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Australia's property industry
Creating for Generations

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Dear Michael

Second Submission on Draft Planning and Design Code - Phase Three (Round 2)

This letter constitutes the official response from the Property Council of Australia to the recently revised Planning and Design Code – Phase 3 (**the Draft Code**). This submission has been compiled in consultation with our members who represent 75,000 people directly employed in the property sector in South Australia. We thank you for the opportunity to respond to provide feedback on the revised Draft Code.

On the 28th of February 2020 we made a submission the first publicly released version of Phase Three of the Draft Code. Following the release of the amended Draft Code it is clear that while some of our recommendations were implemented, many were not. Having reviewed the amended Draft Code, we make the following submissions.

In summary, we respectfully suggest the following amendments be made to the Draft Code –

1. Remove the Site Contamination referral process to the EPA in Part 9 of the Draft Code (and the Practice Direction for Site Contamination Assessment) and instead impose conditions on planning consents requiring sites to be suitable for use prior to occupation.

2. Reduce minimum site area requirements for dwellings in retirement villages to a level below that required for ordinary dwellings.

3. Amend the wording of the Transport, Access and Parking General Module to clarify the parking rates where a development comprises more than one development type.

4. Utilise the *Planning, Design and Infrastructure Regulations 2017* rather than the Restricted Development Tables to assign the SCAP as the relevant authority in circumstances where policy dictates that a certain category of developments should always be assessed by the SCAP. (i.e. shops).

5. Amend various referral triggers, purposes, development types etc. contained within Part 9 of the Draft Code.

Site Contamination Referrals to the EPA – Part 9

The referral to the EPA and the draft practice direction for Site Contamination Assessment are fundamentally flawed and should not be adopted as the means to address site contamination in the planning system in this State. The Draft Practice direction is not as dreadful as the first version, but it is still unacceptable.

We have made this point in detail before, but we make the point, emphatically, again.

The process of referral to the EPA regarding site contamination as proposed in the Draft Code will lead to an unnecessary overuse of consultants and an over-prescription of audits in the assessment of site contamination. This will add needless considerable cost and delay to a large number of developments.

The essence of the flaw is that the presence of site contamination almost never affects the question of whether or not a particular land use or development is appropriate. In the same way that the detailed engineering design of a building is not relevant to whether planning consent should be granted to a large office building, the assessment and remediation of contamination is largely a technical process. There is almost always an engineering solution to remediate or protect against any contamination, which is tailored to the circumstances of the site and the particular development (and the manner in which it is undertaken).

The referral process is a burdensome overreach because it requires an assessment of contamination as part of the planning process and does so in an incomplete and haphazard fashion. That is not to say that there should be no link between the planning approval process and site contamination assessment and remediation measures for the relevant development. However, it is a matter of applying suitable mechanisms at the appropriate point in the process. We have said that this should occur by condition.

Therefore, the process outlined within Part 9 of the Draft Code and the Draft Practice Direction for Site Contamination Assessment is inappropriate for the following reasons –

1. To begin, clause 5 of the draft Practice Direction assumes a set list of developments and has no practical means to apply to an existing or proposed use that is not contained in the Table. The clause does not provide any clear means to address undefined uses (which are quite different to "mixed uses").

2. The effect of clause 6 of the Practice Direction is to always require a preliminary site investigation (PSI) for sensitive use proposals on less sensitive land where a potentially

contaminating activity (PCA) may have occurred. This will require a PSI far more frequently than is necessary at great cost and lead to needless delay.

3. It is clear that in many circumstances a PSI would be plainly inappropriate and only cause additional cost and delay, while failing to provide any assistance to the assessment of an application.

4. Clause 7 of the Practice Direction has the effect that if contamination is determined to be present in certain circumstances then a detailed site investigation is required.

    4.1. Broadly, the triggers in clause 7(1)-(3) are adequate triggers for a requirement (at some appropriate future point) for more detailed investigation.

