



Environmental Defenders Office

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RE: PROPOSED PHASE 2 PLANNING AND DESIGN CODE AMENDMENT

The Environmental Defenders Office (EDO) is an independent community legal centre specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education. The EDO appreciates the opportunity to comment on the proposed phase 2 Planning and Design Code Amendment (the proposed amendment) as the Code is a critical element of the current planning reforms.

In our view good planning needs integrity, and public participation should play a role in that. It is about what benefits the public good, not just private interests and is for the well-being of the whole community, the environment and future generations.

There are some aspects of the proposed amendment that the EDO supports including up front referrals to the Native Vegetation Council with a focus on retention rather than minimisation of native vegetation clearance to enable responsive design.

However, much of the proposed amendment is deeply flawed and if not substantially overhauled will fail the community significantly for decades to come. The code must address the key issues we face as a state including climate change and comprehensively consider the long term impacts of development on communities and their environment. In our view the proposed amendment fails to achieve this goal.

KEY CONCERNS:

1. Despite one of the objectives of the planning reforms being to simplify the system the proposed amendment is very complex and difficult to understand. The document and accompanying mapping comprise multiple tools for assessing development. There are zones, subzones, overlays, general development provisions, desired outcomes, performances outcomes, deemed to satisfy provisions, restricted development provisions, accepted development classifications and procedural matters. More material



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is being added as the consultation progresses, for example Historic Area Statements, making it even more difficult for the community to comment.

2. The consultation involves not just new policy but new terminology, format and structure. The community is also expected to comment on the proposed amendment without the benefit of the eplanning system being in place to readily identify the policies that apply to their area or areas of interest. Direct comparisons between the old and the new are not available and even planners are finding it difficult to understand and advise community members on the detail.
3. Rural communities have been given just eight weeks to respond to the proposed amendment that is still being developed. Owners of properties in historic conservation zones were only advised of the existence of draft historic area statements a full month after consultation began leaving only three weeks to understand and provide comment. Owners of properties covered by the State Heritage Area overlay have not been provided with any draft Historic Area Statements despite guides to the proposed amendment indicating the intention for there to be such statements.
4. The accompanying documentation to the proposed amendment does not explain sufficiently nor provide evidence to support policy positions described in the proposed amendment. The wide ranging impacts of the policy detail must be clearly understood in the interests of fairness and to assist with meaningful comment. The short timeframe to comment is very concerning given that the focus of the reforms has been centred on community participation, involvement and comment at the policy development stage rather than the application stage. The community has not been given the time nor the tools to understand the proposed amendment.
5. There are many issues with the proposed amendment making it very difficult to know what is a policy position and what is an error/omission/inconsistency. Many problems were identified when the proposed amendment was released for public consultation and many have been identified since. The State Planning Commission is still to consider and advise the public fully on these problems.
6. There has not been a like for like policy transition which is in contrast to our understanding that the first-generation Code would largely be a consolidation of all 72 current Development Plans. Current development plan policy is quite different in format and wording to what is in the proposed amendment. There are no direct equivalences. Policy groupings have been pulled apart and rejigged/renamed under different overlays, zones etc. Multiple significant changes to policy have been made that have not been adequately discussed or at all. There are many policy changes that have gone beyond

those canvassed in discussion papers. Crucially much local policy has not been transitioned.

7. There is a lack of alignment with State Planning Policies especially in relation to biodiversity. Policies in the overlays, zones etc do not for example include key content from the current natural resources general module. There needs to be greater policy depth throughout.
8. There is too much reliance on 'deemed-to-satisfy' policy to readily approve low risk and minor development which will not incentivise creative or innovative design.
9. Performance assessed policy includes performance outcomes which are unclear, lack transparency and can be interpreted in multiple ways as they contain subjective, relative or complex concepts. This will make it difficult for applicants to understand what is required of them, for assessors to be certain that the requisite standard can be met and for the public to have an understanding of and faith in the system. The parameters of performance-based planning as outlined in the proposed amendment are worded too far in favour of flexibility. The critical risk is that development will be approved if broadly consistent with the Code ie developers that only meet the overall outcomes of a code can still get their proposals across the line.
10. The proposed code is not built upon transparency and public accountability as far less development is publically notified and even fewer decisions are open to legal challenge. The value of public participation – both in its contribution to better design and for keeping the system accountable and honest – needs to be genuinely recognised and valued. Community rights are warranted in some situations. The proposed amendment classifies very few applications as restricted (where the community can challenge decisions) and in some cases where it has there is a lack of clarity eg tourism proposals in the conservation zone. A further issue is inappropriate use of exclusions to notification of performance assessed developments.

