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Friday, 18 December 2020

Michael Lennon
State Planning Commission
GPO Box 1815,
Adelaide SA 5001

Dear Mr Lennon,

RE: Phase Three Planning and Design Code Public Consultation

Please find attached the UDIA submission on the Phase 3 Planning and Design Code Public Consultation.

Thank you for the opportunity to comment.

Your sincerely
Pat Gerace

Attachment: UDIA (SA) submission on Phase 3 Planning and Design Code Public Consultation.

UDIA (SA) – Revised Draft Phase 3 Planning and Design Code

Key Issues of Concern

UDIA (SA) has reviewed the revised draft version of the Phase 3 of the Planning and Design Code (PD Code) that was subject to public consultation from Wednesday 4th November 2020 to Friday 18 December 2020.

This submission supplements and is provided in addition to the substantive submission to the State Planning Commission provided in February 2020. Since that time representatives of the UDIA (SA) and senior representatives of the Planning and Land Use Services (PLUS) division of the Attorney-General's Department (Formerly DPTI) have had numerous meetings seeking to enhance the PD Code. We acknowledge that the revised Phase 3 PD Code has a number of positive amendments that have addressed various issues previously raised by the UDIA (SA). There are however, a number of issues that remain of concern as well as new issues requiring attention and resolution.

Infill Development

The various changes that have been made to this version of the draft Phase 3 PD Code seem to have an overall effect of significantly reducing the ability to undertake infill development. In a spatial sense this change in ability to develop is largely occurring in the eastern and inner southern suburbs. Whilst most infill development is in the form of one existing dwelling into two (2) or three (3) new dwellings (which is a form of development that is smaller and largely not of a scale undertaken by UDIA members), it appears that the achievement of the infill objectives of the 30 Year Plan for Greater Adelaide will be more challenging under the new Code than is currently the case.

Of concern to UDIA (SA) members is the lack of policy that deals with the potential for infill development to occur in the proposed 'Established Neighbourhood Zone'. There are numerous sites that could be amalgamated to form a larger site that could easily and appropriately accommodate a greater density of development, whilst sensitively dealing with the interfaces with existing lower density/character housing. For example, it is understood the State Planning Commission (SPC) engaged consultants to prepare a concept for precisely this form of development near King William Rd, Unley last year. It is considered that the PD Code should incorporate policy that enables higher density development with appropriate interface outcomes when a site is greater than 4,000sqm. Such policy triggers have been used in Development Plans in the past (for example 'catalyst sites' within the City of Adelaide).

Assessment pathways within the Master Planned Neighbourhood Zone (MPN Zone)

The MPN Zone provides an Accepted, Deemed-to-Satisfy and a Performance Assessed assessment pathway for detached dwellings. We note that the Deemed-to-satisfy pathway is not applicable where the site is within the Emerging Activity Centre (EAC) Subzone.

It is common for this Subzone to apply to entire areas within the MPN Zone. For example, the entire MPN Zone at Two Wells is also subject to the EAC Subzone. As a result, for large areas of the MPN Zone, it will be possible for a dwelling to be Accepted and not Deemed to Satisfy. This becomes problematic in areas where a Building Envelope Plan (BEP) has not been approved, resulting in all detached dwellings within that area needing to follow the Performance Assessed assessment pathway.

We consider it important to note, that as a key advocate for the BEP process, that this should be an optional tool and should not be seen as a mandatory requirement. Accordingly, we support that there is a Deemed-to-Satisfy pathway available without requiring a BEP, which is what the initial draft of the Code proposed.

To avoid this scenario, we request that Table 2 – Deemed-to-Satisfy Development of the MPN Zone be updated to:

. remove reference to the Emerging Activity Centre Subzone in the exceptions listed for detached dwellings within the 'Class of Development' Subzone; and
. add Emerging Activity Centre Subzone DTS/DPF 1.1 to the Subzone column.

