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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Planning and Development Amendment Regulation 2009 (No 11)
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EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
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PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2009 (No 11)

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Overview

The changes proposed to the *Planning and Development Regulation 2008* (the regulation) by this amending regulation 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 processes.

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 regulation may prescribe those things that do not require development approval. 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. Schedule 1A provides for construction tolerances and works in conjunction with schedule 1.

For each type of development that does not require a DA there are stated requirements that the development must comply with for the exemption to apply. For instance the DA exemption for a single dwelling requires that for the development to be DA exempt that it must comply with the relevant rules in the relevant Code and precinct code in the Territory Plan and have building approval under the *Building Act 2004*. The relevant rules are the “black and white” quantitative rules and do not include the qualitative merit criteria in the relevant Code.

Although schedule 1 describes circumstances in which development may be exempt from requiring development approval, the schedule does not remove the requirement for development to comply with any other applicable Australian Capital Territory (ACT) legislation. For example, if the schedule provides that certain dwellings may be constructed without a development approval under the Act, it may be that other authorisations are needed under other laws, such as a building approval under the *Building Act 2004*. The work may also be required to be done by the holders of relevant licences issued under the *Construction Occupations (Licensing) Act 2004*.

The types of development already prescribed in schedule 1 include such things as single dwellings on residential land and small structures such as sheds, garages and pergolas. In the majority, the range of things prescribed in schedule 1 has been successfully used within the community since 31 March 2008 when the Act began operation. For instance, the ACT Planning and Land Authority (the authority) has found that there have been no significant compliance issues identified around the use of the exemption for single dwellings on new residential land (The Land Regulation and Audit Unit of the authority audited 57 of 803 exempt single residential dwellings that were registered for building approval and found no significant issues of concern in relation to compliance with the Territory Plan code).

The amending regulation clarifies or amends some existing exemptions in schedule 1 and also adds a number of new exemptions. These new exemptions relate to developments that operational experience and industry feedback suggest should be DA exempt.

In summary, this amending regulation:

1. Amends when a survey certificate is required.
2. Omits general exemption criteria 1.13 from schedule 1
3. Makes new DA exemptions for:
 - external shades
 - resealing driveways - residential
 - flag poles
 - demolition of class 10 buildings or structures
 - rebuilding 'damaged' buildings
 - bores
4. Amends the criteria for existing exemptions in schedule 1 as follows:
 - s1.45 to allow for a larger building or structure
 - s1.46 to allow for a larger building or structure
 - s1.55 to allow for a larger water tank
 - s1.100 so that an exempt single dwelling does not have to comply with Rule 33 or 66 of the territory plan (this is because the general exemption criteria has been omitted by this amending regulation)
 - s1.103 for reasons of clarification
5. Amends existing criteria s1.75 - 1.78 in schedule 1 to remove the need to comply with the general exemption criteria.

Third party appeals

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 and consequently it may be perceived as an erosion of community opportunity to comment on development proposals. However in the most there has been very little public complaint about DA exemptions and the type of things which are exempt. Industry who in the most deal with proponents and work daily with exempt developments, acknowledge the benefits that DA exempt development offers.

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 (which is the only grounds for third party appeal). The criteria for the type of development, that the amending regulation introduces, maintains these type of parameters and has been consulted on with industry and responds to operational experience in the DA assessment process.

Human rights issues in relation to schedule 2

The types of changes proposed by the amending regulation are not considered to impact on Human rights unduly. This is because the types of development that are affected by the amending regulation are in the most not significant and in many cases are adjustments to existing exemptions.

The removal of third party appeal rights could be seen as a impinging on *human rights*. The *Human Rights Act 2004* (the HRA), in sections 12 (right to privacy) and 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the expanding DA exemptions. However, in relation to section 21, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be quite severe to constitute unlawful and arbitrary interference with a person's right to privacy.

To the extent that schedule 1 of the regulation limits any rights afforded by the HRA, these limitations must meet the proportionality test of section 28 of that legislation. The schedule serves to improve the development assessment process within the Territory by ensuring that only matters which have the potential to significantly impact on residential areas are open to third party appeals. Persons that may be affected by particular development applications in these areas continue to have the ability to make submissions on individual development applications as well as territory plan variations that establish the overall planning policy for these areas. Rights of judicial review under the *Administrative Decisions (Judicial Review) Act 1989* remain.

Detailed summary of provisions

Clause 1 – Name of Regulation –states the name of the regulation, which is the *Planning and Development Amendment Regulation 2009 (No 11)*.

Clause 2 – Commencement –states that the regulation commences the day after its notification.

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

Clause 4 – New section 25 (1) (e) – inserts new section 25(1) (e). New section 25(1)(e) inserts a new circumstance when a survey certificate need not accompany a development application. A survey certificate need not accompany a development application if the proposed development is the alteration of a building on a block in a residential zone if the alteration does not increase the gross floor

area of the building and does not a change the siting of the building on the block. Gross floor area is defined in the territory plan.

