STATE PLANNING COMMISSION

Agenda Report for Decision

Meeting Date: 5 October 2023

Item Name	Amendments to State Planning Commission Practice Direction 12 (Conditions) 2020
Presenters	Chelsea Lucas and Ben Sieben
Purpose of Report	Decision
Item Number	5.4
Strategic Plan Reference	4 Discharging Statutory Obligations
Work Plan Reference	4.3. Ensure the Commission operates in line with governance best practice
Confidentiality	Not Confidential – Release Immediately
Related Decisions	

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately).
2. Approve *State Planning Commission Practice Direction 12 (Conditions) 2020* as amended at **Attachment 1** for publication on the SA planning portal.
3. Authorise the Chair to sign the draft Gazette Notice at **Attachment 2** to give notice of amendments to *State Planning Commission Practice Direction 12 (Conditions) 2020*.
4. Note the Department will arrange for the Gazette Notice to be published in the Government Gazette.
5. Authorise the Chair to sign the letter at **Attachment 3** to the Minister for Planning advising that amendments have been made to *State Planning Commission Practice Direction 12 (Conditions) 2020*.

Background

Section 127 of the *Planning, Development and Infrastructure Act 2016* (PDI Act) provides that in assessing developments, relevant authorities:

- must attach conditions to any approvals as specified by practice direction; and
- must not attach conditions that are inconsistent with any practice direction published by the Commission (and that practice direction may prohibit certain conditions or classes of conditions).

The Commission first issued *State Planning Commission Practice Direction 12 (Conditions) 2020* (Practice Direction 12) on 18 June 2020, and it was further amended on 18 February 2021 ahead of the transition from the *Development Act 1993* to the PDI Act on 19 March 2021.

The Minister for Planning (the Minister) has now recently written to the Commission on two separate occasions to request amendments to Practice Direction 12. The changes are in relation to:

1. prohibiting conditions restricting the use of ancillary accommodation to family members of those residing in the primary dwelling; and
2. the introduction of a mandatory condition requiring common driveways/roads to be constructed before the Commission is able to issue its land division certificate under section 138 of the PDI Act for land divisions under the *Community Titles Act 1996*.

Discussion

Ancillary Accommodation

On 24 July 2023, Cr Carlos Quaremba from the City of Victor Harbor made statements on radio about lobbying the State Government to amend planning laws to allow anybody to live in ancillary accommodation (also known as granny flats), rather than their use being restricted to immediate family members of those residing in the existing primary dwelling.

There is nothing in the PDI Act or in the Planning and Design Code (the Code) that restricts who may occupy ancillary accommodation. However, there is evidence that some councils are placing conditions on approvals for ancillary accommodation that restricts who may occupy it.

The Minister advises that given the current housing situation, there is a change in sentiment towards ancillary accommodation and that the planning system should support establishing self-contained ancillary accommodation that is able to be occupied without condition. It should be a decision of the resident of the primary dwelling as to whether they are comfortable renting ancillary accommodation to persons unrelated to them.

It should be noted that advice from Consumer and Business Services (CBS) suggests that it is currently unclear whether a person renting a granny flat is captured by a standard tenancy agreement. Therefore, the current review of the *Residential Tenancies Act 1995* will seek to clarify whether this sort of arrangement is captured by a standard tenancy agreement or a rooming house agreement (and the relevant protections therefore being afforded to the persons residing in the primary dwelling and granny flat).

Given it has been requested by the Minister, it is recommended the Commission amend Practice Direction 12 to prohibit conditions restricting the use of ancillary accommodation to family members of those residing in the primary dwelling. A revised Practice Direction 12 at **Attachment 1** prohibiting conditions of this nature has been prepared for the Commission's consideration.

It is noted the Minister also requested the Commission initiate an amendment to the Code to review the existing definition of 'ancillary accommodation' and to investigate suitable policy to guide the assessment of Build-to-Rent development. This will be the subject of a further Agenda Report to the Commission.

