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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning and Development Amendment Regulation 2010 (No 1) SL2010–8

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Andrew Barr MLA

Planning and Development Amendment Regulation 2010 (No 1)
Explanatory Statement

This Planning and Development Amendment Regulation 2010 (No 1) (the amending regulation) amends the *Planning and Development Regulation 2008* (the regulation) under section 426 of the *Planning and Development Act 2007* (the Act).

Some of the amendments are substantive, some are consequential and others are for clarification purposes.

Clauses 31, 7, and 12 and 15 make more substantive amendments to the regulation.

Clauses 8 to 11, 13, 19, 20 and 21, 23 to 25, 27 to 30, 32 and 33 are amendments as a consequence of other amendments made by the amending regulation.

Clauses 4 to 6, 14, 16 to 18, 22, 26 and 34 clarify existing sections of the regulation.

Overview of substantive amendments

Clause 31
Clause 31 of the amending regulation amends an existing provision in Schedule 1 (s.1.90 Minor Public Works) and creates a new exemption for public art (proposed new section 1.90A).

Minor public work s.1.90
The wording around the existing criteria is clarified and the parameters of the criteria expanded (refer s.1.90, schedule 1). The expansion of the public works exemption is the result of operational experience about those sorts of public works which are done by or for the Territory and because of their more minor nature, do not require development approval. Other amendments put the public works exemption in plainer language to make the exemption more easily accessed and understood.

Public artwork s.1.90A
Artwork, by its nature, has proved difficult to assess within the normal planning processes and rules and criteria of the Territory Plan. Therefore, a new exemption has been drafted. The new exemption has strict parameters including that the artwork must be funded partly or wholly by the Territory and that TAMS (Territory and Municipal Services) has agreed to the location of the public artwork.

Clause 7
Clause 7 substitutes new sections 300 and 301 and inserts new sections 302 to 305.

It is possible to apply to the Planning and Land Authority (the authority) for a "controlled activity order" under section 350 of the Act. A controlled activity order may require someone to stop unlawful development or to comply with the conditions of a development approval, or to carry out demolition of an unlawful structure, etc (refer s358(3)). The authority may also make a controlled activity order on its own initiative under section 353 of the Act.

Sections 351(4) and 354 of the Act state that if the authority fails to decide an application for a controlled activity order or fails to issue an order by the end of the period prescribed by regulation, the application for a controlled activity order is deemed to be refused or the authority is taken to have decided not to make the order.

New sections 300 and 303 ensure consistency in the time period of deemed refusal and also extend the time period from the present 20 working days. This is because operational experience has shown the 20 working days did not give the authority sufficient time to properly consider its position.

There is presently no provision in the Act or regulation to cover the scenario where a controlled activity order is sought and the relevant activity is, or becomes, the subject of a development application for development approval. The authority should be able to await the outcome of such an application before making a decision on the controlled activity order. For example, if a development application is approved and the relevant activity is authorised by a development approval then there would be no reason to issue a controlled activity order because the activity was made lawful by the development approval. This becomes a little more complicated again when the outcome on a development application is delayed due to appeal. New sections 301-2 and 304-5 cover the various scenarios.

Clause 12

Clause 12 inserts a new subsection in criterion 1 of the general exemption criteria in schedule 1.

The existing wording of the provision (s.1.11, schedule 1) meant that a proponent could not take advantage of a relevant exemption for their development if the development would be located in an easement (because the development would not comply with one of the general exemption criteria). Operational experience, however, suggested that in a lot of cases the utility provider (ACTEW) would be supportive of the development encroaching into the easement.

The amendment allows the person who has ownership or control of an easement or proposed easement, or utility infrastructure access or protection space, to agree in writing to the location of a building or part of a building in the easement (or in the utility infrastructure access or protection space). The amendment allows a proponent to access the relevant exemption if they have the consent of the owner that the development can encroach or be in the easement.

