

18 December 2020

SUBMISSION TO THE STATE PLANNING COMMISSION ON THE REVISED PLANNING AND DESIGN CODE FOR PHASE THREE

SUMMARY

1. The code is still not ready for implementation.
2. There are significant policy gaps, omissions and inconsistencies which would create great confusion and perverse outcomes if the Code were implemented in its current form.
3. The consultation period on the Revised Code has been manifestly inadequate, and the engagement process has once again breached the Community Engagement Charter mandated under the PDI Act.
4. Heritage protections are significantly diminished under the Code through poorly defined policy, loose terminology and a lack of detail about what is to be protected and preserved.
5. The eplanning portal is poorly designed and difficult to navigate and would not be useable for the majority of community members.
6. Public access to information about planning and development decisions appears to have been diminished through the design of the portal and the operation of new assessment pathways.

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Revised Planning and Design Code

Comments from the National Trust of South Australia

The National Trust of South Australia is a community-based charity with more than 6 000 members and volunteers. Since its establishment by an Act of Parliament in 1955, the Trust has worked to protect, preserve and promote South Australia's heritage.

This submission details the Trust's considerable concern with the inadequate consultation process, policy gaps and weaknesses within the draft Planning and Design Code, as it relates to heritage, the efficacy of the ePlanning Portal and the erosion of public rights to information about planning and development proposals and approvals.

The State Planning Commission has failed to provide a genuine opportunity for public consultation and the materials that have been provided for public review are incomplete, error ridden and replete with gaps and inconsistencies.

The revised code document released on 4 November is more than twice the size of the original Planning and Design Code document released a year earlier. Providing just six weeks for public comment on such a document is a clear breach of the community engagement charter mandated under the Planning, Development and Infrastructure Act.

Moreover, during the six-week consultation period, we note that revisions were being made to the code document, with new versions of the Draft Code appearing on the relevant website without notice or explanation of the reasons for the changes nor any description of what were the changes. The consultation process and the materials provided have been grossly inadequate. Much of the code policy remains ill formed and inadequately detailed and has not been subject to adequate public consultation.

1. The Engagement Process

The current period of consultation was, we believe, intended to compensate for the manifest inadequacies of earlier consultation on the Draft Planning and Design Code.

We appreciate the new Minister acknowledging the inadequacy of prior consultation processes and initiating another process. On 1 November, the National Trust and seventeen other community organisations wrote to the Minister outlining their expectations for a new engagement process that would be consistent with the Community Engagement Charter mandated under the Planning, Development and Infrastructure Act.

The letter contended that any further consultation must:

1. Be undertaken on the basis of a complete, final and error free version of the Code being made available and accessible.
2. Include comprehensive detail on what is changing from the current planning rules.
3. Be conducted independently of the State Planning Commission and Planning Department.
4. Provide for at least eight weeks of active engagement activities (avoiding Christmas/New Year holiday period).
5. Be preceded by the public release of the Engagement Report for the Phase 3 consultation required under section 73 of the Act.
6. Be guided by a community engagement plan, developed in consultation with community organisations.
7. Be followed up by a further What We Have Heard Report and Community Engagement Report.

None of these requirements have been met, although we understand item 7 may occur in the new year. As a result, the current consultation has perpetuated the same issues that plagued previous consultations. Once again it failed to fulfil the requirements of the Community Engagement Charter.

Nor can the current period of consultation reasonably be said to be a continuation of the consultation on the Draft Planning and Design Code given the substantial changes that were made to the Code, evident alone in the need to rename this iteration of the Code.

Although the Revised Planning and Design Code is more than twice the length of its predecessor, the consultation period was more than halved, allowing the community only six weeks to comment on an almost 8 000-page document. This is all the more significant given that the number of community information sessions was also drastically reduced over past consultations, with only 9 having been scheduled to occur during the consultation period, omitting 29 council areas. This is not a fit for purpose or genuine consultation.

Nor was the Code even complete as released to the public on 6 November 2020, despite claims made by the Minister to the contrary. In a letter to the President of the National Trust dated 24 November 2020 Vickie Chapman, the Minister for Planning and Local

Government, stated that: "This version of the Code is complete and all best endeavours have been made to minimise any risk of errors within the Code." However, on 30 November 2020 a further 89 pages of material were added to the draft code document, without any notification to the public or via the Planning portal of this having occurred.

