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Enquiries To: Eleanor Walters
Direct Telephone: [REDACTED]

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DPTI



City of
Norwood
Payneham
& St Peters

17 October 2018

Mr Michael Lennon
Chair
State Planning Commission
By Email: DPTI.PlanningEngagement@sa.gov.au
cc. By Email: admin@saplanningcommission.sa.gov.au

Dear Mr Lennon

ASSESSMENT PATHWAYS TECHNICAL DISCUSSION PAPER

I refer to the release of the *Assessment Pathways: How Will They Work? Technical Discussion Paper*. Thank you for the opportunity to provide input and feedback.

The City of Norwood Payneham & St Peters values the various opportunities which have and will continue to be provided to deliver feedback on various aspects of the planning reform process.

The Assessment Pathways Discussion Paper has provided comprehensive information on the application of the *Planning Development and Infrastructure Act 2016* (PDI Act) in relation to the future development assessment system. However, due to the evolving and parallel development of Planning Reforms, a number of technical and operational questions and concerns remain outstanding.

It is acknowledged that the PDI Act requires the implementation of the new system by July 2020. Given the broad scope of the planning reforms program and the magnitude of some of the proposed changes, there is significant concern within the planning sector that processes and outcomes will be compromised in the interest in delivering the new system by this deadline.

The planning reform program involves various components of the system being addressed concurrently. It is challenging to provide genuine feedback when there are so many unresolved questions or issues. For example, it has been challenging to provide the attached feedback on the Assessment Pathways Discussion Paper, without resolution on the content and structure of the Planning & Design Code (the Code) and future Regulations.

In particular, within the past three (3) months, councils and other stakeholders have, or are in the process of responding to:

- draft State Planning Policies;
- Natural Resources and Environment Policy Discussion Paper;
- Integrated Movement Systems Policy Discussion Paper;
- Accredited Professionals Draft Scheme;
- Assessment Pathways Discussion Paper;
- Performance Indicators Discussion Paper; and
- Environment Resources and Development Committee Inquiry into Heritage.

It is noted that the ERD Committee Inquiry was not a product of the Department, Planning Transport & Infrastructure, but was likely inspired by a lack of resolution regarding how heritage will be managed in the new system.

175 The Parade
Norwood SA 5067

PO Box 204
Kent Town SA 5071

Telephone
8366 4555

Facsimile
8332 6338

Email
townhall@npsp.sa.gov.au

Website
www.npsp.sa.gov.au



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Not only has this period been resource intense, but has compromised our ability to provide meaningful and informed submissions. Furthermore, high level operational questions have not been addressed and have instead perpetuated across several submissions. It is also considered that the manner in which many of these documents have been released and the level of consultation undertaken, appear to be falling short of the standards anticipated within the Community Engagement Charter, particularly the lack of awareness and involvement from the broader community.

The complexities of the new system are also raising concerns that the planning reforms will not deliver the simpler, more accessible system that South Australia's Expert Panel set out to achieve. This Discussion Paper outlines a wide variety of processes which could apply before, during and after the assessment of a development application. There are also significant changes to relevant authorities and how applications will be managed through the new ePlanning Portal. Without appropriate consideration of all potential outcomes and comprehensive road testing, there is a significant risk that these system-wide changes will produce more confused, complicated and poorer outcomes.

Another significant change being illustrated through these recent Discussion Papers is a reduced role for councils in the assessment of development applications and related processes. It is noted, however, that councils will very likely continue to be the 'face of planning' to the community, fielding enquiries, assisting with applications and responding to complaints and non-conformances for developments which were determined by other relevant authorities.

Local councils are, by their very nature, best placed to understand the context and needs of local communities. Councils are also an impartial, transparent, accountable and accessible decision maker. The Council holds significant concerns about the potential for private planners to make subjective performance based decisions and the real or perceived issue of decisions not being made in the public interest. In this respect, the potential further privatisation of planning decisions is considered to be contrary to the core values and intent of the planning profession. One only has to consider the issue of conflicts of interests arising between building certifiers and developers currently playing out in New South Wales and the national media to understand that maintaining true independence on planning decisions should remain as a fundamental pillar of the South Australian planning system, rather than being further deregulated.

Please find attached the City of Norwood Payneham & St Peters submission in response to this Discussion Paper providing further details on these key points of concern, in addition to addressing the various topics and key questions as outlined in the Discussion Paper.

Thank you for the opportunity to provide feedback on the Assessment Pathways Technical Discussion Paper. The Council looks forward to providing comment and input into the formulation of the Planning and Design Code and other planning reform processes and topics as they arise.

If you have any questions regarding the Council's submission, please contact Eleanor Walters on [REDACTED] or [REDACTED] or Emily Crook on [REDACTED] or [REDACTED]

Yours sincerely



Carlos Buzzetti
GENERAL MANAGER, URBAN PLANNING & ENVIRONMENT

City of Norwood Payneham & St Peters Submission - Assessment Pathways: How Will They Work? Technical Discussion Paper

Consultation and Communication

The broad scope of the planning reforms process requires several different but interlinked components to be developed concurrently. However, it is exceptionally difficult to provide informed responses while several key details and the practical effects of the proposals are yet to be established. In particular, it has been difficult to provide meaningful feedback on several operational issues outlined in this Discussion Paper until the Planning and Design Code (the Code), land use definitions and the future Regulations have been established. There is a significant need across the planning reforms program for a level of communication which better connects these different elements.

There is also a significant need for 'closing the loop' in consultation processes. Councils and other stakeholders invest considerable time and effort compiling comprehensive submissions on the various documents which have been released (often concurrently) over the past 6 – 9 months. However, the level of feedback in response to submissions has been disappointing. Brief 'What We Have Heard' reports have outlined some, but not all, comments raised through consultation. It is noted, however, that the 'What We Have Heard' report for the Land Use Definitions and Classes Discussion Paper provided a much more comprehensive summary of the varying views raised through consultation; it is recommended that a similar approach be adopted for future 'What We Have Heard' reports. It was particularly disappointing that the draft Accredited Professionals Scheme was released with no explanation as to what recommendations raised during consultation were or were not adopted, and why.

Furthermore, there are a number of 'high level' strategic questions which have not been adequately addressed across the planning reforms process, particularly relating to the content and application of the Code. This has further challenged the ability to provide meaningful feedback on various issues.

Scope of System Change and Timing

Several substantial changes will be enacted in the new planning system including, but not limited to, new relevant authorities, different categories of development, new land use and procedural definitions, consents in any order, deemed consents, changes to appeal rights and a fundamental change in the processing of applications through the ePlanning portal. The simultaneous implementation of all of these substantial changes carries substantial risk of confused processing and poor outcomes. To mitigate this risk, it is recommended that a gradual transition process be adopted, where different elements of the PDI Act are 'switched on' over time.

The Council takes this opportunity to again express its concerns about the ambitiousness of the remaining timeframe to deliver multiple legislative, policy, governance and structural reforms to the planning system, with the appropriate engagement, collaboration, testing, training and review phases as part of this implementation. Outcomes rather than delivery deadlines should be driving the delivery of the new planning system.

Privatisation of Planning

A key change of the new planning system is the introduction of different relevant authorities. Although the decision making powers of various relevant authorities will be established through future Regulations, the proposal as described in the Accredited Professionals draft Regulations intends that private accredited professionals will be able to process performance assessed developments and undertake subjective planning decisions. The Council holds serious concerns about the privatisation of the decision making process. This change has been proposed by the Department following the release of the Discussion Paper and was not reflected in any feedback under the What Have We Heard report, leading to questions of its justification and intent.

Currently private planning certifiers are able to process Residential Code complying (Rescode) developments. Even though processing 'tick-box' decisions should be a straightforward process, the experience of this Council, and reinforced by other Councils, is that a variety of issues can arise through the private certification of planning consents. These issues include, but are not limited to, poor document management (e.g. two different versions of a site plan forming part of the planning consent), questionable determinations of 'minor' variations, different interpretations of criteria, and challenges to the processing of applications (see *Cairo v The Corporation of the City of Norwood Payneham & St*

Peters & Anor [2018] SAERDC 11 (21 February 2018) and *Mundy v City of West Torrens* [2016] SAERDC 30 (29 August 2016)).

Due to the cost and delays involved in Councils taking legal or complaint actions, very few discrepancies are formally or legally challenged. Instead, once a discrepancy, variation or breach is identified by Council staff, often the applicant/private certifier agree to follow the correct processing procedure, or the issue is otherwise resolved, through sometimes resource-intensive means. To this end, the volume of formal complaints or legal challenges is not at all reflective of the common, regular experiences of councils in dealing with these issues. It is also important to note the large extent of, and difficulties associated with, enquiries, compliance, and other post-approval processing councils currently undertaken for applications determined by other authorities (whether private certifiers or SCAP). The consumption of council resources is in no way matched by the base lodgment fee of \$64 currently provided to councils to undertake these services.

It is disappointing to note that the Accredited Professionals Scheme draft has been prepared without proper examination of this past history of Certifiers in South Australia and instead has been broadened in scope, volume and complexity by extending this under the Scheme, including to the assessment of Performance Assessed applications. This proposition is of significant concern to this Council, without first trialling and testing a staged phasing-in of opportunities for Accredited Professionals.

If compliance and complaints are currently present in a system where private planners can only undertake 'tick-box' applications, it is considered that enabling private planners to undertake subjective performance assessed development will further complicate and increase risks in the new planning system.

It is the view of this Council that subjective assessments, such as the performance assessed pathway, should only be undertaken by independent bodies which operate to serve and protect the public interest. Local Governments in particular are by their very nature, best placed to understand the context and needs of local communities, have the best access to information such as site history and are drivers of the strategic direction of the council area. To remove decision making powers from local councils is considered to be a fundamentally flawed process.

There is concern as to whether private professionals offering a commercial service of subjective assessment (as opposed to 'tick-box' processing) can operate impartially given they are engaged by the applicant. One only has to consider the issue of conflicts of interests arising between building certifiers and developers currently playing out in New South Wales and the national media to understand that maintaining true independence on planning decisions should remain as a fundamental pillar of the South Australian planning system, rather than being further deregulated.

For the avoidance of doubt, it is considered that there is a valid continued role for certifiers in 'tick-box' assessments, provided that there is no room for interpretation in the criteria, and no ability to accept variations to the criteria. [REDACTED] [REDACTED] [REDACTED]

Role of councils

Due to a combination of increased volume of accepted and deemed-to-satisfy development, increased decision making powers of private planners and shift of restricted development from councils to the State Planning Commission (the Commission), it is expected that councils will have a reduced role in the assessment of applications. This Council is strongly opposed to the reduced role of councils in the assessment process, as it is considered that local councils are best suited to make development decisions as outlined above.

Despite the reduced assessment role and control over development outcomes, councils will continue to be the first port of call for members of the community. As outlined later in this submission, it is expected that councils will still be expected to operate at the front and tail end of the new system, but without any fee recovery and no control over decision making. Many members of the community will continue to lodge development applications directly with councils, or manually pay lodgment fees, requiring the councils to transact through the ePlanning portal, even if the application will ultimately be determined by another relevant authority. Councils will also continue to provide services such as preliminary development enquiries, enquiries regarding approved developments (even if these were not determined by the council), complaints and compliance. Past experience has demonstrated that

providing these services for developments where the relevant authority was a private certifier or SCAP are more challenging than when the council was the relevant authority, due to the lack of information, documentation and understating of the assessment considerations. Councils will ultimately be responsible for various development related matters and possible effects on public infrastructure, but have reduced involvement in the decision making process and associated reduction in income stream.

Progressive Certainty

Providing 'progressive certainty' and streamlined approval processes are some of the key aims of the new planning system. This will be achieved through measures such as outline consents, increased reserved matter opportunities, staged consents (consents in any order), deferred referrals and 'elements' of a development being processed separately and potentially by different decision makers. Each of these issues is discussed in more detail below, however a combination of these processes is likely to artificially 'break up' developments, confuse applicants and the community and risks artificial outcomes or manipulation of the system. These outcomes are contrary to the goals of the new system providing a streamlined and efficient system which provides certainty for all.

Reliance on Practice Directions

The Discussion Paper outlines numerous issues which will be resolved through future practice directions. It is acknowledged that practice directions are an efficient way of providing consistent guidance to planning practitioners, however, practice directions are not subject to the same consultation process as legislation or statutory documents. As a result, the potential exists for key processes to be introduced without an appropriate level of consultation amongst the community and planning practitioners. A large volume of practice directions could also complicate the provision of information and processing of development matters i.e. a planner will need to consult the PDI Act, the Regulations, the Code and/or practice directions to determine how to appropriately process an application. Careful consideration will need to be given to how practice directions will be communicated through the ePlanning Portal.

