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Expert Panel Secretariat

GPO Box 1815

ADELAIDE SA 5001

DPTI.PDPlanningReform@sa.gov.au

Dear Expert Panel

Re: Planning Review

The Environmental Defenders Office SA (EDO) is a community legal centre with over 20 years experience specialising in public interest environmental law. Our functions include legal advice and representation, educational services and the promotion of policy and law reform in environmental law. Much of our work involves providing advice and assistance in relation to planning law issues. We welcome the opportunity of actively participating in this most important review of the South Australian planning system.

Planning and development in South Australia are primarily governed by the Development Act 1993 (SA) (the Act). The Act not only establishes the planning and development system framework and many of the processes required to be followed within that framework but it also establishes the powers and responsibilities of the respective 'players' in the planning system.

Since the Act commenced operation on 1 January 1994, it has been amended 628 times through 46 separate amending Acts. It is now a long and difficult Act to follow.

The key parts include:

- Part 2 which establishes statutory bodies the Development Policy Advisory Committee (DPAC) and the Development Assessment Commission (DAC);
- Part 3 which establishes the need for the Planning Strategy (Section 22) and local area Development Plans (Section 23), and the processes for amending (Sections 24-29) and reviewing (Section 30) planning policy;
- Part 4 which sets out the development assessment processes (Sections 32-56A), including major developments (Section 46);
- Part 6 which sets out the law surrounding the regulation of building work; and
- Part 11 which sets out processes for enforcement, disputes and appeals.

South Australia's planning and development system has for the last twenty years favoured and facilitated low-density residential developments. However in recent times, an unprecedented number of noteworthy changes to the Act (and the associated Development Regulations 2008 (SA)) have reflected a clear intent to significantly alter the way in which planning policy and development assessment occurs in South Australia.

The new emphasis is on "streamlining" the development assessment processes (especially planning assessment processes involving councils) for residential development and an increase in housing density and infill development in the Greater Adelaide area.

The important changes which reflect this new emphasis include:

- The introduction of the "Residential Code";
- The announcement of the "30-Year Plan for Greater Adelaide";
- Paring-back of measures in the Act that protect individual trees in urban areas from damage and removal; and
- Private certification of development plan consents.

One of the most significant changes in line with the shift in focus was the introduction of the Residential Code which provides for the codified planning assessment of certain forms of residential development. This change was significant, as it allows for the construction of dwellings on smaller allotments than those often demanded by development plans, and in configurations that were often discouraged in development plans.

The 30 year Plan (a key strategic policy planning document) and required for consideration by the Minister of Planning under the Act also represents a significant shift in focus with the emphasis on provision of a comprehensive integrated plan for transport-orientated development and for the development of high-density residential areas and employment lands by precinct.

Other more recent amendments including changes to the provisions relating to significant trees and development approval and amendments allowing the private certification of development plan consents are evidence of this shift in focus.

In this submission we will examine whether our current system is best practice. In our view a leading edge planning system should;

- describe how the goal of ecologically sustainable development (ESD) will be achieved via state, regional and local policies and planning decisions;
- undertake independent baseline studies of catchments' environmental qualities, such as water, soil, vegetation, biodiversity, minerals, air quality;
- provide for comprehensive rights of public participation, and support to engage – including tailored, inclusive engagement for indigenous peoples;
- take account of potential cumulative impacts of development over time;

- identify competing land uses, including sensitive areas where certain development (such as mining) is prohibited based on economic, environmental, social or cultural criteria;
- integrate natural resource management goals into the planning process;
- measure, publish and analyse environmental data across jurisdictions and sectors – to promote accuracy, transparency and evidence-based policy;
- promote resilience to climate change for communities and the environment, addressing risks and opportunities via mitigation and adaptation;
- integrate infrastructure needs ahead of new development, and prioritise public transport and 'green infrastructure'.

It is our key submission that the current system is not leading edge and needs to be reformed. The current system fails;

1. to fully incorporate environmental issues into planning processes and decision making;
2. to facilitate genuine community engagement and;
3. to deliver transparent and accountable decision-making

These problems have in our view led to a history of decisions where development, economic and political interests have held sway over environmental concerns. Planning reform should be based on the principle of achieving ecologically sustainable development with comprehensive public participation in the planning process. In short there must be integration of environmental and community considerations into the planning system.

Reform to date has not moved in this direction. Instead it has focussed on streamlining or delivering fast approvals. This has resulted in many examples of poor quality, high risk or unsustainable development which are not in the public interest. It is a misguided notion that the only measure of an effective and credible planning system is how fast a development receives consent.

This review is an opportunity to change the direction of reform and enable sustainable development outcomes for all South Australians.

We suggest two key reforms;

1. Proper consideration of environmental factors in decision making which includes having ecologically sustainable development (ESD) as the overarching objective of the planning system. ESD principles should be incorporated across all planning policy documents and having regard to ESD principles should be a basic requirement of all decision makers. The Act should also include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.

   Aspects of this reform will be dealt with at various times in this submission.

2. Reinstatement of community engagement as a central feature of the new planning system. The public interest value and benefit of this must not be sacrificed simply to increase the speed of development assessment. Genuine and meaningful community engagement has the benefit of empowering local communities, utilising local knowledge and improving decision making by assisting decision makers to identify public interest concerns.

Good community engagement processes promote community 'buy-in' of decisions which can reduce potential disputes and can help to ensure fairness, justice and accountability in decision making. We refute any suggestion that community engagement is an administrative and bureaucratic burden rather than a process that can add much value to resource management and decision-making. We believe that community engagement helps to ensure fairness, justice and accountability, and can contribute issues to the debate that may otherwise be overlooked.

As an international leader in public participation, IAP2 has developed the "IAP2 Core Values for Public Participation" for use in the development and implementation of public participation processes. These core values were developed over a two year period with broad international input to identify those aspects of public participation which cross national, cultural, and religious boundaries. The purpose of these core values is to help organisations, decision makers and practitioners make better decisions which reflect the interests and concerns of potentially affected people and entities.

