Local Government Association
of South Australia

Planning, Development and Infrastructure Bill 2015

Consultation Paper

This paper has been prepared for consultation purposes only and has not been endorsed by the LGA Board. The contents of this paper are not to be read or quoted as LGA policy.

What is the purpose of this paper?

1. In February 2013 the State government appointed an Expert Panel on Planning Reform to review the state planning legislation and system. The Expert Panel published *The Planning System We Want* (12 December 2014) as their final report. The State government published its response to the Expert Panel Report (*Transforming our Planning System*) in March 2015.

2. On 8 September 2015 the Planning, Development and Infrastructure Bill 2015 (**Bill**) was introduced into Parliament.

3. The purpose of this paper is to set out a high level analysis of the Bill to enable Councils to navigate the Bill and participate in the consultation being coordinated by the Local Government Association of South Australia (**LGA**).

4. This paper includes:

   (a) an overview of the contents of the Bill;

   (b) a discussion of key issues for local government; and

   (c) suggestions as to how you can be involved in the consultation on the Bill.

What is in the Bill?

5. The Bill provides an overarching framework for the new planning, development and infrastructure system in South Australia. The legislation is a coherent framework which should provide a planning and development system which is easier to administer than the current system.

6. The detail for the operation of this scheme will be set out in regulations under the Bill and in a variety of statutory instruments (including the Planning and Design Code). These documents will be developed over a 3 - 5 year implementation program.

7. The legislation provides for statutory and administrative instruments to have significant operational effect. Aside from the Planning and Design Code which will provide the detail against which development assessments occur, there are statutory and administrative instruments which will have the effect of either including or precluding Council involvement in a range of matters provided for under the Bill. See discussion below.

8. Attachment A sets out an outline of the Bill.

What are some key issues for local government?

Flexibility for regional planning (Division 3, Part 3)

9. The Bill provides a mechanism under which planning can occur on a regional basis. Joint planning arrangements are provided for in Division 3, Part 3 of the Bill. Clause 35 empowers the Minister to, after seeking or receiving the advice of the Commission, enter into a planning agreement relating to a specified area of the State with any of the following entities:

(a) any Council that has its area, or part of its area, within the specified area of the State;

(b) any other Minister who has requested to be a party to the agreement; and

(c) any other entity that has requested or agreed to be party to the agreement.

10. A planning agreement must include provisions that outline the purposes of the agreement and may provide for the constitution of a joint planning board. A planning agreement has a term of 10 years. A planning agreement may be varied between the parties to the agreement and may be terminated by agreement of the parties to the agreement or unilaterally by the Minister on prescribed grounds. Further details regarding the planning agreements will be set out in the regulations. The Chief Executive must maintain a register of planning agreements which would be published on the SA Planning Portal.

11. The Minister will establish joint planning boards, in connection with the commencement of a planning agreement, by publishing a notice in the *Gazette*. The Minister may by further notice in the *Gazette* abolish a joint planning board if the relevant planning agreement is terminated.

12. Clause 39 allows the joint planning board to establish a subsidiary. Clause 39(2) indicates that the establishment of a subsidiary is subject to obtaining the approval of the Minister to the conferral of corporate status under the Bill. Corporate status is conferred by clause 2, schedule 2 to the Bill. Schedule 2 provides provisions relevant to a subsidiary. These are of a similar nature to the provisions under Schedule 2 of the LG Act relating to council and regional subsidiaries

Decreased involvement of local government in planning and development
(clauses 56, 62, 77, 78, 81)

13. The scheme provided for by the Bill significantly curtails the existing role of Councils in relation to planning and development.

Council Members are ineligible for appointment to assessment panels

14. A substantial change in this respect is the exclusion of Council Members from assessment panels (clause 77(1)(d)). The Bill specifically provides that Council Members and members of State Parliament are ineligible to be members of assessment panels.

15. With respect to an assessment panel that has been appointed by a Council, the Minister has power to constitute a local assessment panel if the Minister determines, after investigation, that the assessment panel appointed by the Council has consistently failed to comply with the requirement under the Act. The Minister can then remove the Council assessment panel and substitute it with a local assessment panel appointed by the Minister.

Lack of Council and LGA consultation

16. There are many instances under the Bill where provision is not made for consultation with Councils. For example, there is no consultation on the establishment of sub-regions, the decision to initiate an infrastructure scheme and the funding arrangements under an infrastructure scheme (even where the Council is to contribute to this funding).

17. There are specific requirements for consultation with the LGA in respect of regulations dealing with aspects of the infrastructure frameworks (clauses 164, 167 and 168) and also Codes of Conduct under Schedule 3 to the Bill.

Removal of existing Council and LGA roles

18. There are other instances where Councils have an existing role in respect of the planning and development system which is being removed. Notably, Councils will not have a role in the development of statutory instruments including the state planning policies, regional plans, the Planning and Design Code and design standards (except as a member of a joint planning board). While Councils may initiate an amendment to these instruments with the approval of the Minister, Councils do not have the authority to initiate the preparation of these instruments.

19. The LGA's role in nominating appointments to the Development Assessment Commission has not been continued to the State Planning Commission. All members of the State Planning Commission will be appointed by the Minister.

20. The ability for the Planning and Design Code to be adapted and modified to a specific area is also reasonably limited. While a specific overlay over a zone will be permitted, it is limited to a variation of technical and numeric requirements, the variation of a requirement applying in a sub-zone with specific parameters and the adoption of options for development that are additional to those provided in a zone or sub-zone.

Involvement in development assessment scheme

21. The draft Bill proposes to establish a new development assessment scheme in relation to applications for development. The proposed scheme and how it will impact Councils will largely depend on the drafting of the Planning and Design Code, which will need to be closely monitored in the future. The Planning and Design Code will designate, for the most part, what category a development is to be assessed under. The Planning and Design Code will inform what category of development a development will be, who the relevant authority will be and in some cases, whether public notification of that development will or will not occur.

22. Diagrams setting out the assessment process are included as Attachment B.

23. Development that is categorised as restricted development will be assessed by the Commission (subject to further delegation), whereas previously assessment of non-complying development was undertaken by the Council in most instances. . Unless they are the relevant authority, the Council will have no say with respect to the assessment and ultimate decision of a restricted development. The Minister also has power to require that the Commission delegate to a designated committee of the Commission (clause 30).

