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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT (SOLAR ACCESS) AMENDMENT REGULATION 2016 (No 1)

SL2016-24

EXPLANATORY STATEMENT

Circulated by authority of
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Minister for Planning and Land Management

EXPLANATORY STATEMENT

This explanatory statement relates to the *Planning and Development (Solar Access) Amendment Regulation 2016 (No 1)* (the amending regulation) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the amending regulation and to help inform debate on it. It does not form part of the amending regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the amending regulation. It is not, and is not meant to be, a comprehensive description of the amending regulation. What is said about a provision is not taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The ACT Government has varied solar access provisions in the Single Dwelling Housing Development Code (SDHDC) and Multi Unit House Development Code (MUHDC) for developments in the ACT through Variation to the Territory Plan No 346 (V346). The approved Variation is available at:
http://www.legislation.act.gov.au/ni/2016-410/current/pdf/2016-410.pdf

As a result of consultation with industry and the community, concerns were raised that construction tolerances and exempt developments outlined in the *Planning and Development Regulation 2008* (the Regulation) would result in additional impacts to solar access when combined with the changes outlined in V346.

To effectively implement V346, it is proposed that Schedule 1 and Schedule 1A of the Regulation be amended to restrict permitted construction tolerances and select types of exempt development once they exceed the solar building envelope. The objectives of the proposed change to the regulations are to ensure:

- construction tolerances outlined in Schedule 1A of the regulation are used as a contingency for error during the building process, and not relied upon to achieve building design outcomes, and
- application of construction tolerances and exemptions for some exempt developments outlined in Schedule 1 of the regulation does not additionally encroach on the solar access of neighbouring blocks.

These objectives are consistent with the objectives of the *Planning and Development Act 2007* (the Act) and the Territory Plan, which aim to manage land use change and development in a manner consistent with strategic directions set by the ACT Government, Legislative Assembly and the community.

Overview

The regulation amends the *Planning and Development Regulation 2008* (the Regulation).

Schedules 1 and 1A of the Regulation regulate exempt developments under the Act. These schedules permit construction tolerances and some structures to be exempt from assessment where certain criteria are met.

The amending regulation, in clauses 4 to 9, amends sections 1.26, 1.27 and 1.27A of Schedule 1 and sections 1A.10 and 1A.11 of Schedule 1A of the Regulation to reduce construction tolerances and some structures so they are no longer exempt should they encroach on the solar building envelope.

These are considered important changes to effectively implement the amended solar access provisions introduced through V346, reduce unintended planning outcomes, and ensure the final form of constructed dwellings is more likely to reflect the prior expectations of community and government.

The definitions have also been amended to include definitions for the relevant solar building envelope. A building envelope is defined as an imaginary ‘envelope’ that covers a block and controls the location, bulk and scale of a house on the block. The ‘solar building envelope’ applies specifically to development near a neighbour’s northern boundary so that the development doesn’t unreasonably obstruct access to winter sunlight for that neighbour.

Regulatory Impact Statement

It is considered that a regulatory impact statement is required for this amending regulation as there are potential impacts to some members of the community (see section 34(1) of the *Legislation Act 2001*).

There are a number of economic, social and environmental benefits as a result of the proposed changes from V346 and the amendment regulation. Any potential costs are justified as they are reasonable and proportionate.

There will be broader economic benefits for government, industry and the community as the proposed changes will result in a reduction in the administrative and delay costs associated with development. These changes provide greater certainty for industry and the community about how the regulatory process will apply to their developments. These savings are outlined in the regulatory impact statement.

The overall social impacts of the proposed changes are considered to be positive. The proposed changes will result in reduced protection of solar access for some members of the community but will result in improved solar access for increasing numbers of the community as new estates are developed. In this respect, the proposed changes introduce greater equity for all Canberrans. The proposed changes will result in improved design outcomes in residential neighbourhoods which will result in improved quality of life for Canberra residents.

There will be a slight reduction in the number of projects which are subject to compulsory community consultation through the formal development application process. It is the Authority's experience that many members of the community consult with their neighbours on proposed redevelopments regardless of a statutory requirement to do so. There will be no reduction in third party appeal rights as a result of the proposed changes.

Reductions in administrative and delay costs will also benefit members of the community building, redeveloping or extending their homes. It is estimated that 52% of projects likely to benefit from the proposed changes are undertaken by home owners (i.e. self-developers).

The proposed changes will have positive outcomes for the environment. Prior to the introduction of Variation 346, extensive excavation of soil was required for many new developments to meet solar access provisions. The environmental impact associated with excavating, transporting and disposing of this soil will be reduced under these changes. Additionally, any impacts to solar energy gains are also expected to be positive. Reduction in energy gains in existing dwellings (although not expected) is expected to be ameliorated by an increase in energy gains in new dwellings.