It is unclear from the Discussion Paper if Practice Directions, in addition to providing guidance on common issues and processes, will be used as one-off guidance for the assessment of a particular proposed development. For example, the Discussion Paper indicates that the Commission will use practice directions to outline when it will be prepared to assess restricted development and how the Commission will proceed with the assessment, including information requirements and other steps the applicant must take. Clarification is required as to whether there will be a single practice direction applicable to all restricted development applications, or whether a new practice direction will be established for each application.

Reduced Community Involvement

Since the release of the Expert Panel report in 2014, this Council has raised concerns with the foreshadowed reduction of community involvement at the development assessment stage. It is acknowledged that the scope of public notification as defined in the Discussion Paper may result in broader notification when a development is notified. However, due to a foreshadowed increase in 'tick-box' processing and given the broad scope of future notification, it is anticipated that fewer applications overall will be subject to notification. In the reduced circumstances where notification does occur and a representation is made, there will no longer be a right to be heard by a Panel. Furthermore, even when an application is notified, third party appeal rights have been significantly reduced given they are now limited to restricted developments only. As such, while more people might be notified for a particular application, for performance assessed applications there is no opportunity to appeal if they oppose the decision. The reduction of third party appeal rights is not supported.

More detailed comments are provided below under the subject headings as outlined in the Discussion Paper.

1. INTRODUCTION

1.4 ePlanning

Figure 1 in the Discussion Paper provides a useful indication of the basic ePlanning process. The below points outline various comments, concerns or questions relating to this diagram:

Lodging applications and determining the assessment pathway

Figure 1 indicates that applications will be lodged electronically by the applicant. Although many applicants will readily adopt this system, other applicants will still rely on submitting their applications to their relevant council. The council would then be responsible for processing the application including lodgment onto the ePlanning system, answering wizard prompts and scanning and uploading plans if the application is submitted in hard copy. This raises questions of liability if the applicant provides incorrect information which is then entered (or missed) by a council officer simply acting as a lodging agent. Providing this service will also consume resources and it is not clear how the advice given at a council front counter will then be applied to the subsequent stages of lodgment when this can be undertaken by other parties as the relevant authority. It is not clear yet whether there will be any administrative fee payable to contribute towards the resourcing costs associated with this process.

Clarification is required on how the ePlanning system will accurately and consistently determine the assessment pathway of a development application. The FAQ sheet distributed by DPTI has indicated that initially the system would only determine the assessment pathway of some basic forms of development based on questions answered by applicants. Beyond this, it is not clear how an automated system can assess every aspect of a proposal to verify its categorisation (eg. does it create an internal private roadway? does it impact on an adjoining street tree or Regulated Tree?). Correctly determining what on the surface appear to be simple building only or complying development proposals has proven in the past to be complicated and involves ambiguity about elements such as whether blade walls or parapets count towards building height, or whether a carport with a gutter adjacent the boundary counts as 'boundary development'. Calculating other elements such as the maximum cut/fill on a site can also be a very complicated process.

For the ePlanning system to work effectively, it will be vital that all definitions and terminology are unambiguous to ensure that there are no disagreements as to the nature of a development. That said past experience has indicated that there will still be a variety of land uses and built form developments which do not neatly fit into any particular category or description, often for unanticipated or undefined uses or combinations of uses. It is unclear how these types of applications will be processed in the new system as the system cannot rely on self-regulation by applicants. Similarly councils do not want to be checking and overseeing all privately certified applications lodged in the portal to ensure they accurately reflect land use definitions and pick up on all local conditions.

It is understood that an application will only be referred to a private accredited professional if it has **been determined that the application is accepted or deemed-to-satisfy development. It is not clear** how or who has responsibility for this verification. If the nature of development cannot be determined at the time of lodgment, would the application be directed to the council in the first instance? If the council determines that the application is accepted or deemed-to-satisfy, presumably the applicant then still has the option to take their application to a private accredited professional? Ultimately, councils do not want to triage applications they are not assessing and not collecting sufficient remuneration by way of fees to cover resource expenditure to administer such applications.

It is noted that the assessment pathway must be confirmed by the relevant authority who receives the application, however, there is a high chance of incorrect information being input into the system. For example, an applicant may not have checked whether trees on adjacent sites are regulated or significant and incorrectly indicated that no regulated trees will be affected by the proposed development. Will the relevant authority be responsible for confirming details such as whether adjacent trees are regulated? Council officers occasionally need to inspect sites (including those adjacent the subject land) to determine site conditions (e.g. slope) before processing a building only or complying development. Will private accredited professionals have powers under the Act to enter land to undertake inspections or will they need to rely on information from an applicant?

Categorisation of restricted development

Based on previous case law, a minor expansion of an existing non-complying land use is processed as a merit form of development rather than non-complying. Will there be a similar process in the new system and how will the ePlanning Portal determine this?

Commencement of formal lodgment

In what may be an involved process to determine the assessment pathway of a development, it is important that the applicant is aware at what point their application is formally lodged and under assessment due to implications for timeframes and allocation to the relevant authority.

Notification to council of all applications

It is recommended that the relevant council is notified of any application which has been lodged within the council area along with the category of development and relevant authority. Primarily this would keep the council up to date with future development activity within the area, but the council could be prepared for providing information to the relevant authority regarding issues such as important site specific information, major infrastructure upgrades etc. It is unclear to what extent councils will be required to furnish details which only a council holds and what charge will be made for this service to a private certifier. (eg waste management servicing, street tree critical root zones, engineering advice etc)

Currently the *Development Regulations 2008* require a private certifier processing a development plan consent to forward to the council (a) a copy of the application form (b) notification as to the date on which the application was received and (c) the base lodgment fee. The private certifier can also request information pertaining to (a) advice about any site contamination that is believed to exist at the site (b) advice about the likely need for section 221 approvals and (c) advice about whether the development plan specifies any requirements relating to finished floor level (i.e. for flood mitigation). The council subsequently has two (2) business days to provide the development application number and responses to the above questions, if requested by the certifier. The minimum levels of information for lodgment under the new pathways need to be established in agreement with councils prior to being able to support the lodgment aspects of the new system.

Reminders

A benefit of the ePlanning system will be the ability to send reminders to both the applicant and the relevant authority prior to key steps or timeframes. Figure 1 notes that reminders can be sent to the authority and applicant when the deadline for provision of further information is approaching. Reminders could also be sent to referral agencies regarding the deadline of referral responses and reminding applicants prior to their planning consent/building consent/development approval lapsing.

Public hearing/meeting

Figure 1 notes that an assessment report is published on the ePlanning portal and considered by the Panel (presumably this only occurs where a Panel is a relevant authority and does not apply to other applications). **It also notes that representors will be notified of the meeting via the ePlanning system.** This could be problematic as explored under the *Public notification (development assessment)* section of this submission.

Development approval by councils

The relevant council is responsible for issuing development approval once all consents have been issued. The potential challenges and resource implications for councils are addressed under the 2.6 *Council* section of this submission. Additionally, it is unclear how councils can confirm if all elements of a proposal have been issued with the relevant consents. This is a significant area of concern due to the resourcing demand and potential for inconsistencies, confusion and incomplete information created by the ability to fragment planning decisions in so many ways under the PDI Act.

Correspondence

In addition to the notification of Panel meetings as referred to above, consideration will need to be given to whether any correspondence or notifications should be provided in hard copy. For example, if the applicant submitted the application in hard copy via the council because the applicant did not have access to the ePlanning portal, all correspondence would need to be provided by the relevant authority in hard copy. Further to this, any subsequent provision of information should be arranged through the relevant authority rather than the council. If the assessment is being undertaken by a

private accredited professional, the council cannot be involved in receiving and uploading all correspondence and information relating to the assessment.

It is assumed the ePlanning working group is considering the implications for legislative compliance with record keeping/ destruction/ court evidence/ Section 7s etc.

Boundary development and notifications

Many forms of development involve development on a site boundary, however the application does not require public notification to neighbours. Past experience has strongly demonstrated that many applicants/property owners do not notify neighbours under the *Fences Act 1975* which causes unnecessary distress and disruption to neighbours. There are conflicted understandings as to whether an applicant/property owner is required to notify a neighbour of fencing/boundary work if it is consistent with an approval issued under the *Development Act 1993*. Clarification on this point is required.

If the Fences Act notification requirements apply, the ePlanning portal should facilitate a notification process for any application involving boundary development. This would require a question prompt regarding boundary development at the time of lodgement or an input from the relevant authority when issuing a consent. The decision notification form could be issued with information relating to Fences Act requirements e.g. the Legal Services Commission booklet *Fences and the Law* and/or templates for notices served to the neighbour.

If the Fences Act does not apply, consideration should be given to introducing a requirement to notify neighbours prior to boundary development work being undertaken.

2. RELEVANT AUTHORITIES (PLANNING)

Key Question: 1. What should be considered when assigning relevant authorities?

It is challenging to provide informed and meaningful feedback on assigning relevant authorities without an understanding of what types of development fall into which category, which will not be known under the draft Planning and Design Code and land use definitions are released for comment. Nevertheless, the following comments are provided.

It is likely that there will be a decrease in the number of applications determined by councils in the new planning system. This is expected to occur through an increase in exempt, accepted and deemed-to-satisfy development, the likely ability of private (non-government) accredited professionals to determine performance assessed development and the new equivalent of non-complying applications (Impact Assessed (Restricted)) being determined by the Commission instead of councils.

Local councils have the greatest level of local knowledge relating to local conditions and situations, **community expectations and the history of development sites and therefore are considered the** most appropriate relevant authority to determine the majority of applications. It is unclear how this local knowledge will be communicated to relevant authorities outside of councils. Private accredited professionals in particular are unlikely to have the same access to engineers, arborists, heritage advisors or other experts in councils. How this reduction in local contextual information and internal specialist advice will result in good design outcomes, requires explanation.

Despite a potential reduction in the volume of applications determined by local councils and therefore a reduction in revenue from fees, it is expected that the volume of enquiries, development compliance, and complaints will remain at current levels or possibly increase. Currently, answering enquiries relating to privately certified or SCAP approvals, frequently beyond the policy requirements of the relevant zone, have proved challenging without detailed information relating to the assessment process, reports etc which were undertaken by a different authority. This will continue to occur under the new system, albeit at an increasing volume. Additionally, as outlined under the *ePlanning* section of this submission, many applicants will still elect to submit their application with the council. The combination of reduced intake of fees, maintained or increased need to answer public enquiries and complaints, in addition to annual contributions to the ePlanning Portal will place a greater financial burden on councils' development assessment units which ordinarily run at a loss within the current system. It is recommended that the future schedule of fees carefully considers the financial implications for councils in an equitable manner.

Schedule 10 of the Development Regulations 2008 currently outlines a range of applications which are to be determined by the State Planning Commission based on dollar value or scale, rather than the relevant council as would ordinarily be the case. It is expected that many of these types of developments would best fall into the performance assessed category of development. Clarification is required as to whether these developments will continue to be assessed by the Commission, by councils, and/or by private accredited professionals.

2.2 State Planning Commission and Committees

The Community Engagement Charter is based on principles of transparency for the public in understanding how decisions are made. Under the *Local Government Act 1999*, the default position is for decisions to be made in an open public forum with clear transparency of the debate and decision making process. Only in clearly justified circumstances, upon specific resolution are parts of a Council meeting held in camera. With public accountability in mind, all development applications considered by the Council Assessment Panel can be viewed by any applicant, representor or member of the public.

By contrast, all State Planning Commission meetings are held in camera as the default position unless determined otherwise by the Chair. Similarly State Commission Assessment Panel (SCAP) deliberations are conducted in private, which in the past has raised questions from the community as how planning decisions are arrived at. The Council welcomes the recently announced review by the Commission into opening up meetings for greater transparency and hopes that this extends to decision making by both the SCAP and the State Planning Commission to better align with the desire for transparent decision making.