    4.2. The problem with clause 7 is that it too brings forward to within the development assessment process and before approval is given the requirement for a detailed site investigation. Such investigation will have absolutely no bearing whatsoever on whether or not the development is worthy of consent.

5. Clause 8 of the Practice Directions is inappropriate to the extent that it too requires certain work to be completed (leading to the "statement of site suitability") before approval is granted.

While the proposed site contamination referral process is inappropriate, it could be remedied by invoking the powers in section 42(2) and (3) and section 127 (1)(a) of the PDI Act to impose conditions. The system should not require any assessment of contamination prior to the grant of approval. Contamination is <u>not</u> a planning consideration, and should not be a precursor to a decision of land use suitability. Almost all contaminated sites can be developed, they simply need to be remediated. The nature and extent of contamination and the means of remediation are largely engineering and risk assessment matters unrelated to planning.

Instead, the list of circumstances as identified in the practice direction can form the basis for the imposition of a condition which provides that prior to occupation of the approved development, the proponent will obtain confirmation of the suitability of the site for that development. This condition could be imposed by the relevant authority in circumstances identified in the practice direction (such as a version of clause 6(1)). Some of the matters identified in the draft Practice Direction could also act as exemptions from that requirement (such as the circumstances in 7(1)-(3)).

Following those triggers, a condition could read *"prior to the issue of a [certificate of occupancy\certificate under section 51 of the Development Act/ certificate under section 138 of the PDI Act] the nature and extent of any site contamination must be assessed by a suitably qualified expert to ensure that the land is suitable for the development approved herein. Where remediation of contamination is required then prior to the issue of the [certificate of occupancy /certificate under section 138] the relevant remediation must be undertaken and a statement of site suitability must be provided to the relevant authority and the Environment Protection Authority."*

We would be happy to provide several suitably qualified and experienced members of the Property Council to promptly work with the Department and the EPA to refine a system that is workable.

Minimum site area for retirement villages – Design in Urban Areas

It is generally accepted that site areas for dwellings located within retirement villages can be less than those for dwellings that are not located within a retirement village. This is so for a variety of reasons, but includes that –

1. Dwellings with smaller floor areas require less maintenance and lower levels of personal mobility;

2. Open space is typically provided in a consolidated and communal arrangement, and is often supplemented by community leisure facilities where residents can socialise and be active outside of their home environment; and

3. There is less demand for on-site car parking.

While we are generally supportive of the performance outcomes for the Supported Accommodation and Retirement Facilities section of the Design in Urban Areas Provisions, the Draft Code has missed an opportunity to clearly include policies which will allow a relevant authority to depart from the minimum site area provisions which apply to more typical residential developments, and to allow smaller minimum site areas for retirement villages.

We strongly suggest that the Draft Code be amended to include a DTS/DPF provision calling for lower minimum site area requirements for retirement villages than tradition dwelling development. A failure to do so may reduce the commercial viability of retirement villages and greatly constrain their future development.

Car Parking Rates for Mixed Use Developments – Transport, Access and Parking

The wording of the guideline set out in the header of Table 1 is vague and will create confusion regarding the correct number of car parks required in instances of mixed use developments.

1. The current wording states that *"Where a development comprises more than one development type, then the overall car parking rate will be taken to be the sum of the car parking rates for each development type".*

2. We foresee that this wording will lead to instances where the planning authority will apply a far higher parking rate than is actually intended under the Draft Code.

3. For example, we foresee that in an 800m^2 mixed use development for office buildings and consulting rooms, a planning authority may incorrectly calculate car parking rates as the sum of those that would apply to an 800m^2 office building as well as 800m^2 of consulting rooms.

4. Amended wording for this provision could read "*Where a development comprises more than one development type, then the overall car parking rate will be taken to be the sum of the car parking rates applicable to each development type in proportion to the total area of the development site utilised by that development type"*

Use of Restricted Development Classification

It has been stated by the Department that the classification of a development as "Restricted Development" is not an indicator of land use suitability, but merely a tool to designate SCAP as the relevant authority for the assessment of particular applications. Even if that is the present intention, it is not the only legal effect of that designation.

