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Engaging for Reform

Community Alliance
South Australia

The Hon. John Rau MP
Minister for Planning

Dear Minister

Comments on the Planning, Development and Infrastructure Bill 2015

The Community Alliance SA is an umbrella organisation for resident and community groups from across Adelaide and other areas of South Australia. The aim of the Community Alliance is to:

"Put the people back into planning and development in SA"

We write to provide feedback on the *Planning, Development and Infrastructure Bill 2015* that was recently tabled in Parliament on Tuesday 8th September 2015 (hereafter referred to as "the Bill") and to outline the concerns that our members have with this Bill.

The Community Alliance previously provided feedback to you as the Planning Minister on the final report from the Expert Panel entitled "The Planning System We Want" in February 2015. In that submission the Alliance observed that:

"…the primary objectives of the reform ideas as they currently stand are to facilitate rapid development with little regard to social and environmental impacts and sustainable development. While the final report includes a number of reform ideas that seem attractive if taken at face value, the lack of detail makes it almost impossible to support or oppose a proposed reform outright. As always, the devil is in the detail, and the final report largely lacks detail on the actual changes proposed."

Our members commented at that time that the reforms did not describe a better system than the current one and indeed that the implementation of a technical framework as described could produce a far worse system from the community's point of view. Having now had the (limited) opportunity to review the Bill as tabled, we consider that this is indeed the case, with the proposed changes extending well beyond the recommendations of the Expert Panel, while not addressing widespread community concern over lack of consultation/notification and inappropriate planning decisions.

One of our primary concerns remains the failure to address social needs and objectives, and the lack of attention given to sustainability and protecting the built as well as the natural environment. The focus remains on creating a technical system and placing decision-making almost entirely in the hands of professionals, with an excessive amount of direct Ministerial control.

The Bill vastly understates the fundamental importance of social considerations and the need to genuinely engage with community and hear their views. It also overlooks the "value-add" that occurs when the community is engaged in the planning process, as well as the valuable role that Councils play in engaging with their community (particularly Elected Members). The role of community is much diminished in the Bill as tabled, with appeal rights compromised and notification rights even further reduced. This is despite this being one of the main areas of community concern raised with the Expert Panel with respect to the existing planning system. The head powers for a Community Charter, previously recommended by the Expert Panel, provide no assurance that this will not be used to gag, rather than engage with, the community on the future of our built environment.

It is disappointing that the regulations are still unknown, as again 'the devil is in the detail' with respect to notifications, code assessment and other procedures under the Bill.

Specific Comments and Concerns of the Community Alliance

The Bill has been introduced to Parliament without any consultation over its detailed content or prior release of the draft clauses. The Bill is about 200 pages long and requires a considerable amount of time and expertise to understand. In the extremely short time available the Community Alliance cannot comment on all of the provisions of the Bill, or their potential impact on our communities. This, in itself, is a major concern to Community Alliance members; whilst we have attempted to highlight some specific issues of concern below, it is anticipated that further analysis of the Bill will identify further issues.

The Alliance has serious concerns with the following:

Clause 3—Interpretation

(1) adjacent land *in relation to other land, means land that is no more than 40 metres from the other land;*

The Community Alliance notes that the impact of this provision will mean that consultation/notification to residents of a nearby development will be reduced from 60 metres to 40 metres. Lack of notification was a major area of community and local government concern, and feedback was given to the Expert Panel with respect to the inadequacies and inconsistencies of the existing planning system. Further diminishment of this requirement is totally unacceptable and we deplore this provision. It is also inconsistent with requirements of other states.

Amendment Required:

The Community Alliance request that the interpretation of adjacent land be increased to 60 metres as a minimum, and that consideration be given to the responsible authority to increase these provisions if it is reasonable to expect that properties beyond this radius will be impacted by the proposed development.

Clause 5 - Planning regions and Greater Adelaide

The Bill enables the following:

(1) The Governor may, by proclamation made on the recommendation of the Minister—
(a) divide the State into planning regions for the purposes of this Act; and
(b) define 1 of the planning regions as constituting Greater Adelaide for the purposes of this Act.

Although there may be a case for establishing planning regions in country areas of South Australia with the active agreement and request of councils, the Community Alliance has seen no evidence that dividing Greater Adelaide up into one or more arbitrary Planning Regions represents sound policy, that it will provide benefits for residents such as social, environmental or economic benefits, or that it will deliver more efficient or effective governance.