Similarly, in a video published on 03 November 2020 by the State Planning Commission, its Chair, Mr Michael Lennon stated that: "From, November the 4th to December the 18th, a period of six weeks, we are going to release all material relating to the Planning and Design Code and its digital platform in its entirety for the very first time". Yet the provision of this information has been piecemeal; Phase Three Consultation change maps were made available as of 06 November 2020, the "Protecting Heritage and Character in the Planning and Design Code" brochure was released on the 10 November 2020 and the "Guide to the draft revised Phase Three (Urban Areas) Planning and Design Code" was only added to PlanSA website on 1 December 2020.

The failure to transition introductory materials such as the "Community guide to the Code" across to the "Current Code amendments" page on the PlanSA website raises within community groups concerns about the extent to which the Commission will consider and act upon comments on the Code from new parties.

Furthermore, the paucity of information describing how the current planning system will be altered by the Code seeks to limit discussion to a comparison between the Draft Code and the Revised Code, a false comparison for determining whether the community will benefit from the new planning system. When it was put to the Minister during an estimates committee hearing how the public could determine what the changes are, the Minister made reference to maps that had been provided for this purpose.¹ However, these maps only detail the spatial application of zones to the Council area under the relevant Development Plan, the Draft Planning and Design Code and the Revised Planning and Design Code. In order to understand the effect of these changes members of the public would need to undertake a systematic comparison of the 7 938 page long Code as well as the relevant Development Plan. This is antithetical to the principles of the Community Engagement Charter and does not inspire or promote community confidence in the integrity of the new planning system.

2. Code Policy

The Trust remains very concerned about the level of protection afforded to built heritage in the Code and the erosion of current protections.

Although supportive of changes already made to demolition controls in the Historic Areas Overlay, they do not go far enough. A demolition control policy such as that found in the

¹ South Australia, *Parliamentary Debates*, House of Assembly, 23 November 2020, 83 (Vickie Chapman, Deputy Premier, Attorney-General, Minister for Planning and Local Government).

Norwood, Payneham and St Peters (NPSP) Development Plan as it relates to Contributory Items is more appropriate and has been proven to limit the loss of these buildings.

The demolition control in the NPSP Development Plan is not contingent on the state of the front elevation of the building, as it is in the Revised Code. Instead, it requires that the building (or any part of it) that is to be demolished does not contribute to the heritage value, historic character or desired character of the zone.² Furthermore, this policy better ensures that the character of the area is maintained by making demolition approval dependent upon a proposal for development of equivalent or greater contribution to the historic character of the zone as that of the building or part thereof to be demolished.³

The Trust is disappointed that the level of protection of State Heritage places from demolition would be significantly weakened in the State Heritage Places Overlay by Performance Outcome 6.1. Demolition of State Heritage places was non-complying in development plans in key historic areas under the Development Act. We note that not all State Heritage places have such protections under current development plans. However, it appears that more than 600 or 25% of all State Heritage places will have a lower level of protection under the Code if they lose that guarantee of protection from demolition which is the very purpose of statutory protection under the Act. This is an unprecedented diminution of protections for our most significant heritage places.

Similarly, a number of Council development plans treated demolition of local heritage places as non-complying, providing a robust system enabling protection from demolition for hundreds of other properties, which would also be lost under the Code.

We acknowledge that the Minister has insisted on recognition of Contributory items within the Code, despite the repeated false claims and misinformation perpetuated by the Planning Commission over 18 months to block recognition of their value under the Code.

However, the Revised Planning and Design Code is inadequate in providing reliable protection for these places, and the proposed change of names obscures and perhaps distorts the reasons for their protection and retention.

The change in terminology from Contributory Items to Representative Buildings does not accord with the purpose of the Code in standardising planning policy given its long-standing use in South Australia and elsewhere in the country such as in New South Wales and Victoria. Moreover, labelling these buildings 'Representative Buildings' belies their importance. The value of these buildings does not lie in their individual representation of any particular architectural style but in their collective contribution to the significance of the Historic Area. The "Practitioner Overview of Heritage and Character in the New Planning System", in discussing how CIs would be captured by the Planning and Design Code, stated that granting demolition approval within the Historic Area Overlay will require consideration of "how well the theme is represented".⁴ This suggests that 'if there is already

² City of Norwood, Payneham and St Peters, Development Plan (21 March 2019), 138 [27].

³ Ibid.