2.4 Assessment manager

The role of the assessment manager as outlined in the PDI Act is significantly different to the way in which managers of development assessment units currently operate within local government authorities. Currently the Council is a relevant authority which delegates decision making powers to staff, including both managers and other development officers. Appeals against decisions issued by council staff are in the name of the council, rather than individual officers. Under the PDI Act, assessment managers will be an authority in their own right and can delegate their authority to other officers, increasing the direct line of responsibility of the assessment manager. This may result in a greater desire for assessment managers to review decisions made by staff (this is not currently a regular practice amongst councils but has proven to cause delays in processing decisions where it does occur). Clarification is required as to whether appeals against decisions made by an assessment manager or their delegate are in the personal name of the assessment manager, or in the title of the position e.g. *Smith v City of Norwood Payneham & St Peters Assessment Manager*. If the appeal is in the personal name of the assessment manager, it is unclear how this would be processed if the assessment manager left the organisation, or was on extended leave.

There appears to be significant confusion as to whether there can be more than one assessment manager at a council. Legal advice has indicated that the wording of the PDI Act indicates that there will only be one assessment manager, but advice from DPTI staff has indicated that a council could have multiple assessment managers, either dealing with separate issues in defined roles (e.g. assessment manager to the CAP, assessment manager for public notification etc) or sharing roles. Clarification on this point is required so that councils can consider how to adequately resource planning departments.

This Council has previously raised concerns regarding the decision making authority of private assessment managers. Confirmation is required that a private planner engaged to act as an assessment manager for a council can only exercise their assessment manager privileges in that role. That is, a private planner contracted to the position of an assessment manager for a regional council will not be able to process land divisions or publically notified applications outside that council area, as a private accredited professional. This is an important restriction for inclusion in the Accredited Professionals proposed scheme.

2.5 Accredited professional

The potential for private (non-government) accredited professionals to act as a relevant authority for performance assessed development is not supported for a variety of reasons. These concerns include a real or perceived lack of impartiality in being engaged by an applicant to undertake a subjective assessment and decision; a real or perceived lack of accountability for decisions as compared to councils which are more publically accessible and visible; the lack of opportunities for internal referrals to various experts currently undertaken by councils (e.g. engineer, heritage, arborists); and a lack of access to local knowledge and detailed property information. The introduction of various new processes and systems such as deemed consents, consents in any order and elements being determined separately will further complicate matters dealt with by private professionals. For these reasons it is imperative that the draft Regulations require that any subjective assessment (Performance Assessed) should be undertaken by a government body (councils or the Commission) only.

2.6 Council

Councils will remain the relevant authority for issuing full Development Approval, however, as outlined above it is expected that increasing volumes of planning consents will be issued by an authority other than the council and may be artificially broken into separate elements and deferred decisions.

When processing applications with a privately certified building and/or planning consent, many councils currently undertake a 'consistency check' to ensure consistency between the consents which have been issued. Councils often find inconsistencies, particularly when the council has issued planning consent but the building consent was privately certified. In many instances the inconsistencies can be dealt with through processing a minor variation pursuant to Regulation 47A, however on other occasions the inconsistencies can be significant and unreasonable. In either case, it is concerning when the inconsistency is not noted by the private certifier on the Schedule 22A Certificate of Consistency. Should councils not undertake a consistency check, the applicant would remain responsible for undertaking the development which is consistent with the planning and building consents. However, as the inconsistencies only become apparent when the development has been commenced or completed, it is very difficult to undertake enforcement proceedings. It is much easier and equitable for all parties if the council resolves any inconsistencies prior to issuing development approval.

Councils also often find that an application submitted by a private certifier as Schedule 1A development (and to a lesser extent Schedule 4 development) has been processed incorrectly and actually requires a planning assessment. This frequently occurs for heritage listed properties, or properties located within a Historic (Conservation) Zone.

In light of councils' current experiences with consistency and process checks, there is significant concern regarding the potential administrative burden placed on councils within the new planning system. Currently, the fees payable to the council for processing full Development Approval only or undertaking consistency checks is \$64 which does not represent cost recovery. It is recommended that the applicable fee in the new system is carefully reviewed.

It is also recommended that potential liability issues be considered with respect to councils issuing full development approval when an application has been processed incorrectly by a private certifier or with inconsistencies.

2.7 Delegations

The ability for a relevant authority (other than an accredited professional) to delegate any of their functions or powers to a particular person or body is supported. However, consideration should be given to how individualised delegations will differ from council to council and whether any parameters should be established for consistency. Key Question 6 asks what types of development should be assessed by an Assessment Panel (which suggests this would be outlined in future regulations or the Code) however this could be altered by Assessment Panels delegating down a range of different types of development decisions.

3. CATEGORIES OF DEVELOPMENT

The new planning system will rely heavily on accurate and comprehensive definitions of land uses, building types and other terminology. Given that categorisation will be undertaken by a wider variety of relevant authorities and all applications will initially be categorised through the automated ePlanning Portal, it is vital that definitions and categories of development are clear and undisputable.

Key Question 2. Should the current scope of exempt development be expanded to capture modern types of common domestic structures and expected works?

Please refer to NPSP's submission on the review of Schedule 3, submitted to DPTI on 27 April 2018 for comprehensive comments regarding Schedule 3. In addition to the comments provided in the submission, further consideration could also be given to the following:

Caravans

Schedule 3 (5)(2)(e) specifies that the parking of a caravan or motor-home on land used for residential purposes by a person who is an occupant of a dwelling on the land, is not development. However, the Council has previously pursued enforcement action in relation to a caravan which was connected to mains power on the site, was fixed to the land in such a way that it couldn't easily be shifted and was occupied by a relative of the dwelling occupant. It was considered that the caravan was a permanent structure and was being used as a separate dwelling, rather than simply a caravan being parked for storage purposes on the site. Similar issues may arise if a 'tiny house' is established on a vacant site or one which already contains an established dwelling. It recommended that the Planning and Design Code articulate in what circumstances caravans, tiny houses and similar structures do or do not constitute development.

Spa pools

Schedule 3(4)(1)(d) specifies that a spa pool associated with a dwelling which does not have a capacity exceeding 680 litres does not require approval. There are no parameters for depth, pool safety etc. Some investigations suggested the 680 litre capacity may have been determined by waste water requirements and/or the fact that spas of this capacity may more than likely be indoor spas. However in any case, it is recommended that these requirements, particularly in relation to depth and safety, be reviewed as part of this process.

Outdoor Kitchens and Garden Features

Councils receive a variety of enquiries regarding outdoor features such as outdoor kitchens, water features, pizza ovens etc. It is difficult to determine whether these structures require approval and council officers often refer to the requirements for other structures such as fencing. As a result, there is often uncertainty and inconsistency in the advice that is provided across local government. It is **recommended that these types of ancillary domestic structures and their potential impacts are** also considered in the review.

Outbuildings

Schedule 3 provides different maximum floor area for outbuildings which are within Historic (Conservation) Zones (10m^2) compared to those which are not (15m^2). It is considered that an additional 5m^2 is unlikely to make any meaningful difference in potential impacts on heritage value, amenity of the locality, or impacts on neighbours. As such, it is recommended that a consistent maximum floor area of 15m^2 is adopted.

Schedule 3 does not specify any maximum level of cut or fill for the outbuilding. Consideration should be given to whether a maximum floor level above or below natural ground level is appropriate.

3.3 Accepted development

Key Question 3. Should the current scope of 'building consent only' development be expanded to allow for more types of common development with minor planning impacts?

It is recommended that the following points be considered as part of a review of current 'building only' applications outlined in Schedule 1A.

Outbuildings

Schedule 1A permits outbuildings to have up to 1 metre of fill and 1 metre of excavation up to a maximum total of 2 metre. This is extremely excessive when considering the potential impacts on neighbours, particularly for localities which have typically flat topography. It is recommended that this is substantially reduced, for example to a maximum of 500mm cut or fill in an urban context.

Carports and verandahs

Clarification is required as to whether any slats, blinds, trellising etc can be included on the sides of a 'building only' carport or verandah (as part of the application).

Shade sails

Schedule 1A permits shade sails which are located within 900mm of a boundary to have a maximum height of 3 metres above ground or floor level, and shade sails which are located greater than 900mm of a boundary to have a maximum height of 5 metres above ground or floor level. It is recommended that maximum heights be measured above ground level, not floor level; if the shade sail was on a raised deck, the true height of the shade sail would be greater than 3 metres or 5 metres respectively. It is also recommended that a setback in the order of at least 1.5 – 2 metres from a boundary would be required for a shade sail up to 5 metres high, or in the alternative, a maximum height of 3 metres is adopted regardless of the setback from the boundary. A maximum post/wall height of 3 metres is typical for most structures permitted under Schedule 3 and Schedule 1A.

Masonry fencing

Consideration could be given to including masonry fencing up to 2.1 metres in height, in areas where non-masonry fencing can be constructed up to 2.1 metres in height without requiring approval. There is often little visual impact difference between a masonry and non-masonry fence of the same height. That said, careful consideration would need to be given to potential impacts from masonry fence footing construction on regulated trees and street trees and safety.

3.4 Code assessed development**3.4.1 Deemed-to-satisfy***Scope of deemed-to-satisfy development*

The Discussion Paper references (through text and illustrative figures) detached houses as being a 'simple' development and therefore suitable as deemed-to-satisfy. It is worth noting that 'simple' or 'small scale' development can result in significant impacts on neighbouring property occupants and is a frequent source of complaints and enquiries from local residents. The potential importance and significance of 'small scale' development should not be underestimated.

It is expected that current Rescode applicable areas will transition to areas or zones where deemed-to-satisfy criteria will apply to dwelling(s). This is generally supported subject to the final policy detail of **the deemed-to-satisfy criteria. However, there are areas within NPSP and other councils which** were specifically excluded from Rescode applicable areas in the interests of preserving character and development controls. These areas fall into a variety of zones, including 'standard' residential zones as well as character and Historic (Conservation) zones. The extent of deemed-to-satisfy development which applies in areas which are not currently within Rescode applicable areas should be carefully considered. It is strongly recommended that new dwellings remain a performance assessed form of development within character and Historic (Conservation) zones so that a qualitative assessment can be undertaken to take into account the context and character of the locality. It is not considered appropriate to attempt to 'quantify' character as deemed to satisfy criteria, due to the immense variety in what 'character' looks like across South Australia.

The illustrative figures represent deemed-to-satisfy development as a well-designed single storey dwelling. It is expected that deemed-to-satisfy development will also incorporate two storey development and the construction of more than one detached or semi-detached dwelling, as is currently the case with Rescode development in non-character and non-Historic (Conservation) Zones. It is important that the full potential or intended scope of deemed-to-satisfy development is clearly articulated to the community at this point, to avoid incorrect assumptions that only single storey detached dwellings will be subject to deemed-to-satisfy. It is difficult to provide support for the new deemed to satisfy pathway without knowing how widely and in what situations it will apply.

What development should or should not be deemed-to-satisfy?

The scope of deemed-to-satisfy should largely remain consistent with current complying developments. Most development assessments incorporate a range of variables which are difficult to quantify – for example visual impacts on neighbours or the streetscape, or how increased levels of activity will affect the locality.

What should not be deemed-to-satisfy?