Community Title Land Divisions

Under the PDI Act, an applicant can choose to seek the division of land as either a Torrens title subdivision or a division under the *Community Titles Act 1996* (CT Act). For a conventional Torrens title division, any roads created as part of the division generally become a council asset after construction.

As a result, the scheme established under the PDI Act has specific requirements for the construction of roads (road width, construction standards, kerb heights etc) that are provided to the applicant by the relevant council as part of the land division consent process. The developer is then required to construct any roads in accordance with those requirements.

Prior to certificates of title being issued for a Torrens title subdivision, the PDI Act requires the Commission to issue a certificate that it is satisfied the prescribed conditions imposed on a development have been satisfied.

For a community title subdivision, the roads are private roads which are not the responsibility of the council. They remain common property (designated through the community title scheme description) of the owners of the respective community allotments in the division. Every scheme description requires endorsement by the relevant council under the CT Act.

Developers undertaking a community title subdivision are not bound by the specific requirements of councils as to the construction of roads. Instead, they are private roads, and the developer is responsible for the construction and completion of those roads.

The Minister for Consumer and Business Affairs, Hon Andrea Michaels MP, wrote to the Minister to highlight concerns with a development at O'Halloran Hill where the Commission issued its land division certificate prior to the construction of the common driveway (as a result of the council amending the condition of approval that allowed this to occur). This allowed the developer to obtain new titles for each allotment and sell the houses before access roads were constructed. The developer subsequently became insolvent, and the owners of the houses were left without access to their properties. The State Government has since stepped in to construct the common driveway.

CBS has also advised the Department of further developments involving land division under the CT Act where the common driveway remains incomplete, yet new titles for the allotments have been issued and houses subsequently sold.

To ensure this situation cannot continue to occur, the Minister has requested the Commission amend Practice Direction 12 to mandate common driveways/roads be constructed before the Commission is able to issue its land division certificate under section 138 of the PDI Act. A condition of this nature has been included in revised Practice Direction 12 at **Attachment 1**.

The condition applies to development applications that involve the division of land under the CT Act where more than six community lots are created. This is inline with requirements under the CT Act where developments creating more than six lots require a scheme description to be lodged with the Registrar-General, as well as a development contract to be executed for any building work. It is considered there is lower risk for developments where six or less community lots are created, as access is more akin to a driveway (which may simply be paved) rather than a bitumen road.

This change provides additional consistency on the management of roads between both Torrens title and community title subdivisions, as well as ensures more certainty and security for those purchasing homes within community title developments.

Next Steps

Subject to the Commission's approval of amended Practice Direction 12, notice of the variation must be published in the Gazette pursuant to section 42(4)(b) of the PDI Act before the changes may take effect. Given this, it is recommended the draft Gazette Notice at **Attachment 2** be signed by the Chair of the Commission.

A letter to the Minister at **Attachment 3** advising that the Commission has made the requested amendments to Practice Direction 12 has also been prepared for the Commission's consideration.

Attachments:

1. Revised Practice Direction 12 – Conditions (#20661974)
2. Gazette Notice – Practice Direction 12 - Conditions (#20661975)
3. Letter to the Minister for Planning (#20661978)

Appendices:

A. Letter from the Minister for Planning – Ancillary Accommodation (#20665639)
B. Letter from the Minister for Planning – Community Title Land Divisions (#20661981)

Prepared by: Ben Sieben

Endorsed by: Chelsea Lucas

Date: 20 September 2023

PRACTICE DIRECTION 12

Conditions 2020

STATE PLANNING COMMISSION

Introduction

This practice direction is issued by the State Planning Commission ("the Commission") under sections 42(1) and 127 of the *Planning, Development and Infrastructure Act 2016* ("the Act").

Practice direction

Part 1 – Preliminary

1 – Citation

This practice direction may be cited as the *State Planning Commission Practice Direction 12 (Conditions) 2020.*

2 – Commencement of operation

This practice direction came into operation on 31 July 2020.

