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SUBMISSION FROM CITY OF PORT ADELAIDE ENFIELD – ASSESSMENT PATHWAYS DISCUSSION PAPER

Thank you for the opportunity to provide feedback on the above-mentioned paper.

Council looks forward to the implementation of the new assessment pathways under the Planning, Development and Infrastructure Act 2016.

The reforms propose many improvements on the current system which has become cumbersome and resulted in inconsistencies in the processing of development applications from one Council to the next.

We look forward to a system that provides consistency and clarity across South Australia and does not create assessment pathway differences between Councils. We also look forward to the assessment pathways being easily defined and determined, so as not to be open to legal interpretation or prone to being challenged in the ERD Court due to a lack of clarity and certainty.

At this point in time and in the absence of Development Regulations, the discussion paper is more of an “outline” of the proposed assessment processes and does not have the level of detail required to provide meaningful input. There is a lot of detail which will be of utmost importance which is yet to be determined and we therefore look forward to consultation on the proposed regulations in due course.

Council’s key concerns with the Assessment Pathways Discussion Paper are outlined below:

Assessment Pathways

Council notes that there are numerous and various assessment pathways as follows:

- Minister for Planning
- State Planning Commission
- State Commission Assessment Panel (SCAP)
- Assessment Panels
- Assessment Manager
- Accredited professional - planning level 3 (Performance assessed development);
- Accredited professional - planning level 4 (Deemed to satisfy development).
In light of the above, it is worth querying the logistics of how these multiple relevant authorities and many panels will operate day-to-day. The proposal in its simple form appears to create complex additional layers that have the potential to be difficult for users to navigate.

The financial costs to implement and maintain the services expected from an individual accredited professional through to the Local and State Government may be prohibitive to the quality of service provided.

On review, the delegations for each relevant authority leave ambiguity as to what the types of development that will be assessed will actually be, with potential for inconsistency in assessing and decision making between the tiers of Government. Notwithstanding, Councils are advocates for their local area and are well positioned to listen to concerned parties from residents through to developers.

It is considered that Council's issuing development approval may be onerous in situations where they have not been the relevant authority during the assessment for one or multiple stages of the process and therefore face inconsistencies with the PDI Act, code and practice directions with unknown resourcing for this function.

In particular, the use of individual accredited professionals as a relevant authority raises a number concerns with regard to consistency in assessment across the State, and autonomy and independence in decision making with decisions being made for a fee for the individual accredited professionals financial gain. This concern is elaborated upon below.

**Expansion of the role of private planning accredited professionals**

It is our experience (and this has been illustrated through a couple of ERD court decisions) that some Independent Accredited Professional are prone to questionable decision making and liberal interpretation of relevant planning legislation and Development Plan provisions.

Unlike building certification which is “black and white”, planning assessment (irrespective of how tight the legislation is drafted) will always have some level of subjectivity and interpretation. The viability of an accredited planning professional's business relies on developing on-going relationships with their clients. An accredited planning professional who applies the planning code as it should be is always going to "lose out" to those who gain a reputation for interpreting the legislation in favour of their client, rightly or wrongly.

Various DPTI discussion papers espouse an intention to provide for "better decisions" and better recognition of professionals" but ultimately increasing private planning certification may, we respectfully suggest, result in quicker approvals, but potentially at the expense of robust planning decisions and good community outcomes.

In this respect, we do not support the increase in professional accreditation and do not consider that the State Government is listening to these concerns which are repeatedly being raised by Local Government. The proposed legislation could potentially lead to some absurd planning outcomes. For example, if a private certifier does not determine an application within a prescribed timeframe, the applicant might take advantage of the “deemed consent” provisions. Is there the potential for a certifier to intentionally allow this to occur?

Put simply, a robust planning system requires impartial, unbiased, professional planning decision making. This will only occur where merit based planning decisions are made by an “independent" planning body and not a consultant engaged by the applicant.
ePlanning

The intention of the planning reforms to provide for an online development assessment process accessible by the State Governments Planning Portal has merit.

However, there are concerns with the lack of flexibility with an online system accessible to everyone and which is heavily automated. We note that assessment pathways and relevant authorities would be determined at lodgement, based on the information that the applicant enters into the system. This would work well if all applicants were capable of entering data accurately. However, where information is not submitted accurately, it would mean several business days would be wasted rectifying errors. This is particularly of concern now that the notion of a ‘deemed consent’ has been written into the Planning, Development and Infrastructure Act 2016 (PDI Act), which automatically grants planning consent in the event that an arbitrary timeframe has expired.

