



**Local Government Association
of South Australia**

Planning, Development and Infrastructure Bill 2015

LGA Submission



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Introduction

The Local Government Association has been a strong supporter of the planning reform debate for many years and was an active contributor to the work of the Expert Panel on Planning Reform. The Association has worked with its members over the past 2 years through several series of workshops, discussion papers, research projects, working groups and surveys. The overarching clear conclusion was that councils want a better planning system for their communities and South Australia.

Many local communities are concerned about high unemployment, declining or stagnant populations and falling investment. Local Government is a natural leader in local economic development because councils know their local business communities; workforce and comparative advantages better than anyone else. Councils are well positioned to work with local stakeholders to achieve better outcomes for their respective communities and achieve greater economic prosperity.

The Local Government Association acknowledges the important role that the planning system plays in stimulating the construction sector and facilitating a strong and supportive business environment. While Local Government is contributing to a stronger South Australian economy, we don't want our prosperity to be achieved at the expense of other community values that make our State great. We need a planning system that balances our economic goals with the protection and enhancement of our attractive, resilient and sustainable communities.

The Planning, Development and Infrastructure Bill introduced in the House of Assembly on 8 September outlines the framework for a new planning system in South Australia. The LGA had an expectation that it would have a four week period to comment on the details provided within this Bill. Subsequently, and unfortunately it has been introduced and may be debated before the conclusion of our consultation. This submission reflects the views that have been expressed by LGA Members and independent advice received on this important and complex reform.

Executive Summary

As drafted, the Bill significantly curtails the role of communities in the planning system and will not be supported by the LGA.

In formulating a response on the Planning, Development and Infrastructure Bill, the LGA has held ten consultation sessions across the State, which have been attended by approximately two hundred and twenty council members and employees. The sessions were delivered in partnership with Wallmans Lawyers, who also prepared a consultation paper to articulate the Bill and the key considerations for Local Government. This paper is available at www.lga.sa.gov.au/planning

This submission outlines the key issues that have been expressed by LGA members at the consultation sessions and through previous and current submissions provided to Councils. There are four parts to the submission;

1. a detailed summary of the LGA's position on key issues;

2. an assessment of the Planning, Development & Infrastructure Bill against the LGA's 13 Planning Reform objectives;
3. a 'clause by clause' analysis of the Bill, including the specific amendments that are being sought; and
4. a briefing paper commissioned from Wallmans Lawyers on the proposed Infrastructure Scheme and its implications for Local Government.

The consultation undertaken on the Bill reinforces a key message that the LGA has been expressing for many years; that is, the current system is complex and inefficient and is not meeting both the expectations of South Australia and its communities.

The Planning, Development and Infrastructure Bill 2015 outlines the framework for a new planning system. The detail about how this system will operate will be prescribed in Regulations, statutory instruments and the Community Engagement Charter, which are yet to be drafted. Therefore, the LGA and other interested parties are faced with the difficult challenge of forming a view on this Bill in the absence of a complete model.

The key issues that are currently of concern to the LGA are summarised below:

- the role and influence of local communities to shape the future of their community will be significantly reduced, but the expectation for Councils and rate payers to fund the planning system remains;
- without a significant funding and resource commitment from the State Government, Councils are concerned about the capacity to implement significant reforms and realise the benefits of a better planning system;
- there are many instances where the Bill does not require consultation with the LGA or Councils; specifically, the appointment of members to the Commission, the establishment of sub-regions, the establishment of an environment and food production area, the development of the Community Engagement Charter, and the detailed scoping and funding arrangements for an infrastructure scheme;
- there is also no prescribed role for individual Councils or communities in the preparation of important strategic and policy documents such as State Policies, Regional Plans and the Planning and Design Code;
- it is not clear from the Bill whether the Minister can enter into a planning agreement and initiate a joint planning board that does not involve a Council. There is concern about local communities being locked out through agreements between the Minister and the private sector;
- a state-wide Planning and Design Code is likely to result in the loss of local policy that has been developed with communities over many years. There will be less local content in the policies that shape communities;
- a substantial amount of work needs to be done to work through the detail of the proposed infrastructure scheme. As drafted, Councils and ratepayers could end up paying far more than their fair share;
- Council members will be ineligible for assessment panel membership. These panels will consequently have no democratic connection to the local community;
- community members will be distanced from decision makers by more centralised assessment of contentious developments by the Commission;
- there is less chance for community to have a say on developments that impact them and it is not clear how greater engagement in policy will be achieved to justify the scaling back of public notification at the assessment stage; and

- Councils should not have a role in determining whether a person can access private property. This should remain as a civil matter.