Version 3 of this practice direction commences operation on 13 October 2023.

3 – Object of practice direction

The object of this practice direction is –

(a) to specify conditions that may be imposed by a relevant authority pursuant to section 127 (1)(b) and (2)(a) of the Act, including prohibiting certain conditions or classes of condition; and

(b) to specify conditions that must be imposed on the granting of a development authorisation for certain classes of development.

4 – Interpretation

In this practice direction, unless the contrary intention appears –

Act means the *Planning, Development and Infrastructure Act 2016.*

Regulations means the Planning, Development and Infrastructure (General) Regulations 2017.

Note: Section 12 of the Legislation Interpretation Act 2021 provides that an expression used in an instrument made under an Act has, unless the contrary intention appears, the same meaning as in the Act under which the instrument was made.

Part 2 – Conditions

4 – Conditions a relevant authority thinks fit to impose

(1) If a development authorisation is granted by a relevant authority, conditions may be imposed as the relevant authority thinks fit under section 127(1)(a) of the Act.

(2) Under section 127(2)(a) of the Act, any condition imposed by the relevant authority must be consistent with this practice direction.

5 – Conditions specified by practice direction

Column 2 of the following table specifies conditions which must be imposed on a development authorisation issued by a relevant authority if a development incorporates the class of development specified in Column 1.

Column 1: Class of development	Column 2: Condition	Note
Where the application is for or includes the killing, destruction or removal of a regulated or significant tree	Either: a. Replacement trees must be planted within 12 months of completion of the development at the following rates: i. if the development relates to a regulated tree—2 trees to replace a regulated tree; or ii. if the development relates to a significant tree—3 trees to replace a significant tree. Replacement trees cannot be within a species specified under regulation 3F(4)(b) of the Planning, Development and Infrastructure (General) Regulations 2017, and cannot be planted within 10 metres of an existing dwelling or in-ground swimming pool; or b. Payment of an amount calculated in accordance with the Planning, Development and Infrastructure (Fees, Charges and Contributions) Regulations 2019 be made into the relevant urban trees fund (or if an urban trees fund has not been established for the area where the relevant tree is situated, or the relevant authority is the Commission or an assessment panel appointment by the Minister or a joint planning board, the Planning and Development Fund) in lieu of planting 1 or more replacement trees. Payment must be made prior to the undertaking of development on the land.	The relevant authority may, on the application of the applicant, determine that a payment of an amount calculated in accordance with the Planning, Development and Infrastructure (Fees, Charges and Contributions) Regulations 2019 be made into the relevant fund in lieu of planting 1 or more replacement trees (in which case condition (b) will apply).
Division of land in an Environment and Food Production Area	The additional allotments created will not be used for residential development.	Refer to section 7 of the Act

Column 1: **Class of development**	**Column 2:** **Condition**	**Note**
Where the Commissioner of Police determines that a proposed development involves the creation of fortification, but does not consist only of the creation of fortifications and the relevant authority resolves to grant consent or approval to the proposed development	The creation of fortifications is prohibited.	Refer to section 124 of the Act
Any application involving essential infrastructure of a prescribed class or Crown development	Before any building work is undertaken, the building work must be certified by a building certifier, or by some person determined by the Minister, as complying with the provisions of the Building Rules to the extent that is appropriate.	Refer to Section 130(20) or 131(21) of the Act
Where the application is for or includes a new dwelling in an area subject to the Urban Tree Canopy Overlay in the Planning and Design Code	Either: a. Tree(s) must be planted and/or retained in accordance with DTS/DPF 1.1 of the Urban Tree Canopy Overlay in the Planning and Design Code (as at the date of lodgement of the application). New trees must be planted within 12 months of occupation of the dwelling(s) and maintained. b. Where provided for by any relevant off-set scheme established under section 197 of the *Planning, Development and Infrastructure Act 2016* (as at the date of lodgement of the application), payment of an amount calculated in accordance with the off-set scheme may be made in lieu of planting/retaining 1 or more trees as set out in the Urban Tree Canopy Overlay in the Planning and Design Code (as at the date of lodgement of the application). Payment must be made prior to the issue of development approval.	

