Submission to the Expert Panel DTI Planning Review December 2022

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[redacted]

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1. Introduction

We live in a 19th century, Local Heritage listed house in Brougham Court, North Adelaide which is in the Cathedral precinct, the oldest part of North Adelaide.

Since the promulgation of the PDI Act in March 2021, I have participated as a Representer to the Panels and then a Joinder in two separate Appeals by developers against refusals to their Development Applications by, in one case the CAP and the other the SCAP. In both cases, heritage properties were involved. I therefore believe I have considerable and possibly unique experience of the decision-making processes used by the Panels and the ERD Court mediation process.

Specific information obtained during mediation is confidential to the Parties involved therefore I have marked this response as Confidential. In my comments I have taken care to exclude any reference to the particular developments involved. However, I do believe the Review Panel needs to know how the Act operates in practice if it is to make meaningful findings.

If I were to summarise into a single sentence my opinion of the Act, I would say that it is misnamed. It should be called:

"**THE DEVELOPMENT FACILITATION ACT**"

because that is what it is intended to achieve, development at any cost to the community. In the remainder of this document I address many of the Act's shortcomings which I have experienced.

2. Summary of Recommendations

The reasoning which has given rise to these recommendations is shown later in this document.

Recommendations – Design Reviews

a. It is objectively bad policy to allow the Public Service departments responsible for advising approval Panels to also act as paid Planning Consultants on the same matters for which they give advice. Still worse is the requirement for the assessing Panels to take that advice into consideration. This whole process defined in Clause 121 should be completely removed from the Act and Planning Reviews should no longer be carried out by the Public Service.

b. In the event that the above recommendation is not accepted the following should be done:

   i. Section 121 clause 7 should be removed from the Act

   ii. Staff involved in Design Reviews should NOT be involved in writing Reports advising the considerations by SCAP or the relevant CAP. Legal firms call this process a "Chinese Wall"

   iii. The Reports to SCAP or CAP prepared by the various Departments involved, should advise that a Design Review involving Department Members has been carried out and the officer signing the Report should certify that no officer who was at any time involved in a Design Review on the application has participated in drafting the recommendations in those Reports.

Recommendations - Planning

i) A system should be devised so that the Code provisions are assessed with greater weighting being given to those provisions which are nearer the top of the pyramid in order of priority:
   (1) Overlays
   (2) Subzones
   (3) Zones
   (4) Policy Objectives

   See recommendations in Section3 - SCAP & CAP/

ii) The Act should be modified to once again recognise Council City Plans and review the Code at regular intervals to take into consideration changes in those Plans.

iii) The Act should be modified to once again recognise Council City Plans and review the Code at regular intervals to take into consideration changes in those Plans.

Recommendations – SCAP & CAP.

i) Both Panels should publish their reasons for Approving a development application as well as those for Refusing one (as now). That should go some way to reassuring the public that they are being more open

ii) Elsewhere, I have recommended that Code provisions should be weighted according to their position in the pyramid of zones overlays etc. I now recommend that, I order to make the Assessment process more objective:
   (1) The Code should give numerical weightings to each level while each provision should carry a point score.
   (2) Provisions which are satisfied should receive its specified points and conversely, each provision which is not satisfied should have its points subtracted.

(3) The total points for provisions at each level should be adjusted by the weighting of its level.

(4) Ultimately, a positive or negative score will be achieved. Only overall positive scores should be approved.

(5) The results should be published, whatever the outcome. This would benefit developers who can adjust their developments to meet the Code requirements before making application and remove much of the subjectivity in the process.

Recommendations – Appeal Rights

i) At the very least, Councils as representatives of their community, should have a legislated right of appeal. This, of course, raises issues of "divided loyalties" if the appeal is against a CAP decision which currently the Council is required to defend. In the case of SCAP the Crown Solicitor acts for the Commissioner. I believe, since CAP is working under the PDI Act and is responsible to the Planning Commissioner, the Crown solicitor should act for CAP just as it does for SCAP. Then the Council would no longer have a conflict when appealing against CAP.

ii) I believe others who can demonstrate that they would be adversely affected by a development should also have the right to appeal a Panel decision. The excuse for not allowing this is that it would lead to frivolous time wasting but the Court is well able to quickly determine if an appeal is frivolous and disallow the appeal.

iii) At the very least, the legislation should be changed so that the Supreme Court decision to Disjoin Joinders once agreement is reached between the Panel and the developer in an appeal would no longer be valid.

Recommendations - Local Heritage:

i) Change the Act to be prescriptive in protecting Local Heritage Places that do not meet the requirements in PO 6.1 above. This would mean that a Developer who wants to demolish a sound Local heritage Place would first have to apply to the ERD court to have it delisted. That is a small price to pay to ensure that we preserve heritage buildings for future generations.

ii) To do otherwise would result in developers avoiding the due process of requesting delisting of the local heritage place in the ERD Court but could simply hire someone to say "It is not worthy, it should never have been listed in the first place. That way, Local heritage would soon disappear altogether which is not the objective of the Act nor of the Councils and their residents.

