## 11.1 DRAFT DEVELOPMENT ASSESSMENT REGULATIONS AND PRACTICE DIRECTIONS CONSULTATION

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**FILE REFERENCE:** S/04363
**ATTACHMENTS:** A - C

### PURPOSE OF REPORT

The purpose of this report is to seek the Council's endorsement of a submission which has been prepared in response to the draft *Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* and *draft Practice Directions*.

### BACKGROUND

The *Planning, Development and Infrastructure Act 2016 (PDI Act 2016),* was assented to by the South Australian Parliament in April 2016. The Act comprises wholesale reform of the South Australian planning system, the elements of which are being progressively developed and implemented by the State Government.

Unlike the current *Development Act 1993* and subordinate *Development Regulations 2008*, the *PDI Act 2016* has a series of subsidiary regulations dealing with different aspects of the new planning system including:

- fees and charges (including development assessment fees);
- accredited professionals scheme (which applies to planners, building certifiers and other industry professionals making development decisions);
- transitional regulations which are 'switching off' parts of the *Development Act 1993* and 'switching on' parts of the *PDI Act* as we transition to the new planning system; and
- general regulations, which outline operational details of the new planning system, particularly in relation to development assessment.

Parts of the General Regulations have already been proclaimed and introduce processes and bodies (e.g. regulations relating to the State Planning Commission which replaced the Development Assessment Commission, and Council Assessment Panels which replaced Development Assessment Panels). When enacted, the draft *Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* (referred to in this report as the *draft Regulations*), will establish new procedural requirements relating to various aspects of the development assessment process in South Australia.

Accompanying the *draft Regulations*, four *draft Practice Directions* have also been released for public consultation, covering:

- public notification;
- restricted and impact assessed development;
- conditions; and
- conditions to be attached to deemed consents.

Practice directions are a directive tool issued by the State Planning Commission, which the Commission has advised will be used considerably more in the new planning system to provide guidance and instruction for planning practioners and planning authorities on different processes and issues.

The draft *Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* - to be referred to as the *draft Regulations* – are contained in **Attachment A**. The draft Practice Directions are contained in **Attachment B**.

## RELEVANT STRATEGIC DIRECTIONS & POLICIES

***Outcome 1: Social Equity***
*A connected, accessible and pedestrian-friendly community*

***Objective:***
*1. Convenient and accessible services, information and facilities*

***Outcome 2: Cultural Vitality***
*A culturally rich and diverse city, with a strong identity, history and sense of place*

***Objective:***
*3. A City which values and promotes its rich cultural and built heritage*

*4. Pleasant, well designed, and sustainable urban environments*

***Outcome 3: Economic Prosperity***
*A dynamic and thriving centre for business and services*

***Objective:***
*2. Cosmopolitan business precincts contributing to the prosperity of the City.*

***Outcome 4: Environmental Sustainability***
*A leader in environmental sustainability*

***Objective:***
*3. Sustainable and attractive streetscapes and open spaces.*

## FINANCIAL AND BUDGET IMPLICATIONS

The financial and budget implications for this Council associated with the introduction of the proposed *draft Regulations* are largely unknown, given the current absence of detail in the *Fees, Charges and Contributions Regulations 2019* and the designation of processing categories in the Planning and Design Code – which is yet to be released for Metropolitan Adelaide. However, it is likely that Councils will assess fewer Development Applications resulting in a reduction of fee income, unless the schedule of fees is increased by the State Government to compensate for the likely reduction in the number of Development Applications which will be processed. This is expected due to, in part, a greater proportion of developments being deemed-to-satisfy 'tick-box' developments which could be processed by an accredited professional (private certifiers) or exempt developments not requiring any approval. Conversely, administrative functions (such as installing signs on land) undertaking consistency checks and a rise in complaints, compliance and enforcement matters, may increase under the new arrangements.

It is unclear what fees will apply to the administrative functions, and as such on balance, it is difficult to quantify the financial implications for the Council and Local Government generally.

