Planning Review 2022

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Dear Panel Members,

Thank you for the opportunity to comment on reforms to the South Australian planning system.

This is a subject very close to my heart. I retired last year after 15 years in State Parliament, where I was the only MP with planning qualifications. I participated in every debate over planning law and policy since 2006 and am the longest serving Member of the Parliament's oversight body – the Environment Resources and Development Committee. Prior to Parliament, I worked for 10 years as a public interest environmental lawyer primarily in the planning area.

In this submission I have commented on some of the specific questions asked in the Discussion Papers and also made some additional recommendations, particularly in relation to reform of Parliamentary Scrutiny and the role of State Planning Policies.

Yours faithfully,

Mark Parnell LLB, BCOM, MURP

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Discussion Paper – e-Planning System and the PlanSA website Reform Options

Access to Information:

In the "Discussion Paper – e-Planning System and the PlanSA website Reform Options" there are 35 questions posed about "user experience" and "innovation". However, these questions are primarily addressed to applicants and assessment authorities and NOT to the general public who may wish to access information about developments that affect them or interest them.

The most important question not asked is: Should all development application documents be made available for public inspection online and for how long?

I note that PlanSA now has a direct notification service for development applications (which I fully support), however apart from the fact of the application being lodged and some basic information about the assessing authority, information is limited to the address and a brief description of the proposal (eg. new single-storey dwelling).

Problem: Erosion of rights of public to access development applications

Discussion: Under the old Development Act, members of the public were able to attend Council offices and inspect copies of development applications including plans and specifications. Under the 1993 Development Regulations, Councils could charge reasonable fees for access and were not obliged to make available documents that could jeopardise the present or future security of a building. These documents are now all available electronically on-line which should simplify access.

I think there is a fundamental problem with the way planners approach access to information, which is to confuse rights of access to application documents to rights of representation or appeal. In other words, they believe that only documents relating to developments where a person has a legal right to comment or appeal should be publicly available.

Various feeble excuses have been offered over the years for not making all documents available, including that allowing access to plans and specifications would be a "breach of copyright". Another is that allowing access to information is an "undue encouragement" which suggests to members of the public that they may have rights to influence a decision when they do not.

Why is it a problem?

The public have a legally-enforceable right to see that all developments are being undertaken lawfully in accordance with approved plans. Where a developer fails to comply, "civil enforcement" is available. In its Law Handbook, the Law Society describes the procedure in ss. 212-214 of the Act and notes: "A typical action would be against a person

who undertakes development without approval, or fails to comply with conditions attached to the approval." https://lawhandbook.sa.gov.au/ch28s02s07s02.php

The Decisions Notification Form for approved developments almost always contains as the first condition the following:

> **Planning Consent**
> **Condition 1**
> The development granted *Planning Consent* shall be undertaken and completed in accordance with the stamped plans and documentation, except where varied by conditions below (if any).

However, if the public are denied access to the plans and documents, this right is illusory. How would a neighbour (for example) know whether provisions to protect their privacy have been complied with if they do not have access to the approved plans?

This came to a head some years ago in a case I was involved with where the developer substituted the type of frosted glass approved in a multi-storey development to avoid over-looking into neighbouring backyards. If the neighbours hadn't had access to the approved plans, they would not have picked up the substitution which had serious implications for their privacy. The planning authority hadn't picked it up or alternatively, didn't care about the change. The purpose of civil enforcement is to enable citizens to ensure the law is applied where the proper authorities are unable or unwilling to act.

Recommendation:

The Planning portal should contain all application documents and plans under the "documents" tab for ALL developments, not just those subject to public notification.

Problem: SCAP deliberately removes documents from its website and requires expensive and time-consuming Freedom of Information applications to access documents that were previously freely available.

Discussion: In the few days prior to each SCAP meeting, all documents relevant to the agenda including development application documents and reports from relevant planning staff and referral bodies are uploaded to the SCAP website as attachments to the agenda where they can be inspected or downloaded by anyone. After the meeting, these documents are promptly removed. According to the SCAP website:

> "Previous meetings:
>
> Agendas include links to reports for most SCAP agenda items. Attachments to these reports are only available for current meeting agenda items. *After the meeting, attachments to reports can only be obtained through the Freedom of Information process*."

