



Draft Practice Direction (Site Contamination Assessment)

Submission Paper

December 2020

Introduction

The State Planning Commission is consulting on an amended draft practice direction for site contamination, referred to as the *State Planning Commission Practice Direction (Site Contamination Assessment)* (Practice Direction).

The Practice Direction proposes to introduce additional procedural steps into the development assessment process to deal with contaminated, and potentially contaminated, sites.

The Practice Direction will operate in conjunction with Schedule 8 of the *PDI (General) Regulations 2017* (PDI (General) Regulations), as well as Part 9 of the Planning and Design Code (Code) which is also on public consultation in an amended form.

Summary of issues / suggested points of clarification

Issue

The Practice Direction establishes a scheme that applies to applications including land divisions that propose a change of use to a more sensitive use. Whereas clause 2(d) in Schedule 8 in the PDI (General) Regulations creates obligations for proposed new deemed-to-satisfy dwellings, it is not abundantly clear whether the two schemes are intended to operate independently of each other.

Clarification required

How does the Practice Direction interact with Schedule 8?

Will it apply to deemed-to-satisfy dwellings?

Will it apply to other forms of deemed-to-satisfy development (other than new dwellings) and, if so, in what way?

Clause 4 - Interpretation

Issue

Certain capitalised terms are used in the Practice Direction but are undefined (e.g. 'Certificate of Occupancy'; in cl 8(3), 'Land Division Certificate' in cl 8(4)).

Issue

Definitions of 'sensitive use' and 'non-sensitive use' appear superfluous.

Clarification required

Review and amend definitions.

Clause 5(2)(b) – Land Use Sensitivity Hierarchy Table

Issue

The Table includes definitions of 'sensitive use' and 'non-sensitive use', which appear superfluous.

Clarification required

review and amend Table.

Clause 6

Issue

It may be onerous and impractical for a Relevant Authority to undertake a preliminary assessment of whether site contamination exists, or may exist, as a result of activities on the site or adjacent land to the site, prior to verification. Equally, there is no clear or consistent pathway for a Relevant Authority to stop the clock, or request further information, where site contamination becomes an issue during the assessment phase.

Clarification required

Review and amend relevant parts of clause 6 to ensure the system is practicable and workable.

Issue

It is unclear how a Declaration Form may be provided in stages, where a Relevant Authority is required to assess site suitability over the entire site of a development.

Clarification required

Review and amend clause 6(9).

Clause 8

Issue

The form, contents and timing of a 'statement of site suitability' is unclear. As is the foundation for imposing conditions which allow a statement of site suitability to be deferred.

Clarification required

Review and amend clauses 8(3)-(6).

'Land Use Sensitivity Hierarchy'

The Relevant Authority must have regard to the 'Land Use Sensitivity Hierarchy' (**LUSH**) Table, which contains 7 'land use scenarios' in decreasing order of sensitivity: cl 5(2)(b).

Issue

If a proposed use is not listed in the LUSH Table, then the Relevant Authority must have regard to the sensitivity of the human populations proposed to be using the land, and the risk of exposure of those populations to chemicals following the change of use: cl 5(2)(c)(v).

Clarification required

While the LUSH Table separates the 7 items into 2 groups, namely, "sensitive uses" and "non-sensitive uses", there is no apparent relevance to those groupings (and the associated definitions). As such, the groupings (and associated definitions) appear superfluous, and should be removed to avoid confusion.

Preliminary determination as to whether site contamination exists

On determining that a more sensitive use is proposed, the Relevant Authority must make a preliminary determination as to whether site contamination exists, or may exist, on the land. Potentially, this is a more onerous task, requiring consideration whether any potentially contaminating activities undertaken in the course of a business exist, or existed, on the land and, in some cases, on adjacent land.

Issue

Practical questions arise as to how, and when, the Relevant Authority must make that assessment. For example:

The need to consider the existence of class 1, 2 or 3 potentially contaminating activities requires an understanding of the land use history of the site and, to the extent of class 1 activities, the history of land within 60m of the site. In some cases, this may be a time-consuming, onerous and costly exercise, particularly if searching of historical records (such as LTO records, archived council files etc) is required.

The above task is likely to be particularly onerous for accredited professionals in private practice (in relation to deemed-to-satisfy development with, or without, minor variations), who will not have ready access to historical records.

