17 October 2018

Ms Rhiannon Hardy
Project Lead Assessment Pathways
Department of Planning, Transport and Infrastructure
Level 5, 50 Flinders Street
ADELAIDE 5000

Dear Rhiannon

Re: Assessment Pathways Discussion Paper Consultation Response

At its meeting on 16 October 2018, Council considered a report and feedback regarding the Assessment Pathways Technical Discussion Paper and resolved:

1. The proposed feedback, as detailed in Attachment 2 of the agenda report, be approved and submitted to the Department of Planning, Transport and Infrastructure as Council's response to its request for feedback through the consultation on the Assessment Pathways: How Will They Work? - Technical Discussion Paper.

Please refer to the attached Council Report and Consultation Response for details of Council's concerns and suggested improvements.

Should you require further information, please contact Rebecca Perkin, Team Leader Strategy on [redacted].

Yours sincerely

[Terry Buss PSM]
Chief Executive Officer
City of West Torrens

Att:
Council Report
Feedback on the Assessment Pathways Discussion Paper
11.3 Consultation Response to Assessment Pathways: How Will They Work? - Technical Discussion Paper

**Brief**

This report presents proposed feedback to the Department of Planning, Transport and Infrastructure on its technical discussion paper entitled 'Assessment Pathways: How Will They Work'?

**RECOMMENDATION**

The Committee recommends to Council that:

1. The proposed feedback, as detailed in Attachment 2 of the agenda report, be approved and submitted to the Department of Planning, Transport and Infrastructure as Council's response to its request for feedback through the consultation on the Assessment Pathways: How Will They Work?

2. The Chief Executive Officer be authorised to approve any minor additions or changes of an editorial nature required prior to final submission to DPTI.

**Introduction**

The Department of Planning, Transport and Infrastructure (DPTI) has released a number of discussion papers for consultation including Assessment Pathways: How Will They Work? (Attachment 1) Assessment pathways form a key part of the planning reform and are designed to guide the application process and create confidence in the planning system.

‘Assessment Pathways’ refers to the processes a development application will go through when lodged under the Planning, Development and Infrastructure Act 2016 (the Act). This discussion paper explores what will happen at each stage of the application process.

Feedback from the consultation will help inform the future assessment system, which will include Regulations, Practice Directions, and Policy Framework within the Planning and Design Code.

This report presents proposed feedback on the discussion paper for Council's consideration and approval for submission to DPTI.

**Discussion**

The detailed feedback on the discussion paper is contained within Attachment 2 however, there are a number of issues worthy of highlighting.

**Private Sector Accredited Professionals**

The expanded role of private sector accredited professionals, who will become relevant authorities and make decisions in their own right when these provisions of the Planning Development and Infrastructure Act 2016 are switched on, raises a range of issues around independence, autonomy, transparency, accountability and conflicts of interest. One such issue is the difficulty in seeing how a private sector accredited professional (relevant authority) can impartially assess a development application, including determining if public notification is required when the applicant is a paying client.

**Deemed Consent**

Deemed consents have been introduced into the new planning system to improve the timeliness of development assessment as it provides an avenue for applicants to obtain consent if the relevant authority has not processed the application in the statutory timeframe. However, this process may actually result in a number of negative outcomes including:
• A disincentive to negotiate to reach agreement on better development outcomes
• More refusals as relevant authorities get closer to the deadline, they may refuse an application which could have been negotiated given additional time
• A reliance on conditions placed on the consent to try to achieve better outcomes
• More legal action as relevant authorities must apply to the court to quash a deemed consent and applicants appeal refusals.
• Potential for a private sector accredited professional to delay the processing of an application to facilitate an automatic consent.

Public Notification
Public notification requirements have been further reduced in the new assessment pathways. For applications that contain a mix of deemed-to-satisfy and performance assessed elements, only the performance assessed elements are subject to public notification. It is unclear at this stage how that will work from a practical perspective as it may mean that the community is only privy to some aspects of a development, reducing their ability to make an informed submission.

However, for those applications requiring public notification, a sign must be placed on the subject land and as such it is proposed that Council supports this initiative as it provides greater community awareness of proposed development.

Revenue and Community Expectations
The new assessment pathways may, over time, result in a reduction in applications assessed by Council staff and CAP which, amongst other things will mean a potential reduction in revenue for Council. However, community expectations are not likely to change with Council being the first point of contact for development matters, even if Council is not the relevant authority, for the application. Coupled with the costs that Council will incur for the State Government's ePlanning portal, this may result in a funding shortfall for Council, the extent of which is an unknown at this point.

Further detail on these issues and other comments are contained in Attachment 2.

Conclusion
This report presents the How Will They Work? - Technical Discussion Paper which has been released for consultation by the Department for Planning, Transport and Infrastructure and proposes feedback for Council's consideration, approval and submission.