Clause 5 – Schedule 1, section 1.10 (c) — Clause 5 omits section 1.10(c) of schedule 1 from the regulation. This means that Criterion 3 (section 1.13 of schedule 1) is no longer a general exemption criterion. Where criterion 3 applied, a development for the building or alteration of an external wall or roof in a residential zone (including a fence) could not include metal sheet, wall or roofing that has a metallic, white or off-white finish.

Section 1.10 of schedule 1 defines the term **general exemption criteria** as criterion 1 to 8 in sections 1.11 to 1.18 respectively. The term **general exemption criteria** is mentioned in a number of sections within schedule 1 as a compliance requirement for exemption from the need to seek development approval. Section 1.10 lists the different criterion requirements that may be called-up in specific exemption criteria for development. For example the criterion for s1.29 requires that the ‘designated development complies with the general exemption criteria that are applicable to the development’ whereas s1.100B requires that the development ‘...complies with section 1.14 (Criterion 4- heritage and tree protection).

Changing design practices has meant that it is no longer appropriate to exclude the use of these materials or finishes in all circumstances. For example, environmental design practices consider that there are environmental benefits in having a white roof for instance.

Clause 6 – Schedule 1, section 1.13 —omits section 1.13 of schedule 1 from the regulation as a consequence of clause 5 of this amending regulation that removes section 1.10(c) of schedule 1 from the regulation.

Clause 7 – Schedule 1, section 1.122 (1) definition of exterior item, new paragraph (h) —inserts “a pole or post” in the definition of **exterior item** in section 1.22 (1) of schedule 1 of the regulation. This is because of the insertion of new section 1.26A in schedule 1 by clause 8 below which refers to a pole or post.

Clause 8 – Schedule 1, new section 1.26A – inserts a new exemption for external shades. Subsection 1.26A(1) defines **external shade** as a device to shade a window or door externally and includes a pole, post or any other item associated with an external shade. A designated development for an external shade is exempt if:

- (a) the external shade, when opened to its full capacity, is within the boundary of the block; and
- (b) the designated development complies with the general exemption criteria that are applicable to the development.

Clause 9 – Schedule 1, new section 1.30A — inserts a new exemption in schedule 1 of the regulation relating to resealing existing driveways. A designated development for resealing an existing driveway is exempt development provided concrete, bitumen, pavers including bricks, timber and/or grass is used and it complies with the applicable general exemption criteria. This clause extends the

benefit of the exemption already in place for existing school sites (see s.1.99R) to the community in general.

Clause 10 – Schedule 1, section 1.31 (1) definition of *prescribed general exemption criteria* – substitutes a new definition of *prescribed general exemption criteria* in section 1.31 of schedule 1 which removes the reference to section 1.13. This is consequent upon the removal of section 1.13 by clause 6 of this amending regulation.

Clause 11 – Schedule 1, section 1.45(1)(c) – substitutes a new section 1.45(1)(c) in schedule 1 because of the insertion of new section 1.45(1A) by clause 12 below.

Clause 12 – Schedule 1, new section 1.45(1A) — inserts new section 1.45(1A) in schedule 1. The new section maintains the present exemption but also allows for a higher building to be built provided certain parameters are met. Section 1.45(1A) sets out those parameters. The previous height restriction of 3 metres made it difficult to have a pitched roof and encouraged flat roofs which may not be as attractive or appropriate and may adversely affect the amenity of a neighbourhood. Allowing the roof height to be 4 metres above natural ground level in certain circumstances provides greater flexibility and opportunity for appropriate development.

The diagram at the end of this Explanatory Statement shows the intent of the provision and what the provision will not allow.

Clause 13 – Schedule 1, new section 1.45 (2) definition of *size limitation, paragraph (a)* — This is an editorial amendment. It changes the wording from “not more than” to “less than”.

Clause 14 – Schedule 1, section 1.45(2) definition of *size limitation, paragraph (c)* — substitutes 50m² for 36m² in section 1.45(2)(c) to provide consistency between section 1.45 and 1.46.

Clause 15 – Schedule 1, section 1.46(b) — substitutes section 1.46(b) in schedule 1. The sub-section maintains the present exemption but also allows for a higher building to be built provided certain parameters are met. The parameters are provided for in new section 1.46(2) (refer to Clause 17).

Clause 16 – Schedule 1, section 1.46(c)(i) — substitutes 50m² for 25m² in section 1.46(c)(i) to provide consistency between section 1.45 and 1.46.