24. A new provision which may impact Councils as a relevant authority is in relation to the time that a Council has to make a decision on a development application. If an application is not decided within the time prescribed, then the applicant can serve a deemed consent notice. This means that the application has received a deemed planning consent and the relevant authority must then grant planning consent within 10 business days. The time within which to make a decision will be prescribed by the regulations. It will be important for Councils to ensure that sufficient time has been provided to avoid a situation where a deemed consent occurs contrary to the Councils' wishes.

Accredited professionals

25. Accredited professionals, which will now include a building certifier, will be designated as a relevant authority by the Bill and in cases prescribed or organised by the regulations.

26. The duties of an accredited professional are similar to the duties that apply to a private certifier under the current legislative scheme. However, an additional duty applies which requires that an accredited professional must ensure that any development authorisation given by the accredited professional is consistent with any other development authorisation that has already been given in respect of the same proposal. This is an offence provision, so the accredited professional could be prosecuted for breaching this clause.

Liability for infrastructure funding (clauses 155 - 176)

27. Part 13 of the Bill provides infrastructure frameworks. An important component of the scheme established by this part of the Bill is funding arrangements for infrastructure. The Bill contemplates that Councils may be liable for contribution to the cost of essential infrastructure.

Broad definition of 'essential infrastructure'

28. Essential infrastructure is defined in clause 3 of the Bill broadly and includes infrastructure associated with the generation of electricity, the distribution or supply of electricity, gas or other forms of energy, water infrastructure or sewerage infrastructure, transport networks or facilities, causeways, bridges, embankments, coast protection works or facilities associated with sand replenishment, communications networks, health, education or community facilities, police, justice or emergency services facilities and other infrastructure, equipment, buildings, structures, works or facilities brought within the ambit of this definition by the Planning and Design Code or the regulations.

29. This definition goes beyond the types of infrastructure traditionally provided by Councils. There is a risk that Councils will be required to contribute to infrastructure costs which are currently met by the State or private sector.

Lack of consultation of funding arrangements

30. The funding liability of Councils will be provided for in a 'scheme' initiated by the Minister under Part 13 of the Bill.

31. The Minister may initiate a scheme either on his own volition or at the request of any other person or body. The scheme is initiated by the Minister preparing a draft outline of the scheme that includes information specified in clause 155(3) of the Bill. The outline must include a description of the funding arrangement for the scheme and, if a funding arrangement includes a proposal for the collection of contributions by Councils, specify the area or areas (**contribution areas**) in relation to which it is proposed that the contributions are to be imposed. The Minister must take reasonable steps to consult with any Council in a contribution area in respect of the outline.

32. A scheme coordinator will be appointed by the Chief Executive of the Department of Planning, Transport and Infrastructure. The scheme coordinator has various functions in relation to a proposed scheme. The details of the funding arrangement are determined by the scheme coordinator. Again, there is no obligation on the scheme coordinator to consult with any Council which may be affected by the funding arrangement.

33. On the basis of this report, the Minister decides whether or not to proceed with the scheme. There is no requirement on the Minister to consult with a Council affected by the scheme before making this decision.

34. The Bill provides that a funding arrangement takes effect on a scheme coming into operation through gazettal subject to the Governor consenting to the funding arrangement. Again, there is no obligation to consult with Councils prior to the gazettal of a scheme.

35. Consequently, Councils may be locked into a funding arrangement under which they are required to make contributions for infrastructure without any consultation except on the initial outline of the scheme prepared by the Minister.

Operation of a funding arrangement

36. Where a scheme requires Councils to make a contribution then the quantum of that contribution will be specified by the Minister in accordance with the requirements of the Bill in respect of each financial year.

37. The Bill provides mechanisms for the apportionment of contributions where multiple Councils are relevant to a contribution area. The Minister has discretion, however, to determine that there should be differentiating factors applied with respect to the calculation of the respective shares of constituent Councils taking into account any matters prescribed by regulation. Ultimately the share payable by each Council is determined by the Minister. There is a requirement on the Minister to consult with the relevant Councils on this apportionment.

38. A Council's share of the amount to be contributed by the constituent Councils is payable in approximately equal instalments on 30 September, 31 December, 31 March and 30 June in any year in which the contribution applies. The contribution is a debt owing to the Crown and interest will accrue on unpaid amounts.

Councils must impose a charge on land

39. The Bill provides a mechanism by which Councils will be reimbursed for the amounts contributed. As the mechanism provides for reimbursement, Councils will need to incur the upfront costs prior to acquiring the reimbursement.

40. Clause 167 of the Bill mandates that a Council must impose a charge on rateable land in the contribution area. A charge for this purpose must be consistent with the funding arrangement established under the Bill and any determination or direction of the Minister. This means that Councils will have no discretion as to the nature, imposition or quantum of the charge.

41. The Bill also provides that except to the extent that the contrary intention appears, Chapter 10 of the *Local Government Act 1999* applies to and in relation to a charge as if it were a separate rate under that Chapter. The Bill sets out various amendments to the provisions of Chapter 10 for this purpose.

Council may be able to recover its compliance costs

42. The Bill provides that the costs of the Council in complying with these requirements will be recoverable in accordance with the regulations. There is no indication, however, as to who will meet these costs.

A statutory fund is established for each

43. Statutory funds are established by the Bill for the receipt of contributions from Councils and other moneys relevant to a particular scheme. The funds will be applied towards the purpose of the relevant scheme in accordance with any direction or approval of the Treasurer.

44. If the fund is wound up by the Minister then the balance of the fund is transferred to the Planning Fund for another fund or account determined by the Treasurer. This means that contributions by Councils will not automatically be refunded to Councils.

A range of issues for Councils arise

45. Particular issues which arise for Councils in respect of financial liability under the funding arrangements include:

    (a) lack of consultation prior to the funding arrangement coming into effect so that Councils may not have the opportunity to inform the Minister of financial imperatives or limitations which may limit the ability of a Council to make the contribution;

    (b) there being no provision for Councils to seek relief from the Minister in circumstances where contributions are financially unmanageable for the Council (this may be an issue that arises over time rather than at the commencement of the funding arrangement);

    (c) the perception that the contribution is a local government tax, rather than being a state tax;

    (d) the potential for Councils to be required to contribute to the costs of infrastructure which traditionally have been funded by the private sector or the State Government, given the broad definition of 'essential infrastructure';

    (e) there being no mechanism within the legislation for the calculation of anticipated infrastructure costs over time;

    (f) there is no mechanism in the Bill for the capping of Council contributions to a proportion of the cost of the infrastructure or even capping the contributions at the total cost of the infrastructure;

    (g) with the increased incidence of rates non-payment, there is a financial exposure to Councils which ultimately can only be relieved by the sale of rateable property; and

    (h) the legislation does not provide any mechanism for Councils' input into the quality of the infrastructure works that are undertaken with their contributions.

