

Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 5)
Subordinate Law 2009-15

Prepared in accordance with the
Legislation Act 2001, section 34

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Overview

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2009 (No 5)* (proposed law).

The changes proposed to the *Planning and Development Regulation 2008* (the regulation) by the proposed law extends reforms implemented through the planning system reform project. The main aim of the reform project was to improve timeliness, transparency and efficiency in the planning process.

One of the ways the *Planning and Development Act 2007* (the Act) achieves this aim is by allowing straightforward developments to be exempt from requiring a development approval (DA). Under the Act, section 133 and 135, the *Planning and Development Regulation 2008* may prescribe those things that do not require development approval (refer section 20, Schedule 1 and Schedule 1A). Development that does not require development approval is DA exempt development. Section 20 and Schedules 1 and 1A of the regulation exempt specified development from requiring a development approval.

The types of development prescribed in Schedule 1 include such things as single dwellings in new residential estates and small structures such as sheds, garages and pergolas. In the majority, the range of things prescribed in Schedule 1 has now been successfully used within the community since 31 March 2008. During this time, the ACT Planning and Land Authority (the authority) has been monitoring the performance of the exempt development process, in particular, exemptions for single dwellings in new residential estates. There have been no significant compliance issues identified around the use of the exemption for single dwellings on new residential land. The Land Regulation and Audit Unit of the authority audited 57 of 803 exempt single residential dwellings that were registered for building approval and found no significant issues of concern in relation to compliance with the Territory Plan code.

The proposed law seeks to expand the current exemption that applies to development proposals for single dwellings in new residential estates (Schedule 1, section 1.100) to development proposals for single dwellings in any residential zone providing the dwelling complies with the relevant Code and there would be only one dwelling on the block. The proposed law therefore extends the same rights currently enjoyed by people building a single dwelling in new residential estates to other members of the community who live in established areas.

The exemption will apply to residential zones only, that is, the exemption will not apply to Community Facility Zones, Commercial Zones, Non-urban Zones (eg Rural Zone), etc. The Territory Plan sets out zones and precincts in the ACT, objectives and development tables applying to each zone as well as a series of general, development and precinct codes.

A development proposal will still need to comply with the relevant rules in the relevant Code and precinct code in the Territory Plan and have building approval under the *Building Act 2004*. The relevant rules are the “black and white” quantitative rules and do not include the qualitative merit criteria in the relevant Code.

The proposed law further extends the exemption by providing for the alteration of an existing building to be exempt development if the alteration in-itself complies with the relevant Code and that there will only be one dwelling on the block (that is located in a residential zone). It is important to note that in assessing if the proposed alteration, to the existing dwelling, complies with the relevant Codes the new elements (i.e. the alteration) is assessed against the relevant rules particular to the proposed alteration as well against those relevant rules that apply to the alteration in the context of the overall end result. For example, the maximum site density (relevant rule 4 in the Code) must not exceed 50% therefore the area of the dwelling together with the proposed alteration is assessed against this rule.

Clauses 10 and 11 of the proposed law clarify the development approval exemptions in relation to the demolition of a single dwelling and buildings and structures.

The existing exemption in Schedule 1, section 1.101 **Building and structures – demolition** provides for the demolition of a building or structure if the building or structure would be exempt development, if built, and provided the demolition meets the relevant rules in the relevant precinct code and the relevant rules in the Residential Zones Single Dwelling House Development Code.

Clause 10 broadens the exemption to include the demolition of whole or part of a single dwelling in all residential zones, irrespective of whether or not that dwelling, if built, would be exempt. Because of the definition of **dwelling** in section 5 of the regulation, the demolition of an existing class 10a building associated with the single dwelling is also included in the exemption.

Pursuant to clause 11, a development approval exemption will still apply to the demolition of a building or structure if the building or structure would be exempt development, if built (this is the equivalent to the current section 1.101 of Schedule 1 but with a change to exclude the requirement that the development must meet relevant Code rules).

The exemption for the demolition of a single dwelling and any associated class 10a buildings is not dependant on both the dwelling and the associated buildings being demolished at exactly the same time. Both can be demolished at the same time, or the dwelling can be demolished and then the associated building or vice versa. However, this is with the proviso that if a dwelling is demolished well before the class 10a building, there is a risk that the class 10a building may no longer be considered *associated* with the dwelling and the exemption for the demolition of the class 10a building may be lost.

