



ACT
Government

REGULATORY IMPACT STATEMENT

Planning and Development Amendment Regulation 2018 (No 1)

Subordinate Law SL2018–21

Environment, Planning and Sustainable Development Directorate

Date 15 November 2018

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Terms Used

In this Regulatory Impact Statement the following terms are used:

Amendment Regulation	The amending regulation that is the subject of this Regulatory Impact Statement and which amends the Regulation
DA	Development Application under the ACT <i>Planning and Development Act 2007</i>
Exempt	Development that is exempt from the requirement to obtain development approval under the <i>Planning and Development Act 2007</i>
EPSDD	The Environment, Planning and Sustainable Development Directorate
the Act	<i>Planning and Development Act 2007</i>
the Regulation	<i>Planning and Development Regulation 2008</i>
RIS	This Regulatory Impact Statement

Executive Summary

The purpose of this Regulatory Impact Statement (RIS) is to assess the impact of the *Planning and Development Amendment Regulation 2018 (No 1)* (the amendment regulation) which is related to the clarification of the definition of *building line* introduced via Variation to the Territory Plan No 352 (V352) prepared by the Environment, Planning and Sustainable Development Directorate (EPSDD).

The definition of *building line* was refined as part of the changes made to the Territory Plan in V352 to clarify that courtyard walls, fences and retaining walls, whilst they are attached to the building, are not deemed to be part of the 'building' and therefore do not establish the building line for an anticipated development.

Prior to the making of V352, swimming pools in front yards had been considered to be exempt from requiring development approval if behind a courtyard wall on the basis that the courtyard wall forms part of the main building. This exemption is set out in section 1.54 of Schedule 1 of the Regulation. Building approval is still required under the *Building Act 2004* to address public safety and integrity of construction work. This approach has been in place for several years.

The change to the Regulation to retain exemptions from development approval for swimming pools behind courtyard walls is being made to ensure the current practice for these exemptions is maintained, despite the commencement on V352.

Policy Problem

The clarification of the definition of 'building line' in V352 has raised concerns regarding the development approval status of the construction of swimming pools in front yards behind courtyard walls.

The refined definition in V352 makes it clear that courtyard walls, fences, and retaining walls whilst they are attached to the building, are not deemed to be part of the 'building' and therefore do not establish a 'building line' for the purposes of determining building zones for a development.

This change will result in pools which are constructed in front of the building (and within a front courtyard) requiring development approval as they will be treated as being forward of the building line.

The policy problem is to achieve an improved definition of "building line" without unnecessarily interfering with the current balance of regulation of swimming pools and imposing unnecessary red tape.

Objectives for V352 and the amendment regulation

The objectives considered in assessing the amendment regulation are to ensure that Territory Plan V352 does not result in unintended, unwarranted regulatory burden with respect to the construction of front yard swimming pools behind courtyard walls. The amendment regulation also seeks to ensure that the assessment framework for such swimming pools remains consistent with the objects of the Act. Section 6 of the Planning and Development Act sets out the objects and states as follows:

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.

The following options have been considered:

1. Keep the existing policy of swimming pools behind courtyard walls being DA exempt by amending the regulation (i.e. retain the status quo as it applied before V352); or
2. Make no amendments and so require a development approval for the construction of swimming pools behind courtyard walls.

Summary of outcomes

The positive outcomes of the preferred option for a change to the Regulation include no unnecessary regulatory burden on the members of the community; no unnecessary increase in government resources for the assessment of swimming pools that are currently DA exempt, and continuity with current accepted industry practice. The regulation change will therefore retain the current approach.

A potential negative outcome is that there is no opportunity for public comment if no DA is required for the development. However, the negative outcomes of option 2, include an additional regulatory burden on the members of the community; an increase in government resources for assessment of swimming pools that are currently DA exempt; and disruption of the existing practice of assessment and certification.

On balance, it is considered that the retention of the existing policy approach of making swimming pools behind courtyard walls exempt from requiring development approval is the best outcome for the community.