- The public should have a say in decisions about actions that could affect their lives.
- Public participation includes the promise that the public's contribution will influence the decision.
- Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.
- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

There is an urgent need to incorporate such best practice community engagement processes at all stages of our planning cycle. We recommend that the Community Participation Charter (Charter) proposed in the NSW Planning Bill 2013 could be used in South Australia. The Charter will apply to a broad range of planning authorities (bodies which make decisions on strategic plans and development applications), from the Planning Minister down to local councils and other consent authorities.

The Charter sets out seven high-level principles under the Planning Bill (clause 2.1).

1. *Partnership* (opportunities to participate),
2. *Accessibility* (to understandable information),

3. *Early involvement* (participation in strategic planning 'as soon as possible before decisions are made'),
4. *Right to be informed* (about planning decisions that affect the community),
5. *Proportionate* (participation in decisions is proportionate to a development's significance and impact),
6. *Inclusiveness* (representative, inclusive and appropriate consultation methods) and
7. *Transparency* (open and transparent decision-making, reasons for decisions and feedback on the influence of community views).

The Charter is to be given practical effect via Community Participation Plans (CP Plans) prepared in consultation with the community. Each planning authority (other than the Minister11) is 'required to prepare' a CP Plan that 'provides guidance on how it will undertake community participation' for functions that the Charter applies to (clause 2.4(2)). The Planning Department will also prepare Community Participation Guidelines to assist planning authorities to develop their CP Plans.

In our view we should incorporate such a practice into our planning system. A Community Participation Charter must be enforceable, with all planning authorities required to comply with the Charter's broad principles including in the making of Community Participation Plans. All planning authorities should be required to act consistently with a Charter and Plans when undertaking strategic planning and development.

We recommend a minimum exhibition period of 28 days to comment on a draft Charter and Community Participation Plans. There should be express provision for the independent review of Community Participation Plans, with this process to be mandatory and regular.

The Charter should contain minimum requirements at the *strategic planning* stage, including notification of the preparation of strategic plans and local plans; publicly available information (including environmental studies and sectoral strategies); decision makers must take into account submissions made on draft plans; decision makers must provide reasons for decisions about strategic plans

The Charter should also contain minimum requirements at the *development application and assessment* stage should include notification of development applications (DAs); publicly available supporting information, including all information supporting a DA; decision makers must take into account submissions made on DAs; and decision makers must provide reasons for decisions when determining DAs. Generally all notification and exhibition periods should be expressed in business days. Where a minimum exhibition period is provided, the legislation should explicitly state that members of the public (and public authorities) may make comment during these periods, and may inspect and copy any documents for that purpose.

A. Strategic Issues

The environment has suffered as a result of our failure to take a holistic approach to strategic planning and development assessment. We suggest the establishment of an independent planning commission to provide leadership and an unbiased role in our planning system.

Strategic Assessments

A major strategic issue is the system's failure to adequately consider the cumulative environmental impacts of an individual proposal or a number of proposals over a larger geographical area. An example of this is the ad hoc nature of proposed development across Eyre Peninsula notably mining, ports and other infrastructure proposals. The full impacts of many proposals are not considered individually or collectively. Many communities are concerned at the impact of these proposals on their farming lands and water supplies. The lack of strategic assessment is in part due to lack of integration with natural resource management and water catchment plans. The problem is heightened by the fact that government departments, agencies and boards have differing areas of responsibility.

A strategic assessment should be accredited. To be accredited an assessment should ensure ongoing maintenance or improvement of environmental values.
Strategic assessments should be based on comprehensive and accurate mapping and data, undertaken at the earliest possible stage, must assess alternative scenarios and cumulative impacts and involve ground-truthing of impact assessment and extensive public consultation

We need adequately researched environmental policy thresholds to trigger a range of development policy responses, for example, to regulate stormwater runoff and its downstream impacts. The cumulative impacts of proposed developments should not exceed prescribed environmental thresholds. We also need to improve integration, monitoring and reporting on environmental indicators in strategic planning.

Information Collection and Distribution

A key problem is that decisions leading to good environmental outcomes have been thwarted by poor coordination between relevant State and local government agencies in relation to environmental information. Whilst a certain amount of information has been collated across the state in relation to issues such as water quality and flow data, threatened species habitat and vegetation clearance, this information is often not readily available to Council officers assessing development applications. In addition Councils are often basing decisions on out dated mapping to determine whether threatened species will be impacted.

We would support greater efforts to improve information gathering and sharing between government agencies and councils to ensure that planning authorities have access to up-to-date spatial and mapping information when assessing developments, or requiring councils to seek the advice of relevant government agencies. Better information will improve decisions and reduce legal challenges.

Regulation of the Mining Industry

A further difficulty is the different assessment processes for the mining sector. This different system arguably advantages this sector over other land uses. Removal of all exemptions and protections for the mining sector would ensure that decisions relating to this use are subject to sustainable development objectives and accountability under the Act's public

participation processes, along with all other land uses. In addition successive governments have used “special” legislation to regulate particular projects such as the Olympic Dam mining operation. This means such projects are not subject to exactly the same rules as other projects. In our view the government needs to change its policy on the use of such legislation so that all projects are subject to similar environmental and planning regulatory schemes.

B. Development Plans

Many clients find development plans confusing, inconsistent and extremely difficult to follow. In the interests of transparency and accountability plans need to be easier to understand

Plans are also generally lacking when it comes to environmental protection. In particular many plans fail to incorporate lack consistent and clear sustainability provisions and measures to account for the impacts of climate change. Plans should include leading edge sustainable planning principles on issues such as built form, height maximums, living density, open space, block size, essential services, transport, infrastructure, water collection, zero waste, places of cultural significance, heritage places, biodiversity protection and social inclusion. Plans should describe in easily measurable terms the standard which a new development is to meet or a performance based approach with "design techniques"

Plans should also clearly identify competing land uses, including sensitive areas where certain development (such as mining) is prohibited based on economic, environmental, social or cultural criteria. Link plans for private land with plans for public land. Plans should also include biodiversity conservation overlay maps or refer to State maps indicating the various classes of biodiversity across local government areas including such ‘no go’ areas.