Recommendation - Affordable Housing Concessions:

Ensure that all additional apartments designated as affordable housing are sold as such. Developers always run a risk that they will have difficulty selling the apartments they build. They should be prepared to run that same risk on affordable apartments.

Recommendation - Variations:

Ensure that one of the conditions of approval is that the height of the building should not exceed that approved and do not allow variations which are incompatible with the approved conditions.

3. Design Reviews

Part 7- Division 4 - Procedural Matters and Assessment Facilitation, Clause 121 of the Act references Design Reviews which can be requested by a prospective Developer.

Sub-Clause (7) says:

A relevant authority must, in acting under this Act, take into account any advice provided by a design panel (insofar as may be relevant to the assessment of proposed development by the relevant authority).

In other words, the State or Council Planning Department is paid to participates in the design of a Development and then the assessing Panel must consider that review team's advice during their assessment.

One Application being considered by SCAP to which I made an objecting Representation, had undergone three Design Reviews involving State Planning Department staff and the State Architect. Both those organisations presented reports to SCAP recommending approval of the development. Fortunately, the SCAP Panel showed its independence and integrity and refused approval on no less than 7 grounds.

One wonders, however, how many developments which were objectively non-compliant but recommended after Design Reviews, might have been approved.

Behaviour such as this, if not permitted under the Act, would be classified as the criminal offences of bribery and corruption

Recommendations – Design Reviews

i. It is objectively bad policy to allow the Public Service departments responsible for advising approval Panels to also act as paid Planning Consultants on the same matters for which they give advice. Still worse is the requirement for the assessing Panels to take that advice into consideration. This whole process defined in Clause 121 should be completely removed from the Act and Planning Reviews should no longer be carried out by the Public Service.

ii. In the event that the above recommendation is not accepted the following should be done:

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4. Planning

We now readily and correctly acknowledge the connection Aboriginals have to their traditional lands. However, that is a human characteristic which is not confined to Aboriginals alone. Town and city dwellers also often have a connection to the town or suburb where they live and have a right to expect that its characteristics will be maintained or, at least, developed sympathetically with input from them.

Prior to this Act, each Council had its own City Plan which detailed its desired characteristics which were taken then into consideration by its Development Assessment Panel. The PDI Act took some of those existing planning objectives into consideration via zones, sub-zones and overlays. It also established an hierarchy of importance starting with general Planning Objectives and working its way up through zones, sub-zones and overlays with each layer taking precedence over the layers below it when there is a conflict.

The Planning Pyramid:

This well-meaning approach has two significant flaws:

(1) In Performance Assessed developments not only should preference be given to high level provisions over similar low level provision but logically, all high level provisions should carry more weight than low level provisions because these high level provisions more accurately describe the character preferred by the community living in that locality ie: they reflect the City Plan for that particular area.

1) There is no discernible system in the Act to periodically update the Code and provisions in the Act to reflect future changes that residents, represented by their Councils would like.

As a result of the above, there is no effective City Planning in South Australia. Rather, the characteristics of cities, towns and suburbs are determined in an ad hoc fashion by individual developers motivated by profit and often with no personal connection to the community hosting their development.

Recommendations - Planning

iv) A system should be devised so that the Code provisions are assessed with greater weighting being given to those provisions which are nearer the top of the pyramid in order of priority:
   (1) Overlays
   (2) Subzones
   (3) Zones
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v) The Act should be modified to once again recognise Council City Plans and review the Code at regular intervals to take into consideration changes in those Plans.

5. SCAP & CAP

i) These two panels are:
   a. Unelected.
   b. Responsible only to the Planning Commissioner.
   c. Their deliberations are completely opaque and entirely subjective.
   d. There is no requirement to explain how they have arrived at their decision. However, if they refuse a development application, they do give an explanation as to why which assists the developer in lodging an Appeal.
   e. They never give an explanation explaining why they have approved an application.
   f. I have yet to see an application classified as "Seriously at variance with the Code".
   g. There appears to be no process to ensure that they are doing their job in accordance with the regulations.

This is a very unsatisfactory way to conduct such important matters as Development Approvals. Small wonder that most people who encounter the secrecy of the development approval process consider that it is "fixed" in favour of the developer.

Recommendations – SCAP & CAP.

iii) Both Panels should publish their reasons for Approving a development application as well as those for Refusing one (as now). That should go some way to reassuring the public that they are being more open

iv) Elsewhere, I have recommended that Code provisions should be weighted according to their position in the pyramid of zones overlays etc. I now recommend that, I order to make the Assessment process more objective:
   (1) The Code should give numerical weightings to each level while each provision should carry a point score.
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   (3) The total points for provisions at each level should be adjusted by the weighting of its level.
   (4) Ultimately, a positive or negative score will be achieved. Only overall positive scores should be approved.
   (5) The results should be published, whatever the outcome. This would benefit developers who can adjust their developments to meet the Code requirements before making application and remove much of the subjectivity in the process.

