

PLEASE QUOTE

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25 February 2021

Community Consultations
Consumer, Building and Occupational Services
Department of Justice

haveyoursay@justice.tas.gov.au

Dear Sir

SUBMISSION ON OPTIONS PAPER - NO PLANNING APPROVAL REQUIRED CERTIFICATES

Burnie City Council acknowledge receipt of the Options Paper - No Planning Permit Required Certificates, and thank the Department for the opportunity to provide comment.

The three options have been examined, and the preference is for Option 3 - Status Quo.

It is not considered Option 1 or Option 2 will provide a valid or practical means by which to confirm no requirement for a permit to commence or carry out use or development under the provisions of the applicable planning scheme.

Any introduction of a No permit Required Certificate must be legislated under the *Land Use Planning and Approvals Act 1993* as a function of a planning authority.

It is highly inaccurate to suggest local government has advocated and supports introduction of private planning practitioners to certify compliance to a no permit requirement of a planning scheme.

The following comment is made in response to the Options Paper.

1. PESRAC INTERIM REPORT - RECOMMENDATION 26

Recommendation 26 in the Premier's Economic and Social Recovery Advisory Council (PESRAC) Interim Report (July 2020) does not support Option 1 and Option 2.

The PESRAC Report takes a broad policy perspective on actions to reduce cost, delay, and uncertainty for economic activity and job creation in the development and building sector.

Recommendation 26 indicates a need to review the regulatory framework within which a distinction is made between No Permit Required and Permit required use and development.

- a) The relevant regulatory framework is the *Land Use Planning and Approvals Act 1993* and the Tasmanian Planning Scheme.

Section 51 *Land Use Planning and Approvals Act 1993* provides a person must not commence or carry out use or development of land for which the provisions of a planning scheme requires a permit.

Purpose of a permit requirement is to allow assessment for the likely impact of use and development on the purpose and objectives of the planning scheme.

There is no requirement in the Act for a planning scheme to indicate when a permit is not required.

There is a long standing convention, retained in the State Planning Provisions, for Tasmanian planning schemes to identify use or development for which a permit is not required¹.

The object is to avoid cost and delay in assessment and certification for low impact use and development of a kind that will always be appropriate to zone purpose.

No Permit Required use or development -

- i. Is obliged to reference and comply with all applicable standards of the planning scheme²;
- ii. carries the same compliance obligation as Permit use and development; and
- iii. imposes the same obligation on a planning authority to ensure and enforce observance to the requirements of a planning scheme as apply for a permit use or development³

The standard of information and consideration required to establish use or development as No Permit Required is equivalent to that required to determine compliance by a Permitted use or development.

It is appropriate to examine whether the current regulatory framework best serves statutory land use planning objectives and delivers a practical, certain and efficient means by which to advance low impact use and development.

- b) An obligation to comply implies an ability to confirm and document compliance.

There is no mechanism currently available under the *Land Use Planning and Approvals Act 1993* by which to confirm a particular use or development on a nominated site is not or will not be contrary to or in any way impede or obstruct the planning scheme.

A requirement for compliance in the absence of certification creates confusion and uncertainty, and is of doubtful benefit for the purpose and efficacy of the planning system.

Many planning authorities will on request provide a statement confirming a specific use or development does not require a permit. However, such a document is not an action required of a planning authority, and has no statutory standing or security.

¹ No Permit Required differs from an Exempt use or development. The former requires compliance to the applicable standards of the planning scheme, while the later sets aside any need to further engage with the provisions of the scheme

² clause 8.6 of an interim planning scheme and SPP clause 6.6

³ Section 48 and 63

Successive approaches to standardise planning schemes have retained the 'no permit required' convention and consistently rejected calls for a compliance certificate⁴.

The proposition in Option 1 is contrary to prevailing policy.

The alleged driver for Option 1 suggests a failure of confidence in the current regulatory framework, and manifests an external desire for an overt and authoritative means by which to document compliance where a permit is not required.

There is merit in the proposal to document use or development does not require a permit should the current regulatory framework is to remain.