Finally, an important matter is the lack of linkages between development plans and plans for public land dealt with under the National Parks and Wildlife Act 1972. It is vital that if we are to have a fully integrated planning system that such links are developed.

Development Plan Amendments (DPAs)

In our view the DPA process is unnecessarily long and convoluted. Many clients express to us that they do not understand the process. Residents often do not realise that a rezoning is occurring and if they are aware they do not fully understand what might be the future impacts of proposed amendments. Even if they do have input there is wide concern that community views are ignored and no reasons are given as to why they are not taken into account. There are many examples of community disquiet in this regard most notably the Mount Barker DPA.

Other key issues concern the use of Ministerial DPAs, the exercise of interim operation of DPAs, scrutiny of DPA approvals and the use of the DPA process in heritage matters.

Ministerial DPAs

In our view Ministerial DPAs should be limited to matters that cross Council boundaries or where local Councils agree. Ministers should only be able to over-ride local Councils following an open and transparent process including public participation.

Interim Operation

The use of interim operation of DPAs is a difficult matter and careful consideration should be given as to when it is justified. Interim operation should not be used solely to speed up the approval of a particular development. To do so compromises the value of the public comments which follow and therefore care must be taken not to erode the public's rights in this area. The interim operation provisions could still be used, for example, to prevent opportunistic subdivision applications. We suggest that criteria be developed as to when interim operation be used and any use should be approved by a resolution of either House of Parliament.

In our view the adoption of DPAs should also be subject to the same scrutiny. Currently this is a function of the Environment, Resources and Development Committee of Parliament. However this Committee in our view operates ineffectively because it only scrutinises a DPA after it is adopted. In the meantime opportunistic developers can take advantage of the fact that a DPA is in operation.

Heritage matters

It is also confusing that the DPA process is used for heritage protection in addition to processes set out in other legislation. Heritage matters are a key concern for many clients but there is much confusion over how protection occurs via DPAs, the terminology used, the length of time it takes and the poor consultation process which we detail below.

Community Engagement

Community engagement is currently not carried out in an active, iterative, and considered manner. For example, the current system of general public notification is insufficient. There needs to be a greater range of methods used to notify residents including the many and varied forms of social media. The newspaper and government gazette are outdated tools. We also recommend that proposed changes be notified to individual residents.

When notifying residents Councils or regional bodies need to articulate proposed changes in language which can be easily understood and make publicly available the amended document, not just the amendment instructions which often make little sense to the lay person.

Consultation periods are too short and need to be expressed in business days. We recommend an extension of the minimum mandatory exhibition period from 8 weeks to 60 business days (12 weeks) for DPAs.

We recommend that independent facilitators be used to collect views in a wide variety of ways. Special consideration should be given to allow rural communities, indigenous

communities and those from non- English speaking backgrounds to present their views. Views should not be ignored just because they are not formally written.

The emphasis always needs to be on collecting an array of views. A straightforward information session with little time for discussion is not appropriate. Ideally information about several options should be provided in a timely way ahead of open public meetings or other gatherings. Feedback should be provided to all those who provided input especially if their views are not taken up. Currently the advice provided to the Minister from the Development Policy Advisory Committee following consultation is not made public, this needs to be remedied. Finally, we recommend that the methods used for community engagement should be subject to regular review.

We could consider using processes similar to Perth's Dialogue with the City. This process formed part of the broader Western Australian State Sustainability Strategy introduced by the Gallop government in 2003. The overall aim of the Strategy was to integrate environmental protection, social advancement and economic prosperity into the future planning of the state. The Strategy followed a number of government environmental initiatives which had been issues during the 2001 WA state election (old-growth forest logging and the Ningaloo Reef). [1]

The aim of the Dialogue was to enable planning for Perth to become the world's most liveable city by 2030. The process was designed to encourage community engagement and provided numerous avenues for public input to occur. The results of the Dialogue were published as a plan called Network City: A Community Planning Strategy for Perth and Peel.[2]

The process involved a number of different phases and opportunities for the community to be involved:[3]

- A community survey (1711 respondents to surveys sent out to 8000 randomly selected Perth metropolitan residents).
- A television program during prime time discussing four scenarios to deal with Perth's future growth. The program included a nine member panel (representing state and local government, industry and community) plus an interactive audience.

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1 Martin Brueckner and Christof Pforr, The State Sustainability Strategy, see 'Labor's Taste for Sustainability between 2001 and 2005' http://sspp.proquest.com/archives/vol7iss2/1008-037.brueckner.html.

2 Network City: A Community Planning Strategy for Perth and Peel http://www.water.wa.gov.au/PublicationStore/first/52027.pdf.

3 For more information on each of these see: http://www.21stcenturydialogue.com/index.php?package=Initiatives&action=Link&file=dialogue_with_the_city.html.

- Online discussion groups.
- Media features in local/city-wide newspapers and radio over a two month period.
- Specific meetings held with special interest groups: youth, indigenous and non-English speaking residents.
- Painting and short essay competitions for school students under the theme 'Perth 2030, the kind of city I want to live in'.
- A community forum of 1100 participates[4] resulting in:
    - Further community workshops including:
        - Local/state government partnership – resulting in grants to local governments to integrate the plan.
        - Liaison teams with responsibility of informing their constituent groups and providing feedback to the process.
    - An Implementation Team being established to develop a draft plan using all the various sources of community input.