- Dwellings in Historic Conservation Zone, Character Zone or similar
- Development that is sensitive in proximity to side and rear boundaries (or exceeds certain setbacks) should not be Deemed to Satisfy or not able to be accepted as minor variations
- mixed use developments which require an assessment of the individual land uses as well as the potential impacts of the uses operating together (e.g. a shop and dwelling may require a different level of assessment to a shop and a dwelling which operate in isolation);
- change of land uses where an assessment as to appropriate hours of operations etc. may be required;
- sites within a flood, bushfire or other hazard overlay;
- sites where the development affects, or is affected by an easement or significant tree;
- sites where there is potential for site contamination;
- development which requires an assessment against Australian Standards for vehicle manoeuvring such as common internal driveways;
- development with onsite waste management;
- licensed premises;
- development adjacent a State or Local Heritage Place; and
- development greater than 2 storey (in a Residential Zone)

What could be deemed-to-satisfy

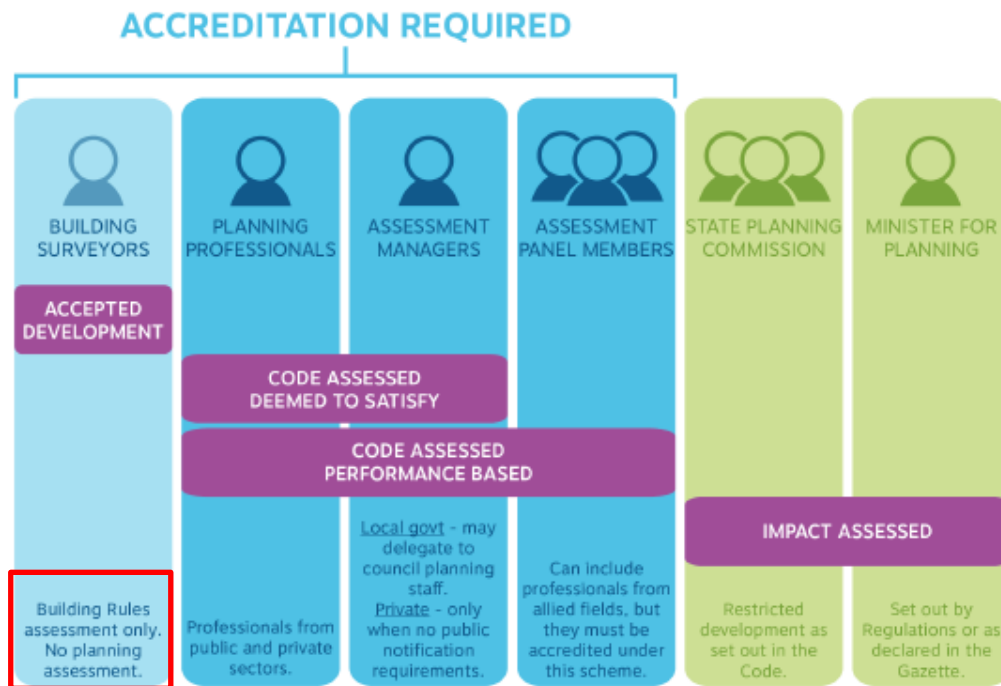
- change of land use applications in high activity areas (such as the current designated areas) where the site is not on a zone boundary and where the change of use has set parameters including specified land uses and maximum tenancy areas to limit potential impacts;
- 'standard' fencing of appropriate materials (such as corrugated iron) on side or rear boundaries within a Historic (Conservation) Zone – this is currently complying within the NPSP Historic (Conservation) Zones; and
- internal work to a Local Heritage Place which does not result in external changes (as above, this is currently complying within the NPSP Development Plan) and 'like-for-like' external maintenance work.

Relevant authorities processing deemed-to-satisfy

The approved assessment activities of accredited professionals will be confirmed by future regulations, however there appears to be an inconsistency in the Fact Sheets provided with the draft Scheme. The 'building professional' Accredited Professionals Fact Sheet indicates that Level 1 Building Surveyors will be able to assess Rescode equivalent assessments:

Class	Approved activities
Level 1: Building Surveyor	<ul style="list-style-type: none"> • Assess against the Building Rules, with no limitations • Undertake building inspections on behalf of a council <li style="border: 2px solid red; padding: 2px;">• Assess 'Residential Code equivalent' development applications, to be designated by the Planning and Design Code* <p><i>*Planning assessments against the Planning and Design Code can only be made by accredited planning professionals</i></p>

In contrast, the Council and Private Planner Fact Sheets indicate that Building Surveyors will only be able to process building rules consent matters:



It is recommended that this information be reviewed to ensure consistency in communication.

Key Question 4. How should the scope of a ‘minor variation’ to deemed-to-satisfy development be defined?

Section 35 of the *Development Act 1993* currently allows for a minor variation to complying development however the scope of a minor variation has never been defined and is the subject of widespread variances in its application. It is expected that minor variations to complying criteria were intended to apply to genuinely trifling departures, perhaps due to construction requirements, dimensions of materials, or inconsequential site constraints. Experience has demonstrated, however, that rather than determine whether a variation is genuinely minor, some planners apply a subjective test of ‘reasonableness’ and consider potential impacts on neighbouring properties e.g considering that a wall length of 9 metres rather than 8 metres is a ‘minor’ variation on the basis that it does not have an unreasonable impact on the neighbour, rather than considering whether an additional metre is genuinely ‘minor’ departure from the 8 metre requirement.

The application of minor variations was considered in *Mundy v City of West Torrens* [2016] SAERDC 30 (29 August 2016). In this decision, various departures were considered, including a 7% shortfall in site frontage requirements. Her Honour Judge Cole deemed a 7% shortfall “considerably in excess of anything which could be considered minor in the context of the highly prescriptive provisions of Schedule 4” and “the combined shortfalls could not reasonably be considered to be minor”.

If a prescriptive percentage or other numerical provision (say, 5%) could be applied as a threshold to a minor variation, this could artificially reduce all complying criteria, therefore eroding the minimum standard. For example, if a minimum setback is listed as 4 metres, but the prescribed minor variation tolerance is 5%, then it is expected that many applicants would design houses with a 3.8 metre setback. Should a minor variation be applied to all numerical parameters, the cumulative effect of numerous minor variations could result in a significantly different development outcome to that intended by the Code. A percentage variation, even if it could be effectively conceived, would not account for ‘minor’ variations that cannot be quantified. This will need to be given careful thought so it can be resolved in the interests of consistent and transparent application by all relevant authorities under the PDI Act.

In the interests of consistency, transparency and to avoid further complications in the new planning system, it is recommended that no minor variations be permitted to deemed-to-satisfy development. The proposed 'hybrid' process will allow any departures from the deemed-to-satisfy development to be dealt with as isolated assessment elements.

3.4.2 Deemed-to-satisfy/performance assessed hybrid

DPTI staff have acknowledged that the use of the term 'hybrid' and the concept of a 'half approved' application is causing confusion. If there is a need to attach terminology to this process, it is recommended that the current term 'Limited Assessment' could be used. This currently refers to circumstances where only one complying criteria is not met, but this could easily be applied to a development which fails more than one deemed-to-satisfy criteria. 'Limited assessment' is a plain English term which articulates the fact that the assessment is confined to limited elements of the proposal.

Section 107(2)(a) of the PDI Act states that deemed-to-satisfy elements "will be taken to have been granted planning consent". This language could be interpreted (particularly by applicants) as requiring a separate planning decision notification form to be issued for the deemed-to-satisfy elements of their proposal up front particularly where, for example, a shed meets deemed-to-satisfy development but the associated new dwelling requires a performance assessment. How this provision inter-relates with the other deferral mechanisms (referrals, elements, outline consents, consents in any order) needs greater explanation to ensure a simpler planning system.

It is understood that although the relevant authority cannot request an applicant to amend an element which meets a deemed-to-satisfy development, this element could be amended at the discretion of the applicant through negotiation. For example, if a boundary wall meets deemed-to-satisfy criteria with respect to length but exceeds the criteria for height, the applicant could, by negotiation, reduce the length of the wall to alleviate the relevant authority's concerns about the wall height. Clarification on this point would be appreciated.

It is recommended that any supporting information prepared by DPTI provides clarification on these issues as it is likely that the concept of some negotiable and some non-negotiable aspects of a development will be a very challenging concept for some members of the community, complicating the assessment process.

3.4.3 Performance assessed

As outlined in the 'Relevant Authority' section of this submission, the ability for private accredited professionals to undertake subjective performance assessments is not supported. This should remain the role of government authorities.

Key Question 5. Are there some elements of a project that should always be notified if the deemed-to-satisfy criteria are not met (e.g. buildings over height)? Are there other things that don't matter as much for the purposes of notification?

Building height

It is strongly recommended that any development which exceeds the maximum building height (in metres or storeys) is notified to owners and occupiers of surrounding properties. The new planning system has been established with an emphasis on community involvement at the policy formulation stage rather than the development assessment stage, however this system is undermined when a development is approved contrary to the established policy. It is also considered that appeal rights should be afforded to representors opposing development which is at variance to the policy in such a significant way.

As outlined above, it is considered that performance assessed developments should be determined by a government body rather than a private accredited professional. However, should private accredited professionals be able to determine performance assessed development, contrary to this recommendation, it is important that private accredited professionals are not able to assess applications where the building exceeds the maximum building height. If a building exceeding building height requirements in the Code required public notification and private accredited professionals were

not able to assess applications requiring public notification, this would prevent the private accredited professional from assessing a proposal for an over height building.

The Council has recently expressed its concern to the Minister for Planning that a number of applications have been approved by SCAP, exceeding a maximum height limit that in several instances is the subject of recently introduced Development Plan policy. The disregard for up-to-date policy requirements, that the community has been consulted upon, cannot be disregarded at the assessment stage. For this reason, building height should be a trigger for notification, but should also be a trigger for categorisation as restricted development, as the only avenue available under the new system for appeal rights.

Other impacts on neighbours

Notification should also occur for other departures from Code policy which have the potential to impact adjacent properties, such as boundary wall height and length, setbacks, car parking shortfalls, and developments which are expected to generate a significant increase in traffic flow (this would need to be quantified). Development that is close to the boundary of a different zone, where the land use or scale of development may have more sensitive impacts than well inside the zone, should also be notified (similar to existing Category 2).

What does not need to be notified

Departures from Code policy where it relates to the capacity of rainwater tanks, private open space and similar features which are much less likely to have a direct impact on neighbouring properties.

Key Question 6. What types of performance assessed development should be assessed by an Assessment Panel?

The types of performance assessed development which should be assessed by an Assessment Panel will vary depending on the zone and context of the local area. For example, it may be appropriate for a development consisting of more than 2 or 3 dwellings to be determined by an Assessment Panel within an inner metropolitan council area, but not an outer metropolitan council where large subdivisions are common and expected. Similarly, it may be appropriate for any development exceeding 2 storeys to be determined by an Assessment Panel in many councils, but this would not be appropriate in many zones within the City of Adelaide.

Developments which were subject to notification where objections were received should also be determined by an Assessment Panel. It is also recommended that Assessment Managers retain the option of referring any development application to the Assessment Panel if the Assessment Manager deems it appropriate for the application to be considered openly and transparently in a public meeting.

3.5 Impact assessed development

3.5.1 Restricted

Removal of councils from restricted development processes

Currently, councils are responsible for assessing the majority of non-complying applications. In the new planning system, restricted development (the new 'equivalent' of non-complying applications) will be assessed by the Commission, removing the council from this level of assessment. As outlined in the 'Relevant Authority' section of this submission, the expected reduction of applications assessed by councils is not supported.

The change in decision maker from CAP to SCAP, under current governance practices, also means planning decisions at the more complex and controversial end of the spectrum will be held in camera, rather than transparent to the applicant, representor and public gallery as currently occurs. This procedural change will mean that there is less visibility and insight of the public into important decision making which is contrary to the Community Engagement principles. Decisions made in camera, combined with a loss of concurrence role, could be perceived by the public as less accountability and rigour in the assessment of restricted applications.

The lack of a concurrence role for councils with restricted development is also not supported. Although the concurrence process adds time to the assessment, it is an important step in ensuring appropriate outcomes are achieved, particularly as non-complying applications are not ordinarily anticipated forms of development. It has been suggested that an informal referral process during the assessment is

likely to be undertaken, however it is important for this to be a formal referral process so that the process is established and transparent. It is important to formally consult with councils, given the depth of knowledge held by councils and the potential impacts on traffic, infrastructure and other council services resulting from larger developments. It is not expected that a referral to council during the assessment of the application will unreasonably hold up the application given how detailed the assessment of a restricted development is likely to be, including concurrent referrals to other bodies.

Assessment against the Code

The Discussion Paper notes that Section 110 (10) of the PDI Act states the Commission's delegate (presumably SCAP), when assessing restricted development, must take into account the relevant provisions of the Planning and Design Code, but is not bound by those provisions. This is contrary to the current process where non-complying developments are assessed against the relevant Development Plan. Although relevant zone policies often do not provide much guidance for the assessment of the application, city wide policies such as Interface Between Land uses, Design and Appearance of Land and Buildings, Transport and Car Parking etc can and should be used in the assessment. Other factors such as the context and history of the site the locality and the potential impacts on neighbours are also considered. Referrals to experts such as acoustic or traffic engineers often form part of the assessment process and NPSP city wide policies refer to external policies such as the *Environment Protection (Noise) Policy* and *Australian Standards* for car parking which requires these document to also be taken into account.

The majority of non-complying developments are at a 'local' scale and in amongst other urban development e.g. an office which exceeds the capped floor area, or a new commercial use in a former corner shop. In some cases, the difference between merit and non-complying developments can be a very fine line so it is considered appropriate to use the same assessment tool for non-complying and merit developments. In the interest of satisfying community expectations of transparency and consistency, it is considered reasonable for restricted development to be assessed against the same set of 'rules' which applies to adjacent sites. The possibility that a restricted development could be proposed next door and assessed against yet-to-be-determined guidelines or standards, rather than the Code policies which apply to that area, would not provide the certainty that the new planning system sets out to achieve. Nor does it provide the community an opportunity for consultation 'up front' on the policy framework if the relevant assessment policies or guidelines are determined on a case by case basis or if Practice Directions are prepared for individual restricted development applications. This would be a system of developing the rules once a proposal is known, which seems contrary to the fundamentals of good land use planning.

