Environmental Defenders Office

Adelaide office: Level 1, 182 Victoria Square

Adelaide SA 5000

25 September 2020

Via email seclrc@parliament.sa.gov.au

Dear Mr Balfour

RE: PLANNING PETITION NO. 2 OF 2020

The Environmental Defenders Office (the EDO) is a national community legal centre dedicated to assisting people to protect the environment through law. Our services include legal advice and representation, legal education and law reform. The EDO appreciates the opportunity to provide a submission on this Petition as we have provided comment on various aspects of the planning reforms since 2014.

The Expert Panel's report The Planning System We Want released in late 2014[1] was the first major review of the system since the passage of the *Development Act* 1993. A key objective was to put in place a planning system that supports the creation of places, townships and neighbourhoods that fit the needs of the people who live and work in them now and in the future.

The EDO strongly believes that planning is about what benefits the public good, not just private interests and is for the well-being of the whole community, the environment and future generations. Good planning needs integrity, and public participation should play a role in that. However we are concerned that the planning reforms lack integrity and do little to overcome current problems such as decisions which appear to be vastly contrary to policy controls such a maximum height. We are also concerned about the prevalence of spot rezoning which when considered with the previous point completely undermine the certainty which the community expects in current and future

[1] https://www.saplanningportal.sa.gov.au/__data/assets/pdf_file/0019/360352/Expert_Panel_-_The_Planning_System_We_Want.pdf

T +61 8 8359 2222 W edo.org.au
E melissa.ballantyne@edo.org.au
GPO Box 170, Adelaide SA 5001
ABN: 72002 880 864

planning decisions. The introduction of performance planning for many decisions will further undermine certainty. There will certainly not be a rule book but a vague set of guidelines for decision making allowing many projects to be approved which would normally not receive approval.

We have a number of other significant concerns with provisions in the *Planning, Development and Infrastructure Act* 2016 (the Act), the Planning, Development and Infrastructure (General) Regulations (the Regulations) and the Planning and Design Code (the Code). These concerns are outlined below in response to the four points in the submission.

1. THE IMPACT OF THE ACT ON :

A. COMMUNITY RIGHTS

i) Public consultation and appeal rights

The intent of the Act as borne out by the Code is reduced public comment and challenge in relation to planning decisions. Only those applications classified as restricted can be challenged by third parties. The reduction in rights was based on the notion that the public would be more involved in the policy development rather than assessment process.

However, the reality is most people take an interest in proposals at the assessment stage. The reforms will see far fewer planning applications subject to public notification and even less will attract third party appeal rights. This means that there will be less transparency and accountability in the system.

The current *Development Act* 1993 provides for three levels of public notification such that the level of notification is commensurate with the scale of a development. Under the new system there will be only two levels of notification for all performance assessed development which are likely to be the majority of applications. In addition, there are no third party appeal rights attached to performance assessed developments. Only applications classed as restricted attract appeal rights, however the Code as currently drafted classifies very few types of development as restricted.

In addition, the Act mandates a Community Engagement Charter which focusses on policy development despite the Expert Panel's recommendation that it include development assessment[2] .

[2] Recommendation 3.1

To date the most important policy development has been the formulation of the Code. Whilst the Act states that the Charter must be followed in the development of the Code it is our firm view that the State Planning Commission has fundamentally failed to follow the principles of the Charter in the public consultation. We explore this more fully under point 3.

ii) Other concerns

Failure to include local policy

The community has also been impacted through the failure to transition much local policy currently found in development plans into the Code. This policy has been developed over many years by local communities seeking to formalise planning policy which is specific and important to decisions in their area. Instead the State Planning Commission has taken a one size fits all approach to the Code without any justification whatsoever. For the most part the Code consists of generic statements without the nuanced policy needed for proper assessment of development applications.

The Expert Panel recommended that the Code should enable local variation to be included[3]. Such policy could be included according to the structure outlined in the Act including via sub zones and other policy layers. When released for public consultation in October 2019 the Code had 37 Councils with no sub zones, 20 Councils with 1 sub zone, 10 Councils with 2 sub zones, 2 Councils with 3 sub zones and the City of Adelaide with 13 sub zones. No explanation was provided in the accompanying documentation for this significant omission.

A key area of loss of local policy is in policy covering built heritage, details of which are set out in part D below.

The EDO is very concerned that unless major changes are made to Code policy communities will be significantly impacted by future development decisions.

[3] Recommendation7.4

Less Council representation and rushed inappropriate decision making

The EDO has serious concerns that the loss of Council representation on assessment panels will erode the role of the community in planning matters. Other regulatory changes and omissions raise concerns of inappropriate developments in local communities such as the shortened time frame for performance assessed developments from 40 to 20 days, deemed consents where applicants could force approvals and the current lack of design standards in the Code which are fundamental to planning decisions.

Diversion of public funds to pay for planning reforms

The EDO strongly opposes the recent amendment to the Regulations authorising the use of funds under the Open Space Contribution Scheme to fund the implementation of the planning reforms.