This goes to the heart of a major problem with the planning system which is a view among many senior planners that they know best and the general public are a nuisance to be tolerated but not encouraged. This particular issue that has been previously raised by me directly with SCAP, with the previous two Ministers for Planning and also in Parliament, yet SCAP maintains its policy of obstructing public access to important documents relating to

developments of public interest. It goes to their credibility as an agency focussed on the public interest in the application of planning policy.

Why is it a problem

The issues are the same as above in relation to non-publication of application documents on the Planning portal. The public have a right to see that developments are being undertaken lawfully in accordance with approved plans. Where a developer fails to comply, civil enforcement is available. If the public are denied access to the plans and documents, this right is illusory. Given that the developments being considered by SCAP are the more complex developments with potentially wide-ranging impacts, the public has a legitimate interest in seeing that development is undertaken lawfully and in accordance with approved plans and documents.

Recommendation:

SCAP should maintain a publicly available online archive of all documents previously made available. This simply requires archiving the attachments to agendas and minutes of previous meetings, rather than removing them.

Discussion Paper – *Planning, Development and Infrastructure Act 2016* Reform Options

The Discussion Paper notes the decline in development applications subject to public notification and appeal. This is reflective of the current (in my view ill-considered) approach to "front-load" public participation to enable submissions on planning policy only. Once planning policy is set, further opportunities for comment or appeal on individual development applications are limited.

A consequence of this approach is that governments are able to "appeal-proof" even the most controversial projects, including on public land. A good example is how the previous government passed planning policy that enabled substantial exclusive private development in the heart of coastal wilderness in a National Park to be approved without possibility of public challenge. This resulted in ALL Friends of Parks volunteers on Kangaroo Island going on strike and led to several large protests both on KI and in Adelaide. The KI fires delayed the project, but it will come back.

Another philosophical difficulty with the current approach is the emphasis on people "affected" by a development. In many instances, objection to a development is not because of physical proximity, but due to broader concerns such as impacts on wildlife or climate. The Act does not adequately acknowledge that even "anticipated" forms of development can have serious environmental consequences. For example, fossil fuel power stations in Industrial Zones might satisfy noise or amenity concerns but are still damaging to the climate. Or, subdivisions for housing over native vegetation can send species to extinction. An interesting case study of a species eventually prevailing over an uncaring planning system is the Eltham Copper Butterfly in Victoria. Thought to be extinct, it was rediscovered

in the outer suburbs of Melbourne and now plays a key role in locational decisions of infrastructure. It is hard to imagine such an outcome in South Australia.

Notification and appeal rights

The Panel notes that whilst there was an expectation of greater public notification under the new planning system, the reality has been a decline from over 10% of all applications under the Development Act to less than 6% now. Third party appeals have also declined.

Whilst the Panel supports the position of not notifying developments "envisaged in the zone", in my submission an exception should be made for cases of particular public interest regardless of zoning.

The Panel refers to the rights of individual property owners, however in the case of public land or "the commons" those rights should be extended beyond the technical owner (eg. Minister) to the public more broadly even if zoning does envisage the proposed use. This is particularly the case for public land reserved for conservation or public use and enjoyment or private land that is protected from development by virtue of binding Heritage Agreements.

Recommendation: All development on public land or private land subject to public interest incumbrances such as Heritage Agreements under the Native Vegetation Act should be notified for public comment.

Recommendation: Appeal rights should be available in relation to all private developments in National Parks and Wildlife Act reserves and all development in coastal waters or on beaches.

Impact Assessed Development

I support the suggestion in the Discussion Paper of reinstating a "Whole of Government" approach to approving major developments, rather than leaving it to an individual Minister. These are decisions of great significance and the impacts of these developments can last for decades. The additional time taken to prepare cabinet submissions is miniscule in the overall time-frame for these projects, however the benefit is that all Ministers (and their departments) have input into the final decision.

I also support bringing mining approvals within the planning system as part of the major projects process. This will require considerable wrangling within government as the culture within the "Mining Department" (in various iterations over the years) has been to provide the least possible opportunities for public input. There have never been rigorous environmental impact assessment processes for mining or opportunities for the public to challenge mining approvals.

Infrastructure Schemes

The Discussion paper refers to the Mount Barker trial and notes that since the trial no infrastructure schemes have been initiated under the PDI Act.

Reforms in this area should be informed by the debacle that was infrastructure in Mount Barker in relation to the rezoning of 1300ha of land for residential development over a decade ago. Part of the "deal" was that the developers would pay for the new freeway interchange. The (then) Minister in Parliament noted that the need for speed in relation to the rezoning was because of fears that the consortium of private property developers was committed to funding infrastructure and that that commitment was being tested by delays. Ultimately (and predictably) taxpayers ended up footing the bill for the new freeway interchange.