## EXTERNAL ECONOMIC IMPLICATIONS

One of the key objectives of the State Government's reform agenda is to drive investment and economic development in the State through removing barriers, 'perceived barriers' and 'inefficiencies' in the planning system.

## SOCIAL ISSUES

The draft Regulations and Practice Directions will change how members of the community interact with the planning system, with the level of impact varying depending on the situation. Again the extent of any reduction in the number of applications which are publically notified cannot be quantified before a review of the Planning and Design Code.

**CULTURAL ISSUES**

Not Applicable.

**ENVIRONMENTAL ISSUES**

Not Applicable.

**RESOURCE ISSUES**

The release of concurrent documents associated with the planning reforms is consuming considerable staff resources.

**RISK MANAGEMENT**

Nil.

**CONSULTATION**

- **Elected Members**
  Not Applicable.

  The State Planning Commission are facilitating Elected Member information sessions regarding the planning reform program, the supporting regulations and the conversion of Council Development Plans to the Planning and Design Code.

- **Community**
  Consultation is being undertaken by DPTI, however the consultation is primarily targeted at planning and building professionals, rather than the general community. At the request of an Elected Member, a briefing session was held with representatives of residents' groups across the Council area, to outline the implications of the draft Regulations.

- **Staff**
  Development Assessment Planners

- **Other Agencies**
  Not Applicable

**DISCUSSION**

Currently, all functions and definitions used in development assessment are contained in the *Development Regulations 2008*, however in the new planning system, many of these will be dealt with through the release of practice directions or through inclusion in the *Planning and Design Code*. For example, land use definitions and the assessment pathways for different types of development will be specified in the *Planning and Design Code.*

The *draft Practice Directions* currently on consultation outline the operational details and requirements for public notification, processing Restricted and Impact Assessed developments, standard planning consent conditions and conditions which will be attached to deemed consents.

Key points of interest in the *draft Regulations* and *draft Practice Directions* are outlined below, and a comprehensive draft submission is contained in **Attachment C**.

## Relevant Authorities

One of the key changes in the new planning system is the implementation of different relevant authorities (decision makers). The relevant authorities under the *PDI Act 2016* include:

- Minister for Planning;
- State Planning Commission (the Commission);
- Assessment Panels – *in the majority of cases this will be a Council Assessment Panel, but could also be a Regional Assessment Panel or Local Assessment Panel where applicable*;
- Assessment Manager – *appointed by the Council*;
- Council; and
- Accredited Professional (private professional).

Any relevant authority, other than a private accredited professional, can delegate any functions or powers to a particular person or body, either on an ongoing or temporary basis. For example, an Assessment Panel could delegate particular types of development to the Assessment Manager and the Assessment Manager can delegate particular types of development to staff. Although delegations are normally used to delegate to 'lower tier' decision makers, the *PDI Act* simply refers to relevant authorities delegating to another person or body. As such, an Assessment Manager could delegate a decision to the Assessment Panel, if they considered it appropriate in the interests of transparency or due to the scale or nature of the development. Even if a relevant authority delegates, however, they will remain responsible for the decisions, such as through any appeals process.

Changes to the decision making role and responsibilities of Councils will be one of the most significant differences for Local Government in the new planning system. Currently, under the *Development Act 1993,* a Council is a relevant authority with respect to obtaining planning consent and is therefore responsible for determining which applications are delegated to the Council Assessment Panel and which are delegated to staff.

Under the *PDI Act 2016*, however, Assessment Panels and Assessment Managers will be relevant authorities for planning consents in lieu of the Council (other than where the Minister or the Commission are specifically identified as the relevant authority). As such, the Council will not be responsible for determining the delegations of the Council Assessment Panel or its Assessment Manager.

