THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2015 (No 1)

Subordinate law SL2015-30

Explanatory Statement

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Outline

Terms used
In this Explanatory Statement the following terms are used:

- *Planning Act* means the *Planning and Development Act 2007*;
- *Regulation* means the *Planning and Development Regulation 2008* made under the Planning Act;
- *Amendment Regulation* means the amending regulation that is the subject of this explanatory statement and which amends the Regulation;
- *Heritage Act* means the *Heritage Act 2004*;
- *Council* means the ACT Heritage Council established under section 16 of the Heritage Act;
- *DA* means development approval granted under the Planning Act;
- *DA exempt* means development that is exempt from the requirement to obtain a DA under the Planning Act because the development is identified as exempt under section 20 of the Regulation made under s133(1)(c) of the Act;
- *Register* means the register of heritage places and heritage objects maintained by the Council under section 20 of the Heritage Act; and
- *Heritage property* means property that, in terms of section 8 of the Heritage Act, is:
    - a place or object that is on the Register or covered by a heritage agreement under the Heritage Act;
    - located in a place that is on the Register or covered by a heritage agreement; or
    - property that has on it a place that is on the Register or covered by a heritage agreement.

Existing Legislation
The Planning Act establishes a planning and land system in the ACT. Section 6 of the Planning Act states that the object of the Act is to:

> "provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles."

Sections 133(1)(c) and 135(1) of the Planning Act makes provision for exempt development which may be undertaken without a development application and development approval (DA), that is development that is "DA exempt". Section 20 of the Regulation sets out development that is DA exempt by reference to principally to schedule 1 of the Regulation and also to schedule 1A.

Existing section 1.14(2) of Schedule 1 of the Regulation provides that a development that would be DA exempt under section 20 and Schedule 1 of the Regulation, is in fact not DA exempt if it:

- is located at a place or on an object in the Register or under a heritage agreement under the Heritage Act; or
- would cause a building or structure or part of a building/structure to be located at a place or on an object in the Register or under a heritage agreement under the Heritage Act.

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The effect of existing section 1.14(2) is to require a heritage property owner to lodge a DA for works that would be DA exempt if carried out on a non-heritage property.

The Heritage Act provides for the recognition, registration, conservation and promotion of places and objects of heritage significance and the protection of all Aboriginal places and objects in the ACT. The Heritage Act establishes the Register and makes provisions to enable a Heritage Agreement to be entered into.

Purpose of amendment

Currently heritage property owners are constrained by the existing requirements of Section 1.14 of Schedule 1 of the Regulation: Currently the owner of a heritage property must apply for a DA for minor works and development even if the minor works or development is DA exempt under the standard exemption provisions under s20 of the Regulation and are of no significance to the heritage values of the property. In contrast, owners of non-heritage properties are not required to apply for a DA in such a circumstance. This means that in many cases works that are of relatively little significance for the purposes of the Heritage Act or development assessment under the Planning Act are still required to be assessed by the planning and land authority and, on referral, by the Council. This is an unnecessary cost and delay for the property owner and an unnecessary use of resources by assessment authorities.

The regulation amendment modifies this distinction between the assessment of heritage and non-heritage properties, whilst ensuring appropriate consideration for the protection and conservation of heritage significance. In summary, the Regulation Amendment is to:

- reduce an unnecessary regulatory burden on owners of heritage properties;
- make more consistent the regulatory treatment of heritage property owners and non-heritage property owners;
- make the development assessment process for heritage properties more efficient; and
- maintain an appropriate level of protection for places or objects on the Register

The Regulation Amendment is consistent with the ACT Government's commitment to reduce red tape and decrease regulatory burden.

This amendment is consistent with the objects of the Heritage Act which include providing a system integrated with land planning and development to consider development applications having regard to the heritage significance of places and heritage guidelines. The amendment is also consistent with the functions of the Council.

The Regulation Amendment is also consistent with the objectives of the Planning Act. A key goal of the Government's reform of the planning system leading up to the introduction of the Planning Act was to enhance the timeliness, transparency and efficiency of the planning processes. One of the ways that the Act achieves this goal is by allowing straightforward developments of low significance to be exempt from requiring a DA (s 133). This recognizes that there is little value added by requiring a DA in such cases, given that typically the DA process would simply verify that the development is compliant with the relevant codes, but would not enhance the quality of the proposed development. The Act provides for the removal of the need to obtain development approval for such straightforward or minor projects, for example, for new code compliant single residences, and minor structures such as sheds, garages and pergolas etc. Such exemptions also serve to improve the efficiency of the development assessment process and the efficient use of assessment and Government

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resources by ensuring that only matters which have the potential to significantly impact on residential areas are open to the DA process and to ACAT merit review.