Column 1: Class of development	Column 2: Condition	Note
Where the application includes rainwater tank(s) to be installed in accordance with DTS/DPF 1.1 of the Stormwater Management Overlay in the Planning and Design Code	Rainwater tank(s) must be installed in accordance with DTS/DPF 1.1 of the Stormwater Management Overlay in the Planning and Design Code (as at the date of lodgement of the application) within 12 months of occupation of the dwelling(s).	
Where the application involves the division of land under the *Community Titles Act 1996* and it creates more than six community lots when all stages (being the subsequent division of development lots under the *Community Titles Act 1996*) of the development are complete.	Construction of the common driveway (including all access points to and from the common driveway) must be completed to provide access to the community lots before the State Planning Commission issues its land division certificate under section 138 of the *Planning, Development and Infrastructure Act 2016.*	

6 – Conditions or classes of conditions prohibited by section 127 of the Act

A development condition must not do any one or more of the following —

(a) require a person or body not related to the subject development authorisation to carry out works for the development; or

(b) require further approval (whether a development authorisation or under other legislation) to enable the condition to be met unless the condition relates to a matter reserved for further consideration; or

(c) require a person to enter into an infrastructure agreement; or

(d) require the payment of a monetary contribution towards public works (including the establishment, operating or maintenance costs of public infrastructure, works to be carried out for public infrastructure or land to be used for public infrastructure), unless:

(i) the payment or contribution relates to an offset scheme established under the Act or Regulations, or a carparking fund established under the *Development Act 1993*; or

(ii) the payment or contribution relates to an obligation imposed under an Infrastructure Agreement; or

(iii) the works can be directly attributed to or are required as a result of the development proposal and the monetary contribution will be applied to the relevant works; or

(e) require an access restriction strip; or

(f) limit the period a development approval has effect for a use or works forming part of a network of infrastructure, other than State-owned or State-controlled transport infrastructure; or

(g) fetter statutory powers by binding future decisions of a relevant authority, nor can it fetter the discretion of an authority under any other legislation; or

(h) require substantial variation by altering the fundamental nature of an application[1]; or

(i) relate to any other subject matter other than the subject matter of the application; or

(j) go beyond the scope of what is being approved; or

(k) be unduly onerous; or

(l) be vague and uncertain; or

(m) be for a purpose other than a purpose envisaged by the Act; or

(n) prevent the leasing, renting or occupation of ancillary accommodation; or

(o) restrict the occupation of ancillary accommodation (including by restricting occupation to family members of those residing in the primary dwelling).

Issued by the State Planning Commission on 18 February 2021

Note: This practice direction commences operation in accordance with clause 2 'Commencement of operation'

Version 3: Commences operation on 13 October 2023

Version 2: Commences operation on 19 March 2021

Version 1: Commenced operation on 31 July 2020

[1] Where an application as lodged does not comply with the Code, refusal of the application may be a more appropriate determination than attempting to address any fundamental discrepancy via condition.

PLANNING, DEVELOPMENT AND INFRASTRUCTURE ACT 2016

NOTICE UNDER SECTION 42

Practice Directions

Preamble

The State Planning Commission may issue a practice direction for the purposes of this Act.

A practice direction may specify procedural requirements or steps in connection with any matter arising under this Act.

A practice direction must be notified in the Gazette and published on the SA Planning Portal.

A practice direction may be varied or revoked by the State Planning Commission from time to time by a further instrument notified in the Gazette and published on the SA Planning Portal.

