



PROFESSIONAL PRACTICE

Advice on the inclusion of Building Rules matters in Provisional Development Plan Consents

It has come to the attention of Planning SA that a number of applications for Development Approval in bushfire prone areas have stalled after the issue of both provisional development plan consent (PDPC) and provisional building rules consent (PBRC) on the basis of a perceived inconsistency between the consents.

The cases in question have had a PDPC issued with conditions and a note that advises of a site hazard category as designated by the Country Fire Service and the subsequent level of construction required under AS 3959 – *Construction of buildings in bushfire prone areas*. Sometimes a copy of the CFS building assessment is also included. A difficulty arises when the site hazard category noted on the PDPC is different to the site hazard category approved under the issue of the PBRC.

As a relevant authority is required, under Regulation 46, to check for consistency between a PDPC and PBRC before it issues any approval for a particular proposal it is understandable that such an inconsistency could cause concern.

Planning SA is however of the view that the problem could be avoided if, when drafting the PDPC, it is restricted in its terms, to only those matters relevant to that consent, and in particular, it must not deal in detail with matters which should be dealt with in detail by the PBRC.

This approach is consistent with that taken in the decision of the Environment Resources and Development Court in the matter of *Opal Inn Pty Ltd v District Council of Coober Pedy and Stonymede Pty Ltd* [2000] SAERDC 11. The Court expressed the following view

However, even where provisions such as this occur, the essential thrust of the Development Act remains the same - the provisions of the Development Plan cannot be applied in such a way as to bring within the assessment for provisional development plan consent matters which properly fall for consideration under the Building Rules.

The consideration of the relative bushfire hazard is part of the planning assessment of a proposal and is also required by the Building Rules. The Building Rules requires that a site hazard assessment be undertaken in accordance with Section 2 of AS 3959 *Construction of buildings in bushfire prone areas*. The subsequent hazard

category will determine the level of bushfire protection required for the building. The issue of the PBRC by the relevant authority ensures the appropriate site hazard category has been determined.

Section 36(4) of the *Development Act 1993* states that a relevant authority must accept that a proposed building complies with the Building Rules where the compliance is certified by a private certifier. To gain Building Rules consent the applicant must submit a proposed site hazard category with the application and the private certifier must independently assess and approve the category as complying with AS 3959, before issuing the PBRC. As the council must accept the PBRC under Section 36(4), the hazard category as approved by the private certifier must also be accepted. Under Section 89(6) the council incurs no liability if it relies on the certificate from the private certifier and for any omission by the private certifier relative to the consent.

Planning SA have also become aware that when assessing a development against the planning principle (contained in Development Plans of Councils with designated bushfire prone areas) that states

‘Residential, tourist accommodation and habitable buildings should ... retain native vegetation where it does not contribute significantly to fire hazard and be designed and constructed in accordance with accepted standards to minimise the danger or damage from bushfires’

Councils have been including conditions on the PDPC requiring compliance with AS 3959 as the minimum standard.

As the Development Act and Regulations prescribe the minimum standards as those contained in the Building Code which is defined as the Building Code of Australia 1996 (BCA 96). AS 3959 – 1999 *Construction of buildings in bushfire prone areas* is in turn an accepted construction manual in the BCA 96. The issue of a PBRC ensures compliance with the Building Rules and in turn ensures compliance with the Development Plan principle.

It should also be noted that the inclusion of additional requirements as a condition of PDPC that are over and above the minimum standard required by BCA 96 may not constitute a valid condition.

Further information

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