How the amendment regulation achieves the purpose

As noted above, the effect of existing section 1.14(2) is to require a heritage property owner to lodge a DA for works that would be DA exempt if carried out on a non-heritage property. The amendment regulation modifies this requirement. The effect of the amendment is to enable standard provisions for the exemption of minor developments from the need to apply for a DA to apply to heritage properties providing that the proposed development will not affect the heritage values of the property.

Specifically, under new section 1.14(2A) inserted by clause 4 of the amendment regulation, a development might still be DA exempt notwithstanding that it is located at a place or on an object in the Register or under a heritage agreement if the following applies. Such a development is DA exempt if the Council provides written advice to the planning and land authority that the development if carried out:

- will not diminish the heritage significance of the place or object;
- is in accordance with heritage guidelines;
- is in accordance with a conservation management plan approved by the council under section 61K;
- is in accordance with a permit to excavate under section 61F; or
- is an activity described in a statement of heritage effect approved by the Council under section 61H of the Heritage Act.

As a result, the following applies to a development that would be DA exempt but for the operation of section 1.14(2) of Schedule 1 of the Regulation. If the Council provides advice that the proposed development will not diminish heritage significance or is otherwise approved under the Heritage Act as noted above then the development is DA exempt. If the Council declines to provide such advice then the development is not DA exempt because of the operation of existing section 1.14(2) of Schedule 1.

Where the Council provides advice that the proposed works are likely to impact on heritage significance and/or are not in accordance with the above, the normal provisions of the *Planning and Development Act 2007* and of the *Heritage Act 2004* apply.

In this way, the amendment regulation reduces regulatory burden on heritage property owners, makes the relevant regulations operate more consistently between heritage and non-heritage property owners, reduces the call on the resources of assessment authorities and maintains appropriate assessment and protection of potential development impacts on heritage properties.

The new provisions will work as indicated in the following two examples.

<u>*Example 1:*</u>

Under section 1.26 of Schedule 1 of the Regulation, skylights are DA exempt if:

(a) the external area of the skylight is not more than 2m2; and
(b) the skylight does not project more than 150mm above the surface of the roof adjacent to the skylight; and
(c) the designated development complies with the general exemption criteria that are applicable to the development.

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Currently if such a skylight is located on a heritage property, a DA is required in all cases. The requirement for a DA in such a case may or may not be necessary for the safeguarding of heritage significance depending on the circumstances. For example, a skylight could potentially cause heritage impacts if located in the front slope of the original roof of an identified dwelling in a heritage precinct. However, there may be no potential heritage impacts if located on the roof of an addition to the relevant dwelling if that roof was not visible from the public realm. In the latter case, the Council may provide advice stating that the works will not impact on heritage significance and may therefore proceed without a DA. In the former case, the Council would not provide such advice and the proponent would be required to submit a DA which would need to be assessed by the planning and land authority and referred to the Council for assessment and formal comment.

Example 2:
Under section 1.30A of Schedule 1 of the Regulation, the resealing of an existing driveway is DA exempt if:

(a) 1 or more of the following materials is used:
- (i) concrete (including coloured or patterned concrete);
- (ii) bitumen;
- (iii) pavers, including bricks;
- (iv) timber;
- (v) grass, including stabilising treatment; and

(b) the designated development complies with the general exemption criteria that are applicable to the development.

Resealing an existing driveway with bitumen on a heritage property in a heritage precinct is in certain circumstances potentially unlikely to impact on heritage significance. However, resealing with patterned concrete is a step that would typically be more likely to cause heritage impacts. Under the amendment regulation the former scenario may not require a DA if the Council confirmed that such a development would have no impact on heritage significance. In the latter case, the Council might decline to provide advice that the development proposal will not impact on heritage significance and a DA would be required.

Human rights analysis

The Amendment Regulation has been reviewed in relation to the *Human Rights Act 2004*. The benefit of the amendment regulation as noted above is that it:

- reduces an unnecessary regulatory burden on owners of heritage properties;
- makes more consistent the regulatory treatment of heritage property owners and non-heritage property owners;
- makes the development assessment process for heritage properties more efficient; and
- maintains an appropriate level of protection for places or objects on the Register

The amendment regulation is consistent with the ACT Government's commitment to reduce red tape and decrease regulatory burden and consistent with the objects of the Planning Act and the Heritage Act as noted above.