Building Envelope Plans

In the 'Master Planned Neighbourhood Zone' (MPNZ), an approved Building Envelope Plan (BEP) has been included as a criteria for dwellings to being assessed as Accepted development. The definition of a BEP has been added. An approved BEP is one that has been approved by the relevant planning authority and has been uploaded to the SA Planning Portal. Our view is that there will be issues for developers with existing projects that have had BEPs in place for many years and have been used as part of Design Guidelines and encumbrance approval processes that have not been approved by Councils (some refused to approve them at the land division stage) and what the process will be now with Councils (delegated approval or CAP decision) to get them approved. The draft Practice Direction does not deal with this issue. It is noted that the BEP policy is not part of a Code Assessed or Performance Assessed process. On this basis, if a dwelling falls out of the Accepted development pathway for whatever reason and the BEP has setback criteria that are different from the PD Code policy, then the application will have yet another policy with which it does not strictly comply. It is apparent that the BEP is a criteria in the 'Master Planning Neighbourhood Zone' (MPNZ) in DTS/DPF 6.1 – 10.1. A BEP must be able to be approved on a stage by stage basis, as often easements and other matters at the civil design approval stage are determined, not at planning and land division stage. The requirement for natural contours to be on the BEP is inappropriate as with most estates benching occurs to some extent. A BEP system needs to be as simple and easy to implement as is currently the case.

Further, in order for detached dwellings to be Accepted development it appears that a BEP must be in place. If a BEP is not in place, then an application cannot be processed in the Accepted pathway which will present issues for some existing projects. Accordingly, existing BEPs that have been in operation from prior to say 1 July 2020 should be able to be submitted to the Chief Executive for uploading to the Portal without having to gain approval from the relevant Council planning authority.

Definitions –

Communal open space – it is uncertain as to whether communal open space to not be publicly accessible needs to be gated. If so, it will be challenging, if not impossible to have communal open space at the front of a site. This would be an outcome that is unnecessary. The definition should be amended accordingly.

Building height – the definition is acceptable, however a diagram would be very helpful in providing further clarity.

Private Open Space (POS) – The change from the original definition is significant. For example. a 2.0 m minimum dimension is now proposed rather than 1.8m on ground level. We note that a 1.8m minimum dimension remains for balconies. Part (c) "is not fully enclosed" could be interpreted in different ways – for example, is a swimming pool (which is fully enclosed) counted towards the POS? There is no limit to the amount of roofed area (alfresco, verandah) that can count towards POS, whereas at present some Councils have a 20% limit. Without a limit there is flexibility, but this is likely to cause inconsistent interpretation by Councils and other relevant authorities.

Overlays

Gas and Liquids Pipelines (and Facilities) Overlays - The issue with these Overlays is that the planning system is getting involved with an issue that has its own separate Act of Parliament (*Petroleum and Geothermal Energy Act, 2000* (PGE Act) and the policy in the PD Code should not intrude upon the regulatory regimes of other legislation.

A planning authority should not be expected, nor are they equipped, to make expert determinations on matters of environmental protection, safety or risk management of high pressure gas pipelines, especially when other Agencies are established under other legislation to determine and regulate such matters. Under the PGE Act the pipeline operator is responsible for the safety of the community and the design, operation and maintenance of high pressure gas pipelines are regulated in a dynamic and responsive manner by an expert, independent regulator under the PGE Act. The wording in the Overlays seeks to transfer risk management and safety responsibility and obligations to a developer together with the concomitant cost of meeting regulatory compliance of the pipeline operator (if/where required). The location and proximity of a high pressure pipeline may be an appropriate consideration when undertaking the rezoning of land (via a Code Amendment), but once land has been rezoned for urban development the PGE Act should apply. On this basis, this Overlay should be removed or DO 1 and PO 1.1 should be amended to make it abundantly clear that the gas pipeline operator is responsible for ensuring the safety of the pipeline under the PGE Act including making any adjustments to the pipeline and associated facilities and infrastructure at their cost.

In addition, PO 1.1 appears to provide justification for a pipeline operator to ignore (exceed) the Environment Protection (Noise) Policy and places the onus on adjoining land owners to address public health and safety issues arising from the pipeline operators failure to meet this policy.

The wording in the Procedural Matters – referrals section of the Overlay means that there could be many applications for dwellings that are referred to the CEO of the Dept of Mines and Energy (DEM) acting for the Minister. Will they have adequate resources to deal with such applications in the time frames required?

Structure Plans / Concept Plans

Existing Structure Plans / Concept Plans in existing Development Plans have now been added in the PD Code as sought by the UDIA in our February 2020 submission. The issue remains as to how these Plans fit within the PD Code. There is no mention of such Plans in the Rules of Interpretation. Given there is likely to be some conflict between PD Code policy and these Structure / Concept Plans, it should be explained where these Plans sit in the hierarchy.

