

The environment's legal team - protecting the public interest

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**EDO(SA) Submission regarding the Establishment of an Enforceable Community Participation Charter under Planning Legislation.
July 2014**

EDO(SA) **strongly** supports the introduction of an enforceable Community Participation Charter under SA planning legislation.

Community Participation Charter Enforcement

Background

An effective planning and development system:

1. fully incorporates environmental issues into planning processes and decision making;
2. facilitates genuine community engagement and;
3. delivers transparent and accountable decision-making

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. This view is reflected in a recent report produced for the Local Government Association of South Australia,¹ in section 11.2 entitled "Community Engagement in Planning".

An enforceable Community Participation Charter (Charter), that applies to all planning authorities (responsible for determining planning policy, planning strategy and development applications from the Minister through to local and regional authorities), is an essential element of a 21st Century planning and development system.

As proposed in NSW, the Charter should set out seven high-level principles:

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. *Proportionality* (participation in decisions is proportionate to a development's significance and impact),

¹ *Strengthening South Australian Communities in a Changing World: The future role of Local Government in South Australia* (November 2013) accessed at: <http://www.lga.sa.gov.au/page.aspx?u=2934>

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).

In order to avoid duplication and inconsistencies, the Charter would need to operate as part of, or in tandem with, a Council's public consultation policy² and its duty to consult in the preparation or review of a strategic management plan for its area,³ where a Council is a planning authority.

In the interests of ensuring adherence to the Charter, it should be enforceable not only in theory but also in practice. The options for enforcement must reflect the principles of the Charter. A process of voluntary self-regulation, for those agencies that have obligations under the Charter but which are not democratically elected, would be ineffective and would undermine (a) the purpose of the Charter; and (b) community confidence in the planning and development system.

Options for enforcing compliance with Charter obligations

In our modern democracy, communities and their members potentially have powerful means to monitor and influence adherence by a planning authority to a Charter (for example, through social media and digital platforms). However, the planning authority must be truly accountable through the provision of information and reports, by the most accessible means, for such community oversight.

There are options for enforcement. They include the following legislative options:

- a) create a duty on a planning authority to adhere to/implement/act in accordance with the Charter;
- b) create offences for breach of the provisions of the Charter and for failure to implement the provisions of the Charter;
- c) provide that a failure to comply with its duty in respect of the Charter (i.e. breach of/failure to implement the provisions of the Charter) is a breach of the law (where the relevant Act enables a court to direct a planning authority consequent upon its breach/failure to implement); and
- d) create an opportunity for any person to apply to a court for an order:
 - i. setting aside any decision made following a failure to comply with the Charter; and
 - ii. directing a planning authority to remedy the breach/failure (start again).

If an offence is created, a planning authority may be charged with an offence, with financial penalty to follow upon a finding of guilt. Legislation could also provide for orders to be made with the goal of remedying the failure, but given the delays that may be involved in laying a charge and bringing the matter to a hearing and judgment, this course may not be the most appropriate.

Where a duty has been created and there is a failure to comply, a declaration or judicial review might be sought from a court, with interlocutory orders, to remedy the situation. However it is suggested that a more appropriate means of enforcement would be the use of the application for orders in the nature of civil enforcement presently available, in the case of breaches of several Acts, in the Environment, Resources and Development Court.

² Required by s50 *Local Government Act 1999*

³ Required under s122 *Local Government Act*

Recommendations

EDO(SA) recommends two complementary approaches to compliance (a) civil enforcement proceedings; and (b) accountability through a public register, audits and review.

Civil Enforcement

All planning authorities should have a duty to comply with:

- The Charter's broad principles when undertaking strategic planning and development assessments (including when making mandatory Community Participation Plans (Plans) - that provide guidance on how a planning authority will ensure community participation for functions that the Charter applies to).
- The specific legislative provisions that will give effect to the broad principles and the Plans – for example, but not limited to, any minimum public exhibition periods for draft Plans and draft development plan amendments; the notification requirements for development applications and decisions .

Breach of the Charter principles or the specific legislative provisions should constitute a breach of the relevant Act. Legislative provision should be made for a planning authority to be called to account in the Environment, Resources and Development Court (Court), through civil enforcement proceedings with "any person" having standing to apply to commence such proceedings seeking orders to remedy or restrain the breach(es).

The Court, if satisfied on the application that the respondent has *a case to answer*, would grant permission to the applicant to serve a summons requiring the respondent to appear before the Court to show cause why the order(s) sought should not be made.

Any such proceedings should be free of discretionary costs security, costs undertakings and costs orders and each party should bear its own costs.

Audits, a Public Register and Review

A Register of Community Participation Plans (Plans) should be publically available (on line). A mandated number of random independent audits to monitor compliance with Plans should be undertaken annually. The results of the audits should be publically available, as part of the Register.

All the Plans should be subject to mandatory review every 5 years, involving opportunities for community members to participate in the review process through community consultation and comment.

Summary

An enforceable Community Participation Charter would increase community confidence in (and community support for) the planning system and facilitate increased accountability and effectiveness at all stages of the planning and development assessment process.