A compliance certificate should be legislated under the Land Use Planning and Approvals Act 1993 to provide certainty for–

- i. a new or changed use or development; and
- ii. subsequent ownership or occupation of land on which that use or development has occurred⁵

A complying use or development certificate should differ from a permit issued under section 57 or 58 of the Act. There should be no ability to impose conditions, and no right of appeal.

However, availability of a certificate will not address the intent of Recommendation 26.

A certificate will merely confirm compliance within the framework; it will not change or improve purpose or operation of that framework

- c) Any action under Recommendation 26 must fully consider alternative means by which to measurably improve certainty, clarity and cost of compliance to land use planning objectives, including for whether to -
 - i. expand the range of exempt use or development to which SPP clause 4.0 applies so as to exclude a requirement for a permit;
 - ii. replace the SPP term "No Permit Required" with "Complying Use" to clearly indicate compliance is required; or
 - iii. delete SPP clause 6.6 and require a permit for any use or development for which compliance to a provision of the planning scheme is required; and
 - iv. legislate in the *Land Use Planning and Approvals Act 1993* –
 - a. for a planning authority to issue a complying use or development certificate; or
 - b. to prohibit the practice of voluntary compliance certificates for no permit required use or development

⁴ For example - Planning Directive No 1 – Format and Structure of Planning Schemes; Tasmanian Planning Scheme (State Planning provisions)

⁵ The issue of a certificate can be a matter recorded on a certificate under section 337 *Local Government Act 1993*

2. DIRECTOR'S DETERMINATION

The availability of a compliance certificate is a matter particular to the statutory function of a planning authority, and is not a matter within the jurisdiction of the *Building Act 2016*.

The *Building Act 2016* provides the Director of Building Control may issue a Determination on any matter set out in section 20(1).

A Determination is an instrument of legislative character, and is therefore subordinate legislation within the meaning of the *Subordinate Legislation Act 1992*.

A valid Determination must be reasonable and appropriate to, authorised by, and in accordance with the objectives, principles, spirit and intent of the *Building Act 2016*, and not be inconsistent with the objectives of other Acts.

The following considerations are relevant -

a) Is there adequate Information?

The Options Paper does not contain sufficient information or clearly formulated reason to support Option 1 and Option 2 and allow evidence based decision making.

There is no data or analysis provided or referenced in the Options Paper to –

- i. Support the allegation that a request to a planning authority for a compliance statement “*can often lead to a significant delay due to resource constraints within councils, meaning work cannot progress*”.
- ii. Support the assertion that alleged delays in provision of a statement by a planning authority are “*unnecessary*”.
- iii. Quantify the alleged increase in project costs said to result from a delay by a planning authority to provide a statement.
- iv. Support the claim that a request for a statement is a “*burden*” on local government.
- v. Support the contention that use of private planning consultants will release the resources of a planning authority to deal with permit applications.
- vi. Identify the nature, cause, and effect of each of the alleged regulatory “*blockages*” in approval processes; or
- vii. Establish confidence that private planning consultants are ready, willing, and able to provide a certificate within a timeframe, at a cost, and with a level of accuracy that is comparable to or better than a planning authority.

b) Is there an available power to issue a Determination?

The Director does not have a general and unfettered power to make a Determination under section 20.

The objects and provisions of the *Building Act 2016*⁶ do not expressly or implicitly provide authority for the Director to make a Determination in relation to matters within the jurisdiction of the *Land Use Planning and Approvals Act 1993*.

A permit requirement of a planning scheme is not a matter within section 20(1)(a) to (c) inclusive; or a matter under 20(1)(d) to be decided by the Director under the Act.

The Director must rely on 20(1)(e), but only if the content of a Determination is in relation to a prescribed matter under Regulation 8 of the Building Regulations 2016.

The only potentially relevant prescribed matters are in –

- i. Regulation 8(f) for “*the form, content, requirements and procedures for certificates and reports used, and relied on, under the Act*”;
 - ii. Regulation 8(ga) for “*the form and content of documents required under the Act, including specified documents, that are not otherwise prescribed in accordance with the Act*”.
- c) Is a No Permit Required Certificate a report, document or certificate required or relied upon for an action under the *Building Act 2016*?