Attachments
2. Assessment Pathways Consultation Response
Feedback on the technical discussion paper is provided against the numbered sections of the document.

1. Introduction

1.5 ePlanning

The ePlanning Development Application Process flowchart states that the 'timeframe to assess' clock (the clock) starts as soon as an applicant pays the fees for lodgement of the application. This is problematic as categorisation of the application (including checking that the application is complete) must be confirmed, and at this stage may yet be reallocated by the relevant authority. If the relevant authority initially tasked with the application does not act in a timely manner before reallocating the application and the clock is running, it may significantly reduce the amount of time left for the correct relevant authority to process the application. Furthermore, a relevant authority should not have their assessment time reduced if an applicant submitted an incomplete response.

However, Council understands that DPTI staff have advised that the clock will not start until the application has reached the correct relevant authority and the initial relevant authority will have a timeframe in which to confirm, reallocate or reject the application. Council supports this position and suggests a period of 5 working days is appropriate for this decision to be made. However, what happens if that does not occur? How will the system deal with delays?

Clarity is also required around how the ePlanning system will manage how an applicant may submit a variation to their application which may occur as part of negotiations to achieve better outcomes during the assessment process.

2. Relevant Authorities (Planning)

2.7 Delegations

A relevant authority (other than an accredited professional) can delegate any of their functions or powers to a particular person or body. This assumes that there is no limit on what an Assessment Manager can delegate. DPTI's advice to Council is that under any delegation, the Assessment Manager would need to be satisfied of every delegated decision and sign off as the relevant authority.

This is contrary to the way delegations currently work in Local Government under the Development Act and Local Government Act and is more akin to a direction than a delegation, is impractical and would place an unreasonable demand on the Assessment Manager’s time and could impact on the ability to process development applications within the statutory time period.
3. Categories of Development

3.2 Exempt Development

There needs to be some clarity around whether some types of development are exempt including screening, some signage eg. LED signs.

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

There is potential to expand the current scope of exempt development to capture modern types of common domestic structures and expected works. However, any exemptions need to carefully consider the appropriateness (or otherwise) of a particular development type along property boundaries.

3.3 Accepted Development

Council agrees with the proposed category of accepted development.

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?

Any proposal to expand the current scope of ‘building consent only’ development should proceed with caution, as even ‘minor’ development may cause issues between neighbours, particularly along property boundaries. Furthermore it is important to consider the implications of such changes.

3.4.1 Deemed-to-Satisfy Development

Council is of the view that deemed-to-satisfy development should not be expanded beyond the current Res Code development. Deemed-to-satisfy should be limited to development of 2 storeys or less detached/semi-detached dwellings.

Development including new dwellings, additions, alterations and creation of new allotments within the ANEF +25 contour should be excluded from the deemed-to-satisfy category.

Urban design criteria should be included in deemed-to-satisfy development.

There needs to be greater clarity around the definition of "does not impact Council infrastructure" this must include better protection for street trees, recognising tree root protection areas.

Deemed-to-satisfy criteria need to include minimum internal garage dimensions and minimum size of a habitable room addressing the street to achieve better quality design outcomes.

Council also seeks clarity on whether or not conditions can be placed on a deemed-to-satisfy development approval.
Question 4. How should the scope of a ‘minor variation’ to deemed-to-satisfy development be defined?

Council is opposed to having “minor” variations in deemed-to-satisfy. The minor variation concept has been tested in the ERD court but there is no consistent definition of what a minor variation is. Allowing minor variations will result in inconsistent interpretation and application across relevant authorities and has the risk of private practitioners allowing greater variations than what was intended and placing the integrity of the privatised system at risk. This is contrary to what the new planning system is designed to achieve - consistency and certainty for applicants. If an application does not meet the deemed-to-satisfy criteria, it should become a performance assessed application.

3.4.2 Deemed-to-Satisfy Performance Assessed Hybrid Development

This should be renamed Limited Assessment to avoid confusion.

3.4.3 Performance Assessed Development

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?

Performance assessed development should always be notified for the following:
- 3 or more storeys development (residential or mixed use)
- more than 1 storey on a hammerhead allotment
- residential development in a non-residential zone
- removal of regulated or significant Council trees
- building on site boundaries
- building on a site adjacent to a different zone
- multi-storey development (over 2 storeys) within, or in proximity to character policy areas
- vehicle access points

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

Development when a representation has been received.

3.5.1 Restricted Development

Council is of the view that all restricted development should be notified. The regulations should include a mandatory requirement for referral to Council as a practice direction is not considered strong enough given the need for local planning knowledge and infrastructure advice.

