Regulatory Impact Statement

Planning and Development Amendment Regulation 2013 (No.1)

Subordinate Law 2013-30

Prepared in accordance with the *Legislation Act 2001*, section 34

Circulated by authority of

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This Regulatory Impact Statement relates to substantive elements of the *Planning and Development Amendment Regulation 2013 (No.1)* (the proposed law). The proposed law amends the *Planning and Development Regulation 2008*.

Terms used

The following terms are used in this regulatory impact 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

Executive Summary

Schedule 1, section 1.100B *Single dwellings- demolition* of the regulation allows lessees to demolition a single dwelling or part of a single dwelling without the need to obtain development approval as long as it does not contravene heritage and tree protection legislation. The exemption operates throughout the ACT in all Territory Plan zones. Section 1.100B was intended to facilitate the demolition of single dwellings by removing the cost and delay associated with obtaining development approvals.

The proposed law amends the demolition exemption by removing its application to the demolition of duplexes. It also amends the re-building and alteration DA exemption in section 1.100 of the regulation by removing its application to duplexes.

The amendments will mean that the demolition, rebuild and alteration of one of the dwellings in a duplex will have 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 (the 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 *Planning and Development Act 2007* (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 potentially subject to applicant ACAT merit review (subject to any exemptions from review in the regulation) as well as Supreme Court proceedings.

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 amendments will therefore ensure that such demolitions, rebuilds and alterations are fully assessed by the authority against current laws and standards taking into account current circumstances. They will also ensure that there is opportunity for public comment on the development application and appropriate review of the decision on the application.

The proposed law 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.

Defining the issue

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 sections 1.100B and 1.100 of the regulation. These exemptions apply throughout the ACT in all Territory Plan zones and apply to duplexes. These exemptions were included in the regulation by amendments made in 2009 (by the *Planning and Development Amendment Regulation 2009* SL2009 – 15).

The availability of 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).

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.

(a) The authorising law

Subsection 133(a) (iii) of the Act provides that development may be made exempt from requiring development approval under a regulation. The ability to exempt development proposals from the need to obtain development approval includes the ability to remove or amend such exemptions (section 46 *Legislation Act 2001*).

(b) Policy objectives of the proposed law and the reasons for them

The objective of the proposed law is to ensure that significant duplex demolition 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.

This objective is to ensure, in particular, that such proposals are fully assessed against the:

- objects and related requirements of the Act;
- Territory Plan; and
- current environmental and planning circumstances.

The object of the Act is:

> "to provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles [section 6 of the Act]"

As the proposed law enacts the policy objectives of the Act, a brief summary of the pertinent policy objectives behind the Act is provided at *Attachment A*.

Sections 120 and 129 of the Act require development applications to be assessed against:

- the Territory Plan objectives for the relevant zone;
- the suitability of the land where the development is proposed;
- the probable impact of the proposed development.

The application of the development assessment process to demolition, rebuild and alteration of a duplex is a measure that supports the Government's objectives as affirmed in The Canberra Plan: Towards our second century: Australian Capital Territory, Canberra: 2008[1] and associated strategic plans. In particular, the application is consistent with objectives affirmed in this Canberra Plan including the following objectives:

> To ensure that all Canberrans enjoy the benefits of living in a community that is safe, socially inclusive and respectful of human rights, that all Canberrans are able to fully participate in community life and that the most vulnerable in our community are respected and supported (The Canberra Plan: Towards our second century p34).
>
> To ensure that a strong, dynamic, resilient and diverse economy meets the needs of the Canberra community now and into the future; to maintain economic growth that promotes a fully sustainable city; and to promote the ACT's place as the heart of the economic region. (The Canberra Plan: Towards our second century p64)
>
> To ensure that Canberra—its heart and its town, group and local centres—offers the best in sustainable city living; to ensure that all facilities are of high quality and meet the needs of the community; and to ensure that all Canberrans are able to participate in the diverse cultural and social life. (The Canberra Plan: Towards our second century p78)

[1] The Canberra Plan: Towards our second century: Australian Capital Territory, Canberra: 2008 accessed on 3 May 2012 at http://www.cmd.act.gov.au/__data/assets/pdf_file/0013/120217/canberra_plan_text_V5.pdf

(c) Achieving the policy objectives

The policy objective is achieved by the amendment of existing schedule 1, sections 1.100 and 1.100B. The amendments remove duplexes from the exemptions provided by those sections for single dwellings.

