

7 October 2016

Via email planningreform@sa.gov.au

Re: Discussion Paper: Renewing our Planning System-Placing Local Heritage on Renewed Foundations

The Environmental Defenders Office (SA) Inc (“the EDO”) is an independent community legal centre with over twenty years of experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education. Community groups have referred this issue to us and we note the intense interest in improving the quality of heritage management and protection that has been articulated by many varied members of the South Australian population. There is certainly a need to improve the legislative process to deliver better outcomes in an efficient and balanced manner. To this end, we have endeavoured to clarify the important issues hereunder.

The EDO appreciates the opportunity to provide a response to the points raised in this important discussion paper (“the paper”) on local heritage. It is acknowledged that the paper raises a number of points seeking feedback. We look forward to, and would strongly recommend, an ongoing discussion on the implications of the points raised particularly with respect to procedural matters which will implement the management of local heritage as part of the legislative drafting process. The paper raises a number of points that warrant the development of a system that will protect local heritage and the owner’s right to develop in a balanced manner.

This is a generational opportunity to review the way South Australia manages heritage. However it is unclear why a key recommendation of the Expert Panel for an integrated approach to all heritage matters separate to planning system was not outlined in the paper nor apparently considered favourably by the Minister. In addition the paper doesn’t cover heritage management and the issue of contributory items.

Certain aspects of the Planning, Development and Infrastructure Act 2016 (PDI Act) already pertain to local heritage and in our view need to further develop a balance between protecting local heritage while allowing for viable development. In particular the legislation allows developers to appeal listings and furthermore require 51% of landowners to approve a heritage character or preservation zone. It is a concern to us that there is scope for heritage protection to be further downgraded if some of the suggestions in the Paper are incorporated into legislation. Condensing our feedback, please consider the following points:

1. *Updating current listing criteria, implementing a framework document and the use of a 'practice direction'*

In our view the problems with the system are in part due to a cumbersome process but also due to delays by the Minister in making decisions. With respect to local heritage we recommend that Councils oversee the listing process and are given the power to make final decisions rather than the South Australian Planning Commission.

The EDO supports the inclusion of local heritage criteria in an integrated heritage act. However having said this, it is not clear from the discussion paper that there is a compelling need for them to be brought into line with HERCON model criteria. The advantage of retaining local heritage within the planning legislation is that the current criteria appears quite adequate for local listing. If there had been a perceived problem with the criteria, the paper did not elucidate the reasons. There are clear distinctions between national, state and local listings and standardization is contrary to this. An existing resource that has thoroughly identified historic periods and themes is the Marsden Historical Guidelines, which are comprehensive, reflective of local and regional differences in settlement and would be a good source material to consider. The EDO does not support the proposed criteria derived from the *Heritage Places Act 1993* as the focus on themes and rarity could potentially fail to list important local heritage. In fact, local heritage varies considerably in content and value according to which regional part of the state in which it is located.

The EDO recommends a simple system based on date/era, and broad historic themes related to the proposed local heritage place. It is considered that significance and future development can and should be part of the listing documentation, prepared in consultation with current owners of potential local heritage places and local councils. Greater flexibility in land uses and land division should also be considered by the Minister in order to enable local councils to provide incentives to restore and reuse neglected heritage and increase employment opportunities for local communities.

The EDO further supports the use of a framework document and practice direction subject to the provision of further detail outlined above. Local councils undertaking the local heritage survey or updating listing should also be encouraged to consider incentives to promote local heritage as an economic benefit to the owner and community. This warrants a separate discussion prior to further drafting and the EDO would be pleased to assist in this. Some element of state support would be an encouragement to local government.

2. *Streamlining the listing process, recording local heritage places*

The EDO supports a less cumbersome process as set out provided upfront surveys and consultation are done in a thorough and appropriate manner. A Practice Direction would be an essentially useful tool for setting out the process for reviewing past surveys, existing studies and documented historical evidence. Consideration should also be given to reducing excessive paperwork and balancing the significance of the place proposed for listing with a

companion interpretation/alteration/future development opportunities section of the listing in consultation with the owner. If this process is undertaken properly as set out above we suggest an appropriate consultation period following the completion of the proposed heritage list should be six weeks.

It is also suggested that if there is successful early engagement and consultation processes then the need for “interim operation” is unnecessary. Interim operation is a significant protection for heritage and should only be available if early engagement and consultation are unsuccessful.

