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THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2008 (No 3)
SUBORDINATE LAW No SL2008-33

EXPLANATORY STATEMENT

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AUSTRALIAN CAPITAL TERRITORY
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Overview

The *Planning and Development Amendment Regulation 2008 (No 3)* is made under section 426 of the *Planning and Development Act 2007* (the Act).

Historically, there have been significant levels of minor contravention of development approvals (DA), for example, the height of floors are not constructed to the exact millimetre dimensions stated in the DA, sometimes varying by +/- 300mm or more. Also, many people building their home often visit the site during construction and discover that construction could benefit from minor variations, such as altering windows or door or making certain rooms larger, etc. In the past, such contraventions and variations were readily regularised by way of a regularising DA amendment after-the-fact. Such amendments, depending on their nature, were approved relatively quickly or subject to significant delay due to the need for public notification.

Any significant delay in obtaining the relevant DA amendment can result in delayed lawful occupation of completed buildings which adds to development holding costs. Sectors of the ACT construction industry have expressed concern with increased delays during implementation of the new *Planning and Development Act 2007* and new territory plan. These sectors have expressed the view that a tolerance on allowable changes to construction under a DA would benefit all stakeholders without significant detriment.

An intention of this amending regulation is to overcome delays caused by minor contraventions of DAs by inserting a range of provisions that will "over-ride" a DA. The provisions prescribe the tolerances within which development under a DA may lawfully contravene the DA without the need for another DA or a DA amendment. These provisions require modification of the Act by this amending regulation (under section 429 of the Act).

The amending regulation also modifies the Act by adding a provision that will permit minor DA amendments to be assessed and processed quickly without further public consultation on the development or further referral to a government agency for advice. The ability to proceed without these steps is tightly circumscribed by this amending regulation and is consistent with the approach already taken in the Act with amendments to development applications. This modification, like the others, will expire on 31 March 2010. Consideration will be given at a later date as to whether this and other provisions should persist beyond this period and whether an Act amendment should be proposed.

Delays and problems can also arise if development that is intended to be carried out in accordance with DA exemption parameters is done in a way that contravenes an exemption parameter. Such contraventions mean the development is no longer DA exempt. Presently, the only way to resolve such a contravention is to obtain a relevant DA to reflect how the development has been carried out or to alter the development so that it complies with the exemption parameter. An intention of this amending regulation is to overcome this problem by prescribing allowable tolerances and other variations to exempt developments to complement those that apply to development

under a DA. As far as practical, the parameters for tolerances in the DA realm are of the same quantum as comparable parameters for DA exempt developments.

Figures 1 and 2 at the end of this statement illustrate some of the above-mentioned tolerances and other permitted variation parameters.

The following summary of provisions of this amending regulation describe how the amendments create the broad framework to give effect to the tolerances and other permitted variations—

- section 4—expands the current kinds of DA exemptions to also include matters in new schedule 1A;
- section 5—"deems" certain changes, particularly new schedule 1A changes, to a development under a DA to be in accordance with the DA despite actual non-compliance with the DA;
- section 14—expands the current schedule 1, part 1.3, list of DA exemptions to cater for certain changes to windows and doors so that schedule 1 correlates with new schedule 1A in relation to windows and doors;
- section 20—inserts new schedule 1A which lists the DA exempt variations to—
    - development under a DA; and
    - DA exempt developments;
- section 21—modifies the Act by providing a new section 198C (When development approvals do not require amendment), to entitle the *Planning and Development Regulation 2008* to prescribe some of the matters mentioned herein above.

Other matters dealt with by this amending regulation include the following:

(1) clarification of the prescribed criteria for direct sales for supportive accommodation - see section 6;

(2) the management of "National Land". The Commonwealth has responsibility for management of "National Land", for example, the parliamentary triangle. The Commonwealth Minister may declare land to be National Land under s27 of the *Australian Capital Territory (Planning and Land Management) Act 1988 (Cwth).* The Minister may also remove National Land status under this section. Section 291 of the repealed *Land (Planning and Environment) Act 1991* (the repealed Act) included a provision to the effect that should National Land lose its National Land status (and so become Territory Land managed by the Territory), any leases existing prior to this shift would survive and be deemed to be leases granted under the Territory's legislation. Section 291 (from the transitional chapter of the repealed Act) was inadvertently omitted from the Act. This amending regulation restores the provision so that leases over formerly National Land are deemed to be granted under the Act - see section 23;

(3) There is some doubt as to whether the transitional provisions in the Act adequately cover the scenario where the planning and land authority (the authority) or Land Development Agency enters into a contract for the sale of a lease prior to commencement of the Act on 31 March 2008 but the lease is not granted until after this date. This amending regulation amends the Act by inserting provisions to cover this gap – see section 22. Such leases are to be granted under the repealed Act in the old format and old wording as contemplated at the time of the original contract unless the purchaser agrees to the grant being made under the Act and in the new format. In either case, the leases are covered by the Act as though they were granted under the Act. This provision has retrospective application in that it applies from 31 March 2008. For the amendment to apply to all relevant leases, it needs to be operational from 31 March 2008. This retrospectivity does not contravene section 76 of the *Legislation Act 2001* because it is non-prejudicial.

Detailed notes on the regulation

Section 1 – Name of regulation – names the regulation as the *Planning and Development Amendment Regulation 2008 (No 3)*.

Section 2 – Commencement – provides that the regulation commences on the day after its notification on the ACT legislation register.

Section 3 – Legislation amended – states that the regulation amends the *Planning and Development Regulation 2008* (the regulation).

Section 4 – Section 20 – substitutes a new section 20 in the regulation. Section 20 defines *exempt development* for section 133 of the Act. New section 20 expands and clarifies the definition of *exempt development*.