Decisions such as these must be evidence based and the community must be properly consulted. The Community Alliance suggests that this proposition should be properly investigated as an initiative of the proposed State Planning Commission and not the Minister. Such decisions or recommendations must be made, and be seen to be made, at arm's length from the Minister.

Currently the Bill allows the Minister to make recommendations to the Governor to establish Regional Planning Boards but there are no criteria or guidelines and no apparent consultation, review or appeal process. It seems that the Minister can effectively do what he/she likes with little/no oversight.

Amendment Required:

The Community Alliance SA request the Bill be amended to provide for mandatory public consultation (with enforceable provisions for the Charter) and that appropriate criteria and guidelines are established before any recommendations are made to the Governor enabling the establishment of Planning Regions in Greater Adelaide. Such recommendations must be from the proposed Planning Commission, not the Minister. We also consider there should be an option for affected Councils to initiate a review process if a Planning Region needs adjustment or proves unworkable.

Similar comments apply to Clause 6 - Sub regions

Clause 7—Environment and food production areas—Greater Adelaide

The draft Bill has provisions for Environment and Food Protection areas but the areas are not identified. The Community Alliance believes they should be.

The Bill enables the Minister to:

(2) The Minister must, in acting under subsection (1), seek to ensure—
(a) that areas of rural, landscape or environmental significance within Greater Adelaide are protected from urban encroachment by the establishment of 1 or more environment and food production areas;

Amendment Required:

The Community Alliance requests that the Bill be amended to specify the criteria, guidelines and consultation process enabling the Minister to identify the areas to be mandated from urban encroachment.

Clause 12—Objects of Act

The Community Alliance SA notes that these are stated as:

(1) The primary object of this Act is to support and enhance the State's prosperity by creating an effective, efficient and enabling planning system, linked with other laws, that—
(a) promotes and facilitates development, and the integrated delivery and management of infrastructure and public spaces and facilities, consistent with planning principles and policies; and
(b) provides a scheme for community participation in relation to the initiation and development of planning policies and strategies.

The Community Alliance recognizes the importance of economic imperatives but points out that prosperity includes a quality built environment that provides pleasant and desirable places to live and recreate, where families and people of all ages can thrive and enjoy their lives.

Amendment Required:

The Community Alliance request that a clause is inserted that acknowledges that prosperity includes a quality built environment that provides pleasant and desirable places to live and recreate, where families and people of all ages can thrive anenjoy their lives. Most importantly, we respectfully request that environmental and social responsibilty is also acknowledged in the Objects of the Act.

Although the Principles of the Bill cover matters of environmental and social importance, they are likely to be neglected due to the reduction of the Objects to a narrow focus on economics and prosperity only. This is unacceptable.

Clause 14—Principles of good planning

The Community Alliance SA notes the following provision in the Bill:
*"In seeking to further the objects of this Act, regard **should** be given to the following principles that relate to the planning system established by this Act (insofar as may be reasonably practicable and relevant in the circumstances)":*

Amendment Required:

The Community Alliance request that the word "should" be replaced by "must" enabling regard to the principles of good planning to be mandated.

Part 3 Division 1-State Planning Commission

Independence of the Planning Commission

The Expert Panel recommended that the State Planning Commission be (our emphasis added in bold):

*"**At arm's length from the government**, the State Planning Commission will provide **independent**, professional advice, enable quality public debate and **generate policy that can span political cycles.** As an **independent body**, it will focus on planning excellence driven by research, whole-of-government policy development and ongoing dialogue with communities." (The Planning System we Want P 26)*

*"For the State Planning Commission to garner public confidence, it will include members with expertise in planning-related topics, specified in legislation. They should not be government employees, representatives of any particular sector **or be otherwise directly connected to the state government or its agencies**. This will ensure members are, and are seen to be, **independent arbiters** of the planning system and that the commission's deliberations are not influenced by particular agency perspectives. Commission members will be appointed by the minister, who **should be required to consult** before taking recommendations to Cabinet." (The Planning System We Want P27)*

Clause 18—Constitution of Commission

Currently the public believes that major decisions are made behind closed doors and there is too much ministerial or government interference; particularly in decisions to rezone land for residential development. Despite the Expert Panel recommendations (quoted above) for the Government to be at arm's length from planning decisions, and for the establishment of an independent Planning Commission to foster community confidence in the new planning system, the provisions of the Bill do not ensure that the Minister is at arm's length, or that the Planning Commission must be independent.