Dwelling is defined at section 5 of the regulation:

- (a) means a class 1 building, or a self-contained part of a class 2 building, that-
 - (i) includes the following that are accessible from within the building, or the self-contained part of the building:
 - (A) not more than 2 kitchens;
 - (B) at least 1 bath or shower;
 - (C) at least 1 toilet pan; and

- (ii) does not have access from another building that is either a class 1 building or the self-contained part of a class 2 building; and
- (b) includes any ancillary parts of the building and any class 10a buildings associated with the building.

The original regulatory impact statement (for the Act) identified the potential for a progressive loss of income as the reforms were rolled-out. Consequently a loss of fee income to the Authority, due to the reduced number of DA applications lodged for developments that are to be DA exempt, was flagged in Government's decisions on these reforms.

The following is information about the proposed law as required by section 35 of the *Legislation Act 2001*.

(a) The authorising law

The provisions in this proposed law are authorised by the following sections of the *Planning and Development Act 2007* ("the Act"):

- section 133 What is an exempt development?;
- section 134 Exempt development-no need for development application or approval; and
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

As the proposed law enacts the policy objectives of the *Planning and Development Act 2007* (the Act) a brief summary of the pertinent policy objectives behind the Act is provided.

Policy objectives behind the Act

One of the key policy objectives of the Government in the development of the Act was to make the planning system simpler, faster and more effective. Pages 2-3 of the Revised Explanatory Statement for the Act states that:

"The Bill is intended to make the Australian Capital Territory's (ACT's) planning system simpler, faster and more effective. The Bill will replace the existing *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002*.

The objective of the Bill 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.

The most significant change under the Bill is simplified development assessment through a track system that matches the level of assessment and

process to the impact of the proposed development. As well as being simpler, more consistent, and easier to use, this system is a move towards national leading practice in development assessment ...

The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require development approval. ...

The new system will have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand what does and does not need approval, what is required for a development application and how it will be assessed. ...”

One of the methods for achieving a simpler, faster, more effective planning system was for the law to permit more developments to proceed without having to go through the development approval process. This approach was noted on page 3 of the Revised Explanatory Statement for the Act:

“The proposed reforms are:

* ***More developments that do not need development approval*** [emphasis added]

* Improved procedures for notification of applications and third party appeal processes that reduce uncertainty

* Clearer assessment methods for different types of development

* Simplified land uses as set out in the territory plan

* Consolidated codes that regulate development

* Clearer delineation of leases and territory plan in regulating land use and development

* Enhanced compliance powers. ...”

The objective for a simpler, faster, more effective planning system is relevant to concepts of “orderly development” and “economic aspirations of the people of the ACT” which are embedded in the object of the Act (section 6):

“6 Object of Act

The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—

(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and

(b) in accordance with sound financial principles.”

Policy objectives of the proposed law

The policy objectives of the proposed law are to further the policy objective behind the Act, that is, a planning system that is simpler, faster, and more effective. The Act has now been in operation since 31 March 2008 and through monitoring of the operation of the Act and in consultation with industry, it is evident that greater efficiencies can be achieved ahead of broader DA exemptions. The proposed law introduces changes that enhance the operation of the existing DA exempt process.

The proposed law extends rights currently enjoyed by people building a single dwelling on new estates to other members of the community who live in established

areas. The amendments to the regulation by the proposed law will permit homeowners, builders and developers to build single dwellings on residential land, not necessarily in new estates, without development approval. Previously, development applications for the building of a single dwelling in an established residential area were assessed in the Code track within statutory timeframes and incurred lodgement fees. Code track DAs are not required to be publicly notified. The amendments will also allow demolition of single dwellings (and associated structures) without development approval, irrespective of whether or not that building or structure, if built, would be exempt.

The authority identified the outcomes of the proposed law as part of the package of options that were considered at a recent meeting, chaired by the Chief Ministers Department, with industry and Government. These options have now been articulated in ACTPLAN. Some of the objectives identified in ACTPLAN have already been realised with the amendment of the regulation by the *Planning and Development Amendment Regulation (No: 2) 2009* which added exemptions for specified building work on existing school sites to Schedule 1 and was, in part, a response to the Commonwealth's *Building the Education Revolution* funding package.

