MISCELLANEOUS TECHNICAL ENHANCEMENT CODE AMENDMENT

State Planning Commission
PlanSA@sa.gov.au

Submission issued September 2022
South Australian Chapter

Association of Consulting Architects
The Business of Architecture

Australian Institute of Architects

ABOUT US

The Australian Institute of Architects (Institute) and Association of Consulting Architects (ACA) are the peak membership bodies for the architectural profession in Australia.

Architects are a key component of Australia's $100 billion built environment sector and there are around 13,500 architectural businesses in Australia with around 40,000 employees. Approximately 25,000 people in the labour force hold architectural qualifications (Bachelor degree or higher) and architectural services in Australia in 2017-18 had revenue of $6.1 billion and generated $1.1 billion of profit.

The Institute and ACA actively work to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

PURPOSE

- This submission is made by the Australian Institute of Architects (the Institute) and the Association of Consulting Architects (ACA) in response to the proposed *Miscellaneous Technical Enhancement Code Amendment* published by the State Planning Commission.
- At the time of this submission:
    - The Institute National President is Shannon Battisson FRAIA, and the SA Chapter President is Anthony Coupe RAIA. The A/Chief Executive Officer is Barry Whitmore.
    - The ACA National and SA President is John Held. The Chief Executive Officer is Angelina Pillai.

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COVER PHOTO

The Australian Institute of Architects' SA Chapter recipient of 2021 SA Architecture Medal and the Keith Neighbour Award for Commercial Architecture. Meals on Wheels SA Head Office. JPE Design Studio.

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1 INTRODUCTION

The Institute and ACA generally support the State's *Planning and Design Code* Expert Review and aims to "provide South Australians with planning policy that is consistent and clear, making the planning process quicker, simpler and more equitable"[1].

However, we have significant reservations in relation to the proposed *Miscellaneous Technical Enhancement Code Amendment* (Code Amendment) and **the Institute and the ACA do not support the proposed Code Amendment as currently presented**.

Where the Code Amendment relates to correction of inconsistencies and errors in the Planning and Design (P&D) Code, we support the proposed changes. Where the Code Amendment will impact the application and interpretation of planning policy as it applies to applications, the proposed changes are not supported, on the basis that the Code Amendment is too extensive to provide confidence that the impact of the proposed changes can be fully assessed or understood.

We believe there is a strong risk that the proposed Code Amendment will contradict the previously established aims of the P&D Code. Our reasoning is as follows:

- Acknowledge the complexity of the P&D Code requires professional expertise to provide clarity around the development rights of landowners and adjacent landowners. This requires referral to experienced professionals with appropriate expertise where performance assessment is required. These professionals will not necessarily be statutory planners.
- Increase in the discretionary powers of 'relevant authority', which raises the risk of unintended consequences where the decision to consider one or more amendments as 'minor' means that the application is assessed through a DTS pathway without referral for expert opinion. There is a significant likelihood that discretionary decisions will be made by:
    - Council staff who may not be accredited professionals but less experienced staff working under delegation
    - Staff working as consultants to Council who are not necessarily familiar with local character and other factors that the Code Amendment assumes are known. We note that the statement, '*It is also acknowledged that Council Assessment Panels and Managers have the appropriate skills, qualifications and local knowledge to undertake an assessment of this nature.',* appears several times in the MTE Code Amendment as justification of the increase in discretionary decision-making powers by the relevant authority.
- Lack of definition in of what constitutes a 'minor amendment'. Determination of what constitutes a minor amendment, and how many should be allowed within one application is at the discretion of the relevant authority.
- Insufficient consideration of the unintended consequences resulting from potential conflicts of interest, inconsistency in interpretation of the P&D Code

[1] https://dbphilpott.com.au/plan-sa-planning-and-design-code-the-code/#:~:text=The%20Code%20seeks%20to%20provide,or%20progressing%20large%20commercial%20developments.

and resultant inequity, resulting from accredited professionals, or those staff working under delegation, making determinations on matters outside of their expertise and Professional Indemnity Insurance coverage (e.g., partial demolitions within Heritage Area Overlays).
- The Code Amendment places SA Heritage and Historical Sites at risk. The Institute and ACA recommend that developments impacting heritage sites and/or historic areas are always deferred to Heritage SA[2]. The assessment of significance and impact needs to be undertaken by appropriately qualified professionals with expertise in preparing and assessing Heritage Impact Statements.

We recommend the P&D Code, and any amendments to it, prioritise quality long-term investments in the built environment, not just speed of assessment and administrative efficiencies. We note that Institute members who undertake work nationally consider that the time taken to assess development applications in South Australia already compares well with approval times in other jurisdictions.

