2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2012

EXPLANATORY STATEMENT

Presented by

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EXPLANATORY STATEMENT

This explanatory statement relates to the *Planning, Building and Environment Legislation Amendment Bill 2012* (the bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Legislative Assembly.

Background

Planning, building and environment legislation has historically been amended by a number of methods, as follows:

- the usual Act amendment process,
- by modification using regulation (commonly referred to as a 'Henry the Eighth' amendment),
- through the Statute Law Legislation Bill process, and
- as a consequence of other legislation. For example, the *ACT Civil Administrative Tribunal Legislation Amendment Act 2008* made consequential amendments to the B*uilding Act 2004*.

These ways of amending legislation in the Planning Portfolio could be cumbersome and confusing for community, industry and government users of the legislation. An omnibus planning, building and environment legislation amendment bill enables more minor matters to be dealt with expediently and consolidates amendments into one place making the amendment process more user friendly and accessible. It provides greater flexibility in drafting amendments of planning, building and environment legislation and helps to minimise costs associated with keeping the legislation up-to-date.

Under guidelines approved by the government, the essential criteria for the inclusion of amendments in the bill are that the amendments are minor or technical and non controversial, or reflect only a minor policy change. During development of the bill, relative government Directorates are consulted and when necessary, industry and the community may be consulted.

The bill forms an important part of maintaining and enhancing the standard of ACT building and planning law. It enables legislative amendments and repeals to be made that would generally not be of sufficient importance to justify separate legislation. The amendments are also inappropriate to be made as editorial amendments under the *Legislation Act 2001*, chapter 11 (which provides for the republication of Acts and statutory instruments).

This is the third planning, building and environment legislation amendment bill. The first bill was passed by the Assembly in June 2011 and through that bill 8 individual Acts were amended. The second bill was passed in December 2011 and delivered two key outcomes: pre-DA community consultation and the requirement to have a sign about building work on the building site. This demonstrates the effectiveness of the omnibus bill process as a tool that collates amendments to legislation relative to planning, building and the environment. Without this bill process, these amendments could have been spread over a number of amendment bills or unnecessarily delayed. In this way, this omnibus bill helps to effectively maintain the statute book.

Previous bills can be accessed on the ACT Legislation Register at www.legislation.act.gov.au.

Well maintained legislation greatly enhances access to it by making it easier to find in an up-to-date form and easier to read and understand. This bill and future such bills facilitate keeping laws as up-to-date as possible to reflect technological and societal change both of which can happen rapidly in today's world.

The bill amends the:

- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Planning and Development Act 2007*
- *Planning and Development Regulation 2008*
- *Unit Titles Act 2001*
- *Unit Titles Regulation 2001.*

The bill has been assessed against the *Human Rights Act 2004* and no issues identified.

Outline of Provisions

Part 1 – Preliminary

Clause 1 — Name of Act
This clause names the Act as the *Planning, Building and Environment Legislation Amendment Act 2012.*

Clause 2 — Commencement
This clause provides for the bill's commencement. The Act commences on the day after its notification day.

Clause 3 — Legislation amended
This clause names the legislation that the bill amends. The bill amends:

- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Planning and Development Act 2007*
- *Planning and Development Regulation 2008*
- *Unit Titles Act 2001*
- *Unit Titles Regulation 2001*

Part 2 Building Act 2004

Clause 4 — Section 136 (1) definition of *building code*
This clause substitutes a new definition of *building code* at section 136.

This is a technical amendment which allows for flexibility in nominating documents that may form part of the building code by allowing a regulation to prescribe such a document.

Part 3 Building (General) Regulation 2008

Clause 5 — Section 10
This clause substitutes existing section 10 with a new section 10.

New section 10 allows for copies to be provided electronically. This updates the legislation to reflect modern practice and technological improvements.

Clause 6 — New section 43A
This clause inserts a new section 43A in part 5 of the regulation.

New section 43A is related to clause 4 above which amends section 136 (1) of the Building Act to allow documents that form part of the Building Code to be prescribed by regulation.