It is important to note that these relevant authorities have been established under the *PDI Act 2016*, and are therefore not able to be changed through the *draft Regulations* currently on consultation. However these *draft Regulations* propose the decision making responsibilities for each relevant authority as summarised in Tables 1 - 3 below. That is, the *PDI Act* has already established who the decision making bodies are, but the *draft Regulations* are currently proposing what types of decisions those bodies will be responsible for.

**TABLE 1: STATE GOVERNMENT RELEVANT AUTHORITIES**

| | **Minister** | **State Planning Commission** |
|---|---|---|
| **Responsible for** | Impact Assessed (not restricted) Development<br>*Similar to Major Development in the current planning system* | Restricted Development<br>*Similar to non-complying in the current planning system (without a concurrence role by Council)* |
| | | Inner Metropolitan Development over 4 storeys in designated areas (yet to be determined) |
| | | Land Not Within a Council |

**TABLE 2: LOCAL GOVERNMENT RELEVANT AUTHORITIES**

| | Assessment Panels | Assessment Manager | Council |
|---|---|---|---|
| **Responsible for** | Publically notified applications | Deemed to Satisfy (tick-box) | Full Development Approval (after planning consent and building consent have been granted) |
| | Development exceeding $5 million | Performance Assessed development not assigned to the Panel *Similar to Merit developments in the current planning system.* | Building Rules Consent |
| | Buildings exceeding 3 storeys | | |
| | Land Division > 20 allotments | *Note: can delegate to staff* | *Note: no longer responsible for Planning Consent* |

**TABLE 3: PRIVATE RELEVANT AUTHORITIES**

| | Accredited Professionals | | |
|---|---|---|---|
| | **Planning** | **Surveyor** | **Building** |
| **Responsible for** | Deemed to Satisfy (tick box) | Land divisions which are Deemed to Satisfy | Building Rules Consent |

Assessment Panel

The proposed decision making responsibilities of assessment panels differ noticeably from this Council's current Council Assessment Panel (CAP) delegations. Some examples of the differences proposed in the *draft Regulations* are set out below:

**TABLE 4: COMPARISON OF CURRENT AND PROPOSED CAP DELEGATION**

| Current NPSP CAP Delegations | Proposed in *draft Regulations* |
|---|---|
| Land divisions where the proposed allotments are less than the minimum site area and frontage requirements in the Development Plan | Land Divisions creating more than 20 allotments |
| New dwelling within an Historic (Conservation) Zone | No similar delegation proposed |
| Currently no cost threshold | Any development costing more than $5 million (which is not otherwise delegated to a State Government authority) |
| Currently no height threshold | Buildings exceeding 3 storeys |
| Any other Application which, in the opinion of staff, should be referred to the Panel for determination | No similar delegation specifically, but Assessment Manager can choose to delegate an application to the CAP |

As outlined above, although the *draft Regulations* propose the above CAP delegations, the Assessment Manager could choose to delegate an application to the CAP, rather than delegate to staff or determine an application themselves. For example, the Assessment Manager may deem it appropriate to delegate a land division creating 15 allotments to the CAP due to the scale of the proposal, in the interests of transparency.

State Planning Commission

Schedule 6 of the *draft Regulations* sets out the circumstances in which the Commission will be the relevant authority. This Schedule includes some 'carry-overs' from the current regulations such as inner metropolitan buildings exceeding four (4) storeys in specified areas (to be prescribed in the future *Planning and Design Code)*. It is unclear what areas this will apply to, however it is expected to apply to similar areas as is currently the case, namely Urban Corridor and District Centre (Norwood) Zones.

Given that the planning reforms sought to simplify and streamline decision making, reform of the suite of relevant authorities, and professionalise the planning system, it is very disappointing that it was considered necessary for this form of development to be determined by the State Planning Commission rather than the relevant Assessment Panel - particularly given that Assessment Panels require accreditation under the Accreditation Scheme but the State Planning Commission members do not. DPTI staff have advised that the State Government wishes to retain an interest in this form of development.

