not comply with a Territory Plan code rule about siting of the garage, but because certain garages are DA exempt in their own right, the house with this garage may, as a whole, still be DA exempt. This is explained in detail under clause notes for new section 20 (5) (refer to clause 4).

The following describes this section in detail.

New section 1.100A (1) introduction and 1.100A(1) (a) and (b) provide that this section only applies if the relevant structure is:

- a single dwelling;
- the first dwelling on the block; and
- if the block is a "preliminary block" (refer section 1.100(4) of Schedule 1), built by the lessee of the holding lease.

New section 1.100A (1) (c) and (d) provide that the section applies if the above-mentioned type of dwelling does not comply with relevant rules in the relevant Territory Plan code and the non-compliance relates to setback, building envelope or minimum private open space requirements.

New section 1.100A (1) (e) provides that an exemption declaration made by the planning and land authority forms part of the s 1.100A prerequisites for an otherwise non-exempt single dwelling's development to be DA exempt, but only in respect of the non-compliant element identified in the declaration. For example, the exemption declaration application could identify that the corner of a building intrudes by no more than 300mm into a boundary clearance zone.

New section 1.100A also prescribes a statutory process for—

- the planning and land authority to determine an application, including what must be considered; and
- the planning and land authority to make, or to refuse to make, an exemption declaration, including limitations on the power to make the declarations.

An intended effect of that process is to allow the planning and land authority to extend a relevant parameter (termed an *extended distance*) of the rules mentioned in section 1.100A so as to cater for the otherwise non-complying development. However, the section requires that the planning and land authority must not make an exemption declaration unless satisfied that—

- the non-compliance with the rule is minor; and
- building the dwelling other than in accordance with the non-compliant rules—
    - will not adversely affect someone other than the applicant; and
    - will not increase the environmental impact of the dwelling more than minimally.

The regulation currently permits development to be constructed no more than 340mm beyond what the relevant DA rules and DA exemption parameters otherwise permit, in certain circumstances. It is intended that, without limiting the planning and land authority's power under s 1.100A, a non-compliance of the relevant rules of that magnitude is a minor non-compliance for the purposes of s 1.100A. Depending on individual case circumstances, including potential for adverse impacts on neighbours, larger non-compliant elements could also be considered as minor.

It is anticipated that in many cases, the planning and land authority's power to approve non-compliant elements under an exemption declaration, will have minimal or nil detrimental effect. This is because the non-compliant elements would fall within building tolerances or be of a nature that may be approved as part of a DA application.

Further, clause 13 and 14 of the amending regulation ensures that the 340mm permitted tolerance cannot be applied in full, in addition to an *extended distance* provided for in an exemption declaration. The 340mm permitted tolerance reduces by the amount of the *extended distance* stated in the exemption declaration to a minimum of 50mm (barring lease boundary encroachments).

See figure 1 at the end of the clause notes for an illustration of elements, of a DA exempt single dwelling on new residential land, that an exemption declaration may apply to and the effect on building tolerances.

**Clause 12 – Schedule 1A, section 1A.10 (2) (a) (i)** – changes the permitted construction tolerances for fences constructed for a lease boundary, such as a common boundary fence between neighbouring blocks. The clause changes the current 25mm tolerance to 50mm (see figure 3 at the end of the clause notes), in line with the 50mm tolerance allowed for buildings that are not fences where they are within 900mm of a lease boundary. The change was requested by the construction industry and land surveying industry on the grounds that a 25mm tolerance on the location of boundary fences is unrealistically strict and could unnecessarily increase fencing costs. The tolerance does not affect the operation of the *Common Boundaries Act 1981*, which deals with fences on boundaries.

**Clause 13 – Schedule 1A, new section 1A.10 (2A) and (2B)** – inserts into Schedule 1A (Permitted variations to approved and exempt developments), new sections 1A.10 (2A) and 1A.10 (2B).