A range of other 'mechanical' issues that impact on Local Government have been highlighted such as- deemed consents, limitations on conditions, checks and balances for private certifiers, change in land use exemptions, and accreditation of professionals.

There is potential for the views expressed in this submission to change, subject to the provision of more detail and any amendments that may arise as a result of the parliamentary process.

LGA Position on Key Issues

Objects of the Act

A primary object of the Planning, Development and Infrastructure Act would be to support and enhance prosperity by promoting and facilitating development. The State's environmental and social aspirations do not feature in the objects of the Act, creating the impression that they are not important considerations in the planning processes. The LGA believes that South Australian communities want a system that strikes a balance between competing demands for the use of land and this should be reflected in the objects of the Act.

State Planning Commission

The LGA has historically provided qualified support for the concept of a State Planning Commission. A key role of the Commission will be to achieve better integration of plans and processes across the State Government, which is currently a barrier for many administrators and users of the system, including Councils.

However the LGA cannot provide its full support to the Commission proposal in its current form given the outstanding concerns about removing the role for the LGA in the appointment of a member, the 'advisory' rather than a decision making role of the Commission and the lack of oversight in the relationship between the Minister and the Commission, which could be argued is not truly independent.

If a Commission was to be established, a contemporary understanding of the role, functions and operation that Local Government would have is a pertinent skill set that must be reflected in the Commission's membership. Local government rejects the removal of the role of the LGA in the appointment of members to the Commission.

The Expert Panel conveyed the view that the introduction of the Commission could refocus the role of the Minister towards state level strategy and policy and away from the administration of the system. While it is acknowledged that further roles could be delegated to the Commission, the LGA considers that its functions should be conferred by statute to provide long-term certainty about what the Commission will do and avoid creating another 'layer' in the decision making chain .

Joint Planning Arrangements

The flexible arrangements for collaboration between state and local government at a regional level are a welcome inclusion in the Bill. Many Councils have already expressed an interest in pursuing the regional planning agreements that are envisaged by the Bill.

One area of particular concern to Councils is that the Bill is unclear as to whether the Minister may enter into a planning agreement with any entity (whether or not an agency or instrumentality of the Crown) that does not include a Council. The most concerning scenario is that a Minister could enter into a planning agreement with a private sector body and establish a regional authority that freezes out the Council and the local community.

Community Engagement

The Government has expressed that engagement with communities will be a central feature of the new planning system. The Minister's second reading speech noted that:

'a new engagement charter will set benchmarks for meaningfully and genuinely engaging communities as ideas are being formed and tested, giving people genuine influence in the process of developing the plans and policies that will shape their communities.'

There is little argument that bringing people into the planning debate at the earliest stages of the process will provide them with the greatest opportunity to achieve influence. However, Councils have invested significant resources in innovative and contemporary place-based engagement strategies to draw communities into discussion about planning policy. These strategies go well above and beyond the statutory requirements and in the majority of circumstances, the return is not commensurate with the effort because the broader community does not interact with the planning system until it directly affects them as either an applicant or a representor. It is not clear to the LGA how a Charter will resolve this fundamental issue and justify the scaling back of notification at the assessment stage.

The LGA is concerned that it may take many years to focus the attention of the broader community towards strategy and policy, and in the meantime there will be a spike in the number of complaints received by Councils about un-notified developments.

It is noted that the Bill makes no provision for community consultation in the preparation of a statutory instrument. In the absence of the actual Charter, it would provide a greater level of comfort if a requirement for consultation was incorporated within the Bill.

It is also noted that the Bill does not provide for consultation with Local Government in the development, review or amendment of the Charter. While this may be intended, the role of Local Government must be reflected in the Bill given the sectors expertise and experience in engaging with communities on a range of matters.

Online Planning

Local Government recognises the major advantages that an online planning system would bring in terms of the accessibility and expediency of the system. Local Government also recognises the substantial establishment costs that will be incurred.

Certainty about the funding of the digital planning system needs to be confirmed and a costing model developed that equitably apportions funding responsibilities and cost recovery strategies over time. Without a significant state investment in an e-planning system, many of the reforms outlined in the Bill will not be achieved and the economic benefit will not be realised.