Prior to the substitution, section 20 provided that a development is exempt from the requirement for development approval if the development complied with schedule 1 (Exemptions from requirement for development approval). The substituted new section 20 restates that provision, and also expands the provision so as to provide that a development is also exempt from the requirement for development approval if:

(a) the development would comply with schedule 1, or would be exempt from requiring development approval under the relevant development table for the development, other than for a matter (the relevant matter) to which schedule 1A (Permitted variations to approved and exempt developments) applies; and
(b) the relevant matter complies with the criteria for the matter in schedule 1A; and
(c) a designated development for the development, as changed by the relevant matter, complies with the general exemption criteria that are applicable to the development.

An example of the effect of item (a) above is as follows—

Schedule 1 provides exemption parameters for a carport which include a limit on the number of exempt carports that can be built within 1.5m of a side boundary—the limit is 2, maximum. If schedule 1A allows a horizontal tolerance to apply to the location of a 3rd carport and provided any encroachment into the 1.5m boundary clearance area is within that tolerance, the carport can be taken to not need a development

approval merely because it contravened the limitation in schedule 1. This is because the contravention is within the relevant parameter of schedule 1A.

New schedule 1A (Permitted variations to approved and exempt developments) is inserted in the regulation by section 20 of this amending regulation (see below).

The expansion of section 20 is necessary to facilitate allowable tolerances which are the prescribed limits by which certain development can contravene relevant development approval or development regulation parameters. New section 20 caters for the fact that many buildings are commonly designed to take full advantage of the relevant development parameters, such as allowable building heights or set-back distances from neighbours, but actual construction may not comply exactly with the plans.

Without the allowable tolerances permitting such non-compliance, the only remedies to the non-compliance are to obtain a new development approval, or amendment to the development approval, as the case requires, or to correct the construction onsite. None of these options is cost effective or efficient or necessary to achieve the relevant policy objectives of development approvals, when the magnitude of the non-compliance is relatively insignificant, as is the case with the proposed allowable tolerances.

The notes to new section 20 specify the meaning of *designated development* and *general exemption criteria*. *Designated development* is as prescribed by schedule 1 (Exemptions from requirement for development approval) section 1.2. *General exemption criteria*, for a development, is as prescribed by schedule 1 (Exemptions from requirement for development approval) section 1.10.

The notes to new section 20 also explain that the definition of *relevant development table* is in the Dictionary of the Act, that the development may still need building approval under the *Building Act 2004* and that the development must comply with the lease on which it is carried out.

Section 5 – New part 3.3 –Development approvals – when amendment not required - inserts a new part 3.3 in the regulation which comprises new sections 35 and 36. New section 35 specifies when amendment is not required to development approvals for new section 198C(2) of the Act. New section 198C of the Act is inserted by section 21 of this amending regulation through the new transitional section 429C (see below).

New section 198C(1) specifies that the section applies if:

(a) the authority has given development approval for a development application; and
(b) the development is changed so that it is not covered by the approval.

Under new section 198C(2), a regulation may prescribe the circumstances in which a development in accordance with the changed development is taken to be in accordance with the development approval.

New section 198C is necessary to ensure that where development fails to comply with the relevant development approval, the failure can be taken not to have occurred for the purposes of determining if the development complies with the approval, but only if the non-compliance complies with the relevant requirements of the relevant regulation. Such requirements include requiring the magnitude of the noncompliance

to be within the parameters of the relevant above-mentioned allowable tolerances. New schedule 1A prescribes the dimensional or other parameters of the above-mentioned allowable tolerances (see section 20 below).

New section 35 of new part 3.3 prescribes the circumstances when development approvals do not require amendment for the purposes of section 198C(2) as follows:

(a) the change relates only to a matter (the relevant matter) to which schedule 1A applies; and

(b) the change complies with the criteria for the relevant matter in schedule 1A; and

(c) a designated development for the development, as changed by the relevant matter, complies with the general exemption criteria that are applicable to the development except to the extent that the development approval allows the development to not comply with the criteria.

Thus, if a development does not comply with the development approval and the non compliance is within the parameters set out in schedule 1A, the development is taken to be in accordance with the development approval and neither a new approval or amendment of an already granted approval is required nor is on-site rectification necessary to achieve 'deemed' compliance with the approval.

This is best illustrated by a simplified example. A building is built but the vertical siting of the building does not comply with the height criteria for the development approval. Provided the height is within 340mm either above or below the point specified in the development approval, there is no need for a new development approval or rectification. (The 340mm parameter is set by schedule 1A.11 of this amending regulation in section 20 (see below)).

The notes to new section 35 explain that the development may still need building approval under the *Building Act 2004* and that the development must comply with the lease on which it is carried out. The notes to new section 35 also specify the meaning of *designated development* and *general exemption criteria*. *Designated development* is as prescribed by schedule 1 (Exemptions from requirement for development approval) section 1.2. *General exemption criteria*, for a development, is as prescribed by schedule 1 (Exemptions from requirement for development approval) section 1.10.

New section 36 provides that part 3.3 expires on 31 March 2010.

Section 431 of the Act requires section 429 and regulations made under section 429 to cease two years after the commencement of the Act (ie two years after 31 March 2008). Section 429 and the regulations under this section are not saved by section 88 of the Legislation Act (because of the exception in section 88(2) of the Legislation Act). Thus, sections 198A to C inserted by this amending regulation (see section 21 below) are temporary and so new section 35 which refers to section 198C is also temporary.

Section 6 – Section 113(1)(b) – substitutes a new section 113(1)(b) in the regulation. The Act restricts the circumstances in which the authority may make a direct sale of a lease (see section 240(1)(a)(i)). The authority may make a direct sale where the sale meets criteria as prescribed by regulation. Section 113 of the regulation prescribes the criteria for a direct sale for supportive accommodation.

Section 100 of the regulation defines supportive accommodation as either a retirement complex, residential care accommodation or supportive housing. These terms are currently defined in the territory plan definitions.