Consistency of the proposed law with Scrutiny of Bills Committee principles and Human Rights analysis

The Committee's terms of reference require it to consider whether (among other things) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

1(a) is in accord with the general objects of the Act under which it is made;

1(b) unduly trespasses on rights previously established by law;

1(c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions;

1(d) contains a matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Legislation Act requires a brief assessment of the consistency of the proposed law with the scrutiny committee principles (see section 35(5)). This amendment package is consistent with the scrutiny committee principles as detailed below:

1(a) The package of V346 and the amendment regulation is consistent with the object of the Planning and Development Act in that it contributes to the orderly and sustainable development of the ACT and is consistent with the social, environmental and economic aspirations of the people. The changes proposed in V346 and the amendment regulation will result in the improved application of provisions outlined under the Territory Plan and greater certainty regarding solar access for neighbours. It finds an appropriate balance for the rights of all members of the community.

1(b) V346 and the amendment regulation do not unduly trespass on rights previously established by law as outlined below. Any limitations on rights are reasonable, proportionate and justified. The changes ensure that the planning system balances the rights of all members of the community and does not preference one group living in an affected suburb over another.

1(c) While the amendment regulation itself does not result in a reduction or encroachment into pre-existing rights, when coupled with the associated V346, the total amendment package will potentially result in the reduction of third party consultation by limiting the requirement to notify third parties of development taking place. This could be taken to impact on the human right of taking part in public life, protected by section 17 of the *Human Rights Act 2004.* However, human rights may be subject to reasonable limits, as set in section 28 of the Human Rights Act. The discussion below demonstrates that any potential engagement with human rights is appropriate and reasonable.

1(d) The changes are appropriately dealt with through the statutory Territory Plan variation process and a regulation. The Act explicitly provides for these processes and contemplates that these types of changes would be made through these instruments.

Reduction in third party consultation

With reference to section 28(2)(a) of the Human Rights Act, the Planning and Development Act has a requirement to notify adjoining premises of minor developments and the broader public of major developments. This notification alerts the community to the opportunity to provide comment on how they may be affected by the development proposal.

The requirements for public notification for merit track development applications are set out in section 152 of the authorising law. Under section 152(1)(a), the Authority may prescribe that a certain matter requires:

(a) Major public notification under sections 155 and 153 (and in some cases 154) of the Act involving public notice of 15 or in some cases 20 working days through public notice (newspaper or government website), physical signs on the relevant property and letters to owners of neighbouring properties; and
(b) Minor public notification under section 153 (and in some cases 154) involving notice of 10 working days through letters to owner of neighbouring property (or in some cases public notice through newspaper or government website).

Under section 27(3) of the regulation, applications in the merit track set out in schedule 2 of the regulation must be notified in accordance with the requirements for

minor public notification as per (b) above that is as required by section 152(2)(b) and 153 of the Act.

Section 28 of the regulation made under section 157 of the Act, states that a limited public (i.e. neighbour) notification matter has a public consultation period of 10 working days. The proposed law relates to a matter set out in item 4 of schedule 2 to the regulation and as such it relates to a matter that currently requires minor public notification under the Act. Item 4 of schedule 2 refers to *"The building, alteration or demolition of a single dwelling, if the development would not result in more than 1 dwelling being on a block".*

The requirement to notify development applications and to consider third party comments is an avenue for the public to contribute to the conduct of public affairs and to have a say on how development may affect them. The proposed changes outlined in V346 will reintroduce equality into the planning system and strike a fairer balance between the rights of existing homeowners and those proposing new development. This will reduce the unintended burden of the planning system for developers, home owners and government (see section 28(2)(b) of the Human Rights Act).

With reference to section 28(2)(c) of the Human Rights Act, V346 and the amendment regulation will see a minor increase in the number of developments that are exempt from development approval. This will result in fewer developments being subject to compulsory third party consultation through the development application process as these developments will no longer be in the assessment process that requires notification of adjoining premises of minor developments and the broader public of major developments. EPD's analysis indicates that through V346 and the amendment regulation there will be a reduction of approximately 1% in the number of Development Applications under the Act as these will now be exempt development (i.e. they will either be exempt, or will be able to proceed following the grant of an exemption declaration).

Addressing section 28(2)(c) and (d) of the Human Rights Act, this is considered to be a reasonable limitation on existing rights of the community as the solar access provisions introduced under V306 did not intend for modest developments to require additional planning approvals and subsequent consultation. The developments are of a kind that should not be subject to administrative burden given their limited capacity to impact on third parties.