Recommendations:

a. Amend Act to include assessment in the Charter as per Expert Panel recommendation
b. Amend Act to increase public notification and third party appeal rights
c. Include local policy in the Code via zones, sub-zones ad general development policies.
d. Amend Act to include greater Council representation on development assessment panels
e. Repeal deemed consent provision in the Act
f. Amend regulations to extend 20 day assessment time frame for performance assessed developments
g. Amend regulations allowing use of open space funds to fund the rollout of the planning reforms
h. Include design standards in the Code

B. SUSTAINABILITY

The Expert Panel's Report notes that when the *Development Act* 1993 was passed the effects of a changing climate were poorly understood. Today we know much more and it is critical that our planning system can properly encourage sustainability in planning and protect the environment for the benefit of current and future generations. There are some Code policies which promote sustainability but they could go much further.

In particular infill policies could be improved. Current policies include smaller building sites (we note that Adelaide has the smallest sites on average in the nation and in some proposed zones, current 2 for 1 infill developments could extend to 4 to 1 or greater), inconsistent or missing frontage provisions, front and side setback provisions, reduced maximum height provisions compared to current and increased residential flats, group dwellings, row dwellings densities. Overall minimum standards have been reduced.

Recommendations:

a. Improve policy relating to infill, for example site sizes, minimum setback and frontages, height restrictions and housing densities
b. Require mandatory referral to the Local Design review scheme

C. ENVIRONMENTAL PROTECTION

There are significant issues with the Code in relation to environmental matters including protection of trees and water resources.

i) Tree Canopy

Urban trees play a very important role in cooling our suburbs and contribute to the well being of community members. In common with many cities Adelaide's tree canopy is declining and hard surfaces are increasing which is contributing to a greater urban heat island effect. A 2016 RMIT study found that Adelaide had the lowest "green cover" in Australia (56.8%) and the second lowest tree cover of 19.45%. Unless significant attention is given to this issue there will be detrimental health and economic impacts. It is clear that if the 30 Year Plan target for a minimum 20% tree canopy by 2045 is to be met there must be significant efforts made with respect to retention and planting of trees on private land. There is simply inadequate public open space available.

Trees decrease psychological stress by 31% and also decrease the chance of people developing fair to poor general health by 33%. Additional benefits of tree canopy in our streets. If we have enough canopy to keep our streets cool, people are more inclined to walk or ride when they have only a short distance to travel. This has good outcomes for physical and mental well-being and also for the environment.

Failure to reform tree regulation has contributed to significant tree loss across Adelaide. Some examples:

- The redevelopment of the Oaklands railway station saw the removal of 18 regulated and 15 significant trees.
- The Paradise Park 'n' ride project has seen the removal of 17 regulated and 1 significant tree.
- The Salisbury Interchange upgrade to support the electrification of the Gawler train line is currently seeing the removal of 21 regulated and 32 significant trees.
- The Glenside redevelopment saw the removal of a total of 83 regulated and significant trees.
- The Springwood housing development at Gawler will see the removal of 47 regulated and 40 significant trees.
- Phase 1 of the Golden Grove Road upgrade saw the proposed removal of 180 trees, most of which were regulated or significant. After community uproar, some of these were saved, but not many. DPTI lost the trust of the Adelaide community during this project, as they had told the locals during the consultation process that "a few" trees would need to be removed. In addition to the loss of the trees, there has been carnage on the roads, as koalas have searched for new habitat. This has not only been dreadful for the koala population but also very distressing for local residents.
- The Pym Street – Regency/South Project has seen the removal of a total of 70 regulated and significant trees, as well as 402 amenity trees.

Prior to the 2018 State election the Liberal Party promised to review measures to protect our remaining native vegetation and urban trees which are largely in our planning laws. This is sorely needed as a series of amendments to laws have seen death by a thousand cuts. Significant trees in some Adelaide suburbs are disappearing at a rate of one tree a week, which adds up to 10% of tree canopy cover disappearing every five years. Adelaide already has one of the lowest levels of canopy cover of any Australian city.

Aside from urban infill government departments such as DIT, Renewal SA and DECD are responsible for the removal of large numbers of trees across the city and state. Since December 2017, these agencies no longer need planning approval nor are they required to consult the public before removing regulated or significant trees for projects such as road-widening projects. Whilst it is almost impossible to get figures on total removals, anecdotal evidence suggests that they have adopted a blanket policy of removal over retention.

However the reforms to the Regulations did not change the definition of regulated and significant trees in the area of size and did not remove exemptions including exotics and dead trees. Other exemptions namely 20m bushfire zone and 10m from building and pool are problematic and have

led to removal of many trees across Adelaide. The pruning definition also remains confused. A further source of frustration is the exemptions from approval and consultation for the Department of Transport and Infrastructure and the Department of Education. Finally, there has been no change as to how much should be paid if tree removal is approved.