The paper could also have mentioned the outrageous situation where property developers in Mount Barker mandated connection to private LPG gas infrastructure, including mandating certain gas appliances in new homes. They did this as part of the legally binding covenants that come with many new housing estates. This was a fundamental restriction on home owners being allowed to choose how to cook and heat their homes and water. It also effectively entrenched (literally) expensive, unnecessary and environmentally damaging infrastructure. The Planning Commission and other planning authorities appear to have shown no interest in this issue.

Other jurisdictions have gone in the opposite direction by banning all gas connections to new housing estates and foreshadowed plans to ban all new gas connections to existing residential properties. (eg. ACT - https://www.abc.net.au/news/2022-08-04/act-no-new-gas-connections-from-2023-new-homes/101299552).

In SA, gas infrastructure has been listed along with water, sewerage, roads, footpaths and electricity as necessary infrastructure for new housing subdivisions. This has the effective of undermining the transition to cheaper and more sustainable all-electric homes.

Recommendation: Ban the practice of property developers mandating gas connection to new homes. The Planning, Development and Infrastructure (Gas Infrastructure) Amendment Bill (No. 4) introduced by Hon. Robert Simms and currently before the Legislative Council achieves this objective and should be supported.

Recommendation: Phase out new gas connections to residential customers. The Gas (Ban on New Connections) Amendment Bill (No. 31) introduced by Hon. Robert Simms MLC and currently before the Legislative Council achieves this objective and should be supported.

Local Heritage in the Planning, Development and Infrastructure Act 2016

The commentary in the Discussion Paper around the debate in the Legislative Council back in 2015/2016 is accurate but carefully worded to avoid offending some current Members of Parliament.

Sub-sections 76(4) and 76(5) were ill-considered and completely at odds with the nature of planning as a public interest exercise rather than a local popularity contest. Extending this approach of popular votes to other planning questions would result in predictable and negative consequences. The role of local voices is important, but it should be within a democratic or judicial context and not as direct decision-maker over planning policy.

The Discussion Paper notes that the scheme of local voting for or against heritage has not yet been commenced. In my discussion with previous Planning Ministers, none had any intention of commencing these provisions because they now appreciated how ill-considered they were, regardless of how they voted at the time.

The answer is very simple – delete these provisions.

Recommendation: Repeal Sub-sections 76(4) and 76(5).

Deemed Consent

I am heartened by the fact that very few Deemed Consents seem to have been issued as a result of planning authorities taking too long to process applications and make a decision.

Nevertheless, I think that the potential for poor decision-making is still a live issue. Faced with a ticking clock, decision-makers are likely to take short cuts and not ask appropriate questions or make proper assessments simply because of pressure of work and lack of resources. Deemed consent means that if you are running out of time to do a job properly – just approve it anyway.

The Discussion Paper notes that Deemed Consents are "having the desired effect" which is faster decisions. This begs the question about whether the planning system is about making fast decisions or making good decisions? Surely the latter should prevail over the former?

I note that other jurisdictions take the opposite approach to SA and if a planning body takes too long, that is Deemed Refusal. I think this is a better approach, but the rights of applicants could be protected with appropriate costs orders from the ERD Court in the event that the applicant is ultimately successful. This would be an exception to the normal rule that in Merits planning appeals, each side pays their own costs.

Recommendation: Replace Deemed Consent with Deemed Refusal subject to appropriate discretionary costs orders to protect applicants who are subsequently successful on review.

Discussion Paper – Planning and Design Code Reform Options

In relation to the detail around Character & Heritage, Infill and car parking I support recommendations made by the Conservation Council of South Australia and the National Trust.

Tree Protection

One major loophole that was identified during debate in Parliament but never resolved is in relation to the "10 metre rule". The loophole is that it is possible to gain approval for a building or swimming pool that is within 10 metres of a protected tree and to then remove the tree because it is within 10 metres of a building or pool!

In Parliament we were assured that any development application within 10 metres of a protected tree would need to be a combined application for both the development AND the tree-damaging activity.

In practice, that appears not to be the case. The situation is further exacerbated where the tree is on one property and the development is on an adjoining property, but still within 10 metres. This arbitrary rule is the kiss of death for many protected trees.

Another loophole recently exposed by the Conservation Council is in relation to using the 10m rule to remove a tree and then to remove the development which was the justification for the tree's removal.