The land use of "shop" is listed as a restricted development in almost 50% of Zones. This appears to be a measure designed to manage retail floor area and the State's retail hierarchy. This is an inappropriate use of the Restricted Development classification for the following reason –

1. Due to the ordinary meaning of the word "restricted", the inclusion of developments within this classification will be interpreted as an indicator that the land use is inappropriate in the location.

2. Classification as a Restricted Development results in a more onerous assessment process (i.e. the inclusion of the power to refuse to assess the development). If the purpose of the classification is merely to assign the SCAP as the relevant authority, this should not be done in a manner that imposes more onerous assessment conditions.

3. Classification as a Restricted Development provides third party representors with full appeal rights against a Planning Consent. As stated above, if the purpose of the classification is to assign the SCAP as the relevant authority, this should not be done in a manner that provides third party representors an appeal right which they otherwise would not have.

4. The designation of some land uses as Restricted Development for the purpose of ensuring the SCAP is the relevant authority has the potential to undermine confidence in the state planning system. For example, within the General Neighbourhood Zone an application for a shop will be processed as a Restricted Development, where as an application for a waste storage facility or a waste treatment plant will be assessed as a performance assessed development. While we understand that the use of the Restricted trigger in this instance may simply be to designate a particular authority to a class of applications, this is not likely to be understood by the broader public and may lead to community distrust of the State's planning system.

Where designation of a land use as a Restricted Development is for the purpose of designating the SCAP as the relevant authority, this could instead be achieved through the *Planning, Development and Infrastructure Regulations*. This would have the effect of designating the SCAP as the authority in desired instances, while avoiding the pitfalls of onerous assessment processes, broad appeal rights and community misunderstanding and distrust.

Amendments to Referral Provisions – Various Overlays

There are various referral provisions contained within the overlays which we suggest require amendment. Our concerns and recommended solutions are as below -

Affordable Housing

1. Both the “Class of Development” and the “Purpose of Referral” are far too vague.

2. The outcomes of this provision may be better achieved through the practice direction and condition making powers referred to above, in order to impose a standard condition.

Design

1. With respect, it is difficult to see how a Government architect (or any architect) would be sufficiently qualified and have the requisite expertise in matters of “inclusiveness”, “fit for purpose”, “promoting investment” or “environmentally responsible development”. These matters should be removed from the scope of the referral.

2. The purpose is generally poorly worded. It would be preferable for the purpose of the referral to simply refer to the high quality design principles laid out in section 14(c) of the Planning, Design and Infrastructure Act.

Hazards (Bushfire – High Risk)

1. The purpose of the Referral is poorly drafted and should amended to state "*to provide direction to the relevant authority to ensure safety of occupiers of development from bushfire*".

Major Urban Transport Routes (Similarly Non-stop Corridors, Traffic Generating Development and Urban Transport Routes)

1. The purpose of the referral is too broadly expressed and should be rewritten to state "*to provide direction to the relevant authority on the safe and efficient operation of major urban traffic routes\roads under the control of the Commissioner\non-stop corridors\traffic generating development\urban transport routes".*

2. The purpose of the referral should be amended by removing the word “management” and by referring to just “the road” (ie the road in respect of which the referral is triggered) not "all roads relevant".

Mount Lofty Ranges Catchment (Area One) & (Area Two)

1. The purpose of the referral is too vague and is not related to the relevant activities. It should be re-expressed to state "*to provide direction to the relevant authority on measures to prevent or mitigate harm from pollution from the development*".

State significant native vegetation areas

1. There is presently no provision in the Native Vegetation Act requiring the Native Vegetation Council or its delegate in DEW to issue permission (or grant one of the exemptions in the regulations) in conjunction with the grant of a development application to which referrals been made to the Native Vegetation Council.

    1.1. In the absence a legislative provision compelling the Native Vegetation Council to issue a matching approval under the Native Vegetation Act, then referral to the Native Vegetation Council should be for regard only.