While Local Government is prepared to pay its fair share for a planning system that serves the interests of communities, the Bill creates a head power for the Chief Executive to send a bill to Councils at any time, for any amount to pay for the e-planning system. Local Government will not support any reform that results in cost shifting and an unequitable financial burden of its members.

The LGA is seeking a commitment from the Government to work with Local Government on the costing, development and delivery of an e-planning model to ensure that the financial and practical implications for Councils are limited.

Planning and Design Code

The replacement of Council Development Plans with a state-wide Planning and Design Code is a reform that has drawn much discussion among LGA members. This discussion has been frustrated by the fact that the form, content and process for developing the Code is unknown at this point.

The principal concern relates to how much local content will be included in a new Code. Councils have worked with communities and gained approval from the Minister over many years to shape the content of existing Development Plans and the Bill provides the potential for this local content to be unilaterally wiped out.

The Bill provides limited scope for Councils (and a raft of other bodies) to amend the Planning and Design Code to recognise 'unique character attributes'. The LGA acknowledges that there must be sensible limits applied to planning policy variations and that the current volume of policies may have tipped the scales in terms of what is navigable and manageable. However, much more needs to be understood about the Government's intention regarding policy variations, as the LGA and its members will not support reforms that remove the ability of Councils and communities to enhance what is genuinely unique or special about their area.

A much greater role for Councils in the determination of local policy content is envisaged.

The centralisation of planning policy also presents a resourcing challenge for the Government. As the Planning and Design Code is a keystone reform, it is critical that it be well executed. Despite the capabilities of existing staff, the LGA is extremely concerned that the existing resourcing issue currently experienced will further be exacerbated and wont be able to deliver a world class planning policy instrument as expected.

Development Assessment Panels

The removal of elected members from assessment panels is unnecessary, does not meet community expectations and will not achieve any actual difference in decision making.

Key points about Development Assessment Panels are summarised below:

- since 2007, the majority of members on individual Council DAPs have been independent professionals, creating distance between planning decisions and the influence of local politics;
- no other state in Australia excludes elected members from the assessment process entirely;
- some of the State's most prominent planning and development experts currently preside over or are members of Council Development Assessment Panels;
- all DAP members, including Council Members must comply with the Minister's Code of Conduct. The LGA would support a review of this Code to ensure that a high degree of individual accountability applies to the conduct of this important role;
- the Independent Commission Against Corruption has not reported any systemic issues of misconduct or corruption in the current DAP structure;
- on average, approximately 90% of development applications are determined by Council staff, with no role for the Development Assessment Panel;
- applications that are presented to the Panel have either drawn community objection or do not comply with the zoning rules that have been approved by the Minister;
- removing local elected members would result in a local democratic deficit and elevate local planning disputes to state politics; and
- fully independent assessment panels are likely to result in higher costs, which would be passed on to the sector.

The LGA has commissioned independent research and surveys that support an ongoing role for elected members on assessment panels. The findings of these studies can be found at www.lga.sa.gov.au/planning

The LGA seeks an amendment to provide an ongoing role for suitably trained elected members on assessment panels at a local and regional level.

The proposed role for the Minister to dismiss and reappoint a local assessment panel is heavy handed and unnecessary. Councils are capable of managing the assessment of the bodies they appoint and if given the necessary authority can dismiss and reappoint a panel if required.

Private Certification

It is frustrating to the Local Government sector that an expanded private certification scheme is being contemplated despite the ongoing issues with the existing scheme. The Government committed to a review of private certification of Residential Code developments after the first 12 months of the scheme's operation. There is no evidence that this review has occurred. A survey of Councils undertaken by the LGA indicated that a number of Councils have experienced an unacceptable number of instances where Res Code developments have been certified in areas where the Code does not apply, or the development did not satisfy the Res Code criteria. Examples were also provided of private certifiers exercising considerable discretion in the judgement of a 'minor' departure from the Res Code criteria.

This is not just a matter of principle for Councils. There are serious practical consequences. Considerable amounts of time and resources are invested in rectifying the mistakes made by

private certifiers on minor matters, resulting in delays for more significant development matters.

Despite these obvious and predictable issues, the Government is intent on an expanded role for private certifiers.

