2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2012 (NO 5)

SL2012-42

EXPLANATORY STATEMENT

Presented by
Mr Simon Corbell MLA
Minister for the Environment and Sustainable Development

EXPLANATORY STATEMENT

This explanatory statement relates to the Planning and Development Amendment Regulation 2012 (No 5) (the amending regulation) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the regulation and to help inform debate on it. It does not form part of the regulation and has not been endorsed by the Assembly.

The Statement is to be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of the provision, this being a task for the courts.

Terms Used

The following terms are used in this statement:

"the Act"	refers to the *Planning and Development Act 2007;*
"the Regulation"	refers to the *Planning and Development Regulation 2008;*
"amending regulation"	refers to the Planning and Development Amendment Regulation (No 5);
"section 1.110" (s1.110)	refers to section 1.110 of Schedule 1 of the Planning and Development Regulation 2008;
"section X..."	is a reference to a section in the Act unless otherwise indicated; and
"DA exempt"	means exempt from the need to obtain development approval under the Act.

Background to the development approval process

Development, as defined under section 7 of the Act, requires a development approval from the planning and land authority unless exempt under schedule 1 of the Regulation. A development approval is obtained by lodging a development application to the planning and land authority. Under Part 7.2 of the Act development applications are split up into three different assessment tracks: Code, Merit and Impact. The majority of applications fall into the Merit track and are assessed primarily against the provisions of sections 119 to 122 of the Act and *Territory Plan 2008.*

A development application requires: plans to be submitted to the planning and land authority, public notification of the application (under s152 of the Act) and referrals and comments from relevant agencies (under s148). In some instances, decisions on merit track applications are subject to third party ACAT review. A merit track development application must be decided within 30 to 45 working days from lodgement and fees must be paid. The planning and land authority must undertake an assessment of an application prior to making a decision on an application.

A decision under section 162 of the Act may be either approved (in which it is deemed not inconsistent with planning policy and legislation), approved with conditions (in which it is deemed not inconsistent with planning policy and legislation subject to the conditions being satisfied) or refused (deemed inconsistent with the planning policy and legislation).

The assessment of a development application must be made against the requirements of the Territory Plan, the Act and Regulation. In particular, the decision-maker must take into consideration section 120 of the Act which includes considerations regarding the environmental impact of the development under section 120(f).

Under section 121 of the Act, all development applications in the merit track must be notified to the public in accordance with division 7.3.4 of the Act. Comments received during the prescribed notification period are taken into consideration by the decision maker prior to a decision being made.

In some cases, development applications must be referred to relevant agencies for comment. Under section 120(d) of the Act, the planning and land authority must consider these comments when making a decision on a development application. Decisions to grant approval are subject to third party ACAT merit review under chapter 13 of the Act unless exempted by regulation (Schedule 1 of the Act). Third party ACAT review gives rights of appeal to members of the public who have made a representation during the notification period.

Background to section 1.110 of schedule 1 of the Regulation

In 2009, the *Planning and Development Regulation 2008* (the Regulation) was amended by the *Planning and Development Amendment Regulation 2009 (No 11)* to incorporate new section 1.110 in schedule 1 of the Regulation to allow the rebuilding of any building or structure that was damaged in an act or event (i.e. natural disaster) without the need for a development approval.

Section 1.110 broadened the policy under chapter 9 of the Regulation which related to rebuilding predominantly residential dwellings after the 2003 Canberra bush fires. Section 1.110 permits rebuilding in different zones i.e. commercial, industrial, non urban etc as well as residential while including provisions to cover a variety of future disasters that may occur.

Both section 1.110 and chapter 9 permitted lessees, who had lost their dwellings or businesses, to rebuild without the cost and delay off the development approval process. Both s1.110 and chapter 9 were seen as positive planning policies as they allow the rebuilding of a damaged building that would, after all, still be standing and operating but for a damaging event.

Section 1.110 currently sets out a number of requirements that need to be met in order to demolish and rebuild a damaged building or structure. If the rebuilding is

undertaken in accordance with the requirements set out in s1.110, an applicant does not require a development application to rebuild.