Overall the process was considered to be very ambitious but, generally, successful. Participants regarded it as wonderfully organised, democratic, hopeful, exciting and a ground-breaking initiative.[5] Some of the criticisms from the forum were that it was orchestrated to promote the "connected network" urban plan and so was not as consultative as it was promoted to be. Some felt that it threatened the role of planners in decision making and would unnecessarily delay projects and planning.[6]

C. Development Assessment

Rigorous assessment must be a cornerstone of any new planning system. Adopting good processes in which all relevant issues are considered leads to sustainable outcomes. It is critical to community support for the planning system that any effort to streamline the system does not compromise the assessment of environmental impacts.

Seriously at Variance test

We question whether the "seriously at variance" test should continue to be used. Whilst forward benchmarks are provided for in plans in practice a much lower test of "reasonableness" is applied. It is left open to developers to determine "how" to satisfy the outcome which is a performance based approach.

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4 For more information about the forum see: 'Deliberation, Decisions, and public Interaction' http://participedia.net/en/cases/dialogue-city

5 Janette Hartz-Karp, A Case Study in Deliberative Democracy: Dialogue with the City, pg 10/11, http://www.activedemocracy.net/articles/jhk-dialogue-city.pdf.

6 For more detailed information and criticisms, go to pg 9: http://soac.fbe.unsw.edu.au/2007/SOAC/multipledialogues.pdf

Normal Projects

The questions we are commonly asked are fourfold; what type of activities need approval, who makes the decision, what is the basis for a decision and finally what rights does a community member have to be involved in the process. The answers to these questions are rarely simple. The system is confusing for those who work within it, let alone the lay person.

The majority of development applications are subject to an array of processes and rules. There is the categorization of applications as either complying, non-complying or merit applications. Similarly we encounter much confusion regarding public notification categories 1, 2, 2A and 3. Planning processes should be made simpler and easier to understand. However it is most important that in simplifying the system we do not forsake quality decision making which appropriately balances the concept of ecologically sustainable development with the practice of land use planning. We should look to implement a best practice system of community rights to participate in planning processes and to challenge decision making.

The right to public notification, the right to public consultation and in certain situations the right to challenge a decision are important parts of the assessment process. These matters are interrelated. If a person is not entitled to be notified of a development, they are not entitled to make a representation. If they are not entitled to make a representation, they are not entitled to be given the results of the assessment process. If they are not entitled to be given the results of the outcome they are not entitled to lodge an appeal.

a. Public Notification

With Category 1 developments there is no right of notification and hence there are no flow-on rights. With Category 2 and 2A applications, limited notification is given to neighbours who have the right to lodge a representation for or against the development but no third party has a right of appeal against a decision to approve.

If a development is Category 3, the proposal must be publicly advertised and neighbours must be personally notified as well as people likely to be significantly affected by the development. In addition there must be notice to the general public through an advertisement in the paper. Anyone may lodge a representation for or against the development and anyone who does so has the right of appeal.

Therefore the right of notice is directly linked to the right to be able to go to court if a person is unhappy with the decision that has been made. It is most important that our development system include appropriate mechanisms in order that developments which might significantly impact on neighbours, and perhaps on the wider community, be subject to public notification, the right of representation and the right of appeal.

Unfortunately in recent times there has been a reduction in the number of opportunities where the public has the right to comment as more and more developments have been given a Category 1 classification. A further difficulty is that the public don't often understand what the application is about, how they can have a say. Furthermore many people now do not

read the newspaper and so do not get notified as members of the public in category 3 matters.

Public notification categories often difficult to work out and this makes it difficult to advise clients. For category 1 and 2 these are assigned by either the Development Plan and also the Regulations. The Regulations prevail over any inconsistency with the Plan. For category 2A applications only the Regulations and not a Development Plan can determine which forms of development are in this category. Category 3 matters are all those "left over" i.e. not category 1, 2 or 2A matters.

For these reasons we recommend a review of categorisation and listing of categorisation matters in the one location. We also recommend that there be wider use of more modern methods of notification and less reliance on advertisements in newspapers. Notices also need to be clearer so that the lay person can clearly understand what the notice is referring to and how they can have a say. Notices of proposed developments could also be placed on the site in question.

Finally it sometimes happens that category 3 notices only specify that those likely to be significantly impacted by a proposed development are able to make a representation. We recommend that councils need to consistently say that anyone in the community can make a representation with respect to category 3 matters.

b. Access to Information

Many of our clients seek advice on accessing information relevant to a planning proposal in their local community.

In our view all information should be publicly available unless there are pressing policy reasons to restrict access. Many clients find that certain information on planning issues is difficult to obtain. For example they have difficulty accessing from their local council the plans and supporting documents accompanying a development application. This can lead to frustration and poor quality representations. Essentially any person should be able to access the same information as the decision maker. Many Councils as a matter of practice make this information available both at their offices and online at least a few business days beforehand but this should be made mandatory for consistency sake.

Other clients seek access to approved applications if they have concerns about whether a development has been undertaken in accordance with the approval and any conditions. However Councils have a discretion to provide such documents and need the building owner's consent. Often copyright is cited as the reason by Councils as not providing easy access to information. Clients often resort to making notes. We recommend that the provisions pertaining to copyright of documents should clearly indemnify all persons including councils and community members where documents are published or accessed for planning purposes, such as commenting on development applications. If copies are provided often the cost is high. We submit that such costs should be limited to the reasonable costs of providing copies.

A further important issue in relation to information is the failure of planning authorities to provide sufficient reasons for decisions. Often decision documents contain very little information as to why a decision was made or community views not followed. We recommend a legislative requirement that decision makers provide reasons for decisions.

A final issue is that when appeals are lodged against decisions there is no requirement on the relevant decision maker for details of these to be posted online. Posting online enables category 1 and 2 representors to consider whether to apply to "join" the appeal. Otherwise residents can only find out this information by looking at the court's case list. In order to join in an appeal you have to know that one has been lodged in the first place. The only people who are formally notified by the Court are the decision maker and any category 3 representors, as the latter group are the only ones with appeal rights.

c. Public participation

We receive many complaints about the time allowed for public consultation with respect to normal applications. Many clients struggle to lodge representations in the 10 business day submission period for ordinary applications. We recommend 20 business days as a more appropriate time frame.