We look forward to continuing to support the Department to ensure the best practical outcome that can achieve the aims of the planning reform.

2 DETAILED RESPONSE

2.1 Minor Development

The Code Amendment does not sufficiently define what constitutes a 'minor development' and 'minor amendment' to a development approval. This lack of clarity has the potential to lead to inconsistent interpretation of the planning framework by the relevant authority, resulting in unintended and inequitable outcomes and eroding public confidence in the P&D Code.

In addition, the P&D Code does not address the cumulative effect of multiple minor amendments and the Code Amendment presents an increase in the number of matters that can be classed as minor amendments by the relevant authority. The effect is a reliance on the discretionary interpretation of the relevant authorities. In practice, the relevant authority (local council) defers this discretion to an accredited planning professional, increasingly engaged on a consultancy basis. Such an arrangement presents several unintended risks:

- Potential conflicts of interests (real or perceived) of the accredited planning professional who may be undertaking work on behalf of applicants and relevant authorities.
- Potential inconsistency in the interpretation of the P&D Code due to deferral of discretionary interpretation by relevant authorities to multiple accredited planning professional, with varied levels of experience and expertise, resulting with inequity of application of the P&D Code.

[2] Referral of matters concerning State Heritage Listed Places is to the Minister responsible for the Heritage Places Act 1993, with Heritage SA offices acting as delegates for the Minister.

- Risk to accredited planning professional making determinations outside of their expertise and Professional Indemnity Insurance coverage.

The Institute and the ACA recommend that the Code Amendment provide further definition (for example a +/- 5% range) and examples of what is deemed as a minor development and a minor amendment to a development, to alleviate the identified risks. This would also provide increased certainty for applicants and provide clear parameters if dispute resolution is required.

We have observed that applicants are aware of the opportunity that exists to submit multiple minor amendments between gaining approval and completion of construction and, in some instances, take advantage of this. The outcome of cumulative changes to the finished building may include poor environmental performance, negative impact on public amenity, poor response to context and reduced soft landscape.

2.2 Public Notification Tables

Public notification is a vital component of the planning system to ensure that all adjoining landowners can identify potential unintended risks of specific developments and ensure community confidence in the P&D Code.

The adjustment and/or removal of public notification triggers is not supported in the following instances:

- Removal of public notification triggers based on failure to satisfy boundary setbacks
- Building work on railway land, rainwater tanks, retaining walls and decks – we recommend further consideration of public notification requirements due to potential visual impact, overlooking, shading and other environmental impacts caused by such developments.
- Land division in Adelaide Parklands, Conservation Zone and Hills Face Zone – due to the potential for significant impact to these sensitive and highly valued environments
- Excavation and filling notification exception in Hills Face Zone - due to the potentially significant impact on biodiversity, erosion, water management and impact on adjoining landowners due to alteration of the natural ground line.
- Similarly, development of dwellings, swimming pools and access tracks – restricted development application due to excavation / filling can have significant impact on biodiversity, erosion, water management, etc.
- On-boundary development – notification trigger inconsistency is not supported.
- Exclusion of land division from public notification is not supported for all zones.

2.3 Heritage

There is significant risk associated with proposed referral outlined in the Code Amendment in relation to Heritage Adjacency Overlays and Historic Area Overlays, and as written has potential to place Heritage and Historical Sites at risk.

The Institute and ACA recommend that the relevant authority be explicitly stated as being:

- The Australian Government in accordance with the EPBC Act when the development is associated with a national heritage place

- Heritage SA, when the development is associated with a state heritage place
- The Council's local heritage advisor, where this service is provided and when the development is associated with a local heritage place

The assessment of significance and impact of development / demolition needs to be undertaken by appropriately qualified professionals with expertise in preparing and assessing Heritage Impact Statements.

Demolition

The Code Amendment proposes to provide relevant authorities with discretionary power in relation to notification of demolition of buildings in Historic / Heritage areas. Clause 2.3.2.10.5 Notification Tables – Demolition of the *Miscellaneous Technical Enhancement Code Amendment for consultation* states the intention of amendment:

"… to give the relevant authority ability to determine that a building is not of historic value and therefore doesn't warrant notification – example below:

> *Except any of the following:*
> *(a) the demolition (or partial demolition) of a State Heritage Place or Local Heritage Place (other than where the building is a place within an area established as a State Heritage Area under the Heritage Places Act 1993 and the relevant authority is of the opinion that the building is not in keeping with the features of identified heritage value in the State Heritage Area in which the building is situated)*
> *(b) the demolition (or partial demolition) of a building (except an ancillary building) in a Historic Area Overlay (other than an ancillary building or where the relevant authority is of the opinion that the building is not in keeping with the historic attributes identified in the Historic Area Statement applicable to the area in which the building is situated). "*

We strongly oppose these proposed amendments for the following reasons:

- Relevant authorities (or local councils) may not have access to professional heritage expertise.
- An accredited professional who is not a heritage architect, lack the expertise to provide an opinion as to:
  - Which building or part of building "is not in keeping with the features of identified heritage value in the State Heritage Area in which the building is situated".
  - Which building or part of building is not in keeping with the historic attributes identified in the Historic Area Statement applicable to the area in which the building is situated."
- The risk of the impact of potential misinterpretation of the heritage value and/or historic attributes resulting in demolition of a heritage/historically relevant place significantly outweighs any potential administrative and time benefits of circumventing referral to Heritage SA.

