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State Planning Commission
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SOUTH AUSTRALIAN PLANNING SYSTEM REFORM

Draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019

The *draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* released in January 2019 generally emulates much of the current Development Regulations, but includes various critical new elements and approach per the new planning system and *Planning, Development Infrastructure Act*.

The opportunity is appreciated, and beneficial, to allow a review of the draft provisions from an industry and practical working perspective.

A complete appreciation and review is challenging when, as acknowledged in the release, there are a range of components not available and more are to follow. Further, much of the effect and implications are reliant on the inter-relationship with the content and policy approach of the new and yet unknown *Planning and Design Code (P+D Code)*.

This feedback should be read together with the *draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* (and associated Guide, Practice Directions and Fact Sheets) as follows:.

- [The draft Planning, Development and Infrastructure \(General\) \(Development Assessment\) Variation Regulations \(the draft Regulations\)](#)
- Practice Directions
 - [Notification of performance assessed development applications](#)
 - [Restricted and impact assessed development applications](#)
 - [Deemed planning consent standard conditions](#)
 - [Conditions](#)

- [Guide to the draft Development Assessment Regulations and Practice Directions](#)
- [Fact sheet - Development Assessment: What is changing and how will this affect me as a resident?](#)
- [Fact sheet – Proposed assessment timeframes](#)

This feedback has its basis in existing City of Unley Strategies, Targets, Plans and operational practices:

- *Community Plan 2033 and Four Year Delivery Plan 2017-2021;*
- *Development Strategic Directions Framework;*
- *Integrated Transport Strategy;*
- *Walking and Cycling Plan;*
- *Business and Economic Development Strategy;*
- *Development Plan (Unley) 2017;*
- *Development Guidelines, Procedures and Delegations.*

The Local Government Association of SA comprehensive analysis and submission on the draft Regulations and associated Practice Directions are supported and commended. Other legal practitioner comprehensive reviews provided through the LGA and local government more broadly provide an invaluable detailed critique and suggested refinements. The submissions reflect detailed analysis through practitioner and legal workshops and provide an extensive critique of intent, drafting and implications. Close attention to these reviews is highly recommended.

Observations from this review include the dispersed and confused arrangement of many provisions (eg Regulated and Significant Trees), non-chronological order and incorrect and interchanged use of terms (eg application 'receipt' versus 'lodgement'), lack of critical definitions of terms (eg development 'element') and generally diminished regard for the autonomy and responsibility of the local planning authority.

Further, in the effort to contain time-frames, the compression and concurrence of processes in the initial validating phase of an application (5 business days) is expected to create significant pressure and need to focus, and potentially increase, resources and professional input to meet all the requirements within this critical period. A more reasonable and pragmatic approach may alleviate this and balance a focus of resources on assessment for good development outcomes in line with the basis for the Reforms.

Enforcement proceedings are large undertakings with unknown outcomes, very expensive and often unwarranted except for the most significant breeches. Whereas expiation is an effective deterrent and message for avoiding failings regarding more administrative and minor, but critical, matters. A range of penalties have included the effective option of expiation fees, and this should be widely expanded.

Attention of feedback has been focussed on key issues of the new approach and particular implications for the City of Unley.

Local Heritage Character or Preservation Zone - Historic (Conservation Zone)

The stated intention of the Minister for Planning, and in Parliament at the time, was for existing local heritage character areas, ie Historic (Conservation) Zones to be transitioned into the new Planning and Design Code (P+D Code).

Subsequent amendment by parliament, not supported by the government, introduced the arbitrary and parochial test of a majority property owner support for future additional areas.

Planning Development and Infrastructure Act - Section 67 – Local Heritage

- (4) *In addition, an area cannot be designated under an amendment to the Planning and Design Code as constituting a heritage character or preservation zone or subzone unless the amendment has been approved by persons who, at the time that consultation in relation to the proposed amendment is initiated under the Community Engagement Charter, constitute at least the prescribed percentage of owners of allotments within the relevant area (on the basis of 1 owner per allotment being counted under a scheme prescribed by the regulations).*
- (5) *In this section— prescribed percentage means 51% of relevant owners of allotments within a relevant area.*

Originally the initial transition of the full P+D Code was expected to be implemented in June 2020.