Changes to consultation and third party appeal rights (clauses 44, 95 -108)

46. With the introduction of the Community Engagement Charter for public participation, public notification and third party appeal rights with respect to a development by development application has been substantially pared back. Councils may receive complaints (regardless of their involvement in the assessment decisions) from residents concerned at a lack of opportunity to comment on development.

47. Part 7 of the Bill and the clauses that deal with the categories of development set out in what circumstances public notification may occur. Under the proposed system, public notification is only available with respect to performance assessed development and restricted development. Public notification for performance assessed development is only given to the owner or occupier of adjacent land or to members of the public by notice placed on the relevant land. There is no longer a requirement to publish a notice in the newspaper. A person will then have an opportunity to make a representation to the relevant authority and the applicant will have an opportunity to respond to that representation. The Planning and Design Code may exclude specified classes of development from public notification on performance assessed development.

48. There are no third party appeal rights against a performance assessed category of development.

49. Public notification is also required with respect to an impact assessed development that is a restricted development. Again, notice of the development is provided to the owner or occupier of adjacent land. It is also available to the public generally by posting a notice on the relevant land. The Commission can also notify owners or occupiers of land which they determine would be directly affected to a significant degree by the development, as well as any other person of a prescribed class.

50. An appeal right is available to third parties against a decision on a restricted development.

51. Interestingly, the Commission can dispense with any public notification requirements for restricted development if the Commission determines that notification is unnecessary in the circumstances of the particular case.

52. The proposed public notification requirements with respect to development under the Bill significantly reduce opportunities for third parties to have a say with respect to a particular development.

53. As compared to the previous public notification rights, we note that the differences are as follows:

    (a) notification will now be by way of placing a notice on the relevant land which will naturally limit the number of representations to those in the vicinity of the development that have not been notified as adjacent land holders;

    (b) no public notification of a proposed development in a newspaper ;

    (c) the definition of adjacent land has been amended so that it means land that is no more than 40 metres from the other land;

    (d) third party appeal rights is only available to one category of development, namely restricted development (which is equivalent to a non-complying form of development);

    (e) the Commission has much broader powers to determine whether or not public notification will or will not occur;

    (f) the Planning and Design Code may exclude specified classes of development from public notification on performance assessed development.

On-line planning services and information (clauses 46-54)

54. It is proposed that the chief executive will establish and maintain an electronic database which is to be known as the SA Planning Database which will gain access to the state planning policies, the Planning Rules, any relevant land management agreements and any other instruments and documents as the chief executive things fit. As part of the SA planning portal, an on-line atlas and search facility will be provided that will allow a person to search across the website and the database.

55. It is also proposed that with respect to the cost of establishing or maintaining these on-line facilities, the chief executive may, with the approval of the Minister, require a Council to make a contribution on a periodic or other basis. The fee or charge sought by Council may be set on a differential basis or varied from time to time by the chief executive with the approval of the Minister. If the Council fails to comply with the requirement to pay the contribution then it will be recoverable by the chief executive as a debt.

How can you be involved in the consultation on the Bill?

Consultation sessions

The LGA has organised a series of consultation sessions to be held in the metropolitan and regional areas. The current schedule for these is available at https://www.lga.sa.gov.au/planning

In an LGA first, an interactive online forum for posting comments and questions about the Bill is available. Join the discussion at www.lga.sa.gov.au/planningforum

Additional resources

A copy of the Bill is available at http://www.legislation.sa.gov.au/listBills.aspx?key=P

Further information regarding the planning reform process is available on the Department of Planning, Transport and Infrastructure website at http://dpti.sa.gov.au/planning/planning_reform_paper_feb_2014

Copies of LGA planning reform resources and previous submissions can be found at www.lga.sa.gov.au/planning

Further information

Further information can be obtained by contacting LGA Director Planning & Development, Lisa Teburea on 8224 2068 or email lisa.teburea@lga.sa.gov.au .

Planning, Development and Infrastructure Bill 2015: Consultation paper Attachment A

Part 1 Preliminary

Commencement and interpretative provisions are set out in Part 1 of the Bill. The key concept of 'development' is defined in substantially the same manner as under the *Development Act 1993* excepting differences relating to local heritage and the concept of the existing use rights.

Change of land use may now be specified by the Planning and Design Code established under the Bill. The Bill now proposes that a change of use within a use class specified by the Planning and Design Code will not be regarded as a change in use of the land under the Act and will therefore not require development approval. It further provides that a minor change of use will not be regarded as a change of use of land under the Act. What will be considered as a minor change of use will be open to interpretation. We note that the revival of a use after a period of discontinuance will be regarded as a continuance of an existing use if that revival is a use allowed by the Planning and Design Code. No development authorisation will be required for a revival of that use.

Part 1 also provides for the Governor to proclaim planning regions for the State (including Greater Adelaide).

Part 2 Objects, planning principles and general responsibilities

Part 2 sets out the objects of the Bill. Any person or body involved in the administration of the Bill is required to have regard to and further the objects. In addition general duties are set out in clause 15 of the Bill that apply to any person or body that seeks to obtain an authorisation under the Bill, performs, exercises or discharges a function, power or duty under the Bill or takes the benefit of the Bill. Persons and bodies are required to act in a cooperative and constructive way, to be honest and open in interacting with other entities under the Bill and be prepared to find reasonable solutions to issues that affect other interested parties or third parties. An additional expectation on state and local government bodies to act cooperatively with any person or body involved in the administration of the Bill and to develop and implement policies that are consistent with the schemes established by the Bill is set out in clause 16.

Part 3 Administration

Part 3 provides for:

(a) the establishment of a State Planning Commission (**Commission**);

(b) planning agreements;

(c) joint planning boards;

(d) practice directions; and

(e) practice guidelines.

The Commission will be subject to the general control and direction of the Minister, except in relation to specific matters, being where the Commission:

(a) is making or required to make a recommendation;

(b) is providing or required to provide advice to the Minister;

(c) is required to give effect to an order of a court; or

(d) has discretion in relation to the granting of a development authorisation.