Under new section 1.100A (refer clause 11), an exemption declaration must state the *extended distance* by which the dwelling's dimensions may not comply with the relevant DA exemption rule. Existing Schedule 1A of the regulation provides for a variety of construction tolerances. New sections 1A.10 (2A) & (2B) provide that tolerances provided for in Schedule 1A are reduced if an exemption declaration applies to the development. The provision reduces the permitted construction variation (tolerance) in proportion to the size of the extended distance. This reduction cannot exceed a minimum tolerance.

New section 1A.10 (2A) reduces the relevant permitted horizontal construction variation for a dwelling by the amount of the extended distance stated in the section 1.100A exemption declaration, but does not reduce the construction tolerance to less than 50mm. The 50mm minimum tolerance is retained by new section 1A.10 (2A) using a factor of 290mm in determining the amount of reduction of the 340mm permitted construction variation (340mm – 290mm = 50mm). The 50mm remainder preserves a minimum construction tolerance of 50mm, which is a standard industry tolerance on normal construction such as bricklaying for walls of a dwelling. The 50mm tolerance is necessary to ensure than insignificant variations (e.g. a few millimetres) in the position of building elements, such as individual bricks in brickwork, do not cause construction to not comply with DA requirements or DA exemption requirements.

The reduction prescribed by section 1A.10 (2A) is intended to apply only to the element of a building, etc that is the subject of the respective exemption declaration. For example, if stairs to a doorway of a dwelling are the subject of an exemption declaration, only the construction tolerance for the respective part of the stairs is reduced by section 1A.10 (2A). Other parts of the stairs and the other parts of the dwelling are not intended to have their permitted construction variations reduced if they are not the subject of an exemption declaration.

New section 1A.10 (2B) is a signpost provision indicating that in section 1A.10 the meaning of the term exemption declaration is the same as it means in section 1.100A (1) (d), which is explained above.

**Clause 14 – Schedule 1A, new sections 1A.11 (2A) and (2B)** – inserts new sections 1A.11 (2A) and 1A.11 (2B) into Schedule 1A (Permitted variations to approved and exempt developments).

The new sections 1A.11 (2A) and (2B) have identical effect as new sections 1A.10 (2A) and 1A.10 (2B) (refer to clause 13), except that new sections 1A.11 (2A) and 1A.11 (2B) relate to the height parameters of a dwelling, not the horizontal siting parameters covered by new sections 1A.10 (2A) and 1A.10 (2B).

**Clause 15 - Schedule 1A, part 1A.3** —omits section 1A.20 (Other permitted variations to approved developments and exempt developments) from Schedule 1A as a consequence of the effect of section 1A.20 being superseded by the effect of clauses 4 and 5.