In Adelaide's east, a magnificent, lemon-scented gum stood on a newly-purchased block of land. ***This significant tree should have been protected by law, but a developer was able to use a disgraceful loophole to destroy it.***

This developer snapped up the property and applied to remove the giant gum. ***Initially, the local Council rejected the application to cut down the gum tree due to its formidable size.***

But the new owner hit paydirt when he unearthed an old swimming pool buried on the property: cracked, broken, filled in and forgotten.

He excavated the pool, quickly put a fence around it so it was 'compliant' and went back to council, arguing he had the right to remove the tree as it was within 10 metres of a 'swimming pool.'

Our flawed regulations don't specify that the pool had to be in a fit state to be used as such - its mere existence was enough to condemn the significant tree.

This cynical use of the regulations meant that the council had no choice but to approve the removal of this beautiful old tree – in spite of the fact the pool would never be used as a pool and that the developer was clearing the entire site to build.

The worst part? ***Once the tree was removed, so was the fence - and the 'pool.'***

Electric Vehicles

In relation to electric vehicles, I note the general consensus amongst industry insiders that these will ultimately become the predominant form of private motor vehicle in Australia within a decade or so. Some overseas jurisdictions have already announced policies that would ban the sale of new internal combustion engine (ICE) cars from as early as 2030. Of course, it will take longer for the entire vehicle fleet to turn over and there will always be some ICE vehicles, however it would be prudent for the planning system to be ready to accommodate a majority of private cars being electric in the foreseeable future. It is also generally accepted that the vast bulk of EV charging will be done at home with a lesser amount of charging at public charging stations.

I agree with the Panel's view that "consideration needs to be given to the appropriateness of EV charging infrastructure remaining unregulated". However, "regulating" does not necessarily require all EV charging infrastructure to be "development", particularly in relation to private dwellings.

One simple approach is to include provision for future EV charging infrastructure to be a condition of development approval, particularly for new multi-dwelling developments. For example a new apartment complex with basement parking could be required to provide the wiring necessary for each parking space to accommodate EV charging. Even if there are no EVs owned by the occupants of the apartments in the short term, it is much easier and cheaper to install the wiring upfront that will ultimately be required. Space can also be made for necessary switchboards and meters even if none are required in the immediate term. The NSW Government has resources available for apartment owners and offers the following advice: "Whole-of-building infrastructure installation is typically much lower cost in new builds compared to retrofits". https://www.energy.nsw.gov.au/business-and-industry/programs-grants-and-schemes/electric-vehicles/electric-vehicle-ready/strata

Recommendation: Mandate provision of basic infrastructure in all new multi-dwelling developments to accommodate future uptake of electric vehicles at a rate of at least one per dwelling.

New issue: Genuine Parliamentary Scrutiny

Consequential reform to Parliamentary Committees Act 1991

The Discussion papers refer to Parliamentary Scrutiny of planning policy, (including the Planning and Design Code) by the Environment Resources and Development Committee of Parliament.

A simple reading of the Act gives the impression that this is a genuine process of review and potential rejection by Parliament of inappropriate planning policy. However that ignores the fact that the ERDC is a government-controlled committee that always supports the government line. Occasionally, the ERDC recommends changes to planning policy, but when push comes to shove, ultimately always defers to the decision of the Planning Minister if the recommended changes aren't accepted.

Whilst there are no publicly-available documents to support the above claims (because minutes of ERDC meetings are not published) I was a Member of this Committee for 15 years and am its longest serving Member and the only one with planning qualifications (MURP). Trying to use this flawed system of Parliamentary Scrutiny to achieve positive change was a big part of my work for a decade and a half!

The statutory problem is that the ERDC is the "gate-keeper" through which all planning policy must pass before they are able to be considered by either House of State Parliament. Unless ERDC resolves to reject a change to the Planning and Design Code (for example), the matter cannot be considered by the Houses. Parliamentary scrutiny stops dead at the Committee.

Having served on the ERDC for 15 years, I can only recall twice when the ERDC has rejected a rezoning proposal. One was a short-lived attempt to reject the rezoning of the former Glenside Hospital for housing back around 2008. That decision was revisited at a subsequent meeting and reversed before it could get to Parliament for debate.