The members of the Commission are appointed by the Minister for a term not exceeding three years. The functions of the Commission are set out in clause 22 and relate to the Commission being the State's principal advisory and assessment body. Aside from this role, the Commission has a range of functions relating to supporting the Minister and other entities in the administration of the Bill. The Commission has all the powers of a natural person and may do anything necessary or convenient to be done in the performance of its functions.

The Minister is empowered to enter into a planning agreement relating to a specified area of the State with a relevant Council, any other Minister or any other entity that has requested or agreed to be party to the agreement. The planning agreement may provide for the constitution of a joint planning board.

The establishment of joint planning boards, however, occurs through the Minister publishing a notice in the Gazette. A joint planning board can, by agreement with the Council, operate in an area which takes in parts of Council areas.

Part 3 also enables the Commission to issue practice directions for the purposes of the Bill, including specifying procedural requirements and steps in connection with any matter arising under the Bill. The Commission may also (with the approval of the Minister) make practice guidelines with respect to the interpretation, use or application of the Planning Rules or the Building Rules.

Part 4 Community engagement and information sharing

The Bill provides that there must be a Community Engagement Charter for public participation with respect to the preparation or amendment of a statutory instrument (where provided by the Bill) and in other circumstances (where provided by the Bill). The Charter must not relate to the assessment of applications for development authorisations in circumstances where public participation is already prescribed by the Bill (ie the Charter will probably only apply to policy creation or amendments).

The Minister is responsible for establishing and maintaining the Charter. The process to prepare or amend the Charter is as follows:

(a) proposal is initiated by the Minister (or Commission);

(b) the Commission prepares a draft;

(c) the Commission consults (prescribed entities and the general public);

(d) interested persons can make representations;

(e) the Commission prepares a consultation report to the Minister;

(f) the Minister may adopt the Charter, alter the Charter or determine not to proceed with the Charter (ie the Minister has the ultimate say).

The principles to be taken into account in relation to the preparation of the Charter make it clear that public participation should occur at an early stage in any process and scale back when dealing with settled or advanced policy (the reference to policy reinforces that the Charter will probably only apply to

policy creation and amendments).

The Bill provides that a failure to comply with the Charter does not give rise to a right of action or invalidate any decision or process under the Bill.

Other clauses of Part 4 relate to the establishment of the SA planning portal, the SA planning database, an on-line atlas and search facility (and the preparation of standards and specifications that will apply to each of them) and an on-line system of planning services and processes for accessing documents from the SA planning portal, SA planning database and other on-line services. The Bill contemplates Councils contributing the cost of an electronic planning system.

Part 5 Statutory instruments

Part 5 provides for state planning policies, regional plans, the Planning and Design Code and Design Standards (**designated instruments**).

The state planning policies are to set the overarching goals or requirements for the planning system. State planning policies must be prepared by the Minister with respect to design quality, integrated planning and special legislative schemes (as defined in clause 3 of the Bill). A regional plan will be developed for each region, either by the Minister or a joint planning board constituted for an area. A regional plan must be consistent with the state planning policy.

The Planning and Design Code is the key planning instrument established under the Bill. The Code will set out the comprehensive set of policies, rules and classifications (including in relation to zones, sub-zones and overlays, as well as land use and land use classes) which may be selected and applied in the various parts of the State for the purposes of development assessment and related matters. The Code may designate a place of local heritage. The Code may also declare a tree or a stand of trees to be significant.

Part 5 also enables the Minister to prepare design standards that relate to the public realm or infrastructure for the purposes of the Bill. There is no role for Councils in initiating the preparation of a designated instrument unless the Council is involved in a joint planning board. Amendments to a designated instrument may however be initiated by a Council (among other persons and entities) with the approval of the Minister.

An amendment to the Planning and Design Code may be permitted by the Minister on the basis that the Council will conduct the process specified in the Bill to make that amendment. In particular, a Council can prepare a draft of the amendment. However, the Council must comply with certain requirements, in particular, it must comply with the community engagement charter for the purposes of consultation in relation to the proposal and must consult with any person or body specified by the Minister and any other requirements prescribed by the regulations. A report must then be prepared and provided to the Minister. The Minister may then either consult with the Commission. The Minister may then adopt the amendment, make alterations or determine whether or not the matter should proceed. The proposed amendment then must be published in the Government Gazette. The amendment does not have effect until it is published on the SA planning portal.

Part 5 of the Bill also enables the Minister to publish ministerial building standards that may have the effect of modifying the Building Code as it applies under the Bill.

It would be worth highlighting that provisions relating to local heritage and regulated & significant trees has remained largely unchanged in this Bill.

Part 6 Relevant authorities

Part 6 of the Bill designates relevant authorities and provides for the appointment of assessment panels. Relevant authorities for the purposes of the Bill include Councils and an assessment panel appointed by a Council (except where a planning agreement envisages the appointment of an assessment panel

by a joint planning board, or a regional assessment panel has been constituted or if a local assessment panel has been constituted by the Minister in substitution for an assessment panel appointed by Council.

Assessment panels may be established by joint planning boards, Councils or the Minister. A joint planning board or Council may appoint more than one assessment panel provided that it is clear which class of development each assessment panel is to assess. A Council Member or member of State Parliament is ineligible to be a member of an assessment panel. Only accredited professionals may be appointed to assessment panels. An 'accredited professional' is a person holding a qualification under clause 81.

Each assessment panel is to have an assessment manager. The assessment manager must be either an accredited professional or a person of a prescribed class. Assessment panels, as well as the Minister, the Commission, an assessment manager, an accredited professional and Councils are prescribed as relevant authorities and Part 6 sets out when each can act as a relevant authority in relation to a proposed development. Of particular note is the power of the Commission to be the relevant authority for restricted development (as classified by the Planning and Design Code) and for a proposed development that the Minister calls in.

As well as the ability to call in a proposed development that is of significance to the State, the Minister may also call in a proposed development where the Minister considers that an assessment panel appointed by a Council, a joint planning board or a regional assessment panel has failed to deal with an application within a reasonable period. There is also a broad power to call in where the Minister considers that it is necessary or appropriate for the proper assessment of the proposed development that the proposed development be assessed by the Commission.

The Minister may act as the relevant authority in relation to a proposed development that is classified as impact assessed development.