Many clients also complaint that they have difficulty understanding what is being proposed. We suggest that new and innovative ways could be used to present proposals and gather responses such as 3D modelling and intensive design charette. This is an inquiry by design process which links policy objectives to a visualisation of desired physical and other outcomes. The Victorian Department of Sustainability and Environment describes a charette as "an intensive, multi-disciplinary ... design workshop designed to facilitate open discussion between major stakeholders of a development project.

A team of design experts meets with community groups, developers and neighbours over a period from three-four days to two weeks long, gathering information on the issues that face the community. The charrette team then works together to find design solutions that will result in a clear, detailed, realistic vision for future development. The charrette process is an exercise of transparency, where information is shared between the design professionals and the stakeholders of a project area. In this way, trust is built between the parties involved and the resulting vision can be based predominantly upon the issues that stakeholders feel are most crucial to them."

There are three stages to a charette:

1. Gathering of information – consultation with stakeholders and the community. Includes ability for people to submit solutions.
2. Design – with knowledge from consultation the project is designed by a team of experts, preferably with diverse skills/viewpoints.
3. Presentation – the final proposal is presented (and may be subject to further public consultation).

The requirement for consultation occurs prior the design phase. There must be a reasonable level of public awareness so that a proper opportunity is afforded to those who wish to be involved. The short time period during which a charette usually occurs limits the availability of opportunities via which people can participate and perhaps does not allow for adequate reflection or refinement of ideas. Charettes are generally limited to once off events or projects.

The process however does encourage positive community engagement by allowing the public to submit ideas prior to anything being designed or finalised. This can also keep costs down if final public consultation results in fewer changes to the final design. Having a diversity of viewpoints means that innovation is encouraged. It would appear the process must be expertly and effective managed for the best outcome to be achieved.

In South Australia there has been very limited use of charettes. One example was the City of Charles Sturt's process with respect to the Woodville Village Master Plan (May 2010)[7]. The aim was to revitalise the Woodville Road area, particular the area adjacent to the Woodville Railway Station. Council engaged with community via 6-month consultation period ending with a week-long charrette. Charrette included residents, property owners, traders, community and sporting groups, State Government and Council staff.

In the end a Master plan ("vision statement") was presented to the public and a report made on the outcomes of community engagement.[8] Feedback in the report from 84 respondents found:

- 25% strongly opposed the vision
- 21% strongly supported the vision
- Overall, 44% supported and 37% opposed the vision

d. Review of decisions – access to justice issues

Third party appeals are amongst many types of review available in the Environment Resources and Development Court (ERD Court) against a number of decisions made by Councils or the Development Assessment Commission.

With respect to category 3 merits appeals there is a 15 business day time limit on the lodgement of appeals. Many clients struggle to lodge within this time frame. We recommend that this be extended to 20 business days.

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7 http://www.charlessturt.sa.gov.au/page.aspx?u=191&c=4287

8 Woodville Village, p8-14, http://www.charlessturt.sa.gov.au/webdata/resources/files/Woodville_Village_Master_Plan_-_Community_Engagement_Feedback_Report.pdf

ERD Court procedures are relatively informal and this is of benefit to our clients. In virtually all cases the Court convenes a round table conciliation conference to see if the matter can be settled. The cost of lodging a notice of appeal and going to the conciliation stage is relatively inexpensive. Appeal hearings take place in conventional court rooms but are run less formally without strict application of the rules of evidence.

The role of the court is to examine afresh the merits of a proposed development and make a new decision on whether it should be approved or refused. ERDC decides whether to grant consent based on the evidence it receives during the hearing and its own inspection of the site and its locality. Many clients comment on the usefulness of site visits. However many clients find court processes difficult to understand and deal with and a significant commitment both time wise and emotionally. Clients also struggle enormously with the need to obtain expert evidence which is often costly and difficult to obtain when many experts are acting for developers.

In most ERD Court reviews it is a “no costs” jurisdiction in which each party bears his or her own costs win or lose. This is very helpful for many of our clients. However many clients are anxious about pursuing matters as they are concerned that even if they are successful there is the risk of a developer appealing that decision to the Supreme Court where the usual costs rule generally applies ie loser pays winner costs.

With enforcement matters we submit it is a good feature of the system that any person can look to file proceedings if for example a development has not been undertaken in accordance with some of the conditions of approval. However there are serious barriers to taking such proceedings including facing costs orders if they lose together with possible orders as to security for costs and undertakings as to damages. The court should be able to make public interest costs orders more freely and the provisions relating to security for costs and undertakings as to damages should be repealed.

A further issue concerns class actions. In our view there needs to be clarification in section 85 of the Act that “all persons” is all people who, at the time that the first application is made, the representative presumes to represent. This does not mean that the representative cannot represent more people at a later stage, nor that the court must see the written consent of all represented persons on record, but that at the time proceedings commence, the representative must have some form of consent from all involved people that they are happy for the representative to commencing proceedings on their behalf, with their interests being pursued.

Finally, a key issue for many of our conservation group clients is their frequent inability to be joined in applicant appeals as they do not have the requisite special interest, in many cases adjoining landowners whose interests are affected by the subject matter of the appeal. We submit that the Act should be amended to specifically allow joinder of such parties who acting in the public interest.

We also note the availability of judicial review proceedings to challenge the legality, validity or regularity of procedures, for example assessment and development plan procedures. For the most part the Supreme Court deals with these matters. There are barriers to taking action in this court including the probability of having to pay costs if the case is lost.

However for a few years now the ERD Court has had the power to review questions raised by adjacent landowners as to the nature of the development or as to its categorisation for public notification purposes. Whilst a useful reform we recommend that this jurisdiction be extended to include other procedural reviews.