For example: the Bill proposes that the Minister will appoint the chairperson and members of the proposed Planning Commission and also appoint the members of Regional Assessment Panels. This will inevitably lead the people of South Australia to conclude that the Minister appoints those who will do his/her bidding. This would not appear to be an arm's length process for planning policy creation or assessment; in fact exactly the opposite, with the level of ministerial control and access to information much increased in the Bill.

Amendment Required:

The Community Alliance SA requests the Bill be amended enabling the Minister to appoint an appropriately qualified and experienced Independent Chair of the State Planning Commission from a public process of nominations with appropriate independent oversight.

The Chair of the Planning Commission can then appoint, (with the aid of an independent selection panel), from a public process of nominations, the 4-5 members of the commission who have appropriate expertise and qualifications including social,

environmental and scientific disciplines. One member of the commission must be a community representative.

While the Community Alliance does not support the proposed Regional Development Assessment Panels, the members of these panels should be appointed in a similar way, with oversight and approval from the Councils located in their region of operation.

Clause 44—Community Engagement Charter

We refer to subsections 7 and 10 of Clause 44 below:

(7) Despite a preceding subsection, the charter must not relate to the assessment of applications for development authorisations under this Act in addition to the other provisions of this Act that apply in relation to such assessments.

(10) Despite a preceding subsection, the charter does not give rise to substantive rights or liabilities (and a failure to comply with the charter does not give rise to a right of action or invalidate any decision or process under this Act).

The Community Alliance SA welcomes the inclusion of the Charter but points out that it only facilitates community consultation on policy and not assessment. In addition we note that the Charter is not enforceable (although the Planning Commission can issue a directive for an entity to comply with the Charter). The public has no recourse whatsoever if the Charter is not followed or breached. This is completely unacceptable and creates a tokenistic engagement approach that will be totally ineffective.

The Community Alliance SA strongly believes that consultation must be up front including notice of all development proposals, commensurate with the likely impact of the proposal. All too often developments are approved without any meaningful consultation at all. This was strongly identified in the Expert Panel's report "What We Have Heard" and reflected in "The Planning System We Want" as a major issue of community concern. It has not been addressed. There may be times when public notification of a proposed development and opportunity for public comment is in the public interest. A notifications process and the Community Charter should cover this step in the development assessment process.

The Expert Panel recommended the following:

. *"3.1 Legislate to require a statutory charter of citizen participation that will focus attention on policy and direction and streamline engagement on development assessment.*

. *3.2 Establish principles of citizen participation in legislation, to guide the development of the charter." (The Planning System We Want p 36)*

Amendment Required:

As a minimum we request that the Bill be amended; that Subsection 7 of Clause 44 is either deleted or suitably amended enabling the inclusion of the assessment process and that Subsection 10 be amended or deleted making compliance with the Charter mandatory. We further request that the notification provisions of the Bill are thoroughly reviewed to allow notification commensurate with the likely impact of the development, and to allow legal recourse if they are not followed.

Division 2—Online planning services and information

Clause 54—Fees and charges

The Community Alliance notes that:

(*2) The Chief Executive may, with the approval of the Minister, require a council to make a contribution, on a periodic or other basis, towards the costs of establishing or maintaining—*
(a) the SA planning portal; and
(*b) the SA planning database; and*
(c) any online atlas and search facility under this Division.

While the Community Alliance realizes that operating the proposed e-planning portal will incur running costs we do not believe that councils should have to contribute towards those costs. Councils will be forced to re-coup those costs from ratepayers. Clearly this is a State Government initiative and managing and operating this system is the responsibility of the State Government.

Amendment Required:

That clause 54 (2) (a) (b) (c) be removed.

Clauses 61 – 62 - 65, Planning and Design Codes

The Community Alliance has significant concerns about the establishment of the proposed codes:

State Planning Code
Design Code
Assessment codes
Building Rules
Development Standard Designs

There is little information on the establishment of the Planning and Design Codes in particular; this is a major concern as this will determine the assessment path for development. It appears that these requirements will be developed solely at the Minister's discretion, with no requirement to consult over the content of these critical documents.