Clause 15

Clause 15 changes the general exemption criteria in section 1.14 of schedule 1 to provide any development, other than class 10 buildings or structures (for instance, sheds, pergolas), on heritage listed property or property the subject of a heritage agreement, cannot be DA exempt.

Previously, the criteria merely stated that a development must not contravene the *Heritage Act 2004*. In practice, this relied upon building certifiers to make a determination as to whether or not the development contravened the Heritage Act. This has proved problematical. The amendment makes it clear that any development except for minor things such as a shed, clotheslines, etc cannot be DA exempt if it is on a heritage object or place. However, maintenance of a heritage object or place remains DA exempt under schedule 1, section 1.23.

Outline of Provisions

Clause 1 – Name of Regulation – states the name of the regulation, which is the *Planning and Development Amendment Regulation 2010 (No 1)*.

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

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

Clause 4 – New s110(1)(aa) – inserts new section (aa) in section 110(1) to include additional criteria for a direct sale of contiguous unleased public land that the proposed use of the land be compatible with ACT or Commonwealth government policies applicable to the proposed use.

Clause 5 – New section 122(1)(aa) – inserts new section (aa) in section 122(1) to include additional criteria for a direct sale of contiguous unleased land other than public land that the proposed use of the land be compatible with ACT or Commonwealth government policies applicable to the proposed use.

Clause 6 – Section 175(2)(b) – amends section 175(2)(b) to remove the words “(if any)”. These words cannot be included because under section 175(1), the planning and land authority (the authority) must remit all or part of a change of use charge for a variation of a lease and therefore, there must always be an amount to be remitted.

Clause 7 – Sections 300 and 301 – substitutes sections 300 and 301 of the regulation with new sections 300 to 305.

It is possible to apply to the authority for a "controlled activity order" under section 350 of the Act. A controlled activity order may require someone to stop unlawful development or to comply with the conditions of a development approval, or to carry out demolition of an unlawful structure, etc (refer s358(3)).

Section 351(4) of the Act states that if the Authority fails to decide the application for a controlled activity order by the end of the period prescribed in the regulation, the application for a controlled activity order is deemed to be refused.

The authority may also make a controlled activity order on its own initiative. The process is much the same as an application by a person under section 350(1) except:

(1) The process starts with the authority issuing a "show cause notice” (s353(2)).

(2) section 354 of the Act states that if the authority fails to decide whether to issue a controlled activity order or not by the end of the period prescribed in the regulation, the authority is deemed to have decided to not make the controlled activity order.

The amending regulation overcomes the following difficulties with the present provisions:

(1) One time period applies for the authority to decide whether to issue a controlled activity order applied for by a member of the public, that is, 20 working days from date of application (s351(4) of the Act and present s300 of the regulation) and another time period applies for the same decision when the controlled activity order is sought under the authority's own initiative, that is, 20 working days from date of issue of the show cause notice (s354(2) of the Act and present s301 of the regulation). The time permitted for decision is effectively much shorter in the former case. This inconsistency is not warranted because the nature of the decisions and the workload involved is much the same. New sections 300 and 303 extend the periods for a deemed refusal of an application for a controlled activity order and a deemed decision not to make a controlled activity order from 20 working days to 20 working days after the 10 working day period within which the lessee may give the authority written reasons.

(2) The previous period of time was not sufficient to allow the authority to complete its administrative processes and properly consider applications and representations, if any, from lessees. Show cause notices have a 10 working day response period pursuant to section 350(4)(b) and section 353(4)(a). This meant the authority only had 10 working days of the 20 working days to make a decision.

(3) There is presently no provision in the Act or regulation to cover the scenario where a controlled activity order is sought and the relevant activity is or becomes the subject of a development application for development approval. The authority should be able to await the outcome of such an application before making a decision on the controlled activity order. For instance, if a development application is approved and the relevant activity is authorised by a development approval then there would be no reason to issue a controlled activity order because the activity was made lawful by the development approval. This becomes a little more complicated again when the outcome on a development application is delayed due to appeal. Sections 301 and 302 and 304 and 305 cover the various scenarios.

