1 March 2019

DPTI Planning Reform Engagement Team
Department of Planning, Transport and Infrastructure
Level 5, 50 Flinders Street
ADELAIDE SA 5001

VIA EMAIL: DPTI.PlanningEngagement@sa.gov.au

Dear DPTI Planning Reform Engagement Team

FEEDBACK ON DRAFT PLANNING, DEVELOPMENT AND INFRASTRUCTURE (GENERAL) (DEVELOPMENT ASSESSMENT) VARIATION REGULATIONS AND PRACTICE DIRECTIONS – NORTHERN REGIONAL COUNCILS

This is a joint feedback submission from the:

- Yorke Peninsula Council;
- Copper Coast Council;
- Barunga West Council;
- Wakefield Regional Council; and the
- Port Pirie Regional Council.

The following tables set out our feedback on the draft Planning, Development and Infrastructure (General) (Development Assessment) Variation Regulations (“the draft regulations”), Practice Direction – Notification of performance assessed development applications, Practice Direction – Deemed planning consent standard conditions and Practice Direction – Conditions.

The draft regulations

<table>
<thead>
<tr>
<th>Draft regulation reference</th>
<th>Comment</th>
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<tbody>
<tr>
<td>4 – Variation of regulation 3 – Interpretation essential safety features writing</td>
<td>The term “essential safety features” appears to be a typographical error. The term used in draft regulation 100 is “essential safety provision” We question the utility of defining this term as it is not used in the context of governing when advertisements are and are not “development” and does not appear to be used in the draft regulations nor the Act. We question whether this definition would be better placed as an administrative definition in the Planning and Design Code.</td>
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<td>Lack of link from regulations to definitions in the</td>
<td>We submit that a regulation should be provided that links the definitions included in the Planning and Design Code to the interpretation of the regulations, in the absence of an equivalent to Schedule 1 of the Development Regulations 2008.</td>
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**Planning and Design Code**

**Regulation 3(3)**

To automatically determine a designated flood zone on minimum finished floor levels may have extended implications on such detail as insurance. For instance, localities such as the Wallaroo Marina outline minimum floor levels however the development sites adequately meet these levels. We request that some consideration be given to excluding areas which have been engineered so that development sites are at minimum floor levels.

**5 – Insertion of regulations 3A to 3I**

**Regulation 3E**

We consider this to be a positive reform which will further assist in ensuring that buildings are properly approved and are suitable for occupancy.

**Regulation 3G**

We acknowledge that this regulation is similar to regulation 6B of the current Development Regulations 2008 and that its intent is to reduce pool drownings by ensuring that prescribed swimming pools require swimming pool fencing and other safety features.

Many inflatable swimming pools with filtration systems can be purchased relatively cheaply from retailers. Many people who own these pools are unaware of their obligations under the Act. We suggest that regulation of retailers such that pools are sold with warning stickers or other notifications confirming the requirements of the Act to ensure that members of the community are better aware of them. Alternatively, we suggest that this regulation be removed entirely given that it is inherently difficult to enforce with consistency.

**8 – Insertion of Parts 4 to 18 and Schedules 1 to 19**

**Regulation 22(1)(a)(ii)(B)**

We note that the term ‘total amount to be applied to any work’ is not defined. This may lead to legal argument as to the correct approach to calculating this amount which is best avoided. We suggest that the term ‘building work’ or another calculation method is used or, alternatively, that the regulation be deleted.

The term ‘storey’ is not defined and this may lead to legal argument as to the meaning of this term. We recognise that roof-top gardens are not uncommon in townhouse and other developments and that they may incorporate open, verandah and/or pergola structures which may or may not constitute a ‘storeys’. Also, it is not clear whether a ‘storey’ includes only portions of a building above ground or whether below ground levels are included. If the intention of this regulation is to ensure that buildings which have the appearance of having more than 3 storeys above ground are assessed by an assessment panel, we suggest that this regulation be rephrased to provide either a definition of storey or to clarify that it applies to a building which will exceed a particular height above ground level expressed in metres.