1. Introduction

1.1 Purpose

The purpose of this Regulatory Impact Statement (RIS) is to assess the impact of the *Planning and Development Amendment Regulation 2018 (No 1)* (the amendment regulation) which is related to the implementation of the adjusted definition of ‘building line’ introduced through V352.

The aim of the amendment regulation is to ensure that the changes to the definition of ‘building line’ implemented via V352 do not result in any unintended changes to the current practice regarding the exemption from development approval for swimming pools behind courtyards walls.

As such, this RIS considers both the effect of implementing the changes to the definition of ‘building line’ in V352 and the effect of clarifying the regulation so that the status quo can be maintained.

1.2 Background

Variation to the Territory Plan No. 352 (V352) makes changes to various development tables, codes and definitions in the Territory Plan. This was undertaken as part of continued monitoring and updating of the Territory Plan. V352 commenced on 25 May 2018.

The definition of ‘building line’ was refined via V352 to clarify that courtyard walls, fences, and retaining walls, whilst they are attached to a building, are not deemed to be part of the ‘building’ and therefore do not establish the building line for the anticipated development.

The Territory Plan and the *Planning and Development Regulation 2008* (the Regulation) use the term ‘behind the building line’ as a condition within provisions in various development codes and sections of the Regulation respectively. The Regulation states that the definition of ‘building line’ is the Territory Plan definition.

Prior to the making of Territory Plan Variation 352, swimming pools in front yards have been considered to be exempt from requiring development approval if behind a courtyard wall on the basis that the courtyard wall forms part of the main building, consistent with section 1.54 of Schedule 1 of the Regulation. Building approval is still required under the *Building Act 2004* in terms of public safety and integrity of construction work. This approach has been in place for several years now.

DA exemption for swimming pools

Section 1.54 of Schedule 1 in the Regulation currently exempts pools from requiring development approval where they meet certain requirements. These include:

- no part of the pool, or an associated structure being between a front boundary and a building line for the block or within 1.5m of a side boundary or rear boundary for the block;
- if the pool includes an associated structure with an elevated floor—the height of the finished floor level is not more than 1m above finished ground level; and
- the height of the pool’s reservoir is not more than 1.5m above natural ground level;
- the designated development complies with the general exemption criteria that are applicable to the development.

Concerns regarding effect on DA exemption for swimming pools

V352 clarifies the definition of ‘building line’ to specifically mention those structures (fences, courtyard walls, retaining walls) which do not form the ‘building line’ for the purposes of development. This will result in pools behind courtyard walls in front yards no longer being exempt from development approval as they will be treated as being forward of the building line.

This has raised concerns in some parts of the building industry as pools have typically been exempt from development approval where located behind courtyard walls.

To address this situation, it is proposed to amend section 1.54(2) of Schedule 1 of the Regulation to allow courtyard walls to continue to establish the building line only for the purposes of exempting swimming pools from the requirement for development approval.

1.3 Objectives of ‘building line’ definition changes in V352 and associated regulatory change

The objectives of refining the definition of ‘building line’ in V352 are:

- to ensure that current EPSDD development assessment practice regarding the application of ‘building line’ to development proposals is properly reflected in the definition.

The objective in considering a proposed amendment to the Regulation is:

- to ensure there is an appropriate level of regulation of swimming pools in terms of sustainable development and related objectives of the Act and in particular to ensure there is no unintended, unnecessary adverse regulatory and cost burden imposed on property owners as a result of V352.

1.4 Identifying the Problem

V352 clarifies the definition of ‘building line’ to specifically mention those structures (fences, courtyard walls, retaining walls) which do not form the ‘building line’ for the purposes of development. This will result in pools behind courtyard walls in front yards no longer being exempt from development approval as they will be treated as being forward of the building line.

This has raised concerns in some parts of the building industry as pools have typically been exempt from development approval where located behind courtyard walls. The consequence is that future proposals will require a DA for a development that was previously exempt from the DA process. Concern has been expressed that this could amount to an unnecessary regulatory burden.