The second was more recently around 2020 when I moved to reject the rezoning of the Detmold industrial site in Bowden. I only succeeded because one of the Government members was absent from the ERDC meeting that day, which affected the numbers and enabled the opposition and cross-bench votes to prevail. Unlike with the Glenside example, there was insufficient time for the Government to reconvene a meeting to reverse the decision before I had tabled the necessary Motion in Parliament. The purpose of this Motion was NOT to reject the idea of transforming a blighted industrial site to modern housing, but rather to bring the parties together to negotiate some revisions, particularly around height limits and overlooking in the proximity of existing single-storey housing. Having requested this leverage of the Committee, the local Member, Hon Peter Malinauskas was then able to secure changes acceptable to all parties, so I withdrew my motion before the Legislative Council without debate. The Minister made the agreed changes and everyone was happy.

The reason the ERDC is government-controlled comes from the Parliamentary Committees Act which provides that the Committee will consist of three members from each House, but requires the Presiding Member to come from the House of Assembly, which in practice means it will always be a government Member. There is also a significant salary increase for Presiding members, so it is regarded as one of the spoils of office for a governing party to allocate for factional reasons or to reward those who miss out on Ministerial positions. It is never based on merit or even an interest in or understanding of planning.

If there is an equality of votes, the Presiding Member has a casting as well as deliberative vote (s.24(4)). Historically the three House of Assembly Members have comprised two Government and one Opposition Member and the Legislative Council Members, one Government, one Opposition and one Cross-bench Member. The three Government

Members include the Presiding Member who is regularly called on to cast a deciding vote when the Committee is divided 3:3.

Note: In the last 20 years, there was one brief period where the Committee comprised two Government, two Opposition and two Cross-bench Members. That resulted in the Committee briefly rejecting the rezoning of Glenside Hospital until the Late Dr Bob Such (a former Liberal who then sat on the cross bench) could be convinced to change his vote. No government since has dared NOT to control this Committee with its own Members.

Recommendation: Amend s.8(4) of the Parliamentary Committees Act 1991 to provide that the Legislative Council must provide the Presiding Member of the ERDC. This increases the likelihood that the Committee will not be government-controlled and will have a non-government (ie. Opposition or cross-bench) Member with the casting vote in the event of a 3:3 tie.

New Issue: the Role of State Planning Policies

Problem: State Planning Policies are supposed to inform the Planning and Design Code (s.58(s)), yet they are routinely ignored in the development of both the original Planning and Design Code and subsequent variations.

In Parliament, I moved for the inclusion of two State Planning Policies into the Act, namely Biodiversity and Climate Change. The Policies ultimately developed were disappointing to say the least. Nevertheless, the purpose of State Planning Policies is to inform the Code. In my submission, at the very least the Policies should result in assessment criteria being included in the Code that would enable assessment bodies to reject or apply conditions to applications to reduce impacts on climate change or biodiversity. Assessment bodies are not permitted to refer directly to the State Planning Policies, so if those Policies don't inform the Planning and Design Code, they are effectively a waste of space.

For example, over the years I routinely made submissions to the SCAP in relation to new fossil fuel power stations arguing that it was a relevant planning consideration to consider the climate impact of the project. To my horror, the approach of SCAP was to claim that they were not required to even ask the question of the proponent as to the level of direct CO2 emissions, much less take these emissions into account in assessing the development. Of course, SCAP looked at visual amenity, noise, traffic and zoning etc (because these are within their comfort zone) but refused to consider CO2 emissions. This begs the question, what is the point having a State Planning Policy on Climate Change if it doesn't inform the Code and therefore doesn't influence the assessment of development applications? Whilst I haven't seen any recent SCAP determinations, I would suspect that they have not changed their view that CO2 emissions impacting the climate are NOT a consideration for planners. That is unacceptable.

I strongly suspect that the attitude of SCAP towards biodiversity is similar. Even when a species is close to extinction, this is not enough to stop or amend a project. A case in point is the rocket launching facility at Whalers Way on Lower Eyre Peninsula, which directly

impacts on one of the last remaining populations of Southern Emu Wren. Again, the question is: What is the point of a State Planning Policy on Biodiversity if it doesn't help protect species from extinction?

Recommendations:

All amendments to the Planning and Design Code should contain a detailed statement of consistency with State Planning Policies.

Where an Assessment body believes that the Planning and Design Code ignores or is at odds with a State Planning Policy, the body should be required to report this belief to the State Planning Commission, the Minister and the Environment Resources and Development Committee of Parliament for consideration.

In addition, alleged failure of the Planning and Design Code to reflect State Planning Policies should be able to be challenged by interested parties by way of judicial review.