The current shift to introduce the P+D Code in 3 Phases has led to the potential unforeseen situation where the P+D Code might be regarded as being implemented at the 1st Phase in mid-2019 and Phases 2 and 3 (Greater Adelaide) regarded as amendments, thereby triggering Section 67 (4).

This unintended and contrary situation must be avoided.

The Regulations must provide that Section 67 (4) and (5) are not enacted at this time and not until after the initial full P+D Code transition is complete (June 2020).

Full and appropriate transition of the current Historic (Conservation) Zones is fundamental to the proper and critical protection of the essence of the already identified rich heritage character areas and neighbourhoods that form Adelaide's and Unley's unique and historic legacy; so valued and attractive to the community, businesses and tourists.

Demolition and Front Fences - Streetscape (Built Form) Zone - Unley

The Streetscape (Built Form) Zone in the City of Unley, introduced in 2008 in partnership with Department Planning Transport and Infrastructure (DPTI), is an important element of the spectrum of zone controls from conservation, historic built character, landscape character, infill and regeneration.

Critical to the Streetscape (Built Form) Zone is the protection of the intrinsic historic built fabric, including front fences, and the strong streetscape character that it forms. The zone comprises a significant 40% of the area, and 45% of properties, that is an intrinsic and irreplaceable part of the unique historic streetscape character fabric of the city.

Zone and Development Spectrum

	COMMERCIAL	RESIDENTIAL				
	Centres and Mixed Use	Regeneration	Infill	Streetscape Landscape	Streetscape Built Form	Historic Conservation
DESIRED OUTCOME	Distinct clusters of different but complementary mixed uses with residential above and behind 3-5-9 storeys	High density apartments on main corridors and selected precincts 3-5 storeys	Medium density dwellings 2 storey	Low to medium density dwellings 1-2 storey	Low density dwellings 1-1.5 storey	Low to medium density dwellings 1-1.5 storey
PROPORTION	8%	12%	9%	12%	45%	14%
GROWTH Likely Dwell Gain (25% of potential) 3,600	2,500	500	250	100	150	100
Likely Pop Gain (x 1.8) 6,500	4,500	900	450	180	270	180
DEMOLITION (aside from Heritage Places)	Nil	Nil	Nil	Nil	Avoid for valued buildings unless unsafe, unsound, irredeemable or equal / better replacement	Precluded for contributory unless unsafe, unsound or irredeemable
FENCES (up to 2.1 metres or 1.0 metre for masonry)	Nil	Nil	Nil	Nil	Complement streetscape with control forward of main building frontage	Complement building and locality with all controlled (policy focus on forward of main building frontage)

Upon interim approval of the Streetscape (Built Form) Zone in November 2008 the Minister for Urban Development and Planning for the purposes of the Development Regulations declared demolition of a building in the Streetscape (Built Form) Zone as a merit form of development, and reaffirmed this upon final approval of the zone in March 2009, and therefore subject to applicable Development Plan policy.

- *Schedule 4 (2008) – Complying development*
Part 1 Section 1 Building Works – declare demolition as a merit form of development – Government Gazette 27 November 2008 (page 5244)
- *Schedule 1A – Development that does not require development plan consent*
Clause 12 - Demolition - Part 1 (c) and (3) - designated area - GG 13 March 2009 page 1007

In addition, front fences forward of the main building line to the street were recognised as warranting assessment on merit pursuant to applicable Development Plan policy.

- *Schedule 3 – Acts and activities that are not development*
Clause 4 Part 1 (f) (E) - Streetscape (Built Form) Zone in the City of Unley exempt

The Streetscape (Landscape) Zone complements the spectrum of higher order conservation zones by seeking to maintain the key elements of the existing desired character of coherent streetscapes, siting, building form and features.

The *draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations 2019* include no recognition of control over demolition or (front) fences other than for historic or conservation zone (sub-zone or overlay).

The failure to include further declared designated areas and/or zones (eg Streetscape (Built Form) Zone) will represent a substantial and significant change and undermining of the long accepted and desired planning policy framework in Unley.

Relevant Planning Authority – Subversion of Local Planning Authority

Support is not evident for the continued need, logic or lack of confidence in the local Council Assessment Panel (CAP) with authority being subverted by the State Commission Assessment Panel (SCAP) for significant development. Part 5 Regulation 23.

