Local Government
Reporter

Planning law reform builds momentum in South Australia

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South Australia's planning and development system, which has traditionally favoured and facilitated low-density residential developments, is currently undergoing unprecedented amounts of change.

Planning and development in South Australia are primarily governed by the Development Act 1993 (SA) (the Act).[1] Since the Act commenced operation on 1 January 1994, it has been amended (on the author's count) 619 times through 45 separate amending Acts.

In recent times, a number of noteworthy changes to the Act have reflected a clear intent to significantly alter the way in which planning policy and development assessment occur in this state, with a particular focus on increased housing density and infill development in the Greater Adelaide area and on "streamlining" development assessment processes (especially planning assessment processes involving councils) for residential development. These changes are discussed below.

The introduction of the "Residential Code"

The Residential Code provides for codified planning assessment of certain forms of residential development.

This amendment to the Act and the associated Development Regulations 2008 (SA) (the Regulations) was, in the author's view, the first significant change in this regard. Under the Act, a development application may be classified by a relevant authority (ie, a council or the State Development Assessment Commission) as either complying, merit or non-complying development.[2] The relevant authority must grant development plan consent to complying developments — that is, there is no discretion to refuse such an application on planning grounds. Merit developments are subject to a full assessment against the relevant development plan and can either be approved or refused by a relevant authority. Applicants may appeal a decision to refuse development plan consent to such an application in the Environment, Resources and Development Court.

Non-complying development applications must be accompanied by additional reports not required for other forms of development applications. A relevant authority may, in its discretion, choose to refuse such an application without undertaking any assessment of it against the relevant development plan. Further, there are no appeal rights available to applicants in respect of decisions made regarding non-complying applications.

The Residential Code reforms amended the Act and the Regulations such that developments that met the Residential Code provisions contained in Sch 4 to the Regulations *must* be treated as "complying" developments, and the designation of a development as "complying" could not be overridden through an individual council's development plan. This change was significant, as the Residential Code allowed the construction of dwellings on smaller allotments than those often demanded by development plans, and in configurations that were often discouraged in development plans. Further, with the introduction of the Residential Code came the introduction of Sch 1A into the Regulations, which provides for certain types of residential development that is ancillary to dwellings to be exempt from the need to obtain development plan consent. Developments listed in Sch 1A only require Building Rules consent (which is limited to an assessment against the National Construction Code and additional Minister's specifications relevant to building in the state) to obtain full development approval.[3]

The announcement of the "30-Year Plan for Greater Adelaide"

The 30-Year Plan is the primary strategic policy planning document for the Greater Adelaide Area and forms part of the planning strategy. According to the Act, the Minister for Planning is responsible for preparing and maintaining the planning strategy.[4] Each development plan (which is the document against which development applications are assessed) is informed by, and should seek to promote the provisions of, the planning strategy.[5] The 30-Year Plan was an important document, as it provided a comprehensive integrated plan for transport-oriented developments and for the development of high-density residential areas and employment lands by precinct — and, for the first time, put limitations on the future expansion of the Greater Adelaide Area.

The paring-back of measures in the Act that protect individual trees in urban areas from damage and removal

On 20 April 2000, the Act was amended to include "tree-damaging activity" to significant trees as an act of "development" requiring development approval under the Act. Significant trees were those in designated areas (being the Adelaide metropolitan area) with a certain trunk circumference, or trees that were designated as "significant" in a development plan.[6] Uniform development plan provisions for significant trees were contained within each development plan, which generally emphasised their retention except in circumstances where they posed a threat to safety, where they were diseased and dying or causing significant damage to significant buildings and structures, and where no reasonable remedial measures were available.