The proposed law also implements Government objectives of improving access to affordable housing at all levels as indicated, for example, in the *Affordable Housing Action Plan 2007*. Government policy also seeks to reduce regulatory intervention where another mechanism can provide acceptable outcomes, particularly where regulations have the potential to impede or discourage timely housing developments.

The proposed law is also consistent with related objectives as indicated in section 6 of the Act, that is, of a land system that contributes to "the orderly and sustainable development of the ACT consistent with the social, environmental and economic aspirations of the people of the ACT". This is because the proposed law does not remove any significant categories of development from the development application and approval system. Instead, the law extends the circumstances in which current DA exemptions can apply. Sections 1.100, 1.100A and 1.101 of schedule 1 already provide for development approval exemptions for single dwellings and demolition work. The proposed law expands these exemptions – the exemption for single dwellings is extended to include the building or alteration to an existing single dwellings in all residential zones; demolition work is expanded to include the demolition of a single dwelling, in part or whole, without the need for the development to be exempt development, if built; and the requirement that a building or structure would need to be compliant with the relevant codes is removed.

In summary, the reforms are consistent with one of the principal aims behind the authorising law, which was to create a planning and development assessment system that is simpler, faster and more effective. The exempt category offers significant savings in time, effort and costs for thousands of ACT residents each year, who were previously required to obtain development approval under the *Land (Planning and Environment) Act 1991*.

(c) Achieving the policy objectives

The proposed law achieves the policy objectives by amending the *Planning and Development Regulation 2008* to:

- broaden the existing DA exemption for single dwellings (Schedule 1, s1.100 & 1.100A) in new estates to single dwellings in all residential zones; and
- extend the existing exemption for demolition (Schedule 1, s1.101) so that it allows for the demolition of a single dwelling, or part of, in all areas; and
- extend the existing exemption declaration process, currently only available for single dwellings in new residential estates, to all residential zoned areas.

All these things will contribute to making the planning system faster, more effective and simpler.

Single dwellings – buildings and alterations

The proposed law expands the current exemption that applies to development proposals for the building of a proposed single dwelling in new residential estates (Schedule 1, section 1.100) to development proposals for the building of a proposed single dwelling on any residential land provided the proposed dwelling would comply with the relevant rules in the Single Dwelling Housing Development Code and there would only be one dwelling on the block.

The exemption is further expanded to include the proposed activity of altering a dwelling in a residential zone. The proposed alteration to the dwelling would need to comply with the relevant rules in the Single Dwelling Housing Development Code and can not result in there being more than one dwelling on the block.

Demolition

The proposed law also expands the current exemption that applies to the demolition of those things that are currently DA exempt (Schedule 1, section 1.101) to include the demolition of single dwellings (and associated class 10a buildings), on a residential block. It is not necessary that the single dwelling be exempt development, if built, for its demolition to be DA exempt.

Exemption declaration

Section 1.100A of Schedule 1 currently permits a DA exempt single dwelling in new estates to remain DA exempt notwithstanding the actual construction of the dwelling results in a minor breach of the relevant DA exemption rules. This is managed through an 'exemption declaration' process.

The proposed law modifies how this provision works by linking it to requirements for a DA exempt single dwelling. This assists understanding in how the provisions are intended to work together i.e. proposed s1.100 and s1.100A. As proposed s1.100 extends the existing exemption, for single dwellings, from new residential areas to all residential areas the application of s1.100A is also extended to all residential areas. Likewise, as s1.100 also provides for the alteration of an existing dwelling s1.100A extends to alterations as well.

Otherwise the conditions attached to the exemption declaration process remain the same.

An exemption declaration can declare that specified non-compliance with DA exemption requirements shall not cause the overall development to cease to be DA exempt. The authority can only make such an exemption declaration on application if the authority is satisfied that:

- the non-compliance is minor;
- building the dwelling in the non-compliant form will not adversely affect anyone other than the lessee/builder; and
- building the dwelling in the non-compliant form will not result in more than minimal environmental harm.