New section 43A prescribes a document that forms part of the Building Code. The document prescribed is a volume of the National Construction Code series if the volume is published by the Australian Building Codes Board and includes a notation that it forms part of the Building Code.

Part 4 Planning and Development Act 2007

Clause 7 — Meaning of *associated document* – pt 3.6, New section 30 (1) (da)
This clause inserts new section 30(1) (da).

This is a technical amendment to include an estate development plan as an associated document for a development application.

Clause 21 inserts a new sub-section 139 (2) (n) to require that a development application for the proposed development of a new estate must be accompanied by an estate development plan. This makes it clear that an estate development plan is a document that forms part of a development application when that application proposes development of a new estate.

Documents *associated* with a development application must be available on the public register. Existing section 30 provides the meaning for *associated document* and lists other documents that are associated documents.

The amendment includes an estate development plan as an *associated document*.

Clause 8 — Territory plan, new section 46 (2) and note
This clause is consequential to clause 9 and an amendment made by the *Evidence (Consequential Amendments) Bill 2011* (the Consequential Bill). It relocates existing section 47 (1) to section 46 (2).

The effect of clause 9 is to delete section 47(2) that requires the planning and land authority, upon application, to provide a certified copy of the territory plan.

An un-commenced provision of the Consequential Bill deletes the note in section 47. The existing note in section 47 includes reference to sections 11 and 12 of the *Evidence Act 1971* which are redundant on the establishment of the *Evidence Act 2011* (the Evidence Act). The *Evidence Act 1971* is repealed by clause 4 of the Consequential Bill. The note is not being retained with references to the equivalent sections of the Evidence Act as this is no longer consistent with drafting practice.

The net effect of the deletion of section 47(2) and the note is that the only provision remaining at existing section 47 is sub-section (1) “the territory plan is a notifiable instrument”.

Section 46 provides that there must be a territory plan that applies to the ACT. It is appropriate, therefore, to relocate remaining section 47 (1) to section 46 to provide that the territory plan is a notifiable instrument.

Clause 9 — Public availability of territory plan, Section 47
This clause omits section 47. The purpose of clause 9 is to omit sub-section 47 (2) that requires the planning and land authority to provide a certified copy of the territory plan upon a written application. This is because an up-to-date copy of the territory plan is always electronically available on the ACT Legislation Register. Further, the *Evidence Act 2011* provides that documents that are printed from the ACT Legislation Register are able to be submitted as evidence in a court.

Clause 8 has moved what remains of section 47 (subsection 47 (1)) to section 46 and therefore, section 47 can be omitted.

Clause 10 — Public consultation – notification, Section 63 (1) (c)
This clause amends section 63(1) (c) to omit the words “on the day after” and to substitute the words “10 working days after”.

Presently, a consultation notice must state that copies of written comments about a draft territory plan variation will be available for public inspection for at least 15 working days starting *on the day after* the consultation period ends.

Operational experience has indicated that this does not allow sufficient time for the necessary administrative arrangements to be completed e.g. privacy requirements and publication formatting. A period of 10 working days is more appropriate.

Section 90 contains a similar requirement to make consultation comments available the day after the consultation period ends and is amended by clause 15 for similar reasons.

Clause 11 — Partial rejection of plan variations by Legislative Assembly, new section 84 (2A) and (2B)
This clause inserts new sections 84 (2A) and (2B).

New section 84 (2A) states that the planning and land authority must, in relation to each provision of the plan variation that is rejected, prepare a notice stating that the provision of the plan variation has been rejected.

New section 84 (2B) makes the notice, inserted by new section 84 (2A), a notifiable instrument.

This clause is related to clause 12.

The amendment is technical and ensures that elements of a territory plan variation that are rejected are notified in the same way as a territory plan variation where no element has been rejected.

The amendment ensures that requirements for notification on the ACT Legislation Register of certain procedural steps are consistent.

Clause 12 — Partial rejection of plan variations – publication etc New section 85 (1) (aa)
This clause is consequential to clause 11 and inserts new section 85 (1) (aa) before paragraph (a) requiring details of a rejection notice under new section 84 (2A) (inserted by clause 11) to be published in a daily newspaper. The amendment ensures that a territory plan variation that is partially rejected is published in the same way as a territory plan variation where no element has been rejected and that requirements for notification on the ACT Legislation Register of certain procedural steps are consistent.