Major Projects

We have a number of concerns with the provisions applying to major projects. We submit that they should not be separately dealt with in the Act. If this situation is to remain we recommend major reform to the provisions covering these projects.

a. Declaration of Major Projects

A key area of concern is the discretion associated with declarations of major projects. The Minister's power to declare projects on the basis of their significance has not been applied consistently over a number of years and has become a highly politicised process. For example in recent years shopping centres have been declared major projects whilst a proposal for a pulp mill at Penola was not. We strongly advocate for the inclusion of very strict and specific criterion for qualification for assessment under the major project provisions which cannot be departed from at will. If the criteria are specific enough, and there are appeals mechanisms available then the decision maker will be kept accountable and the application of those criteria will be consistent.

For example, appropriate criteria could be:

1. The projected project cost is an amount that would correspond with a large project of state significance e.g. $100 million and
2. It is a project of significant public benefit, such as:
    a. A project that delivers essential public services
    b. A public transport project
    c. A public housing project
    d. A renewable energy project
3. Mining projects, road projects and private housing and commercial developments are not projects of "significant public benefit".

After a decision is made it must be published and include notes demonstrating how the project meets this criterion. Additionally, there should be a third party appeal mechanism relating to the declaration. This is an important check and balance in the system and will help to ensure that politicisation of the process is removed and that criteria are consistently applied. A further accountability mechanism could be that every declaration must be supported by a resolution of both Houses of Parliament.

b. Assessment process

We recommend that environmental impact assessment (EIA) should only assess the impacts of a project on the biophysical environment, rather than the very broad assessment currently undertaken. EIA should assess such impacts in the first instance. The purpose of EIA is to fully assess significant negative impacts on the environment to determine whether they are unacceptable, or whether the project needs to be conducted in such a way to avoid or minimise any negative impacts.

Such an assessment is in our view heavily compromised when integrated with assessments of potential economic benefit. Although consideration of economic benefit is an important consideration, it should come once the environmental impacts and costs are well understood. An EIA that is focussed on biophysical impacts will be a shorter, simpler and narrower process than the current one. We recommend that EIA be prepared by independent experts using a fund contributed to by developers and administered by an independent body

EIA should be administered by the Minister for the Environment (with the support of the Department of the Environment, Water and Natural Resources or the Environment Protection Authority), being the decision maker best placed to assess the impacts on the biophysical environment and formulate appropriate conditions for the avoidance and mitigation of these impacts.

This process means that a decision is made whether the impacts of a project are environmentally acceptable or not, and whether it can go ahead from an environmental point of view, before any other approvals are sought. It is appropriate that this assessment be done first, and separately to other assessments as the outcome will shape the project and any other approvals it may need. This saves time and money, as there is no preparation of extensive expert EIA documentation on the social and economic impacts of a proposal at the outset, if in the long run it is not going to be acceptable environmentally. Further, if the project is found to be environmentally unacceptable it avoids the wasted expense of seeking other approvals.

Additionally, the requirements for what must be assessed for each project should be clearly spelt out in legislation and the decision maker should prepare tailored scoping directions for each project. These should be exhibited for a defined period of public comment before they are finalised. Rather than the Development Assessment Commission handling this process the decision maker should appoint an Assessment Committee to assess the project. The committee should consist of individuals with expertise on the issues identified for assessment in the scoping directions. Public meetings should be held where the expert authors of the assessment documentation attend so that community members can cross examine them if they wish.

The Assessment Committee must provide a written report to the decision maker providing the decision maker with a recommendation on whether the decision maker should grant all or some of the applicable approvals for the declared project (with or without conditions) or refuse to grant all of the applicable approvals. This report of recommendations of the

Assessment Committee should be made public at the same time that is provided to the decision maker. Within a certain time frame of receiving the Assessment Committee's report, the decision maker should make a decision whether to grant all of the applicable approvals that are necessary or refuse to grant all of the applicable approvals that are necessary.

The decision maker must have regard to the report of recommendations of the Assessment Committee in making their decision. If the decision maker wants to depart from these recommendations in their decision they must specify the reasons for this in a "reasons for decision" document that must be made public at the time of the decision. The Act should set out matters that the decision maker must address in this document if departing from the recommendations of the Assessment Committee. There should be specific criteria regarding what the decision maker must consider in making their decision and the decision maker should consult with all relevant Ministers. The details and outcomes of these consultations should be included in the decision documentation.

In addition to these process recommendations we also have certain suggestions to make in relation to decision making. We recommend the use of a two-stage model to incorporate environmental concerns into decision-making. The first stage is the introduction of a provision that would require that specific environmental criteria must be met before development approval is given. This might include, for example, a rigorous 'improve or maintain' environmental outcomes test for key environmental values such as biodiversity, native vegetation, catchment health and water quality, energy and water use, climate change and pollution. There should also be assessment of the climate change impacts of individual projects, and specific conditions to address these impacts (for mitigation and adaptation).

Only after passing this objective test would assessment move on to a second more subjective approach based on the values established in local development control plans (such as suitability of the site, form and design, aesthetics, overshadowing, bulk, and set-backs).Such a two-stage approach is consistent with an overarching objective of achieving ecologically sustainable development and ensures that development is undertaken within the physical capacity of the environment. Proposed developments must minimise environmental impacts. In other words, environmental impacts have to be avoided wherever practicable, unavoidable impacts are to be mitigated to the extent practicable, and if necessary, offsetting is to be used to offset eligible impacts.