The effect of V346 and the amendment regulation is that developments will have an increased solar building envelope, which means they are more likely to be able to proceed as either exempt, or once an exemption declaration is granted. This is a reasonable limitation as these types of development are considered to be modest and were not expected to be subject to unnecessary administrative burden. In addition, it is recognised that a number of proponents and home owners undertake targeted consultation on proposed developments with affected members of the

community as a matter of best practice and regardless of a statutory requirement to do so. Of note, of the developments that will be subject to a reduced regulatory burden as a result of the proposed changes, many sought and received the support of their neighbours prior to lodging an application with the Authority.

There will be no changes to existing rights of third parties to seek merit review by the ACT Civil and Administrative Tribunal (ACAT) in respect to these matters as there are currently no existing rights of review for these developments under the SDHDC. This is because under current legislation these developments are of the type set out in item 4 of schedule 2 to the regulation. Schedule 2 items are excluded from third party ACAT merit review (refer to item 4 column 2 paragraph (b) of schedule 1 to the Act and section 350 and item 1 of Part 3.2 of schedule 3 of the regulation). These changes are not relevant for developments under the MHDC as these developments are not able to be exempt from assessment and approval.

The proposed changes outlined in V346 will reintroduce fairer outcomes into the planning system by balancing access to sunlight on both sides of the fence.

The above processes are provided for under the Planning and Development Act. There are no less restrictive means to reasonably achieve the variation and regulation amendment given the statutory process outlined in the Act (see section 28(2)(e) of the Human Rights Act).

Due to these reasons the proposed changes are considered to be reasonable and proportionate.

Reduced access to sunlight for some dwellings

The changed provisions will result in a reduced amount of solar access for some existing dwellings. While this is a reduction in the statutory rights of residents in existing dwellings, this is not considered to be an unreasonable limitation on these existing rights as the application of the current provisions unreasonably favour only a proportion of the community (i.e. those in existing dwellings have greater rights than those proposing new development).

When V306 was introduced, it sought to limit the development that could impact on the solar access of neighbours. This was important, as at the time, there was no solar building envelope. However, it was not the intention of V306 to have such a significant impact on the ability of new homes to be built. In this respect, it is considered that V306 unfairly elevated the rights of existing residents over the rights of neighbours wishing to redevelop or undertake extensions. As such, the provisions introduced through V346 aim to balance the community's access to sunlight and restore equity amongst the community.

Any reduction in access to sunlight for existing dwellings will be balanced against the need to increase access to sunlight to new dwellings as access to sunlight will be shared amongst the community. Owners of existing dwellings will also benefit from these changes should they choose to redevelop or extend their homes. In balancing

the outcomes on both sides of the fence, the proposed changes ensure everyone has reasonable access to sunlight.

For these reasons, the proposed amendment regulation is considered to be consistent with the Scrutiny of Bills Committee's principles.

Outline of Provisions

Clause 1 Name of regulation

This clause names the regulation as the *Planning and Development (Solar Access) Amendment Regulation 2016 (No 1)*.

Clause 2 Commencement

This clause states the regulation commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause states the regulation amends the *Planning and Development Regulation 2008*.

Clause 4 Schedule 1, new section 1.26 (ba)

This clause inserts an additional requirement that skylights do not project above the relevant solar building envelope for developments on blocks to which a relevant solar building envelope applies.

Clause 5 Schedule 1, section 1.27 (1) (b)

This substituted clause requires that a service mounted on a roof does not project above the relevant solar building envelope for developments on blocks to which a relevant solar building envelope applies. This clause applies in addition to the existing requirement that roof mounted services are not more than 1.5m in distance from the top of the service to the closest point of the roof.

Clause 6 Schedule 1, section 1.27A (1) (b)

This substituted clause requires no part of a panel to project above the relevant solar building envelope for developments on blocks to which a relevant solar building envelope applies. This clause applies in addition to the existing requirement that no part of the panel is more than 300mm above the closest point of the roof.

Clause 7 Schedule 1A, new section 1A.10 (1A)

This clause inserts a requirement that developments are unable to be exempt from assessment if a relevant solar building envelope applies to the block, and any point of the building or structure extends beyond the relevant solar building envelope.

Clause 8 Schedule 1A, new section 1A.11 (1A)

This clause inserts a requirement that developments are unable to be exempt from assessment if a relevant solar building envelope applies to the block, and any point of the building or structure extends beyond the relevant solar building envelope.

Clause 9 Dictionary, new definition of *relevant solar building envelope*

This clause inserts a new definition of *relevant solar building envelope* into the *Planning and Development Regulation 2008*. *Relevant solar building envelope* is defined as:

a) for a development of a single dwelling on a block in an estate development plan approved under a development application on or after 5 July 2013—the solar building envelope that applies to the block under the territory plan, Residential Zones—Single Dwelling Housing Development Code; or

b) for a development of multi unit housing on a block in an estate development plan approved under a development application on or after 5 July 2013—the solar building envelope that applies to the block under the territory plan, Residential Zones—Multi Unit Housing Development Code.