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

Where the land use or building is contemplated somewhere in the Code, even if not in that zone/subzone, the Code should apply.
4. **Public Notification**

The amended definition of adjacent land is an arbitrary figure which does not necessarily capture those people who may be most impacted by a development. For example, an application for a new business premises may result in increased truck movements along a suburban road. Those affected in this instance may be those who are located anywhere along the new truck route to the main road which will, in many instances, exceed the 60m rule. Consideration needs to be given to the type of development and potential impacts when determining who may be affected.

4.2 **Performance Assessed**

The extent of the impact must be determined in order to determine if a performance assessed development requires public notification. The discussion paper states that minor, reasonable or anticipated level of impact would not require public notification. Council questions how this is determined. Is it the responsibility of the relevant authority to determine the nature of impact or will there be some quantitative or qualitative measures contained in the Code to guide this? Council strongly opposes Accredited Professionals assessing Performance Assessed development but if this occurs, in the case of private accredited professionals making those decisions, there is potential for impacts to be considered minor to ensure an easier process for applications in the absence of further guidance.

The public notification requirements are limited to the performance assessed elements only. Council is of the opinion that the entire application should still be placed on public notice with a clear explanation of which parts are notified.

There should be a template created for notification signs to ensure consistency in size, information provided, contact details, materials etc.

In terms of placement of signs, there needs to be some direction given as to where signs must be placed to ensure greatest visibility. In the instance where the development site is on a corner, will a sign be required on both boundaries? If a site is split by a road, for example, will there be a requirement to place signs on both parcels of land?

Removal of a public notification sign prior to the due date should be an offence and signs must be removed on the due date.

While Council supports the concept of signs as a form of public notification, it does allow anyone to make a submission whether it impacts them or not. This may result in a significant number of submissions particularly in light of the ability to broadcast on social media channels which will increase the amount of effort required to review the submissions. Allowing submissions from any interested party also creates expectations that their comments will be considered.

The Act does not specify a right for representors to be heard for performance assessed development. However, it is Council's understanding that DPTI are of the view that verbal representations are precluded under the Act. Local Government legal advisors have the opposite view that as the Act is silent, Assessment Panels are able to allow verbal representations through their meeting procedures.
Council holds a strong view that in keeping with the principles of the Community Engagement Charter, verbal submissions should be allowed. This requires clarification.

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

Accredited professionals/assessment managers should only have the capacity to determine publicly notifiable applications if there are no submissions received. This should only apply to accredited professionals/assessment managers engaged by councils and not private sector accredited professionals. Council's understanding is that DPTI's position on this is that an application that requires public notification cannot be assessed by a private accredited professional and Council supports this position.

**Question 11 - Who should be responsible for placing a notice on the subject land?**

The relevant authority should be responsible for placing the notice on the subject land at a cost to the applicant. This should ensure a more consistent approach and is more likely to meet the requirements of the Regulations.

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

This could be achieved with a photograph of the sign uploaded to the ePlanning portal against the development application.

**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?**

An application should be on public notification for 10 business days following the placement of the sign on the subject land. For more complex applications, a longer period of 15 business days should apply.

5. **Procedural Matters**

5.1 **Provision of Information**

**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?**

Plans need to show that all of the deemed-to-satisfy criteria have been met eg. plans clearly indicate the amount of private open space, site coverage etc. It should not be the responsibility of the relevant authority to determine these.

**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?**

No, if the information is mandatory, there should be a reason it is mandatory. If it is not adding value to the assessment process, then it should not be mandatory. Relevant authorities should not be able to pick and choose what information they consider.
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 as the referral agency may consider different aspects of a development which may not have been addressed in the first instance. This should result in a better outcome.

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

Yes, as additional information could be used to provide a better outcome. This may also negate a refusal of the proposed development.

5.2 Outline Consents

The discussion paper states that the practice direction is likely to apply outline consents only to certain elements of development in certain areas/zones e.g. building heights/envelopes. This is problematic for the community as one aspect does not provide sufficient detail for a layperson to properly consider a development and provide a submission (assuming the development is notifiable).

Council is of the view that if an outline consent is notified for one aspect of the development, if a subsequent application is lodged which requires another aspect to be notified, then the original notifiable event from the outline consent process should be included in the application notification process. This will enable community members to comment on those aspects as a whole.

Question 18 - How long should an outline consent be operational?

12 months

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

For publicly notified performance assessed applications, where planning policy is not clear, for master planned developments, for structure plans.

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

Council Assessment Panels or SCAP

5.3 Design Review

Any design panel established by the Minister should include the relevant Council. This would be essential for considering implications for Council infrastructure and community expectations.
5.4 Referrals

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

Council's positions on this is none unless DPTI can provide specific examples for Council to consider. Any matters which are fundamental to the decision should not be able to be deferred, particularly now that all referrals are for direction.