Deemed Consent

Council does not support the introduction of ‘deemed planning consents’ and considers this to be one of the most problematic aspects of the planning reforms. We note that additional information can only be requested once. Accordingly, where a relevant authority identifies a new issue, or the original issues are not considered to have been adequately raised, the relevant authority will have no choice but to refuse the application otherwise a “deemed consent” notice can be implemented by the applicant. This is not an ideal planning outcome.

There are likely to be other circumstances arise where to avoid a deemed consent being issued the relevant authority has no choice but to refuse the application as an alternative ‘approval' might not be appropriate at that point in time. There are many circumstances where this is likely to occur for example:

- where an application is being determined by the CAP (which only meets monthly) and;
- where the applicant has intentionally provided vague, incomplete or inconsistent information;

We are also concerned that the “deemed consent” provisions could be manipulated by private accredited professionals to enable an otherwise unsatisfactory proposal to receive approval. We elaborate on this issue in response to question 26 below.

Outline Consent

Outline consents are likely to be more applicable to inner-metro Councils where certainty surrounding maximum building heights would guide the type of possible development.

There are concerns surrounding the ability for allowing accredited professionals to grant outline consents, and who the applicant would then seek the full consent from (ie. Accredited Professional then Council, or vice versa). A lot more work is required before meaningful feedback can be provided on this issue.

Appeals

Council queries how a third party might gauge consistency in assessment given an accredited professional, an assessment manager and an assessment panel can determine
performance assessed applications, and subsequent financial and time costs should there be increased third party reviews of nature of development.

Notably, an application determined by an assessment manager (who has been appointed by an assessment panel) can be appealed to the assessment panel by the applicant. Foreseeably, an assessment manager may defer refusals to the CAP but it is unclear what impact this practice may have on timeframes and possibility of a deemed consent.

Conclusion

We request that the above-mentioned issued be considered carefully. Council desires planning reforms that put the community interest's firsts whilst also ensuring reasonable developments can proceed expeditiously. We feel that proposed system is not achieving this balance and is weighted in favour of hurried or biased decision-making.

Attached is Council's response to the 33 questions raised in the Discussion Paper.

If you have any further queries with regards to this matter please do not hesitate to contact Steve Hooper, Development Services Manager on

Yours faithfully

[Signature]

Deb Richardson

Director Community Development
Relevant Authorities

1: Code assessed applications are assigned to an assessment panel, except where the regulations assign an assessment manager or accredited professional. What should be considered when assigning these relevant authorities?

The State Government needs to be mindful not to overcomplicate the planning reforms. Assessment Panels should be assigned developments where representations have been received that raise planning concerns with respect to a proposal. The role of Accredited professionals should be confined to deemed to satisfy applications with minimal discretion to determine "minor variations" as from Council's experience the terminology "minor" is not being applied consistently. Assessment managers and their delegates are suitably qualified to determine all other code assessment developments where no representations raising concerns have been received.

Assessment Categories

2/3: Should the scope of exempt and 'building rules only' development be expanded?

We suggest that expanding the list of exempt and 'building rules only' developments should only occur where it can be demonstrated that the impacts on adjoining properties will be minimal. We cannot foresee any obvious examples that demonstrate this.

4: How should the scope of a 'minor variation' to 'deemed to satisfy' development be defined?

It has been noted with privately certified Rescode developments, decisions have been made on 'minor variations' that are hard to justify and are even at odds with the limited case law determinations on the subject, which themselves can be interpreted in different ways by lawyers.

It is considered that going forward clear guidelines on what is a 'minor variation' should be listed to stop confusion, disagreements between authorities and less abuse of power in trying to approve proposals that should not be approved via a privately certified pathway. Considerations for 'minor variations' could be; percentage variation from the quantitative requirements, the number of variations and the type of variations allowed-e.g. should being less than the recommended allotment size be allowed to be considered a 'minor variation'?

Factoring in the above, an authority could also have a 'variation percentage budget' where they have say 5% of variations to allocate. This way they can choose to have one variation at 5% of have multiple smaller variations; such as open space varied by 2% and the front setback by 3%. With the current Rescode powers of multiple 'minor variations' without any quantitative caps, proposals can be approved that really should have been dealt with via a merit pathway.