Recommendations

a. Amend Regulations to expand definition of regulated and significant trees to include a list of common and important street trees
b. Amend Regulations to clarify definition of pruning as a tree damaging activity
c. Significantly increase the amount paid by landowners where a tree removal is approved, to better reflect the loss of the tree and to encourage retention over removal.
d. Amend Regulations to require public notification of all tree removals
e. Amend Regulations to require the Department of Education and the Department of Infrastructure and Transport to apply for planning approval and publicly consult where their projects involve tree removal

Whilst we support the tree planting requirement in the Code for new developments there are in our view significant problems with other tree policies. Most critically the draft Code contains a single Regulated Tree Overlay. This is in direct contrast with current development plan policy, which distinguishes between and provides separate policy for both regulated and significant trees. As currently proposed regulated and significant trees will not have the same level of protection under the Code as is currently the case in development plans. The regulated tree policy appears to have been consolidated within a single Regulated Tree Overlay with no higher order of policy relating to the proposed removal of a regulated tree that is a significant tree.

The proposed criteria for a tree damaging activity that is not to be undertaken with other development does not reference the current test that “all other reasonable remedial treatments and measures must first have been determined to be ineffective”. The omission of this requirement, at least in respect of significant trees, will result in a severe weakening of the current level of protection.

Reference has been lost to indigenous to the locality, important habitat for native fauna, part of a wildlife corridor of a remnant area of native vegetation and important to biodiversity of local area. Significant trees have a lesser assessment test for retention “retained where they make an important visual contribution to local character and amenity” compared to current “Significant Trees should be preserved”.

Recommendations

a. Significant tree policy should be in a separate overlay.
b. The Significant Tree Overlay should include reference to indigenous to the locality, important habitat for native fauna, part of a wildlife corridor of a remnant area of native vegetation and important to biodiversity of local area and replace the test for retention of significant trees to "retained where they make an important visual contribution to local character and amenity" to "Significant Trees should be preserved".
c. In the case of significant trees the Overlay should include the test of "all other remedial treatments and measures have been determined to be ineffective".
d. Include policy which encourages tree retention in design, siting and setback requirements, make removal the last resort
e. Include policy on types of trees to be planted and maintenance of trees on new dwelling sites

ii) Water resources

The EDO is concerned that the draft Code and in particular the Water Resources Overlay has weaker management policies than are currently found in development plans. The final version of the Code must ensure that there is an appropriate level of protection.

D. HERITAGE PROTECTION

The Act has a heritage provision of concern and policy in the draft Code has some significant problems.

i) Creation of Heritage Conservation Zones

The Act provides that 51% of affected property owners must agree to a new Zone[4]. The EDO submits that planning policy should only be made if in the public interest not on the basis of a vote. No other policies are made on this basis and therefore this provision is inappropriate and should be repealed.

ii) Lack of local policy

As noted above there has been a fundamental failure to include important local policy in the Code and this is particularly so in the area of heritage. For example the draft State Heritage Areas Overlay is generic across all listed Areas within the State and does not take into account that individual Heritage Listed Areas often have very different and distinctive characteristics. There are significantly

[4] S67(4)

less prescriptive requirements than in current Development Plans, signifying less rigorous and well-defined protections. In addition, requirements for assessment are unclear. As development is no longer defined as non-complying there is now no ability for an early rejection of a development proposal, creating greater uncertainty.

All existing State and Local Heritage Places have been transferred across in the draft Code to a State Heritage Overlay and a separate Local Heritage Overlay. The Overlays provide the policies for assessment of developments impacting heritage places. The assessment of the impacts of development on State Heritage Places will hinge on having an appropriate Statement of Heritage Significance for each heritage place, however such Statements do not currently exist for all such places. Current draft policy does not and should clearly express the importance of preserving heritage values. Clarity is also required as to what is suitable development for applications involving alterations and/or additions to State Heritage Places and the operation of the phrase of "extent of listing" for local heritage places and how it will operate for places that do not presently have an "extent of listing" statement.

Similar issues arise with the draft Historic Area Overlay. This Overlay incorporates current Historic Conservation Zones. Contributory items are the "building blocks" for these Zones. All of these zones have been transferred across to the proposed Planning and Design Code to become Historic Areas in an Overlay format. The Historic Area Overlay applies to a historic area in its entirety.

At the time of release of the Code for consultation draft Historic Area Statements were also released. It appeared that the purpose of these statements was to provide guidance for future development in areas covered by the Historic Area Overlay and to describe local characteristics of a particular area, its local history, built form and include specific planning requirements relating to set backs, heights, building materials, design, etc. However they were completely deficient in all these areas. The generic introductions made no reference to the specific Historic Area Overlay being described, so that no context is set regarding historic background, development pattern or heritage values of the particular Historic Area.