Part 7 Development assessment – general scheme

The assessment process is not too dissimilar to the existing Development Act process, in that a development is an approved development if and only if the relevant authority has assessed the development against planning consent, building consent or land division consent.

The main difference will be how each of the developments are assessed as determined by section 96 which sets out the categories of development. There are three types of categories that will now exist. Those categories will be:

(a) accepted development;

(b) code assessed development;

(c) impact assessed development.

Accepted development

Accepted development is development that falls within the category as classified by the Planning and Design Code and does not require planning consent, however, Building Rules consent will still be required.

Code assessed development

Code assessed development will be any development classified in the Design Code as deemed satisfied development or will default to code assessed development if it does not fall within the category of accepted development or within the category of impact assessed development.

Deemed to satisfy assessed development is similar to the existing 'complying' classification of development in the current legislative scheme, in that the development must be granted planning consent.

Performance assessed development

If a development cannot be assessed or fully assessed as a deemed to satisfy development then it becomes a performance assessed development to be assessed on its merits against the Planning and Design Code.

Impact assessed development

Impact assessed development is further divided into three parts:

(a) restricted development as classified by the Planning and Design Code;

(b) impact assessed development as classified by the regulations; or

(c) impact assessed development as declared by the Minister.

Restricted development

Restricted development is similar to the non-complying process under the current scheme, however, is different in some ways. Unless delegated further, only the Commission will be the relevant authority for the assessment of restricted development under the draft Bill. The Council has no power to concur with the restricted development or formal opportunity to comment on the application.

Limited public notification may be undertaken with respect to the restricted development. However, the Commission may dispense with the requirement if it considers that the giving of a notice is unnecessary in the circumstances. Appeal rights by a third party are permitted if a written representation has been received in relation to the proposed development.

Impact assessed development by Minister

The assessment undertaken under this category is similar to the major developments process by the Minister under the current legislative scheme.

This assessment is undertaken by the Minister where an Environmental Impact Statement (**EIS**) must be prepared in relation to the proposed development. The Minister has the ultimate decision as to whether the application is approved or not.

Building consent

The assessment against the Building Code and the provision of building consent process largely remains the same as the existing process under the Development Act.

There is now provision for the submission of what is called an 'outline consent'. If an outline consent has been granted and an application is made with respect to the same development, then the relevant authority must grant consent that has been contemplated by the outline consent. The practice directions will establish the circumstances where an outline consent may be granted.

There will continue to be referrals to other authorities and agencies similar to the current system under the Development Act. The details of the referral process will be as set out in the regulations. We note that a relevant authority no longer has the power of 'regard'. A referral agency only has the power of requiring concurrence or direction.

Deemed consent

The regulations will set out the time within which a relevant authority must make a decision on a development application. If a relevant authority does not decide an application within the time prescribed then an applicant can serve a deemed consent notice which means that upon receipt, the application has a deemed planning consent. The relevant authority must then grant the planning consent within 10 business days. If a deemed consent has been granted

and the relevant authority considers that the consent should have been refused then the relevant authority can apply to the court to quash the consent.

Alternatively, if the relevant authority does not decide an application within the time prescribed then, after 14 days notice, the applicant can apply to the court for an order requiring the relevant authority to make its determination.

Part 8 Development assessment – essential infrastructure

This Part establishes a new assessment pathway for a proponent to apply to the Commission for approval for the construction of essential infrastructure. This process takes the assessment of essential infrastructure outside of the standard development assessment process and streamlines the assessment of that essential infrastructure. We note that the Commission must give notice of the proposed development to the Council in accordance with the regulations. The Council then has an opportunity to report to the Commission on any matters contained in the notice and has four weeks within which to do so. If the Council is opposed to the proposed development, then a copy of the Council's report must be attached to the Commission's report. The report is then furnished to the Minister who may approve or refuse the development. There are no appeal rights against the decision of the Minister to approve or refuse .

Part 9 Crown development

This Part sets out the process for the assessment of Crown development. This is largely the same as the existing scheme.

Part 10 Development assessment and approval – related provisions

This Part is largely taken from the existing legislation and relates to, for example, the law governing proceedings under the Act. The requirement to upgrade buildings, urgent building works, urgent work in relation to trees, the provision of a land division certificate, access to land requirements and administrative powers in instances where a development is not completed.

Part 11 Building activity and use – special provisions

This Part is also quite similar to the existing legislative scheme and sets out provisions with respect to notification during building, construction of partywalls, rights of the building owner, classification of buildings, certificates of occupancy, temporary occupation and powers of building certifiers. It also sets out the administrative powers of authorised officers with respect to the issuing of emergency orders, swimming pool and building safety, fire safety, etc.

This Part also extends the liability provisions with respect to defective building work and how loss may be apportioned in terms of that building work.

Part 12 Mining – special provisions

The Minister administering the Mining Acts may (or must where required by regulation) refer applications for mining production elements and proposed statement of environmental objectives under the *Petroleum and Geothermal Energy Act 2000* to the Minister for Planning for advice. Provision is made for environmental impact statement process where the operations to be conducted in pursuance of a mining production tenement are of major social, economic or environmental importance.

Part 13 Infrastructure frameworks

The Minister may initiate a scheme for the provision of essential infrastructure and the undertaking of any related development on own initiative or at the request of any person or body interested in the provision or delivery of the infrastructure. 'Essential infrastructure' is defined in clause 3 and includes:

electricity, gas, energy, water, transport, coast protection works and other nominated infrastructure.

Process is initiated by development of an outline of scheme by the Minister. The Minister must take reasonable steps to consult with the Council within whose area the scheme proposed is to be undertaken.

The Minister then appoints a scheme coordinator (person, committee, precinct authority). The role of scheme coordinator includes scoping, costing, developing work program, consultation and developing funding arrangements. After receiving a report from the scheme coordinator, the Minister determines whether or not to proceed with the scheme. If proceeding, then the scheme is gazetted and the scheme coordinator has the delivery role, including administration of the funding arrangement.

In developing a scheme, consideration must be given to applying the principle that the funding of infrastructure should seek to distribute the costs over the lifetime of the infrastructure (or some other appropriate period).

On gazettal of the scheme, the funding arrangement takes effect subject to obtaining an approval of the Governor under section 160.

Clause 160(1)(iii) indicates that a funding arrangement may provide for the collection of contributions.