⁴ Department of Planning, Transport and Infrastructure, *Practitioner Overview of Heritage & Character in the New Planning System*, May 2019, 7.

representation of a particular style of building or type that it may not be necessary to keep all representations. Therefore, 'Contributory' is a more accurate assessment of the value of the building within the area and better safeguards it from demolition. For this reason, the Trust recommends that the term 'Contributory Items' is reinstated and that the following definition, which better describes their purpose, is substituted in the Code:

Contributory Items referenced in Historic Area Statements and Character Area Statements and mapped in the South Australian Property and Planning Atlas are buildings which display historic characteristics and contribute to the significance of the Historic Area. These buildings should be retained. The identification of Contributory Items in a particular historic area is not intended to imply that other buildings in an historic area are not of importance.

Of further concern is the fact that Representative Buildings are not referred to anywhere within the Code Policies and are only spatially identified in the South Australia Property and Planning Atlas. To rectify this the generic preamble to all Historic Area Statements should be amended by substituting the following:

The Historic Area Overlay identifies localities that comprise characteristics of an identifiable historic, architectural, economic and/or social theme of historic significance. These localities may comprise and demonstrate historic land divisions and development patterns, architectural styles and built form, streetscape and context that provides a legible connection to the historic development of a locality.

These attributes have been identified in the table below. Where referenced, State, Local Heritage Places and Contributory Items all contribute to the attributes and historic significance of the Historic Area.

The preparation of an Historic Impact Statement can assist in determining potential additional attributes of an Historic Area where these are not stated in the table below.

The content of the Historic Area Statements ('HAS') itself also needs to be significantly amended. At present they are generic and lack substantial detail. In particular, the HSAs for the Barossa regions are grossly inadequate with many elements of the HSA simply "[Not Stated]".

HSAs also lack forward-facing policy describing how new development should be undertaken, as is presently found in Desired Character Statements in many Development Plans. This makes the HSAs of little assistance at the time of development assessment. Supposedly, the new Code "[w]ill be supported by a design guideline that sits beside the Code (still under preparation) to guide the built form of new development in Historic Areas and Character Areas, which will include diagrams and style guides for key eras of development."⁵

⁵ Phase Three (Urban Areas) Planning and Design Code Amendment Summary of Post-Consultation Amendments report p. 17.

Such guidelines are clearly going to be important to the development assessment process. Details of this type are presently found in many existing Development Plans (often contained in the tables to the back of the Plans). Sometimes heritage principles within development plans will refer to external guidelines and include a notation to the effect that development undertaken in the relevant zone or policy area should be undertaken having regard to and consistently with those external guidelines. Thus, although the guidelines are not within the Development plan, they must nevertheless be considered as part of any development assessment because of the reference to them within the Plan. Under the Development Act 1993, a planning authority is required to undertake its development assessment against the provisions of the appropriate development plan.⁶

The proposed guidelines will contain important information and details which should be able to be considered as part of the process of assessing development in the Historic and Character areas. However, the information contained in the guidelines is not found in the Code nor is there any reference to them within the Code. Given the current structure and wording of the provisions in both the Historic and Character areas within the Code, the Trust is extremely concerned about the extent to which planning authorities and the ERD Court can have regard to such guidelines (which we emphasise are not part of the Code) when making their development assessment decisions. Planning authorities have to assess a development against the relevant provisions of the Planning Rules (102(1)(a)PDI Act). “Planning Rules” are defined to be the Planning and Design Code, Design Standards prepared by the Commission relating to the public realm or infrastructure or any other instrument prescribed by regulations. The ‘public realm’ means parks and other public places and streetscapes’. The documents being drafted are described as ‘guidelines’ not as ‘design standards’. It also seems that they are something different to ‘Practice Guidelines’ under s43 of the Planning, Development and Infrastructure Act 2016.

Furthermore, if they are s43 Practice Guidelines they do not have to go through a public notification process where they can undergo public scrutiny and be subject to public input or feedback. The guidelines should be available for public comment. The community Consultation process is deficient if they are not. It is very difficult to consider and comment on the efficacy of the Historic and Character Area Overlays and Statements without access to the draft guidelines. Furthermore, it is neither fair nor consistent with the Government and State Planning Commission’s much lauded Community Engagement Charter to introduce a new set of planning policies in the Planning and Design Code and then use a series of ‘guidelines’ to elaborate on and explain that policy yet not make them publicly available, nor a relevant consideration in the development assessment process.

However, it does appear that the guidelines could be made a relevant consideration in the development assessment process, even though not part of the Planning and Design Code, if they are prescribed by regulation to be part of the Planning Rules.⁷ This ought to be done.

⁶ Development Act 1993, s 33(1)(a).

⁷ See the definition of Planning Rules set out above and defined in s3 of the Planning, Development and Infrastructure Act 2016.