The maps were too basic without any detail including street layouts, subdivision patterns or listed local and state heritage places. The table has no title and no headings, and it is not clear what the function of the table is. This needs to be clarified for it to make sense. Information provided in the tables is confused, inadequate and would provide no basis against which to measure development application. Some of the information comes from existing Development Plan provisions, but is selective and *ad hoc*. The statements in their current forms would

provide no assistance for the development assessment process. For example, the drafts require new development to reflect the design of surrounding buildings and do not provide sufficient customisation and detail to guide new development in these areas. The generic introduction makes no reference to the Historic Area Overlay being described, so that no context is set about historic background, development pattern or heritage values of the Area. Some of the information comes from existing development plan provisions, but is selective and ad hoc. These tables as outlined do not "identify and articulate the key elements of historic importance in a particular area."

The Historic Area Overlay has the potential to protect heritage but only if the Historic Area Statements adequately encapsulate local policies which many Councils currently do in their existing development plans with detailed policy statements for particular local areas.

For example, the following policies from Norwood Payneham St Peters Council development plan are missing in the draft Code:

a. Policy governing not rendering or covering original brickwork and stonework
b. Site coverage consistent with buildings which contribute to character
c. Wall height and window placement
d. Vertical and horizontal proportions
e. Minimisation of unbroken walling, treatment of openings, depths of reveals
f. Roof form, pitch and colour
g. Verandah, balconies and eaves detail
h. Upper level in the roof space or not resulting in excessive mass or overshadowing
i. Total width of upper level windows not exceeding 30% of total roof width
j. Corner site redevelopment to address both frontages
k. Use of stone, brick, natural coloured bagged render and/ or brick as main external wall finish
l. Avoidance of brightly coloured or highly reflective materials/ surfaces
m. Development not fronting an un-serviced laneway
n. Historic Guidelines Table NPSP/4 (illustrated design principles)
o. Row dwelling garaging to the rear
p. Retention of front gardens and substantial landscaping
q. Fencing to not restrict visibility of dwelling

r. Fencing material and height detailed for each Policy Area

s. Carports/ garages not extending verandah elements or historic detailing across the same alignment as main face of building

t. Not incorporating under croft car parking not consistent with historic character

u. Garaging to rear of allotment where laneway exists

If the Statements are not amended to include detailed local policy or this policy is not included elsewhere such as in subzones, there are increased risks of poor planning decisions and the loss of historic values.

iii) Failure to list Contributory Items

A further significant issue is the failure to include lists of Contributory Items in the Code as is done currently in Council development Plans. Contributory items collectively show important historic values in historic conservation zones and provide clarity, certainty and transparency to current and future owners. If Contributory Items are not transitioned owners, potential buyers and Council staff will be engaged in a longer, more costly assessment process which could lead to more litigation. Contributory items have been included in development plans as policy matters since 2001 and are the subject of Departmental guidelines.

There is no sound reason for not including them in the Code in the same way as other policy matters. Alternatively, Contributory items could be given a statutory definition as is the case with local heritage. The State Planning Commission has failed to consult properly on this issue by not releasing the People and Neighbourhoods Policy Paper prior to release of the draft Code. It has consistently failed to address the concerns of many in the community on this issue in a meaningful way and has ignored legal advice to the effect that Contributory items can be included in the Code. Other states protect contributory items and there is no reason why this cannot happen in South Australia.

iv) Reduction in protection for heritage in the Historic Area Overlay including properties currently designated as Contributory Items

Whilst development plan polices vary from Council to Council many have adopted the South Australian Planning Policy Library (SAPPL) policy on demolition within Historic Conservation Zones (or a slight variation thereof). Demolition of Contributory items is generally only considered if the

structure is proven to be unsound (by a suitably qualified expert) and in a state of disrepair. However proposed demolition policies in the Historic Area Overlay are weaker than currently. The differences between current controls and what is proposed is set out below:

Old system (SAPPL -most councils)

Buildings and structures should not be demolished in whole or in part, unless they are:

(a) structurally unsafe and/or unsound and cannot reasonably be rehabilitated
(b) Inconsistent with the desired character for the policy area
(c) Associated with a proposed development that supports the desired character for the policy area.

Proposed Planning and Design Code

Buildings and structures that demonstrate the historic characteristics as expressed in the Historic Area Statement are not demolished, unless:
(a) The front elevation of the building has been substantially altered and cannot be reasonably, economically restored in a manner consistent with the building's original style; or
(b) The building façade does not contribute to the historic character of the streetscape; or
(c) The structural integrity or condition of the building is beyond economic repair

The proposed policies do not strike the right balance and are poorly worded. They are clearly at odds with the many statements by the State Planning Commission claiming that there is no change to policy protection. It is true that the same policies will apply across the state but certainly there has been no complete transfer over of 'like for like" policy as repeatedly promised by the Commission.

Essentially the proposed policies place inappropriate emphasis on front elevations, visibility of building facades and contribution to streetscape character and economic viability. Policies across the 24 current council development plans with Contributory items are not limited in this way and neither should the proposed Code demolition policies. An undue focus on the façade as the measure of heritage value would risk the loss of historic homes in good condition simply because of superficial, out of character alterations. Similarly, an overemphasis on streetscape character opens

up the possibility that a sound historic home could be demolished if it is obscured to the street by a high fence and/or vegetation.