KEY RECOMMENDATION:

The proposed amendment currently does not enable the community to know with any certainty how and why decisions will be made, what opportunities there will be for public input and what decisions can be challenged in court. In addition there are important policy gaps and errors. The EDO strongly recommends that all elements of the proposed amendment be immediately reviewed and road tested then released again for public consultation for an appropriate period of at least four months.

Given the short time frame to understand, consider and comment on the proposed amendment our comments below address key natural and built heritage conservation policy concerns regarding the number and type of Zones, Sub-zones, Overlays and their wording, the range of definitions and the way in which definitions are expressed, the spatial application of Overlays, Zones and Sub-zones to the various parts of the State and the assignment of development types to assessment pathways and exemptions from public notification triggers for Performance Assessed development types.

Essentially a large process to dissect current policies has occurred and in the case of natural and built heritage policy it has been spread over a number of overlays, zones etc. In the process certain policy has transitioned, other policy has not and some policy (but not others) has changed. We note that there is much greater use of overlays than in the current system combined with far fewer zones. In our view this creates problems across the state as it is impossible to have a “one size fits all” code. In addition there is only scant use of subzones meaning that local unique policy found in many plans has not been transitioned over. Finally, there are critical issues with the spatial application of zones such as the conservation zone not at this point correctly covering all reserves and wilderness protection areas. This must be addressed before full implementation of the code occurs.

Overlays

A key concern we have is biodiversity policy in the proposed amendment. The EDO notes that overlays are intended to be the primary mechanism to express State Planning Policies, including, for example, bushfire, flooding and watershed information. Overlays take precedence over zones, subzones and General Development Policies, because overlays deliver State interest policy.

State Planning Policy 4 – Biodiversity states

The planning system has a fundamental role to play in conserving biodiversity at the landscapes scale to maintain the critical function it provides. The planning system must enable the recognition and protection of ecosystems that help safeguard the prosperity, vitality, sustainability and liveability of our state. This includes mitigating the undesirable impacts of biodiversity loss: helping businesses and industry capture new and emerging market opportunities; and increasing our resilience to challenges such as climate change.

The planning system has a role to play in ensuring biodiversity and associated life-supporting functions are maintained and enhanced by identifying and protecting areas of high biodiversity value;

Ensuring development occurs in appropriate locations, is sympathetically designed and is compatible with conservation values;

Assessing the cumulative impact of development on biodiversity, including spatial temporal and incremental impacts.

Recognizing and maintaining modified landscapes where land use and conservation values co-exist in a mutually beneficial ways;

ensuring people have access to natural places that contribute to their quality of life health and wellbeing as well as providing areas for recreation.

When environmental values are considered early in the planning process development in environmentally sensitive areas can be avoided and cumulative impacts are able to be better managed.

The proposed amendment fails to adequately reflect the Biodiversity State Planning Policy. There are large policy gaps and the little that has transitioned appears in a number of overlays eg the State Significant Native Vegetation, Native Vegetation, River Murray Floodplain, River Murray Tributaries, Mount Lofty Ranges Catchment Overlays (both) Water Protection Area, Water Resources, Sloping Land, Coastal Areas – threatened species, Marine Parks (both), Hazards (Bushfire) (all),Regulated Trees, Limited Land Division, Limited Dwelling, Environment and Food Protection, Significant Landscape Protection and Ramsar Wetlands.

It is vitally important that overlays are comprehensive. However the draft overlays in the proposed amendment often lack policy depth including key policy around threatened species and ecological communities.

Of particular concern is the Regulated trees overlay which does not transition across all current development plan policies. Whilst the general premise is that trees should be retained there is a lack of strong policy setting out the value of trees and avoiding tree damaging activity where at all possible.

A further concern is the exclusion of Wilpena Pound or any park from the Significant Landscape Protection overlay. Given the significance of Wilpena Pound in terms of land form and landscape value, it should be included in this overlay which covers most of the Flinders Ranges, Barossa and Willunga Basin - all iconic landscapes valued by tourists and community for their landforms, land uses and cultural significance.