NOTICE

PURSUANT to section 42(4)(b) of the *Planning, Development and Infrastructure Act 2016,* I, **Craig Holden**, Chair, State Planning Commission:

a. vary State Planning Commission Practice Direction 12 (Conditions) 2020; and

b. fix the day on which State Planning Commission Practice Direction 12 (Conditions) 2020 is published on the SA Planning Portal as the day on which the varied practice direction will come into operation.

Dated: 09 October 2023

CRAIG HOLDEN
CHAIR
STATE PLANNING COMMISSION

20661978

STATE PLANNING COMMISSION

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9 October 2023

Hon Nick Champion MP
Minister for Planning

By email: officeofministerchampion@sa.gov.au

Dear Minister Champion

Amendments to State Planning Commission Practice Direction 12 (Conditions) 2020

I write in relation to your correspondence of 6 September 2023 and 17 September 2023 regarding amendments to *State Planning Commission Practice Direction 12 (Conditions) 2020* (Practice Direction 12).

The State Planning Commission (Commission) agrees it is important to improve certainty and security for those purchasing homes within community title developments, as well as provide greater consistency in the management of roads between both Torrens title and community titles subdivisions.

As a result of the current housing shortage and the change in sentiment towards ancillary accommodation, the Commission is also of the view that the planning system should support establishing self-contained ancillary accommodation that is able to be occupied without condition.

Given this, I am able to advise that on 5 October 2023, the Commission approved amendments to Practice Direction 12 to achieve the following:

- prohibit conditions restricting the renting or leasing of ancillary accommodation (including those that restrict the use to family members of those residing in the primary dwelling); and

- impose a mandatory condition that the common driveway (including access points to and from the common driveway) be constructed before the Commission issues its land division certificate under section 138 of the *Planning, Development and Infrastructure Act 2016* for all developments involving the division of land under the *Community Titles Act 1996* where more than six community lots are created.

I understand notice of the amendments to Practice Direction 12 will be published in the Government Gazette before it is published on the SA planning portal and commences operation.

These important amendments to Practice Direction 12 will assist with easing pressure on the rental market, as well as lead to better outcomes for consumers purchasing into community title developments.

Yours sincerely

Craig Holden
Chair

Hon Nick Champion MP

Government of South Australia

Minister for Trade and Investment

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23EXT0254

Mr Craig Holden
Chair
State Planning Commission

By email: saplanningcommission@sa.gov.au

Dear Mr Holden Craig

As you may be aware, on 24 July 2023 Councillor Carlos Quaremba from the City of Victor Harbor made statements on radio about lobbying the State Government to amend planning laws to allow anybody to live in ancillary accommodation (also known as 'granny flats'), rather than their use being restricted to immediate family members of those residing in the existing primary dwelling.

While I am advised there is nothing in the *Planning, Development and Infrastructure Act 2016* or in the Planning and Design Code (the Code) that restricts who may occupy ancillary accommodation, it is understood councils often place conditions on approvals for ancillary accommodation that restricts who may occupy it.

In addition, I am also advised that the recently amended definition in the Code for ancillary accommodation includes a requirement that it cannot be 'self-contained', and that this is potentially hindering this form of development accordingly.

The current housing situation is driving a change in sentiment towards ancillary accommodation. I am therefore of the view that the planning system should support establishing self-contained ancillary accommodation that is able to be occupied without condition.

You may also be aware that the State Commission Assessment Panel currently has two development applications under assessment for 'Build-to-Rent' residential development.

The Built-to-Rent model for residential development is growing in Australia. This class of housing is focused on providing high quality, purpose-designed rental apartment stock where the developer retains ownership of all apartments and offers them for rent. Build-to-Rent developments typically offer longer-term leases, which provides tenants with greater security of tenure.

Many of the physical and design attributes of an apartment building are similar with both Build-to-Rent and Build-to-Sell developments. However, there are some differences, including strong focus on common apartment amenities, such as gyms, co-working spaces and other shared facilities, and a strong focus on quality construction and sustainability.

