

Special Council Assessment Panel Agenda & Reports

10 February 2021

Our Vision

*A City which values its heritage, cultural diversity,
sense of place and natural environment.*

*A progressive City which is prosperous, sustainable
and socially cohesive, with a strong community spirit.*

City of Norwood Payneham & St Peters
175 The Parade, Norwood SA 5067

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City of
Norwood
Payneham
& St Peters

5 February 2021

To all Members of the Council Assessment Panel:

- Mr Terry Mosel (Presiding Member)
- Ms Jenny Newman
- Mr Phil Smith
- Ms Fleur Bowden
- Mr John Minney

NOTICE OF SPECIAL MEETING OF THE COUNCIL ASSESSMENT PANEL

I wish to advise that pursuant to Clause 7.4 of the Terms of Reference, the next Special Meeting of the Norwood Payneham & St Peters Council Assessment Panel, will be held in the Council Chambers, Norwood Town Hall, 175 The Parade, Norwood, on:

Wednesday, 10 February 2021, commencing at 7.00pm.

Please advise Kate Talbot on 8366 4562 or email ktalbot@npsp.sa.gov.au if you are unable to attend this meeting or will be late.

Yours faithfully



Mark Thomson
ASSESSMENT MANAGER

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City of
**Norwood
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VENUE Council Chambers, Norwood Town Hall

HOUR

PRESENT

Panel Members

Staff

APOLOGIES

ABSENT

- 1. CONFIRMATION OF THE MINUTES OF THE MEETING OF THE COUNCIL ASSESSMENT PANEL HELD ON 20 JANUARY 2021**

2. STAFF REPORTS

2.1 BUSINESS READINESS FOR THE PLANNING, DEVELOPMENT AND INFRASTRUCTURE ACT 2016

REPORT AUTHOR: Manager, Development Assessment
GENERAL MANAGER: Not Applicable
CONTACT NUMBER: 8366 4567
ATTACHMENTS: A & B

PURPOSE OF REPORT

The purpose of this report is to present a number of matters to the Council Assessment Panel (CAP) for determination related to the transition of the planning system to the Planning, Development and Infrastructure Act 2016 (the PDI Act). These matters include delegations to the Assessment Manager, updating the Panel's Terms of Reference and referral of Building Rules assessment to the Council.

BACKGROUND

As Members are aware, the State Government has been implementing the new planning and development system across the state under the PDI Act. The implementation program has been staged with elements of the system being progressively 'turned on' since 2016. The final stage of the program, referred to as Phase 3, will be the introduction of the new Planning and Design Code with the associated development assessment pathways to metropolitan Adelaide. This phase has been delayed from the original implementation date of July 2020, to a new date of 19 March 2021.

With the implementation of Phase 3, the CAP will become a relevant authority in its own right and as such, will need to consider and determine whether to delegate and/or refer certain powers to other entities. In addition, the Panel's Terms of Reference will require amending, to reflect the new arrangements.

DISCUSSION

The key business readiness matters which the CAP must consider and resolve a position on prior to the commencement of Phase 3 of the transition program, are discussed in detail below.

Planning Assessment Delegations

Under the PDI Act, the CAP is the relevant authority for the Planning assessment of Development Applications where public notice of the application must be given. For all other Planning assessments, the Assessment Manager is the relevant authority. The Assessment Manager can delegate that authority to other staff.

This means that the CAP is responsible for all administrative actions associated with the assessment of Development Applications which are subject to public notice, including; the verification of the application, determining the classification of the application and relevant fees, any requests for additional information, undertaking public notification (including potentially the placement of a notice on the subject land), referral of the application to agencies and a range of other administrative matters.

The CAP is able to delegate some or all of its powers to the Assessment Manager. This could apply to administrative tasks and/or Planning assessments against the Planning and Design Code.

A draft instrument of delegations has been prepared, based on a template prepared by the Local Government Association of South Australia (LGA), listing various functions which it is recommended be delegated to the Assessment Manager. For obvious reasons, this includes the various administrative tasks throughout the assessment of a Development Application, as it would be highly impractical for the CAP to perform those tasks and in any event, there would be little benefit in the CAP doing so, compared with staff undertaking those tasks. A copy of the draft instrument of delegations is contained in **Attachment A**.

