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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development Amendment Regulation 2020 (No 1)
SL2020-28

EXPLANATORY STATEMENT

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Planning and Development Amendment Regulation 2020 (No 1)

This explanatory statement relates to the *Planning and Development Amendment Regulation 2020 (No 1)* (the **amendment regulation**) as made by the Executive. It has been prepared to assist the reader of the amendment regulation and to help inform any debate on it. It does not form part of the amendment regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the amendment regulation. It is not, and is not meant to be, a comprehensive description of the amendment 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.

OVERVIEW OF THE AMENDMENT REGULATION

The amendment regulation amends Schedule 1 of the *Planning and Development Regulation 2008* (the **Regulation**). Schedule 1 of the Regulation provides for types of development that are exempt from requiring development approval under the *Planning and Development Act 2007* (the **Act**).

The amendment regulation proposes changes to development exemptions involving electric vehicle charging points, developments on school sites and correcting an error for minor public works when undertaken by, or on behalf of the Territory in reserves.

<u>Electric Vehicle Charging Points</u>

Changes are made to the exemption for electric vehicle charging points to facilitate investment and construction of new electric vehicle charging points in the Territory. The changes aim to incentivise investment in charging stations, leading to increased use of electric vehicles and a reduction of greenhouse gas emissions in the transport sector.

Market research has identified manufacturers who produce charging points beyond the limits currently set out in the exemption. There are likely to be new products coming on to the market which will also not fall under the current exemption.

Encouraging electric vehicle charging technology investment in the ACT

Currently, section 1.113 of the Regulation limits the exemption for electric vehicle charging points to ones that have a vertical surface area of not more than 0.5 m^2 when attached to a building or structure, or are not more than 1.8 m high and the plan area is not more than 1 m^2 when attached to a free-standing column or bollard.

This has disincentivised manufacturers of larger electric vehicle charging technology from investing in the ACT as development approval processes and fees are a barrier for small-scale infrastructure investment.

Clause 13 of the amending regulation simplifies the limits in the provision and expands the exemption to charging points of not more than 2.5 m in height and not more than 2 m^2 in plan area.

These specifications have been developed in consultation with investors in electric vehicle charging points to ensure that the exemptions are available to products currently on the market.

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Ensuring public safety

The amending regulation adds new provisions to respond to safety risks associated with the installation and operation of electric vehicle charging points at commercial location which are not currently provided for in the exemption. The new provision requires compliance with Australian/New Zealand Standard 60079.10 (Explosive atmospheres). The intention of this provision is to ensure public safety is maintained during the installation and operation of electric vehicle charging points at commercial sites, such as petrol stations and other areas where there may be a risk of combustion.

Mitigating risks to the power grid

The amending regulation also adds new provisions to consider and manage risks associated with the electricity grid. The new provisions require the block to be connected to the electrical network. Also, in specified circumstances, a statement of compliance from the electricity utility provider must be obtained. This provision has been developed in consultation with the electricity utility provider Evoenergy (ActewAGL Distribution) with the intention of ensuring vehicle charging points are not established on sites without power supply and that the grid is able to accommodate the load of each new charging point.

Division 1.3.6A – Exempt developments – schools

In response to the 2008-09 global financial crisis, the Australian Government introduced a large school infrastructure component to their economic stimulus package. To assist with timely construction on school sites, the ACT Government introduced Division 1.3.6A (the **Division**), commencing on 24 March 2009.

The Division exempts developments carried out at an existing school campus, only if the campus existed on the commencement day of the Division (24 March 2009) with the aim to improve timeliness, transparency and efficiency in the planning process for specified building work at schools.

The Division was also introduced with a provision requiring the planning and land authority to review its operation no later than 30 September 2012. A review was undertaken, and the findings were presented in the *Planning and Development (Exempt developments - schools) Review Notice 2013 (No 1) (NI2013-49)* (the **Review**).

The Review found the school exemptions in the Division were largely effective and were supported by both government and non-government education sectors, with no extensive community or industry objections to the continuation of the exemptions. The following key recommendations and observations were made:

a. For consistency and equity, exemptions could be extended to schools that have or will become operational after 24 March 2009

b. Further assess whether a new definition of "school" is required and whether this should include new schools that have development approval but are yet to be built

c. The new definition of existing school should address schools that have closed and will/are operating as a use other than for educational purposes

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d. The new definition of existing school should address staged developments and clarify at what point the exemptions apply

e. Clarity is required in relation to whether the exemption applies to buildings consisting of multiple Building Classes (e.g. Class 9 and Class 5 buildings).