Clause 13 — What are *technical amendments* of territory plan?
New section 87 (h)
This clause inserts a new paragraph (h) in section 87.

Section 87 provides those types of territory plan variations that are *technical amendments*. New paragraph (h) provides that an amendment to relocate a territory plan provision, where the substance of the provision is not changed, is a *technical amendment*. It is appropriate that such an amendment is a *technical amendment*. It is similar to the existing *technical amendment* prescribed by section 87(g).

Certain *technical amendments* have limited consultation (refer to section 88).

Clause 14 below inserts a new section to require that the *technical amendment* provided at paragraph (h) requires limited consultation as this was considered appropriate and is similar to requirements for existing section 87 (g). Not all *technical amendments* require limited consultation, for example, an *error variation* does not require consultation.

Clause 14 — Is consultation needed for technical amendments,
New section 88 (1) (d)
This clause inserts a new section 88 (1) (d) as a consequence of clause 13.

Clause 13 inserts paragraph (h) at section 87 to provide that an amendment to relocate a territory plan provision, where the substance of the provision is not changed, is a *technical amendment*.

New section 88 (1) (d) provides in effect, that a section 87(h) *technical amendment* requires limited consultation. This ensures that similar types of *technical amendments* require the same level of consultation. For instance, section 87(g) *technical amendments* which are similar to the new section 87(h) *technical amendments* require limited consultation.

Existing section 90 sets out the requirements for the limited consultation. These requirements are not changed.

Clause 15 — Limited consultation section 90 (2) (d)
This clause amends section 90 (2) (d) to omit the words “on the day after” and to substitute the words “10 working days after”.

Presently, a notice published in the daily paper about the limited consultation (refer to section 88) provides that copies of written comments about a *technical amendment* will be available for public inspection for at least 15 working days starting *on the day after* the consultation period ends.

Operational experience has indicated that this does not allow sufficient time for the necessary administrative arrangements to be completed e.g. privacy requirements and publication formatting. A period of 10 working days is more appropriate.

Section 63 contains a similar requirement to make available consultation comments available the day after the consultation period ends and is amended by clause 10.

Clause 16 — What is an *estate development plan*? Section 94 (1), new note
This clause inserts a new note in section 94 (1) as a sign post to new section 139 (2) (n) (inserted by clause 21)

A development application, for the proposed development of a new estate, must be accompanied by an estate development plan. Existing section 94 provides what must and may be included in an estate development plan.

Existing s139 provides for those things that form part of a development application.

Clause 21 inserts a new requirement that a development application must be accompanied by an estate development plan if the application is for the development of an estate.

This amendment makes it clear that an estate development plan is part of a development application.

Clause 17 – Section 133
This clause substitutes existing section 133 with a new section 133.

The clause divides existing section 133 into subsections and adds a provision that exempt development does not include development if a development application is required to be assessed in the impact track. The amendment does not change the operation of the section.

This is a technical amendment to make it clear that impact track assessable developments cannot be exempt development. It is not appropriate to exempt a proposed development from needing a development application if the impact track would apply.

Clause 18 — Exemption assessments and notices Section 138D (2) (b)
This clause substitutes a new section 138D (2) (b).

Clause 19 is a consequential amendment to this amendment and clause 26 is relative to this amendment.

Existing section 138D (2) (b) provides that an exemption assessment notice must state whether the development is exempt and anything else prescribed by regulation.

Existing section 23 of the Planning and Development Regulation provides a list not only of what the notice must *state* but also a list of what the notice must *include*.

This means that the terminology used at existing section 138D (2) (b) is not correct as it only provides for what the notice must *state* whereas the regulation is expressed in terms of what must be *stated* as well as what must be *included*. The original intent was to provide for what the notice must *state* and *include*.

Clause 18 is a technical amendment to change the wording of the provision to correctly provide a notice must *state* whether the development is exempt development and must *include* anything else prescribed by regulation.

A new sub-section 138D (2A) inserted by clause 19 provides the power to prescribe what must be attached to the notice and the information that is required to be shown.