Clause 160(1)(c) indicates that a funding arrangement may provide for any charge or other amount to be imposed, collected, rebated or adjusted according to a determination of ESCOSA, or of some other specified person or body (including a determination that is made after the scheme has been approved). Clause 160(2) confers specific power on ESCOSA to make a determination for the purposes of clause 160(1).

The Bill provides for Council contributions in respect of the funding of infrastructure. The Bill is unclear as to the extent of Council liability, but does apply for the apportionment of liability between Councils. Councils will have the ability to seek reimbursement of their contributions from landowners as a charge against the land which the Bill mandates must be established by the Council (see discussion below at #). The statutory charge is in the nature of a special rate and Chapter 10 of the *Local Government Act 1999* applies to the charge with specific modifications.

The Minister is required to establish a fund for each scheme into which the Council contributions and other relevant moneys will be paid. The moneys in the fund must be applied towards the purposes of the relevant scheme in accordance with any directions or approvals of the Treasurer made or given after consultation with the Minister. If a fund is wound up, the balance is transferred to the Planning and Development Fund or another fund or account determined by the Treasurer (see discussion below at #).

Aside from providing for the funding of infrastructure, Part 13 of the Bill provides infrastructure powers to 'designated entities' for the purposes of infrastructure works for essential infrastructure. Councils are designated entities along with Ministers, agencies and instrumentalities of the Crown, declared designated entities and persons acting under a scheme (which could include private sector entities). The powers include entry onto land and the compulsory acquisition of land under the *Land Acquisition Act 1969*.

Part 14 Land management agreements

A designated authority (ie the Minister or another Minister or a Council) may enter into an agreement relating to the development, management, preservation or conservation of land with the owner of the land. The requirements regarding land management agreements of this nature are similar to the existing arrangements under the Development Act. A designated authority must have regard to the provisions of the Planning and Design Code and to any relevant development authorisation under the Bill and the principle that the entering into of an agreement under this section by the designated authority should not be used as a substitute to proceeding with an amendment to the Planning and Design Code under the Bill. Agreements must be registered and a register must be kept available for public inspection.

An agreement of this nature may include an indemnity from a specified form of liability or right of action, a waiver or exclusion of a specified form of liability

or right of action, an acknowledgement of liability, or a disclaimer, on the part of a party to the agreement (this is new). Further, an indemnity or the like may be expressed to extend to, or to be for the benefit of, a person or body who or which is not a party to the agreement. This might apply where the Council takes a position that it will not be liable for damage caused by flood, for example. It is contemplated that an agreement of this nature can be rescinded or amended and in such a case, the Registrar-General must enter a note of the rescission or amendment against the instrument of title.

This part also provides that a designated authority may enter into an agreement with a person who is applying for a development authorisation that will, in the event that the relevant development is approved, bind the person and any other person who has the benefit of the development authorisation and the owner of the relevant land. The parties must have regard to the provisions of the Planning and Design Code and the principle that the entering into of an agreement under this section by the designated authority should not be used as a substitute to proceeding with an amendment to the Planning and Design Code under the Bill. Agreements must be registered and a register must be kept for public inspection. A development to which an agreement relates cannot be commenced unless or until the agreement has been given effect under the Bill. Agreements of this nature can also be rescinded or amended and the Registrar-General is to make a note of the rescission or agreement against the relevant instrument of title or against the land. The relevant development approval may lapse in circumstances where an agreement of this nature does not have effect within the period described by the regulations.

Part 15 Funds and offset schemes

This Part establishes the Planning and Development Fund and how that Fund is to be managed and applied. It also carries across into this Part the open space contribution scheme and the Urban Trees Fund, both of which are carried across from the Development Act. A new provision in this Part is the establishment of an off-set scheme. Under this clause a person proposing to undertake development can make a contribution to the Fund. The moneys paid into the scheme can be used to support or facilitate development in the public interest or otherwise, planning or development initiatives that will further the objects of the Act or any other initiative or policy designated by the Planning and Design Code.

Part 16 Disputes, reviews and appeals

The Bill provides for the following rights of review and appeal:

(a) an owner of land designated as a place of local heritage value may appeal to the court against the decision to make the designation;

(b) an applicant for development authorisation may appeal to the court against any assessment, request, decision, direction or act of a relevant authority that is relevant to the determination of the application or a decision to refuse to grant the authorisation or the imposition of conditions in relation to the authorisation or the applicant may apply to the assessment panel for a review in circumstances where the application was made to an assessment manager appointed by an assessment panel acting as the relevant authority. If an applicant seeks a review from an assessment panel and the applicant is dissatisfied with the outcome of the review, the applicant may then go on to appeal to the court;

(c) a person who is entitled to be given notice of a decision in respect of a restricted development may appeal to the court (similar to a category 3 appeal);

(d) a person who applied to a Council for a certificate of occupancy or approval to occupy a building on a temporary basis may appeal to the court against the refusal;

(e) a person who is a party to a dispute relating to the Building Rules may apply to the court for a determination of the dispute;

(f) a person who can demonstrate an interest that is relevant to the determination of an application for a development authorisation (owner or occupier of the development site or of adjacent land) may apply to the court for a review as to the nature of the development (ie the category of

development – excepted, code assessed, impact assessed);

(g) a person who is authorised to bring proceedings before the court by the regulations.

Where an application is made to an assessment panel for a review (in circumstances where an assessment manager acted as a relevant authority), the application must be made within one month after the applicant receives notice of the decision.

The assessment panel may adopt such procedure as the assessment panel thinks fit and is not bound by the Rules of Evidence and may inform itself as it thinks fit.

The assessment panel may request from the assessment manager relevant documents and a report on any aspect of the subject matter of the review and the assessment manager must provide all requested documents and information.

The assessment panel may either affirm the decision or vary the decision or set aside the decision and substitute its own decision.

Applications to the court must be made within two months after the applicant receives notice of the decision to which the application relates (except for an appeal by a person who is entitled to be given a notice of a decision in respect of a development classified as a restricted development – such an appeal must be commenced within 15 business days after the date of the decision – note clause 103 subclause 7 refers to 15 development agreements which must be a drafting error).

This Part sets out the powers of the court in determining any matter (similar to existing powers).