Clause 17 – Schedule 1, new section 1.46(2) — inserts new section 1.46(2) in schedule 1. The new section maintains the present exemption but also allows for a higher building to be built provided certain parameters are met. Section 1.46(2) sets out those parameters. The previous height restriction of 3 metres made it difficult to have a pitched roof and encouraged flat roofs which may not be as attractive or appropriate and may adversely affect the amenity of a neighbourhood. Allowing the roof height to be 4 metres above natural ground level in certain circumstances provides greater flexibility and opportunity for appropriate development.

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Clause 18 – Schedule 1, new section 1.47(c) substitutes section 1.47(c) in schedule 1. The sub-section maintains the present exemption but also allows for a higher building to be built provided certain parameters are met. The parameters are provided for in new section 1.47(2) (refer to Clause 19).

Clause 19 – Schedule 1, new section 1.47(2) — inserts new section 1.47(2) in schedule 1. The new section maintains the present exemption but also allows for a higher building to be built provided certain parameters are met. Section 1.47(2) sets out those parameters. The previous height restriction of 3 metres made it difficult to have a pitched roof and encouraged flat roofs which may not be as attractive or appropriate and may adversely affect the amenity of a neighbourhood. Allowing the roof height to be 4 metres above natural ground level in certain circumstances provides greater flexibility and opportunity for appropriate development.

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Clause 20 – Schedule 1, section 1.51(2), note 3 — omits note 3 as a consequence of the removal of section 1.13 by clause 6 above.

Clause 21 – Schedule 1, section 1.54 (1) (c) – omits section 1.54 (1)(c) as a consequence of the removal of section 1.13 by clause 6 above.

Clause 22 – Schedule 1, section 1.55(1) and note – omits section 1.55(1) and note as a consequence of the removal of section 1.13 by clause 6 above.

Clause 23 – Schedule 1, section 1.55(2)(b) and (c) — substitutes new section 155(2) (b) and (c) to alter the height limitation on water tanks from 2.45metres to 3 metres and allows tanks to be installed in front yards provided the whole tank is buried under the ground.

Clause 24 – Schedule 1, section 1.55 (2) (e) except note — substitutes a new section 1.55 (2)(e) which is a consequence of the removal of section 1.13 by Clause 6 above and the removal of section 1.55(1) by clause 22 above.

Clause 25 – Schedule 1, section 1.56(c) – omits section 1.56(c) to remove the size limitation on ponds. This provides consistency with the exemption for swimming pools which do not have a size limitation.

Clause 26 – Schedule 1, new section 1.61 — inserts new section 1.61 in schedule 1 which provides a designated development for building or a flag pole is exempt development if:

(a) the height of the flag pole is not more than 10 metres above finished ground level; and

(b) the designated development complies with the general exemption criteria that are applicable to the development.

This clause extends the exemption already available for the installing of a flag pole on existing school sites (s1.99L) to the general community. There is minimal potential for adverse impacts from flag poles and any noise pollution from lanyards striking the flagpole is dealt with by legislation regulating noise.

Flag pole includes a lanyard, flag or other item associated with a flag pole.

Clause 27 – Schedule 1, section 1.66 – substitutes a new section 1.66 consequent upon the removal of section 1.13 by Clause 6 above.

Clause 28 – Schedule 1, sections 1.75 to 1.78 – substitutes new sections 1.75 to 1.78 to remove the reference in those sections to the general exemption criteria. These sections deal with lease variations and the types of things covered by the general exemption criteria are either considered as part of the development application process to vary the lease (controls in the Territory Plan guide decisions on multiple-occupancy for instance – s1.17) or are inappropriate (for example s1.12 – plumbing and drainage clearances).

Clause 29 – Schedule 1, section 1.85(1) — substitutes a new section 1.85(1) consequent upon the removal of section 1.13 by Clause 6 above.

Clause 30 – Schedule 1, section 1.100(1)(c)(ii) – substitutes a new section 1.100(1)(c)(ii) to include the words “(other than rule 33 and rule 66)”.

Clause 31 – Schedule 1, section 1.100(4) definition of *prescribed general exemption criteria*, paragraph (a) – omits section 1.100(4) definition of *prescribed general exemption criteria*, consequent upon the removal of section 1.13 by clause 6 above.

Clause 32 – Schedule 1, section 1.101 (1) – substitutes a new section 1.101(1) in schedule 1. Presently, the demolition of a building or structure is exempt if the building or structure, if built, would be exempt (the demolition of a single dwelling is also exempt - see section 1.100B). Clause 32 amends section 1.101(1) to expand the provision and provides that the demolition of a class 10 building or structure is exempt development as long as the building or structure is in a residential zone and it complies with section 1.14 (Criterion 4 – heritage and tree protection). This allows for the demolition of a class 10 building or structure on residential land even if the parameters of the building or structure mean that it does not meet the criteria to be “exempt development, if built”.

Clause 33 – Schedule 1, section 1.103 (1)(c) and notes — substitutes a new section 1.103(1) (c) and notes in schedule 1 providing a new DA exemption in relation to utility and communications services. Clause 33 adds to the exempt category the installation of minor infrastructure not higher than 2 metres above natural ground level.