5: Are there some elements of a project that should always be notified if the deemed-to-satisfy criteria are not met? (eg buildings over height) Are there other things that don't matter as much for the purposes of notification?
Variations that could be reasonably unexpected by neighbours and that may have a substantial impact on the surrounding area, such as exceeding height limits or building excessive length/height on a boundary, should require public notification.

6: What types of performance assessed development should be assessed by an Assessment Panel?

Performance assessed development will typically require a lot of qualitative assessment that may be outside the scope of a more tick box quantitative approach. Noting the above, Assessment Panels should determine applications where representations have been received.

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

8: How should 'restricted' development be assessed? What other considerations outside of the Code should be taken into account?

Restricted development should be confined to developments which would reasonably be anticipated to have an adverse impact on the surrounding locality unless appropriate mitigated.

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

No comment.

Public Notification

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

Accredited private professionals should not have any capacity to determine publicly notified applications. Assessment Managers or their delegates should only have the capacity to determine publicly notified applications where no adverse representations have been received. All other publicly notified applications should be determined by Assessment Panels.

11. Who should be responsible for placing a notice on the subject land?

The applicant should be responsible for placing a notice on the subject land. It would be an unnecessary impact on the resources of the relevant authority for them to undertake such a task. The sign should be in a standardised form across SA however and potentially provided by the assessing authority.

12. How would that person/body provide/record evidence of a notice being placed on the land throughout the specified notification period?

The person/body who erected the sign should provide a statutory declaration, with a photo of the sign erected, stating that they erected the sign with the date of erection. While this does not necessary mean the sign will remain onsite for the specified period, the risk of the relevant authority doing a site inspection or being informed by members of the public, could give sufficient incentive for the applicant to keep the signage on display for the legislative timeframe, as long as there are sufficient penalties for taking a sign down early.
13. For how long should an application be on public notification. Should a longer period apply for more complex applications?

The current 10 days statutory timeframe is considered appropriate for all applications.

Provision of Information

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?

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?

If a portion of the mandatory information listed is not considered necessary to make an informed and justifiable decision, flexibility should be allowed on the amount of information that is required to be provided. To prevent unnecessary arguments from applicants or excessive liberties taken by private certifiers, it is considered that there should be guidelines provided on the type of information that can be dispensed with and under what circumstances.

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. A referral agency or panel may have different degrees of expertise and interest in an aspect of a development than the relevant authority staff. Also, as a separate entity, for the main assessing authority to hold off requesting information or changes that are within its area of expertise while waiting on a response from a referral authority, would create unnecessary delays for the applicant and also prevent the referral authority from being able to communicate directly with the applicant, which is often found to be the most efficient and effective form of communication.

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

Yes. Changes to designs and the submission of new information can raise new issues. If the relevant authority cannot raise questions of issues that previously either did not exist or could not be known, then it would limit their ability to do a robust assessment of the issues, plus it would most likely result in potential refusals and undue delays over issues that could have been resolved with further communication.

Outline Consents

18. How long should an 'outline consent' be operational?

Though there is not much detail surrounding how an "outline consent" may work, 12 months would seem to be a logical period for an outline consent to be operational.

19. When, where and for what kind of development would an outline consent be appropriate and beneficial?
Outline consents are likely to be more applicable to inner-metro Councils where certainty surrounding maximum building heights would guide the type of possible development. In practice, we feel they will have limited application elsewhere.

20. *What types of relevant authorities should be able to issue outline consents?*

We do not believe this question can be answered until such time as the State Government has specified the types of development where "outline consents" might be applicable.

**Referrals**

21: *What types of development referral should the regulations allow applicants to request for deferral to a later stage in the assessment process?*

Any referral that may be integral to the determination of a development proposal should not be allowed to be deferred to a later stage of the assessment process. For example, a proposed use that could have significant environmental impacts, which may prevent any approval or at least a substantial redesign, should have early consultation with the EPA, CPB or other relevant referral authority. Another example being the demolition, alteration, or construction of a building in a heritage area would not benefit from any deferred consultation to the relevant heritage agency.

**Preliminary Advice**

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?*

It can be time consuming for Council to provide endless preliminary feedback on applications without any financial compensation for the time spent reviewing plans.

We have concerns regarding the weight that preliminary advice may have when a price is placed on preliminary feedback – applicants may see that as they have paid a fee for advice, that the advice may essentially form an 'in kind' approval.