In summary, the combination of failure to include local policy, list Contributory items and weaker demolition controls has the potential to lead to delayed assessments and poor development outcomes. Any person wanting to demolish a property or make changes will have no clear guidance as to its significance or recommendation for retention or otherwise. This has the potential for substantially more costly litigation. Particularly at risk are historic buildings in poor condition or buildings with owners who allow the properties to fall into disrepair and then apply to demolish. Consultants will need to be employed to assess and argue the case on a case by case basis, adding cost and time to the whole process. Decisions will be made using weak and open ended planning policies with too great an emphasis on economic viability. Whilst there are some inconsistencies in development plans regarding identification processes, listings and controls for Contributory items the inconsistencies should not give rise to overturning a system that has provided significant and valuable protection for many years.

Recommendations:

a. Repeal s67(4) in the Act
b. Draft Code should be edited and rewritten to expand the content and incorporate necessary additional information which can be used to guide appropriate development in significant historic areas.
c. Contributory Items should be retained and transitioned over to the Code in a clearly identified database (e.g. spatially identified on a map showing the newly termed Historic Areas boundaries or by address) or the Act be amended to provide for a legal definition
d. Demolition controls in the Historic Area Overlay should be rewritten to reflect those in the current Norwood, Payneham and St Peters Development plan.

2. INDEPENDENT REVIEW OF THE GOVERNANCE AND OPERATION OF THE STATE PLANNING COMMISSION AND THE STATE COMMISSION ASSESSMENT PANEL

The governance structures, composition and processes of the State Planning Commission are specified in the Act and essentially invest a great deal of power in the Commission to develop planning policy in this state. The Act also provides for the establishment of the State Commission

Assessment Panel (SCAP). It is vitally important the Commission and SCAP follow the highest levels possible of transparency, accountability and accessibility of information.

However, during the process of the rollout of the planning reforms the Commission has adopted a very secretive approach to decision making. For example, many agenda items are marked confidential and minutes lack details of discussions by Commission members and the decisions they make. There is also no public access to meetings except via invitation.

Whilst SCAP meetings are more open the SCAP can decide to determine matters in camera. Whilst this may be appropriate in certain situations the position should be that meetings are open except in specified circumstance. The EDO is also concerned that minutes lack detail and do not detail opposition by members.

A further key concern is that documents on individual applications are difficult to access once consultation and assessment has been completed. The retention of these documents is very important for public interest reasons including to assist civil enforcement action if there has been a failure to comply with the consent. Frequently the conditions will say that development take place in accordance with the approved plans and the application documents. There is often a great deal of information in those documents about how the development will take place that is important. If those documents are not available then it is difficult to ascertain whether or not a developer is in breach of their obligations. Where documents are submitted with the application(such as noise reports which contain recommended approaches) are not easily available this represents a significant hurdle to civil enforcement. Therefore we strongly recommend that it is in the public interest to enable the permanent publication of all supporting documents and materials with development applications.

Finally, many high profile decisions made of late which appear to be completely at variance with planning policy have been made by the SCAP. These decisions have eroded community confidence and in response the EDO recommends an audit of all SCAP decisions and a complete review of the policies and procedures used by the Commission and SCAP.

3. DEFER THE FURTHER IMPLEMENTATION OF THE PLANNING AND DESIGN CODE UNTIL A GENUINE PROCESS OF PUBLIC PARTICIPATION HAS BEEN UNDERTAKEN AND A THOROUGH AND INDEPENDENT MODELLING AND RISK ASSESSMENT PROCESS IS UNDERTAKEN

The Code is vitally important as it is the planning policy document against which development proposals must be assessed by the relevant planning authority. It is worth noting that the Act contemplates that the Code '...be simple and easily understood and… provide consistency in interpretation and application'. The Act provides that the Charter's consultation principles of genuine, inclusive and respectful, fit for purpose and informed and transparent must be complied with in the formulation of the Code. In our view consultation on the draft Code did not meet any of these principles. For example, in relation to consultation on phase 2 of the Code which covers rural councils;