Section 301 and new section 302

Sections 301 and 302 set-up the parameters for what happens with an application for a controlled activity order when the development application (relevant to the order) has either been approved (section 301) or refused (section 302).

If a development application (made after a show cause notice) is approved then the period for deemed refusal is 10 working days otherwise it is 20

working days. These amendments respond to amendments made to section 300.

New section 303
New section 303 operates in the same way as amended section 300 but deals with a *deemed decision not to make a controlled activity order* as opposed to a deemed refusal (refer section 300).

Sections 304 and 305
Sections 304 and 305 set-up the parameters for what happens with an application for a controlled activity order when the development application (relevant to the order) has either been approved (section 304) or refused (section 305).

If a development application made in relation to a controlled activity is approved, the period for deemed refusal is 10 working days, otherwise it is 20 working days. These amendments respond to new section 303 and mirror new sections 301 and 302.

Clause 8 – Section 400(1) – substitutes a new section 400(1) to remove the reference to the street furniture agreement as it is no longer needed. The street furniture agreement was previously referred to in section 1.90 of schedule 1 but amendments to section 1.90 by this amending regulation have removed any reference to the street furniture agreement from the schedule (see Clause 31).

Clause 9 – Section 400(3), definition of *street furniture agreement* – omits the definition of street furniture agreement from section 400(3) as it is no longer needed. The street furniture agreement was previously referred to in section 1.90 of schedule 1 but amendments to section 1.90 by this amending regulation have removed any reference to the street furniture agreement from the schedule (see clause 31).

Clause 10 – Schedule 1, section 1.4(2)(b) – substitutes a new section 1.4(2)(b) in schedule 1 as a consequence of the amendment to the section 1.15 heading by this amending regulation (see clause 16).

Clause 11 – Schedule 1, section 1.10(d) – substitutes a new section 1.10(d) in schedule 1 as a consequence of the amendment to the section 1.15 heading by this amending regulation (see clause 16).

Clause 12 – Schedule 1, sections 1.11(1A) and (1B) – inserts section 1.11(1A) and 1.11 (1B) in section 1.11 of schedule 1. Clause 12 inserts a new subsection in criterion 1 of the general exemption criteria in schedule 1 that allows the person who has ownership or control of an easement or proposed easement, or utility infrastructure access or protection space, to agree in writing to the location of a building or part of a building in the easement. Thus, a development on an easement (or in a utility infrastructure protection space) may not be DA exempt but may become so if the consent of the owner of the easement (or utility infrastructure protection space) is obtained.

Clause 13
Clause 13 amends the definition for utility infrastructure. This is required because of the amendments made through clause 12.

Clause 14
Clause 14 inserts a new note to guide the reader to where technical codes and rules (under the *Utilities Act 2000*) may be found.

Clause 15 – Schedule 1, new sections 1.14(2) and (3) – inserts new section 1.14(2) and (3) in section 1.14 of schedule 1. Clause 15 changes the general exemption criteria in section 1.14 of schedule 1 to provide any development, other than class 10 buildings or structures (for instance, sheds, pergolas), on heritage listed property or property the subject of a heritage agreement, cannot be DA exempt.

Previously, the criteria merely stated that a development must not contravene the *Heritage Act 2004*. Operational experience relied upon building certifiers to make a determination if a development contravened the Heritage Act and this has proved problematical. Clause 15 makes it clear that any development except for minor things such as a shed, clotheslines, etc cannot be DA exempt if it is on a heritage object or place. Clause 21 of the amending regulation makes it clear that maintenance of a heritage object or place is still DA exempt.

Clause 16 – Schedule 1, section 1.15 heading – substitutes a new heading for section 1.15 of schedule 1 which removes the word “other”. This is to clarify that lease and development approvals are not related which was implied by the use of the word “other” in the heading.