Those definitions are:

- **Retirement complex** means the use of land for permanent residential accommodation for persons aged 55 years or over and which consists of a grouping of self-care units as well as a hostel and/or nursing home accommodation together with *ancillary* facilities provided for the use of residents. *Ancillary* facilities may include chapels, medical consulting rooms, meeting rooms, recreational facilities, therapy rooms, kiosk facilities and the like.

- **Residential Care Accommodation** means the use of land by an agency or organisation that exists for the purposes of providing accommodation and services such as the provision of meals; domestic services and personal care for persons requiring support. Although services must be delivered on site, management and preparation may be carried out on site or elsewhere.

- **Supportive Housing** means the use of land for residential accommodation for persons in need of support, which is managed by a Territory approved organisation that provides a range of support services such as counselling, domestic assistance and personal care for residents as required. Although such services must be able to be delivered on site, management and preparation may be carried out on site or elsewhere. Housing may be provided in the form of self-contained dwellings.

The existing section 113(1)(b) of the regulation states that the criteria for the direct sale of a lease for supportive accommodation includes the proposed lessee being accredited (however described) under an Act, or Commonwealth law to provide supportive accommodation. This requirement applies to all lessees irrespective of the accommodation type. This universal requirement is inappropriate because such accreditation is not always required for all of these accommodation types.

New section 113(1)(b) removes the need for all proposed lessees to hold an approval or to have accreditation under an Act or Commonwealth law. The substituted clause states that if the proposed lessee requires an approval (formerly referred to as accreditation), the proposed lessee must hold the approval to meet the prescribed criteria. This substitution ensures that where a proposed lessee does not require an approval under law, the proposed lessee will not be prevented from potentially providing supportive accommodation.

The substituted section also states that the proposed use of the land relates to the supportive accommodation. This ensures consistency between the supportive accommodation, the proposed lessee and the use of the land.

Section 7 – **Section 410** – omits the reference to schedule 5 and instead inserts a reference to schedule 20. This is necessary because schedule 5 is renumbered as schedule 20 by section 24 of this amending regulation (see below). The reason for

changing the number of the schedule is to ensure that a clear record of transitional provisions is retained in the endnotes to the regulations. Once schedule 5 expires, there is a real possibility of the schedule's number being re-used in the future and the reference to the modification of the Act in the endnotes will be lost.

Section 8 – **Schedule 1** – omits the reference to section 20 and substitutes a new reference to section 20(1). This is necessary because of the changes made to section 20 of the regulation by this amending regulation (see section 4 above).

Section 9 – **Schedule 1, section 1.1, definitions of *designated development, finished floor level, general exemption criteria* and *surface water*** – omits these definitions from schedule 1, section 1.1. The definitions of these terms are inserted in identical form in the Dictionary of the regulation by sections 27, 29 and section 31 respectively of this amending regulation (see below). The definitions have been transferred to the Dictionary because they have general application for the regulation and their use is not restricted to schedule 1.

Section 10 - Schedule 1, part 1.2 heading – substitutes a new heading for Part 1.2 of schedule 1 to remove the superfluous words "for exempt developments".

Section 11 – **Schedule 1, section 1.12, note** – substitutes a new note in schedule 1, section 1.12 to include a definition of *surface water*. This is for clarification purposes.

Section 12 – **Schedule 1, section 1.15** – substitutes the words "relevant development" for the words "exempt development" in schedule 1, section 1.15. This is necessary because the term "exempt development" is defined elsewhere in the regulation to have a different meaning to that intended in section 1.15.

Section 13 – **Schedule 1, section 1.16, examples and note** - substitutes new examples and note in section 1.16 of schedule 1. This is for clarification purposes and to allow the examples to refer to some of the new provisions inserted by this amending regulation.

Section 14 – **Schedule 1, section 1.21 –** substitutes a new section 1.21 in schedule 1 to clarify that section 1.21 only applies to "low impact" external doors and windows in buildings. Section 14 also inserts a new section 1.21A in schedule 1 which applies to "high impact" external doors and windows.

Figure 1 at the end of this statement illustrates the relationship between low impact windows and doors, the adjacent floor level and natural ground level. Windows or doors that are not low impact windows or doors are high impact windows or doors. The 1 metre limitation correlates to the 1 metre maximum floor height for other development approval (DA) exempt circumstances, such as the maximum height of the floor of a deck. Limiting such floor heights to 1metre above natural ground level mitigates the potential for adverse impacts arising from overlooking of neighbouring property.

New section 1.21 Installation, alteration and removal of low impact external doors and windows in buildings

This section applies to the installation, alteration or removal of low impact external doors and windows in a building.

New section 1.21 of schedule 1 prescribes some of the technical parameters which

must be complied with for certain installations, alterations or removals of low impact external doors and windows in buildings to be *exempt development*. For a development to be exempt from requiring a development approval, it must comply with each of the 8 general exemption criteria in schedule 1, part 1.2 (general exemption criteria). Criterion 8 of the general exemption criteria states that the development must comply with any other criteria in part 1.3 of schedule 1 that apply to the development (see schedule 1, section 1.18). In other words, a development is exempt only if it complies with the criteria in part 1.2 of schedule 1 and any applicable criteria in part 1.3 of schedule 1.

For the purposes of criterion 8, new section 1.21 of schedule 1 sets out the criteria, in addition to the general exemption criteria, that must be complied with for the installation, alteration, or removal (the relevant change) of low impact doors and windows in buildings to be *exempt development*.

The criteria (as set out in new sections 1.21(a)-(e) of schedule 1) are:

(a) the height of the building's *finished floor level*, or other trafficable surface, immediately adjacent to the relevant change is not more than 1 metre above *natural ground level*. The limitation on the height ensures that modifications are not made to doors or windows on an *upper floor level*, as defined by the territory plan. Taking the *natural ground level* as the reference point ensures that any earthworks undertaken on site do not increase the potential for adverse off-site impacts, such as eroding neighbours' privacy. *Natural ground level* is defined in the territory plan, (Definitions).