The requirements are set out in subsection 1.110(1) as follows:

- the original building must have been previously approved ((ss(1)(a));
- the new building must be no higher than the damaged building ((ss(1)(b)(i));
- the new building must have no more than 15% gross floor area than previously approved ((1)(b)(i));
- the new building must not increase the number of dwellings greater than what had previously been approved ((1)(b)(iii)); and
- setbacks of the new building must not be less than previously approved or is stated in Part 3.2 of the Territory Plan ((1)(b)(iv).

Section 1.110 (1)(c) of the Regulation requires the lessee to inform the planning and land authority of:

- when rebuilding and development on the site will commence ((1)(c)(i));
- a plan of what will be developed on the site ((1)(c)(ii)); and
- a statement by a certifier shown on the plan that the design will not result in conflict with any matter mentioned under subsection (1)(b) ((1)(c)(iii))

Section 1.110 (1)(d) of the Regulation requires the certifier to notify the planning and land authority at the time of completion of the development that it has been constructed in accordance with the plan presented at subsection (1)(c).

Section 1.110 (2) of the Regulation defines a number of terms which are used in the section. Damage is particularly relevant as it is defined under s1.110 as:

> *"...in relation to a building or structure, means damage caused by an act or event, other than an act done by the lessee of the land with the intention of causing the damage"*

If all the requirements under s1.110 are met, the works are exempt from requiring a development approval. If you do not meet all of the requirements, a development application is required for rebuilding a damaged building or structure.

Section 1.110 of the Regulation currently applies to all zones under the Territory Plan.

Overview of amending Regulation

The issue

The rebuild exemption exempts rebuilding of damaged buildings from the need to obtain development approval. The rebuild exemption applies throughout the ACT in all Territory Plan zones.

Specifically the rebuild exemption allows lessees whose buildings are damaged by an act or event (eg an electrical fire, vandalism) to rebuild the damaged building without the need to obtain development approval. The exemption is subject to conditions. In particular, the original building must have been approved by a

development approval and the new building must not be higher than the previous building, contravene setbacks required in the original development approval

The rebuild exemption allows, for example, the rebuilding of a fire damaged single dwelling in a residential zone as well as the rebuilding of a flood damaged property in an industrial area.

The rebuild exemption was acceptable on the basis that the exemption merely permits a damaged building to be replaced with a similar building ie nothing new is being done and as such there are few, if any, impacts on neighbours or the wider community.

The above conclusion holds for most zones such as residential zones. However there is an issue as to whether this conclusion holds for industrial areas because of the nature of buildings and uses in these zones. Activities in industrial areas may include liquid fuel depots, hazardous waste facilities, machinery workshops and warehouses handling different chemicals. There is the risk or perceived risk that such operations might generate off-site disruption to residences and businesses in the event of an unexpected fire or other event.

There was considerable community concern following the 2011 Mitchell chemical fire and the April 2011 fire at the Just Rite Insulation building at Fyshwick. This concern has indicated a need to re-assess the scope of the DA exemption from development approval of rebuilds in industrial areas.

In response to the Mitchell fire, the Minister required a review of the planning framework applying in industrial areas. This review was recently conducted by Lloyd's Register consultants. The review recommended a number of changes to the existing regulatory framework including changes to planning legislation, the Territory Plan and agency referral processes. The amending regulation is not the subject of a specific finding or recommendation in the review. However, the regulation is consistent with the review's emphasis on the need to ensure that there are no significant regulatory gaps and for processes and standards to be up to date.

The rebuild exemption means that rebuilding of damaged buildings in an industrial area can take place without having to undertake development assessment and so without having to consider such changed circumstances. This is a particular issue for industrial areas given the nature and variety of uses that can occur in these areas. In contrast rebuilds in residential or other non-industrial zones are relatively unlikely to have any greater impact on the environment than when originally assessed and built.

The rebuild exemption prevents assessment of the rebuild against current policies (the current Territory Plan and related policies) and current planning and environmental circumstances. Current policies and circumstances may differ significantly from those applying at the time the original building was assessed and built. The original building that is to be replaced as a result of damage may, for example, have been approved:

- more than a decade ago at a time when there was less attention to environmental impacts in relevant planning laws;
- when the nature and intensity of surrounding local uses differed markedly from the situation on the ground today; or
- when surrounding local areas were unpopulated or otherwise zoned non-residential in contrast to the situation applying today.