a. Phase 2 communities had just 8 weeks over October and November 2019 (some of which was during harvest time, bushfires and drought) to provide feedback on a complex policy document-much less time than the 20 weeks given to phase 3 communities. Currently the same amount of time is allocated to straightforward amendments to development plans. Communities were also given just 4 weeks to comment on draft Historic Area Statements (although some building owners had just 3 weeks notice).
b. The draft Code comprised 1833 pages of unclear and inconsistent policy in a paper format which was not indexed and therefore not easily searchable. In addition the community was provided with a number of complex accompanying explanatory documents.
c. The draft Code was released as a separate document to the incomplete eplanning system making it very difficult to navigate. The community was expected to comment without the benefit of the eplanning system being fully in place to readily identify the policies that apply to their area or areas of interest.
d. Direct comparisons between the old and the new were not available and the wider ranging impacts of the policy detail were not well explained
e. The draft Code contained not just new policy but new terminology, format and structure.
f. The draft Code was not ready to be released as there were many policy gaps and errors which made it very difficult to know what was a policy position and what was an error/omission/inconsistency. A collation of some of the acknowledged errors and responses was released on 20 December 2019.This led to redrafting of policy, however the redrafted parts were not subject to any further public consultation.
g. An updated draft Code was released publicly on the 30 June 2020. Phase 2 communities had just 4 weeks to familiarise themselves with this and importantly the "mechanics" of the new eplanning system prior to implementation on the 31 July. They had no opportunity to have any further say on the draft unlike Councils and other key stakeholders who were invited to participate in a "verification" process.

h. The recent announcement to defer full implementation of the Code from September 2020 to a date in 2021 further disadvantaged phase 2 communities who are not the beneficiaries of greater implementation timeframes
i. The People and Neighbourhoods and Renewable Energy discussion papers were released at the same time as the draft Code after a long delay. This is unlike most other policy papers which were released well before the consultation began on the amendment. Other discussion papers went through a period of consultation followed by a summary of submissions in a What We Have Heard Report.

In the heritage policy space there was no prior consultation process due to the delay with the People and Neighbourhoods discussion paper. Instead, in May 2019 the State Planning Commission released "policy position papers" (not discussion papers accompanied by a period of public consultation). The public was given no opportunity at that time to respond to key changes to heritage policy including the proposal not to transition Contributory Items into the Code.

Phase 2 of the Code has now been in operation since the 31 July and Phase 3 will come into operation not before the end of this year. Since the 31 July Phase 2 Councils have reported that the Code and the Portal are not delivering as promised. For example the Berri Barmera Council in it's agenda papers for a meeting on the 22 September reported that some of the problems include:

a. The public notification tool is not working so any application requiring notification cannot be processed
b. The web based programs used to assess development applications are not integrated meaning assessment is taking longer than before
c. The Code is considered to be vague which makes assessment time consuming

Not only is there criticism from Councils but also from a wide range of community organisations and even the development sector. The whole process has been a long and costly one and there is great uncertainty as to whether the Code will deliver it's supposed benefits. The promise of like for like policy has clearly not eventuated as key policy in areas such as heritage and tree protection has been considerably weakened.

The EDO questions whether the reforms including the Code will improve the quality of design, enable appropriate planning where climate change and COVID19 are extreme risks. Policy change

has been made on the run and not subjected to proper consultation, independent modelling and risk assessment. The result is a very poor outcome in terms of policy development.

For all of the reasons outlined above it is our strong submission that further implementation of the Code be deferred until:

a. appropriate policy content is included
b. appropriate modelling and risk assessment has been done of proposed policy
c. the eplanning process is fully integrated and working properly to the satisfaction of Council staff
d. the draft Code has been subject to a further period of public consultation

4. POLITICAL DONATIONS

These should be outlawed in line with the ban on donations in NSW and Queensland.

The New South Wales Government enacted four pieces of legislation from 2008-2012 addressing political finance laws. The second of these Acts was the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW), prohibiting political donations by property developers. The laws governing prohibited donors can now be found in the *Electoral Funding Act 2018* (NSW) in Part 3 Division 7, and these extend the list of prohibited donors to include property developers, tobacco industry business entities, liquor or gambling industry business entities, an industry representative organisation with majority prohibited donors or close associates of prohibited donors. For a period of time there was also a ban on donations for those not on the NSW electoral roll (i.e. all corporations, trade unions, foreigners etc.) however this was repealed after the High Court found it contravened the implied freedom of political communication and was unconstitutional.[5]

It is unlawful for a property developer, someone on their behalf, someone solicited by a developer, or someone solicited by another person on a developer's behalf to make a political donation.[6] It is also unlawful to accept a political donation in such circumstances. A property developer is defined as an individual or corporation engaged in business mainly regarding residential and commercial development of land with the ultimate purpose of the sale or lease of the land.[7] In addition, the

[5] *Unions NSW v New South Wales* [2013] HCA 58.

[6] *Electoral Funding Act 2018* (NSW) s 52 ('*EFA Act*').
[7] *EFA Act* (n 1) s 53(1).

developer must have one relevant planning application pending or three or more determined within the previous seven years.

In October 2015, the High Court held the prohibition on political donations by property developers did not impermissibly burden the implied freedom of political communication and was constitutionally valid.[8] A 6:1 majority decision found the restriction on political communication justified by the public interest in removing the risk and perception of corruption.