The applicant retains the option of being able to lodge a development application, either before initiating an application for an exemption declaration, or after, if the application is refused. In effect, 'a right of appeal' against a refusal to grant an exemption declaration lies in making a development application and if this is refused, appealing to ACAT. Furthermore, there is no substantive removal of appeal rights for third parties because the type of things that an exemption declaration can deal with is tightly constrained.

Conclusion

In conclusion, the proposed law achieves the objective of a simpler, faster, more effective planning system by amending the regulation to allow the following scenarios:

- (1) The building or altering of a single dwelling which is compliant with the relevant rules of the relevant Code (Code compliant) without development approval in all residential zones. Dwellings which are not Code compliant can still be built but require either development approval or an exemption declaration depending on what features are not Code compliant. See clause 7 & 9.
Note: The relevant rules of the relevant Code are the "black and white" quantitative rules and do not include the qualitative merit criteria in the relevant Code.
- (2) The demolition of a single dwelling in all residential zones without development approval. See clause 10.
- (3) The demolition of part of an existing dwelling and an extension to the dwelling without development approval provided the extension is compliant with the relevant rules in the relevant Code (Code compliant). Extensions which are not Code compliant may still be carried out but are subject to development approval. The exemption still applies to an alteration of an existing dwelling even though part of the existing building is not Code compliant provided that existing part has previous development approval. See clause 7 and 10.
- (4) The demolition of class 10a buildings that are associated with a single dwelling without development approval. In this situation, the requirement that the class 10a building being demolished must be exempt development, if built,

does not apply. This is because the definition of **dwelling** includes associated class10a buildings. See clause 10.

- (5) The demolition of a building/structure without development approval if the building/structure would be exempt development, if built. For example, a garage which has parameters which would make its building exempt from development approval can be demolished without development approval. See clause 11.

(d) Consistency of the proposed law with the authorising law

The authorising law, section 133(c) of the Act (What is an exempt development?), entitles the regulation to prescribe development that is exempt from requiring development approval.

Under s133 of the Act, section 20 of the Regulation (Exempt developments—Act, s 133, def exempt development, par (c)), specifies development that is DA exempt. In summary, under s20 of the Regulation schedule 1 lists exempt development. Development may also be exempt notwithstanding non-compliance with schedule 1 provided the non-compliance meets criteria in schedule 1A. Note the development tables of the Territory Plan may also specify development that is DA exempt (refer s133) and development specified in s134 of the Act is also DA exempt.

The proposed law is within the parameters of the authorising law, section 133 of the Act. It is relevant to note that the proposed law does not create entirely new categories of DA exemptions but instead broadens the circumstances in which current DA exemptions can apply. The discretion to declare that minor breaches of DA exemption rules shall not cause a development to cease to be DA exempt is tightly circumscribed in the manner noted above and is also consistent with the authorising law.

As indicated above, the proposed law is also consistent with the Government objectives behind the making of the Act and the objects stated in section 6 of the Act.

(e) the proposed law is not inconsistent with the policy objectives of another territory law.

The proposed law is not inconsistent with the policy objectives of another territory law.

(f) Reasonable alternatives to the proposed law

The objective of the proposed law is to make the planning system simpler, faster and more effective through removal of unnecessary restrictions on the application of existing DA exemptions. There are no alternative means to achieve this except by amendment of the regulation.

(g) Brief assessment of benefits and costs of the proposed law

There are no significant whole of Government budget implications in respect to this regulation. The original regulatory impact statement (for the Act) included in the

package of material for Cabinet approval, identified the potential for a progressive loss of income as the reforms were rolled-out.

The reforms delivered by the proposed law are twofold: increased flexibility in applying the DA exemption framework and a reduced need for obtaining a DA for development achieving significant benefits to the community through:

1. DA application fees for building and or demolition

The broadening of these exemptions saves home-owners one, possibly two, application fees. This is because currently a DA is required for demolishing the existing dwelling thus saving one application fee. If the type of proposed replacement dwelling is Code compliant the second application fee is saved.