The apparent fallacy in Option 1 is that a building services provider or a permit authority is to require or rely upon evidence that a permit is not required under a planning scheme before building work may be authorised or approved.

The *Building Act 2016* and Building Regulations 2016 do not –

- i. require compliance to the requirements of a planning scheme before work on a building may be authorised or approved; or
- ii. require a building services provider or a permit authority must rely on or obtain a certificate, report or document or other form of evidence for compliance with a no permit requirement of a planning scheme before authorising or approving building work

Decision makers are directed by the Act to “*take into account*” a number of matters when determining an application for an authorisation to perform work on a building.

A requirement to “*take account*” means the matter must be considered and given appropriate weight among other elements relevant to a decision required under the Act. It does not mandate compliance.

In this regard the Act requires a decision maker is to take into account -

- i. “*any other permit, consent or order, in place or required under any other Act in respect of work on a building or the premises where the work is to be performed*”⁷

⁶ Objectives in section 3, and the function of the Director under section 16,

⁷ Section 98(1)(e); 109(1)(e); 121(1)(e)

A notice of notifiable works⁸ work must contain prescribed information, including “if applicable, evidence that the requirements of other relevant Acts have been complied with in respect of the work”⁹

- ii. “any relevant requirements of this Act or of a permit, consent or authority in force under any other Act in respect of the premises where the proposed work is to be performed”¹⁰

The consideration is limited to any requirement of an approval already issued and having lawful effect under another Act;

The absence of a requirement for a permit under a planning scheme does not constitute “a permit, consent or authority in force under any other Act” because there is no need for a certificate before commencing or carrying out use or development for which a permit is not required under a planning scheme.

A requirement for evidence of an approval under a planning scheme¹¹ is not “applicable” if a use or development does not require a permit.

The relatively recent practice of building surveyors to request a certificate appears driven by an incorrect interpretation of the Act.

Any ambiguity in the interpretation of an instruction to take other approval requirements into account may be resolved by applying a purposive approach that promotes the object of the Act¹² and the particular context of its wording.

An instruction to “take into account” does not invite a general sweep for compliance to any other regulation which in some manner may also apply for the land, premise or work the subject of a decision under the Building Act.

A decision to authorise work on a building must limit consideration to matters specified under the Act and the National Construction Code and related standards.

There is no apparent purpose or power within the *Building Act* to regulate or confirm compliance to a planning instrument made and administered under the provisions of the *Land Use Planning and Approvals Act 1993*.

It is doubtful the Director has a proper authority to create a “permit, consent or authority” requirement for use or development regulated under a planning scheme by specifying evidence in the form of a 321 certificate is required for a *Building Act* decision¹³.

d) Assessable Items

Option 1 proposes section 321 be used to –

⁸ Section 97(2)(b); 108(2)(b); 102(2)(b)

⁹ Building Regulation 26(k); 34(l) and 46(j)

¹⁰ Section 132(1)(e); 158(1)(e); 183(1)(e)

¹¹ Including for any matter to which 97(2)(b), 108(2)(b) or 102(2)(b), or section 98(1)(e), 109(1)(e) and 121(1)(e) apply

¹² Section 8A *Acts Interpretation Act 1931*

¹³ Including any authorisation or approval to which in section 130(2)(b), 156(2)(b) and 181(2)(b) and a consideration under 132(1)(e), 158(1)(e) and 183(1)(e) apply

- i. identify an exemption or a no permit required provision in a planning scheme as an “*assessable item*”;
- ii. create a certificate as evidence there is no requirement for a permit under a planning scheme for works described in a notice or application for an authorisation under the *Building Act* for; and
- iii. authorise the Director to specify the form of certificate and the qualifications of a person who may provide such a certificate

The Director has explained purpose of an assessable item certificate is to assist the design and assessment of building, plumbing and demolition works in relation to more complex, hazardous, or novel aspects where the advice or conclusions of a person with a higher or more specialist level of expertise is necessary.¹⁴

Matters specified in section 321(1) to be an “*assessable item*” relate directly to aspects of design and performance of work on a building, and excludes matters addressed in a planning scheme.