The removal of the exemption will mean that the demolition, rebuild and alteration of duplexes will require an 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 a development application;
- public notification of the 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 the 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) and Supreme Court review.

This process will ensure that development proposals for the demolition, rebuild and alteration of duplexes will be assessed against the current Territory Plan and relevant Government policies and in light of current planning and environmental circumstances. It will also provide opportunity for public comment.

(d) Consultation

There has been no specific public consultation on the proposed law. The development of the amendments has taken account of public concerns in relation to the demolition of duplexes.

(e) Consistency of the proposed law with the authorising law

The authorising law permits a regulation to prescribe the types of development that are exempt from the need for development approval. The proposed law uses the power of the authorising law to amend the regulation.

(f) The proposed law is not inconsistent with the policy objectives of another Territory law

The proposed law is not inconsistent with the policy objectives of another Territory law.

(g) Mutual recognition issues

There are no mutual recognition issues.

(h) Reasonable alternatives to the proposed law

The following options were considered:

1. **Maintain the status quo.**
   The retention of the status quo would allow the demolition, rebuild and alteration of duplexes without any input from the authority or the community about any affect those actions may have on the adjoining residence and streetscape.

2. **Remove the existing exemptions for demolition, rebuild and alteration of a duplex**
   This approach would mean that the DA exemptions for demolition, rebuild and alteration of duplexes would no longer be available. This would mean that duplex demolition and alteration work would have to be assessed against current planning laws and in the light of current planning and environmental circumstances (unless the project is DA exempt under a different exemption provision in the regulation).

3. **Remove the existing exemption for demolition of duplexes but maintain status quo for alterations and rebuilds of duplexes**
   This approach would maintain the exemption provided by s1.100 for alterations and rebuilds of duplexes whilst removing the DA exemption for demolition of a duplex. This is not acceptable because it may result in major alterations being made to a duplex which affect the visual and physical integrity of the duplex without input from the planning authority and the community. For instance, the addition of another storey or room could seriously affect the roof line and facade of the duplex. Such alterations even though they do not amount to demolition, could have a major effect on the amenity and value of the adjoining duplex. This is because, from a street appearance point of view, the two halves of a duplex appear to look like a single cohesive building. This appearance is part of the value and amenity of a duplex. If one half of the duplex is significantly altered then the value of the other residence of the duplex may be significantly affected. This relationship between the two halves of a duplex and the responsibilities that go with this are apparent to a purchaser of a residence in a duplex, that is, they accept they have some obligation to maintain their half relative to the adjoining duplex.

(i) Brief assessment of benefits and costs of the proposed law

The proposed law ensures that the demolition, rebuild and alteration of a duplex is assessed against current planning laws, using current assessment methodologies and in the context of current planning and environmental circumstances.

Costs

The potential costs are as follows.

The proposed law will impose development application costs on duplex owners. The application fee varies depending on the nature of the development from $100 for small developments to over $10,000 for larger developments.

The new regulation will impose some delays as a result of the application of the development application and assessment process. The development assessment process is required to be completed within 30-45 days depending on the application and whether public representations are received (in 2010-2011 73% of development applications were decided within the required time frame). The decision to approve merit track assessable development applications may be subject to applicant and third party ACAT merit review (subject to exemptions in the regulation, s 350). The decision may also be subject to review applications to the Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989*.

The proponent may find that the required development approval is granted subject to conditions. There may be a financial cost in complying with such conditions.

The application of the development assessment process introduces a measure of uncertainty. There is the risk that the development application may be refused or subject to stringent conditions.

However, this uncertainty is reduced by the fact that the relevant decision must be within the known parameters set by the Territory Plan and against the known factors set out in the Act. Any decision must not be inconsistent with the Territory Plan (section 50 of the Act). The Territory Plan can be varied. However, standard (non-technical) variations of the Territory Plan cannot occur except through extensive public consultation, assessment and review by the Legislative Assembly (Part 5.3 of the Act).

While these matters may impact in particular circumstances, the overall impact is likely to be limited because:

- The number of demolitions of duplexes in the ACT is relatively few compared to the numbers of overall developments;
- development application fees are relatively minor compared to the cost of physically completing the required work.

Benefits

The potential benefits are as follows.

The new regulation will require the development assessment of rebuilds, alterations and demolitions of duplexes. This has benefits for the wider community.

The new regulation will apply the development assessment process. This process will involve public notification which will permit the community to comment on the proposals. If the community has a concern then the community will be able to raise this through the

notification process. The planning and land authority is required to take account of such public comments in the assessment of the development application.