The wording should further cater for the whole of the development, inclusive of all stages to ensure that a developer does not plan a say, 40 allotment development, but apply for it in 2 or more stages.

This provision does however have implications should Assessment Panels not seek to delegate. When considering such large-scale developments, a relevant authority must work in closely with the developer from the early stages to achieve appropriate planning outcomes. This relationship becomes difficult to build if you cannot provide certainty to the developer that support will be given if the following changes are made. The addition of an Assessment Panel report within the 60-day time period creates further difficulty.
<table>
<thead>
<tr>
<th>Regulation</th>
<th>Description</th>
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<tbody>
<tr>
<td>22(1)(d)</td>
<td>We submit that consultation on the nature and extent of deemed-to-satisfy land divisions, which (in addition to other relevant authorities) an Accredited professional – surveyor can assess for planning consent, should occur. If deemed-to-satisfy land divisions are limited to land divisions which occur after built form applications for corresponding development are approved (noting that this will require new definitions of ‘detached dwelling’, ‘semi-detached dwelling’ and ‘row dwelling’ in the Planning and Design Code and clear clarification that this can occur to overcome existing Supreme Court case law authorities which prevent this from occurring), then we are generally supportive of this regulation.</td>
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<tr>
<td>22(1)(e)</td>
<td>We are supportive of this regulation. An assessment manager is best placed to assess infrastructure and other requirements imposed under sections 102(1)(c) or (d) of the Act.</td>
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<tr>
<td>23(2)(b)</td>
<td>We suggest that the timeframe for providing a report to the Commission should be increased to 20 days (i.e. 4 working weeks). The northern regional councils do not always have sufficient in-house resources to be able to provide engineering and other advice and often rely on consultants in this regard. The extra timeframe is requested to ensure that sufficient time is allowed for this to occur so that reports to the Commission are sufficiently detailed and of assistance to them. Further, in some circumstances, reports may need to be endorsed by the elected body of a council and a 15-business day period will make this very difficult to achieve.</td>
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<td>23(3)</td>
<td>We note, with disappointment, the limited content of a report provided to the Commission by a council. Councils, particularly rural and regional councils are very close to their communities and are usually aware of local conditions and possible resultant impacts of developments which authorities based in Adelaide do not. We suggest that this regulation be deleted so as to allow councils to make submissions on community impacts, local conditions and other matters which may be relevant as per the Planning and Design Code to ensure that Commission decisions are as robust and informed as possible.</td>
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<tr>
<td>25(2)(a)</td>
<td>We query this inclusion and the ability to provide accredited professionals in the field of building, to undertake planning assessments.</td>
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<td>25(4)</td>
<td>We note that this regulation restricts Accredited professional – level 3 to the assessment of class 1 and 10 buildings only. This restriction is stricter than AIBS Accreditation Requirements for the AIBS-equivalent accreditation level and, is therefore, stricter than present requirements. We suggest that the reference to class 1 and 10 buildings be expanded to include classes 2 – 9 inclusive.</td>
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<tr>
<td>27</td>
<td>We suggest that clarification on the term ‘element’ used in this regulation should be considered. For instance, if a mixed use development contains shopping, office and residential components, does this mean that each component is an ‘element’ which must be identified? If a development has both deemed-to-satisfy and performance assessed components, are they ‘elements’?</td>
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</table>
We also submit that the obligation to identify elements be first placed upon the applicant for the authorisation sought, allowing the relevant authority to review that assessment with planning or building expertise as relevant.

**Regulation 30(1)(b)**

Presently, development applications are lodged at the relevant council in whose area the development will be occurring. We suggest that this provision be amended to better accommodate assessment panel arrangements by stating that, where an assessment panel has been appointed, a development application must be lodged at the principal office of the council in whose area the development is proposed to occur. We suggest that a similar amendment be considered for joint planning boards to avoid applicants having to travel great distances to lodge a development application.