Together the amendments made by clause 18 and clause 19 provide for what the notice must state and what must be attached (or included). There is no substantive change to the existing requirements for the notice or the attachments.

Clause 19 — New section 138D (2A)
This clause inserts a new section 138D (2A).

Clause 19 is consequential to the amendment made by clause 18. Clause 26 is related to this amendment.

New section 138D (2A) sets out what sorts of things a regulation under section 138D (2) (b) (ii) may prescribe. The regulation can prescribe the documents that must be attached to an exemption assessment D notice and information required to be shown in the document.

Together the amendments made by clause 18 and clause 19 provide for what the notice must *state* and what must be attached (or included). There is no substantive change to the existing requirements for the notice or the attachments.

Clause 20 — Form of development applications Section 139 (2) (h)
This clause inserts the words “be accompanied by” before “an assessment” in section 139 (2) (h) for clarification reasons.

The amendment makes it clear that a development application prescribed by regulation for the paragraph must be accompanied by an assessment prepared using the criteria provided by one or more of the referral entities.

Section 26 of the Planning and Development Regulation provides the types of entities to which a development application is required to be referred.

Clause 21 — New section 139 (2) (n)
The clause inserts new section 139 (2) (n).

Clauses 7 and 16 are related to this amendment.

Section 139 provides the form of development applications. The section lists circumstances where the development application must be accompanied by certain documents. The insertion of new section 139 (2) (n) clarifies that a development application must be accompanied by an estate development plan if the application is for the development of an estate.

Clause 22 — End of development approvals for lease variations, new section 185 (2) (b) (iii)

This clause inserts a new section 185 (2) (b) (iii).

The amendment extends the existing provision to provide that a development approval that includes a lease variation survives for 2 years after any appeals in relation to the decision about the lease variation charge are determined.

The existing provision already provides that the development approval does not end for 2 years from the day the approval takes effect or, if an appeal is made to a court in relation to the approval, for 2 years from the day after the appeal ends.

However, the existing provision does not provide for the reconsideration, merit review to ACAT or appeal to a court in relation to the decision about the lease variation charge amount. This could mean that a development approval could end before the reconsideration, merit review to ACAT or appeal to a court in relation to the lease variation charge amount is decided.

This amendment is necessary because a development approval of a development application which includes a lease variation cannot be used until the lease variation charge is paid. The Planning and Development Act (the Act) provides that a proponent can ask for a reconsideration of the lease variation charge (s277C) as well as a reconsideration of the development application (DA) decision (Division 7.3.10) i.e. there are two matters where a reconsideration (or appeal) of the decision can be sought.

Without this amendment, it is possible for a development approval to end before the matter of the lease variation charge has been finally settled (i.e. at the end of all appeal options). This is not desirable and the amendment corrects this omission and is consistent with other similar provisions.

Clause 23 — Section 287
This clause substitutes existing section 287 with a new section 287 and inserts a new section 287A.

Existing section 287 treats the consolidation or subdivision of a rural lease during the holding period the same way. This does not promote the Government's objective of increasing consolidation of small rural leaseholds.

For this reason, new section 287A allows the consolidation of a rural lease during the holding period. The substituted section 287 continues to provide that a rural lease cannot be subdivided during the holding period.

Clause 24 — Transfer of land subject to building and development provision Section 298 (4)
Clause 24 omits the word "holding" from section 298 (4).

The existing provision provides that the planning and land authority may consent to a transfer of a lease containing a building and development provision, or an interest in the lease, if the proposed transfer is the first sale of an individual lease of

undeveloped land by the person who provided the infrastructure on, and subdivided, the holding lease of which the individual lease is a subdivision.

The amendment will allow the planning and land authority to consent to the transfer of a lease before the lease building and development provisions have been complied with provided the transfer is the first sale of an individual lease of undeveloped land following subdivision.

The new provision applies this facility to all leases not just a holding lease. The restriction to holding leases is unnecessary given the other criteria applying.