(b) if the relevant change is to an existing door or window, it must be within one (or more) of the following parameters:

(i) the replacement of the door or window with either a door or a window without changing the width of the opening in the wall;
(ii) an increase in the width of the door or window by not more than 340mm;
(iii) an increase in the height of the door or window by not more than 340mm;
(iv) a reduction in the height, or width, or both, of the door or window; and
(v) the installation of a wall instead of the door or window.

Figure 1 at the end of this statement illustrates how these parameters can be applied.

The 340mm dimension is based on the standard height of 4 courses of brickwork. A standard brick is 76 mm high x 230 mm long x 110 mm wide. With a 10mm bed of mortar, a single course of brickwork is 76mm + 10mm = 85mm approximately. Therefore, 4 courses = 4 x 85mm = 340mm. Four courses is generally considered to be an inconsequential amount by which a building's position can change, considering the matters covered by a development approval.

(c) if the relevant change is not to an existing door or window, the relevant change can only be removing part of the wall and installing a door or window with an external horizontal opening of not more than 2 metres.

Figure 1 at the end of this statement illustrates how this parameter can be applied.

The limitations imposed by new sections 1.21(b) and 1.21(c) ensure that the relevant change can only be of a minor scale.

(d) no part of the relevant change is less than 1.5 metres from a side boundary or 3 metres from a rear boundary. Distance limitations from side and rear boundaries ensure that large-scale alterations do not impose an undue impact on the amenity of surrounding land, or land users.

(e) the designated development complies with the applicable requirements in the general exemption criteria, sections 1.10–1.18, of schedule 1.

New section 1.21A Installation, alteration and removal of high impact external doors and windows in buildings

This section applies to the installation, alteration or removal of high impact external doors and windows. A door or window is high impact if the height of the building's *finished floor level*, or other trafficable surface, immediately adjacent to the door or window is more than 1 metre above *natural ground level* (See section 1.21A(a)). *Natural ground level* is defined in the territory plan, (Definitions).

Figure 1 at the end of this statement illustrates the relationship between low impact windows and doors, the adjacent floor level and natural ground level. Windows or doors that are not low impact windows or doors are high impact windows or doors. The 1 metre limitation correlates to the 1 metre maximum floor height for other DA exempt circumstances, such as the maximum height of the floor of a deck. Limiting such floor heights to 1metre above natural ground level mitigates the potential for adverse impacts arising from overlooking of neighbouring property.

New section 1.21A of schedule 1 prescribes some of the technical parameters which must be complied with for certain installations, alterations or removal (the relevant change) of high impact external doors and windows in buildings to be *exempt development*. New section 1.21A allows for minor alterations to high impact doors and windows in buildings without development approval.

For a development to be exempt from requiring a development approval, it must comply with each general exemption criteria in schedule 1, part 1.2 (general exemption criteria). Criterion 8 of the general exemption criteria states that the development must comply with any other criteria in part 1.3 of schedule 1 that apply to the development (see schedule 1, section 1.18). In other words, a development is exempt only if it complies with the criteria in part 1.2 of schedule 1 and any applicable criteria in part 1.3 of schedule 1.

For the purposes of criterion 8, new section 1.21A of schedule 1 sets out the criteria, in addition to the general exemption criteria, that must be complied with for the installation, alteration, or removal (the relevant change) of high impact doors and windows in buildings to be *exempt development*.

The criteria (as set out in new sections 1.21A(a)-(d)) are:

(a) the height of the building's *finished floor level*, or other trafficable surface, immediately adjacent to the door or window is 1 metre or more above natural ground level;

(b) the relevant change involves no more than the following:

(i) the replacement of the door or window with either a door or a window without changing the width of the opening in the wall;
(ii) an increase in the width of the door or window by not more than 340mm;
(iii) an increase in the height of the door or window by not more than 340mm;
(iv) a reduction in the height, or width, or both, of the door or window;
(v) the installation of a wall instead of the door or window or a part of the door or window;

Figure 1 at the end of this statement illustrates how these parameters can be applied.

The 340mm dimension is based on the standard height of 4 courses of brickwork. A standard brick is 76 mm high x 230 mm long x 110 mm wide. With a 10mm bed of mortar, a single course of brickwork is 76mm + 10mm = 85mm approximately. Therefore, 4 courses = 4 x 85mm = 340mm. Four courses are considered generally to be an inconsequential amount by which a building's position can change, considering the matters covered by a development approval.
The limitations imposed by section 1.21A(b) ensure that the relevant change can only be of a minor scale.

(c) no part of the relevant change is less than 1.5 metres from a side boundary or 3 metres from a rear boundary. Distance limitations from side and rear boundaries ensure that large-scale alterations do not impose an undue impact on the amenity of surrounding land, or land users.

(d) the designated development complies with the applicable requirements in the general exemption criteria, sections 1.10–1.18, of schedule 1.

Section 15 – **Schedule 1, section 1.22(1) definition of *excluded item*, note** – amends the note at the end of the definition of *excluded item* to insert a reference to section 1.21A which is inserted by this amending regulation (see above).

Section 16 – **Schedule 1, sections 1.51(2)(c) and 1.52(1)(c), new note** – inserts a new note in schedule 1, section 1.51(2)(c) and 1.52(1)(c) to include a reference to the definition of ***surface water***. This is for clarification purposes.

Section 17 – **Schedule 1, section 1.78 –** corrects a typographical error by omitting the reference to section 1.72 and substituting the correct section number – section 1.77.

Section 18 – **Schedule 1, section 1.102(2)** – corrects a typographical error by substituting the word "or" with the word "for".

Section 19 – **Schedule 1, section 1.106 and 1.107** – omits schedule 1, sections 1.106 and 1.107 from the regulation. The omission of the sections is a consequence of their intended effect (tolerances) being made obsolete by this amending regulation. The

allowable tolerances are now provided for, and expanded upon, by other provisions in the regulation, particularly schedule 1A (inserted by section 20 of this amending regulation (see below)).