Not requiring a restricted development to be assessed against the Code more closely resembles the current process for major development. Given the scale of major developments and the fact that they are usually unique examples for that locality it is logical for major developments (if they are subject to rigorous declaration process) to be assessed against special criteria. For example, a new marina is likely to be significantly outside the scope of the Code policies and warrants an assessment against external guidelines, whereas an office within a residential zone, although not anticipated, is not significantly outside the scope of the Code policies.

It is noted that one of the requirements for preparing an EIS for an impact assessed (not restricted) development, pursuant to Section 113(4)(c)(iii) of the PDI Act 2016, is that it must include a statement outlining the extent to which the expected effects of the development are consistent with the provisions of the Planning and Design Code. It is curious that there appears to be a stronger assessment relationship between the Code and impact assessed (not restricted) development, than between the Code and impact assessed (restricted) development.

In light of the above, it is recommended that Code is used as the primary assessment tool for restricted development. A practice direction can establish guidelines for when it may be appropriate to support a restricted development e.g. in the same way the Supreme Court outlined 10 reasons why a planning authority may be justified in departing from a clearly expressed policy in *Town of Gawler v Impact Investment Corporation PTY LTD [2007] SASC 356 (3 October 2007)*. It is also recommended that the Code policies include references to recognised external documents, such as Australian Standards and *Environment Protection (Noise) Policy*. As an electronic document, the Code can be easily updated to reflect any changes to these references.

Practice directions

Section 109 of the PDI Act requires the Commission to publish a practice direction with respect to circumstances under which the Commission will assess a restricted development and how the Commission will proceed with the assessment. It is assumed that this refers to a single practice direction applied to all restricted development, rather than a new practice direction for every new restricted development application, although this requires clarification. A single, consistent practice direction is supported, in order to provide consistency between developments and to help establish community expectations. Clarification on this point would be appreciated.

As currently set out in the Act, the process for restricted development is quite different to the current non-complying process. It could then be assumed, therefore, that there will not be a similar or 'like-for-like' transition from non-complying development to restricted development i.e. some forms of development which are currently non-complying will more likely be performance assessed than restricted. To preserve opportunities available in the current system, where development which vastly exceeds the zone expectations (either in terms of land use or scale/ impacts) during the Code Amendment Process, may result in the need for allocation of some forms of development (or scale of development) to the restricted category, to deliver the intent of 'like-for-like'. In either scenario, the effects of this shift in the categorisation of development and the potential loss of statutory rights, will need to be carefully and explicitly communicated to the community when the Commission undertakes community engagement on the draft spatially applied Code.

Key Question 7. What types of principles should be used when determining 'restricted' development types in the Planning and Design Code?

It is recommended that the following types of development be included in 'restricted' development:

- land uses which are contrary to the primary intention of the zone and which have the potential to cause conflicts with surrounding land uses. Examples may include: commercial activities in a residential zone (other than on arterial roads or existing commercial sites), heavy industry in mixed use or centre zones, or residential uses in a heavy commercial zone;
- development which exceeds established parameters such as building height by a defined margin; and
- development that has third party appeal rights under the current Development Plan to deliver on the first generation intent of "like for like" policy translation.

Key Question 8. How should restricted development be assessed - what other considerations outside of the Code should be taken into account?

As outlined above, it is recommended that the Code is the primary assessment tool for restricted developments. Additional assessment tools could be referred to in a practice direction as supplementary guidance, but not developed reactively once a proposal is lodged.

3.5.2 Impact assessed (not restricted)

Terminology

The term 'Impact assessed (not restricted)' is considered to be a confusing and misleading term for proposals at the most complex and high impact end of the assessment continuum. Firstly, although this is intended to be the highest order of assessment, for most people in the community 'not restricted' development sounds like a lower level assessment pathway compared to 'restricted'. Secondly, the terminology 'not restricted' could create the perception that there are no restrictions in place for the proposed development - as in, the developer can 'do what they like'. It is recommended that this form of development is referred to as 'impact assessed (by Minister)' or 'impact assessed (by regulations)' as per the PDI Act, or alternatively 'impact assessed (major development)'.

Public notification

In accordance with the PDI Act 2016, public notification for impact assessed (not restricted) development will involve a public notice, copies of the EIS published on the Planning Portal and any other consultation as required by the Minister. It is recommended that notification also be provided to adjacent or surrounding sites and a sign be placed on the land whenever feasible (acknowledging that the scale, context and location of a major development may not always facilitate this). It is important

that those directly affected are notified personally, rather than relying on these people checking the SA Planning Portal.

Section 113 of the PDI Act requires that copies of the EIS are to be available for public inspection and purchase. The PDI Act does not appear to clarify that plans and specifications of the development must also be made available. Although it is expected that the EIS would include development details, it is recommended that the future Regulations or practice directions clarify that all relevant details of the development should also be available for public inspection. It is also recommended that at least some level of documentation should be provided free of charge, rather than for purchase which seems to be a redundant concept in an ePlanning system.

In addition to the above, it would be appreciated if clarification could be provided on the following points outlined in the Discussion Paper:

- *“The State Planning Commission must issue a practice direction which sets out the assessment guidelines...”* for impact assessed (not restricted) development. It is unclear if there will be a new set of assessment guidelines for each individual development, each type of development (e.g. marinas, wind farms, timber plantations etc), or a single practice direction for all not restricted developments ;
- *“The Commission is required to determine the potential impacts of a project and set the ‘level’ of investigation based on information provided by the proponent as part of the formal development application.”* Does this imply that the required level of assessment is based solely on information provided by the applicant? The level of required assessment should be determined by the Commission based on an independent review of the nature of the proposal, the potential impacts and the context of the locality.

Key Question 9. What scale of development and/or impact types would be suited to the impact assessment (not restricted) pathway?

This pathway should be limited to major developments which have complex impacts, where the assessment of these impacts would be beyond the scope of the Code policies. These developments are typically unique within the local area (by virtue of the significant scale and the fact that it would not ordinarily be an anticipated form of development).

Types of development which may warrant an impact assessed (not restricted) process could include: landfill or waste processing centre, mining related operations (which are not processed through other avenues), significant township or tourism development in a non-residential or unestablished area, or solar/wind farm.

It is not considered necessary or appropriate for development which could reasonably be assessed against the relevant Code policies to be processed as impact assessed (not restricted) e.g. residential apartments, aged care, or student accommodation in an urban area. The impacts resulting from these developments typically relate to bulk and scale of the built form, traffic generation, overlooking and overshadowing and similar impacts, which are common to most urban development and will be addressed by Code policies.

It is expected that this pathway would have little or any relevance to application in an inner metropolitan area such as the City of Norwood Payneham & St Peters. Community trust in the certainty and predictability of the planning system, could be rebuilt by reserving the use of this pathway for genuinely worthy, major unanticipated development not as an alternative for proposals that do not otherwise meet the policy requirements of a zone.

4. PUBLIC NOTIFICATION (DEVELOPMENT ASSESSMENT)

The Discussion Paper outlines several key differences in the new system with respect to public notification.

Engagement at the Development Assessment Stage

This Council has outlined in previous submissions that the emphasis on engagement at the policy formulation stage at the expense of notification at the development assessment stage is not supported. The Council supports engagement throughout all stages of the planning process, however many members of the community are not engaged with, or fully appreciate, the planning system until it

directly affects them through a development proposal. It is important, therefore, that the appropriate scope of public notification (and in limited and defined circumstances, appeal rights) during the development assessment process, is retained.

Public Notices and Signs

The removal of the need for local paper public notices is supported; notices in the Advertiser attract a substantial cost and is not normally an effective way of reaching the target audience. The need to place a sign on the land is generally supported (subject to comments below), as this is a more effective way to reach affected persons.

Scope/Levels of Notification

With respect to the new definition of 'adjacent land', it is understood that the 60 metre distance is measured from the boundary of the subject land however confirmation of this should be provided in the Regulations. Whether or not the scope of 'adjacent land' is appropriate depends significantly on the nature of the proposal. In an inner metropolitan context, a distance of 60 metres (presumably measured 'as the crow flies') from a site boundary, could result in notification to a person who is separated from the subject land by several allotments. This would be unnecessary for most metropolitan residential developments as the development may not have any impact on a site which is several allotments away. This level of notification is better suited to a commercial or other non-residential development where impacts such as noise, traffic generation and air pollution can more broadly affect sites in the surrounding locality. By comparison, the current definition of adjacent land does not require properties separated by several allotments to the side or rear to be notified, other than if the relevant authority determines to notify more broadly for Category 3 notification.

With respect to a sign on the site, this is an effective method of notifying those who genuinely interact with the site or could be affected by the development, however it also provides other members of the public who may be less affected an opportunity to comment on the proposal (a 'nosey neighbour', perhaps). This level of notification is appropriate for a large scale development which could potentially impact the broader locality, but would not be appropriate for smaller scale development that is unlikely to have any impacts beyond directly abutting sites.

In light of the above, there appears to be a missing 'middle ground' level of notification in the new system. Performance assessed developments will be subject to either no notification, or a level of notification equivalent to the current Category 3. There is no equivalent of Category 2 public notification which is considered a reasonable 'middle ground' for development which warrants notification to neighbours, but does not warrant broader public involvement. For example, it is considered appropriate to notify neighbours of a development involving one or more two-storey hammerhead dwellings but it is not considered necessary for the broader public to become involved in this assessment process.

When faced with two extremes of notification, it is more likely that the authors of the spatially applied Code would err on the side of designating no notification for a particular development type in the interest of efficiency and certainty for those undertaking developments. Instances where the Code errs on the side of no notification rather than 'over' notification, this could unreasonably remove opportunities to comment from directly affected neighbour and does not deliver on the intent of a "like for like" (not reformational) first generation of the Code.

Since 2009, the *Development Act 1993* has included reference to Category 2A public notification but Category 2A notification has not been in operation as there are no details provided in the *Development Regulations 2008*. It is understood that the intent of Category 2A notification was to only require notification to genuinely affected neighbours (e.g. notify one affected rear neighbour only, rather than all adjacent properties, including those 60 metres down the street). This is considered a more reasonable approach for smaller development.

It is recommended that an additional form of notification be included in the new system, allowing for the extent of notification to better reflect the scale of the development. The extent of notification could be at the discretion of the Assessment Manager or, in the interests of consistency across councils, could be a specified lesser scope of notification. To avoid doubt, it is still recommended that larger scale developments retain the scope of notification as proposed in the Discussion Paper.

Minor Forms of Development

In addition to the above, the *Development Regulations 2008* currently allow for a relevant authority to determine a development as a Category 1 minor form of development. It is recommended that an Assessment Manager be able to determine that a development requiring public notification in the Code is a minor form of development and therefore doesn't require notification (e.g. a minor alteration or variation to an existing use), subject to these types of circumstances being prescribed in a Practice Direction for consistency of application.

Notification through an electronic system

While the ePlanning process will facilitate a much greater proportion of electronic correspondence, it is unclear whether public notification will be sent electronically or via post. Most councils would not have a reliable email database for all property owners and occupiers so would still rely on a hard copy mail out. Additionally, the ERD Court often relies on documentary evidence of notices given and received. Any notifications sent electronically would require a system for confirming that a notice was received by the property owner/occupier, to avoid any doubt or challenge of the process. Figure 1 – ePlanning system on page 14 of the Discussion Paper indicates that Representors are notified of a meeting via the ePlanning system. The system must allow for notifications to be posted, for those representors who were notified and responded in hard copy. It is important for government bodies to effectively communicate with and service the whole community, not just those with access and literacy in online tools.

A further barrier to electronic notification is in commercial/ retail buildings with multiple tenancies and sub-lessees. In these circumstances, council property records often do not contain details of smaller individual tenants, or tenant changeover means these are not up-to-date and therefore notices are delivered by hand or into letterboxes. An electronic delivery system will need to pay careful regard to the occupiers of adjacent land.

4.2 Performance assessed

Representations relating to deemed-to-satisfy elements

Section 107 (4) and (5) of the PDI Act states that a representation in relation to a performance assessed development must be limited to the performance based elements of the development. Careful consideration will need to be given to how this can be communicated to notification recipients; it is expected this will be challenging to communicate and for representors to prepare an acceptable representation. Section 107(5) states that a representation which is not made in accordance with this is not required to be taken into account. This clause is concerning as it could be interpreted as invalidating the whole representation, including any comments relating to the performance based elements, rather than just invalidating the comments made specifically in relation to deemed-to-satisfy elements. It is recommended that the Regulations provide clarification on this issue and ensure that only the comments relation to deemed-to-satisfy development are disregarded, rather than the whole submission being disregarded.