2.4 Land use and administrative definitions

There are a series of ambiguities that are not supported throughout the Code Amendment. Specific comments as follows:

- Restricted development classification – the removal of "discouraged or inappropriate" development is not supported, as relies on discretionary judgment of by the relevant authority and does not appropriately provide a framework for assessment.
- Urban corridor zones – side boundary setback is defined as "located toward the front part of allotment". Further definition is required in metres or expressed as a percentage of lot length.
- Land use and intensity Clause DTS/DPF 1.1 is not supported. This clause allows for the replacement of a dwelling on condition that hazard / emission is ceased, however there is no reference to any potential continued impact of a former hazard or emission.
- Hills Face Zone Clause DTS/DPF 3.1 – a rigorous definition of natural ground level is required. This definition needs to consider the impact of previous site works undertaken and how they have impacted the original ground levels and impacts of land that is built up on one side of boundary and excavated on other side.
- Exclusions - Land division that is a boundary realignment –
    - According to the common definitions a boundary realignment is not a land division, so this amendment is redundant.
    - Boundary realignment and land division need to be defined in the Planning and Design Code. Currently they are not, so the common definitions should be applicable.
- Common definitions
    - A Boundary Adjustment or boundary realignment is a survey to change the boundaries between two or more lots of land without creating a new lot – for example there are two lots initially and the proposal is to change the boundaries between them so that there will be two lots at the end.
    - Land division - The division of land into at least two or more allotments.
- Inconsistency in the definition of building height, building wall setback and wall height – further articulation and review of how these definitions impact on one another is required. For example, where clause 2.3.2.12 notes that the height of the wall is measured from the top of its footing, the scenario of footing acting as a retaining wall (which could be up to 1 metre in height) has not been considered.
- Clause 2.3.3.1 Affordable housing overlay – the proposed amendment replaces the existing complex set of options with a singular requirement. Such an amendment may have the unintended consequence of discouraging the provision of affordable housing by private developers. The intent of excluding the South Australian Housing Authority from complying with this clause is unclear. Consistent planning framework for the public and private affordable housing developments will ensure there is consistent quality and quantity of affordable housing in SA.
- Clause 2.3.3.4 Design overlay referral – the nature of what is a minor variation to an application is left to the opinion of the relevant authority. We note the previously highlighted issue of consistency and equity with such an approach, and stress that statutory planners are not appropriately qualified to undertake design quality assessments. We highlight the aim of the *Mandatory State Planning Policy 2: Design Quality* and note that a discretionary approach will oppose the encouragement of high-quality design and innovation within the planning framework. We recommend that where a design performance assessment is required it is undertaken by a registered architect and that where an amendment to an approved proposal that has been subject to design review is submitted it needs to be reviewed by a registered architect for design impact.

- Restricted development – there is insufficient clarity in the definitions and examples provided between the principles for assessment (Principle 1 and Principle 2). Further articulation is required to ensure clarity to developers as to which assessment pathway is applicable for their specific development.

2.5 Policy inconsistencies and definitions

There are a series of ambiguities that are not supported throughout the Code Amendment. Specific comments as follows:

- Concept plans – insufficient definition provided for what constitutes a concept plan. It is unclear as to the process undertaken for assessing concept plans (refer to Clause 2.3.2.3).
- Use of subjective terms such as "pleasant character" (refer Clause 2.3.2.5) is discouraged as it does not provide sufficient clarity and consistency in interpretation.
- Statement under Restricted development classification table 4: "dwellings provide a convenient base for landowners…" is a subjective term that does not provide consistency and clarity in interpretation.
- Inconsistency in the definition of and performance outcome of wall heights and boundary wall heights throughout the Code Amendment. Consistent definition and how the height will be measured needs to be applied throughout the Code to ensure clarity in interpretation.
    - Clarity is required in the application of performance criteria, which (as amended) allow for two building height options, to ensure consistent interpretation of the Code. The current amendment provides options for the development height, which can result in unintended consequences eroding community confidence in the Planning and Design Code.