The Review also recommended that the Regulation is regularly revisited to reflect the changing needs of school and licensed childcare developments in the ACT community, and in the light of changing ACT planning requirements.

In light of these recommendations and to assist the Education Directorate in their responsiveness to school enrolments, particularly in new and developing suburbs in the Territory, the Regulation is being amended to expand the operation the Division to be available to all existing schools, either constructed or with development approval.

Extension of exemptions to all schools

As outlined above, the major change relating to the school exemptions is the extension of the provisions to apply to all existing schools, and schools not yet developed but with development approval. The amending regulation does not negate the need for a new school or significant additions (i.e. non-exempt additions) from requiring assessment through the development application and approval process.

Schools in bushfire prone areas

The amending regulation inserts an additional exemption criterion which must be met for all school sites in bushfire prone areas. The provision requires the emergency services commissioner to provide written agreement to any exempt development undertaken at schools located in a bushfire prone area. This reflects a requirement of the ACT's Strategic Bushfire Management Plan for sensitive developments, such as schools, in bushfire prone areas to be endorsed by the emergency services commissioner. This will ensure the construction of any school building or structure in bushfire prone areas meet the standards enforced by the Emergency Services Agency and does not contravene the Strategic Bushfire Management Plan.

Adding office buildings

The amending regulation adds a category of development which can be undertaken at school sites without development approval. Specifically, the amending regulation allows for class 5 buildings, such as an office, to be constructed, provided that the building is ancillary to, and supports, the functions of the school. This minor addition is consistent with the other types of development which can be already be constructed as exempt development, including halls, gymnasiums and classrooms.

The aim of this amendment is to assist the Education Directorate to effectively deliver supporting infrastructure to all existing schools as the need arises, while also implementing one of the key recommendations of the Review.

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Increased limits for shade structures

The amending regulation also increases the size limits for certain shade structures which can be built under the exemption. The provision now provides a distinction between shade structures built within 30 metres of a residential block boundary, and those beyond that distance. The existing limitations within the provision remain for shade structures close to residential blocks, while the size limitations are relaxed for structures away from residential blocks.

The intention of this amendment is to ensure large areas, including basketball courts and playgrounds, can be covered without the need to obtain development approval. The important safeguards remain to protect residential blocks in proximity and limit the potential visual impacts and the risk of overshadowing.

Section 1.90 – Minor public works

Section 1.90 of the Regulation exempts some public works from requiring development approval where the works are undertaken by or for the Territory.

Section 1.90 of the Regulation was amended as part of the *Nature Conservation (Minor Public Works) Amendment Act 2017* (the **Amendment Act**) which intended to reduce the number of Environmental Significance Opinion (**ESO**) applications in relation to minor public works, when undertaken by or on behalf of the Territory, in a reserve. The Amendment Act introduced a minor public works code which had the effect of providing a standing ESO for works which were covered by the code.

The Amendment Act also aimed to ensure minor public works carried out in a reserve were also exempt from requiring development approval, if these works were undertaken in accordance with the minor public works code.

However, an error in the drafting of section 1.90 appears to limit the exemption to only apply to minor public works which are undertaken by or on behalf of the Territory in a reserve, when performed in accordance with a minor public works code.

The current provision therefore does not reflect the purpose of the Amendment Act. This has also led to uncertainty about whether other public works covered by the exemption, including works that do not require or have received environmental authorisation, require development approval rather than being able to be considered as development application (**DA**) exempt under section 1.90.

Clause 5 of the amendment regulation corrects this drafting error and ensures section 1.90 also applies to minor public works undertaken by or on behalf of the Territory in a reserve, where they were performed in accordance with a minor public works code. This extends the operation of the existing exemption provision to also include the minor public works.

REGULATORY IMPACT STATEMENT

A separate regulatory impact statement has been prepared for this amendment regulation.