Section 20 – **New Schedule 1A** –inserts new schedule 1A in the regulation. As explained above (see section 4 above), new section 20 of the regulation has been expanded to facilitate allowable tolerances which are the prescribed limits by which certain development can contravene relevant development approval or development regulation parameters. Schedule1A is inserted because new section 20 requires the non compliance with a DA to be within the parameters set by schedule1A.

Schedule 1A provides for certain permitted variations to approved and exempt developments. It is intended that the tolerances and other permitted variations mentioned in schedule 1A only apply to development as it is being undertaken, or as it has been undertaken. They do not apply to development at the design or plan-drawing stage.

For example, if plans forming part of a development application show a dwelling sited 1.4m off a side boundary, and the relevant rule applicable to the application required the dwelling to be not less than 1.5m off the boundary, the application cannot be taken as complying with the rule, despite the horizontal siting tolerance mentioned in schedule 1A. However, if a development approval shows the dwelling being sited not less than 1.5m from the boundary and during construction, the building's brickwork inadvertently encroaches slightly into the 1.5m setback, the dwelling can be taken as complying with the relevant 1.5m setback requirement of the DA provided the encroachment into the boundary clearance zone is within the permitted tolerance for the siting of the dwelling and it complies with the any other relevant parameters applicable under schedule 1A.

Schedule 1A Permitted variations to approved and exempt developments

Part 1A.1 Preliminary

1A.1 Definitions –sch 1A - provides definitions of the following terms for the schedule:

approved development means a development that is covered by a development approval.

exempt development means:

(a) a schedule 1 exempt development; or
(b) a development that is exempt from requiring development approval under the relevant development table.

Development tables are prescribed under the territory plan and are another method of prescribing development approval exemptions.

sch 1 exempt development means a development that is exempt from requiring development approval under section 20(1) of the regulation (see section 4 above).

Part 1A.2 Permitted construction tolerances

1A.10 Permitted variations - Horizontal siting tolerances for buildings and structures

New section 1A.10 relates to the allowable tolerances for the horizontal placement of buildings and structures. The section applies to the horizontal siting of a building or structure on a block that does not comply with the applicable siting criteria.

Applicable siting criteria are defined in subsection (3) as follows:

Applicable siting criteria, in relation to a point of a building or structure on a block means the criteria about the horizontal siting of the point on the block under:

(i) the approval, if the building or structure would be covered by a development approval other than for its horizontal siting on the block; or

(ii) schedule 1, part 1.3 (Exempt developments), if the building or structure would be a sch1 exempt development other than for its horizontal siting on the block; or

(iii) the development table, if the building or structure would be an exempt development under the relevant development table other than for its horizontal siting on the block.

If the section applies, the allowable horizontal tolerances are:

(a) If the applicable siting criteria allows or requires any point of a building or structure to be sited on or not more than 900mm horizontally from a boundary block:

(i) for a boundary fence – the point is sited so that the centre of the fence's panelling is not more than 25mm horizontally from the boundary; and

(ii) in any other case, the point is sited wholly on the block and not more than 50mm horizontally from where the applicable siting criteria allow or require it to be sited; and

(b) if the applicable siting criteria allows or requires any point of a building to be sited more than 900mm horizontally from a boundary of a block:

(i) the point is sited wholly on the block and not more than 340mm horizontally from where the applicable siting criteria allow or require it to be sited; and

(c) compared to the approved development or exempt development, the building or structure does not do either or both of the following:

(i) increase the diversion or concentration of the flow of surface water

(A) in a way that causes ponding; or

(B) onto other land.

(ii) change the number of stories in the building or structure.

Figure 1 at the end of this statement illustrates how some of these tolerances can be applied.

Figure 2 at the end of this statement illustrates how the above-mentioned tolerances can be applied to boundary fences.

The above-mentioned 340mm tolerance coincides with the magnitude of vertical tolerances prescribed for other matters in schedule 1A.

The much smaller 50mm tolerance in section 1A.10(a)(ii) has been applied because a larger tolerance could produce adverse impacts on neighbouring properties, such as—

- increasing overlook into private space; or
- the creation of narrow strips of land between boundary fences and buildings which are too narrow to allow access for grounds or property maintenance.

Subsection 1A.10(3) specifies that, for this section, an *easement* means an easement registered, or shown on a certificate of title, under the *Land Titles Act 1925;* and *on*, a block, or a boundary of a block, includes above or below ground level for the block or boundary.

1A.11 Permitted variations - Height tolerances for buildings and structures

New section 1A.11 applies to the vertical siting of a building or structure on a block that does not comply with the applicable height criteria.

Subsection 1A.11(3) specifies the meaning of applicable height criteria.

Applicable height criteria, in relation to a point of a building or structure, means the criteria about the height of the point under:

(1) the approval, if the building or structure would be covered by a development approval other than for the height of the point; or

(2) schedule 1, part 1.3 (Exempt developments), if the building or structure would be a sch1 exempt development other than for the height of the point; or

(3) the development table, if the building or structure would be an exempt development under the relevant development table other than for the height of the point.

If the section applies, the allowable height tolerances for buildings and structures are that the building or structure must be vertically sited so that:

(a) for any point of the building or structure that the applicable height criteria allows or requires to be sited at a particular height:

(i) the point is sited wholly within the lease to which the point relates and is not more than 340mm above or below where the applicable height criteria allows or requires the point to be sited; but

(ii) if the point is the sill of an exterior window, the sill is not more than 50mm closer to the *finished floor level* immediately adjacent to the window's sill; and

(b) compared to the approved development or exempt development, the building or structure does not do any of the following:

(i) increase the diversion or concentration of the flow of surface water:

(A) in a way that causes ponding; or

(B) onto other land.

(ii) reduce the accessibility of the building or structure for people with disabilities;
(iii) change the number of stories in the building or structure.