3. The ePlanning Portal

Despite considerable time and expense, the ePlanning Portal has not been finalised. So much so that it was necessary to take it offline during the consultation period, as can be seen below. This deprived the community of access to not only the tool but also the Code itself. Asking the community to comment on an incomplete, and at times inaccessible, product is not in accordance with genuine consultation.

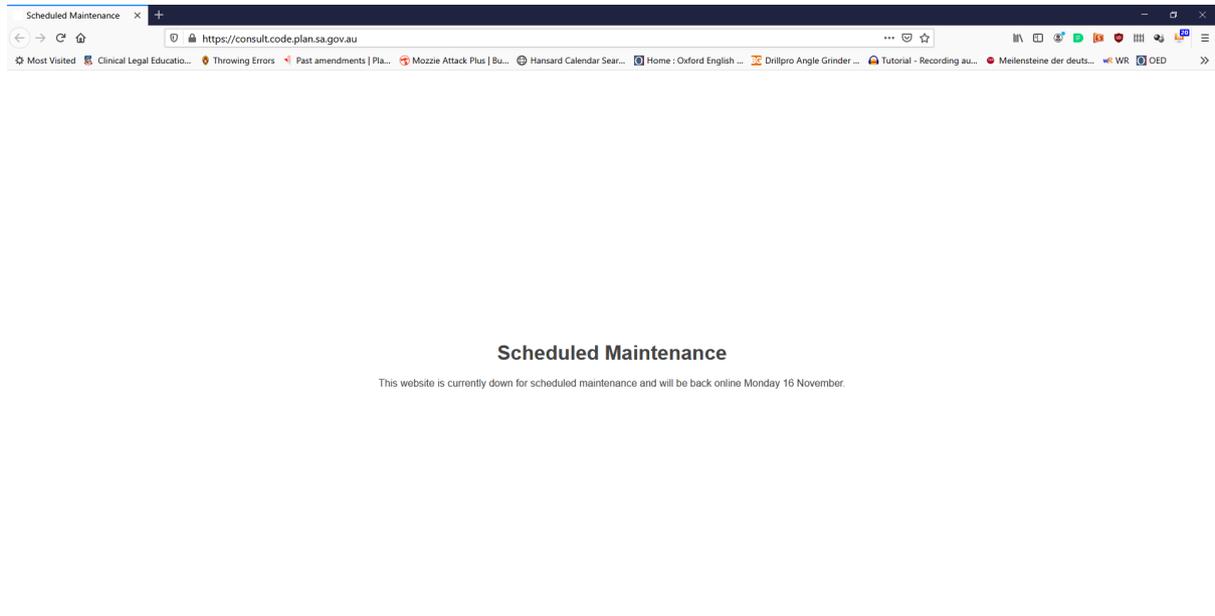


Figure 1 - ePlanning Platform scheduled maintenance.

Although a vast improvement over the paper-based Code, the ePlanning Portal is still not error free or easily navigable. For example, when the Code is searched for the newly added Representative Buildings this non-linking result is returned:

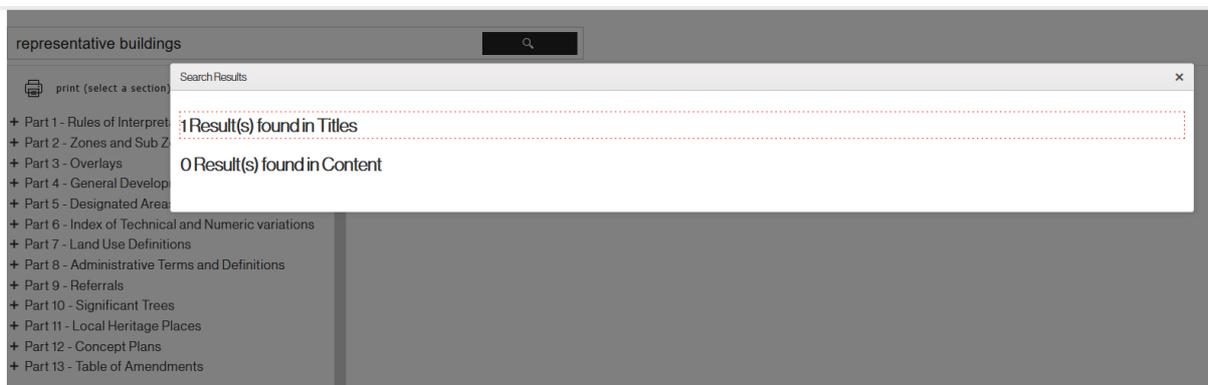


Figure 2 - Search for 'Representative Building'