Clarification required

It is suggested that the practicality of this 'preliminary assessment' system requires further consideration, and road-testing, amongst planning practitioners.

PSI and Declaration Form**Issue**

It is doubtful whether applicants will volunteer to provide a PSI and Declaration Form up front with their application. Rather, many will rely on the Relevant Authority to determine and advise that the documents are required (which determination would be appealable as a 'prescribed matter' as defined in s 201 of the PDI Act).

Provision of a PSI and Declaration Form seems to be a requirement 'specified by the practice direction' for the purposes of PDI (General) Regulation 29(3). Assuming this to be the case, if an applicant fails to provide a PSI and Declaration Form where required or requested, the application will be deficient.

Clarification required

Verification under regulation 31 should not occur until the information is provided, so that the assessment clock does not commence.

Issue

Staged approvals also give rise to difficulty. Clause 6(9) contemplates that where an application for planning consent envisages a staged development, a Declaration Form may be provided for separate stages. However, it is unclear how a Relevant Authority could grant planning consent for an overall change of land use where it only has available a Declaration Form pertaining to one or more stages.

Clarification required

It does not appear that clause 6(9) has been thoroughly considered, and it should be reviewed and redrafted accordingly.

Site suitability**Issue**

The Practice Direction does not specify or define what constitutes a 'statement of site suitability' (SoSS), or its requirements.

Nor is the Practice Direction definitive about when an SoSS is required (and this is an area where the Practice Direction may benefit from clarification).

It would assist if a template SoSS was an attachment to the Practice Direction.

On the one hand, subclause 8(1) implies that the SoSS will be provided prior to the grant of planning consent. This is understandable, given that satisfaction as to site suitability will usually be a pre-requisite to the grant of planning consent for a change of land use.

Issue

Subclause 8(5) contemplates that where the presence of building structures on a site has an obscuring effect, the Relevant Authority may issue planning consent subject to a condition that a SoSS is provided prior to the issue of development approval. Conversely, however, the Practice Direction does not contemplate that conditions may be imposed in other circumstances, including where it is contemplated that the SoSS will be provided after development approval has been issued.

Clarification required

There is no apparent logic or rationale for authorising a condition in one situation but not others.

Issue

It is not clear that the Practice Direction has properly empowered the use of conditions. Previous court decisions have held that conditions can only validly regulate incidental aspects of a development. Conversely, they cannot be used in relation to fundamental issues that go to the heart of whether a proposed development is appropriate or suitable in the first place. Consideration of site suitability is usually a fundamental planning issue. Therefore, conditions which seek to defer that issue until after the grant of planning consent and, in some cases, until after the grant of development approval, would seem to be invalid.

Where site remediation is required in order to make a site suitable, developers will want the certainty of receiving planning consent before they invest in site remediation works. If the intent is to facilitate that outcome, it does not appear that clause 8 in the Practice Direction has achieved its purpose.

Clarification required

While s 127(1)(b) of the Act seems to enable conditions to be 'specified' by a practice direction, the Practice Direction does not seem to have done so.

New dwellings (deemed-to-satisfy)

Issue.

The Practice Direction does not expressly exclude its operation with respect to deemed-to-satisfy dwellings. Nor does it explain how it interacts with the requirements of Schedule 8, if at all.

The interplay between the Practice Direction and Schedule 8 is unclear and should be clarified. Is Schedule 8 intended to operate as a stand-alone scheme for new deemed-to-satisfy dwellings?

Clarification required

The Practice Direction should make the interplay between the Practice Direction and Schedule 8 clear.

Other deemed-to-satisfy development

Issue

Other forms of deemed-to-satisfy development are not dealt with in the Regulations. Therefore, it will be necessary for the Code to include, wherever relevant, a deemed-to-satisfy criterion which requires compliance with the Practice Direction, or otherwise addresses the issue of site contamination.

Presumably, this will occur via reference to Site Contamination, DTS 1.1 in the General Development Policies section of the Code.

Site Contamination DTS 1.1. refers to concepts introduced by the Practice Direction (such as the site contamination declaration form), but without specifically defining them, or making any express reference to the Practice Direction.

Clarification required

This should be clarified in the Code in the interests of consistency and creation of an integrated scheme.



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