Figure 1 at the end of this statement illustrates how the tolerances can be applied.

Part 1A.3 Other permitted variations

Section1A.20 Other permitted variations to approved developments and exempt developments

This section applies to the internal alteration of a class 1 building and the installation, alteration or removal of an external door or window. The Building Code of Australia defines the term *class 1 building*, (generally, they are houses). A designated development for the internal alteration of a class1 building must be carried out in accordance with schedule 1 (Exemptions from requirement for development approval) section 1.20.

A designated development for the installation, alteration or removal of an external door or window in a building must be carried out in accordance with schedule 1 (Exemptions from requirement for development approval) section 1.21 or section 1.21A.

Figure 1 at the end of this statement illustrates how this provision can be applied to the insertion of a window.

Section 21 – Schedule 5, modification 5.1 – New sections 429A to 429F
For simplicity, this amending regulation replaces modification 5.1 of schedule 5 of the Act in its entirety. New sections 429A to 429E are new modifications to the Act. The modification in new section 429F was previously inserted by Planning and Development Regulation 2008 SL2008-2 sch 5 (as inserted by SL2008-8 s51). This modification was previously numbered section 429A but has been renumbered as section 429F because of the insertion of new sections 429A to 429E by this amending regulation, otherwise this modification is unchanged.

The modifications of the Act in schedule 5 of the regulation, existing and new, will all expire on 31 March 2010. The modifications to the Act will then cease to apply. Consideration will be given at a later date as to whether this and other provisions should persist beyond this period and whether an Act amendment should be proposed.

Section 429A Modification – s197 (Applications to amend development approvals) - New section 429A modifies the Act as permitted by section 429 of the Act by adding new paragraph (c) to section 197 of the Act.

The additional paragraph (c) is necessary because of the insertion of new section 198C into the Act by this amending regulation (see new section 429C below).

New section 197(1) provides that the section applies if:

(a) the authority has given development approval for a development proposal; and
(b) the development proposal changes so that it is not covered by the approval; and

(c) section 198C (When development approvals do not require amendment) does not apply to the changed development proposal.

The effect of new section 197(1)(c) and new section 198C is summarised in the description of new modification section 429C below.

Section 429B Modification – s.198 (Deciding applications to amend development approvals) – New section 429B modifies the Act as permitted by section 429 of the Act by substituting a new section 198(4) in the Act. New section 198(4) is necessary because of the insertion of new section 198B by this amending regulation (see new section 429C below). New section 198(4) continues to provide that if public notification of a proposed development is required then only the application for the amendment need be publicly notified. The only change to 198(4) is to state that 198(4) is not relevant if the requirement for public notification is removed by the operation of new section 198B.

Section 429C Modification – div 7.3.11 (Correction and amendment of development approvals) – New section 429C modifies the Act as permitted by section 429 of the Act by inserting new sections 198A, 198B and 198C.

New section 198A specifies that, despite section 198(1)(b), the authority need not refer an application to amend a development approval to an entity if satisfied that the amendment does not affect any part of the development approval in relation to which the entity made a comment. This provision is consistent with the approach taken in existing section 145(4) with respect to changes to development applications.

New section 198B specifies that, despite section 198(1)(b), the authority need not publicly notify an application for the amendment of a development approval if satisfied that:

(a) no-one other than the applicant will be adversely affected by the amendment; and

(b) the environmental impact caused by the amendment will do no more than minimally increase the environmental impact for the development.

New section 198B is consistent with the approach taken in existing section 146(3) with respect to changes to development applications.

New section 198C specifies that the section applies if:

(a) the authority has given development approval for a development application; and
(b) the development is changed so that it is not covered by the approval.

Under new section 198C(2), a regulation may prescribe the circumstances in which a development in accordance with the changed development is taken to be in accordance with the development approval.

New section 198C applies in the situation where a development is authorised by a development approval but the actual development as built (or part built) turns out to exceed some of the dimension parameters in the development approval. If the built form exceeds the approval parameters but is still within the tolerance range specified in the regulation under 198C(2), the building is deemed to still comply with the

requirements of the development approval and a new or amended approval is not required. Similarly, if the building includes a new feature outside the terms of the development approval (such as a new door or window) and the new feature is authorised under 198C(2), then again the building is deemed to comply with the approval. For example, if the building is a class 1 building (eg a house) and the internal arrangement of the house's walls, ceilings, kitchen and bathroom fitouts are varied so they are outside the terms of the development approval, the building is deemed to comply with the approval if the variation is authorised under 198C(2). The provision effectively permits the regulation to exempt specified matters from requiring a development approval amendment in the same way as the existing regulations exempt specified matters from requiring development approval.

Amended section 197, section 198 and new section 198C are intended to work as follows. Section 198C must be considered to determine whether an amendment to a development approval is necessary. If an amendment is necessary then amended section 197 gives the proponent the ability to apply for an amendment. Section 198 sets out the process for deciding such an application.

Section 429D Modification – s.203 (Development other than use lawful when begun) - New section 429D modifies section 203(1)(c) of the Act as permitted by section 429 of the Act. The new section 203(1)(c) adds the words "because of an amendment of this Act" to the end of section 203(1)(c). The addition of these words clarifies that the provision only applies if the Act changes but not if the development, of itself, changes so that it is no longer exempt development. As the provision stands, it could perhaps be interpreted as making lawful a development that started out being an exempt development under schedule 1 but, because of a change to the nature of the development during construction, it stops being exempt. This was not the intention of the provision and the modification clarifies the intent.

Section 429E Modification – s204 (Use as development lawful when begun) - New section 429E modifies section 204(1)(c) of the Act as permitted by section 429 of the Act. The new section 204(1)(c) adds the words "because of an amendment of the development table or regulation" to the end of s204(1)(c). The addition of these words clarifies that the provision only applies if a development table or regulation changes but not if the development, of itself, changes so that it is no longer exempt development. As the provision stands, it could perhaps be interpreted as making lawful a development that started out being an exempt development under schedule 1 but, because of a change to the nature of the development during construction, it stops being exempt. This was not the intention of the provision and the modification clarifies the intent.