Who will write the Codes? Will there be provision for community representatives on the panel? Will panel members be accredited experts and, if so, in what disciplines? Will panel expertise include social, environmental and scientific disciplines? How will an acceptable balance be achieved between economic and social or environmental objectives? Most importantly, what consultation will be undertaken?

The Community Alliance also has significant reservations about code based assessment procedures, for example the use of a "tick and flick" methodology that enables corners to be cut and poor quality development approved without notification to people that will be directly impacted. The largest investment that many people make is in their family home, and

there is a very strong argument that they have a right to be consulted and to have the impacts from adjacent development properly assessed.

The Community Alliance considers this provision warrants a detailed examination of the proposed code assessment procedures to determine the possible benefits and impacts. We understand code assessment has caused significant problems in other states where it has been introduced. The inclusion of code assessment in the Bill must be evidence based – i.e. what are the *pros and cons*? This provision, and the proposed Codes, should be considered by a Parliamentary Committee supported by a properly formed Reference Group (including community representatives), to which public submissions can be made.

No evidence has been provided to show that there are problems with the timeliness of existing assessment procedures (we understand that around 95% of applications are assessed within prescribed timeframes?). On the contrary, we have received many concerns from our members with respect to the quality of planning decisions when development is "rushed through" to meet tight timeframes, with no time allowed for consultation or notification of directly impacted neighbours.

Amendment Required:

These provisions, and the proposed Codes, should be considered by a Parliamentary Committee supported by a properly formed Reference Group (including community representatives), to which public submissions can be made. We request that the Bill is not passed until the impact of the undisclosed changes that may be included in the Codes can be properly considered.

We further request that the Bill is amended to require mandatory consultation and oversight of future Code amendments.

Clause 63—Local heritage

The Community Alliance is disappointed that the Expert Panel's recommendations for reform of heritage provisions have been excluded from the Bill. We consider that similar processes for listing heritage, both State and local heritage, should be integrated under the Heritage Places Act and should be separate from provisions for management of heritage, which should be retained under the proposed Bill.

The current Development Plan Amendment (DPA) process for listing local heritage is costly, lengthy and unresponsive to community heritage values. The time taken up in the DPA process can result in the demolition of heritage items before they can be successfully listed, and the Minister can reject items proposed for inclusion without any oversight. Inappropriate nominations for State listing may result when local places are under threat. There is currently no provision for public nomination of a place for local listing and this would be rectified by inclusion in the Heritage Places Act.

Clause 63 seems to perpetuate the current listing process under a new Code, however with consultation with owners removed from the current Development Act and included in a Community Charter. There are references to new classes of heritage character or preservation policy "that is similar in intent or effect to a local heritage listing", however there is no

information on the intent of this Section; it is not therefore not supported.

Amendment Required:

Clause 63 should be deleted and any transitional provisions for local heritage should only apply until the Expert Panel's recommendations can be implemented in a fore-shadowed future Bill.

Our members are also very concerned that the new Bill and associated Code documents will remove the current level of protection afforded to Contributory Items in Development Plan provisions. This would fundamentally change the character of suburbs across Adelaide previously protected as "Historic Conservation Zones".

Any proposed changes to Contributory Items should be considered by a Parliamentary Committee supported by a properly formed Reference Group (including community representatives), to which public submissions can be made. This should also allow for assessment of some Contributory Items against criteria for local heritage listing prior to removal of that status.

Clause 77—Panels established by joint planning boards or councils

(1) (d) a person who is a member of the Parliament of the State or a member of a council is not eligible to be appointed as a member of an assessment panel;

The above provision in the Bill, excluding elected members of councils from sitting on development assessment panels, is strongly contested by the Community Alliance on the grounds that local councillors provide valuable knowledge and expertise to the decision making process about development. Local decisions need to be made by local people. The UK National Planning Policy 2012 asserts:

"Yet, in recent years, planning has tended to exclude, rather than to include, people and communities. In part, this has been a result of targets being imposed, and decisions taken, by bodies remote from them." (UK National Planning Policy 2012, p i).

Amendment Required:

The Community Alliance request that the following sub clause in the Bill be amended enabling council elected members to continue to be members of an assessment panel.