To further improve the independence and rigour of project assessment and approval (including where a state government or authority is a proponent/beneficiary) it should be mandatory to identify and adhere to targets and limits across environmental indicators such as biodiversity, native vegetation, water, soil and air quality (including public health considerations), and greenhouse gas emissions. We also recommend that a proposed development only be approved if its impacts remain within identified and acceptable environmental limits of the catchment or region.

c. Community engagement

We consider the current public consultation periods on assessment documents for major projects too short and recommend that they be extended. In deciding on appropriate time frames the ability of the average layperson to read and digest large volumes of highly complex technical material should be taken in to account. For example the current six week consultation period on environmental impact assessments is clearly inadequate for projects of a very large size. We recommend consultation periods of at least 45 business days for major projects requiring an environmental impact statement level of assessment, and at least 35 business days for major projects requiring either a development report or public environment report level of assessment.

d. Review of decisions

We recommend that merits appeals be allowed with respect to decisions on major projects. At present section 48E of the Act prevents challenges to any decisions made with respect to major projects. This means that the government is not held accountable for its proper compliance with the law of the land.

Crown Developments

There are particular issues associated with the Crown development system. There is a lack of transparency and accountability which has been made more serious by the increasing number of private/public projects being assessed pursuant to section 49 of the Act. For example, no declarations or notices are published in the Government Gazette, making what are often Crown-sponsored developments almost invisible. Project documentation (Development Applications and appendices) is only available to the public for 3 weeks via the Department of Planning, Transport and Infrastructure website and are then withdrawn. There is no public register for Crown sponsored developments or archive of applications. For projects worth less than $4 million there is no public consultation. There is only 15 business days of consultation on projects worth more than $4 million, however those who do make representations are not permitted to see the proponent's written response to public submissions and no feedback is provided on submissions. We recommend that the consultation period with respect to such developments be extended to at least 30 business days and that there be mandatory provision of reasons for decision.

Other Issues

Referral System

The referral system is problematic in a number of respects.

Firstly, most agencies only have the right to advise not veto applications. For example, the Coastal Protection Board has been powerless to prevent some recent controversial coastal development particularly in more remote areas of the State such as the Eyre Peninsula. Secondly, some agencies such as the National Parks and Wildlife Service and the Native

Vegetation Council are never consulted when clearly they may have relevant and pertinent comments on particular development applications.

We recommend a review of the referral list with a view to conferring the right of direction to other Ministers and agencies. No further changes should be made pending the outcome of this review. Our key recommendation here is that in certain situations the Environment Minister should have the power of veto. In particular where a proposed development is likely to cause significant adverse impacts on state listed species and/or clearance of native vegetation there should be a referral to the Environment Minister with the right of direction. Any disputes should be referred to Parliament

Finally, as identified recently by the Environment Protection Authority (EPA), only some proponents of major projects need to provide evidence of their ability to meet general environmental duties, the objects of the Environment Protection Act 1993 and relevant Environment Protection Policies. At present it is only those that involve an activity listed in Schedule 1 of the Environment Protection Act 1993 that have to do this. This needs reform.

Residential Code

Another area of concern is that the Residential Code is currently in the Regulations. As it is in the Regulations it can be changed easily, without the need to go through a formalised parliamentary process and community consultation. The Code should be in the Act for more effective integration and accountability.

Mediation

We recommend that mediation before a development approval be considered. In Tasmania there is opportunity to engage in mediation before a development permit is issued. Resolving issues before an approval is issued has the potential to improve approval conditions and significantly reduce appeals, or to narrow the issues on appeal. If introduced in South Australia there would need to be efforts to educate council officers and the community (including developers) about the availability and advantages of this process. Training of mediators is also important.

Site Contamination

Whilst primarily dealt with under the Environment Protection Act there is an urgent need for a consistent approach by Councils to dealing with applications for a sensitive use of a contaminated site. This matter needs to be the subject of amendments to the Act's Regulations.

Review of the Act

Whilst we welcome this review we also recommend that consideration be given to including a legislative requirement for periodic and independent review of the efficacy of the Act beyond the term of this Review. Such periodic review would assess whether the relevant processes, implementation and decision-making are improving or maintaining

environmental values, and whether the legislation is achieving ecologically sustainable development.

Enforcement

Effective enforcement is critical to maintaining public confidence in any land use planning decisions. Enforcement action is not an unnecessary regulatory burden but a critical aspect of a robust planning system. We recommend that the Act be amended to allow a greater range of enforcement options including better offences and penalties for inaccurate or incomplete information; audits and enforcement. We should provide incentives that reward leading practice ecological sustainability, social inclusion, environmental innovation and low-impact design. We should have independent audits of project compliance with licensing and consent conditions, as well as the accuracy of EIA predictions. Finally but importantly there should be proper resourcing so that there can be ongoing monitoring and responsiveness to community reporting of breaches.

If you have any queries in relation to this submission please feel free to contact the writer. In any event we look forward to further participating in the review process.

Yours sincerely

Melissa Ballantyne
Coordinator/Principal Solicitor
Environmental Defenders Office (SA) Inc.

Full List of Recommendations

3. Ecologically Sustainable Development should be the overarching objective of the planning system and incorporated across all policy and planning documents.
4. Rename the Act the Sustainable Development Act
5. Require strategic assessments to consider the cumulative impacts of a range of development proposals over a broad geographic area.
6. Strategic assessments to be based on comprehensive and accurate mapping and data, undertaken at the earliest possible stage, must assess alternative scenarios and cumulative impacts, involve ground-truthing of impact assessment, and involve extensive public consultation. Cumulative impacts of proposed developments must not exceed prescribed environmental thresholds.
7. Strategic assessments to include the direct and indirect impacts of climate change
8. Require decision makers to exercise their powers and functions (including major project decision-making) in accordance with ESD principles
9. Require all decision-makers take into account the long term, direct and indirect effects of development on climate change
10. Include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.