429F Modification—s 298A (Application for extension of time to commence or complete building and development) – this section was previously numbered as section 429A but has been renumbered as section 429F to accommodate the insertion of sections 429A-E above. The modification in section 429F was previously inserted by Planning and Development Regulation 2008 SL2008-2 sch 5 (as inserted by SL2008-8 s51). This provision is otherwise unchanged.

Section 22 – Schedule 5, new modification 5.7 New section 459A - inserts modification [5.7] which inserts a new section 459A in the regulation (as permitted by section 429 of the Act).

Existing sections 458 and 459 of the Act set out transitional arrangements for the granting of a lease. Under these sections, a lease may be granted under the *Land (Planning and Environment) Act 1991* (the repealed Act) where an application for a lease was made but not decided before the commencement of the Act on 31 March 2008. There is some doubt as to whether these transitional provisions cover the scenario where a contract for the sale of the lease was entered into before 31 March 2008 but the lease is not granted until after this date. This is because it is arguable that in this scenario the decision to grant the lease was made before 31 March, that is, when the contract for sale was entered into and as such, existing sections 458 and 459 do not apply. New section 459A removes this doubt by inserting transitional provisions that authorise the granting of leases in these cases.

Under the new section 459A, the lease may be granted under the repealed Act (ie in the old format with references to the repealed Act etc) or, if the potential lessee agrees in writing, under the Act. Where a lease is granted under the repealed Act using this provision, the lease (like other leases granted under the repealed Act) is taken to have been granted under the Act and it can still be registered at the Land Titles Office.

This provision has retrospective application in that it applies from 31 March 2008. For the amendment to apply to all relevant leases, it needs to be operational from 31 March 2008.

Section 76 of the *Legislation Act 2001 - Non–prejudicial provision may commence retrospectively* - prohibits statutory instruments from including retrospective provisions that are prejudicial unless specifically authorised by the relevant Act. New section 459A does not contravene this requirement because it is non –prejudicial. The effect of new section 459A is to confirm that the:

- authority or land development agency is able to meet obligations for the grant of leases under contracts for sale entered into prior to 31 March 2008;
- the potential lessee has the right to elect to have the lease granted in terms consistent with granting under the repealed Act or in terms consistent with granting under the Act; and
- relevant leases acquire the same status and protections afforded other leases covered by the Act and can be registered at the Land Titles Office (consistent with the underlying approach in existing transitional provisions in Part 15.6 of the Act).

These effects are not prejudicial but operate to the benefit of the parties concerned.

Section 23 - Schedule 5, new modification 5.8 New section 459B - inserts modification [5.8] which inserts a new section 459B in the regulation (as permitted by section 429 of the Act).

Section 291 of the repealed Act provided for the conversion of Commonwealth leases. This section was applied in circumstances where under section 27(1) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth), (the PALM

Act), a declaration classifying land as National Land had been rescinded, revoked, amended or varied. Consequently, land that had been National Land ceased to be National Land.

The PALM Act, section 27, states that the Minister may declare land to be National Land only where it is, or is intended to be, used by or on behalf of the Commonwealth. In this section, the Minister may rescind, revoke, amend or vary land that is National Land. Furthermore, section 28 of the PALM Act states that at any time when any land in the Territory is not National Land, that land is Territory Land for the purposes of the PALM Act. In the event that National Land becomes Territory Land, section 291 of the repealed Act allowed for a lease that was in force immediately before the declaration to be taken as having been granted under the repealed Act. In this way, the continuity of these leases and their continued management under Territory legislation was assured.

The Act does not have a provision similar to section 291 of the repealed Act. The new section 459B corrects this omission.

Section 24 – Schedule 5 – renumbers schedule 5 as schedule 20**.** The reason for changing the number of the schedule is to ensure that a clear record of transitional provisions is retained in the endnotes to the regulations. Once schedule 5 expires, there is a real possibility of the schedule's number being re-used in the future and the reference to the modification of the Act in the endnotes will be lost.

Section 25 – **Dictionary, note 3, new dot point** – includes the term "exempt" in Note 3 of the Dictionary for clarification purposes.

Section 26 – Dictionary, new definition of *approved development* – inserts a definition of *approved development* for the purposes of schedule 1A which is inserted by section 20 of this amending regulation (See above)**.**