The paper proposes that an expert heritage committee makes final decisions ie amendments for incorporation into the Planning and Design Code. As noted above the EDO recommends that local councils have this role. In addition, the recommendations that are forwarded to the Minister should be dealt with expeditiously. Should the Minister refer the proposed schedule of local heritage places back to the Council for reconsideration, then following the council’s response to the referral, the Minister should be required to gazette the local schedule or local heritage place within a 3-4 months timeframe. We strongly support local councils having the responsibility for listing given that management of heritage will be on the basis of a partnership between owners, council, and community. However, the EDO does support a single source of information for heritage listings. This could occur through the State Heritage Branch and DPTI website, with all listings and relative criteria provided and updated regularly.

3. Streamlining Development Assessment Processes

The Paper proposes a number of matters here- we will comment on some of these.

- a. A review of activities that constitute ‘development’ of heritage places. The detail here is very important and appropriate community consultation and other rights should occur prior to enactment. Following this phase, if certain local heritage development is classified as exempt, accepted or ‘deemed-to-satisfy’ there is no public consultation or third party appeal rights.
- b. The proposal that demolition of local heritage dealt to be dealt with on merit rather than as non-complying development is suggested. The EDO does not support this proposal. Currently, where development is described in a Development Plan or the Development Regulations 2008 (SA) as 'non-complying' the relevant authority may refuse an application without proceeding to assess it, in which case there is no right of appeal by the applicant. The relevant authority may then determine to proceed to assess it, in which case as part of its assessment the relevant authority will require from the applicant a Statement of Effect. This Statement of Effect must include:
 - a description of the proposal, the relevant provisions of the Development Plan and the extent to which the proposal complies with the Development Plan, and
 - an assessment of the expected social economic and environmental effects of the development on its locality

As non-complying developments can be controversial or have potentially adverse impacts on the local environment, a non-complying development must not be granted consent unless both the local council and the Development Assessment Commission agree. In addition, where the Development Assessment Commission is the relevant authority, the Minister for Planning must also agree.

Often, a Development Plan does not list a particular form of development as either complying or non-complying. In these cases, the relevant authority must consider each development on its merits, having regard to the objectives and principles of development control set out in the Development Plan. Planning consent can be granted or refused. If it is refused, the applicant for development approval can appeal against the decision. A Statement of Effects is not required. Given the new system of documentation involving criteria inclusive of historic periods and themes, and owner consultation we strongly suggest that non-complying categorization will be a more robust protective measure.

Rather we would urge that all applications for demolition be classified in the new Planning and Design Code as non-complying to offer greater protection to local heritage. The basis for this recommendation is that listing will involve significance AND future development options in full consultation with an owner. Consequently the process of documentation will be more labour intensive and subsequent listing should provide a rigorous level of protection against demolition.

- c. Accredited professionals could provide advice and decide on development applications for local heritage places, at a local level and provision should be made to include local historians and local heritage societies. At the outset we would submit that accredited professionals need tertiary qualifications in the disciplines of history, or architecture, as well as in a town planning. As to the role of such professionals we support their use as advisors to the council, rather than as members of an expert heritage committee. If within the role as decision makers in some form or other, their decisions should be subject to review.
- d. Contributory items / Character protection
While not fully explored in the discussion paper, the EDO supports the distinction between character and heritage. Therefore, a character overlay or similar planning tool to designate character landscapes and townscapes would improve the current planning system. This may of course include a streetscape character based upon past development patterns; in which case the articulation of the existing character in terms of form, setbacks, heights, textures, materials, landscape treatments and include a definition of desired future character. Replacement buildings would need to respond to the equivalent of a desired future character statement and be illustrated by plan overlays.

The retention of contributory items is not supported by the EDO on the basis that contributory items should relate more to streetscape character. In a number of situations, contributory items have been assessed more as local heritage places to the overall detriment of the heritage system as a fair system.

Summary of recommendations:

- a. Apply the KISS principle to criteria for local listing, which should retain the existing criteria, with added era/broad historic themes as a guide on the basis of the retention of local heritage within planning legislation.
- b. Include consultation and future development guidelines as part of the listing process. Further discussion would be welcome on this important aspect.
- c. Provide a non-complying category for demolition of gazetted local heritage places under the new system to reinforce the value of listing.
- d. Full support for a gazettal process rather than the existing cumbersome DPA process.
- e. Consider how local councils may be able to assist owners and the community in enhancing the value of local heritage as an adjunct to the legislative reform in process. Consider a practice circular that encourages Councils to consider an incentives package for local heritage places as an adjunct to proposing a local historic places listing via gazettal.

Overall, the ideas articulated include simplifying the local heritage listing process and the suggestions above propose added ways of balancing local heritage protection with a more consultative and transparent heritage system for local communities. We would welcome an opportunity to expand on some of the points and contribute to the improvement of local heritage protections in SA.

Please contact the EDO office should you require further discussion on this submission.

Yours faithfully



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The environment's legal team since 1992- protecting the public interest – evening the odds

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