Clause 17 – Schedule 1, section 1.15(1)(a) – substitutes a new section 1.15(1)(a) in schedule 1 for clarification purposes. The new subsection makes it clear that a development must not be inconsistent with a condition of a development approval for any development on the block including the relevant development.

Clause 18 – Schedule 1, section 1.23 (except heading) – omits everything before paragraph (a) in schedule 1, section 1.23 except the heading and substitutes the words “A designated development (other than a development to which section 1.22 applies) for the maintenance of a building or structure

if-“. The amendment clarifies that the section does not apply to development to which section 1.22 applies. For instance, clause 18 clarifies that painting the exterior of a building to change its appearance is covered by section 1.22 and painting the exterior for purely maintenance reasons is covered by section 1.23.

Clause 19 – Schedule 1, section 1.23(a), example 2 – omits example 2 from section 1.23(a) of schedule 1 because example 2 refers to roof tiles which is "roofing" which is covered by schedule 1, s1.22 (1) (d) and s1.22 (2) (ii) as a result of the amendment to section 1.23 by this amending regulation (see clause 18).

Clause 20 – Schedule 1, section 1.23(a), note 1 – omits the words “or roofs” from Note 1 of section 1.23(a) of schedule 1 because "roofing" is covered by schedule 1, s1.22 (1) (d) and s1.22 (2) (ii) as a result of the amendment to section 1.23 by this amending regulation (see clause 18).

Clause 21 – Schedule 1, section 1.23(b) – inserts the words “, other than section 1.14 (2) (Criterion 4 – heritage and tree protection)” after the word “criteria”. Clause 15 of this amending regulation ensures any development except for minor things such as a shed, clotheslines, etc cannot be DA exempt if it is on a heritage object or place. The amendment to section 1.23(b) ensures maintenance of a heritage object or place is still DA exempt as long as the maintenance does not involve changing the kind of material used for the part of the building or structure to which the maintenance relates.

Clause 22 – Schedule 1, section 1.30(1)(b) – inserts the words “across the road verge” after the words “2 driveways” in section 1.30(1)(b) for clarification purposes.

Clause 23 – Section 1.55(d) – omits section 1.55(d) from schedule 1 because s1.55 is relocated to subdivision 1.3.2.4 and renumbered s1.62 by this amending regulation (see clause 26) because water tanks are not a class 10 building or structure. For similar reasons, the criteria in s1.55 (d) is not applicable and can be omitted.

Clause 24 – Schedule 1, section 1.57 (1)(d) – omits section 1.57(1)(d) from schedule 1 because s1.57 is relocated to subdivision 1.3.2.4 and renumbered s1.64 by this amending regulation (see clause 26) because animal enclosures are not a class 10 building or structure. For similar reasons, the criteria in s1.57 (1) (d) is not applicable and can be omitted.

Clause 25 – Schedule 1, section 1.58(1)(d) – omits section 1.58(1)(d) from schedule 1 because s1.58 is relocated to subdivision 1.3.2.4 and renumbered as s1.64A by this amending regulation (see clause 26) because clotheslines are not a class 10 building or structure. For similar reasons, the criteria in s1.58(1)(d) is not applicable and can be omitted.

Clause 26 – Schedule 1, sections 1.55 to 1.58 (as amended) – relocates sections 1.55 to 1.58 (as amended by this amending regulation - see clauses

23 -25) from **Subdivision 1.3.2.3 Class 10b structures** to a new **Subdivision 1.3.2.4** for clarity reasons and renumbers them as sections 1.62 to 1.64A. The sections are relocated because water tanks (s1.55), external ponds (s1.56), animal enclosures (s.1.57) and clotheslines (s1.58) are not class 10b structures and are more appropriately placed in their own subdivision entitled **Other Structures**.

Clause 27 – Schedule 1, new subdivision 1.3.2.4 heading – inserts the heading **Other structures** in the new subdivision 1.3.2.4 which is created by this amending regulation (see clause 26).

Clause 28 – Schedule 1, section 1.65 – substitutes a new section 1.65 in schedule 1 to change the reference to minor public works to public works. This is because section 1.90 is amended by this amending regulation to apply to public works and not just minor public works (see Clause 31).