Representor's right to be heard

The Discussion Paper notes that the PDI Act does not specify a right to be heard for representors in relation to performance-assessed development. It has been suggested that if a Council Assessment Panel chooses to permit a representor to be heard, this could be the subject of legal challenge. It is recommended that the Regulations permit a Council Assessment Panel to determine through its Terms of Reference whether or not representors are permitted to be heard.

Increase in notification but decrease in appeal rights

The inclusion of a sign on a site and the redefinition of adjacent land are expected to increase the number of people actively engaged in the notification process for performance assessed development. However, despite the potential increase in notification in this pathway, it is of great concern that there are no appeal rights for representors in relation to performance assessed development. This is not considered an acceptable outcome for members of the community and results in a loss of rights which are conferred by the existing *Development Act*. It is recommended that appeals be permitted in specified circumstances, such as where a building exceeds the maximum building height for that locality, or other parameters are exceeded to the detriment of surrounding owners.

Development requiring notification

The types of performance assessment requiring notification is yet to be determined, however it is agreed that this should be determined on a zone-by-zone basis as outlined in the Discussion Paper.

Other suggestions for triggering notification include:

- development including several dwellings, particularly if the dwellings are two-storey or higher;
- land divisions or multiple dwelling applications where the site areas are below the required minimum;
- change of land uses or specified built form (e.g. two-storeys or higher) on a zone boundary;
- fencing above a specified height as measured from a neighbour's land;
- boundary development which exceeds the maximum height or length specified in the Code;
- development exceeding the maximum building height in the Code;
- demolition of a heritage listed property;
- industrial or other commercial land uses, other than where in a designated commercial zone;
- tennis court lighting;
- balconies or similar elements of a development which may result in overlooking; and
- site coverage exceeded by a specified percentage.

4.3 Impact assessed – restricted development

The scope of notification for restricted development is generally considered appropriate. The ability for a representor to appear before the Commission is supported and it is also important that SCAP's decision making process should be made in public, not in camera for reasons already articulated.

4.4 Impact assessed (not restricted)

Please refer to the 3.5.2 *Impact assessed (not restricted)* section above for comments relating to public notification of this category of development.

Key Question 10. Should accredited professionals/assessment managers have the capacity to determine publicly notified applications?

It is not considered appropriate for accredited professionals (who are not a delegate of an assessment manager engaged under Section 87(d)(i) –(iii)) to assess and determine performance assessed development for the reasons outlined earlier in this submission.

It is considered appropriate for Assessment Managers to determine performance assessed development requiring public notification where no representations opposing the development are received. If objections are received, the application should be determined by the Council Assessment Panel. If the Council Assessment Panel terms of reference permit representors to be heard personally, consideration may need to be given to an application where a representor is in favour of the proposal but still wishes to be heard by the Panel.

Key Question 11. Who should be responsible for placing a notice on the subject land? & Key Question 12. How would that person/body provide/record evidence of a notice being placed on the land throughout the specified notification period?

A notice on the land could be installed by the relevant authority, the applicant, or a third party engaged by either of these parties. Considerations for determining who should be responsible for the sign include:

- resources of the relevant authority and location of the site. It is expected that sourcing, installing and potentially monitoring the notice would be very resource intensive, particularly if this is undertaken by the relevant authority and the site is a significant distance from their offices. It is likely to be too onerous for a geographically large, but resource limited, regional council to install and monitor the notice;
- if a council is responsible for the installation of the notice, the size, design and content of the notices would be consistent ensuring legibility and correct information; and
- if notification to adjacent properties is undertaken by a council, but the notice is installed on the land by the applicant, it could be challenging to ensure the notice was installed and the notification letters were posted at the same time.

It would be beneficial to understand how this system operates interstate and overseas and whether these issues have been problematic. The Regulations could establish parameters regarding the specifications of the notice, when the notice is installed and removed, and an appropriate fee to be paid if the relevant authority takes responsibility of installation and/or maintenance of the notice.

Key Question 13. For how long should an application be on public notification (how long should a neighbour have to provide a submission)? Should a longer period apply for more complex (i.e. impact assessed) applications?

The current notification timeframe of ten (10) business days is considered appropriate for performance assessed and impact assessed (restricted) applications. However, if notification letters are posted, sufficient time should be allowed to ensure the letters are received by the first day of the notification period given that Australia Post can take up to six (6) business days to deliver.

A significantly longer period of time will be warranted for impact assessed (not restricted) development, due to the time taken to read and comprehend lengthy technical background reports. This may need to be determined based on the scale and complexity of the development. The current major development process includes a scaled notification period (six weeks for EIS or PER; three weeks for DR). These timeframes could be adopted as a minimum level of notification required to be undertaken.

After a representation period has closed, the ePlanning system should automatically advise persons who have lodged a representation, if the application has been withdrawn or if the applicant has sought to split the application into elements for assessment, so that the community are not left wondering what happened to their representation.

5. PROCEDURAL MATTERS

5.1 Provision of Information

It is understood that under the current and new system, relevant authorities are only be able to make one request for the applicant to provide additional information. Currently this can be difficult to manage for a number of reasons. Applications are frequently lodged without all of the necessary information having first been provided. An acknowledgment letter is normally sent requesting the required additional information prior to undertaking the assessment. For merit developments, this may include any outstanding Schedule 5 information as well as any other missing information (e.g. details of any proposed retaining wall and fencing, stormwater disposal plan/details). Occasionally, an inspection of the site or a more thorough review of the plans during the assessment may indicate that further clarification or information is required (e.g. an arborist report for an adjacent significant tree). In order to avoid more than one information request, the initial request for information could be postponed until a more detailed assessment is undertaken and the planner has gone out on site. However this would delay the applicant's opportunity to provide the outstanding information and a full assessment can't be undertaken in the first place, if there is important information missing from the time of lodgment.

Key Question 14. What type of information should be submitted with deemed-to-satisfy applications? Are the current requirements in Schedule 5 of the Development Regulations 2008 sufficient/too onerous? &

Key Question 15. Should relevant authorities (including accredited professionals be allowed to dispense with the requirement to provide the mandatory information listed by the regulations/code/practice directions?

Currently Schedule 5 outlines planning consent application requirements for complying outbuildings, carports, verandahs, alterations and additions and new dwellings. Given that these types of developments make up a small proportion of applications for most metropolitan councils, additional information outside the scope of Schedule 5 is often required such as:

- copy of the Certificate of Title (this is included in Schedule 5(1) for building rules consent requirements but not for planning consent requirements);
- schedule of colours and materials (this is only required for carports and verandahs);
- site survey plan (in AHD if the site is within a flood risk area);
- details of any retaining walls and fencing (often the developer intends to construct fencing over 2.1 metres in height but does not include details in the planning consent documentation);
- shadow diagrams;

- arborist report;
- streetscape elevation;
- report from other specialist such as traffic or acoustic engineer; and
- details of predicted light spill (required for tennis court lights or lights at a sports field).

With respect to changes of land use, the following information is ordinarily requested:

- site plan showing:
 - location of the tenancy (if on a multi-tenancy site)
 - location of any existing or proposed car parks (sometimes an understanding of other tenancies in the group is required if the car parking is shared)
 - location of any new signs
 - location and details of waste storage;
- floor plan show how different areas will be used e.g. office space, retail space, storage etc;
- design and dimensions of new signs; and
- details of business operations such as a description of the business, operating hours, number of staff, deliveries/pick up/waste collection etc.

It is recommended that standard information requests be tailored for different development types and land uses, however the relevant authority should retain the ability to waive the need for specified information if it is not required and the ability to request additional information as required.

Due to the system's enforcement of the single request for information, this will mean that documentation can be received by the relevant authority, but "lodgment" has not occurred. The system needs to record what information has been received and the timeframe for assessment (and confirmation advice to the applicant) only commencing once all documentation received and verified for accuracy/ completeness.

Key Question 16. Should a referral agency or assessment panel be able to request additional information/amendment, separate to the one request of the relevant authority?

Yes, when sending an information request the relevant authority will not be able to predict all of the information required by the referral agency and it is reasonable for the referral agency to have all of the information necessary to make an informed decision. If this results in amendment to the proposal, it may be necessary for the relevant authority to undertake a second request for further information, which should be allowed for.

Key Question 17. Should there be an opportunity to request further information on occasions where amendments to proposal plans raise more questions/assessment considerations?

Yes – if necessary, to provide transparency the relevant authority could provide a reason for requesting the i.e. outlining what has changed and why this requires additional information.

5.2 Outline Consents

Providing applicants with some level of certainty at a preliminary stage is supported, particularly where it is required to facilitate financing for a large development. However, depending on the type of development and the level of information provided, there could be considerable risk and uncertainty associated with outline consents. The details of outline consents needs further discussion and warrants limited use in the new planning system.

Holistic assessment vs assessing elements in isolation

A holistic planning assessment takes into account a variety of factors such as land use, car parking and design detail. If an outline consent was sought for a building height/envelope only, these other factors couldn't be taken into consideration. For example, the appropriate building setback may be determined by noise emitted from the building, the floor area may be determined by the number of car parks which can be provided on site (noting that Australian Standards for car parking dimensions varies depending on the type of the land use), building heights/setbacks may be determined by the selection of external materials etc. The outline consent process should not be used to facilitate a development in parts as this is contrary to good planning principles as set out in SPP 1 Integrated Planning.

Public notification

It is unclear how outline consents and public notification will be managed. A relevant authority should not be issuing an outline consent if that element of the development requires public notification.

Outline consents notified to neighbours

If an outline consent is notified to neighbours, the neighbours are likely to have very limited information e.g. if a building outline is the only information provided. This would not provide the neighbours with an understanding of the full scope of the development and would make it challenging to provide genuine comments or representations. If there are other elements of the development which trigger public notification, there may also be a need for a second round of public notification when the application is formally lodged. This would be very confusing for adjacent property occupants. In the case where two rounds of notification are undertaken (once for an outline consent and once during the formal assessment) there should be a limited time between the notification periods in case the owners or occupiers of adjoining properties changes during that time.

Outline consents not notified to neighbours

In the alternative, if public notification is only undertaken after an outline consent has been granted when formal development application is under assessment, it is not appropriate for those neighbours to be consulted about an element which has already been granted an irreversible outline consent; that consultation would not be genuine or fair and misleads neighbours regarding what they can influence. Presumably this could only occur if the outline consent related to an element which did not require public notification.

Assessment of separate elements where an outline consent has been granted

An outline consent may also be problematic if separate elements are assessed by different relevant authorities as per Section 102. If there are multiple relevant authorities, at least one would not be the authority which granted the outline consent. What requirement is there for these other authorities to ensure consistency with the outline consent? How does a council take account of all parts of a development in the final development approval when there are multiple opportunities for fragmentation of the decision-making process? A series of flowcharts should be prepared for comment showing all of these combinations of deferred decision making by differing bodies.

Confidence in good policy

Many of the common elements which are subject to an outline consent (e.g. building height, site coverage, setbacks etc) would have clear policy guidance in the Code. If the Code contains good, clear policy, it is arguable that an outline consent is not required to provide the applicant with sufficient confidence. Where a development does not meet the requirements of the Code, a full assessment should be undertaken to determine if the impacts are appropriate. The applicant could obtain an understanding of the potential issues and risks through a preliminary advice service.

Key Question 18. How long should an outline consent be operational?

Currently consents are valid for 12 months. Given the potential challenges with public notification it is recommended that a lesser timeframe be given for outline consents – perhaps 6 months or similar.

Key Question 19. When, where and for what kind of development would an outline consent be appropriate and beneficial?

In light of the comments above, it is recommended that outline consents are not used for developments which involve public notification, or at least are not used for elements which trigger public notification. The use of outline consents may be best suited to large subdivisions in specified areas, where details relating to individual building design and infrastructure can be managed through the formal development assessment process. It is not considered necessary or appropriate for an outline consent to be granted for small scale development such as a single dwelling, as this complicates rather than simplifies the planning process.

Key Question 20. What types of relevant authorities should be able to issue outline consent?

Given the limited scope of development for which outline consents are considered appropriate, it is recommended that outline consents not be applicable to non-government relevant authorities.

5.3 Design Review

The forthcoming Design Review Discussion Paper is a critical piece to the understanding of both the Planning and Design Code and the Assessment Pathways (in terms of the role of Design Review processes).