At the end of 2011, the Act and the Regulations were amended to create "regulated trees" under which "significant trees" are a subclass.[7] Development plans were amended to include uniform provisions for regulated tree removal, which are not as strict as those for significant trees and envisage the removal of trees where required for development that is "reasonable and expected" and that would otherwise be impossible. Further, all trees within 10 metres of an existing dwelling or swimming pool, no matter whether or not that dwelling or swimming pool is on the same site as the tree, are exempt from the definition of regulated tree — except willow myrtles and eucalyptus trees.[8]

Private certification of development plan consents

The Act and the Regulations were amended on 11 April 2013 to allow the private certification of development plan consents such that registered individuals known as "private certifiers" can now undertake planning assessments of Residential Code developments, rather than this being done by councils or state government bodies.

Prior to that date, only a council or the Development Assessment Commission was entitled to grant development plan consent to a development. The then s 89(3) of the Act restricted the role of private certifiers to the assessment of Building Rules consent only.[9] This section was deleted from the Act, and the role of private certifiers is contained within the Regulations and allows not only the private certification of Building Rules consents, but also the certification of development plan consents for Residential Code developments.[10] Where a Residential Code development application is privately certified, the role of the local council is generally limited to issuing final development approval, and to retaining documents on a register that may be inspected in the future.[11]

Housing and Urban Development (Administrative Arrangements) (Urban Renewal) Amendment Bill 2013

Further to the abovementioned changes, Bills are progressing through Parliament that will, if passed, result in further significant changes to the state's planning and development system.[12] Of these Bills, the most significant is the Housing and Urban Development (Administrative Arrangements) (Urban Renewal) Amendment Bill 2013 (SA).

This Bill does not propose any changes directly to the Act itself. However, the changes that it does propose to the Housing and Urban Development (Administrative Arrangements) Act 1995 (SA) will have a direct impact on planning and development in the state.

The Bill proposes to create a scheme of precinct-based development — which, in the author's view, has similarities to the Western Australian planning system — through the following relevant changes to the planning system:

- The Minister will be able to establish "precincts" to facilitate urban renewal; the provision of land suitable for commercial, industrial or residential purposes close to public transport; the establishment of new industries; or other planning and development outcomes for the renewal or redevelopment of a distinct area that promotes the purpose of the Planning Strategy.
- Before establishing a precinct, the Minister must consult with the Planning Minister, any council within the proposed precinct, and the Development Policy Advisory Committee. The Minister may also seek the advice of the Development Assessment Commission on the objectives of a precinct.
- In establishing a precinct, the Minister may appoint Renewal SA (still referred to as the "Urban Renewal Authority" in the legislation) or a council as a "precinct authority".
- Precinct authorities may — or, at the direction of the Minister, must — establish a design review panel, a community reference panel consisting of representatives of persons who live in or around the precinct, and any other panel considered appropriate in the circumstances, to provide advice relating to planning and development within the precinct.

- The precinct authority must then prepare and maintain a precinct master plan (for the entire precinct) and precinct implementation plans (for all or parts of the precinct).
- Precinct master plans are required to promote the provisions of the planning strategy, while precinct implementation plans must:
  - — contain design guidelines, including design criteria for buildings;
  - — contain detailed plans and maps relating to roads, sizes and arrangements of allotments, building heights, and densities and public places;
  - — contain an implementation framework that must address infrastructure;
  - — specify classes of development that are to be taken as "complying" development for the purposes of the Act;
  - — provide for the provision of open space in accordance with s 50 of the Act; and
  - — address, adopt or incorporate any other matter specified by the Minister.

Precinct plans will be public documents published in the Gazette. Public consultation must occur on any proposed precinct plan before it commences operation. Where a relevant authority receives a development application for development within a precinct, that development must be treated as "complying" if it is certified as such by the precinct authority. Further, any applications for land divisions must be taken as satisfying the Act[13] where the precinct authority has certified a land division application as having satisfied these requirements.

Any open space requirements imposed by a relevant authority on a land division application within a precinct must be consistent with the relevant precinct implementation plan. The Minister will be able to make amendments to development plans without undertaking formal (and lengthy) processes under s 26 of the Act to give effect to a precinct plan, and the Minister will have the ability to appoint the Development Assessment Commission as the relevant authority in respect of any development that will have a significant impact on an aspect of a precinct.