For existing DA single dwelling exemptions on new residential land industry charges \$1,500 - \$2,000 for determining if the development is DA exempt, issuing a BA and doing the inspections. For DAs lodged with the Authority an average fee is \$900 is charged. Industry charges around \$1,500 - \$2,000 to issue a BA, which also involves determining that the development is exempt development (this is akin to the Authority assessing the DA for compliance with the Code) and to conduct inspections. Overall, it is reasonable to assume that expanding the exemption into all residential areas will not result in a marked increase in costs rather home owners may achieve a saving of around 20%.

The saving on application fees also applies to situations where an extension to an existing single dwelling is proposed.

Further savings will be achieved through the exemption declaration process through negating the need for a DA. The application fee for an exemption declaration is set only to recover costs and could be as low as \$220.

However, these cost savings, to the home-owner, builder or developer, may be reduced if there is an increase in fees charged by building certifiers to determine if the building/s are DA exempt when the certifier is assessing the development for building approval (BA) under the *Building Act 2004*.

2. Construction benefits

By not requiring a development approval, the proposed law allows development to commence sooner thus possibly reducing the overall timeframe for the development. This can significantly reduce holding costs.

Further, through the exemption declaration process, it is estimated that assessment time would be considerably shorter than the normal DA process as only those elements of the development that the exemption declaration applies to need to be assessed by the authority. This is a significant benefit as a full DA process can add considerable time to a development proposal.

3. Other general benefits

The proposed law broadens the circumstances in which DA exempt development can occur and ensures consistency in the application of the exempt development

framework. The consistency provided by the proposed law will greatly assist home-owners, builders and developers to understand when a DA is required therefore delivering a core objective of the reform package, that is, greater certainty.

Further, the proposed law, by ensuring greater certainty provides an opportunity for the authority to direct limited resources to the assessment of more complex development proposals. This has a flow-on benefit of delivering greater efficiencies to those home-owners, builders and developers who require development approval thus allowing building to commence sooner and costs to be kept to a minimum.

The proposed law will encourage enhancement of existing housing stock thus reducing demand for new housing in new residential areas.

The proposed law also represents a further implementation of the underlying principles of the planning reform as agreed upon by the community and Government¹.

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

The proposed law refines the regulation, made under the Act, without making substantive changes, except for the matter discussed below. The discussion below demonstrates that the matter is consistent with the Committee's principles.

Furthermore, general principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to. Similarly, the regulation being amended by the proposed law has been reviewed by the Human Rights section of the ACT Department of Justice and Community Safety and no issues were identified.

The matter that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles are:

A reduction in ability to comment on proposed development

Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). Public notification can be either *minor* or *major*, depending on the particular development proposal.

The proposed law, by broadening the circumstances in which development may occur without development approval, will impact on the ability to comment on such development. Minor breaches of DA exemption rules that have been addressed by an exemption declaration will mean that such development is not open to comment.

¹ For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008*.

Further, there is no public notification process for DA exempt development as it does not require development approval.

Exempt development does not have a public notification requirement because during the development of the Act and the relevant Territory Plan Codes extensive public consultation was conducted. Therefore, the resultant rules around exempt development are designed to deliver acceptable community outcomes i.e. they do not create any material detriment.

There may be discontent that more exempt development is being allowed and this could be perceived as an erosion of community opportunity to comment on development proposals. However, it is important to note that Code compliant single dwelling development applications are currently in the Code track and as such, not subject to public notification or third-party appeals.

The impacts of the proposed law are minimal and justified for the following reasons:

(1) the exemption has been operating since 31 March 2008 for single residential dwellings in new estates. The range of things prescribed in Schedule 1 has now been successfully used within the community since 31 March 2008. During this time, the authority has been monitoring the performance of the exempt development process, in particular, exemptions for single dwellings in new residential estates, and no significant compliance issues have been identified. The Land Regulation and Audit Unit of the authority audited 57 of 803 exempt single residential dwellings that were registered for building approval and found no significant issues of concern in relation to compliance with the Territory Plan code.

(2) the proposed law will encourage enhancement of existing housing stock thus reducing demand for new housing in new areas.

(3) the DA exemption declaration process will allow for small discrepancies to be approved without having to go through the DA process. The regulation includes rules to ensure that such matters are minor only and do not affect third parties and do not have significant environmental impacts. This minimal impact is justified by the gains in efficiency and clarity noted above.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.