Section 9 of the *Building Act* provides there can be nothing effective within a planning scheme or a planning permit that relates to the technical requirements of the design or construction of a building, building work, or plumbing work without the approval of the building portfolio Minister.

A permit requirement under a planning scheme is cannot conceivably be an “*assessable item*”; and cannot be included within the purpose of a certificate issued under section 321.

e) Will a Determination be consistent with the objectives of other Acts?

There are separate and independent arrangements under the *Land Use Planning and Approvals Act 1993* and the *Building Act 2016* to regulate land use and building work respectively.

- i. Neither Act intends the powers and processes of one are to intrude upon, assume, or undertake a function of the other.
- ii. The object of the *Land Use Planning and Approvals Act 1993* is to make provision for land use planning and approvals in furtherance of the objectives set out in Schedule 1;
- iii. A planning authority has an exclusive statutory function to maintain, observe, and enforce observance of the planning scheme applicable to the municipal area¹⁵.
- ii. A planning authority may only delegate its functions or powers to a person employed by the planning authority¹⁶.

A private planning practitioner is not an employee of a planning authority, and cannot be authorised under the *Building Act 2016* to use any power or perform any function of a planning authority.

¹⁴ Director’s Determination - Certificates by qualified persons for an assessable item

¹⁵ section 48 and 63A *Land Use Planning and Approvals Act 1993*

¹⁶ Section 6 *Land Use Planning and Approvals Act 1993*

- iii. The functions of a planning authority include to assess and determine compliance to a planning scheme, and to issue or refuse any document required to certify compliance.

A power to issue or refuse a permit implies a power to determine when a permit is not required.

- iv. Issue of a No Permit Required Certificate is not an action currently required of a planning authority under the *Land Use Planning and Approvals Act*.
- v. The *Building Act 2016* does not intend a gatekeeper function to ensure the consent requirements of other regulation, including the *Land Use Planning and Approvals Act 1993*, are satisfied and documented.

Option 1 is inconsistent with the object and operation of the *Land Use Planning and Approvals Act 1993* and the powers and functions of a planning authority, and is contrary to section 3A of the *Subordinate Legislation Act 1992*.

Any introduction of a No Permit Required certificate must be legislated under the *Land Use Planning and Approvals Act 1993* as a function of a planning authority.

3. CERTIFICATION BY A PRIVATE PLANNING PRACTITIONER

Option 1 will be more restrictive than the current practice of requesting a planning authority provide advice, and will not provide any additional clarity, certainty, immediacy, or cost savings for proposed use or development.

- a) The arrangement will not address the confusion and uncertainty associated with a regulatory framework which provides for permit and no permit required use and development.
- b) A planning authority is uniquely resourced and experienced in the operation and observance of the planning scheme in effect within its municipal area.

Successful observance requires familiarity and understanding for the content and spatial application of a planning scheme, and for the processes to establish and enforce compliance.

Determination as no permit required involves more than a simple checklist assessment against requirements of the planning scheme.

There may be applicable conditions in a prior permit or agreement, current enforcement or scheme amendment action, or agency or utility provider requirements, each of which may impact on compliance.

A planning authority is part of an agency which has multiple functions relevant to the use and development of land; and will therefore have access to records and knowledge not readily known or available to a private practitioner.

- c) There is no evidence planning authorities are overwhelmed by a requirement to deal with permit applications to the exclusion of matters that do not require a permit; or that the involvement of private practitioners is necessary to free resources in order to focus on permit applications.

Burnie City Council will provide a no permit required statement on request for a small fee.

Despite impact of COVID 19 on work practices and a significantly increased demand for planning advice and permits during 2020, the planning authority has continued to both determine permit applications well within statutory timeframes and to issue a statement without undue delay.

- d) Option 1 will add cost and delay if a certificate assumes a default mandatory status for a decision under the Building Act and is only available from a private practitioner.
- e) It is unclear whether a planning authority will have authority to issue a certificate.

