



Agenda Report for Decision Meeting Date: 20 June 2024

Item Name	Practice Direction 12
Presenters	Ben Sieben and Cassia Byrne
Purpose of Report	Decision
Item Number	4.1
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	5 October 2023 1 February 2024
Conflicts Declared	Nil
Is the Report Author aware of any potential undeclared conflict?	NO

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 the amended *State Planning Commission Practice Direction 12 (Conditions) 2020* at **Attachment 1**.
3. Authorise the Acting Chair of the Commission to sign the draft Gazette Notice at **Attachment 2** to give notice of amendments to *State Planning Commission Practice Direction 12 (Conditions) 2020*.
4. Authorise the Acting Chair of the Commission to sign the letter at **Attachment 3** to the Minister for Planning advising that further amendments have been made to *State Planning Commission Practice Direction 12 (Conditions) 2020*.
5. Authorise the Acting Chair of the Commission to sign the letter at **Attachment 4** advising that further amendments have been made to *State Planning Commission Practice Direction 12 (Conditions) 2020* and send it to the following stakeholders:
 - o Local Government Association;
 - o Planning Institute of Australia (SA);
 - o Housing Industry Association;
 - o Master Builders Association;
 - o Property Council of Australia;

- Urban Development Institute of Australia (SA);
 - Consumer and Business Services; and
 - All local councils.
6. Authorise the Acting Chair of the Commission to make any amendments to the Attachments as required to finalise.
 7. Note the further advice provided in relation to bonding mechanisms under the *Community Titles Act 1996* and the *Planning, Development and Infrastructure Act 2016*.
 8. Note the further work undertaken by the Department to limit the use of community title land division to only where appropriate.

Background

Meeting – 5 October 2023

In accordance with a request from the Minister for Planning to reduce the risk for people purchasing community title properties, the State Planning Commission (the Commission) approved amendments to *State Planning Commission Practice Direction 12 (Conditions) 2020* (Practice Direction 12) at its meeting on 5 October 2023. The effect of the amendment was to require a mandatory condition that common driveways (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* (PDI Act). The condition must be applied to development authorisations for developments involving the division of land under the *Community Titles Act 1996* (CT Act) where more than six community lots are created.

In approving the amendments on 5 October 2023, the Commission resolved:

- 6) *Note the Department will, following publication of the updated Practice Direction, seek the views of a broader range of stakeholders on changes regarding community titled land divisions, and the Department will return to the Commission with further refinements to the Practice Direction as required.*

The amendments to Practice Direction 12 subsequently commenced on 13 October 2023, with letters sent to the following stakeholders advising of the changes:

- Local Government Association;
- Planning Institute of Australia (SA);
- Housing Industry Association;
- Master Builders Association.
- Property Council of Australia;
- Urban Development Institute of Australia (SA);
- Consumer and Business Services; and
- All local councils.

The letter sent to the above-mentioned stakeholders advising of the amendments to Practice Direction 12 also sought feedback on the changes.

Meeting – 1 February 2024

In line with the Commission's recommendation, advice was provided at the 1 February 2024 meeting following consultation with the sector. Advice was that the mandatory condition was too restrictive, especially for smaller community title land divisions where the common driveway may be damaged during the subsequent construction of the dwellings.

It was also noted that the matter and possible solutions were to be discussed at the next MLG meeting. As a result, the Commission agreed to the following recommendation:

The Department to provide further advice to the Commission following the MLG (Subcommittee) meeting with advice on possible further changes to PD12, draft Practice Direction 19 and a potential bonding mechanism.

The Subcommittee of the Minister’s Liaison Group (MLG Subcommittee) comprised the Housing Industry Association, Local Government Association, Master Builders Association, Property Council of Australia, Urban Development Institute of Australia and Planning Institute of Australia.