The draft instrument of delegations also delegates the assessment of Development Applications against the Planning and Design Code to the Assessment Manager. A limitation listed at the back of the instrument, excludes the Assessment Manager from determining applications where one or more persons have made a valid representation, expressing opposition to the application being granted planning consent and those persons remain opposed, despite any attempt made to resolve their concerns.

This is consistent with the CAP's current delegations, in relation to Category 2 applications that undergo public notification. All Category 3 applications are currently determined by the CAP, regardless of whether or not a third party is opposed to the application. Category 3 applications are relatively few and are often non-complying applications. Under the PDI Act, the equivalent application to a non-complying development is a restricted development. Unlike the current situation whereby the CAP is ordinarily the relevant authority for non-complying development applications, the State Planning Commission (SPC) will be the relevant authority for all 'restricted' development applications.

The CAP could determine not to adopt this aspect of the draft instrument of delegations and instead be the relevant authority for the assessment of all applications which are the subject of public notice, regardless of whether or not a third party is opposed to an application. Other than development applications for which the SPC will be the relevant authority, development which will be the subject of public notice within the City of Norwood Payneham & St Peters, will likely comprise development which exceeds certain criteria in the Planning and Design Code, such as height, or which is not an envisaged land use. It may also include buildings which are located on boundaries which exceed height and/or length criteria. The detail of the triggers for notification are not yet known.

The absence of opposition to such a development by a third party, indicates that there is no significant public concern with the development; noting that written notice will be given to adjacent land and a notice will be placed on the land. A key benefit of the CAP assessing development which third parties are concerned about, is that those third parties are likely to feel more assured that a panel of people, rather than one person, has determined the application. No such benefit exists if there are no third parties opposed to an application. Accordingly, in instances where third parties are notified of those applications and no representations opposing the development are received, it is considered most appropriate that the Assessment Manager be delegated the authority to assess those applications against the Planning and Design Code.

Standing Referral for Building Rules Assessment

The Council is currently responsible for all Building Rules assessment matters under the *Development Act 1993* and delegates that function to relevant staff. While the Council would remain responsible for certain building consent matters under the PDI Act (such as undertaking inspections of building work to confirm compliance with the National Construction Code in accordance with Practice Directions 8 and 9), the CAP will become the default relevant authority for determining building consent unless it refers this assessment to Council (under Section 99(1)(c) of the PDI Act). The Council has already determined to delegate this power to its Building Officer(s) in line with current practice, if the CAP determines to refer this power to it.

It is recommended that the Panel adopt a standing referral to the Council for building assessment, such that Council's Building Officers are responsible for all building consent matters. The recommended resolution has been prepared by the LGA for this purpose.

It is noted that the Panel could alternatively act as the relevant authority for building consent assessment and delegate these powers to the Council's Building Officers, however this is not recommended so as to ensure that there is one authority within City of Norwood Payneham & St Peters responsible for all building rules related matters.

Terms of Reference

As the CAP was appointed as a relevant authority under the PDI Act in 2017, the Panel's existing Terms of Reference are largely 'up to date'. That said, the Delegations section of the Terms of Reference will require updating to address Development Applications which are lodged on or after 19 March 2021.

There is no requirement for the delegations conferred by the CAP to be specifically set out in the Terms of Reference. Similarly, there is no need for the delegations which have been conferred by the Council in relation to Development Applications lodged under the *Development Act 1993* to be set out in the Terms of Reference. Separate documents exist (ie. the instruments of delegation) which serve the purpose of setting

out the relevant delegations. Therefore, it is recommended that for simplicity, the Panel's Terms of Reference be amended to refer only to the different delegation structures depending on lodgement date, without replicating the specific delegations. A draft of the recommended amendments to the Terms of Reference is contained in **Attachment B**.

CONCLUSION

From 19 March 2021, the CAP will be a relevant authority in its own right, while also continuing to be a delegate to the Council for the assessment of Development Applications lodged before that date. As a relevant authority in its own right, the CAP is able to delegate its powers and functions.

It is recommended that the CAP delegates administrative tasks associated with the assessment of Development Applications. It is also recommended that the CAP refers the assessment of development against the Building Rules to the Council.

In relation to the assessment of Development Applications against the Planning and Design Code, the PDI Act limits the role of the CAP to assessing applications which are the subject of public notice. Of those applications, it is recommended that the CAP delegates the assessment of applications to which third parties are not opposed, to the Assessment Manager.