Centres Hierarchy

The relaxation of location of centre type uses (particularly retail) in the PD Code is an extension of the State's approach to centres hierarchy in the past decade. Whilst this is, so far, proving to be of benefit to communities in established areas it is already causing difficulty for developers in greenfield locations who are trying to attract retailers to a proposed activity centre. This is because the ability to bypass the centres hierarchy with PD Code policy and develop up to 1,000sqm (the Restricted trigger) floorspace of retail almost anywhere in a MPN Zone (and in zones such as the General Neighbourhood Zone, Rural Living Zone and Employment Zone which abut a MPN Zone) is considerably easier.

In order to achieve appropriate urban development patterns over the medium to longer term, those who are establishing centres in growth areas need some protection, otherwise centre development (particularly retail) will end up in inappropriate locations that are not supported by appropriate dwelling density nor key transport connections and infrastructure. Such a laissez faire approach to retail/centre development has occurred in most cities in the United States over the past 60 years. The result has been too much retail floorspace in the wrong locations which results in failing centres. There is a whole consultancy industry in the United States on what to do with closed malls. It is considered the Restricted criteria for shop or group of shops in the various zones in the MPN Zone and nearby growth area zones should be reduced from 1,000sqm to say 250sqm as has been the case in Development Plan policy. This may require an Overlay to be used as it is largely geographic rather than zone based.

Activity Centre Subzone

The spatial application of the 'Activity Centre Subzone' is confusing. In some instances, it picks up centre zones that are part of the proposed MPN Zone. This is considered appropriate. However, in Mt Barker, Angle Vale, Playford North Extension, Two Wells and Blakeview the entire growth areas are within an 'Activity Centre Subzone'. This is inappropriate as it undermines the ability of those landowners to develop land where the proposed centres have actually been designated. The extent of the Subzone should be reduced to only cover those areas designated in a Concept Plan for an Activity Centre. Furthermore, the MPN Zone Table 2 – Deemed-to-Satisfy Development should be amended to ensure that straightforward dwelling applications can benefit from a streamlined assessment process within the Activity Centre Subzone.

Contributory Items

The inclusion of former contributory items as 'Representative Buildings' is a retrograde step and gives character buildings essentially the same protection as a Local Heritage Place. The Design Guide which will guide built form proposals is not even available at this stage to determine what might be able to occur. If a specific character in a locality is desired, then proposed development should meet that character. Unless a building meets the criteria for a Local or State Heritage Place it should not have that level of protection from demolition and/or redevelopment.

Referrals

UDIA (SA) remains very concerned about the mandatory direction power given to the vast majority of referral Agencies. This fundamentally makes those Agencies the planning authority, which is the problematic system that was in place prior to 1993 where proponents had to gain a range of approvals from various authorities prior to seeking planning Consent.

The appeal process is often expensive and time consuming and in many cases beyond the ability of many proponents. Authorities know this and some may leverage this power. It is considered the system of referral under the *Development Act 1993* should remain (i.e. in terms of what Agencies have power of 'direction' and what Agencies relevant Authorities must have 'regard' to). If the State wants referral Agencies to stand up and defend their decisions (including conditions of consent) then this should be achieved in another way.

Designated Performance Features

There is considerable concern regarding how Designated Performance Features (DPF) will actually work. The text in the Rules of Interpretation remain inadequate in making it absolutely clear that a DPF is but one way of meeting the Performance Outcome. The Rules of Interpretation require improvement in this regard.

Open Space and Recreation

The Assessment Provisions in the General Development Policies have DTS/DPF 4.1 seeking no more than 20% of open space having a slope of more than 1 in 4 (which is considered reasonable) and no more than 20% of the land being water affected (water courses, wetlands and detention basins).

This is considered to be far too low as a percentage in the majority of circumstances, particularly in the MPN Zone as considerable effort is made by developers to ensure water affected land has high levels of amenity and is useable (i.e. as high amenity passive open space with quality water features). In many cases, water affected areas are only affected once or twice a year. Many useable parks have been created on land that is below the 1 in 20 flood level. To not count such land towards the open space contribution is inappropriate when considering the amenity that can be achieved on water affected land.

Balconies

The Master Planned Neighbourhood (MPN) Zone states:

> *7. One of the following is satisfied:*
>
> *a) the longest side of the balcony or terrace will face a public road, public road reserve or public reserve that is at least 15m wide in all places faced by the balcony or terrace*
> *or*
> *b) all sides of balconies or terraces on upper building levels are permanently obscured by screening with a maximum 25% transparency/openings fixed to a minimum height of:*

i. *1.5m above finished floor level there the balcony is located at least 15 metres from the nearest habitable window of a dwelling on adjacent land*
or
ii. *1.7m above finished floor level in all other cases.*

The above policy is not relevant to single storey detached dwellings and could result in single storey dwellings being subjected to the 'Performance Assessed' assessment pathway if the relevant authority decide that the above criteria is not adequately satisfied.