This Part also deals with an initiation of proceedings to gain a commercial competitive advantage. If the business of a person or the business of an associate of a person other than the proponent of the development might be adversely affected by a particular development on account of competition in the same market, then the person will be taken to have a commercial competitive interest in any relevant proceedings that are related to that development. If a person commences any relevant proceedings or becomes a party to any relevant proceedings and the person has a commercial competitive interest in the proceedings then the person must disclose the commercial competitive interests. Further, if a person commences any relevant proceedings or becomes a party to any relevant proceedings and the person receives, in connection with those proceedings, direct or indirect financial assistance from a person who has a commercial competitive interest in the proceedings, then both the person who commenced the proceedings and the person who provided the financial assistance must disclose the commercial competitive interests. The Bill provides a mechanism for the proponent of the development to recover from the person an amount equal to the amount of any loss that can be reasonably assessed as having been suffered by the proponent as a result of delays to the development on account of the proceedings if the court is satisfied that the sole or predominant purpose in pursuing the proceedings was to delay or prevent a development in order to obtain a commercial benefit.

Part 17 Authorised officers

The Minister or a Council may appoint authorised officers (with prescribed qualifications). The requirements relating to the appointment of authorised officers appears to be similar to the existing regime.

This Part also prescribes the powers of authorised officers. This also appears to be similar to the existing regime.

Part 18 Enforcement

Designated authorities (the Commission, a Council, the South Australian Heritage Council or a person prescribed by the regulations) may issue enforcement notices. The power to issue enforcement notices appears to be similar to the existing regime provided for in section 84 of the Development

Act. For example, there is a 12 month limitation period, 14 days within which to appeal and stepping rights for non-compliance.

Designated authorities and other persons may apply to the court for an order to remedy or restrain a breach of the Bill or the Repeals Act. The power to make applications to the court appears to be similar to section 85 of the Development Act. For example, there is a three year limitation period and stepping rights for non-compliance. The orders that the court can make are also similar.

This Part describes offences under the Bill (these are similar to the existing offences under the Development Act).

The Minister or the DPP or the chief executive or the Commission or the Commissioner for Consumer Affairs or an authorised officer or a Council or the South Australian and Heritage Council or a person acting with the authorisation of the Attorney-General may commence proceedings for an offence against the Bill (three year limitation period).

If a body corporate is guilty of a prescribed offence, each director and chief executive officer are deemed to be guilty of an offence and liable to the same penalty in certain circumstances. For all other offences against the Bill, directors and chief executive officers may be guilty and liable to the same penalty, provided the prosecution proves knowledge.

In any proceedings for an offence against the Bill, the court may, in addition to any penalty that it may impose, make orders to rectify the breach. Where a person is found guilty of an offence against the Bill, the court may also make adverse publicity orders requiring the offender to publicise the offence, its consequences, the penalty imposed and any other related matter. The court may also require the offender to notify the specified person or specified class of persons of the offence, its consequences, the penalty imposed and any other related matter. The Commission is responsible for ensuring compliance with adverse publicity orders.

The Commission (and only the Commission) may, as an alternative to criminal proceedings, recover by negotiation of an application to the court an amount as a civil penalty in circumstances where the Commission is satisfied that a person has committed an offence. The Commission can only do so if the relevant offence does not require proof of intention or some other state of mind. The Commission must consider whether to initiate proceedings for an offence or take action to recover a civil penalty having regard to the seriousness of the contravention, the previous record of the offender and any other relevant factors. This path sets out the process for making the application to the court. The Commission must provide notice before making an application to the court and a person may elect to be prosecuted for the contravention.

This Part provides for a number of other matters relevant to enforcement including the implementation of conduct or state of mind of an officer or employee, make good orders in relation to tree damaging activities, the recovery of economic benefit by the Commission and enforceable voluntary undertakings. Written undertakings are to be made to the chief executive and a person must not contravene an undertaking made by the person (criminal offence). The chief executive may apply to the court for an enforcement of the undertaking.

Part 19 Regulation of advertisements

This Part relates to the regulation of advertisements. The Commission or a Council may serve a notice ordering a person to remove or obliterate an advertisement or advertising hoarding that disfigures the natural beauty of a locality or otherwise detracts from the amenity of a locality or is contrary to the character desired for a locality under the Planning and Design Code. A notice cannot be served in relation to an advertisement authorised under other specified Acts or an advertisement for the sale or lease of land or an advertisement of a prescribed class. There are prescribed stepping rights for non-compliance. Non-compliance is an offence. A person may appeal against a notice within one month after service.

Part 20 Miscellaneous

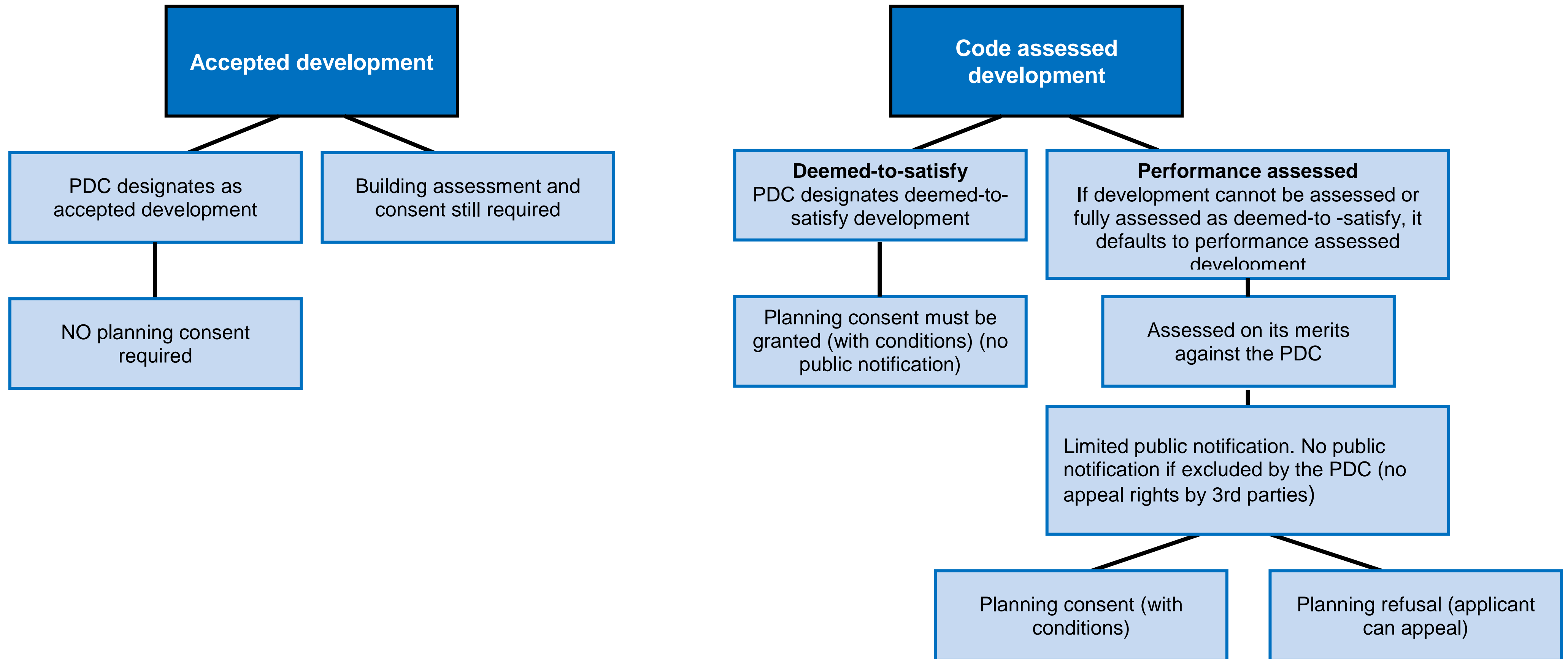
This Part sets out a number of miscellaneous provisions including the constitution of the Environment, Resources and Development Court, an exemption from liability for the Minister, the Commission, a relevant authority, a Council or other authority under the Bill or an authorised officer or a building certifier, insurance requirements for prescribed classes of persons, obtaining professional advice in relation to certain matters, the use of confidential information, the accreditation of building products, copyright issues, charges on land, registering authorities to note transfer, approvals by the Minister or the Treasurer, compulsory acquisition of land and making regulations.