It is questioned whether the timing of release of both the Design Discussion Paper and the People and Neighbourhoods Discussion Paper will allow for sufficient time for community understanding and feedback, prior to the release of the draft Planning and Design Code in February 2018. With the critical role of good design in the new planning system, it is disappointing that this fundamental aspect of the planning system is not yet available for comment.

5.4 Referrals

It is agreed that some current referrals for regard could be managed through standard policies in the Code, for example referrals to DPTI regarding internally illuminated signage. However other referrals, such as referrals to the State Heritage Unit, require a specific assessment of the development and provide advice or specific conditions regarding siting, design, appropriate materials and finishes. The Discussion Paper notes that if an applicant requests a deferral, the relevant authority must comply; it is recommended that this process be amended so that it is by mutual agreement between the applicant and the relevant authority.

Many referral inputs are fundamental to the design of the development and could require significant changes to the development to accommodate the referral requirements, particularly as under the new system referrals are reserved for only matters which cannot be addressed by generic planning policy. This could be particularly complicated if an application has undergone public notification; if a referral response requires a change to the plans and this change affects a neighbour, would the application be renotified? Referral advice can affect other issues aside from neighbours, for example if DPTI require a central common driveway but this requires the removal of a street tree, consultation with councils' arborist would be required. Clearer guidance is required to outline the process if a deferred matter can't be resolved.

If referrals under the PDI Act are only for State important matters, it is not generally considered appropriate to dispense with a referral during the assessment.

Clarification is also requested on whether a referral agency could or would be party to an appeal. This is particularly pertinent if the reason for refusal was a result of the direction from the State agency referral.

Key Question 21. What types of development referrals should the regulations allow applicants to request of deferral to a later stage in the assessment process?

It is not clear what current 'direction' referrals could be safely deferred, however it is recommended that deferrals be by three-way agreement between the applicant, relevant authority and referral agency.

5.5 Preliminary Advice

Key Question 22. The Act stipulates that preliminary advice may be obtained from agencies. Should there also be a formal avenue for applicants to seek preliminary advice from the relevant authority? &

Key Question 23. Should there be a fee involved when applying for preliminary advice?

Providing preliminary advice is an important service used by many applicants and normally leads to improved outcomes. If not handled properly, however, issues can arise such as the applicant misunderstanding the advice given, or the authority not clearly articulating the advice and the applicant feels aggrieved by this. A formalised process ensures greater clarity and confidence in the advice given. With the increased scope of deemed to satisfy and (as currently drafted but not supported) performance assessed able to be determined by privately engaged individuals, the connection between preliminary advice given at a council and the plans that are lodged via the portal with a certifier, has the potential for poor outcomes and confusion.

It should be up to the relevant authority if a fee is provided for formal written advice, particularly if meetings are held between the authority and the applicant. Experience has demonstrated how time consuming and resource intensive preliminary advice processes can be. A fee should not be required for more general or initial advice, such as phone and front counter enquiries, however fee distribution equity should be ensured in the new system for those obtaining council advice/ lodgment but then pursuing an application through a private entity.

5.6 Decision Timeframes

Key Question 24. How long should a relevant authority have to determine a development application for each of the new categories of development? &

Key Question 25. Are the current decision timeframes in the *Development Act 1993/Regulations 2008* appropriate?

It is challenging to determine appropriate assessment timeframes for different categories of development without an understanding of what types of development will fall into the different categories. Nevertheless, the existing timeframes are considered generally appropriate. Exceeding the statutory assessment timeframes generally occurs with more complex developments which require public notification, statutory and internal referrals, and/or where the decision is made by a CAP and the application needs to wait for the next CAP meeting. It is recommended that the assessment timeframes be tailored according to these requirements i.e. a development which requires public notification should have a longer assessment timeframe than one which doesn't. Clock stops need to be consistently recorded by the portal and the applicant notified accordingly so differences in expectation don't arise and potentially leading to incorrect deemed consents.

5.7 Deemed Planning Consent

Deemed consent is a significant change in the new planning system and is likely to have negative repercussions as outlined below.

Disincentivising negotiations

Deemed consents could act as a disincentive to constructive discussions between the relevant authority and the applicant. Sometimes assessment timeframes are pushed due to lengthy discussions with applicants in the hope of achieving an agreeable outcome. To avoid a deemed consent, the assessing planner is more likely to issue a refusal, rather than assist the applicant to achieve an agreeable outcome, which creates an adversarial process. Whilst it is acknowledged that negotiation is not technically part of the assessment process, the reality is that negotiations between applicants and authorities do occur and should be encouraged as long as the mutually aim is to achieve a good planning outcome.

DPTI staff have suggested that an applicant is unlikely to issue a deemed consent notice if negotiations are underway, however past experience has indicated this may not always be the case.

Reasons for delays

It is acknowledged that a relevant authority should not exceed the stipulated assessment timeframes. That said, different factors can occasionally affect assessment timeframes including:

- referrals to internal or external consultants taking longer than anticipated;
- if an application needs to be determined by a CAP and the meeting dates or reporting cycle result in the assessment timeframes being exceeded;
- temporary staffing issues, particularly in regional councils; and
- the consent is contingent on another consent or agreement – for example managing issues relating to rights of way, easements, or consents from other agencies.

It is important that 'stopping the assessment clock' on assessment timeframes is managed very carefully. The ePlanning system may consider that the assessment 'clock' is ticking when it shouldn't be – for example, an applicant often considers they have fulfilled the requirements of a request for further information but they haven't provided all of the necessary information or the quality of the information provided is inadequate. In this respect, the relevant authority should be responsible for determining when the request for information is satisfied. With other tasks such as referrals, there should not be any disagreement or confusion about what 'stops the assessment clock'.

Issuing consents within 10 days

When issued with a deemed consent notice, a relevant authority may attempt to resolve outstanding issues and concerns through conditions. For example, the relevant authority may attach conditions requiring wall heights to be reduced, different material selection, changes to car parking configurations etc. Some of these conditions may be rushed solutions or not be appropriate and result in poor outcomes or challenges to the decision and its conditions. Future practice directions relating to conditions will hopefully address this issue.

Risk of poor outcomes

The default position of consent, rather than refusal, is considered very risky. What if an inappropriate development is approved, resulting in negative impacts on surrounding properties or the broader locality? Has this approach been adopted in other states, and if so, have there been any negative outcomes as a result? There is a collective concern in the local government sector about this provision, which should not be introduced without evidence that this works well elsewhere.

Extended timeframes

It is possible that a deemed consent process will take longer to resolve than if the relevant authority was just provided with additional time to issue a decision. Presumably the regulations will ensure a deemed consent can't be acted upon until after the appeal timeframes have passed. That is, the applicant will need to wait one month after issuing the deemed consent notice to see if the relevant authority appeals the notice. If an appeal is lodged, further time would be required for the court determination. Further time still would be required if the court determines that the deemed consent was invalid and the assessment is remitted back to the relevant authority. In light of this, the deemed consent process may not be appealing to many applicants, but nevertheless, the concerns regarding deemed consents remain valid. Anticipating that an applicant is *unlikely* to make use of a process does not negate the need to make sure the system is correct and poor outcomes do not occur.

Resourcing

The process of deemed consents considered to take up unreasonable time and resourcing for relevant authorities. As above, the resourcing required to appeal a deemed consent is likely to be greater than if the authority just finalised the assessment. Clarification is required as to whether there will be a specific delegate in the council who needs to apply to the court and whether sub-delegates can lodge that appeal. For example, if a deemed consent appeal needs to be lodged by the Assessment Manager, but the Assessment Manager was on leave, it is assumed that a delegate of the Assessment Manager is able to lodge the appeal with the court. If not, there is a risk that an appeal couldn't be lodged within the appropriate timeframe.

Misuse of deemed consent processes

There is a risk that the deemed consent process could be misused, or could occur inadvertently due to computer system errors in forwarding information etc. In order to get an inappropriate development approved, a relevant authority could intentionally not issue a decision on an application, and when a deemed consent notice is issued, the relevant authority could intentionally not appeal the notice, resulting in a consent being issued and valid. Only the relevant authority responsible for the application can appeal a deemed consent notice. As such, a council is not able to appeal a poor development outcome if the relevant authority was a private accredited professional. DPTI staff have indicated that any relevant authority that misuses the system would be subject to review and audits, however it is not clear what would happen to the consent and whether it would or could be revoked. The system would also not readily reveal when this had been used to advantage, unless a complaint was made, details of development outcomes would not often be visible to the public. This aspect of the new legislation is not supported, but if it must proceed, to avoid this issue only coming to light once a development has been constructed, it is important that a council is notified of any deemed consent notices which are issued for their council area and is able to also lodge an appeal.

In light of all of the above concerns, the deemed consent process is not supported and the case for its introduction has not been made. A more appropriate alternative may be that when a notice is served, the relevant authority has the option of issuing consent or refusal. This process would provide a determination for the applicant which they could then appeal to the court.

5.8 Conditions and Reserved Matters

Conditions

It would be appreciated if the following points relating to conditions could be clarified:

- The Discussion Paper notes that conditions must be consistent with the Act, future regulations and Planning and Design Code. It is unclear in what circumstances a condition would not be consistent with these documents.

The previous *Planning and Design Code Technical Discussion Paper* indicated that Code policies will only address those matters which require development approval under the PDI Act. In our submission, we noted that some aspects of a proposal aren't development in their own right but form an important part of the overall development (e.g. landscaping, rainwater tanks, certain types of fencing, new vehicle access points etc). If the Code policies do not cover activities which are not development, and conditions must be consistent with the Code, does that imply that conditions relating to landscaping, rainwater tanks etc can't be used? How will important aspects of the urban environment such as green canopy cover be pursued if trees are not development in their own right and cannot be monitored. How will the WSUD assessment tool be used for aspects that are not development?

- The Discussion Paper refers to 'classes' of conditions but does not specify what a class of conditions is.
- A "What's New" point states that a condition may provide that a proposed deemed-to-satisfy development will be undertaken so as to address any minor variation to make it consistent with the deemed-to-satisfy requirement. This would defeat the purpose of a minor variation to a deemed-to-satisfy development. Wouldn't a minor variation to a deemed-to-satisfy development just be dealt with as a minor variation (if these are permitted in the new system) rather than by way of condition? Currently the purpose of minor variations is to allow for a development to have a small departure from the requirements. Most relevant authorities note any minor departures from complying requirements by way of file note or note on the complying check sheet observing what the departure is and why it is considered a minor variation. The relevant authority would not normally condition that departure to meet the complying criteria.

Key Question 28. What matters should be addressed by a practice direction on conditions?

Consistency in the wording and application of conditions is supported, however some flexibility should be retained so that the relevant authority can address specific issues. For example, referrals or advice from arborists, traffic engineers, or advice from engineers regarding stormwater often require specialised conditions unique to a development, rather than a standard condition.

Standard conditions

Standard conditions for residential development could include privacy treatments for upper level windows, straightforward stormwater disposal, maintenance of landscaping, and maximum noise levels for swimming pool pumps and similar structures. Standard conditions for commercial development will vary, but could include: hours of operation, matters relating to car parking areas (wheel stops, maintaining line marking, keeping spaces free and accessible and not used for bin storage etc), waste storage and collection, and any special conditions relating to illuminated signage (managing the duration and changeover of LED displays, no flashing lights etc).

Ongoing conditions

Conditions should not be used unnecessarily, excessively, or to address issues which should be addressed through amendments to plans (as referred to under Deemed Consents). However, there is value in attaching ongoing operational conditions even if these are specified elsewhere. Change of use applications often include significant operational details provided in planning reports; the planning reports do not always form part of the approved documents (particularly if some details are amended over the course of the assessment), or are not always made accessible to future operators of the business. Operational conditions such as hours of operation, waste collection, or any limitations on business activity (such as the number of consultants on the premises at any one time), are considered ongoing conditions for the purposes of Section 7 searches. As such, anyone purchasing the property

would be alerted to these conditions through the Section 7 search. The Decision Notification Form which contains conditions is also more readily accessible, so it is much more convenient to check operating conditions via the DNF as compared to reading through a planning report.

Reserved Matters

The Discussion Paper notes that a relevant authority must allow any matter to be reserved on the application of the applicant if specified by the Planning and Design Code for that purpose. It is recommended that reserved matters are by mutual agreement between the applicant and relevant authority.

Key Question 29. What matters related to a development application should be able to be reserved on application of an applicant?