Elected Members may recall that the designation of the Commission as the relevant authority for this form of development, was initially introduced in 2013, without consultation, immediately after the *Kent Town & Norwood Strategic Growth Development Plan Amendment* (which introduced the 'uplift' zones in Kent Town and Norwood, to facilitate increased dwelling and population densities and create employment opportunities) came into effect. This decision was particularly frustrating for this Council given the co-operative and collaborative approach the Council took to rezoning these 'uplift' areas. In addition, the decisions which have been made by the Commission since 2013, have regularly and some instances significantly departed from the recently rezoned Development Plan policy, in terms of maximum height limits and other built form outcomes. This demonstrates a prioritisation of development interests at all costs and has significantly eroded the community's confidence in the planning system's capacity to deliver development outcomes that align to policies provisions contained in the Council's Development Plan.

As with the current regulations, Schedule 6 specifically excludes the Commission referring applications for inner metropolitan buildings with heights greater than four (4) storeys to the relevant Council for comment. Currently, this Council and DPTI have a Memorandum of Understanding which allows the Council to provide comments (albeit with some limitations regarding the extent of planning observations which the Council can provide), however it is unclear if a similar process will be maintained.

The attached submission highlights that the rhetoric of consistent decision making and "professionalisation" of the planning sector is not necessarily matched with a trust in Council Assessment Panels (with four Independent Members) to make decisions on larger scale Development Applications within inner metropolitan Adelaide.

Accredited Professionals

The structure of the Accredited Professionals Scheme was first consulted upon in February 2018 and included a level for appropriately qualified town planners in the private sector and land surveyors to issue land division consents. This Council did not support this proposal due to the complexities and risks associated with privatising land division assessments and approvals. DPTI's review of submissions on the Accreditation Scheme had indicated that, due to overwhelming criticism of this proposal, land surveyors would not be part of the accredited professional scheme. The inclusion of a land surveyor accredited professional stream in the *draft Regulations* has therefore been a surprising and disappointing inclusion, which again is not supported.

With respect to planning accredited professionals, the *draft Regulations* propose that less experienced private sector planners (Level 4) can process deemed-to-satisfy "tick box" Development Applications, whereas more experienced private sector planners (Level 3) can process deemed to satisfy applications with minor variations to the "tick box" requirements. Although concerns remain regarding the likely increase in applications being processed by privately accredited planners, and the risk of misconduct within the private sector, this is considered an improvement on earlier proposals which sought to allow private sector planners to make qualitative, judgment-based decisions on planning applications.

Changes to Local Government Act 1999

The *PDI Act* introduces changes to the *Local Government Act 1999,* in respect to Section 221 and Section 222 permits which regulate use and encroachment over public land. In particular, a private accredited professional can issue a development consent involving the alteration or use of public road, with the concurrence of the council. Maintaining up to date Section 221 and 222 related Council policies (e.g. crossover policy, tree policy, outdoor dining policy, etc) will therefore likely be an important requirement in the new system to ensure consistent and efficient responses can be provided to the accredited professionals. It remains unclear what is sought to be achieved by this process.

Regulation 24 of the *draft Regulations* appears to indicate that the Council's Assessment Manager will be responsible for approving encroachments over public land and for signing off on offset schemes, however the application of this regulation is unclear so clarification is being sought from DPTI.

**Assessment Timeframes**

The *draft Regulations* propose changes to the timeframes within which decisions on Development Applications need to be made. Favourably, additional business days are proposed for Applications which require public notification, external referrals or decisions by an Assessment Panel. In the interests of efficiency, however, the timeframe has been reduced for an Application which does not require public notification, statutory referrals, or a Council Assessment Panel (CAP) decision. This type of Application can still require an involved assessment including non-statutory referrals within Council (e.g. engineers or arborist) or external consultants (e.g. traffic or acoustic engineers). The reduced timeframe applicable to these types of applications could place additional pressure on Development Assessment staff. In this respect, the draft submission recommends this timeframe be amended to thirty (30) business days rather than the currently proposed twenty (20) business days, to ensure the assessing planner has adequate time to process the application.