There is a formal preliminary advice process for applicants to receive feedback from referral agencies and Council in the like under the current Regulations, however it is rarely used in the format set out by the Regulations.

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

Council is not sure under what circumstances an applicant would be compelled to pay a fee? Additional information would be required on how this might work in practice before Council could adequately respond to this suggestion.

**Decision Timeframes**

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

Given that the legislative reform is proposing that an application is automatically approved if a determination is not made, the time frames to make a determination should be greatly expanded to the extent that anything beyond that would be unreasonable. Determining what
is reasonable is a difficult task as every application is liable to have small intricacies that can make it either easy to assess or very difficult. Without seeing the new Regulations and the Planning and Design Code, it is not possible to predict what a reasonable time frame would be for each category of development.

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

The timeframes that currently exist in the Development Regulations 2008 for the assessment of applications have rarely been tested. It is likely that the reason for this is that if an applicant applies to the court for a decision and a decision is not made, the application is taken to be refused. It is therefore in the best interest of the applicant to not call into question the prescribed time in which a decision must be made. This is completely reversed with the introduction of a 'deemed consent', where it becomes in the best interest of the applicant to question the time frames and potentially stall the assessment, in the event that their proposal is questionable.

Deemed Planning Consent

26. Should a deemed planning consent be applicable in cases where the timeframe is extended due to:
   • a referral agency requesting additional information/amendment
   • absence of any required public notification/referral
   • any other special circumstances.

Council does not support the introduction of 'deemed planning consents' for the reasons outlined earlier within our correspondence. Key issues associated with deemed planning consents are also outlined below:

• it is considered that they should not apply whenever it is demonstrated the applicant has provided misleading or false information that has resulted in time being wasted at the expense of the relevant authority.
• they should also not apply to an application that is to be determined by a CAP where the recommendation is for refusal. This is because for most Councils, CAP meets once a month, with a month potentially being a substantial proportion of the time within which a determination must be made. If the applicant is aware that his or her application is going to the Panel with a refusal recommendation, why would they not apply for a 'deemed consent' that the Council would then have to appeal to the Court against?
• It is also noted that 'deemed consents' are automatically generated by the Portal after the 10 days that the relevant authority has to respond to a request.
• This could manifest itself through Accredited Professionals who have been hired by a landowner to lodge an application on their behalf and can act as the relevant authority. Council is concerned that an Accredited Professional may lodge an application that they know does not meet the deemed-to-satisfy criteria as a deemed-to-satisfy application, and thereafter deliberately not undertake a thorough categorisation and simply wait for the timeframe to expire? As we have outlined previously, Accredited Professionals have a vested interest in acquiring consent, whether via their own decision or via automatic decision.
27. **What types of standard conditions should apply to a deemed consent?**

Council opposes deemed consents. We do not see how standard conditions could readily address the wide range of applications with the legislative reforms anticipate might receive a deemed consent. We consider this entire approach to be flawed and request a review of this ideology.

**Conditions & Reserved Matters**

Council has no comment with respect to questions 28 & 29.

**Variations**

30. *Should the scope of 'minor variations'—where a new variation application is not required—be kept in the new planning system?*

It is considered that there needs to be some flexibility in the legislation to allow for minor amendments to be processed in a simple manner. Minor amendments to applications are from experience frequent and often required as a major evolves.

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

It has been this Council's experience that the amount of time spent determining variations as being minor warrants some monetary compensation.

Currently, there is nothing that deters an applicant from making as many minor variations as they desire, with each instance costing the assessing officer up to 60 mins of time. Having a fee would encourage applicants to have their proposals in order from the beginning and keep amendment requests to a minimum.

In the event that a proposed amendment is not minor, the numbering system for the subsequent variation application should reflect the application number of the original application. For instance, an amendment to application 040/1234/18 could read as 040/1234/18/V1. This would allow for anyone who looks that the application to quickly gauge the storyline behind a proposal and its amendments.

It is noted that the discussion paper uses two different meanings for the term 'minor variation'. In one instance it is referring to a small variance from the requirements of the deemed-to-satisfy criteria, whereas in this instance it is referring to a change to the form or details of a proposal. This difference needs to be highlighted through the use of different legal terminology.

**Crown Development & Essential Infrastructure**

Council has no comment with respect to questions 32 & 33.