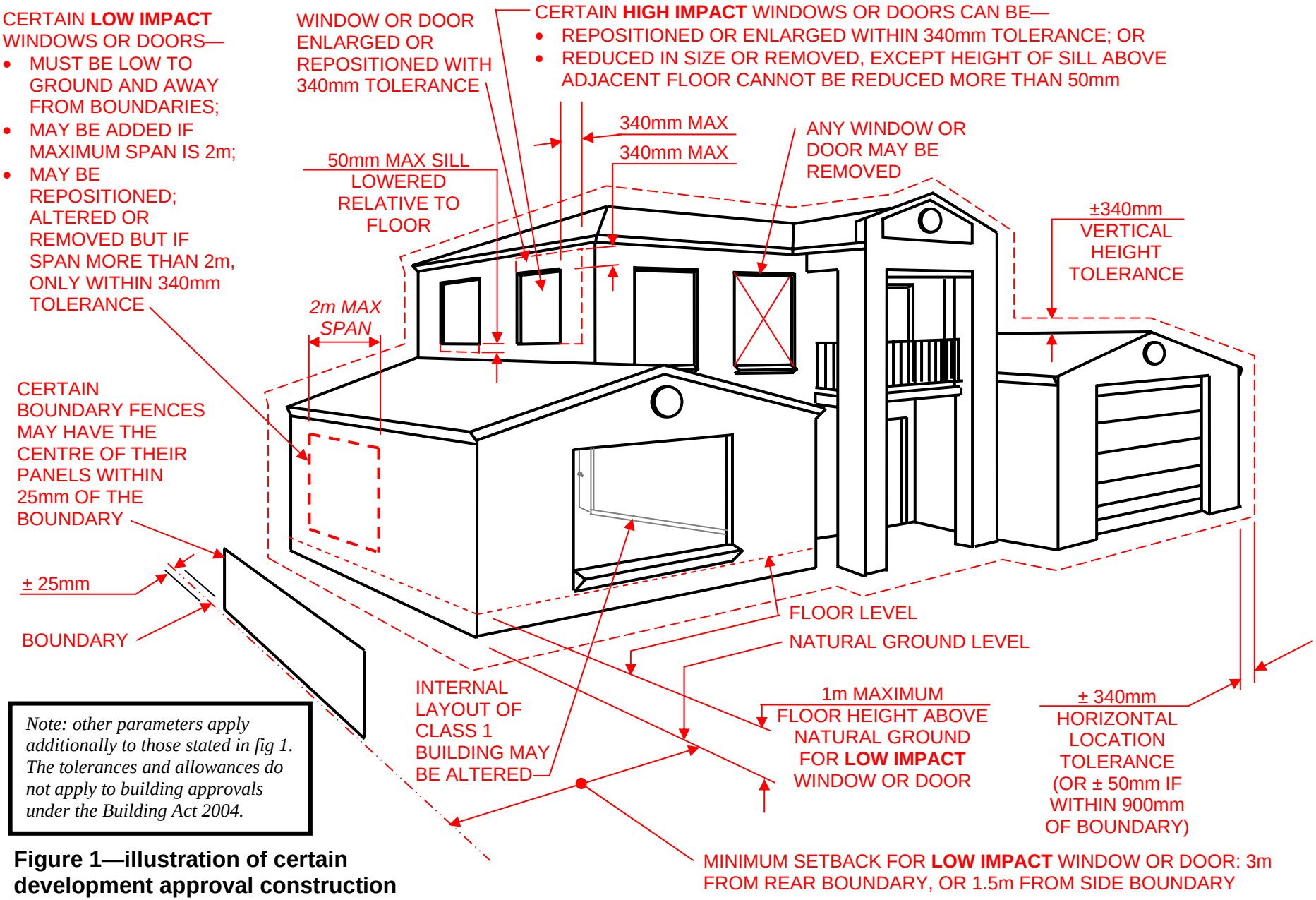
Section 27– Dictionary – definition of *designated development* –inserts a definition of *designated development* for the purposes of schedule 1 and new schedule1A. The definition was previously in schedule 1 only. However, the term now applies beyond schedule 1 because of this amending regulation. As a result, the definition of the term has been moved to the regulation's Dictionary.

Section 28 – Dictionary – new definition of *exempt development* – inserts a new definition of *exempt development* for the purposes of schedule1A which is inserted by section 20 of this amending regulation (see above).

Section 29 – Dictionary, definitions of *finished floor level* and ***general exemption criteria*** – inserts a definition of *finished floor level* and *general exemption criteria* for the purposes of schedule 1 and new schedule1A. The definitions were previously in schedule 1 only. However, the terms now apply beyond schedule 1 because of this amending regulation. As a result, the definitions of the terms have been moved to the regulation's Dictionary.

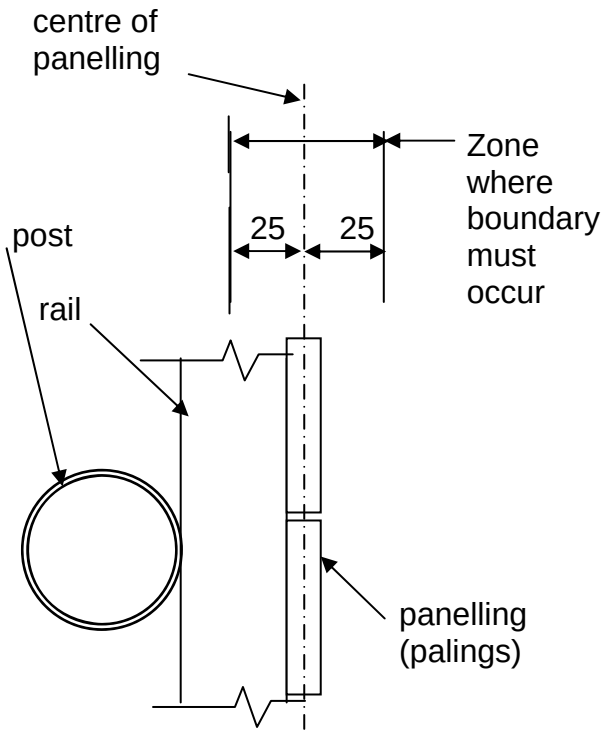
Section 30 – Dictionary, new definition of *sch 1 exempt development* – inserts a new definition of *sch 1 exempt development* for the purposes of schedule 1A which is inserted by section 20 of this amending regulation (see above).

Section 31 – Dictionary, definition of *surface water* — inserts a definition of *surface water* for the purposes of schedule 1 and new schedule1A. The definition was previously in schedule 1 only. However, the term now applies beyond schedule 1 because of this amending regulation. As a result, the definition of the term has been moved to the regulation's Dictionary.



Note: other parameters apply additionally to those stated in fig 1. The tolerances and allowances do not apply to building approvals under the Building Act 2004.

Figure 1—illustration of certain development approval construction tolerance parameters and allowable variations to approved developments



FENCE PLAN VIEW
Permitted DA exemption, mirror-case also permitted

Post and rail paling fence shown, certain other fences also permitted.

Note: other parameters apply additionally to those stated in fig 2. The tolerances do not apply to building approvals under the Building Act 2004.

Figure 2—illustration of certain development approval construction tolerance parameters for certain fences.