A study into the impacts of the NSW legislation on political donations found quantifiable and significant decrease in the volume and value of political donations as a consequence of the laws.[9]

Queensland was the second state to act on political donation restriction laws. Amendments to the *Local Government Electoral Act 2011* (Qld) ("*LGE Act"*) were instituted following recommendations provided by an investigation of the Queensland Crime and Corruption Commission (QCCC) into political donations. The amendments were passed in 2018 and had retrospective impact, applying to donations made in Queensland from 12 October 2017.[10]

A political donation under Queensland legislation is a gift made to or for the benefit of a political party, councillor of a local government or election candidate(s).[11] The definition in the *LGE Act* also covers indirect methods of gifting such as via third parties and reimbursement methods. The scheme, found in the *LGE* Act Part 6 Div 1A, bans donations from property developers and provides a similar definition to the NSW legislation – a person or entity engaged in business that regularly makes relevant planning applications regarding development of land with the ultimate purpose of the sale or lease of the land for profit.[12] It does not, however, extend to other industries beyond that of property developers such as the tobacco or liquor industry.

The amendments were recommended by the QCCC after an investigation into offences under the *LGE Act* found widespread non-compliance with laws relating to local government donations. It was recommended a prohibition reflect the New South Wales provisions.[13] It was argued local government decisions were serving the private interest of donors over the public interest, as donations are often perceived as purchasing influence in, or access to, government decision

[8] *McCloy v New South Wales* (2015) 257 CLR 178.
[9] Malcom Anderson et al., 'Less Money, Fewer Donations: The impact of New South Wales political finance laws on private funding of political parties' (2018) 77:4 *Australian Journal of Public Administration* 797.
[10] Electoral Commission Queensland, *Policy – Determination that a person or an entity is not a prohibited donor* (2018) 4 (*'ECQ Policy'*).
[11] *Local Government Electoral Act 2011* (Qld) s113A(1) (*'LGE Act'*).
[12] *LGE Act s* (n 7) 113(2).
[13] Crime and Corruption Commission Queensland, 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government' (October 2017) 77 ('CCC Report').

making.[14] Planning and development was identified as a significant risk area as it resides within local government power and decisions about things such as zoning and development applications directly influence the success and profitability of businesses which seek to make donations.[15] Donors contended they did not receive any specific benefits, consistent with expert witnesses who noted there was little research evidence of donors receiving preferential treatment by politicians generally.[16]

However, research does suggest donations assist with buying 'a seat at the table' and accessing the network, giving donors an advantage over others in receiving favourable decisions.[17] The donations data showed the largest donors were 'new Chinese developers', reasoned by their need to access the decision-making network to further their interests.[18] Thus, donations can be seen as a method for accessing decision-making rather than purchasing a direct influence in it. This is further evidenced by research showing big business had a tendency to split donations between the ALP and LNP 50:50 when the ALP was in power, or on the verge of, but when the LNP was in power the donations skewed to 90:10 in the LNP's favour. The study suggested this evidenced payment for power and a belief the LNP would further advance the interests of big business, however it could not be determined whether the same donors were switching sides or whether different groups were supporting the parties depending on their success.[19]

The approach to managing political donations before the ban was based on transparency – there had been an increase in transparency between donations and local-government decision-making over time in response to similar allegations 'examined in major inquiries…over the last 25 years'.[20] It was concluded by the QCCC report this was 'insufficient to manage risks of actual and perceived corruption' regarding property developer donations. This is supported by research showing transparent donations only account for 12-15% of political parties incomes.[21]

The policy behind the amendments outlines how the prohibition aims to 'reinforce integrity and minimise corruption risk' and to improve transparency and accountability in State and local

[14] CCC Report (n 9) 76-77.
[15] CCC Report (n 9) 76.
[16] CCC Report (n 9) 76-77.
[17] CCC Report (n 9) 77.
[18] CCC Report (n 9) 77.
[19] Lindy Edwards, 'Political Donations in Australia: what the Australian Electoral Commission disclosures reveal and what they don't' (2017) 77:3 *Australian Journal of Public Administration* 392, 399.
[20] CCC Report (n 9) 77.
[21] Lindy Edwards, 'Political Donations in Australia: what the Australian Electoral Commission disclosures reveal and what they don't' (2017) 77:3 *Australian Journal of Public Administration* 392, 392.

government, giving the public more confidence in electoral processes.[22] It is administered by the Electoral Commission Queensland.

It has been argued this was a political move by the Labor Government as the Liberal National Party received a 'materially greater amount of donations' from property developers or like parties[23] (research shows federally the LNP received twice as much as the ALP from 2014-2019)[24]. Gary Spence, former LNP president was unsuccessful in challenging the validity of the scheme in the High Court. A majority concluded in *Spence v State of Queensland*[25] the scheme was constitutionally valid and did not breach the implied freedom of political communication nor intergovernmental immunity. The decision also deemed a section of Federal legislation that was enacted in response to the scheme invalid as it was beyond the Commonwealth's power – it prevented state donation restrictions from impacting federal campaign donations. The decision resulted in it being irrelevant whether a donation is for a state or federal purpose.