2. The trigger for the referral relies on the achievement of deemed to satisfy elements. This is inappropriate given that the deemed to satisfy provisions are worded for a different use. If may instead be better to explicit state those requirements.

3. The purpose of the referral is too vague. It should be reworded as "*to provide direction [or regard] to the relevant authority clearance of native vegetation*".

4. Ideally the regulations under the Native Vegetation Act would be amended so that a proposal that has been the subject of referral to the Native Vegetation Council and is the subject of a power of direction must be granted an exemption under those regulations.

River Murray floodplain

1. The purpose of the EPA referral is unclear.

2. It is unclear whether the referral is for regard or direction.

State Heritage Area

1. The purpose is too vague and ought to be rewritten to state "*to provide direction to the relevant authority to prevent any adverse effect on the heritage values of the State Heritage area*".

2. There should be further definition (potentially in the administrative definitions section) which sets out what the relevant heritage values are. Alternatively, the heritage values could be more clearly described within an overlay written for each State Heritage area.

3. In the column headed "Classes of development" further amendments are needed.

4. Paragraph (a) is too vague as there is no definition of any "identified heritage value". This problem also arises in paragraph (c).

5. The phrase "like for like" in paragraph (e) (while understandable in general abstract terms) is ambiguous particularly in the context of detailed work to buildings. Further definition of this phrase would be beneficial in the administrative definitions.

6. The "like for like maintenance" reference in paragraph (e) should be amended to include "like-for-like maintenance, repair or replacement" to include more than mere maintenance.

State Heritage Places

1. The phrase "like-for-like maintenance" in the preamble (ii) and paragraph (e) should be amended to include "like-for-like maintenance, repair or replacement" to include more than mere maintenance.

2. Similarly to State Heritage areas, the purpose is vague and should be rewritten to state "*to provide direction to the relevant authority to prevent any adverse effect on the heritage values of the State Heritage Place*".

3. The notion of materially affecting the context of State Heritage Place (see paragraph (c)) is vague and inappropriate. The context of a place could mean anything from its historic context through to its physical context. At the least this should be reworded to state "*materially adversely affect the important historically significant context of the State Heritage Place*". It might even be possible to refer to the listing of the place on the State Heritage register to identify those heritage qualities that are nominated on the register.

4. The word "substantive" (in (c)) is somewhat vague and presumably included incorrectly in the place of “substantial”. The notion of involving substantial physical impact to the fabric of significant buildings is misconceived and should instead regard substantial work to a state heritage place. This provision should be reworded in that fashion.

5. The reference to new buildings visible from a public street that abuts a state heritage place in (d) is far too imprecise.

    5.1 It has the effect that any new building on the same road (even if it happens to be 2 km along the road) would be captured by this provision.

    5.2 Similarly it is in no way substantiated that simply because a new building will sit alongside a heritage building that referral is required. In some instances a heritage building has been listed because of its historic importance or its association with a figure of historical significance. In those instances referral to the State Heritage Minister for comment on architecture is completely irrelevant.

    5.3 Any such referral should therefore be limited strictly to State Heritage places that have been listed because of their design or aesthetic qualities under section 16 of the Heritage Places Act.

6. It is not apparent why land division in paragraph (g) must in all instances be referred. This provision should be limited to "*division of an allotment constituting or containing a state heritage place*".

7. The comments about paragraph (d) apply to an extent to paragraph (h) in that referral of anything on the same road again is far too broad. Surely it is only necessary for a referral for "… *fencing (a) forming part of the State Heritage Place or (b) on land containing or constituting a state heritage place which is visible*…"

8. Paragraph (i) is vague and should be rewritten. In any event, the removal of a tree is not development.

Water Protection Area

The purpose is inappropriate and should be edited to read "*direction to the relevant authority to prevent harm from pollution and waste arising from the development to the water protection area*."

For the above reasons, strongly recommend the Commission consider our submissions and make appropriate amendments in the final Planning and Design Code – Phase 3.

If you would like to discuss any aspect of this submission, please do not hesitate to contact me.

Yours sincerely

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