11. Improve integration, monitoring and reporting on environmental indicators in strategic planning and major project assessment processes.
12. Environmental accounting to ensure planning systems properly account for environmental values, costs and benefits
13. Requirement for community engagement in all phases of decision making
14. Inclusion of a Community Engagement Charter and Plans
15. Requirement that all planning authorities act consistently with any Charter and Plans when undertaking strategic planning and development assessment
16. Minimum exhibition period of 28 days to comment on a draft Charter and draft Community Participation Plans.
17. Requirement for independent review of Community Participation Plans, with this process to be mandatory and regular.
18. Criteria for Ministerial use of interim operation of DPAs and a Resolution of either House of Parliament.
19. Approval of DPAs subject to a Resolution of either House of Parliament
20. Ministerial DPAs should be limited to matters that cross Council boundaries or where local Councils agree.
21. Range of notification methods should be used including social networking sites (such as Facebook and Twitter), blogs, video sharing sites, hosted services, and web applications.
22. Requirement to notify individual residents regarding rezoning proposals
23. Public consultation should be undertaken by independent facilitators using a range of methods
24. Use of particular consultation methods with indigenous community members and others with communication issues
25. Consultation sessions should focus on seeking views not just information
26. Information about proposed DPAs should clearly set out what is intended and the impacts if it is to go ahead
27. Information about proposed DPAs should be provided to the community ahead of open community meetings
28. Independent consultation facilitators should be used for open community meetings
29. Public submissions should not be overlooked because they may not be in the "correct" format or are of a low literary standard
30. Review public notification categories and any additions to category 1 matters to be scrutinised carefully to prevent inappropriate developments receiving such a classification.
31. Category 1 and 2 public notification criteria to be located either in development plan or regulations but not both
32. All applications and accompanying documents together with planning officer's report be available online no less than 5 business days prior to the council development assessment panel or Development Assessment Commission hearing
33. Requirement that details of all development applications and government advisory documents are to be freely available (building owner's consent not required) with the right of appeal against non-disclosure.
34. Cost of obtaining copies of documents should be limited to the reasonable cost of producing those copies

35. Provisions pertaining to copyright of documents should clearly indemnify all persons *including councils and community members* where documents are published or accessed for planning purposes, such as commenting on development applications.
36. Details of all appeals against development decisions should be posted online by decision makers within 2 days of lodgement
37. Requirement that with category 3 developments the notice must indicate that "any person may make representations concerning the application" rather than that "any person or body affected may make representations"
38. Requirement that notices be put on properties advising of proposed developments
39. Extend consultation time frame for ordinary applications from 10 to 20 business days
40. Extend consultation time frame for major projects requiring an environmental impact statement level of assessment to at least 45 business days, and for major projects requiring either a development report or public environment report level of assessment to at least 35 business days
41. Extend consultation time frame for Crown developments worth over $4 million to at least 30 business days
42. Specific requirements for consultation with Indigenous Australians wherever an assessment involves cultural heritage.
43. Requirement that decision makers take community views into account and provide reasons as to why a decision was made or community input was not followed
44. Removal of prohibition on appeals against critical/State infrastructure projects.
45. Extend merits appeal time limit to 20 business days.
46. Extend right to apply for joinder in applicant appeals to parties seeking to protect the environment in the public interest.
47. Clarification of section 85 that "all persons" is all people who, at the time that the first application is made, the representative presumes to represent
48. Public interest costs orders available in enforcement matters
49. Extend the judicial review jurisdiction of the Environment, Resources and Development Court
50. Establish a State Planning Commission to facilitate a 'whole-of-Government' approach to strategic planning
51. Plans need simplification and consistency
52. Plans should include leading edge sustainable planning principles on issues such as built form, height maximums, living density, open space, block size, essential services, transport, infrastructure, water collection, zero waste, places of cultural significance, heritage places, biodiversity protection and social inclusion
53. Plans should describe in easily measurable terms the standard which a new development is to meet or a performance based approach with "design techniques"
54. Plans should include biodiversity conservation overlay maps or refer to State maps indicating the various classes of biodiversity across local government areas including 'no go' areas .
55. Development plans should have linkages to plans for public land.

56. Fixed criteria for declaration of major projects, third party appeals available in relation to declaration and declarations require a resolution of both Houses of Parliament
57. EIA should only assess the impacts on the biophysical environment and this should be done prior to any other approvals being sought by the proponent
58. Assessment Committee rather than the Development Assessment Commission to set parameters for EIA
59. Environment Minister to make decisions on EIA
60. Require all proponents not some, of major projects to provide evidence of their ability to meet general environmental duties, the objects of the Act and relevant EPPs (not just those that involve an activity listed in Schedule 1 of the Environment Protection Act 1993)
61. Use of two stage model for environmental assessment
62. Proposed developments must minimise environmental impacts (impact hierarchy) i.e. environmental impacts have to be avoided wherever practicable, unavoidable impacts are to be mitigated to the extent practicable, and if necessary, offsetting to be used to offset eligible impacts.
63. Require assessment of the climate change impacts of individual projects, and specific conditions to address these impacts (for mitigation and adaptation)
64. Environmental impact assessments to be prepared by independent experts using a fund contributed to by developers and administered by an independent body
65. Improve the independence and rigour of project assessment and approval (including where a state government or authority is a proponent/beneficiary) by identifying and adhering to targets and limits across environmental indicators such as biodiversity, native vegetation, water, soil and air quality (including public health considerations), and greenhouse gas emissions
66. Projects can only be approved if their impacts remain within the identified and acceptable environmental limits of the catchment or region
67. Statements of environmental effects should accompany a development application where the proposed development is likely to cause significant adverse impacts on state listed species and/or clearance of native vegetation
68. Schedule 8 referral of development applications involving impacts on state listed threatened species to Environment Minister with right of direction and referral of disputes to Parliament
69. Schedule 8 referral of development applications involving clearance to Environment Minister with right of direction and referral of disputes to Parliament
70. Provide a greater range of enforcement options including better offences and penalties for inaccurate or incomplete information; audits and enforcemenT
71. Provide incentives that reward leading practice ecological sustainability, social inclusion, environmental innovation and low-impact design.
72. Have independent audits of project compliance with licensing and consent conditions, as well as the accuracy of EIA predictions.
73. Sufficient resourcing to enable ongoing monitoring and responsiveness to community reporting of breaches