The community will also benefit from having demolitions, rebuilds and alterations assessed against the Territory Plan and the Planning and Development Act as noted above.

There may be some delay in the process as a result of the need to obtain development approval but as noted above there are time limits for decision making on development applications under the Act.

Costs and benefits for administration
The proposed law will have no significant impact on Government revenues, resources or effective administration. As noted above, the measures are consistent with Government objectives.

The removal of the existing DA exemptions for demolition, rebuild and alteration of duplexes will most likely increase the number of applications for development approval. The increased number of applications will result in a minor increase in the payment of development application fees to the Government. However, as noted above, the number of applications is likely to be small and therefore, this increase is likely to be relatively minor.

(j) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The Committee's terms of reference require it to consider whether (among other things):

(a) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

i. is in accord with the general objects of the Act under which it is made;
ii. unduly trespasses on rights previously established by law;
iii. makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
iv. contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

...

The proposed amendments of the regulation are consistent with the above principles. In particular, the amendments:

(i) are in accord with the general objects of the Act under which it is made. The requirement that duplex demolitions rebuilds 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;

(ii) 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. Whilst this is an added requirement

for lessees seeking to demolish, rebuild or alter a duplex, it is not one that unduly trespasses on existing rights. This is because the proposed law:

a. does not of itself prevent the demolition, rebuild 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, rebuild 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 or s1.100 of schedule 1 of the regulation will be able to be completed without development approval (refer below).

Furthermore, lessees 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. Construction of 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. The conduct of home businesses (s1.108)
11. Rebuilding damaged buildings (s1.110).

(iii) do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The amendments do the opposite, that is, they make the demolition, rebuild 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.

(iv) do 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 duplex demolition proposals to the default position of the Act which is that all development requires development approval.

The proposed law is a measured proposal that balances competing individual and community interests without imposing regulatory burden unnecessarily. It is submitted that the proposed law strikes the right balance between the rights of owners to demolish, rebuild or make major 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 proposed 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.

(k) Transitional arrangements

The proposed regulation amendments will not have retrospective effect. Any development commenced under the existing exemption provisions in schedule 1 of the regulation prior to these amendments 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 section 76 of the *Legislation Act 2001* that prohibits statutory instruments from having retrospective effect that would be to anyone's disadvantage.

The proposed law will not affect the operation of leases. Uses authorised by existing leases will remain authorised.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the Legislation Act. An Explanatory Statement for the proposed law has been prepared for tabling.

Attachment A

Background to the policy objectives of the ACT Planning and Development Act 2007

As the proposed law enacts the policy objectives of the Act, a brief summary of the pertinent policy objectives behind the Act is provided.

One of the key policy objectives of the Government in the development of the Act was to make the planning system simpler, faster and more effective. Pages 2-3 of the Revised Explanatory Statement for the Act (website *www.legislation.act.gov.au/b/db_27986/relatedmaterials/revised esplanning.pdf*)states that:

> "The Bill is intended to make the Australian Capital Territory's (ACT's) planning system simpler, faster and more effective. The Bill will replace the existing *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002*.
>
> The objective of the Bill is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles.
>
> The most significant change under the Bill is simplified development assessment through a track system that matches the level of assessment and process to the impact of the proposed development. As well as being simpler, more consistent, and easier to use, this system is a move towards national leading practice in development assessment …
>
> The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require development approval. …
>
> The new system will have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand what does and does not need approval, what is required for a development application and how it will be assessed. …"

One of the methods for achieving a simpler, faster, more effective planning system was for the law to provide improved procedures for notification of development applications and third party appeal processes. This approach was noted on page 3 of the Revised Explanatory Statement for the Act:

> "The proposed reforms are:
>
> - more developments that do not need development approval
> - improved procedures for notification of applications and third party appeal processes that reduce uncertainty
> - clearer assessment methods for different types of development
> - simplified land uses as set out in the territory plan
> - consolidated codes that regulate development

- clearer delineation of leases and territory plan in regulating land use and development
- enhanced compliance powers. …"

The objective for a simpler, faster, more effective planning system is relevant to concepts of "orderly development" and "economic aspirations of the people of the ACT" which are embedded in the object of the Act (section 6):

> **"6 Object of Act**
>
> The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—
>
> (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
>
> (b) in accordance with sound financial principles."

The policy objectives of the proposed law are to further the policy objective behind the Act, that is, a planning system that is simpler, faster, and more effective.