This approach was never discussed or justified when commenced in 2013 and is particularly questionable now when the promoted intent for the State developed and controlled P+D Code is to provide clear development policy, facilitating appropriate development and focussing local resources and critical knowledge on such more important matters. The associated processes of Design Review, through the State Government Architect or a locally formed similar body, can be equally involved by the local planning authority and CAP as for SCAP.

In the absence of authority, formal recognition of a Referral to the council is welcomed. However, the substantial exclusions of its scope and application is of serious concern.

Currently SCAP authority is limited to the Urban Corridor Zone, or otherwise option for a call-in of development over \$5M. However, it is noted the draft Regulations propose the capture to be broadened (*in relation to any zone, sub-zone or overlay in Metropolitan Adelaide identified under the Planning and Design Code for these purposes*) and most concerning that no referral to councils will occur in these cases. This must be an error? The SCAP cannot make informed decisions if it is acting blind and without critical local knowledge and input. Uninformed decisions will create significant implications, potential conflicts and uncoordinated outcomes for the public realm and locality. The unknown and unlimited potential exclusion of the local authority and for any local council input is unjustified, ill-considered and contrary to good outcomes and community expectation.

The case for subversion of authority and local input should be addressed.

In the event of referral, it is limited to 15 business days, which is unrealistic and unreasonable. The period should recognise the scale and complexity of development

that is intrinsically involved, and the implications of addressing identified relevant matters (essential infrastructure, traffic, waste management, stormwater, public open space, public realm assets and features, impact on local heritage places, any other matter required by the Commission) and suggested additional ones including Regulated and Significant Trees. Such matters require diverse expert involvement, investigation and compiling of a coordinated response. Further, it is disappointing that local observations that can help inform planning consideration are also not afforded and the value of local input respected.

At least a minimum of 30 business days is warranted, if not option of longer times relative to the scale and complexity of development and issues. Further, there should be the option included in the provisions for councils to make submissions on any other matters it considers to be relevant to the assessment.

Council must receive an appropriate fee (logically a percentage of the planning fee so it reflects the scale and complexity of development and issues) as part of the formal referral to help mitigate the significant commitment of resources necessary for appropriate and timely review that ultimately facilitates the overall process.

Council inherits the approved development, roles of ensuring concurrence, compliance, public realm and infrastructure reinstatement, construction management, ongoing development etc implications and will be the first contact point for these, and other issues, with the community. This warrants commensurate involvement and input in the design and approval phases.

Public Notification

The general intent to limit and tailor public notification of development to where there is unexpected variation from policy is noted. However, it is also considered there is inherent value from neighbour input where direct impacts are proposed (eg building on boundary) and local knowledge of site conditions would also benefit the ultimate design and development.

The legislation limits public notice to *Assessment on Merit* and *Restricted* development, but the scope and nature of this is unknown at this stage without resolution in the pending the P+D Code.

The extension of period for comment from 10 to 15 business days for *Assessment on Merit* development, and 20 business days for *Restricted* development (and larger and/or more complex *Impact Assessed* 30 business days) is positive.

The placement of a sign on the property is positive. However, the practical (and legal) mechanics of coordinating the timing, location, cost (fee to council where applicant declines responsibility) and maintenance (avoiding de-facing or removal) creates areas of concern and potential for additional distraction of council resources. More pragmatic solutions, flexibility and monitoring the experience in practice is necessary to refine effective arrangements. The applicant would be best charged with full responsibility for the sign given their ability for individual attention and vested interest in the outcome.

The public notification scope, however, is still unduly constrained and simplistic, with a limited one-size-fits-all approach, eg time periods and letters to adjacent land within 60

metres. It would be preferable for nuanced options to reflect scale and consequence of development; some more specific matters, eg carport or wall on 1 neighbour's boundary, maybe lesser requirements and more significant scale and complexity, multi-storey mixed use or apartment towers, more extensive requirements. One-size-fits-all is not effective or efficient.