Clause 34 – Schedule 1, new section 1.110 and new section 1.111 — inserts a new section 1.110 in the schedule providing a new exemption in relation to rebuilding damaged buildings and structures. If a building or structure was built in accordance with a development approval but it is later damaged, this exemption permits the same building or structure in accordance with the previous development approval to be built without a development application. **Damage** is defined as “...an act or event, other than an act done by the lessee of the land with the intention of causing damage.”

New section 1.111 is inserted and provides that a designated development in relation to a bore is exempt development if the development complies with the general exemption criteria that apply to the development. This DA exemption was inadvertently not included when the regulation was first made.

Diagram – showing permissible outcomes – refer clause 12, 17 & 19

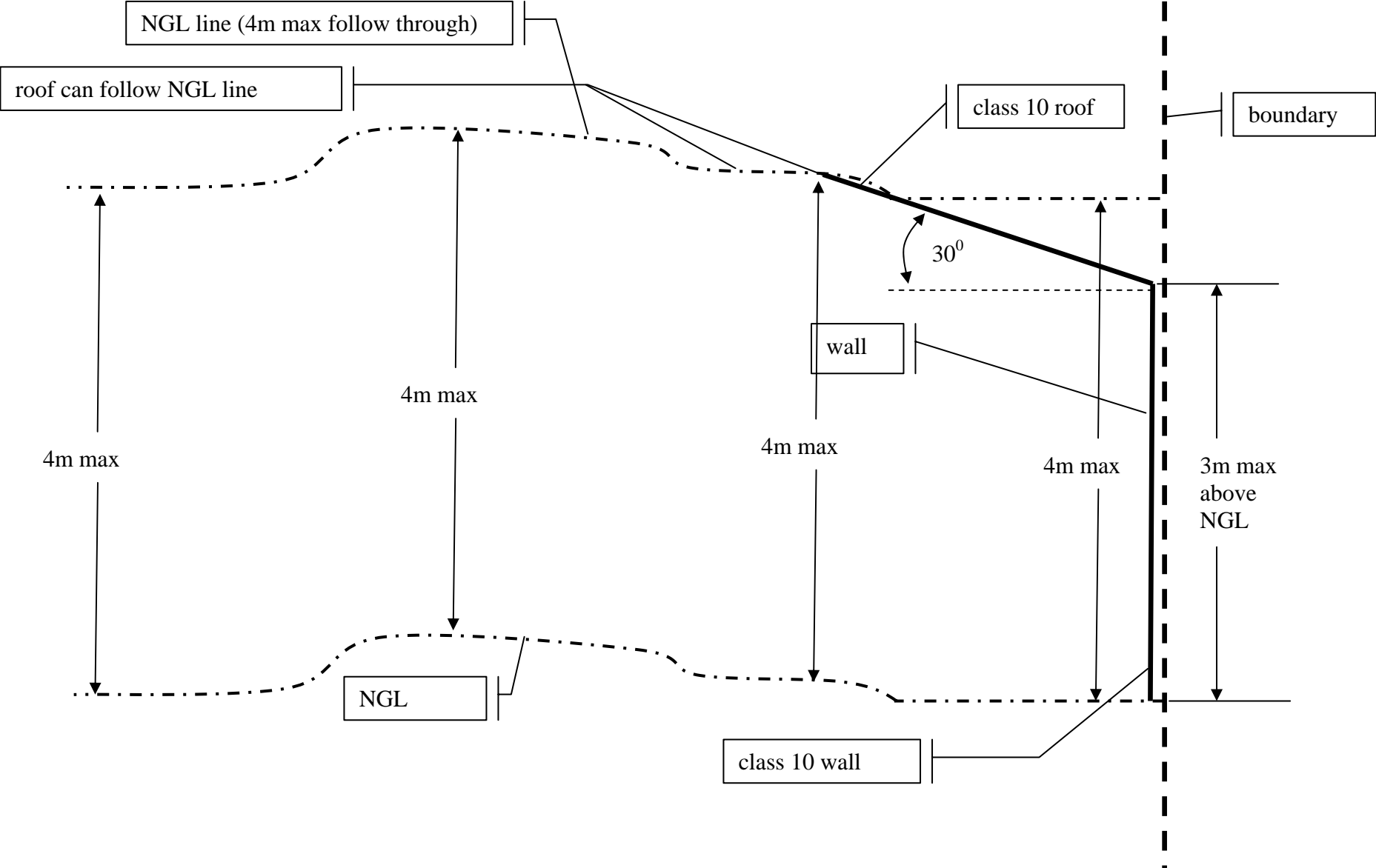


Diagram – showing NOT permissible outcome – refer clause 12, 17 & 19