The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors[26] was a decision in 2020 finding the scheme is consistent with human rights, as its purpose of preventing governmental corruption and undue influence is consistent with a democratic society. The plaintiff, the AIP, is funded from sources including prohibited donors and sought to clarify whether their activities were 'electoral expenditure' under the Act and thus they were committing an offence.[27] It was noted third parties like AIP may still accept donations from prohibited donors as long as no part of it is used, or intended to be used, for an election campaign.

Currently, Queensland and NSW are the only two states to legislate for the banning of industries, such as property developers, to make political donations.There does not appear to be a comparable

[22] *ECQ Policy* (n 6) 4.
[23] Nicholas Aroney and Daniel Whitmore, 'Spence v Queensland: A Turning Point in the High Court's Approach to Federalism' (16 October 2019) AustralianPublic Law <https://auspublaw.org/2019/10/spence-v-queensland-a-turning-point-in-the-high-courts-approach-to-federalism/>.

[24] Lucas Baird, 'Where the property industry's political donations go' (July 20 2019) Australian Financial Review <https://www.afr.com/politics/federal/where-the-property-industry-s-political-donations-go-20190719-p528sy>

[25] [2019] HCATrans 045.
[26] [2020] QSC 54.
[27] Patrick Holland and Kate Swain, 'Queensland Supreme Court clarifies property donor laws' (23 April 2020) Mccullough Robertson Lawyers <https://www.mccullough.com.au/2020/04/23/queensland-supreme-court-clarifies-property-donor-laws/>.

level of misconduct in the history of South Australian local and State electoral campaigning compared to NSW and Queensland – there has certainly been no comparable level of major investigation into corruption or crime in the area. However, the issue has been raised before: in 2007 Greens' MLC Mark Parnell inquired into the fact Makris Corporation, a property developer which had previously donated to the ALP, had been awarded multiple development projects.[28] Whilst suggestions of misconduct were swiftly refuted by the ALP Minister, it remains clear by the developers agreeance with comments that by donating they "want to be looked after" and that that's just how politics works that some form of benefit was expected. Research from 2010 shows Makris projects were subject to political decisions and in the previous financial year before their approvals substantial donations had been made by Makris and associated companies to both major political parties.[29] Clearly this is not evidence of corruption or misconduct. However, in addition to comments made by Makris regarding motivation for donating, it does not support the view that property developer donations have no impact on development decision-making. A case such as this certainly shows the potential risk of corruption and has the potential to decrease public confidence in the integrity of electoral and development processes.

Findings from the QCCC in particular highlight the advantages of implementing a banned donor system. It found an approach based on donation transparency is not sufficient to manage the risks of actual and perceived corruption regarding developer donations.[30] By legislating to ban political donations by property developers, South Australia could significantly reduce the possibility of misconduct or corruption in the area. It could also be seen to be unnecessarily restrictive. This view is countered by considering the multiple decisions to uphold the bans in both NSW and Queensland after they were challenged in the Supreme and High Courts. There have been multiple opportunities for the diminution of the prohibitions by judiciary, but the bans have been consistently valid under scrutiny. In addition, the bans deny developers the opportunity to 'buy a seat at the table' and access decision-making via monetary donations therefore acting to level the playing field for prospective developers.

[28] Mark Parnell MLC, 'Question without notice: Developer donations to the ALP' (2 May 2007) South Australia Legislative Council Transcript.
[29] Crikey Independent Inquiry Journalism, 'Democracy, South Australian Style' (Feb 02 2010) < https://www.crikey.com.au/2010/02/02/democracy-with-a-south-australian-twist/>.

[30] CCC Report (n 9) 78.

Therefore the EDO submits that South Australia should legislate to ban political donations by property developers, similar to laws in Queensland and NSW. Whilst it may be argued a ban is unnecessary, its consequences result in higher levels of fairness, impartiality and integrity whilst decreasing risks of corruption by ensuring the interests of the public are served over the private interest of donors and supporting democracy. If a prohibition is not preferred, the compliance levels of local government donations should first be investigated in South Australia.

Strong evidence in favour of a ban has been the deep involvement of the property, building, construction and development industries in the development, structure and content of the Code. An example of the close relationship between industry and key Government planning authorities and the Minister, was a Study Tour to London. Manchester and Glasgow, brokered and organized by the UDIA. The members of the Tour Group, who spent eight days travelling, meeting, dining and sightseeing together in April 2019, comprised the Minister, the Chair of the SPC, senior DPTI officials and a cross section of industry representatives. There was a notable absence of advocates for the environment, heritage and the community. The close relationship between the property, building and development sectors and the Government and its planning agencies, clearly explains the bias in the Planning and Design Code towards unrestrained development at the expense of community concerns about the future of our built and natural environment.

We request the opportunity to provide further evidence to the Committee if possible.
Should you have any questions on the above, please do not hesitate to contact Melissa Ballantyne via email melissa.ballantyne@edo.org.au

Yours sincerely

Environmental Defenders Office

Melissa Ballantyne
Managing Lawyer – Adelaide