Development proposals that require a DA must typically be publicly notified and the general public has a right to make representations on the DA. There is also a right to seek ACAT merit review of a decision on a DA in relation to the relatively more significant development

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proposals. These features do not apply to development proposals that are DA exempt as there is no application to notify and no DA decision that can be subject to merit review.
The proposed amendment regulation will by broadening the circumstances in which development may occur without a DA will impact on the ability to comment on the development and seek ACAT merit review. As a result the amendment regulation could be seen as impacting on the following human rights:

- "Right to privacy" (section 12 of the Human Rights Act); and
- "Taking part in public life" (section 17); and
- "Fair trial" (section 21).

The objective of the amendment regulation is an important one for the reasons noted above, that is, for removing unnecessary regulatory burdens and making the regulatory position of heritage property and non-heritage properties owner more consistent where this can be done so without impacting on heritage significance. As noted above, the objective of the amendment regulation is consistent with the objects of the Heritage Act and the Planning Act. The amendment regulation is necessary and effective in meeting the stated objectives and there are no other reasonable means available for doing this.

The types of changes proposed by the amending regulation are not considered to unduly impact on the abovementioned human rights. This is because the types of development that may be DA exempt as a result of the amendment regulation are relatively minor because they are works that:

- would already be DA exempt under the Regulation but for the fact that the works are on a heritage property; and
- the Council advised would have no significant impact on heritage significance or are of a type already sanctioned under the Heritage Act.

A decision of the Council to provide written advice to the effect that a proposed development will not impact on the heritage significance of a heritage property or is already sanctioned under the Heritage Act will be subject to review by the Supreme Court under the *Administrative Decisions Judicial Review Act 1989* or the common law jurisdiction of the Supreme Court.

In relation to the section 21 human right, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be severe to constitute unlawful and arbitrary interference with a person's right to privacy.

Consistent with the above it is concluded that to the extent that the amendment regulation does impact on rights afforded by the Human Rights Act, it is considered that these amendments must meet the proportionality test of section 28 of the Human Rights Act. Section 28 states as follows.

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

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(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Financial and revenue/cost implications

The Amendment Regulation has a direct positive financial implication for heritage property owners. This is because such owners will no longer be required to submit a DA, and pay the accompanying fee and wait for approval. The Amendment Regulation provides greater confidence and clarity for economic development in relation to heritage places.

To the extent that DAs are no longer required for certain developments there may be a limited and relatively minor resource saving for the Territory.

Regulatory Impact Statement

In accordance with section 36 of the *Legislation Act 2001,* a Regulatory Impact Statement (RIS) for the amendments has been prepared.

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Detailed explanation of clauses

Clause 1 – Name of regulation
Clause 1 names the Amendment Regulation as the *Planning and Development Amendment Regulation 2015 (No 1).*

Clause 2 - Commencement
Clause 2 states that the Amendment Regulation commences on the day after its notification.

Clause 3 - Legislation amended
Clause 3 confirms that the Amendment Regulation amends the *Planning and Development Regulation 2008 (Regulation).*

Clause 4 – Schedule 1, new section 1.14 (2A)
Clause 4 inserts new section 1.14(2A) into Schedule 1 of the Regulation.

Existing section 1.14(2) of Schedule 1 of the Regulation provides that a development that would be DA exempt under section 20 and Schedule 1 of the Regulation, is in fact not DA exempt if it:

- is located at a place or on an object in the Register or under a heritage agreement under the Heritage Act; or
- is a building or structure or part of a building/structure located at a place or on an object in the Register or under a heritage agreement under the Heritage Act.

The effect of existing section 1.14(2) is to require a heritage property owner to lodge a DA for works that would be DA exempt if carried out on a non-heritage property.

New section 1.14(2A) of schedule 1 modifies this existing requirement. Under new section 1.14(2A) a development might still be DA exempt notwithstanding that it is located at a place or on an object in the Register or under a heritage agreement if the following applies. Such a development is DA exempt if the Council provides written advice to the planning and land authority that the development if carried out:

- will not diminish the heritage significance of the place or object;
- is in accordance with heritage guidelines;
- is in accordance with a conservation management plan approved by the council under section 61K; or
- is an activity described in a statement of heritage effect approved by the Council under section 61H of the Heritage Act.

As a result, the following applies to a development that would be DA exempt but for the operation of section 1.14(2) of Schedule 1 of the Regulation. If the Council provides advice that the proposed development will not diminish heritage significance or is otherwise approved under the Heritage Act as noted above then the development is DA exempt. If the Council declines to provide such advice then the development is not DA exempt because of the operation of existing section 1.14(2) of Schedule 1.

Clause 5 – Schedule 1, section 1.14 (3), new definitions
Clause 5 inserts new definitions for conservation management plan, heritage guidelines, heritage significance and statement of heritage significance. These definitions refer the

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reader to their definitions in the Heritage Act. These are terms used in new section 1.14(2A) inserted by clause 4.

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