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CONSULTATION ON THE PROPOSED APPROACH

The changes to exemptions for schools have been prepared in consultation with the Education Directorate. The Transport Canberra and City Services Directorate and the Emergency Services Agency were also consulted to ensure the proposed amendments did not pose major traffic and parking risks and accounted for the development of school infrastructure in bushfire prone areas.

The changes to exemptions for electric vehicle charging points have been developed following discussions with investors in electric vehicle charging points, including ActewAGL Retail, Evoenergy, Tritium, Jetcharge, EV Council and NRMA. The updated specifications better reflect those typically manufactured by these key stakeholders. The amendment regulation has also been developed in consultation with Evoenergy to ensure the electricity supply and power grid risks have been adequately mitigated.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The amending regulation potentially engages the right of taking part in public life, in particular the right and/or opportunity to take part in the conduct of public affairs, being the development application and approval process. The right is defined in Section 17(a) of the *Human Rights Act 2004:*

> Every citizen has the right, and is to have the opportunity, to—
>
> a) take part in the conduct of public affairs, directly or through freely chosen representatives.

1. Nature[1] of the right and the limitation (s28(a) and (c))

As stated above, under s 17(a) of the *Human Rights Act 2004,* every citizen has the right and/or the opportunity to take part in the conduct of public affairs, directly or through a representative.

Typically, under the *Planning and Development Act 2007*, development proposals that require a development application are publicly notified and the general public has a right to make representations. In some circumstances, there is also a right to review a decision on a development application in the ACT Civil and Administrative Tribunal (ACAT). These features do not apply to development proposals that are exempt from the requirement to obtain development approval, as the development application and approval does not apply. Therefore, there is no application to notify and no decision to review.

Although minor and limited in nature, the proposed amendment regulation will broaden the scope of exemptions with a consequent reduction in mechanisms for the community to comment on the development and seek ACAT review. This may limit the opportunity of the community to take part in public affairs.

[1] The 'nature' of some rights is absolute such they may never be subject to reasonable limitations. This includes the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law. Where these rights are engaged, explain why the measure does not limit these rights and any safeguards that are in place to ensure compatibility.

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2. Legitimate purpose (s28(b))

The amendment regulation extends the exemptions available to existing schools. The primary purpose of this is to assist the Education Directorate to effectively and efficiently respond to school enrolments, particularly in the new and growing regions of the ACT.

The amendment regulation seeks to remove the unnecessary regulatory burden applied to manufacturers of larger electric vehicle charging points, thereby incentivising them to invest in the ACT. The aim of this is to increase the supply of electric vehicle charging points around the Territory, to encourage the use of electric vehicles and to reduce greenhouse gas emissions in the transport sector.

3. Rational connection between the limitation and the purpose (s28(d))

The minor and limited expansions to the exemptions have been proposed to allow the efficient allocation of public resources, to ensure the Education Directorate can efficiently respond to changes in school enrolments and to incentivise investment in electric vehicle charging technology. These measures will assist in delivering public infrastructure efficiently as the ACT's population continues to grow, and in the effort to transition to zero emissions vehicles.

It is important to note that without this amendment regulation, a development application submitted for the types of development in question, such as a $650m^2$ shade structure on an existing school campus or a 2m tall electric vehicle charging station, would very likely receive development approval. Therefore, the development application and approvals process would serve minimal additional benefit in assessing the impacts of these development. The drafting of the exemptions is limited to developments which would only have a minimal impact on the public and surrounding lessees.

It is recognised that by expanding exemptions, this will reduce the mechanisms for the community to comment on developments and potentially seek ACAT review. However, given the expansion is limited to developments which would receive development approval and have a minimal impact on the community, it is considered that the limitation is appropriate. The limitation facilitates good community outcomes by facilitating investment in public infrastructure, such as schools and electric vehicle charging stations, and minor public works in reserves.

4. Proportionality (s28 (e))

The amendment regulation is specific, not general in its application, and only exempts limited additional types of development from requiring development approval.

Additionally, as discussed above, without this amendment regulation, a development application submitted for the types of development captured by this amendment regulation would be very likely to receive development approval based on the minimal potential impacts of these developments.

On this basis, the approach proposed is the least restrictive way of achieving the desired outcome.

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CLAUSE NOTES

Clause 1 Name of regulation

This clause provides that the name of the regulation is the *Planning and Development Amendment Regulation 2020 (No 1)*.