If development is generally typical and within expectations the limited notice and no 3rd party appeals may be appropriate, but where reasonable variation from policy is exceeded, eg 7 or 9 storeys in a 5 storey zone, the same limited notice and lack of 3rd party appeals is less appropriate. Greater requirements, periods for review, comment and 3rd party appeals and independent expert critique by the Court would be appropriate.

More prescription of key development design limits, eg over-height, transition envelope / setbacks etc, could be considered in the P+D Code as *Restricted* development to reflect limit of reasonable expectations. However, this could limit flexibility where there may be merit and automatically transfer further planning assessment responsibility from CAP to the SCAP.

Significant Trees

The provisions for management of Regulated and Significant Trees, between the Regulations and pending P+D Code, remains unclear. It appears the current regime is largely repeated, including its various problems (eg confusion between significant and regulated, 10 metre exclusion from what point of a dwelling or pool, a new dwelling compromising protection of existing trees, Corymbias being included along with Eucalyptus and Willow Myrtles, etc), whereas clarity could be improved.

Further, the current relaxed controls from the 2011 review should be re-visited and control shifted back towards a stricter regime to support the promoted Planning Strategy and State Planning Policy targets and value to help maintain the urban tree canopy.

The provisions in the Regulations are dispersed and confused, whereby a consolidation and reconciliation would be highly beneficial to aid clarity and understanding.

The Regulations currently only refer to a spatial Significant Tree Overlay. It is unclear, and confused, if this also includes Regulated Trees or not, and if it infers designation on an overlay will include all qualified trees, meeting circumference requirements and listings, or not.

It is trusted pending additional regulation components will reaffirm the generic capture of trees via the circumference controls, and the P+D Code overlay will only relate to the additional specifically listed identified trees, eg Development Plan (Unley) Significant Tree List Table Un/9. Initially this will present enough of a challenge to be spatially represented in an overlay, given the limitations and manual nature of their location identification, and devotion of necessary resources by DPTI (or councils?).

It must be ensured that the valuable adjunct of warranted specific tree listing to the simplistic circumference controls is maintained into the future with the P+D Code.

Deemed consent and automatic approval if no decision is made in time, should not apply to removal of trees. In such a scenario, time for review / appeal is limited, and once a mature tree is gone it cannot be reinstated.

Provisions should be amended to reduce the 30% threshold for pruning, and that it should be balanced around the tree, as often a tree damaging activity that removes 30% of a tree, and/or is concentrated on one side, ultimately results in the instability or death of the tree and subsequent necessary complete removal.

Further, the exclusions for removal near dwellings and pruning etc should be *Deemed-to-Satisfy* and not *Exempt* to allow for the facts of a situation, eg species, distances etc, to be confirmed before action is taken. The onus of proof should be reversed in a trees favour. Tree damaging activity or removal is not redeemable.

Upon removal of a Regulated or Significant Tree, the current and proposed provisions fail to address what is expected in terms of replacement trees (eg tube stock, saplings or mature trees) and in the alternative the reasonable amount payable for each replacement tree not planted. This 'fee' or 'contribution' should reflect the true 'value' of the tree being replaced. There are now practical and credible methods available for deriving this 'value'.

Additional Planning Application Information Requirements – Context Report

Together with the update of the Historic (Conservation Zone and new Streetscape (Built Form) Zone in the City of Unley, introduced in 2008 in partnership with Department Planning Transport and Infrastructure (DPTI), a fundamental element of the conservation of historic built character and streetscapes was ensuring development, new buildings and substantial additions or alterations, fit the context of the locality.

Accordingly, the requirement for a context analysis and report to be undertaken and accompany an application for such types of development was introduced.

- *Schedule 5 – Application to relevant authority*
Clause 2B – Additional requirements for City of Unley in certain areas

It is welcomed these provision have been transferred to the new PDI Regulations.

- *Schedule 8 – Plans*
Clause 8 – Additional requirements for certain development in designated historic or conservation zone, sub-zone or overlay.

Unfortunately they have only been made applicable to designated historic or conservation zone, sub-zone or overlay.

The provisions for a Context Design Analysis and Report should be equally applicable to all zones and areas where the 'Desired Outcomes' aim for new development to emulate and complement the existing character. The design analysis and response helps the design process and illustration of conformity with aims through ensuring development fits-in and complements the essential existing development character, patterns and features. This would include all potential character type zones (eg Streetscape (Built Form) Zone, Streetscape (Landscape) Zone, other types of Character Zones or similar designated or intended zones) to be formulated within the P+D Code.