Of particular note is the express authority for a designated entity (the Minister, the Commission or the chief executive) to publish any document, instrument or material in which copyright may exist. Further, a designated authority may refuse to accept any document, instrument or material unless or until there is an agreement in place relating to any copyright that may exist or where the designated entity considers that the issue of copyright has not been dealt with appropriately or adequately.

Also of particular note is the ability for the Minister to acquire land where the Minister considers that the acquisition of land is reasonably necessary for the operation or implementation of the Planning and Design Code or for the implementation of a development authorisation of the prescribed class or an order to further the objects of the Bill. In such circumstances the Land Acquisition Act applies.

Planning, Development and Infrastructure Bill 2015

Attachment B: Categories of development



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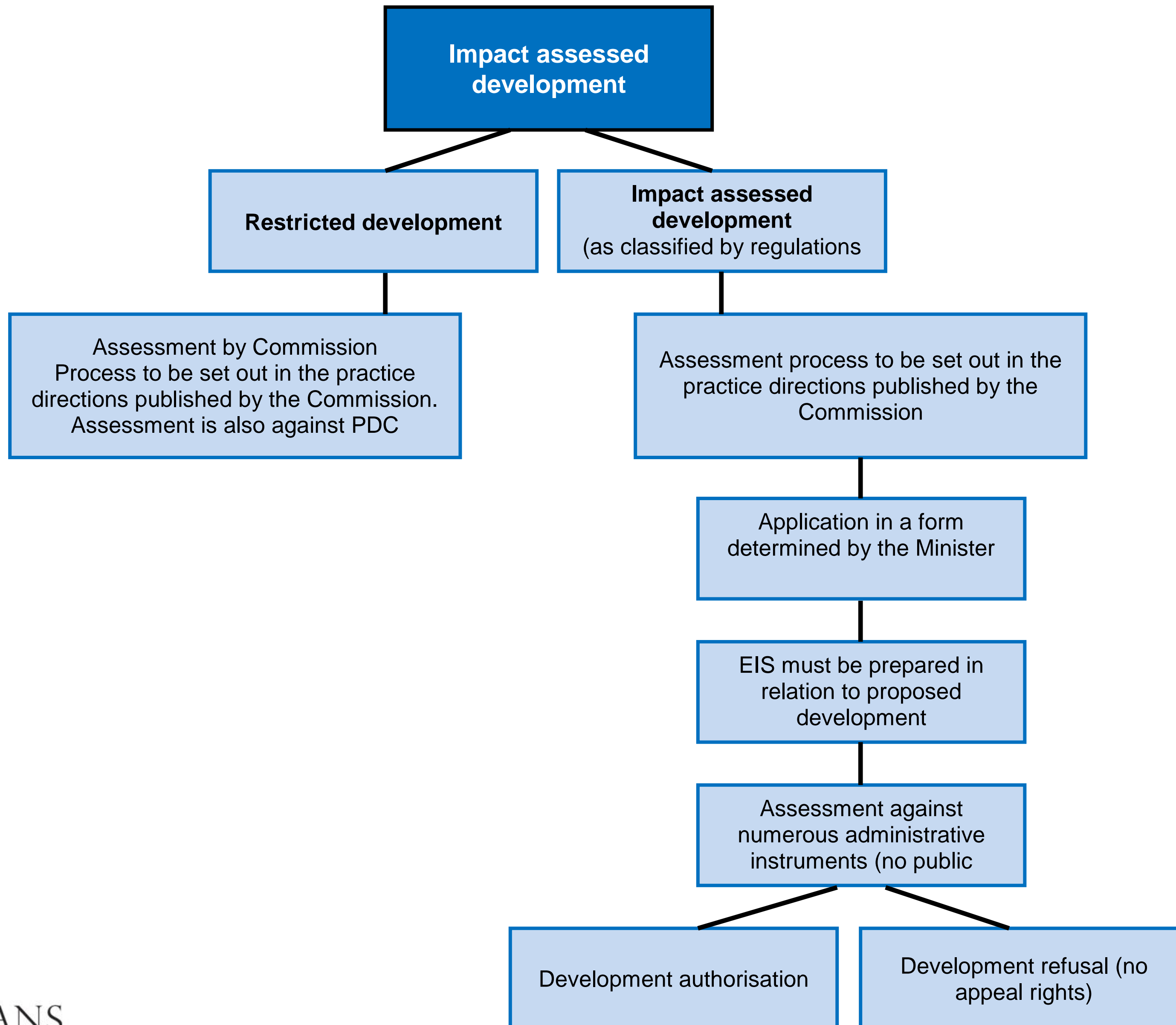

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