SOUTH AUSTRALIA

Given the current housing shortage in South Australia, and to encourage the establishment of ancillary accommodation and provide greater policy certainty for Build-to-Rent residential development as part of a diverse mix of housing to meet community needs, I respectfully request that the State Planning Commission (the Commission):

- Investigate an update to *Practice Direction 12 – Conditions* to prohibit conditions on planning approvals restricting who may occupy ancillary accommodation.
- Initiate an amendment (or separate amendments) to the Code to:
    - Review the existing definition of ancillary accommodation to enable it to be self-contained, consider if any consequential policy adjustments are required as a result of changing the definition, and consider streamlining the approval pathway for ancillary accommodation in certain circumstances.
    - Investigate a suitable policy regime through a Code Amendment including consideration of a definition, assessment pathways and relevant tailored policy to guide the assessment of Build-to-Rent development.

I am of the view that the Commission is best placed to lead these amendments given the nature of the changes and state-wide application.

In addition to this, I will seek to progress amendments to the *Planning, Development and Infrastructure (General) Regulations 2017* to clarify that existing conditions restricting the occupancy of ancillary accommodation no longer need to be complied with, and to ensure that Built-to-Rent housing is required to contribute the Planning and Development Fund similar to other residential development.

Yours sincerely

Hon Nick Champion MP
Minister for Planning

17 / 9 / 2023

Hon Nick Champion MP

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23MP170071

Mr Craig Holden
Chair
State Planning Commission

By email: saplanningcommission@sa.gov.au

Dear Mr Holden

I am writing to advise the State Planning Commission (the Commission) regarding a community title residential development at O'Halloran Hill where the developer has recently been declared bankrupt. As a result, there are a significant number of homes that are not fully constructed and cannot be completed due to unfinished roads servicing these homes.

Under the *Planning, Development and Infrastructure Act 2016* (the PDI Act), an applicant can choose to seek the division of land as either a Torrens title subdivision or a division under the *Community Titles Act 1996* (the CT Act).

For a conventional Torrens title division, any roads created as part of the division generally become a council asset, which becomes the responsibility of the council after construction. As a result, the PDI Act and its Regulations have specific requirements for the construction of roads (i.e. road width, construction standards, kerb heights etc.) that are provided to the applicant by the relevant council as part of the land division consent process. The developer is then required to construct any roads in accordance with those requirements.

Prior to certificates of title being issued for a Torrens title subdivision, the PDI Act requires the Commission to issue a certificate that it is satisfied that prescribed conditions have been satisfied. In those situations where conditions of approval have not been met (for example, where it may not be practical for the road to be fully completed before seeking the issuing of titles) the PDI Act provides the ability for a security bond to be provided by the developer. The purpose of a security bond is to allow the council to complete the roadworks on behalf of the developer if required.

For a community title subdivision (such as the development at O'Halloran Hill), the roads are private roads which are not the responsibility of the council. They remain common property (designated through the community title scheme description) of the owners of the respective community allotments in the division. Every scheme description requires endorsement by the relevant council under the CT Act.

SOUTH AUSTRALIA

Developers undertaking a community title subdivision are not bound by the specific requirements of councils as to the construction of roads. Instead, they are private roads, and the developer is responsible for the construction and completion of such private roads.

To ensure the situation at O'Halloran Hill cannot be repeated in the future, I urgently seek the Commission's support to investigate an update to *Practice direction 12 – Conditions* to mandate standard conditions on relevant development approvals.

I have been advised by Planning and Land Use Services that a mandatory condition could be placed on all community title subdivisions where a private road is to be constructed. The condition could require that, prior to issuing a certificate from the Commission under section 138 of the PDI Act, all roads have been constructed in accordance with the details as set out in the scheme description.

This would provide for further consistency in the management of roads between both Torrens title and community titles subdivisions. Importantly, it would also provide more certainty and security for those purchasing homes within community title developments.

I appreciate the Commission's attention to this important matter.

Yours sincerely

Hon Nick Champion MP
Minister for Planning

6 / 9 / 2023