Clarity is sought on the use of the terms 'lodge' and 'receipt' given that timeframes in regulation 56 run from when verification of a development application occurs under regulation 35.

**Regulations 30(1), 31, 32, 35(1), 36 and 38 - use of the terms 'lodge' and 'receipt', etc**

Regulation 30(1) appears to provide that 'lodgement' of a development application occurs whenever it is lodged on the SA planning Portal by an applicant or when it is submitted to a relevant authority.

Regulation 31 provides that applications must be lodged with plans and details etc prescribed under Schedule 8. Regulation 31(4) suggests that lodgement only occurs when the relevant authority confirms that all information and documents are present or, in the alternative, if it permits the applicant to lodge an application without certain items.

However, regulation 32 then provides that an application 'received' under regulation 30(1)(b) must be lodged on the SA planning portal within 5 business days after receipt, suggesting that an application is not lodged until after it is uploaded to the SA planning portal.

Regulation 35(1) then provides that 'on receipt' of an application, a relevant authority that has received the application (either electronically or otherwise, must within 5 business dates after receiving the application, undertake the verification required by regulations 35(1)(a) and (b).

Regulation 36(5) then provides that requests for further information must be issued within 10 business days from the date of the application being lodged.

Regulation 38(1) provides that, subject to regulation 38(2) assessment time limits 'reset' upon a relevant authority allowing an applicant to vary their application to the ‘date of receipt of the application’.

It is not clear whether the concepts of lodgement and receipt are intended to be separate or the same and, if there is a difference, what that is. The above regulations appear to 'jump' between receipt and lodgement. We suggest that consideration be given to redrafting the abovementioned regulations to remove the separate references to each term or that the terms be clarified. An alternative to the above may be a single, consolidated, regulation which 'steps' through the various steps from receipt, verification and lodgement in a sequential order.

**Regulation 35(1)**

Relevant authorities appointed by Councils do not have the capacity or resources to undertake this task within the specified time frame. The
existing time constraints provided for assessment in addition to the deemed consent trigger and additional Assessment Panel reports must be taken into consideration.

**Regulation 36(5)**

A time limit of 10 business days from date of lodgement and one information request is insufficient to allow for the request for information on major developments such as large subdivisions. A relevant authority would still be awaiting agency response and consideration must be had by internal council departments. One request allows for the provision of a SMP or site contamination audit, however assessment of this detail and relevant follow-up requests may be required. Again, this may result in an increase in refusals and removes the ability for the relevant authority to work with the applicant to amend the development to achieve a positive outcome.

We consider that this regulation should be reconsidered as it is likely to result in increased refusals of development applications where requests for further information are outstanding. Where a development application is complex, such as where site contamination exists or other environmental issues are relevant, requests for further information can take many months to resolve. At present, the approach of all councils is to allow an applicant sufficient time to obtain further information, even if this timeframe does exceed 12 months, in circumstances where the council is satisfied that the applicant is acting reasonably, in preference to refusing their application. Due to the operation of deemed consents under the Act and the implications of these for relevant authorities, we consider that refusals will increase as a result of this regulation. This outcome is not considered ideal and should be reconsidered.

We submit that an ideal solution to address the issue is the introduction of 'stop-clocks' in the calculation of business days in the assessment period. When an application is sent to a referral agency for response, or when a request for information is submitted by the relevant authority, the clock should stop and should only resume counting applicable business days when the referral response or valid information response is received (or the period for response lapses). This would address the capacity of the relevant authority to assess development applications in a timely manner to produce appropriate development outcomes.

**Regulation 38(2)**

We submit that this regulation should be reconsidered as it is likely to result in increased refusals of development applications where requests for further information are outstanding. Where a development application is complex, such as where site contamination exists or other environmental issues are relevant, requests for further information can take many months to resolve. At present, the approach of all councils is to allow an applicant sufficient time to obtain further information, even if this timeframe does exceed 12 months, in circumstances where the council is satisfied that the applicant is acting reasonably, in preference to refusing their application. Due to the operation of deemed consents under the Act and the implications of these for relevant authorities, we consider that refusals will increase as a result of this regulation. This outcome is not considered ideal and should be reconsidered.