Planning and Development (Open Space) Fund – Maintenance of Purpose

The Planning and Development Fund (created from contributions per new allotments in lieu of providing land for public open space) primarily provides for the management, maintenance, increase and improvement of public land for conservation, open-space and recreation.

Funding has traditionally been directed to public open space but also improvement of public places, ie creek corridors, main streets etc, to improve quality. A clear nexus and relationship with the principle purpose and benefit for off-setting and improving public open space is fundamental. Access to these substantial funds by councils for these purposes, particularly inner city areas that through small land divisions do not typically receive land, is critical to improvement of its limited public open space areas.

The Regulations have included a provision for a much broader purpose than open space, given the wide scope of *State Planning Policy*, eg *Housing Supply and Diversity*, *Primary Industry*, *Employment Lands*, *Resources* (mineral and energy assets), *Strategic Transport and Infrastructure*, *Energy*, *Emissions and Hazardous Activities*. The broader application of the fund could seriously dilute the outcomes from the intention, purpose and benefit from the open space contributions.

- *125—Application of Fund*
For the purposes of section 195(g) of the Act, a public work or public purpose that promotes or complements a policy or strategy contained in a state planning policy is authorised as a purpose for which the Planning and Development Fund may be applied.

The potential for application of funds to Greener Neighbourhoods grants as recently muted may be a reasonable and related purpose.

The potential broad scope of application indicated is not reasonable, related or equitable.

Lodgement of Hard Copy Applications

A relevant authority (council) is bound to lodge an application in the *SA Planning Portal* if the application is received at the office of the relevant authority; presumably in hard copy form.

It should not be for Council's to take the responsibility to upload an application. In fact, such a requirement should be avoided so any potential errors, omissions and legal implications are not borne by council, but continue to be borne by the applicant.

Further, it is not known what 'fee' may be determined for this 'service', but other than for the most simple application there would be substantial time and costs to scan, organise and lodge material. If such a 'service' is to be provided at all, the fee should relate to the scale and/or value of the application and reflect the amount of associated material.

Principally, the responsibility, and related cost, should lie with the applicant.

The chronology and terminology used through the framework for lodging applications is confused. Clarity should be provided on order and between 'receipt' of an application,

as outlined in above example, versus the point when an application is regarded as 'lodged', validated and complete.

The compression of the initial validating phase for an application to 5 business days creates significant pressure and consequence whereby most attention and professional resources will need to be targeted to meet these requirements. A more pragmatic approach could alleviate this and balance focus with assessment for good development outcomes.

Schedule 4(4)(1)(h) – Exempt Development

It is noted that a fence (2.1 metres), associated retaining wall (1.0 metre) and therefore potential 3.1m high 'fence' from the lower / neighbours side is proposed to be 'exempt' from needing any approval.

It is also noted, boundary walls are typically allowed to 3 metres high (per current exemptions / ResCode) but this is correspondingly limited to being up to 8 metres long. This is a far different situation to a whole boundary fence of 3.1 metres height. If permitted, it contradicts the reasonable limitation of 3 metre high walls beyond 8 metres long. Furthermore, fencing (and associated base plinth/retaining wall) this high should require a Building Rules Consent given potential loads and implications.

More reasonably, the combination of plinths / retaining walls and fences that are exempt should be limited to minimum typical heights, ie plinth 0.3 metres, fence 1.8 metres (maybe with additional 0.3 metres of 50% open panels on top) and therefore overall height of solid fence to 2.1 (plus open panel to 2.4) metres. Any extent beyond these typical heights would reasonably be subject to assessment of planning and building impacts.

Submission Recognition

It is trusted this general and specific feedback, sought by 1 March 2019, assists with the State Planning Commission and Department of Planning Transport and Infrastructure refinement and enhancement of the regulations and in particular addressing critical concerns about implications upon existing fundamental policy positions.

Should you have any questions please contact David Brown, Principal Policy Planner, on [REDACTED] or [REDACTED].

Yours faithfully



PT **Peter Tsokas**
CHIEF EXECUTIVE OFFICER