Zones

Particular zones also lack policy and clarity. Zones are meant to set out policies and rules primarily relating to: land use; land use intensity; and built form characteristics (such as building setbacks and height). Zones also identify envisaged land uses and the relevant assessment criteria. However, unlike zones in current Development Plans, zones in the Code do not include local variations.

The Guide to the Draft Planning and Design Code, Attachment 2: 'Alignment of the Planning and Design Code with State Planning Policies' states: "Of note, the Conservation Zone will be applied to all reserves proclaimed under the *National Parks and Wildlife Act 1972* and *Wilderness Protection Act 1992* (this includes National Parks, Conservation Parks, Recreation Parks, Game Reserves, Regional Reserves and Wilderness Protection Areas) applying a consistent policy framework to preserve and enhance the biodiversity value of these natural areas."

(p154)

However most of the land under these 'conservation tenures' has not been included in the Conservation Zone which appears to be reflective of existing Development Plans in part as existing anomalies have been transitioned across and hence the Code is highly inconsistent in this regard.

There is also very loose wording in the Conservation Zone around tourist accommodation 'contemplated' by park management plans which means Tourist Accommodation could occur in Parks with perverse outcomes.

Table 2 in Conservation assigns Tourist Accommodation as Performance-assessed Development, instead of Restricted, where any of the following apply:

- Visitor Experience Subzone
- In an area proclaimed under the *National Parks and Wildlife Act 1972* and is contemplated by the relevant 'management plan' prepared in accordance with that Act.
- In an area proclaimed under the *Wilderness Protection Act 1992* and is contemplated by the relevant 'management plan' prepared in accordance with that Act.

The wording, especially the use of "contemplated" is vague and open-ended and could lead to ad-hoc development (potentially anywhere in the reserve). It is unclear when a proposed development will be assigned as restricted and not performance assessed which impacts directly whether the community has rights of appeal because as noted above restricted is

the only classification in the system which attracts appeal rights. Already the code has very few developments subject to legal challenge than is currently the case. In the case of reserves the test outlined above is not an objective test for determining if development is 'restricted' or not which is in direct contrast to the clear classifications in the current planning system. The policy wording could undermine the intent of adopted Management Plans. There is the prospect of conflict with a number of management objectives and actions.

Consequently, tourism accommodation may be considered without public scrutiny and participation in parts of parks where the protection of the natural and cultural environment and overall park management may be compromised. Some management plans for National Parks which attract significant tourism have supported development of accommodation and/or other facilities in part of a reserve (eg. the Flinders Ranges National Park Management Plan in the past). There is the possibility that tourist accommodation anywhere else in the reserve would be assigned as Performance-assessed Development, not Restricted (for example in Wilpena Pound itself rather than a designated area for development adjacent the approach road).

In addition, some management plans show campgrounds. Across the State, and in nature reserves of various kinds internationally, campgrounds may contain cabins as well as tent sites. A tent or similar shelter may be a permanent structure for hire on a commercial basis as tourist accommodation. The mere establishment of a campground therefore could be argued to be contemplation of tourist accommodation and a potential precursor to a management plan amendment or development application enabling the development of permanent structures. The majority of visitor experiences catered for by reserves, with a few exceptions, are enhanced by the very absence of development. There must be clear controls to prevent loss of environmental values through ad hoc development.

Therefore the word 'contemplated' should not be used especially in light of the fact that management plans do not as yet reference the code. The proposed terminology undermines the certainty the public are entitled to expect as regards the purpose, use and protection of reserves.

In relation to built heritage the various overlays lack policy strength and have not transferred current policy over entirely eg the historic area overlay does not include lists of contributory items which have been the subject of planning policy for nearly two decades and are the building blocks of historic conservation zones.

Fully detailed historic area statements are missing and there is little depth of policy in the drafts for the community to comment on. The overlays need stronger policy which asserts the value of retaining heritage for economic, environmental and social purposes. As currently drafted there is confusion about what policy applies to properties inside and just on the border of overlays. We strongly disagree that any conservation work should be accepted development given how critical it can be to retention of built heritage. Finally, as with natural heritage public consultation provisions have been omitted where they should be inserted ie across all heritage overlays.