If not, the approach is restrictive on competition and excludes participation by a body with statutory authority to advise and decide on compliance to a planning scheme.

Option 1 will not alter the statutory function of a planning authority, or prevent it from providing advice on whether or not a permit is required.

There is potential for conflict and confusion if the content of a certificate differs from the advice of a planning authority.

The regulatory power of a planning authority will prevail in the event of any conflict.

- f) A need to engage a private practitioner to obtain a service that is logically and historically within the competence and authority of a planning authority will add confusion and cost.

The most effective approach to consistency and certainty is to avoid fragmentation of responsibility and agency.

- g) There is no inherent capacity in a private planning practitioner to outperform a planning authority practitioner.

Involvement of multiple private planning practitioners increases likelihood of differing opinion and conclusion; each of which is potentially at risk of being set aside by contrary evidence from the relevant planning authority.

Any assumption of improved service level ¹⁷ is flawed because a private planning practitioner –

- i. may have limited experience in regulatory compliance;
- ii. is likely to work across several Tasmanian municipal areas, and is unlikely to have the necessary familiarity with the content and spatial application of each separate planning scheme

Implementation of the Tasmanian Planning Scheme will not remove local variation. A Local Provisions Schedule may contain Particular Purpose zones, Specific Area Plans and Site Specific Qualifications that add to, modify or substitute for the SPPs; each of which will be unique to a municipal area.

¹⁷ There is no identified baseline from which to measure improvement

- iii. does not have access to the records and registers held by a council, all of which may be relevant to whether a particular use or development will not require a permit

A request for access to content will add time to provision of a certificate.

- iv. may self-determine acceptance, nature and priority of commissions and workload

Council is aware private planning consultants are currently experiencing a heavy workload and have a backlog of projects.

One regionally based planning service advised prospective clients in late 2020 that due to current commitments it is unable to accept new commissions before the second quarter of 2021.

The willingness and ability of a private practitioner to certify compliance cannot be assumed or assured.

- v. will set fees on a commercial basis;
- vi. cannot function as a delegate of the planning authority, and therefore has no power to make a binding lawful compliance decision; and
- vii. may have a conflict in that the role of a planning consultant is not consistent with that of a regulator

- h) Certainty and clarity will not be improved by any requirement to hold a license on the criteria recommended in Option 2.

- i. PIA focused criteria for appointment and licensing are exclusionary and a disincentive for participation
- ii. Membership and qualification acceptable to the PIA does not provide certainty a practitioner is suitably qualified and experienced.

Membership is available to persons holding a wide range of qualification and experience that is not always relevant or adequate for competency to certify statutory compliance;

Not all private planning practitioners elect to become members of PIA. Some competent practitioners may be excluded if unable to meet the restrictions imposed by PIA focused eligibility criteria.

Any requirement referenced to PIA should be deleted; and the eligibility criteria changed to include all of –

- a. a qualification in land use planning;
- b. specific training in regulatory compliance; and
- c. not less than 5 years' experience in the preparation or assessment of permit applications under the Tasmanian land use planning system

- i) Purpose of a certificate is to document evidence of compliance.

The issue of a certificate must be recorded and accessible for future reference.

There is no capacity or arrangement in Option 1 –

- i. to create a centralised or municipal register of certificates;
 - ii. to require a copy of a certificate must be provided to the relevant planning authority; or
 - iii. for a council to include the issue of a certificate as a matter on a certificate issued under section 337 *Local Government Act 1993*
- j) The ability to suspend or cancel a license in the event of malpractice or incompetence by a private practitioner is acknowledged.

However, disciplinary action requires the availability of sufficient and relevant evidence of wrongdoing.

There is no capacity or arrangement in Option 1 or Option 2 for –

- i. registration of a certificate;
- ii. oversight of a private planning practitioner, including by a planning authority;
- iii. for a planning authority to issue and enforce a contrary opinion;
- iv. to cancel a certificate issued in error; or
- v. to prevent “practitioner shopping” and the possible issue of multiple certificates, not all of which may be consistent or correct

Any system for certification of use or development as no permit required must be limited to provision and administration by a planning authority.