Therefore, we recommend that criteria 7 be updated to read '*if the dwelling exceeds one storey, any balconies satisfy one of the following*'.

Boundary Walls

Deemed to Satisfy within the Suburban Neighbourhood Zone includes the following criteria:

Suburban Neighbourhood Zone DTS/DPF 7.1 – Boundary Walls

(a) Dwellings, except where the dwelling is located on a central site within a row dwelling or terrace arrangement, incorporate side boundary walls on only one side boundary that satisfies (a) or (b): adjoin or abut a boundary wall of a building on adjoining land for the same length and height
(b) does not:
(i) exceed 3.2m in height from the ***lower of the natural or finished ground level***
(ii) exceed 11.5m in length
(iii) when combined with other walls on the boundary of the subject development site, exceed a maximum 45% of the length of the boundary
(iv) Accepted Development Classification Criteria 7 applied to detached dwellings within the encroach within 3 metres of any other existing or proposed boundary walls on the subject land

In contrast, General Development Policies – Design in Urban Areas DTS/DPF 8.1 references wall height measurement from the "top of footings".

DTS/DPF 8.1
Other than walls located on a side boundaries, building walls are set back from side boundaries:

(a) at least 900mm where the wall is up to 3m measured from the top of the footings
(b) other than for a wall facing a southern side boundary, at least 900mm plus 1/3 of the wall height above 3m
(c) at least 1.9m plus 1/3 of the wall height above 3m for walls facing a southern side boundary.

To avoid confusion, inconsistent approach and the necessary additional survey data DTS/DPF 7.1(b)(i) should be amended to a "top of footings" criteria.

Site Contamination Practice Direction and PD Code

UDIA (SA) has been in constant discussion with the EPA and the Department of Planning (formerly DPTI) for several years regarding this matter.

We recognise that due to inconsistencies across Council areas, that in order to provide a more consistent approach, a framework will be created via a draft Practice Direction and the PD Code.

The industry remains concerned about the unnecessary investigations and costs associated with developing land that arise from the current processes around site contamination. This was articulated via the EPA working group the UDIA participates in, and also via the submission made by the UDIA in May 2019 (which included more detailed comments) on earlier iterations of the framework,

Broadly, we are concerned that the proposed PD Code policy and procedures as well as the draft Practice Direction will lead to an increased number of audits having to be undertaken in the absence of any increased risk or benefit to public health or the environment.

While the Practice Direction has a mechanism, which enables a site contamination consultant to conduct a preliminary site investigation (and where required a detailed site investigation) and an ability to sign off that the land is suitable for a more sensitive use if appropriate, we are concerned that many consultants will be reticent to do so on the basis of other factors including risk to reputation, insurance premiums and ongoing practice approval by the EPA.

Our members are concerned that this, combined with a culture of *risk elimination* as opposed to *risk management* within the EPA, will not lead to better outcomes. Some concerns were expressed that without a sufficient number of recommendations for audits, consultants would be at risk of being taken off the consultant register, irrespective of the commensurate risks they were dealing with.

The overarching issue for a site contamination system is ensuring the public is not exposed to unsafe conditions. The UDIA is not aware of any situation in past couple of decades where a sign off by a consultant occurred (recommended no audit) and this was subsequently found to be incorrect.

We are concerned that under the proposed system many small commercial or industrial sites that can only yield less than ten dwellings are likely to remain undeveloped as it will be unviable to go through an audit process.

These properties are likely to become blighted particularly as they are also no longer suitable for commercial or industrial purposes. We also understand that based on recent experience, many of these sites only have groundwater as a likely contaminant and the EPA has been requiring audits in the vast majority of such cases, despite there being no vapour issues and minimal risk because licenses to extract groundwater are not available.

Feedback from members has also indicated that the EPA can require an investigation when proposals are near a business that might be a contaminated site. Such investigations have often cost tens of thousands of dollars and substantially delayed projects with the end result confirming what the site contamination consultant first recommended.

In an operational sense we are also concerned that any increase in audits will be difficult to achieve in a timely manner as there are not enough auditors in SA (as well as some interstate auditors who have chosen to avoid SA).

To be clear, the UDIA understands that there is an important role that the EPA and adequate controls play to safeguard the public health interests of the community and environment, but we also believe that the current practice direction may not lead to substantially better outcomes.