RECOMMENDATIONS:

1. Policy needs to be redrawn across all relevant overlays, zones etc to include and expand upon current policy relating to biodiversity protection and conservation.
2. Include more subzones to take into account important, unique, local characteristics.
3. Include at the beginning of each overlay a detailed outline of it's purpose.
4. Regulated trees overlay policy to include:
 - a. reference for regulated trees in general to indigenous to the local area and important habitat for native fauna being criteria for considering retention
 - b. reference for significant trees to indigenous to the local area, important habitat for native fauna, part of a wildlife corridor and importance to maintenance of biodiversity being criteria for considering retention
 - c. Retention test "Significant Trees should be preserved" rather than "where they make an important visual contribution to local character and amenity"
 - d. test for significant trees of "all other remedial treatments and measures have been determined to be ineffective"
5. Consider creating one Biodiversity Overlay to replace a number of proposed overlays including native vegetation, regulated and significant trees, water resources and the significant landscape protection overlays (this overlay should include Wilpena Pound). A new biodiversity overlay could comprehensively cover all matters pertaining to biodiversity protection and which fully implements the provisions of the state biodiversity planning policy.
6. Include the following definition of biodiversity in all key overlays and zones ; *the variety of all living things; the different plants, animals and micro-organisms, the genetic information they contain and the ecosystems they form. Biodiversity is usually explored at three levels – genetic diversity, species diversity and ecosystem diversity. These three levels work together to create the complexity of life on earth.*
7. Include 'to minimize impacts of development on areas of recognized natural character and values' and 'the retention of all large, long lived and drought resistant trees' within the context of biodiversity policies.
8. Include policy statements regarding the economic, environmental and social value of trees and biodiversity in general in all key overlays and zones.

9. Conservation Zone
 - a. Use 'Restricted' classification for Tourist Accommodation in areas proclaimed under the *National Parks and Wildlife Act 1972* and the *Wilderness Protection Act 1992*.
 - b. Define the phrase "public amenity"
 - c. Clarify whether tourist accommodation is to be considered in reserves areas beyond temporary tents rather than permanent facilities (eg cabins)
 - d. Ensure it applies spatially to all reserves and wilderness protection areas and also include Native Forest Reserves.

10. Public notification and exemptions for performance assessed development and what is restricted development should be consolidated in one location in the code.

11. Consideration should be given to including more in depth policies from other jurisdictions eg <http://eplan.brisbane.qld.gov.au/CP/BiodiversityOC>
<http://eplan.brisbane.qld.gov.au/CP/HeritageOC>
<http://eplan.brisbane.qld.gov.au/CP/SignificantTreesOC>

12. List contributory items in the Historic Areas Overlay

13. Replace current demolition controls relating to contributory items in Historic Area Overlay with:
 1. A Contributory Item should not be demolished or removed, in total or in part unless:
 - (a) the part of the item to be demolished or removed does not contribute to the heritage value, historic character or desired character of the zone; or
 - (b) the condition of the item is structurally unsound and substantial rehabilitation work is required to an extent that is unreasonable; and
 - (c) in either of the circumstances described above, the demolition of that building, or that part of a building, is part of a development involving erection of a substitute building, or part of building, or addition to that building, in a manner which does not diminish the level of contribution to the historic character of the zone made by the building on the site of the demolition.
 2. The poor appearance of a contributory item should not serve as justification for its demolition or significant modification.

14. Heritage Area Statements for State Heritage Areas and Historic Areas should contain detailed policy in line with those that currently apply.

15. The Heritage Overlays should clearly express the importance of preserving heritage values.
16. Include pictorial guides
17. Remove deemed to satisfy provisions for conservation work
18. Include public notification provisions in Heritage Overlays
19. Clarify which policies apply to properties within the State Heritage, Local Heritage and Historic Area Overlays and which apply to adjacent sites
20. Clarify what are acceptable changes in the Historic Area Overlay
21. Clarify what is suitable development for applications involving alterations and additions to properties in the State Heritage Area and State Heritage Places Overlays
22. State Heritage Place Overlay should refer to preservation of whole landscapes
23. Define or clarify the phrase "extent of listing" in the State and Local Heritage Place Overlays and the phrase "visible from the public realm" in the Historic Area Overlay

Please contact the writer with any queries in relation to this submission.

Yours faithfully

A handwritten signature in cursive script that reads "M Ballantyne". The signature is written in dark ink on a light-colored background.

Melissa Ballantyne

Coordinator/Solicitor – EDO (SA) Inc*.

*Environmental Defenders Office (SA) Inc has executed an agreement to merge with EDO Ltd. The legal merger will occur over the coming weeks