Following the meeting of the MLG Subcommittee and in line with the above resolution from the 1 February 2024 meeting, this Agenda Report seeks:

- the Commission’s approval to amend Practice Direction 12 to provide greater flexibility to the existing community title mandatory condition;
- to provide further advice on a bonding/security mechanism under the *Community Titles Act 1996* and/or the *Planning, Development and Infrastructure Act 2016*; and
- to provide an update on limiting the use of community title land division to only where appropriate.

Discussion

Recommended changes to Practice Direction 12

The MLG Subcommittee had the following comments in relation to the change made to Practice Direction 12 in October 2023:

- the common driveway (if constructed first) will be damaged during the construction of the dwellings.
- it would be more appropriate to amend the CT Act to require security/bonding for the construction of common property, noting this should not be a requirement for smaller developments (such as one into two developments).
- the mandatory condition will present cash flow issues as developers are unable to settle on the sale of community lots.

It should be noted that this feedback was largely consistent with the feedback received from the City of West Torrens when feedback was sought from stakeholders on the change.

In response to these concerns, it is recommended that further changes to Practice Direction 12 be made to provide additional flexibility for the building industry. In order to provide this flexibility, it is recommended that the Commission amend the existing condition to allow its land division certificate to be issued where the common driveway has not been constructed if evidence of adequate financial security (to the satisfaction of council) has been set aside to construct the common driveway. This would be achieved with the inclusion of the underlined wording in the below table.

Development to which condition applies	Mandatory condition
Where the application involves the division of land under the <i>Community Titles Act 1996</i> and it creates more than six community lots when all stages of the development are complete (including the subsequent division of development lots under the <i>Community Titles Act 1996</i> , if applicable).	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 <i>Planning, Development and Infrastructure Act 2016</i> , <u>unless evidence that adequate financial security (to the satisfaction of council) has been set aside to construct the common driveway.</u>

It is considered such an approach would provide developers with flexibility in circumstances where it may not be feasible to construct the common driveway before dwellings are constructed. It should be noted that the approach was recommended by the City of Salisbury, who indicated that they currently attach similar conditions to development authorisations to require a developer to provide a bond or security.

It is recommended that this change be made without further consultation given stakeholders have had an opportunity to provide feedback when the Commission wrote to them following the initial amendment to Practice Direction 12 in October 2023.

Bonding / Security

At its meeting on 1 February 2024, the Commission requested that further advice be provided regarding options to require developers to provide bonding or security for the construction of common driveways. There are two legislative mechanisms (under either the PDI Act or CT Act) that would allow security or bonding for common infrastructure to be collected.

With respect to bonding under the CT Act, section 47(6) of that Act provides that the regulations may require a developer to provide security of a specified kind to a community corporation in respect of a developer's obligations under a development contract. A development contract is required where a scheme description indicates that a developer is to (or is likely to) erect buildings or other improvements on common property, noting that a scheme description is only required where more than six community lots are created.

The Department has been working closely with the Attorney-General's Department (AGD) and Consumer and Business Services (CBS) to investigate the drafting of regulations to allow security to be collected under the CT Act. In doing so, the following have required significant consideration:

- the scope of any security required to be provided – whether it should just cover the common driveway and service infrastructure or all common property;
- how the amount of security is determined – whether an amount per square meter of common driveway or an amount per length of the common driveway/road be prescribed;
- how the security is maintained as the developer controls the community corporation until the lots are sold (which is after new titles are issued, but not necessarily before construction of the common property is completed) – the CT Act requires the security to be provided to the community corporation, and if the developer owns all the titles and is in control of the community corporation, there needs to be a guarantee that the security is maintained until construction of the common driveway is completed; and
- at what point the security is triggered or released back to the developer– there needs to be a mechanism whereby it is confirmed that the common driveway has been constructed to an appropriate standard for the security to be either spent by the community corporation or released back to the developer.

While advice from some councils to the Department has previously been that they should not need to get involved in confirming the construction of common property for community title developments, after working through the above matters with AGD and CBS it has become clear that councils will need to be involved in the process if security is to be collected.