Clause 25 — Reviewable decisions, eligible entities and interested entities Schedule 1, item 12, column 2
This clause is a technical amendment to schedule 1, item 12, column 2 to include the words “unless the development application to which reconsideration relates is exempted by regulation”. The amendment corrects an error because these words should be included at item 12 to ensure that it is consistent with other items in the schedule.

The amendment makes it clear that a development approval reconsideration decision attracts the same appeal rights and the same appeal restrictions as the original decision.

Part 5 Planning and Development Regulation 2008

Clause 26 — Section 23
This clause substitutes a new section 23 and inserts a new section 24 in the Planning and Development Regulation as a consequence of amendments made by clause 18 and 19 above.

New sections 23 and 24 are in the same terms as existing section 23 but have been divided up into two separate sections to reflect the amendment made by clause 18 to existing section 138D (2) (b) of the Planning and Development Act (the Act) and the insertion of new section 138D (2A) of the Act by clause 19.

Existing section 138D (2) (b) of the Act provides that an exemption assessment notice must state whether the development is exempt and anything else prescribed by regulation. Existing section 23 of the regulation provides a list not only of what the notice must *state* but also a list of what the notice must *include*.

Clause 18 amends section 138D (2) (b) to correctly provide a notice must *state* whether the development is exempt development and must also *include* anything else prescribed by regulation. Clause 19 inserts new section 138D (2A) to provide that a regulation can prescribe the documents that must be attached to an exemption notice and information required to be shown in the documents.

Section 23 of the Planning and Development Regulation is amended to bring it into line with these amendments made by clauses 18 and 19.

New section 23 prescribes what information is to be *included* in an exemption assessment D notice under section 138D (2) (b) (ii) and new section 24 prescribes what documents are *attached* to the notice and what information can be in the documents under section 138D (2A).

The substance of existing section 23 is retained.

Clause 27 – Compliant single dwellings Schedule 1, section 1.100, definition of *preliminary block* paragraphs (b) and (c)
This clause clarifies the meaning of the definition of ***preliminary block*** and is related to clauses 16 and 21 above.

Clause 21 inserts new section 139 (2) (n) in the Planning and Development Act. The insertion of new section 139 (2) (n) clarifies that a development application must be accompanied by an estate development plan if the application is for the development of an estate. Clause 16 inserts a new note in section 94 (1) as a sign post to new section 139 (2) (n).

Clause 27 substitutes new sub-paragraphs (b) and (c) in schedule 1, section 1.100 (4) of the Planning and Development Regulation to clarify the meaning of *preliminary block* in relation to estate development plans.

Part 6 Unit Titles Act 2001

Clause 28 — Unit title applications – general requirements, New section 17 (1A)
This clause inserts a new section 17(1A).

New section 17 (1A) provides that section 17 (Unit title applications – general requirements) applies if the remaining term of the parcel's lease is at least 50 years.

This makes it a requirement for a parcel to be unit titled that there must be at least 50 years remaining on the term of its lease.

The reason for this minimum time period is because of the complexity of issuing the new leases and to ensure the new leases are of a sufficient length for lessees to obtain mortgages and so on.

Clause 29 — Section 17(1)
This clause makes a minor amendment to section 17(1) as a consequence of clause 28 above. The amendment omits the words "a parcel" and substitutes the words "the parcel" to reflect the wording used in new section 17 (1A).
Part 7 Unit Titles Regulation 2001

Clause 30 — Unit title assessment report – contents – Act, s22B (5) (a) Section 2D (1) (n) (i)
This clause clarifies requirements for letter boxes for the purposes of unit title assessment reports.

Under the Unit Titles Act, a works assessor assesses and collates stated requirements for a unit title application and provides that material in the form of a unit title assessment report. The report is based on a site inspection by the works assessor. The applicant or lessee uses the report as part of their application to the planning and land authority for unit titling.

The Unit Titles Regulation prescribes, amongst other things, what a unit title assessment report must contain or anything that must accompany the report.

One of the matters that the works assessor reports on in the unit title assessment report is whether requirements for letterboxes have been met.

Clause 30 clarifies those requirements.

Clause 31 — Permissible unit subsidiaries – Act, s19 section 3 (2)
This clause corrects a numbering error.