Generally reserved matters should be matters which are not fundamental to the initial assessment. A key example would be the need to provide a stormwater management plan where a standard engineering solution could reasonably be achieved. Another common reserved matter is a site contamination audit or report if there is sufficient confidence through preliminary tests that any potential contamination can be remediated.

As outlined below, it is not clear in what circumstances Section 102(7) can be applied in order for 'elements' of a development to be assessed separately by separate relevant authorities. Consideration will need to be given as to when something could or should be dealt with as a reserved matter, rather than 'breaking up' the development into separate elements.

5.9 Variations

Key Question 30. Should the scope for 'minor variations' – where a new variation application is not required – be kept in the new planning system? &

Key Question 31. Should a fee be required to process 'minor variations'?

The introduction of Regulation 47A Minor Variations was considered a positive change in the way variations are managed. Prior to this change, many councils informally dealt with minor variations without a development application, however there was no legislative framework for this process. In the majority of cases, minor variations are processed easily and efficiently. However, some applicants submit multiple minor variations which consume time and resources and can cause issues with document control such as confusing the approved and superseded plans and the public understanding of the approved plans, particularly when the application was subject to public notification.

It is recommended that a process of 'Regulation 47A minor variations' to a consent or approval be maintained in the new system. If a fee was charged (e.g. equivalent of a base lodgment fee) this would encourage applicants to consider all changes they may wish to make in a single minor variation, rather than in multiple minor variations over time. The fee would also help recover some cost associated with processing minor variations.

It is difficult to define or quantify what a minor variation is, as sometimes the proposed change is qualitative (e.g. change to colour and material). However some direction or distinction between *process* versus *assessment and outcome* may be beneficial. Some planners process a change as a minor variation on the basis that, in their opinion, the outcome is still acceptable even though the scale of the change is not genuinely minor. Where the work is not minor, a separate variation development application should be lodged and, if it is acceptable, it should be approved.

Clarification would also be beneficial as to whether minor variations can be processed if it requires changes to the decision notification form or conditions or variations to a decision by another authority. Development descriptions on decision notification forms can (usefully) be thorough in describing the different elements involved, however as a new decision notification form isn't normally issued for a minor variation, the final plans could be contrary to the decision notification form. Similarly, if an applicant is seeking a minor change to a condition, say extending operating hours by 1 hour on a Saturday, can this be processed as a minor variation given the condition is on the decision notification form? When a Section 7 search is completed, councils only document decision notification forms, not correspondence confirming minor variations. Guidance should be provided as to whether either (a) a

change is not minor if it requires a change on the decision notification form or (b) an amended decision notification form can be issued.

With respect to formal variation development applications, it is recommended that the ePlanning system facilitate a number system where the original application number is used with an alpha e.g. the original application is 155/153/2018 and the subsequent variation application is 155/153A/2018. Some current systems require the variation application to have a completely separate number which can be confusing. An alpha system would help to provide continuity and clarity when dealing with variations.

5.10 Permits under the Local Government Act 1999

There is some concern regarding the ability for private accredited professionals issuing Section 221 and 222 permits under the *Local Government Act 1999*, even with concurrence from councils. It is imperative that the accredited professional consider any council policy, such as a new crossover policy, outdoor dining policy, outdoor trading policy, street tree policy, waste collection policy, or under verandah signs overhanging footpaths. Councils will, of course, need to ensure there are formal policies for these matters or there will need to be comprehensive design standards. The timing of the concurrence process is also very important and must ensure council has adequate time to review and consider the application *prior* to the accredited professional issuing the permit in case changes are required (e.g. if a driveway needs to be relocated to avoid the removal of a street tree). Currently assessing these permits normally involve site inspections, measurements and calculating requirements such as structural root zones for street trees.

5.11 Land Division

The ability for a planning consent for new dwellings/buildings to be processed prior to the land division consent is considered a positive change. Further details regarding design standards for land divisions and the multi-unit building contributions is required.

6. APPEALS

6.1 Applicant appeal rights

6.1.1 General rights of appeal

It appears that the applicant appeal rights are generally similar to appeal rights under the Development Act 1993, except for the loss of third party appeal rights for performance assessed (formally merit) developments.

6.1.2 Decision of Assessment Manager

The ability to appeal the decision of an Assessment Manager to a Council Assessment Panel is considered to be highly problematic. This will severely undermine the ability for an Assessment Manager to effectively work with applicants toward an acceptable (approvable) development. If given the option of having the decision of the Assessment Manager reviewed by the CAP, many applicants will likely do so. This will consume resources in preparing and presenting the 'appeal' to the CAP. Further resources would be consumed if the applicant then goes on to appeal to the court.

In addition to creating an adversarial approach between applicants and Assessment Managers, this also has the potential to foster an adversarial approach between Assessment Managers and CAPs. Whereas currently council staff and CAPs generally work collaboratively and strive to create a united and consistent approach, that is unlikely to manifest under the proposed system.

There is no similar process outside of the court for other relevant authorities (accredited professionals, CAP, the Commission, the Minister). Although the Assessment Manager is appointed to the CAP, the Assessment Manager is not appointed by the CAP; rather they are appointed by a joint planning board, a council CEO, or the Minister. This is contrary to the "What's New" information under the Appeals information in the Discussion Paper. These appeals will relate to decisions appointed to the Assessment Manager in the Regulations, not decisions delegated by the CAP. As such, there is not a clear line of sight from the Assessment Manager to the CAP in the same way that there is from a delegate to a delegator. Decisions made by an Assessment Manager should follow the same appeal processes as other relevant authorities.

The ability to appeal performance assessed applications to the CAP also provides the applicant with two opportunities to appeal a decision, which seems inequitable given that third party appeal rights are not applicable. This process seems disproportionately tipped in favour of the applicant.

6.1.3 Refusing to proceed with assessment of a restricted development

The ability for the Commission to refuse to proceed with an assessment of a restricted development is supported, to avoid what is likely to be an unnecessary long and involved assessment process.

6.1.4 Nature of development

Section 202(1)(g) implies that an appeal to the nature of the development involve an appeal of the categorisation of a development, in particular – accepted and code assessed development but not impact assessed development. Presumably this encompasses the definition of the land use or built form definition and the associated assessment pathway. Clarification as to what is meant by the ‘nature’ of the development is required.

An applicant should be required to wait for the relevant authority to confirm the appropriate nature and processing of the application to lodge an appeal, rather than appealing the determination of the ePlanning portal which may be incorrect.

6.1.5 Section 234AA of the Local Government Act 1999

Clarification is required as to what is considered “unreasonable” with respect to preventing or delaying a development which requires section 221 or 222 consents or concurrences and when this would apply. For example, if proposed a driveway conflicts with street infrastructure and the council is actively trying to resolve an alternative solution, this should not be the subject of an appeal. If the council determines that the infrastructure should not be removed, would this also be subject to appeal? What happens if a private accredited professional has already granted consent to the related development?

6.2 Third party appeal rights

The removal of third party appeal rights from performance assessed development is not supported. It has been suggested that public notification will be broader reaching in the new system, which is true with respect to the visibility and effectiveness of a sign on the site as opposed to a notice in the advertiser and the possibility that the new definition of adjacent land will be broader reaching than is currently the case. However, this increased reach of public notification is met with a loss of appeal rights; more people are invited to participate in the assessment process, but fewer will have the ability to appeal if they are aggrieved by the decision.

The Discussion Paper suggests that third party appeal rights are retained for all restricted development as the development is beyond that anticipated by the planning rules. In contrast, the Paper suggests that ‘code assessed’ development is envisaged in a zone, hence why it ‘cannot be held up by third party appeals’. There are likely to be many forms of performance assessed development where the land use is envisaged in the zone, but the scale of the development is above and beyond what is expected for the zone. For example, a residential flat building may be performance assessed rather than restricted as it is an anticipated land use, but the building may well exceed building height or well exceed the density requirements in the zone. In these circumstances, the development may be subject to public notification, but there would still be no third party appeal rights even though it is a development of a scale which is not anticipated within the zone. These applications should not be exempt from ERD Court accountability just because the land use is envisaged.

6.2.1 Restricted development

The retention of third party appeal rights for restricted development is supported, however as previously stated, the reduction of third party appeal rights in other categories of development is not supported.

Clarification would be appreciated as to whether an appeal can be made against a restricted development by any third party or only those who made a representation as per Section 202 and Section 110(6) of the PDI Act 2016.

6.2.2 Nature of development

As outlined under 6.4.1 a clear definition for the 'nature' of development should be provided.

6.3 Local Heritage

It is noted that Schedule 8(10) prevents appeals of local heritage listings applying to existing local heritage places, as outlined in the Discussion Paper. The PDI Act (Sec 73(2)(b)(vii)) allows anyone with an interest in land to initiate a Code amendment. Clarification would be appreciated as to whether an owner of an existing Local Heritage Place can initiate a Code amendment to remove the Local Heritage listing from the Code.

8. CROWN DEVELOPMENT and ESSENTIAL INFRASTRUCTURE

The Discussion Paper notes that crown development or essential infrastructure which exceeds \$10 million requires public notification. It is recommended that public notification triggers are more closely aligned with other forms of development rather than on the value of the development.

The "What's New" information indicates that if a proposed development is consistent with a 'standard infrastructure design' and is undertaken within an 'infrastructure reserve' an accredited professional may act as a relevant authority. It is recommended that the assessment of any essential infrastructure is assessed by a government body: the Minister, the Commission or a council.

The scope of essential infrastructure includes "testing or monitoring equipment", "communication networks", and "health, education or community facilities" among other things. Some of these descriptions are very vague and it is unclear if there are any parameters for the nature of scale of these types of development which would trigger a process for essential infrastructure. For example, would essential infrastructure include any development of private schools, any aged accommodation, any health facility such as a private health clinic? Clarification on the scope of essential infrastructure is required.

OTHER ISSUES Section 102(7)

Section 102(7) of the PDI Act states that "if a development involves 2 or more elements that will together require planning consent, each element may be assessed separately (including by different relevant authorities) and granted a planning consent with respect to that particular element." It is not clear what is intended by 'element' in this clause. Other clauses of the PDI Act refer to an element in the context of aspects of a development which do or do not meet deemed-to-satisfy criteria. This could include a wall height, a front setback, a roof pitch etc. It would be overtly impractical for the same definition of element to apply to Section 102(7); one relevant authority cannot assess a wall height, while another relevant authority assesses a roof pitch.

If Section 102(7) intends to apply to more distinct, but still integrated elements, this would still be problematic e.g. if one relevant authority was assessing the built form, but another relevant authority was assessing the land use.

In the alternative, if Section 102(7) intends to apply to different development activity undertaken on the same site, for example a new dwelling, a swimming pool, and a shed, it is unclear why these activities would not just be lodged as separate development applications. If processed as separate elements of the same development, issues such as determining appropriate pool safety fencing could still arise.

In any of the circumstances above, the separation of elements would artificially 'break up' a development and is not considered an orderly process for assessing development. It is highly likely that complications will arise, such as an amendment to one element affecting another element which has already been granted consent by a different authority. Would this require a variation to the already approved element? Section 99(3) of the PDI Act states that councils are responsible for granting the

final development approval after all elements of the development have been approved by 1 or more relevant authorities. How would a council determine that all elements of a development have been determined, as well as all conditions being satisfied? Presumably the ePlanning portal will indicate any assessments currently under assessment or yet to be determined and any conditions required to be satisfied? Clarification is required regarding the scope of an 'element' in the context of Section 102 and how this will be processed.

Consents in any order

It is considered problematic to allow a building consent to be issued prior to a planning consent, unless the development is deemed-to-satisfy. The preparation of building consent documents is very involved and costly and requires detailed assessment and calculations based on specific development information. It can be very difficult and expensive to subsequently amend building consent documents if changes are required. If building consent has been issued prior to planning consent, a planner may be less inclined to ask for amendments on the basis that the changes will be very costly to the applicant, but this may compromise good planning outcomes.

Summary

As outlined above, a greater level of connectedness of the various aspects of the planning reform is required to have a more comprehensive understanding of the new system, and to provide more informed and comprehensive feedback. Further clarification is required as to how the assessment pathways will operate in light of future land use definitions, the release of the Code, and the ePlanning Portal so that we can see how the system will work together, not just elements in isolation.

The Councils is aware of, and concerned by, the limited timeframe in which the system needs to be operational. However, it is important that all issues are considered, case studies and 'road testing' are undertaken, and that flow charts are prepared illustrating the various new pathways proposed for the new system.

It is also requested that a comprehensive response to the consultation for this Discussion Paper is provided, prior to the release of draft Regulations.