Therefore, to find the places where Representative Buildings are mentioned in the Code one has to manually navigate through Part 3 – Overlays->Historic Area Overlay->Historic Area

Statements in the drop-down menu on the left. However, if one has a sufficiently intimate understanding of the Code to get this far it is only to find out that Representative Buildings are “not identified” or are “identified – refer to SA planning database”. Both statements are confusing. The former makes it unclear whether there are any Representative Buildings within the respective area or whether they simply have not been listed, and in the case of the latter it is unclear where RBs are listed. It is inexplicable why a Code intended to be accessible to laypeople would make vague reference to a ‘SA planning database’ when the South Australian Property and Planning Atlas is meant. The presence of these issues during the consultation period is unacceptable as it unnecessarily increases the difficulty of members of the public providing informed comments on the Code and ePlanning Portal and is thus not fit for purpose.

4. Loss of public access to information under the Code and within the Portal

Amongst the objects of the Planning Development and Infrastructure Act are to:

S 12 1 (b) provide a scheme for community participation in relation to the initiation and development of planning policies and strategies;

S 12 2 (b) enable people who use or interact with the planning system to access planning information, and to undertake processes and transactions, by digital means; and

S 12 2 (c) promote certainty for people and bodies proposing to undertake development while at the same time providing scope for innovation.

All of these objects are predicated on equal and effective access to information around planning policies, rules and decisions.

However, it appears that the design of the planning system and the e-planning portal are, in fact, reducing the information available to the public and removing from public scrutiny much of the workings of the development assessment and approval process. There appears to have been little effort to enhance or guarantee public access to information within the planning portal, which further curtails public rights to participate and be informed about planning and development decisions.

After all the public money invested in the e-planning portal, it is concerning that one of its principal outcomes is a reduction in the amount of information available to the public and the transparency of decision making.

Firstly, it appears that the Planning and Design Code will significantly reduce the number of developments that require notification. The Norwood, Payneham and St Peters Council has calculated that the proposed planning system would have caused a 41% reduction in notifiable applications in 2018 with a further 11% remaining unclear, and a 56% reduction in

notifiable applications in 2019 with a further 16% remaining unclear. A reduction in notifiable developments of this scale significantly disenfranchises the community.

Third party rights to make representations and then appeal from decisions have been limited to restricted development (202(1)(d) PDI Act). There will be a limited number of developments that are classified as restricted development. Therefore, there will inevitably be less third-party rights to make representations and then seek appeal under the PDI Act as opposed to the Development Act.

The rights to appeal and to make representations under the proposed system lack clear expression on the ePlanning Platform. For example, it is not clear on the “Notified Developments” page of the PlanSA website within which category of development requiring notification each of the listed applications fall. Therefore, in conjunction with the incomplete information on the “How to have your say”, the public is left unaware of where a particular development falls within the hierarchy of classification and thus the right to make representations, how these representations are considered and the rights to appeal, if any, that apply.

This is a marked deterioration over the transparency of the current planning system.

Furthermore, the development application register does not provide sufficient information for the community to be informed of proposed developments nor for the community to be able to review whether an appropriate decision was made in relation to a planning application. Below is an entry on the register that exemplifies this issue.

20002004	Empak Homes	46 SHERWIN RD MIL-LEL SA 5291	Private Dwelling & Associated Shed	11/12/2020
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No further information relating to the application is provided upon expanding the entry.

Where the register provides a link to the application documents relating to a development it is often a dead link. The documents are either inaccessible or missing. This is even the case for some notified developments. Without the opportunity to review hardcopy documents currently offered by Councils, how can the public make informed representations for these developments? This is a major retrograde step and must be rectified immediately.

Furthermore, the failure to implement a direct public notification facility as provided for in s 48 of the PDI Act further speaks of a lack of commitment to ensuring a transparent planning system. At a minimum such a service would allow the public to be at least aware of what is happening. Without such, the public has been effectively excluded from participation, contrary to the stated objects of the Act.

Rather than empowering the people paying for the system, the ePlanning portal appears to be excluding them from an accessible way to participate.

We ask that prior to implementation, that the rights of the community to access information are strengthened and promoted. There should be an explicit commitment to

improving and enhancing public access to information in the portal through usability enhancement and the availability of an automatic notification service.

We trust that the issues raised here can be addressed before the implementation of the Code in Phase 3 areas.

A handwritten signature in black ink that reads "Deborah Morgan". The signature is written in a cursive, flowing style.

DEBORAH MORGAN

President

National Trust of South Australia