Clause 29 – Schedule 1, section 1.77 – omits section 1.77 from schedule 1 because these types of matters are dealt with under new section 1.112 inserted by this amending regulation (see Clause 34). The omission of s1.77 and the insertion of s1.112 clarifies that subdivisions under the *Unit Titles Act 2001* are not a lease variation.

Clause 30 – Schedule 1, section 1.78 – omits everything before paragraph (a) and substitutes new words as a result of the omission of section 1.77 by this amending regulation (see Clause 29).

Clause 31 – Schedule 1, section 1.90 – substitutes a new section 1.90 which expands and clarifies the exemption for public works. It is no longer limited to minor public works and the new section provides a better guide as to what public works are covered by the exemption.

A designated development for public works carried out by or for the Territory is exempt development if the development does not require an environmental authorisation or environmental protection agreement under the *Environment Protection Act 1997* and the designated development complies with the general exemption criteria that are applicable to the development. Designated development is defined in section 1.2 of schedule 1 and Part 1.2 of schedule 1 sets out the general exemption criteria.

Subsection 1.90(2) provides meanings for terms used in the section including ancillary sporting structure, bicycle parking facility, landscaping, playing field and public works.

Public works means:

(a) Installation or maintenance of street and park furniture (that is, the conventional equipment of urban streets and parks); ancillary sporting structures (eg goal posts, fencing) on or beside playing fields; water tanks; and temporary structures for an event (eg marquee, portable toilet, stage, tent)

(b) Construction or maintenance of a footpath, bicycle path, bicycle parking facility, walking track or other pedestrian area
(c) Maintenance of a road, car park, stormwater drainage and flood mitigation structure, and water quality treatment device
(d) Temporary flood measures
(e) Bushland regeneration, landscaping, gardening, tree planting, tree maintenance, tree removal or fire fuel reduction, construction or maintenance of a fire trail.

Clause 31 also inserts a new section 1.90A in schedule 1 which provides an exemption from development approval for public art works that meet the criteria set out in the section. Subsection 1.90A (3) states that ***public artwork*** means an artwork to be displayed in a place open to and accessible by the public (for example, sculpture, statue, structure, painting).

Designated development for the installation of a public art work is exempt from development approval if:
(a) the development is funded completely or partly by the Territory
(b) the public artwork will be located on territory land or land occupied by the Territory
(c) the chief executive of the administrative unit responsible for municipal services (presently Territory and Municipal Services) has agreed, in writing, to the location of the public artwork
(d) the artwork is not more than 6 metres in height unless it is on an arterial road in which case the height limit is 12 metres
(e) the development does not require an environmental authorisation or environmental protection agreement under the *Environment Protection Act 1997*
(f) the public artwork is not a habitable structure
(g) the designated development complies with the general exemption criteria, other than section 1.17 (Criterion 7 – no multiple occupancy dwellings) that are applicable to the development

Clause 32 – Schedule 1, section 1.91 – omits section 1.91 of schedule 1 as a consequence of the amendments to s1.90 by this amending regulation (see clause 31). The exemption in section 1.91 is covered by the new section 1.90.

Clause 33 – Schedule 1, section 1.99M, note – substitutes a new note in section 1.99M of schedule 1 as a consequence of an amendment to s1.55 by this amending regulation (see Clause 26 which changes the number of section 1.55 to s1.62).

Clause 34 – Schedule 1, new section 1.112 – inserts a new section 1.112 in schedule 1 for clarity reasons. Subdividing land under the *Unit Titles Act 2001* was previously dealt with in s1.77 of Division 1.3.4 of schedule 1. This Division is concerned with lease variations which are exempt development. Subdivisions under the Unit Titles Act are not a lease variation. Clause 34 moves the exemption to a more appropriate place in schedule 1 and clarifies that the exemption applies to the subdivision of land under a unit title application under the Unit Titles Act.