Assessment of Planning Applications

It is noted that the proposed categories of development are not dissimilar to the existing assessment streams. However, Local Government has a keen interest in the types of development that will be dealt with under each category and this level of detail has not been provided. The LGA is seeking a commitment that the State Government will work with Local Government on developing the detail of the Code and any Regulations that deal with assessment matters.

Notwithstanding that the detail of assessment categories have not been resolved, the fact sheets prepared by the Department of Planning, Transport and infrastructure (DPTI) suggest that planning staff engaged by Councils will only deal with generally minor matters, which will also be available to private certifiers. Council planning staff are best placed to deal with planning and development applications. They understand the impacts an application may have on a community, they are acutely aware of the issues within the locality and understand the implications of the decisions they make. To render this knowledge and skillset to deal with minor applications is a significant waste of the talents and resources available within Local Government and is likely to see an increase in the proportion of applications that must be presented to an assessment panel.

It is also noted that Councils will no longer have any role in the assessment of restricted development. Again, this reform does not take into account the demonstrated capacity for Local Government to deal with complex and contentious planning matters and the expectations of the community.

The LGA submits that the assessment of all applications (other than genuinely significant major projects) should, by default, be dealt with by council staff or appointed bodies and only be called in by another assessment body if there is verified evidence that the relevant Council has systematically failed to satisfy prescribed performance standards.

The concept of a deemed consent for anything other than accepted or 'deemed to satisfy' categories of development is not supported. The risks of issues arising from the practical application of this Clause exceed any potential benefits.

Access to Land

The Bill provides a role for Councils in granting a permit to access adjoining land for the purposes of carrying out approved construction works. The Council may be asked to issue such permits even if the adjoining owner has objected and refused entry.

This is a civil matter and Councils have objected to receiving these powers. The LGA is seeking for the related Clauses to be removed.

Infrastructure Funding Scheme

For a number of years, the LGA has been working with its members, the State Government and the development industry to move South Australia closer to a more sophisticated infrastructure funding model. It is encouraging that the State Government is intent on addressing this longstanding issue and has entered its own model into the policy debate.

However, the LGA is not encouraged by the limited detail provided and the absence of any consultation with Local Government on this matter prior to the introduction of the Bill. It is noted that the Regulatory Impact Statement prepared for the Bill does not consider the proposed infrastructure framework and there is little public evidence of any detailed modelling or comparison studies to demonstrate that this is the best option for South Australia.

Infrastructure funding is an important reform, and a complicated one. While the concept of a framework built upon the principles of equity, apportionment and nexus is one of support and the practical operation of the proposed infrastructure scheme is a matter of great interest to LGA members. Given the limited time frame provided to form a view, the LGA engaged Wallmans Lawyers to provide detailed advice on the implications of the proposed scheme on Councils. Their review identified a number of key issues of concern to the LGA:

- there are limited opportunities for Councils to be involved in the development of infrastructure schemes or funding arrangements;
- the funding arrangements under Part 13 of the Bill enable the imposition of liability for the cost of a broad range of infrastructure on Councils;
- a Council may need to raise its contribution to infrastructure costs by entering into commercial financing arrangements;
- a Council must impose a charge on rateable land with respect to the reimbursement of the Council's contribution (infrastructure charge);
- despite the infrastructure charge being a charge on rateable land mandated by the State, the infrastructure charge is likely to be perceived to be a Council tax rather than a State tax;
- Councils will be financially exposed to the extent that the infrastructure charge does not recover the amount of debt funding secured by the Council to pay its contribution of the infrastructure costs;
- proposed consequential amendments to the Local Government Act 1999 (LG Act) will subordinate Council regulation of roads and activities on roads to development authorisations granted under the Bill; and
- aspects of Part 13 of the Bill require amendment to correct errors, provide clarity and rationalise the regulatory framework under Part 13 with other systems of regulation relating to infrastructure.

A copy of the paper prepared by Wallmans Lawyers on behalf of the LGA has been provided as an attachment to this submission. The LGA welcomes the opportunity to work with the Government in the first instance to address the issues that have been raised in the paper and by LGA members. However, given the LGA did not receive an advance copy of the Bill, it has not been possible in the time provided for the LGA to prepare a detailed list of specific amendments required to overcome our concerns.

Role of Local Government

The Planning, Development and Infrastructure Bill is a move towards a centralised planning system, with a less significant role for Local Government. An independent community survey commissioned by the LGA suggests that this is not what communities want. The survey (report available at www.lga.sa.gov.au/planning) confirmed that the majority of community members consider Councils to be best placed to manage planning processes. There is also evidence that the community wants State and Local Government to work in partnership, this is not what the Bill delivers.