Given the PDI Act provides a mechanism for councils to collect and hold security, the Department is now investigating whether it would be more appropriate to amend the *Planning, Development and Infrastructure (General) Regulations 2017* (the Regulations) to allow for this. While it remains unclear whether such an amendment would be supported by all councils, it is anticipated that consultation would occur if an amendment to the Regulations is progressed.

It should be noted that should a regulation be drafted and made under the PDI Act, the mandatory condition in Practice Direction 12 would be able to be removed as councils would have statutory power to hold a bond or security themselves (which would provide even greater protection for purchasers of community lots).

Ongoing Use of Community Title Land Division

As the Commission may recall, the Minister for Planning requested that it consider the use of the CT Act for the division of land to ensure that community title land division occurs only where appropriate (and not where it is more appropriate that Torrens title land division occur instead). In response to this, the Department prepared a new draft Practice Direction to guide relevant authorities in their assessment to determine the appropriateness of the division of land under the CT Act (which is an existing test under the PDI Act when assessing an application for land division).

The MLG Subcommittee provided the following feedback on the draft practice direction:

- It would be much more efficient and less costly to industry to determine the appropriateness of a community title land division at planning consent stage rather than at land division stage.
- Placing limitations on when community title land divisions can be used for residential development may reduce diversity and choice in the middle of a housing affordability and accessibility crisis (and thereby increase the cost of housing).
- Changes would be required to the Planning and Design Code (the Code) to ensure the appropriateness of a proposed community title land division is a matter considered as part of planning consent assessment. That is, this decision should be made prior to a developer seeking land division consent (which is after planning consent for land division has been obtained).

Given the concerns raised, the Department is investigating a possible amendment to the Code to allow the appropriateness of the division of land under the CT Act to be determined during the planning consent assessment for land division.

Attachments:

1. *State Planning Commission Practice Direction 12 (Conditions) 2020 (#21170430)*
2. *Gazette Notice (#21172432)*
3. *Letter to the Minister (#21172431)*
4. *Letter to Stakeholders (#21172433)*

Prepared by: Ben Sieben

Endorsed by: Jane Trotter

Date: 7 June 2024



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 4 of this practice direction commences operation on 1 July 2024.

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	<p>Either:</p> <p>a. Replacement trees must be planted within 12 months of completion of the development at the following rates:</p> <p>i. if the development relates to a regulated tree—2 trees to replace a regulated tree; or</p> <p>ii. if the development relates to a significant tree—3 trees to replace a significant tree.</p> <p>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 3 metres of an existing dwelling or in-ground swimming pool; or</p> <p>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.</p>	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 <u>only</u> 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	<p>Either:</p> <ul style="list-style-type: none"> 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 <i>Planning, Development and Infrastructure Act 2016</i> (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 <i>Community Titles Act 1996</i> and it creates more than six community lots when all stages of the development are complete (including the subsequent division of development lots under the <i>Community Titles Act 1996</i> , if applicable).	Council must confirm that either the common driveway (including all access points to and from the common driveway) has been constructed or that evidence of appropriate security for the construction of the common driveway has been provided before the State Planning Commission issues its land division certificate under section 138 of the <i>Planning, Development and Infrastructure Act 2016</i> .	

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 application¹; 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 4: Commences operation on 1 July 2024

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.

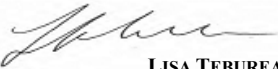
A practice direction may be varied or revoked by the State Planning Commission from time to time by a further instrument notified in the Gazette and published on the SA Planning Portal.

NOTICE

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

- a. vary *State Planning Commission Practice Direction 12 (Conditions) 2020*; and
- b. fix the day on which the varied *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: 21 June 2024



LISA TEBUREA
ACTING CHAIR
STATE PLANNING COMMISSION

21172431

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83 Pirie Street
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01 July 2024

Hon Nick Champion MP
Minister for PlanningBy email: officeofministerchampion@sa.gov.au

Dear Minister Champion

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

I write in relation to further amendments that have been made to *State Planning Commission Practice Direction 12 (Conditions) 2020* (Practice Direction 12) by the State Planning Commission (Commission).