Adhering to assessment timeframes will become increasingly important in the new planning system with the option for applicants to issue a 'deemed consent'. If a relevant authority (which may be a privately accredited professional engaged by the applicant) does not issue a decision within the appointed timeframe, the applicant can issue a 'deemed consent' notice and the authority will be taken to have granted the consent. The relevant authority has up to ten (10) days to issue its own consent, which would supersede the deemed consent. However if the authority fails to issue its own consent, the deemed consent will remain valid. The authority can apply to the Court for an order quashing the deemed consent within one month from the consent date, for example if the deemed consent resulted from an administrative error.

There are considerable risks associated with this process, particularly for Councils which will inherit poor planning outcomes, or be forced to take legal action to limit the effect of 'deemed consents'. This may lead to an unnecessary adversarial approach between Councils and applicants. Again, there is no data to support this change other than a mantra that Local Government is inefficient.

**Exempt development (development not requiring any approval)**

Schedule 4 in the *draft Regulations* sets out a range of activities which do not require development approval, meaning there is no involvement from the Council or other relevant planning authorities. The majority of activities set out in Schedule 4 are essentially carried over from the current regulations, however notable proposed additions to the list of developments that will be exempt from requiring development authorisation include:

- Combined retaining wall and fence structures up to 3.1 metres in height;
- demolition of single storey buildings (other than heritage buildings and those in specified areas);
- tree houses; and
- masonry outdoor kitchens (e.g. woodfire pizza ovens).

The potential for combined retaining wall and fence structures up to 3.1 metres in height to be built without approval raises a number of concerns. DPTI staff have advised that this was included on the basis that retaining walls up to one (1) metre in height are currently exempt from development, as is fencing up to 2.1 metres high. This is considered misguided and illogical, however, as the 2.1 metre height of a fence is measured from the lowest side, meaning the maximum height of exempt fences currently includes any retaining wall required as part of the structure.

The potential issues with this proposal include, but are not limited to:

- a 3.1 metre high fence and retaining wall, particularly along the whole length of a side or rear boundary, could have unreasonable impacts on the amenity enjoyed by owners and occupiers of adjoining properties;
- a 3.1 metre combined fence and retaining wall height is greater than what would ordinarily be expected or considered reasonable in most areas, other than in areas with particularly sloping terrain (such as the foothills). The wording in the *draft Regulations* does not specify any minimum difference in ground levels where this could apply, so there could be as little as 100mm of retaining wall and 3 metre high fencing ;
- if a fence (and supporting retaining wall) of this height can be built 'as of right' it may affect the extent to which an excessively long and high boundary wall proposed as part of a dwelling application, can be refused in a planning assessment given that "complying" boundary walls in a residential context are typically allowed to a height of three (3) metres and a length of eight (8) metres); and
- it is unclear what consideration has been given to the potential Building Code implications of such a tall fence (e.g. for wind loading, structural safety), particularly if the retaining wall is of minimal height.

The attached draft submission states that the Council is not supportive of this proposal in the *draft Regulations*.

Another proposed inclusion of particular interest, is the demolition of a single storey building (other than a heritage building or a building in a specified area). The specified area(s) will be determined by the *Planning and Design Code* and as such, it is not clear at this stage where this might apply, but it should exclude Historic (Conservation) Zones, otherwise this completely undermines the current Historic (Conservation) Zone framework in which dwellings in those zones cannot be demolished 'as of right'. It is anticipated that demolitions not requiring approval in the new system will align with current 'building only' demolitions which only require a building assessment (i.e. no involvement by a planner), given that there is minimal building assessment currently undertaken. It is worth noting that any asbestos related issues are currently dealt with by Safe Work SA and are not within the jurisdiction of Councils.