The current delegations which have been conferred to the CAP by the Council, require the assessment of Development Applications by staff, Elected Members and their families, to be assessed by the CAP. Under the PDI Act, this is not possible. Therefore, staff will prepare a policy for the Council's consideration, which deals with how such Development Applications should be determined, in order to address the potential for real or perceived bias or conflict of interest.

RECOMMENDATION

1. In exercise of the power contained in Section 100 of the *Planning, Development and Infrastructure Act 2016* the powers and functions under the *Planning, Development and Infrastructure Act 2016* and statutory instruments made thereunder contained in the proposed Instrument of Delegation (annexed as Attachment A to the Report entitled *business readiness for the Planning, Development and Infrastructure Act 2016*) are hereby delegated this 10th of February 2021 to the person occupying the position of Assessment Manager of the Council subject to the conditions and/or limitations, if any, specified in the Schedule of Conditions in the proposed Instrument of Delegation.
2. The City of Norwood Payneham & St Peters Council Assessment Panel determines to act under Section 99(1)(b) of the *Planning, Development and Infrastructure Act 2016* in relation to all Development Applications received by it that involve the performance of building work.
3. Pursuant to Section 99(1)(c) of the *Planning, Development and Infrastructure Act 2016*, where the City of Norwood Payneham & St Peters Council Assessment Panel has determined to act under Section 99(1)(b) of the PDI Act, it refers the assessment of the development in respect of the Building Rules to the City of Norwood Payneham & St Peters.
4. That, pursuant to 83(1)(f) of the *Planning, Development and Infrastructure Act 2016*, the City of Norwood Payneham & St Peters Council Assessment Panel adopt the Council Assessment Panel Terms of Reference, contained in Attachment B to this report, until reviewed further by the Panel.

2. STAFF REPORTS

2.2 POLICY FOR THE COUNCIL ASSESSMENT PANEL (CAP) – REVIEW OF DECISIONS OF THE COUNCIL’S ASSESSMENT MANAGER

REPORT AUTHOR: Manager, Urban Planning & Sustainability
GENERAL MANAGER: General Manager, Urban Planning & Environment
CONTACT NUMBER: 8366 4521
FILE REFERENCE: -
ATTACHMENTS: A - C

PURPOSE OF REPORT

The purpose of this report is to seek the Panel’s endorsement of a new policy for reviewing a decision made by the Assessment Manager under the *Planning, Development and Infrastructure Act 2016*.

BACKGROUND

The *Planning Development and Infrastructure Act 2016* (the Act) introduces the most significant change to the planning and development system in the last three decades. These changes include the statutory functions of Council Assessment Panels.

The Act provides that where an application for development is made to an Assessment Manager, a person who has applied for the development authorisation may apply to the Council Assessment Panel (CAP) for a review of a prescribed matter.

Legal advice on this review process is that the review does not apply to applications that have been delegated from the Panel to the Assessment Manager, but only to those applications assigned by the Regulations to the Assessment Manager in his/her own right.

A prescribed matter is defined under the Act as:

- *any assessment, request, decision, direction or act of a relevant authority under this Act that is relevant to any aspect of 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*
- *subject to any exclusion prescribed by the regulations, any other assessment, request, decision, direction or act of a relevant authority under this Act in relation to the authorisation.*

The scope for requesting a review of an Assessment Manger’s assessment, request, decision, direction or action, is broad – it may be the final determination of an application (eg refusal) or any administrative step in the process (e.g. a decision to publicly notify an application).

To assist Councils in setting a Panel policy governing the expectations and procedures under this section, the Local Government Association of South Australia (LGA) has prepared template policies. The policy, including a number of discretionary options are presented in this report for the Panel’s consideration and adoption.

DISCUSSION

This new statutory function will become available to applicants on the designated day, being the day that the Planning and Design Code is “switched on” in the metropolitan (Phase Three) area. The Minister for Planning has recently announced the designated day will be 19 March 2021.

This is a new legislative process in the planning system whereby an applicant has the benefit of this CAP review process. An Applicant may also subsequently apply to the Environment Resources and Development (ERD) Court for a full hearing of the matter. Under section 202(1)(c) of the PDI Act, a person may also appeal to the Court against the review decision of the Assessment Panel.

