2013

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT REGULATION 2013 (No 1)

Subordinate law 2013-30

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 2013* (No 1) (the amending regulation) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the amending regulation and to help inform debate on it. It does not form part of the amending regulation and has not been endorsed by the Assembly.

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

Terms used

The following terms are used in this explanatory statement:

"Act"	means the *Planning and Development Act 2007*;
"regulation"	means the *Planning and Development Regulation 2008;*
"duplex"	means two single dwellings on 2 separate leases that are attached by a common or "party" wall
"DA exempt"	means exempt from obtaining development approval
"ACAT"	means the ACT Civil and Administrative Tribunal

Background

The availability of development approval (DA) exemptions was included in the Act to cut red tape and achieve the aim of a faster, simpler, more transparent planning system. Exemptions achieved this aim by allowing straightforward developments to be exempt from requiring a DA. Under section 133 and 135 of the Act, the regulation may prescribe those things that do not require development approval (refer section 20, schedule 1 and 1A).

A DA exemption for the demolition of a single dwelling or part thereof, and the rebuild and alteration of a single dwelling is provided, respectively, by section 1.100B and 1.100 of the regulation. These exemptions apply throughout the ACT in all Territory Plan zones and apply to duplexes.

The types of development prescribed in schedule 1 of the regulation include such things as single dwellings on residential land and small structures such as sheds, garages and pergolas. At the time of the commencement of the Act, the exemption of single dwellings from development approval applied to new estate areas only ie only in newly developed land. After the operation of this limited exemption for a period, the exemption was extended beyond newly developed land to all residential areas. This extension was made in April 2009 under the *Planning and Development Amendment Regulation 2009* (No 5), SL 2009-15 and has been operating in all residential areas since.

In the majority, the range of things prescribed in schedule 1 has now been successfully used within the community since the Act's inception in 2007. During this time, the planning and land authority (the authority) has been monitoring the performance of the exempt development process. Whilst there has generally been no significant issues identified, there has been community concerns about the demolition and alteration of duplexes. This is because of the unique characteristics of duplexes as compared to other single dwellings. For instance, there is a party wall involved, and closely located neighbours whose home is directly affected as well as streetscape issues. One recent example is the demolition of one half of a duplex in Yarralumla that left a party wall exposed and the other half of the duplex as a stand-alone structure without recourse being available to the adjoining duplex owner and other people living in the street whose streetscape was affected.

These community concerns indicated a need to re-assess the scope of the DA exemption from development approval for the demolition, rebuild and alteration of single dwellings as they relate to duplexes.

In 2012, the regulation was amended to include section 1.19 in schedule 1. Section 1.19 applies to sections 1.100, 1.100A and 1.100B and requires the proponent of a development proposal to take reasonable steps to give written information about the proposal to the occupier of an adjoining dwelling. Requirements for physical signs to go up on the property in relation to alterations and demolition of DA exempt single dwellings were also included in the *Building Act 2004* ((refer ss37A ad 37B of Building Act and s30B of the Building regulation and *Planning and Building Legislation Amendment Act 2011* (No 2) in A2011-54 http://www.legislation.act.gov.au/b/db_43470/default.asp).

These amendments provided for better informing of neighbours about proposed developments, and therefore, improved accountability and protection. However, it is considered that they did not go far enough in the case of duplexes because of their unique character ie the interdependence of the two residences in the duplex. The proposed requirement to undertake a development application takes this process a step further in that it gives the community the opportunity to comment on the proposed development and requires the authority to consider the comments in deciding the development application. It is considered that this extra protection is necessary in the case of duplexes.

Overview

The amending regulation amends the demolition exemption (s1.100B) by removing its application to the demolition of duplexes. It also amends the general rebuilding and alteration exemption in section 1.100 of the regulation by removing its application to duplexes. The objective of the amending regulation is to ensure that significant duplex demolition rebuild and alteration development proposals are fully assessed under the planning development system. This is to make sure that such developments do not result in environmental, social, or planning outcomes that are contrary to the Territory Plan or relevant Government policy and also to ensure that the community has an opportunity to comment on all such proposals.

The amending regulation will require the demolition, rebuild and alteration of dwellings consisting of a duplex to be approved by a development approval granted under the Act before it can proceed. This will ensure that the proposal is subject to the development application and assessment process. The proposal will be assessed by the planning and land authority against the current Territory Plan and the environmental and other factors for consideration required to be assessed under sections 119, 120, 128, 129 and related sections of the Act (merit track assessment). This will include for example, assessment against the objectives of the zone identified in the Territory Plan, the relevant code rules and criteria in the Territory Plan, the general suitability of the land and the impact of the development on the environment. This assessment will require consideration of the current local environmental and built environment circumstances in the context of the Territory Plan.

The required development applications for approval will be publicly notified and open to public comment. The assessment of the applications will take account of the public comments. The applications will also need to be referred to relevant government referral agencies such as the Environment Protection Authority for review. The decision on such applications will also be subject to applicant ACAT merit review (subject to any exemptions from review in the regulation) as well as Supreme Court proceedings.

The amendments will therefore, ensure that such demolitions, rebuilds and alterations are fully assessed against current laws and standards taking into account current circumstances. They will also ensure that there is opportunity for public comment and appropriate review of decisions.

The amending regulation will also ensure that conditions relating to the carrying out of the demolition, rebuild or alteration can be imposed. For instance, removal of one side of a dwelling may have visual, dust and other structural impacts on an adjoining dwelling. The requirement to obtain development approval will enable the authority to set conditions, if necessary, to maintain the amenity and integrity of the adjoining dwelling. For example, a condition can be placed on the approval of the DA that the roof space of the adjoining dwelling be repaired and fully enclosed within 3 months of the demolition.