5.5 Preliminary Advice

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?

Council supports the proposal that there should be a formal avenue for applicants to obtain preliminary advice from agencies in addition to existing services Council provides for informal advice.

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

Council invests heavily in preliminary advice by having a full time staff member dedicated to that function. This leads to better quality outcomes and greater community understanding of the planning system and processes. Council sees that questions requiring verbal responses should continue to be provided free of charge but more complex questions involving written responses may incur a fee. This is particularly relevant as under the new system, Council is concerned that over time it may collect reduced development application fees which currently fund important services such as preliminary advice.

5.6 Decision Timeframes

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

The timeframes should be increased form the current ones due to the deemed consent process.

5.7 Deemed Planning Consent

Council's view is that deemed planning consent has some fundamental issues which may lead to poor outcomes. Where a timeframe is not met and an applicant serves notice, the authority should have 10 days to make a decision (including refusal), not grant consent.

The deemed consent process may result in more refusals as relevant authorities near the end of the timeframe for assessment issue a refusal to manage potential risks rather than encourage negotiation with the applicant for an agreed outcome. This may lead to an increase in the number of court actions from applicants unhappy with a refusal.
If a relevant authority considers that a deemed planning consent application should have been refused, it can apply to the court. This is an expensive exercise which may not be pursued by private accredited professionals (as the relevant authority) leading to consents being issued for developments that are inappropriate and potentially poor planning outcomes for the community. Council will be the recipient of any complaints regardless of the fact that Council has nothing to do with the decision.

In addition, private accredited professionals being paid by a client may be loath to challenge a deemed consent of a lucrative client and in more extreme cases, may use that process to allow approvals to proceed without making a decision. Although that behaviour will be subject to some scrutiny through Code of Conduct complaints, it may be difficult to prove and does not reverse a poor planning decision.

The deemed consent process does not take into consideration the issues faced by councils of staff shortages and CAP meeting schedules which can occur from time to time resulting in an increase in the time taken to process an application. If this results in an increase in consents which the relevant authority must apply to the court to have quashed, additional time and significant cost will be added to the planning system.

The deemed consent process may result in an outcome opposite to what it was trying to achieve ie. streamlining the application assessment process.

**Question 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?

No

**Question 27 - What types of standard conditions should apply to deemed consents?**

This will depend on the type of application.

**5.8 Conditions and Reserved Matters**

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

This should not apply to anything which is fundamental to the decision.

**5.9 Variations**

**Question 30 - Should the scope for ‘minor variations’ - where a new variation application is not required - be kept in the new planning system?**

Council's position is this should be kept in the new planning system.

**Question 31 - Should a fee be required to process ‘minor variations’?**

Council's position is that a fee should be payable as minor variations still require consideration and use of Council resources.
6. Appeals

6.1.2 Decision of Assessment Manager

Where an applicant appeals against the decision of an assessment manager, the appeal should be against the decision of the position, not the individual. This will ensure that if there is a turnover of an assessment manager within a council, the appeal will be managed by the new assessment manager.

General Comments

The number of development applications processed by councils under the new planning system is likely to reduce markedly over time. However, despite information and education on councils' role in the new planning system, many members of the community still assume that councils have responsibility for what is developed in their local area. As a result, councils will still be the first point of contact for the community and will require resourcing to provide that service which will not be offset by the level of fees charged.

How does DPTI propose to offset the cost of service provision for councils particularly in light of additional costs for the ePlanning portal while still maintaining internal systems?

The intent of the new planning system seems to be to increase the number of private sector accredited professionals assessing development. This leads to conflicts of interest between the best outcome for the accredited professional's client (who is paying for that service) and good planning outcomes. In the current system, Council plays an important role in balancing the needs of the applicant with the needs of the community and understands local context.

How will this be maintained under the new system particularly as public notification requirements appear to be watered down? DPTI's position of community participation at the policy level rather than at an individual application stage assumes a level of interest, understanding and knowledge and computer literacy which may be absent. In general, community members tend to get involved when directly affected by a proposal rather than at the theoretical policy level. Currently, many multi-storey developments do not require public notification while community expectations are that notification should occur and there should be a greater level of transparency.

Council strongly opposes further reducing the public notification requirements and urges reconsideration to ensure community expectations are met by ensuring all development of two or more storeys are publicly notified.

Council also strongly opposes negotiation of key assessment issues including maximum building heights and carparking requirements for multi-dwelling developments noting that the current Government, while in opposition, committed to ensuring that these requirements would be non-negotiable.
Good afternoon Rhiannon

The City of West Torrens would like to add a further point to our submission. Where planning policy refers to storeys, consideration be given to changing this to levels to aid in understanding. Should you have any questions or require further information, please contact me.

Regards
Sue

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Phone:
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