2. Variations to the Territory Plan and Regulation

2.1 Ensuring effective implementation of V352 and potential regulation amendment

The change to the definition of ‘building line’ in V352 confirms current EPSDD development assessment practice for determining setbacks for the purposes of development.

As a result of V352 it is necessary to consider consequential regulatory implications for swimming pools and options for ensuring that an appropriate level of regulation from a planning and regulatory burden point of view is maintained.

2.2 Outline of proposed change to the Regulation

The intention of the proposed change to the Regulation is to continue with the existing policy where pools are exempt from DA approval where behind courtyard walls. This aim is consistent with the broader objective of ensuring that there is no unwarranted imposition of red tape in this area and in particular no unwarranted regulatory burden on land owners who may wish to install a swimming pool in the front yard.

3. Options Analysis

The following options have been considered:

1. Keep the existing policy of swimming pools behind courtyard walls being DA exempt by amending the regulation (i.e. retain the status as it applied before Variation 352); or
2. Make no amendments and so require a development approval for the construction of swimming pools behind courtyard walls.

3.1 Retain DA exempt status (Option 1)

This option will involve the amendment of the regulation to allow swimming pools located behind courtyard walls to continue to be treated as exempt from requiring development approval.

This option, in contrast to option 2, will mean that relevant swimming pools will be DA exempt. This will mean that the construction of the swimming pool will not involve any application for development approval and there will be no public notification of the proposal through the DA process and therefore no opportunity for representations to be made on a development application. In addition, there will be no potential for third parties to seek ACAT merit review of a decision to approve the development.

The positive outcome of the regulation amendment is that the land owner will not be required to go through the expense, the time and potential uncertainty of the development application and merit review processes.

In assessing these matters it is considered that in practical terms the construction of a swimming pool behind a court yard wall, because they are hidden from street view, will not have any more planning or social impacts than the construction of a back yard swimming pool. Back yard swimming pools are and will remain DA exempt as they are not affected by the Territory Plan variation. This view is supported by the fact that the current exemptions for front yard pools have been in place for several years without significant issues arising in the public domain.

As noted above, construction and public safety issues will continue to be regulated through requiring building approval under the Building Act.

Therefore, there is no apparent need to impose new regulatory requirements on front yard swimming pools. The proposed regulation will retain the current approach and in this sense avoid unnecessary red tape. It is suggested that this outcome is consistent with the objects in section 6 of the Act.

In summary, the proposed benefits of the amendment regulation include:

- no unnecessary regulatory burden on the members of the community who wish to install a swimming pool in their front yards

- no unnecessary increase in government resources for the assessment of swimming pools that are currently DA exempt
- continuity with current accepted industry practice for the assessment and building approval certification of swimming pools behind courtyard walls

The potential negative outcomes for this option include:

- no opportunity for public comment on development applications
- no potential for third party ACAT merit review of relevant development approval applications

Option 1 is recommended.

3.2 Make no change (Option 2)

This option will result in a change to the current approach (as in place before V352) to require the construction of relevant swimming pools to have development approval.

This option will ensure that the relevant development will require a development application and go through the subsequent public notification process, with opportunity for representations to be made on the development application. In addition, there will be a potential for third parties to seek ACAT merit review of a decision to approve the development (assuming other existing regulations do not affect this review right).

The negative outcome of this option is that it would require the land owner to go through the expense, the time and potential uncertainty of the development approval and merit review processes.

As noted above in connection with option 1, there is no justification to impose this additional regulatory requirement.

In summary, the proposed benefits of the amendment regulation include:

- opportunity for public comment on development approval applications for front yard swimming pools behind courtyard walls
- potential for third party ACAT merit review of relevant development applications.

The potential negative outcomes for this option include:

- additional regulatory burden on the members of the community who wish to install a swimming pool in their front yards
- an increase in government resources for the assessment of swimming pools that are currently DA exempt
- disruption of existing practice for the assessment and building approval certification of front yard swimming pools behind courtyard walls.

Option 2 is not recommended.

4. Consistency with ACT laws

4.1 Consistency of the proposed law with the authorising law

Section 133(1)(c) of the Act states that exempt development means *'development that is exempt from requiring development approval under a regulation'*.