As you are aware, the Commission approved amendments to Practice Direction 12 on 5 October 2023 (which commenced on 13 October 2023) to impose a mandatory condition that common driveways (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*. The mandatory condition applies to all developments involving the division of land under the *Community Titles Act 1996* where more than six community lots are created.

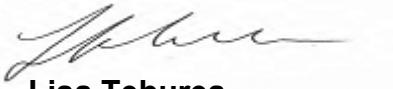
The Commission approved the changes to improve certainty and security for those purchasing homes within community title developments, as well as provide greater consistency in the management of roads between both Torrens title and community titles subdivisions.

Having said that, the Commission was conscious of ensuring the change achieves an appropriate balance between protecting those purchasing a home and providing sufficient flexibility in the delivery of community titled developments. As such, feedback was sought on the change to Practice Direction 12 to reduce any unintended consequences.

Following consideration of the feedback received, further changes to Practice Direction 12 have been made to provide additional flexibility by allowing the Commission to issue its land division certificate where the common driveway has not been constructed in circumstances where the council confirms it has received evidence of appropriate security for construction of the common driveway.

This important further amendment to Practice Direction 12 ensures developers have the necessary flexibility to progress less at-risk developments, while also ensuring consumers are afforded necessary protections where appropriate.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lisa Teburea', is written over a light grey rectangular background.

Lisa Teburea
Acting Chair

21172433

Level 10
83 Pirie Street
Adelaide SA 5000GPO Box 1815
Adelaide SA 50011800 752 664
saplanningcommission@sa.gov.au

01 July 2024

By email: [REDACTED]

Dear [REDACTED]

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

I write in relation to further amendments that have been made to *State Planning Commission Practice Direction 12 (Conditions) 2020* (Practice Direction 12) by the State Planning Commission (Commission).

Common driveways associated with Community Title developments

As you may recall, the Commission approved amendments to Practice Direction 12 on 5 October 2023 (which commenced on 13 October 2023) to impose a mandatory condition that common driveways (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*. The mandatory condition currently applies to all developments involving the division of land under the *Community Titles Act 1996* where more than six community lots are created.

The Commission approved the changes to improve certainty and security for those purchasing homes within community title developments, as well as to provide greater consistency in the management of roads between both Torrens title and community titles subdivisions.

Having said that, the Commission was conscious of ensuring the change achieves an appropriate balance between protecting those purchasing a home and providing sufficient flexibility in the delivery of community titled developments. As such, feedback was sought on the change to Practice Direction 12 to reduce any unintended consequences.

Following consideration of the feedback received, further changes to Practice Direction 12 have been made to provide additional flexibility by allowing the Commission to issue its land division certificate where the common driveway has not been constructed in circumstances where the council confirms it has received evidence of appropriate security for construction of the common driveway.

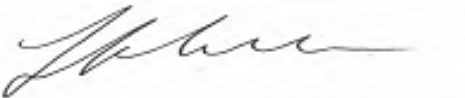
This important further amendment to Practice Direction 12 ensures developers have the necessary flexibility to progress less at-risk developments, while also ensuring consumers are afforded necessary protections where appropriate.

Replanting of replacement trees

The State Government recently made amendments to the *Planning, Development and Infrastructure (General) Regulations 2017* (the Regulations) to better protect regulated and significant trees. One of the amendments reduced the exemption distance from an established dwelling or pool, which exempted an otherwise protected tree from requiring approval to remove. The exemption distance has been reduced from 10 metres to 3 metres. As such, the mandatory condition relating to replacement trees in Practice Direction 12 has been amended to reflect the new exemption distance of 3 metres. This will ensure replacement trees are not able to be easily removed once planted.

This minor amendment will ensure that Practice Direction 12 is consistent with the Regulations.

Yours sincerely



Lisa Teburea
Acting Chair