This regulation introduces an increased risk of unlawful demolition when there is no processing of an application undertaken by a council. However, if introduced, this process would be similar to the removal of regulated trees, where the onus rests with the property owner to accurately and honestly determine whether approval is required prior to removing the tree (or in this case demolishing the building). That said, after the event it will be harder to conceal the unlawful demolition of a building within a specified area than it is to conceal the unlawful removal of a regulated tree, however this does not overcome the fact that the building is demolished. This process, and any enforcement proceedings and penalties for unlawful demolition relies on a good community understanding. The attached submission recommends that DPTI undertake a thorough and periodical awareness/communication program about what can and cannot occur without approval. Again, this issue has not been thought through by DPTI and is seeking to solve an issue which has not been identified.

**Public Notification**

Under the *PDI Act* there will no longer be different categories of public notification for development applications, unlike the current system (Category 1, 2 and 3). Instead, an application processed at the Local Government level will either require public notification or not, with no variations in the scope of notification. (Note that a different level of notification may apply to applications processed at the State Government Level).

Development applications which are publically notified will require written notices sent out to owners and occupiers of land within sixty (60) metres of the subject land and a notice(s) installed on the subject land. The relevant authority (which will be staff on behalf of the Assessment Panel) is responsible for sending out notices to adjacent properties. The applicant is responsible for putting the notice on the land, unless they request the relevant authority to do so for a prescribed fee. The *draft Regulations* and *draft Practice Direction*, outline different requirements relating to the written notices and notice on the land, however it is apparent that ensuring the notice is maintained in an appropriate condition for the duration of the public notification period, could be a very resource intensive and challenging task if the notice is not installed in a robust structure.

The period for public notification is proposed to be increased from ten (10) business days to fifteen (15) business days which is considered positive in the interests of providing a genuine opportunity for affected parties to comment on a development proposal. Unlike the current system, the relevant authority can decide whether or not to hear representations. Unfortunately, the *PDI Act* has already removed the opportunity for third party appeal rights for the majority of development applications.

**Required Information**

The *draft Regulations* set out information which is required to be submitted with a range of Development Applications. For some forms of development, the extent of information required will increase however, the attached draft submission outlines a range of comments in respect to further information which is recommended to be included, given that the standard of an assessment relies on the quality of the information which is provided.

For a detail assessment of further issues and policy responses, please refer to the attached draft submission contained in **Attachment C**.

**OPTIONS**

The Council has the following options with respect to how it response to the *draft Regulations* and *draft Practice Directions*.

Option 1
Following consideration of the *draft Regulations* and *Practice Directions*, the Council can resolve to endorse the attached draft submission contained in **Attachment C**, with or without amendments, as being suitable for submitting to the Commission.

This option is recommended.

Option 2
The Council can resolve to make changes to the submission beyond the discussion in this report.

This option is not recommended, due to timing deadlines imposed by the consultation period.

Option 3
The Council can resolve to not make a submission to the State Government in response to the consultation, however this would result in a missed opportunity to raise issues of concern.

**CONCLUSION**

The *draft Regulations* and *draft Practice Directions* set out proposed operational details of the new planning system, particularly the development assessment framework. A significant proportion of the *draft Regulations* have been carried over from the current *Development Regulations,* however, there are some key proposed inclusions such as the decision making responsibilities of the different relevant authorities, changes to assessment timeframes and public notification requirements and additional activities proposed to be exempt from development approval. Some of the changes proposed to be introduced through the *draft Regulations* and *draft Practice Directions* are positive, however several have the potential to result in poor process or built form outcomes.

## COMMENTS

Nil

## RECOMMENDATION

1. That the draft submission contained in Attachment C, in response to the *draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* and *draft Practice Directions*, be endorsed and the submission be forwarded to the State Government.

2. That the Chief Executive Officer be authorised to make any minor editorial/grammatical changes to the submission prior to the submission being lodged.