The Community Alliance further requests that the decision to establish Regional Assessment Panels require the approval of the relevant Councils and not be forced on communities.

Clause 118—Time within which decision must be made

We note the following provisions in the Bill:

(1) "A relevant authority should deal with an application as expeditiously as possible and within

the time prescribed by the regulations.
*(2) If a relevant authority does not decide an application within the time prescribed under subsection (1) in respect of the provision of planning consent, the applicant may, before the application is decided, give the relevant authority a notice in the prescribed manner and form (a **deemed consent notice**) that states that planning consent should be granted.*
*(3) On the day that the relevant authority receives the deemed consent notice, the relevant authority is, subject to this section, taken to have granted the planning consent (a **deemed planning consent)".***

The Community Alliance has serious concerns about the provisions of Clause 118. This clause appears harsh and repressive; in an age when all organisations are asked to do significantly more with less, it is quite possible that some development applications due to their complexity may run over the "deemed time". Delays by developers in responding to requests for information, which do occur, should not be used as a lever to obtain a deemed approval.

To place the onus on Councils to fund a legal challenge against the "deemed planning consent" is a harsh provision and will result in significant cost to ratepayers. This provision is also likely to result in inappropriate developments being approved as the cost of the legal challenge (and the associated risks) is too great.

Planning professionals need time to exercise due care in the assessment process, particularly with the increasing amount of infill development occurring. Tight time lines do not necessarily accord with quality decisions.

Amendment Required:

The Community Alliance SA requests clause 118 (2) (3) be removed. A developer should not be able to force a decision from the relevant planning authority.

Clause 133—Access to neighbouring land—general provision

We note the following provisions in the Bill:

*(1)"This section applies if a person reasonably requires access to a part of a building (including a building under construction) or an allotment (a **relevant place**) from an adjoining allotment in order to carry out—*
(a) an inspection for the purposes of proposed development with respect to the relevant place (including in order to make an application under this Act with respect to the proposed development); or
(b) *any building work with respect to the relevant place; or*
(c) any other prescribed activity.
In a case where this section applies, the person seeking access to the adjoining allotment may serve notice requesting that he or she be given access on the owner of the adjoining allotment."

We have serious concerns about Clause 133 provisions for granting access to neighboring land for building works. We believe these provisions are quite unreasonable by permitting building workers to access neighboring land uninvited and unwanted. This has serious privacy implications, is likely to result in disputes and will infringe on basic property rights. With an increasing trend for developers to build to side boundaries and with urban infill also

increasing in established suburbs there must also be some consideration of owner's rights to enjoyment of their own land. The prospect of access being demanded during the construction of a six plus storey building in a quiet residential street, just because the developer has decided to maximize site coverage by building to boundaries with adjoining properties, is unfortunately a likely scenario under this provision. We do not believe that the implications of this clause have been properly considered.

Amendment Required:

The Bill does not specify what *"reasonably requires access"* includes or excludes. The Bill needs to be amended accordingly or this clause deleted.

Part 13—Infrastructure frameworks

164—Contributions by constituent councils

The Community Alliance SA notes the following provision:

*(1) If this Subdivision applies in relation to a contribution area, the council or councils whose areas or parts of whose areas fall within the contribution area (the **constituent councils**) are responsible to make a contribution under this Subdivision based on an amount specified by the Minister in accordance with this Subdivision in respect of each financial year with respect to which this Subdivision applies.*

Under this clause the Minister can impose a charge on a council to make a contribution to the development of a subdivision without any consultation. The party benefiting from the creation of the subdivision should bear the costs of providing infrastructure. Why should council ratepayers provide funding to a planning scheme initiated by a private developer effectively providing a subsidy to the developer and adding to their profit margin?

If a council is forced to make a contribution, then the council will be forced to re-coup these costs from its ratepayers. This is yet another tax and one that is fundamentally unfair as those it is raised from have no ability to influence the quantum.

Amendment Required:

The Community Alliance SA requests this clause 164 (1) be removed.

In principle , the Community Alliance opposes any cost shifting to local government under this Bill as in the end it will always be the community that has to pay the price.

If any clarification is required on the above comments and concerns, please contact the undersigned on 0429 337 453.

Yours Sincerely,

Tom Matthews
Community Alliance President

Bibliography

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"UK National Planning Policy 2012". Department of Communities and Local Government, 2012, London.