The amending regulation is within the parameters of the authorising law. Section 133(1)(c) of the Act expressly authorises the making of exemptions from the requirement to obtain development approval. This type of development is currently considered exempt from requiring development approval. There are also a number of other existing DA exemptions set out in schedule 1 to the Regulation and the amending regulation would be of a type that is consistent with existing exemptions for other minor developments. In addition, the change to the definition of 'building line' in V352 was not intended to result in the outcomes that are outlined in this RIS.

The proposed amendment is also consistent with the objects of the Act as noted above.

The amending regulation does not create a new category of exempt development, rather it modifies the qualifying criteria to retain existing development rights.

4.2 Consistency of the proposed law with Scrutiny of Bills Committee principles

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):

- (a) is in accord with the general objects of the Act under which it is made;
- (b) unduly trespasses on rights previously established by law;
- (c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions;
- (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 is consistent with the scrutiny committee principles as briefly outlined below:

- (a) The change to the definition of 'building line' in V352 and the amending regulation is consistent with the object of the Act in that it maintains the orderly and sustainable development of the ACT and is consistent with the social, environmental and economic aspirations of the people. The changes in V352 and the amending regulation will have no net disadvantage for any member of the community wishing to undertake the development of a swimming pool in their front yard given the current DA exemptions for swimming pools. The changes retain an appropriate balance for the rights of all members of the community as this type of development is currently exempted from the DA process in specific circumstances as provided in Section 1.54 of Schedule 1 of the Regulation, and the amending regulation retains the status quo.
- (b) Clarifying the definition of 'building line' in V352 and the consequential amending regulation do not unduly trespass on rights previously established by law. While the making of V352 by itself would have the result that development approval would be required for the construction of swimming pools in front yards if behind a courtyard wall, this is an unintended consequence that is being remedied by this amending regulation. This amending regulation does not trespass on rights previously established by law as it seeks to maintain the status quo and current practice. That is, that swimming pools behind courtyard walls are exempt from requiring development approval.
- (c) The proposed amending regulation does not make rights, liberties and/or obligations unduly dependent upon non reviewable decisions. While the amending regulation will reinstate the exemption from requiring development approval for swimming pools behind courtyard walls, this merely returns to current practice prior to V352 commencing. The amending regulation will mean

that some developments are exempt from requiring approval, thereby reducing the ability to comment on planning proposals and removing appeal rights. However this decision is made in the context that these developments are unlikely to affect neighbouring lessees and there is no planning or development rationale to require development approval.

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

In particular in terms of the amending regulation, it is noted that, section 133(1)(c) of the Act expressly authorises the making of exemptions from the requirement for development approval. This type of development is currently considered exempt from requiring development approval. There are also a great many other existing DA exemptions set out in schedule 1 to the Development Regulation and the amending regulation would be of a type that is consistent with existing exemptions of diverse other minor developments. In addition, the introduction of refinements to the definition of 'building line' in V352 was not intended to result in the outcomes that are outlined in Section 1.4 of this RIS.

The matter of swimming pools behind courtyard walls is not likely to impact on the public, therefore there is no planning or development rationale to require development approval. It is appropriately dealt with through an exemption in the Planning and Development Regulation.

The amending regulation does not create a new category of exempt development, rather it modifies the qualifying criteria to retain existing development rights.

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

4.3 Human Rights analysis

The amendment regulation does not engage human rights and is merely intended to continue current practice regarding approval of swimming pools behind courtyard walls.

4.3 Transitional arrangements

The proposed regulation does not have retrospective effect. No transitional arrangements are necessary.

4.4 Mutual Recognition

There are no mutual recognition issues.

5. Conclusion

The proposed consequential amendment to the Regulation is supported as it will result in an appropriate level of regulation of swimming pools. The amendment regulation in response to the changes in V352 for the definition of 'building line' will ensure that existing exemption criteria still apply where a pool is proposed to be located behind a courtyard wall in front yards and as such will not impose an unwarranted regulatory burden on land owners.