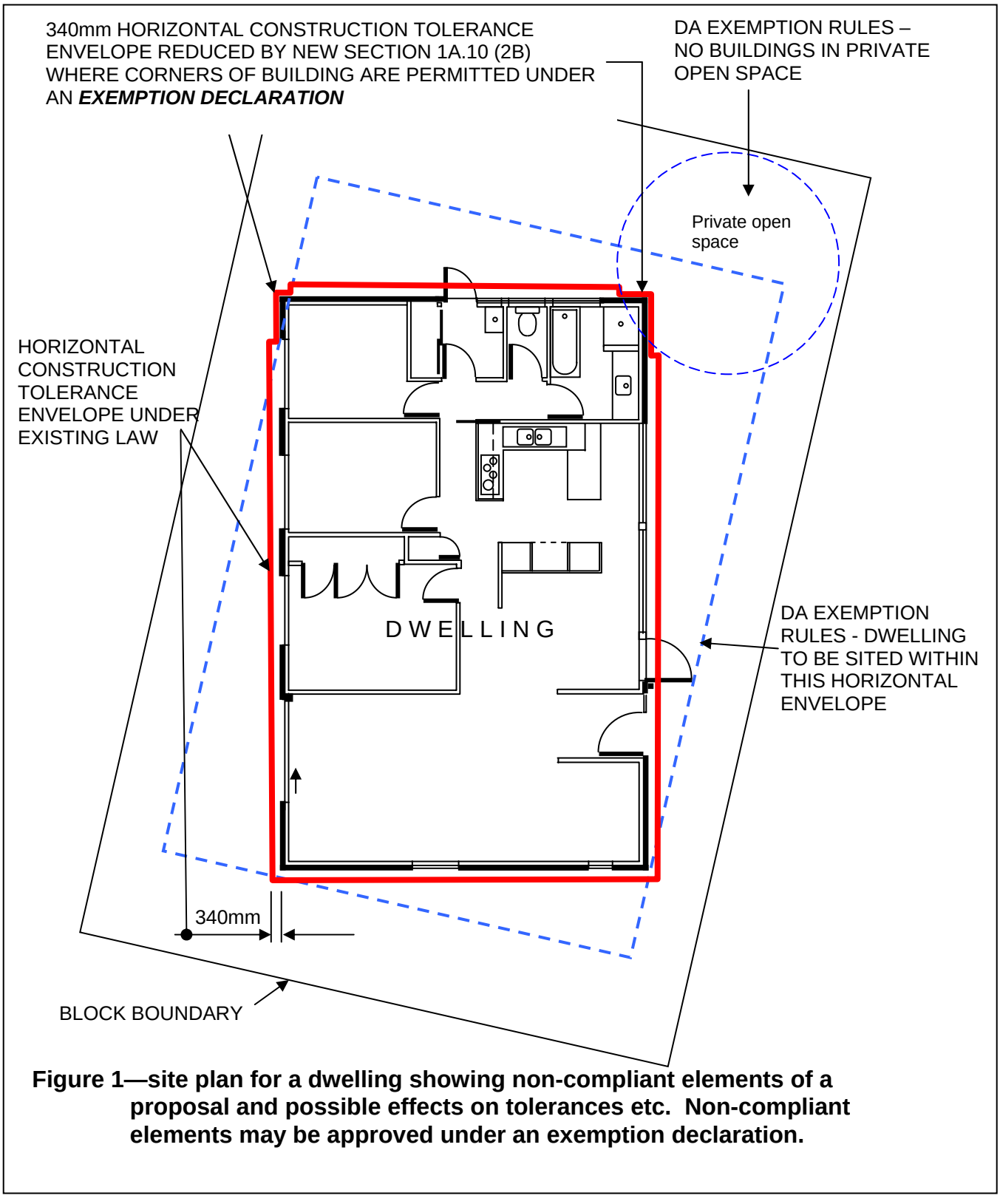



**Figure 1—site plan for a dwelling showing non-compliant elements of a proposal and possible effects on tolerances etc. Non-compliant elements may be approved under an exemption declaration.**