We submit that this regulation should be reconsidered in its entirety. The area of each of our councils is very large and the requirement for our assessment panels to ensure that notices are placed on land will be onerous and expensive to administer. We are of the view that the responsibility to place a notice on land should rest with the applicant alone.

**Regulation 50(4)**

We submit that this regulation should be reconsidered in its entirety. The area of each of our councils is very large and the requirement for our assessment panels to ensure that notices are placed on land will be onerous and expensive to administer. We are of the view that the responsibility to place a notice on land should rest with the applicant alone.

**Regulation 52**

Similar comments to those made in respect of Regulation 30(1)(b), we suggest that this regulation be amended to clarify that public inspection occurs at the relevant council to avoid the need for excessive travel and administrative costs.

**Regulation 53(1)(a)(i) and 53(2)**

We submit that the public notification timeframe should end 15 business days after the relevant authority receives proof that the notice has been placed on the land by the applicant only to avoid difficulties arising when there is a delay in the placement of the notice occurring.
Further, the definition of ‘ordinary course of postage’ is problematic for us. Priority Post (which has timeframes which meet the definition) is not often delivered within 3 business days within our council areas. Linking anticipated postal delivery timeframes to public notification timeframes is, therefore, problematic and should be reconsidered.

**Regulation 56(1)(e)**

When undertaking the assessment of large scale residential subdivisions, a period exceeding 60 business days is commonly required.

There is concern that the relevant time frames, intertwined with a deemed consent threat, limited condition parameters and potential panel report preparation and consideration requirements will result in poor planning outcomes. It is envisaged that a substantially high number of refusals will need to be issued. This does not assist in building relationships with developers or the community and places relevant authorities, and our new planning system in a poor light as a result.

Negotiating extensions to this period with the developer is not deemed possible or desirable as there is no trigger to then stop developers from issuing a deemed consent notice.

**Regulation 56(2)**

Given the reduced assessment timeframes provided for in regulation 56(1), the fact that advice from referral bodies is often of material significance to the assessment of a development application and additional timeframes under (1)(g), (h) and (j) will run concurrently is considered to be problematic. We also note that there are no ‘stop-clocks’ for referral agency reports to be received. Given our expectation that all referrals will have a power of direction, we consider that assessment timeframes should pause when awaiting receipt of a referral report.

**Regulation 60(2)**

We query whether 5 business days to issue a decision notification form after determining a planning, building or land division consent is too long. We suggest that consideration be given to reducing this timeframe and allowing more time for the assessment of a development application.

**Regulation 99(3)**

Given Australia Post delivery timeframes in our areas are often not met, and the fact that notifications can be given through the SA Planning Portal and to authorised officers of the Council, we suggest that the ability to achieve service of notifications by registered post be removed.

**Schedule 4, clause 2 – Council works**

We note that the wording of this exemption clause applies to certain activities ‘by a council’. Councils often use contractors for such works and, from time-to-time, community groups may wish to undertake some works named in this exemption. We suggest that the wording of (1) be amended to read “The construction, reconstruction, alteration, repair or maintenance by or on the behalf of a council of—” to ensure that there can be no legal argument that works undertaken by contractors or other persons on a council’s behalf are exempt.

Clause (1)(f) – given the popularity of adult exercise equipment in recreation areas, we suggest that this exemption should be amended to include adult exercise equipment as well as playground equipment.

**Schedule 4, clause 4 – Sundry minor operations**

Clause (1)(h) – the intent of this new exemption is understood however the proposal creates a streetscape concern, does not consider Clause (1)(f) exemptions and is currently worded in a problematic fashion.

Existing wording does not limit the height of the proposed fence and accordingly allows for such a structure as a 2.9m high fence constructed on top of a 200mm high retaining wall.
A 3.1 metre high structure to a street frontage can have detrimental impacts upon streetscape character. It is not uncommon for frontages of properties to be filled. Accordingly it is considered that such structures forward of building line should be excluded from the relevant exemption.