The objective
The objective is to address the following scenario. For example, the rebuild may be of a chemical warehouse facility that was acceptable at the time of original construction. The rebuild of the facility may possibly be no longer acceptable because of changes as a result of the passage of time. The facility may be contrary to the current Territory Plan because of the risks or perceived risks that such a facility presents to nearby residents. Nearby residents may be concerned that the facility may result in pollution or other impacts if the facility were to be damaged by an emergency event. Alternatively, the rebuild of the facility may be acceptable as consistent with the Territory Plan and other Government policies provided the rebuild met certain conditions.

The amending regulation is to ensure that all significant development proposals in industrial areas are fully assessed under the planning system in accordance with contemporary laws and standards and best practice assessment methodologies. This is to ensure that such developments do not result in environmental, social, or planning outcomes that are contrary to the Territory Plan or relevant current environmental standards, policies that must be considered under the Act. The objective is also to permit comments from the local community during the public notification process as well as comments from government agencies such as the Environment Protection Authority during the agency referral process.

The importance of assessing these rebuilding applications is that the majority of uses which potentially could have significant impacts on their surroundings are located in the industrial areas (IZ1 General Industrial, IZ2 Mixed Use Industrial and the Harman Industrial Area, in NUZ1 Non Urban Zone 1 Broadacre Zone). An example of a permissible use in an industrial area is: hazardous industry or liquid fuel depot. By requiring a development application it will also provide a greater opportunity for public comment on the proposed development.

The objective in particular, is to ensure that such proposals are fully assessed against the:
- objects and related requirements of the *Planning and Development Act 2007* and Regulation;
- current Territory Plan;
- current environmental standards and policies; and
- current planning, social and environmental circumstances

A recent review of the ACT planning framework, *Review of the location of hazardous industries* 2012 has been completed by Lloyd's Register consultants. The review consisted of a study of existing planning and environment policies and regulations as they relate to the location of hazardous industries in relative close proximity to

residential developments. The review recommended a number of changes to the existing regulatory framework including changes to planning legislation, the Territory Plan and agency referral processes. The proposed amendment is not the subject of a specific finding or recommendation in the review. However, the regulation is consistent with the review's emphasis on the need to ensure that there are no significant regulatory gaps and for applicable processes and standards to be up to date. The Government's response to the review could, for example, include variations to the Territory Plan or changes to relevant environmental safety standards to be considered by referral agencies. Were this to be the case, the proposed regulation will ensure that any such changes apply to rebuilds of damaged buildings.

The proposed amending regulation

The amending regulation inserts a new subsection 1.110 (1A) into the Regulation which states that the section does not apply to the following zones identified in the Territory Plan:

(a) IZ1 General Industrial Zone;
(b) IZ2 Mixed Use Industrial Zone; and
(c) Harman Industrial Area, in NUZ1 Non Urban Zone 1 Broadacre Zone, as indicated in the map.

The amendment means that s1.110 does not apply to rebuilding a damaged building or structure in an industrial area. All other requirements of s1.110 remain the same and the section still applies to all other zones in the Territory Plan. This means that rebuilding a damaged building or structure in an industrial area will require development approval.

The amending regulation ensures that rebuilds of buildings damaged by fire or other event in industrial areas will require application for development approval. Such applications are assessable in the merit or impact assessment tracks depending on the nature of the development. Matters that are required to be assessed in the impact track are identified in Schedule 4 to the Act and the relevant development table in the Territory Plan. For example, a hazardous waste facility will require impact track assessment as it is identified in schedule 4 to the Act.

The application of the development approval process will require rebuilds in industrial areas to be subject to a number of steps such as:

- assessment against the Territory Plan and Planning and Development Act and Regulations (section 120);
- public notification of the proposal (section 121);
- agency referral, in which relevant agencies (i.e. Environment Protection Authority) can make comment (section 148); and
- be subject to third party ACAT merit review (s407, 408 unless exempt under the Regulation).