Clause 2 Commencement

This clause provides that the regulation commences on the day after its notification day.

Clause 3 Legislation amended

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

Clause 4 Disapplication of Legislation Act, s 47 (6)—regulation

This clause substitutes section 400 of the Regulation. This clause is purely administrative and reflects a change to drafting practice about how the disapplication of s 47(6) of the Legislation Act is referred to in the Regulation.

Previous drafting practice listed each Australian Standard or Australian/New Zealand Standard separately in s 400 of the Regulation. The amendment in clause 4 removes references to each individual standard and relies upon s 426(4) of the *Planning and Development Act 200*7 which disapplies s 47(6) of the Legislation Act.

The reference to the *All Groups Consumer Price Index* remains as it is not a Standard captured by s 426(4) of the Planning and Development Act.

Clause 5 Schedule 1, section 1.90 (1), except notes

This clause substitutes section 1.90(1). The intent of this clause is to correct a previous drafting error. This clause ensures the provision also applies to minor public works undertaken by or on behalf of the Territory in a reserve, where they are performed in accordance with a minor public works code, rather than limiting the whole provision to this category of works.

This amendment reflects the original intent of this provision as outlined in the explanatory statement for the *Nature Conservation (Minor Public Works) Amendment Act 2017* which introduced the provision.

This clause has the effect of making minor public works in reserves, by or on behalf of the Territory, and undertaken in accordance with a minor public works code, exempt from requiring development approval.

Clause 6 Schedule 1, section 1.96, definition of *existing ground level*

This clause substitutes the definition of *existing ground level* in section 1.96 of the regulation. Clause 6 amends the definition of existing ground level to capture the updated definition of *existing school* that is established in clauses 6 and 7 below.

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Clause 7 Schedule 1, section 1.96A (1), definition of *existing school*, paragraph (a)

This clause substitutes part of the definition of *existing school* in section 1.96A(1)(a) of the Regulation. The intent of clause 6 is to expand the definition of existing schools to include all schools that have received development approval in addition to those that existed (were constructed) before the commencement day. This ensures Division 1.3.6A applies to all existing schools, including those established after the commencement day of the original regulation provisions for schools (24 March 2009).

The effect of this provision is that the exemptions will apply to all schools which are existing (are constructed), or which have development approval. This means that the minor works included in the exemptions that follow in that division can be undertaken at school sites without the requirement for development approval.

However, a proposal for a new school development will require a development application for development approval.

Clause 8 Schedule 1, section 1.96A (1), definition of *existing school*, paragraph (b) (i) (A)

This clause substitutes part of the definition of *existing school* in section 1.96A(1)(b)(i)(A) of the Regulation. This clause is a supporting amendment to the one outlined above and includes the new expanded meaning for existing school for the purposes of this provision.

Clause 9 Schedule 1, section 1.97, definition of *existing school campus*

This clause omits the reference to the commencement day in section 1.97 of the Regulation. The intent of clause 9 is to expand the definition of *existing school campus* to ensure it is consistent with the amended definition of *existing school* in section 1.96A, as presented in clauses 7 and 8.

Clause 10 Schedule 1, new section 1.99AA

This clause inserts section 1.99AA in Subdivision 1.3.6A.1 which sets out preliminary provisions for the school development exemptions. Clause 10 adds an additional exemption criterion for all school exemptions when the school is located in a bushfire prone area. The intent of clause 10 is to ensure the emergency services commissioner agrees to the construction of any regularly habited school buildings or potentially combustible structures, when the school is in a bushfire prone area. This is to ensure these all school developments meet the standards enforced by the Emergency Services Agency, including the requirements of the Strategic Bushfire Management Plan.

Clause 10 provides definitions for the key terms of *bushfire prone area* and *strategic bushfire management plan* by reference to the *Emergencies Act 2004*.

Clause 11 Schedule 1, section 1.99C (a) and examples and note

This clause substitutes section 1.99C(a) of the Regulation. Clause 11 adds a new category of buildings to the existing exemption. The new provision adds a class 5 building that is ancillary to, and supports the functions of, an existing school. The intent of clause 11 is to also exempt class 5

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buildings (such as an office) that are constructed to support the functions of an existing school. This additional provision does not apply to exempt office buildings that are not supporting the functions of a school. All building classes captured by s 1.99C(a) are still required to meet the setback and height restrictions set in sections 1.99C(b) and (c).