The removal of the exemptions will result in the following:

Demolition, rebuild and alteration of duplexes will require application for development approval. Such applications will be assessable in the merit assessment track. Development application, assessment and approval processes will then apply to the development and this will involve:

- lodgement of development application;
- public notification of development application;
- referral of development application to government referral agencies;
- assessment of the development application by the planning and land authority:
    - against the Territory Plan including relevant zone objectives

    - of the suitability of the land;
    - of the potential environmental impacts as required under s120 of the Act including the nature, extent and significance of probable environmental impacts (including natural and built environmental impacts and the cultural and social dimensions of such impacts – refer to the definition of "Environment" in the dictionary to the Act); and
    - taking into account public comments and views of referral agencies;
- decision on development application (to grant the development approval, grant the approval with conditions or refuse the approval); and
- ACAT merit review (unless the matter is exempted from merit review by the regulation).

Section 350 and item 3 of Part 3.2 of Schedule 3 of the *Planning and Development Regulation 2008* exempts building, alteration or demolition of a single dwelling from third party ACAT review. The third party review exemption is only available if the development would not result in more than 1 dwelling being on a block. It is appropriate for this exemption from third party review to remain in place given the limited scope and limited potential impacts of such matters. This exemption has been in operation since the commencement of the *Planning and Development Act 2007* in March 2008. This includes the period from March 2008 to April 2009 when new single dwellings outside of new estate areas required development approval ie were not exempt from the development assessment process. It is relevant that this exemption from third party review has not resulted in extensive community concerns since its inception in 2008. The proposed application of the development assessment process to duplexes is sufficient to address community concerns in relation to duplexes without having to change the present position on third party ACAT review.

The proposed amendments of the regulation are consistent with the Legislative Assembly's Scrutiny of Bill's Committee Terms of Reference. In particular, the amendments:

(a) are in accord with the general objects of the Act under which they are made. The requirement that duplex demolitions and alterations be subject to the development application and assessment process is consistent with the objects of the Act as stated in section 6 of the Act;

(b) do not unduly trespass on rights previously established by law. The amendments will require certain development proposals that can currently proceed without a development application to go through the development application and assessment process. While this is an added requirement for lessees seeking to demolish or alter a duplex, it is not one that unduly trespasses on existing rights. This is because the amending regulation:

a. does not of itself prevent the demolition or alteration from proceeding, it only requires that it be subject to the development assessment process;

b. is justified on the basis that the demolition and alteration of a duplex can have significant impact on the adjoining duplex which needs to be assessed through the development application and approval process;

c. requires 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 duplex 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 s1.100B of schedule 1 of the regulation will be able to be completed without development approval (refer below).

Furthermore, owners of duplexes will still be able to access other DA exemptions provided by schedule 1 of the regulation. For instance, exemptions for:

1. Internal alterations of buildings (s1.20)
2. Installation, alteration and removal of low and high impact external doors and windows (s1.21 and 1.21A)
3. Exterior refinishing of buildings and structures (s1.22)
4. Maintenance of buildings (s1.23)
5. Roof slope changes not more than 2 degrees (s1.24)
6. Installation of a chimney, flue or vent, skylight, external shades, external heaters and coolers, solar panels, switchboards, external area lighting, driveways (s1.25 – 1.30)
7. Non habitable buildings and structures and class 10a buildings and class 10b structures, and other structures such as water tanks, ponds, animal enclosures, clothes lines (div 1.3.2)
8. Installation of utility services and vehicle charging points (ss1.103,1.113)
9. Landscape gardening (s1.104)
10. Conduct of home businesses (s1.108)
11. Rebuilding damaged buildings (s1.110).

In addition, the amending regulation does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The amendments do the opposite, that is, they make the demolition and alteration of a duplex subject to a development assessment decision. The decision is able to be reviewed by internal reconsideration by the planning and land authority and, subject to exemptions in the regulation, by ACAT in an application for merit review.

The amending regulation also 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, the amending regulation returns duplex demolition proposals to the default position of the Act which is that all development requires development approval.

It is considered that the amending regulation strikes the right balance between the rights of owners to demolish or make alterations to their duplex homes and the rights of the adjoining owner of the duplex (and other home owners in the street) to be informed about alterations and to have such alterations assessed by the authority to ensure the physical and visual amenity of their half of the duplex is maintained. This has flow-on benefits to the community as a whole in that it ensures development occurs in an appropriate and orderly manner with proper consideration being given to the issues including environmental that can be affected by development.

Regulatory Impact Statement

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 regulation as the *Planning and Development Amendment Regulation 2013 (No 1)*.

Clause 2 Commencement

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

Clause 3 Legislation amended

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

Clause 4 Schedule 1, section 1.1, new definition of *party wall*

Clause 5 inserts a new definition of ***party wall*** in schedule 1. This is a consequence of the amendments made by clauses 5 and 6 below.

Clause 5 Schedule 1, section 1.100 (3)

Clause 5 inserts in section 1.100 (3) that the term ***single dwelling*** when used in section 1.100 does not include a dwelling that has a party wall. This effectively excludes dwellings with a party wall, more commonly known as duplexes, from the DA exemption to rebuild or alter a single dwelling provided by section 1.100.

Clause 6 Schedule 1, new section 1.100B (2)

Clause 6 Inserts a new subsection (2) in section 1.100B that states that the term ***single dwelling*** when used in section 1.100B does not include a dwelling that has a party wall. This effectively excludes dwellings with a party wall, more commonly known as duplexes, from the DA exemption to demolish a single dwelling provided by section 1.100.

Clause 7 Dictionary, new definition of *party wall*

Clause 7 inserts the new definition of ***party wall*** in the Dictionary. This is a consequence of the amendments made by clauses 4, 5 and 6 above.