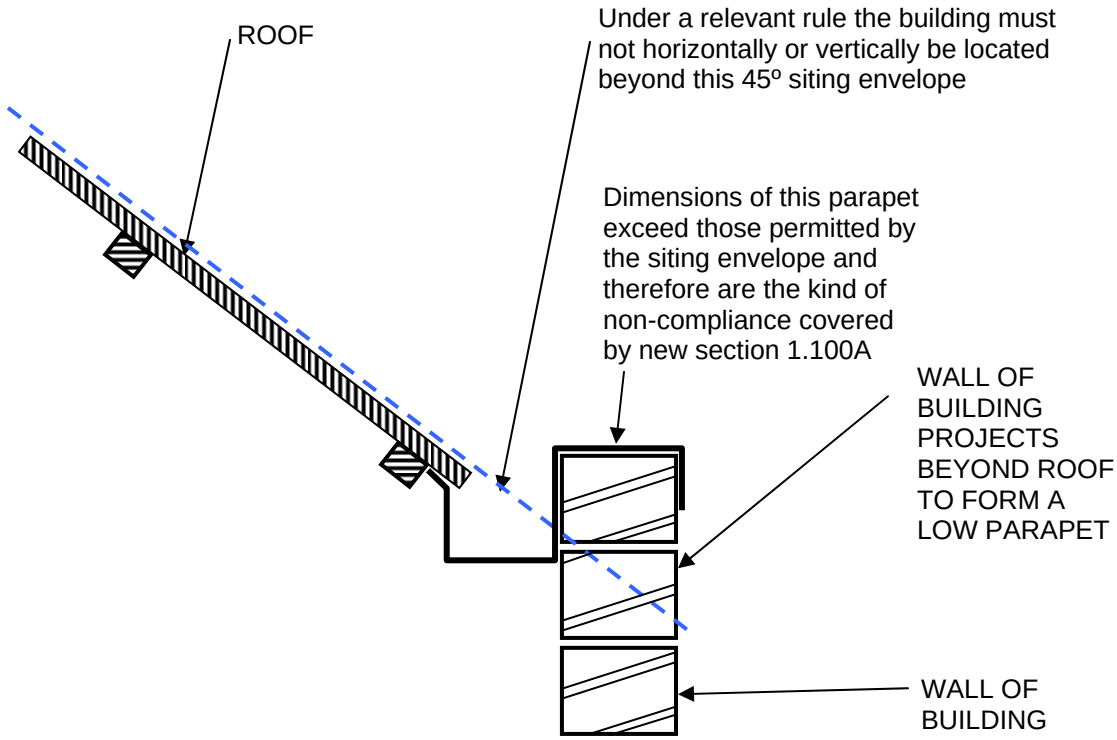
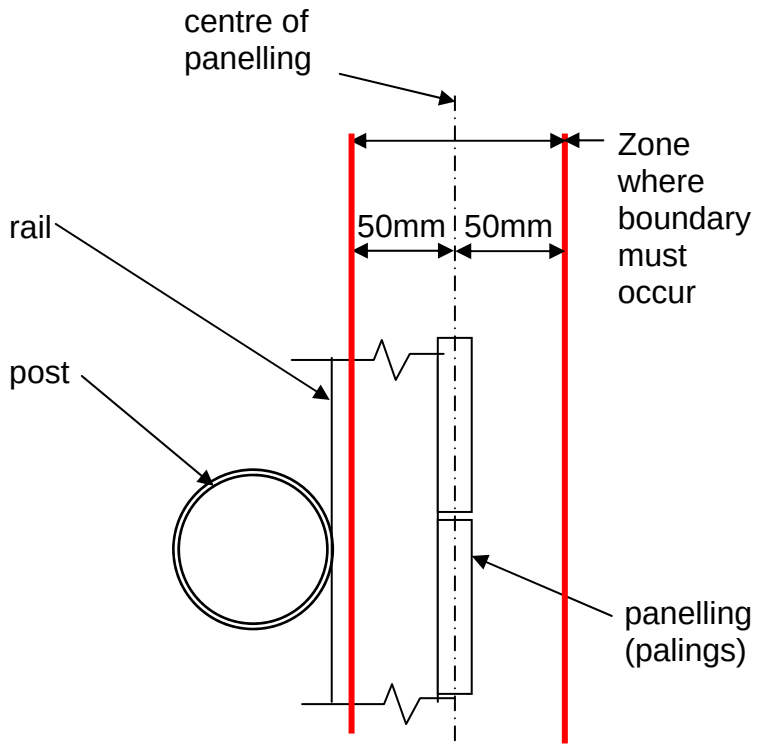



**Figure 2—part cross section through roof showing parapet projecting beyond height permitted by relevant DA exemption rule**

**FENCE—PLAN VIEW**
**mirror-case also permitted**




**Note: Post and rail paling fence shown, certain other fence types also permitted.**

**Figure 3—application of substituted 50mm construction tolerance for a boundary fence**.