This submission, including the clause by clause analysis points to those areas where Local Government has a stronger role to play.

As drafted, the Bill significantly curtails the role of communities in the planning system and will not be supported by the LGA.

Appendix 1- Assessment of the Bill against LGA Objectives

Reform Objective	Indicator	Comments
Accessible		
Policies and processes are clear and consistent, resulting in equity, fairness and certainty.		The Planning and Development Code intends to create policy and process consistency, creating greater certainty for straightforward developments. However the Code will only achieve this objective if it is well resourced and developed in partnership with Local Government. There are many instances in the Bill where the policies in the Planning and Development Code can be departed from or dispensed with altogether. This limits the achievement of equity and fairness.
Opportunities for public participation in the planning system are clear, with an emphasis on influencing outcomes at the strategic planning and policy development stages.		The Community Engagement Charter intends to weight engagement towards the strategy and policy development stages of the planning process. However, as the Charter has not been drafted, it is not clear how the Government intends to draw people into the policy debate (noting that it is notoriously difficult). Further, it is noted that the Bill does not specifically call for community engagement in the development of statutory instruments. The level of engagement provided for in the assessment process is unlikely to meet community expectations.
The pathways to development are clear and uncomplicated, with the level of assessment required matched to the level of risk of impact associated with a development.		In general, the proposed pathways are a positive reform. However, the assignment of different types of development to the different pathways will occur through Regulations and the Planning & Design Code, which are yet to be drafted. There are likely to be practical issues around the division of elements of a development into different categories. This will create confusion and uncertainty about what is being assessed and what has been approved.
The appeal and review process is timely and cost effective and compliance and procedural matters are principally resolved through a non-judicial process.		The proposed review process is likely to lead to cheaper and quicker appeal processes. It is noted, however, that third parties would be limited to 'restricted' development.

<u>Integrated</u>		
Planning policies and processes are underpinned by triple bottom line thinking, which balances the State's economic, environmental and social interests.		The Objects of the Act are strongly weighted towards economic development. The Planning & Development Code is yet to be drafted, however the 'principles of good planning' upon which it will be based are broad and comprehensive.
Local Government works with the State Government to develop and implement an overarching planning strategy and to ensure that all major state and local policy documents are consistent with the strategy and with each other.		The option to enter into a flexible planning agreement and establish a regional planning board is an important step towards better consistency and integration between State and Local Government.
The system promotes excellence in urban and built form which improves the health and wellbeing of communities. This is underpinned by decision makers having a high level of planning and design competency.		There are proposals to better incorporate design into statutory instruments (such as the Planning & Design Code) and certain applications may undergo a design review process. Accreditation of professionals will be required to undertake certain functions
<u>Accountable</u>		
Decision making at all stages of planning is transparent and decision makers are held accountable for their performance by introducing fair and reasonable performance measures		The Bill proposes that performance targets and monitoring will be introduced. However, it is not clear how the performance of the Commission will be monitored.
The development assessment process is robust but is more efficient through the removal of red tape.		Addressing the proportion of full 'merit' assessments is a key objective of the Bill and there are a number of processes that have been streamlined by the Bill. The online planning system should, if implemented well, reduce red tape. However, the assignment of different categories of development to different pathways has not been contemplated by the Bill, making it difficult to comment on the robustness of the process.
Planning policy can be updated quickly and efficiently, with amendments that are not seriously at variance with the Planning Strategy taking no more than six months to be finalised from the date of lodgement.		The Bill has introduced a new pathway for policy amendments that are clearly consistent with the relevant regional plan.

There is accountability in the planning policy amendment process through the introduction of performance measures and transparency through the introduction of an online 'tracking' system.		The Bill does introduce the concept of performance monitoring, however the Bill does not specifically address the performance of policy amendments.
<u>Local Involvement</u>		
Local Government has primary responsibility for developing and updating the local elements of planning policy and the assessment of local impacts of all development proposals.		Local Government's and local communities role in policy setting and assessment has been significantly curtailed.
Elected Members have a high level of engagement and influence in the development of local planning policy, which is used to make objective decisions about development outcomes.		Individual Councils will have a limited role in developing regional plans and tailoring policies to recognise the special aspects of an area. Elected Members have been removed from Development Assessment Panels.