In reviewing an Assessment Manager's decision, the Panel is able to determine to:

- a) affirm the decision being reviewed; or
- b) vary the decision being reviewed; or
- c) set aside the decision being reviewed and substitute its own decision.

The Act is not clear on what procedures follow if a Panel determines a different outcome for an administrative step that has already been undertaken by the Assessment Manager (or delegate) during the assessment (for example, a Panel's determination that a different nature of development applies and therefore a different relevant authority may be applicable).

The Act sets out some prescribed legislative requirements for the review process. Panels may establish their own policies and procedures for those matters that are not prescribed.

The prescribed legislative requirements include:

- The Panel may adopt a procedure for a review of a decision.
- The application must be made in a prescribed manner and form (refer to Attachment **B**) and the applicant must pay a fee of \$511.
- The application must be made within one (1) month after the applicant receives the notice of the decision and the Panel may provide additional time for a review.
- The Panel is not bound by the rules of evidence and may inform itself as it thinks fit and draw any conclusions of fact it considers proper.
- The Assessment Manager must provide the Panel with all relevant documentation for the application and if requested by the Panel, any other relevant material, including a report on the matter.
- The Panel may, on a review affirm the decision, vary the decision or set aside the decision and substitute its own decision.

The LGA has produced two policy templates for Council Assessment Panels to consider in setting their policy – a simplified policy template and a prescriptive policy template. The templates provide the Panel with some degree of discretion in setting its own policy. Copies of the LGA templates are contained in **Attachment A**, together with guidance notations on amending the template.

The "Simplified" template provides the following recommended key clauses:

- That the Presiding Member be assigned the responsibility to determine if an extension of time should be granted (beyond the one month after an applicant receiving notice of a Prescribed matter) - for practical expediency.
- That the Assessment Manger provides the Panel with all the material which was considered in the application - for procedural fairness.
- That the Assessment Manager provides the Panel with a report setting out all the relevant details and reasons for the decision.

- That the Panel considers the prescribed matter afresh, rather than a narrower approach to consider whether errors were made during the decision.
- That the Presiding Member permits Panel members to ask questions and the applicant and/or Assessment Manager to respond;

The “Prescriptive” template includes the following additional matters:

- Repeats the ‘prescribed matters’ meaning from the Act and how an application may be lodged.
- Prescribes a detailed process for an applicant to submit additional information for consideration as part of the review.

The Application Form and relevant section of the PDI Act is contained in **Attachment B**.

The Council’s planning solicitors, Norman Waterhouse, will provide a briefing on this and other aspects of the Panel’s responsibilities under the new Act, at the Information Session to be held immediately prior to this Special CAP meeting.

DISCRETIONARY CLAUSES

The following aspects of the review process require a decision by the Panel as to how it wishes the Policy to operate:

Commencing a Review

The Act requires the Panel to determine whether to grant an extension of time (beyond the one month statutory entitlement) to an applicant seeking to review an Assessment Manager’s decision. For reasons of practical expediency, there will be efficiencies in enabling the Presiding Member to determine whether to grant an extension of time, rather than having such extension requests come to the full Panel for a decision.

It is recommended that the Policy specifies that the Panel delegates the decision as to whether to extend the timeframe, to the Presiding Member of the Panel.

Standing Request for a Report to be prepared

The Act allows the Panel to request a report from the Assessment Manager to assist in its consideration of the review request. The Policy can remain silent on this aspect or can require a review report from the Assessment Manager in every instance.

Panels are generally assisted in their deliberations by reports and it could cause more work (and time delays) if a Panel was to not have a report before it.

It is recommended that the Policy specifies that the Assessment Manager (or his/her delegate) must prepare a report to the Panel setting out the details of the relevant development application, the prescribed matter which is the subject of the review request and the reasons for the Assessment Manager (or delegate’s) decision on the prescribed matter.

Applicant’s Documentation – Written Submission

The review application form affords the applicant the opportunity to set out the reasons why they are requesting a review. The Panel, as part of this policy, should determine whether written submissions can be provided in addition to the details on the form.

There is no requirement in the PDI Act or General Regulations that an applicant be afforded any additional opportunities in this regard, such as through providing additional written submissions or additional (new) information to the Panel.

It is considered that providing further written statements should not be made available to applicants, beyond what is contained in the form.