6. Appeal Rights

Developers have the right to Appeal against Panel decisions. Council and adjacent property owners or occupiers do not. At the very least, this is a denial of natural justice.

Recently, the Chief Justice of the Supreme Court made a decision in the South Esplanade Case that neighbours who had been Joined as objectors to a developer's Appeal during the mediation phase but after the SCAP and the developer had come to a compromise agreement as yet unratified by the Court, should be disjoined because the Act gives them no right of appeal. At the time of writing, I believe this is before the Appeals Court.

It is not clear whether this might also mean that no neighbours or others adversely affected by a development, could ever be Joined to an Appeal.

Recommendation

iii) At the very least, Councils as representatives of their community, should have a legislated right of appeal. This, of course, raises issues of "divided loyalties" if the appeal is against a CAP decision which currently the Council is required to defend. In the case of SCAP the Crown Solicitor acts for the Commissioner. I believe, since CAP is working under the PDI Act and is responsible to the Planning Commissioner, the Crown solicitor should act for CAP just as it does for SCAP. Then the Council would no longer have a conflict when appealing against CAP.

iv) I believe others who can demonstrate that they would be adversely affected by a development should also have the right to appeal a Panel decision. The excuse for not allowing this is that it would lead to frivolous time wasting but the Court is well able to quickly determine if an appeal is frivolous and disallow the appeal.

v) At the very least, the legislation should be changed so that the Supreme Court decision to Disjoin Joinders once agreement is reached between the Panel and the developer in an appeal would no longer be valid.

7. Local Heritage

North Adelaide has the highest density of Local and State Heritage buildings in the State. It is a special place, a living museum which the Act considers worth protecting. However, it is entirely possible that not all those buildings which are Local Heritage listed deserve that protection. The Expert Panel on Planning Reform convened in 2012 and whose recommendations gave rise to this Act, recommended that, before the Act was promulgated, all Heritage places should be re-assessed. That has not happened.

However, any owner of a Local Heritage Place can apply to the ERD Court to have it de-listed. There its merit will be thoroughly examined by experts. The Assessment Panels are not so equipped.

(1) An example is:

During the mediation phase in the ERD Court of an appeal by a developer against refusal by the SCAP to its proposed development which included the demolition of a Local Heritage Place, the Developer asked the SCAP if the demolition of the local heritage place was a trigger. Meaning whether SCAP would never approve the application if it involved the demolition of the local heritage place.

The response was:

It should be noted that the SCAP does not, and ought not, view any particular provision of the Code as compulsory (unless otherwise required by the Planning Development and Infrastructure Act 2016) but considers that, on balance, the departures from the requirements of the Code continue to warrant a refusal of planning consent.

It is not considered that the SCAP cannot entertain an application for demolition of a local heritage place. The merits of the application are considered, as is required, as a whole. This means that demolition is considered in the context of the entire application for development by assessing it against all relevant provisions of the Code.

The code states:

PO 6.1

Local Heritage Places are not demolished, destroyed or removed in total or in part unless:

1. *the portion of the Local Heritage Place to be demolished, destroyed or removed is excluded from the extent of listing that is of heritage value*
   or
2. *the structural integrity or condition of the Local Heritage Place represents an unacceptable risk to public or private safety and is irredeemably beyond repair.*

Since all parties agreed that neither condition applied, why is this not prescriptive? It certainly should be, particularly since there is already a right to apply to the ERD Court to have it de-listed.

Recommendation: Local Heritage

Change the Act to be prescriptive in protecting Local Heritage Places that do not meet the requirements in PO 6.1 above. This would mean that a Developer who wants to demolish a sound Local heritage Place would first have to apply to the ERD court to have it delisted. That is a small price to pay to ensure that we preserve heritage buildings for future generations.

To do otherwise would result in developers avoiding the due process of requesting delisting of the local heritage place in the ERD Court but could simply hire someone to say “It is not worthy, it should never have been listed in the first place. That way, Local heritage would soon disappear altogether which is not the objective of the Act nor of the Councils and their residents.

8. Affordable Housing Concessions

Developers of high-rise accommodation can build extra floors for affordable housing. However, not only are they not required to advertise the affordable housing they only have to have it on the market for 90 days before they can use the space for normal Housing. This has simply become a way of increasing the number of apartments built beyond those that the Panel approved.

Recommenation - Affordable Housing Concessions:

Ensure that all additional apartments designated as affordable housing are sold as such. Developers always run a risk that they will have difficulty selling the apartments they build. They should be prepared to run that same risk on affordable apartments.

9. Variations

It is becoming established practice to obtain Planning approval for a five-storey building, say and then request variations to add extra floors. These variations do not go to public consultation and are passed through as an administrative matter. This is plain wrong and is very upsetting to neighbours while making a mockery of the Panels.

Recommendation - Variations:

Ensure that one of the conditions of approval is that the height of the building should not exceed that approved and do not allow variations which are incompatible with the approved conditions.