In addition to the above changes, the Bill proposes to allow the Governor to, by way of regulation, authorise a precinct authority to:

- grant any statutory approval, consent, licence or exemption;
- provide a service or infrastructure;
- impose and recover a rate, levy or charge; or
- exercise any other statutory power specified in the regulation.

Debate on the above Bill is continuing in Parliament.

Review of the Act

Further to the abovementioned reforms, a formal review of the Act, dubbed the "Planning Improvement Project" (PIP), has commenced.

The PIP is being led by an independent five-member panel (the Expert Panel on Planning Reform), which consists of prominent planning professionals — including one of the state's preeminent planning lawyers, as well as planners and developers. Under the Terms of Reference, the Panel is required to:

- review legislation relating to planning, urban design and urban renewal, including the Development Act and the Housing and Urban Development (Administrative Arrangements) Act 1995;
- review the role and operation of all other legislation that impacts on the planning system;
- review statutory and non-statutory governance and administrative arrangements relating to the planning system;
- propose a new statutory framework, governance and administrative arrangements for the planning system; and
- consider any matters referred to the Panel by the Minister for advice.

The Panel is required to report its findings and recommendations to the government in December 2014.

The next state government election in South Australia will occur prior to that deadline. Whether the current Labor government returns to power remains to be seen. The Opposition's position on the PIP, should it enter government, is yet to be made public. However, given the current momentum of law reform, and the age of the Act, it is the author's review that the PIP will continue regardless of the outcome of the election.

Regardless of this uncertainty, one thing is certain: the South Australian planning and development system is in a state of flux, and momentum towards significant change is increasing. It remains to be seen whether these changes will achieve their desired outcomes of increased residential densities and infill development, urban renewal,

and the delivery of efficient transport-oriented developments and employment areas.

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Footnotes

1. A summary of the Development Act 1993 and the development assessment process, written by the author and a colleague, was published in a previous issue of this newsletter: see J Oborne and V Shute, "Residential development in South Australia" (2012) 11(2) *Local Government Reporter* 28–33.
2. Development Act 1993, s 35.
3. See Development Act, s 33. Under s 32 of the Act, "no development may be undertaken unless the development is an approved development". Section 33 then provides for the approval process. Development applications for buildings and structures generally require both development plan consent and Building Rules consent before final development approval is issued.
4. Above, n 2, s 22.
5. Above, n 2, s 23(3).
6. The relevant trunk circumferences for "significant trees" were provided for in reg 6A of the Development Regulations 1993 and 2008 as being "2 metres or more" or, for trees with multiple trunks, "a total circumference of 2 metres or more and an average of 625 millimetres or more, measured at a point 1 m above natural ground level".
7. Under the current Act and reg 6A, regulated trees are "trees … that have a trunk with a circumference of 2 metres or more or, in the case of trees with multiple trunks, that have trunks with a total circumference of 2 metres or more and an average of 625 millimetres or more, measured at a point 1 metre above natural ground level". Significant trees have a similar definition, except the trunk circumference must be 3 metres or more.
8. Above, n 6, reg 6A(5).
9. The private certification of Building Rules consent is a relatively commonplace occurrence in South Australia. To become a private certifier in respect of Building Rules consent, a person must have appropriate building surveying qualifications from the Australian Institute of Building Surveyors or be recognised as having appropriate qualifications and experience from the Minister.
10. Above, n 6, reg 89.
11. Above, n 2, ss 35(6) and 36(4); Above, n 6, regs 15, 89 and 101.
12. These Bills include the Development (Interim Development Control) Amendment Bill 2012 (SA), the Development (Development Plan Amendments) (Notification) Bill 2012 (SA) and the Housing and Urban Development (Administrative Arrangements) (Urban Renewal) Amendment Bill 2013 (SA).
13. Above, n 2, ss 33(1)(c) and (d), which govern the requirements for obtaining land division consent for a proposed subdivision.