It is recommended that the Policy not enable an Applicant to provide a written submission beyond the review application form.

Applicants Documentation - New Information

It is discretionary whether a Panel considers new information that was not part of the Assessment Manager (or delegate's) decision making. The process set out in the LGA's "prescriptive" template provides considerable scope for new information to be considered by the Panel, and associated administrative steps, particularly for the Presiding Member.

Arguably, this additional information may materially influence the original decision that was made by the Assessment Manager and should therefore should not be dealt with in this review process, but instead through lodging a new development application.

It is recommended that the Policy states:

- that information that was not before the Assessment Manager at the time of the decision on the Prescribed Mater will not be considered by the Panel; and
- that the Panel will not receive submissions or verbal addresses from any party.

Materials for Review Hearing

The attached draft Policy includes clause 4.1 which sets out what materials must be collated by the Assessment Manager to provide to the Panel. While the PDI Act provides that it is at the discretion of each Panel as to what materials they wish to have before them (Section 203(3)), to ensure integrity and consistency in the review process, it is recommended that the Policy require all materials which were before the Assessment Manager (or delegate) be before the Panel.

There is no prescribed time within which a review application should come before a Panel for determination, although panels should seek to conduct reviews in a timely manner. The draft Policy sets out that reviews should be put to the next available panel meeting after the relevant materials have all been collated (i.e. the next meeting for which the agenda has not yet been finalised, not necessarily the next in time meeting).

Clause 4.5 has been included in the draft Policy, which requires the Applicant to be advised of the time and date of the Panel meeting at which the review will be heard.

Review Hearing

The PDI Act and General Regulations do not specify how the review hearing is to proceed. Subject to common law requirements of procedural fairness, this is entirely at the discretion of the CAP.

It is recommended the Panel consider the 'prescribed matter' that is the subject of the review "afresh". This means that the Panel will make its own decision on the matter based on the materials before it, rather than considering whether there was an error in the decision made by the Assessment Manager.

An applicant does not have a right to be heard before the Panel. It is suggested that there is no need to provide a formal opportunity for the applicant to speak to their request. The draft Policy includes clause 5.2 which states that the Panel will not hear addresses from any party.

To provide guidance as to the conduct of the hearing for review, the Policy is able to specify that Panel Members are able to ask questions of the applicant or the Assessment Manager, or in the alternative, that the Panel makes its decision only on the papers before it. It is considered reasonable for the Panel members to ask questions and this has therefore been included in the draft Policy.

It is recommended that the Policy specify:

- timing for the Panel's consideration of the review will be at the next available meeting (noting this may not be the next scheduled calendar date of the Panel meeting);
- that the applicant is advised of the time and date of the Panel meeting at which the review will be heard; and
- that Panel members are invited to ask questions and the applicant and Assessment Manager can be invited to respond.

The Policy is silent as to whether the Panel will deliberate in public or in confidence. Regulation 13(2)(b) of the General Regulations enables a Panel to determine review applications in confidence. The policy is also silent on how decisions are made (i.e. majority vote, etc.) and recorded (minuted etc.).

As these reviews will be conducted as part of regular Panel meetings, these matters should be governed by the meeting procedures for the Panel. In the case of the City of Norwood Payneham & St Peters CAP meetings, this will default to the standard practice of conducting meetings in public, unless determined otherwise.

OPTIONS

A hybrid of the LGA template documents has been used in preparing the draft Policy, seeking to set a balance between a fair and equitable review process and the need for administrative efficiencies.

It is proposed that Council's website be updated to provide information on the review process, including links to the prescribed form and the Panel's adopted policy from the date it becomes operational.

CONCLUSION

In considering an appropriate process, it is noted that this new legislative process is intended as a review of prescribed matters and applicants have the opportunity to lodge a full appeal to the ERD Court.

The Panel is able to review any aspect of this policy after an initial period of operation.

A draft *Council Assessment Panel Review of Decisions of the Assessment Manager Policy* is attached for the Panel's consideration.

RECOMMENDATION

1. That the Council Assessment Panel resolves to adopt the *Council Assessment Panel Review of Decisions of the Assessment Manager Policy* dated 10 February 2021 (the Policy) as contained in **Attachment C**.

3. **OTHER BUSINESS**
(Of an urgent nature only)
4. **CONFIDENTIAL REPORTS**
Nil
5. **CLOSURE**