The addition of class 5 buildings, with the limitation of being required to be ancillary to, and supporting the functions of, an existing school is considered to be a minor expansion of the existing provision and consistent with the other types of buildings which can currently be constructed under the exemption.

Clause 12 Schedule 1, section 1.99J

This clause substitutes section 1.99J of the Regulation. The new provision removes the plan area limitation of a shade structure which is more than 30 metres from the boundary of a block in a residential zone.

Where the shade structure to be constructed is within 30 m of a residential block boundary, the existing limitations within the provisions will continue to apply. That is, the existing height and plan area limitations of 10m and 200m^2 respectively, will continue to apply to shade structures that are 30m or less from the boundary of a block in a residential zone.

The intent of this change is to allow for larger shade structures to be constructed under the exemption where they are unlikely to have an impact on surrounding residents. These shade structures will be limited to a 12 metre height limit under the exemption. This change will allow larger areas, such as basketball courts (approximately 685m^2) and playgrounds.

This addition strikes a balance between allowing minor development to proceed without approval and ensuring visual impacts and the risk of overshadowing for surrounding residents are minimised.

Clause 13 Schedule 1, section 1.113

This clause substitutes section 1.113 of the Regulation relating to electric vehicle charging points. The intent of clause 13 is to increase the size limits within the provision to allow for larger vehicle charging points to be constructed under the exemption. Also, the new provisions insert important safeguards to ensure construction is undertaken in accordance with relevant Australian Standards and that there are no adverse impacts on the electricity grid.

The purpose of this change is to incentivise manufacturers of electric vehicle charging infrastructure to invest in the ACT, thereby increasing the supply of electric vehicle charging points, encouraging the use of electric vehicles and reducing greenhouse gas emissions in the transport sector.

The size limits are increased to 2.5 metres in height and 2 square metres in plan area.

New section 1.113(1)(b) provides that the exemption can only apply where electricity services are already connected to the block. The intent of this provision is to ensure DA exempt electric vehicle charging points are not constructed on a site that is not connected to the electrical network, for example, greenfield sites, so that the electricity utility provider has appropriate oversight of electricity network impacts.

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New section 1.113(1)(d) requires applicable developments to comply with the Australian/New Zealand Standard AS/NZS 60079.10 (Explosive atmospheres). This requirement is to ensure public safety is maintained during the installation and operation of electric vehicle charging points on commercial sites, such as petrol stations and other areas where there may be a risk of combustion.

AS/NZS 60079.10 is adopted as in force from time to time, as permitted by s 426(3) of the *Planning and Development Act 2007.* This clause also relies upon s 426(4) of the Planning and Development Actwhich disapplies s 47(6) of the *Legislation Act 2001*, with the effect that the standard need not be notified on the legislation register. Section 47(6) is disapplied because it otherwise requires that any external text which is to be applied as law in the ACT needs to be republished as a notifiable instrument. It is not possible to republish text contained in Australian Standards documents as they are protected by copyright. The clause provides that Australian Standards are available for purchase at www.standards.org.au. Copies of many standards are available for public viewing at the National Library of Australia.

New sections 1.113(1)(e) and (f) require a proponent to obtain a statement of compliance from Evoenergy (ActewAGL Distribution) and to comply with any conditions imposed if:

- the development is for one or more fast charging points (a capacity of 50kW or more); or
- the development is for three or more regular charging points (a capacity of less than 50kW); or
- the block already has three or more vehicle charging points.

If a development is below these thresholds, i.e. two regular charging points, a statement of compliance is not required.

The intent of this provision is to ensure Evoenergy have a level of oversight where there may be electrical supply risks. This will also ensure the grid is able to accommodate the load of the charging point.

Clause 14 Dictionary, Note 2

This clause inserts a new dot point for the *emergency services commissioner* under Note 2 of the Dictionary which provides that this is a term defined under the *Legislation Act 2001*.

Clause 15 Dictionary, Note 3

This clause inserts a new dot point for *development approval* under Note 3 of the Dictionary which provides that this term has the same meaning in the Regulation as it does in the *Planning and Development Act 2007.*

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