Possible impacts on existing rights

The numbers likely to be impacted on by this change are relatively few. While relevant approvals and records do not explicitly capture instances of DA exempt rebuilds, indirect, approximate measures are as follows. In the period 1 July 2008 to

17 February 2012 in industrial areas there were 13 projects subject to building approval that had a demolition or removal component. This suggests there were 13 or fewer projects in this period that involved rebuilds, as rebuilds will typically be associated with or follow on from demolition or removal. Of these 13 projects ten involved development approvals for new building work, ie building work that was not DA exempt because it involved more than the rebuilding of the original structure. This suggests that of these 13 projects from 2008 to 2012 only the remaining three projects were possibly associated with or might be associated with in future DA exempt rebuilds. This number is small compared to the total number of development approvals (326) and building approvals (1684) in industrial areas for the same period. The numbers in this analysis are approximate only, given that they rely on manually recorded information and free text descriptions supplied from a large number of people over a considerable period.

While the amending regulation is an added requirement for lessees seeking to rebuild damaged buildings in industrial areas, it is not one that unduly trespasses on existing rights. This is because the amending regulation:

a. does not of itself prevent the rebuilding of damaged buildings from proceeding it only requires that it be subject to the development assessment process;
b. is justified on the basis that rebuilds in industrial areas are significant developments which need to be assessed through the development application and approval process;
c. require development approval but will also permit the proponent to seek review of the development approval decision by internal reconsideration by the planning and land authority and/or application to ACAT for merit review;
d. does not impose an unusual or unprecedented process. On the contrary, it simply returns these rebuild development proposals to the default position of the existing law. The default position is that all development requires development approval subject to an exemption regulation; and
e. does not have retrospective effect. Any development that is commenced under the existing exemption provision in s1.110 of schedule 1 of the Regulation will be able to be completed without development approval (refer below).

The amending regulation also does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The amendment does the opposite, that is, it makes the rebuilds of damaged buildings in an industrial area subject to a development assessment decision which decision is subject to review by the planning and land authority through internal reconsideration and, subject to exemptions in the Regulation, by application to ACAT for merit review. Subject to exemptions in the Regulation, ACAT merit review is available for both the proponent and third parties.

The amending regulation does not contain matter that might be considered to be more properly dealt with in an Act. The ability to make and amend regulations

exempting development proposals from the need to obtain development approval is explicitly provided for in the Act. As noted above this amendment returns the rebuild development proposals to the default position of the Act which is that all development requires development approval.

The amending regulation will not have retrospective effect. Any development commenced under the existing exemption provision in s1.110 of schedule 1 of the Regulation prior to this amendment will remain exempt from development approval and so will be able to be completed without the need to obtain development approval. This is the effect of section 203 of the Act. This position is also consistent with s76 of the Legislation Act that prohibits statutory instruments from having retrospective effect that would be to anyone's disadvantage.

The amending regulation will not affect the operation of leases. Uses authorised by existing leases will remain authorised. In accordance with section 36 of the *Legislation Act 2001,* a Regulatory Impact Statement (RIS) for the amending regulation has been prepared.

Outline of Provisions

Clause 1 Name of regulation

Clause 1 names the amending regulation as the Planning and Development Amendment Regulation 2012 (No 5).

Clause 2 Commencement

Clause 2 states the amending regulation commences on the day after its notification day.

Clause 3 Legislation amended

Clause 3 notes that this amending regulation amends the *Planning and Development Regulation 2008.*

Clause 4 Schedule 1, new subsection 1.110 (1A)

Clause 4 inserts a new subsection 1.110 (1A) into Schedule 1 of the Regulation.

New subsection 1.110 (1A) states that section 1.110 does not apply in the following zones in the Territory Plan:

- IZ1 General Industrial;
- IZ2 Mixed Use Industrial; and
- Harman Industrial Area, in NUZ1 Non Urban Zone 1 Broadacre Zone, as indicated in the map

These are all of the industrial areas in the Territory Plan.

This means that the action of rebuilding a damaged building in an industrial area will require a development approval.

Section 1.110 continues to operate as it presently does for all other zones. No other requirements under s1.110 have been changed.