Clause (1)(f) outlines a number of exclusions which are then not repeated within (1)(h). Failure to do so raises concern that there are then again allowed for by (1)(h). Examples include a masonry fence, a 3.1 metre high structure within a 4 x 4 corner cut off or a 3.1 metre high fence/retaining wall structure within a Historic Conservation Area.

Should the above be addressed we suggest that the height restriction, currently expressed as “less than 3.1 metres in height” be amended to read “not exceeding 3.1 metres in height” given that standard fence panels are often 2.1 metres in height.

Clause (1)(m) – we support this new exemption in principle but suggest that the term “tree house” be replaced with “cubby house”. Whilst cubby houses can be considered to be exempt outbuildings pursuant to clause 1(a), many kit-form cubby houses with sandpits, slides and play equipment underneath are taller than 2.5 metres and, therefore, are too tall to be exempt as an outbuilding. We submit that all cubby houses of up to 5 square metres in floor area should be exempt, regardless of whether they are located in a tree or not.

Clause (5) – we suggest that the term “domestic floor” be revisited and replaced with simply “floor”.

Clause (2)(a) – we note that the term “home activity” is not defined in the draft regulations. We also note that this term is defined in the draft Outback Code. There is, however, no link in the draft regulations to ensure that this term must be interpreted as defined in the Code. We suggest that this clause be amended to read “the carrying on of a home activity as defined in the Planning and Design Code on land used for residential purposes” for clarity.

Schedule 4, clause 5 - Use of land and buildings

Schedule 7, clause 5 - Haysheds etc

Schedule 9 - referrals

Draft PD reference Comment

Conditions

Part 2, Clause 4 Practically speaking this will create unnecessary delays

Part 2, Clause 5(6)(a) It is considered that in instances conditions must also apply to the owner of the land. Such an example may be an ongoing condition such as landscaping maintenance. It cannot be the responsibility of the applicant to undertake these works for the life of the development. Additionally consultants may wish to apply for development upon the owners behalf.
Historically an approval sits with the land rather than the applicant, however the relevant practice direction suggests that should an applicant change, an amendment application may be required.

### Notification of Performance Assessed Development Applications 2019

**Clause 11(4)**

As stated above at our comments for draft regulation 50, we consider that the responsibility to place a notice on land should rest solely with an applicant. The area of each of our councils is very large and the requirement for our assessment panels to ensure that notices are placed and maintained on land will be onerous and expensive to administer.

**Clause 14(1)**

In agreement with this inclusion (as Section 128 of the PDI Act only outlines this requirement to renotify for Restricted Development).

### Deemed Planning Consent – Standard Conditions 2019

**The building and site must be maintained in good condition at all times**

This condition lacks an ‘arbiter’. Presently, conditions imposed by the Council will be phrased such that it reads “in good condition at all times to the reasonable satisfaction of the Council”.

The ERO Court has upheld this standard as being valid and enforceable. The advantage of it is that it is the Council – i.e. the authority usually tasked with undertaking development compliance actions – which determines whether a building or site is in good condition, thereby better facilitating enforcement by it.

We note that the first landscaping condition requires landscaping plans to be to the “reasonable satisfaction” of the relevant authority. We also note that similar phrasing is used in the Air Conditioning/Plant/Equipment condition and in the Privacy conditions.

**Landscaping in accordance with the approved plans must be established prior to the operation of the development and must be maintained and nurtured at all times with any diseased or dying plants being replaced.**

As above.

**Site Management**

As above for all three conditions.

**Privacy – both conditions**

For the sake of absolute clarity, we suggest that these conditions be amended to expressly state that screening and treatments be thereafter maintained in good condition to the reasonable satisfaction of the relevant authority.

Yours sincerely

Roger Brooks

DIRECTOR DEVELOPMENT SERVICE