Regulatory Impact Statement

Planning and Development Amendment Regulation 2009 (No 11)
Subordinate Law 2009-40

Prepared in accordance with the
***Legislation Act 2001,* section 34**

Circulated by authority of
Andrew Barr MLA
Minister for Planning

Overview

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2009 (No 11)* (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 and Schedule 1). Development that does not require development approval is DA exempt development. Section 20 and Schedule 1 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 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 and no significant compliance issues have been identified.

The proposed law seeks to introduce new exemptions for such things as driveways in residential areas and flag poles (both of which are already in-place for school sites), adjusts the criteria for existing exemptions to allow greater opportunities for home-owners, and removes the need to comply with some elements of Schedule 1 such as the general exemption criteria in specific circumstances such as a DA for a lease variation.

The proposed law maintains the core principles of the DA exemption framework and responds to community and industry feedback and operational experience. Further the proposed law provides opportunities to industry as it removes the requirement for the proponent to lodge a development application (with the ACT Planning and Land Authority) and directs this work to the private sector.

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. The proposed law introduces changes that enhance the operation of the existing DA exempt process.

The proposed law extends the range of the types of things that can be DA exempt as well as extending existing exemptions, currently available only on schools sites, to residential areas. It further expands existing exemption criteria to allow greater opportunities for proponents and supports a Government objective of stimulating the ACT, and regions, economy.

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. For instance by including an exemption for the rebuilding of a damaged dwelling the proposed law achieves two objectives: firstly it protects the rights of home-owners to rebuild their home to the same (or similar) standards as

it was prior to the damage occurring without costly or time consuming DA assessment processes; and secondly it alleviates some demand that would have been placed on the rental market during the rebuilding process.

The proposed law seeks to ensure that the exempt development framework does not unduly create *unfair* competitive advantage. Industry feedback suggested that a number of businesses where excluded from the taking advantage of the DA exemptions as their core products were slightly larger than what is prescribed in the criteria and consequently lost business to those businesses whose products (while not significantly different to theirs) met the exemption criteria.

The proposed law also seeks to make further minor adjustments to ensure the original policy objective is achieved.

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 range of the types of things that can be built without a DA for example resealing driveways or erecting a flag (these exemptions are already in place for school sites);
- extend the existing exemption criteria for Class 10a buildings so that larger Class10a buildings can be built without a DA. The types of Class10a buildings provided for in the exemptions are typically those type of things *mass produced* to standard sizes. By adjusting the criteria the proposed law ensures fair and competitive opportunity to businesses in this market group;
- extend the existing exemption for demolition to those Class 10 buildings or structures that do not meet the prescribed exemption criteria. By adjusting the criteria the proposed law provides consistency for the types of development that it applies to. For instance, currently if a proponent had two garages (both of which are Class 10 buildings or structures) and wanted to demolish both, one met the criteria and one didn't, a DA would be required for the one that didn't meet the exemption criteria, even though they are both Class 10 buildings or structures i.e. they are both garages;
- remove the need for a DA for proponents who seek to rebuild their previously DA approved home following damage caused by an act or event, other than that done by the lessee of the land with the intent of causing damage; and
- make minor amendments, in response to operational experience, to ensure original policy intent is delivered.

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

(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. 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 existing DA exemptions and adds other exempt development types of a similar nature to that already included in Schedule 1 e.g. resealing existing driveways in residential areas (already in place for existing schools).

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 and construction benefits

The broadening of these exemptions saves home-owners application fees. It does this in two ways: firstly a DA (and application fee) would not be required if for

example the home-owner wanted to demolish a Class 10 building or structure but it did not meet the prescribed exemption criteria. And secondly by expanding and introducing other exemptions the home-owner is no longer required to lodge a DA application thus saving the DA fee.

Although the potential savings, to the home-owner, are small the proposed law removes unnecessary regulatory burden and promotes economic activity in the private sector. 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*.

Further 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.

2. 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 Government[1].

(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.

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

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 is about the 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. 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. The proposed law seeks to maintain these core rules (established during the Acts development) and consultation with peak industry groups (HIA and MBA) ensure that the DA exempt framework continues to achieve a core objective: that is that it is provides 'black and white' criteria easily understood by the community and industry and of a nature so as to not invoke adverse community comment.

There may be discontent that more exempt development is being allowed and this could be perceived as an erosion of community opportunity to comment. However, those things that require a DA are assessed in the Code track, do not require public notification and are not open to third-party appeal. For those things that are already exempt, such as water tanks, the expansion of the criteria does not unduly impinge on community rights.

The impacts of the proposed law are minimal and justified because 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 and no significant compliance issues have been identified. For instance 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. Further the authority, in proposing these changes, is acknowledging operational experience, responding to industry feedback, and ensuring that the DA exemption framework is consistent in its approach and application.

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.