4. LICENSING OF PRIVATE PLANNING PRACTITIONERS

Option 2 is redundant if the proposition in Option 1 cannot lawfully be achieved.

Assessment and certification as no permit requirement under a planning scheme cannot properly be classified as “Prescribed Work” for the purpose of Part 1 of Schedule 1, and in particular, paragraph 3(a) or paragraph 3(c) of the Occupational Licensing (Building Services Work) Regulations 2016.

The requirements of a planning scheme are entirely different in nature and purpose to paragraph 3(a) and paragraph 3(c) of the Act, and are not reasonably or appropriately particular to any decision to be made under the *Building Act 2016* in relation to –

- a) an architectural or engineering design matter for the purposes of obtaining statutory approvals, permits or authorisations to perform building or demolition work under the *Building Act 2016*; or

- b) a requirement for inspection, assessment, testing, reporting, advising, authorisation or certification of building work, premises, buildings or temporary structures under the *Building Act 2016*

It appears –

- a) there is no need to license a private planning practitioner because there is no function for the practitioner to perform under the *Building Act 2016*; and
- b) there is no power under the *Occupational Licensing Act 2005* to license a private planning practitioner for the purpose of certifying work that does not require a permit under a planning scheme

5. IMMUNITY FROM LIABILITY

There can only be immunity from liability under section 325(1) for a private planning practitioner if Option 1 is lawful.

Section 321(2) provides a person may rely on a certificate issued in respect of an assessable item unless evidence is provided to the contrary.

A planning authority will not be prohibited from issuing contrary advice.

Any subsequent action by a person relying on a certificate for which a planning authority has issued contrary advice may lose an immunity from liability.

Section 325 does not provide a person with immunity from liability for an offence against the *Land Use Planning and Approvals Act 1993*.

Protection from liability provided under the *Building Act* is not adequate or secure.

6. REDUCE THE REGULATORY BURDEN

While many planning authorities will issue a statement on request for a particular use or development on a specific site, the service is not an action required of a planning authority under the *Land Use Planning and Approvals Act* despite complying use and development being an integral part of the current regulatory planning framework.

There can be no failure of a statutory duty if a planning authority does not issue a statement or is considered to have delayed issue of such a statement.

The absence of an obligation and authority to issue a certificate makes it difficult to understand why Option 1 and Option 2 are argued as necessary to “tighten up the permit and approvals process within local government”.

Options 1 and 2 involve the creation of more, not less, red tape, and will expand the regulatory burden in that –

- a) a certificate will become necessary to a secure decision by a building services provider;
- b) the certificate must be on an approved Form;

- c) a certificate may only be issued by a person qualified, experienced, and insured in accordance with the Director's Determination, and licenced under the *Occupational Licensing Act*;
- d) additional resources will be required to administer and participate in the arrangement; and
- e) monetary and time costs will be passed on to the consumer

A cross-jurisdictional arrangement to certify compliance to a requirement under the *Land Use Planning and Approvals Act 1993* by means of a power and process regulated under the *Building Act* will further add to, complicate, and confuse regulatory complexities.

CONCLUSION

It is agreed the current regulatory framework for permitted and no permit required use and development requires review.

The proposition to introduce a no permit required certificate has merit as a means to improve certainty for compliance to the provisions of a planning scheme if the current framework is to remain.

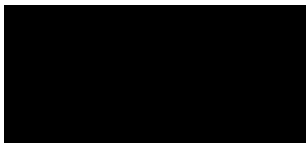
Issue of a certificate must be legislated under the *Land Use Planning and Approvals Act 1993* as a function of a planning authority, and Option 3 is the preferred delivery mechanism.

Option 1 and Option 2 are unsupported by policy and verifiable evidence; and appear beyond purpose and power of the *Building Act 2016*.

Use of private planning practitioners will introduce additional red tape, and is unlikely to deliver any improvement in service delivery.

Council trust these comments will be useful in determining further action on the Options Paper.

Yours faithfully



Patrick Earle
Director Land and Environmental Services
Burnie City Council