

## Agenda Report for Noting

**Meeting Date: 19 January 2023**

<b>Item Name</b>	Certificate of Title Requirements
<b>Presenters</b>	Chelsea Lucas and Ben Sieben
<b>Purpose of Report</b>	Noting
<b>Item Number</b>	6.2
<b>Strategic Plan Reference</b>	N/A
<b>Work Plan Reference</b>	N/A
<b>Confidentiality</b>	Not Confidential (Release Immediately), with the exception of Appendix B which is designated as Confidential (Legal Advice or Litigation)
<b>Related Decisions</b>	SPC Agenda Item 5.3 – 22 July 2021 – Certificate of Title and Information Requirements for Development Applications SPC Agenda Item 4.2 – 14 October 2021 – Certificate of Title and Information Requirements for Development Applications

### 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), with the exception of Appendix B which is designated as Confidential (Legal Advice or Litigation).
2. Note the outcomes of Planning and Land Use Services (PLUS) investigating possible regulatory change to mandate a Certificate of Title being provided for land division development applications.
3. Note the outcomes of the review of the efficacy of the checkbox facility in the Development Application Processing (DAP) System.

### Background

On 22 July 2021, the Commission was presented with a paper on PLUS' rationale for Certificate of Titles not being required to accompany all development applications lodged under the *Planning, Development and Infrastructure Act 2016* (the Act) (**Appendix A**). The Commission subsequently requested a further paper with additional detail on this matter (**Appendix B**).

After considering the further paper on 14 October 2021, the Commission resolved to:

- *Endorse the Attorney-General's Department (the Department) to develop a facility in the Development Application Processing (DAP) system in early 2022 for applicants to provide details or declarations (through a checkbox facility) for the existence of any registered interests over a relevant site the subject of a development application;*
- *Endorse the Department to further investigate possible regulatory changes to mandate a CT being provided for applications for land division; and*
- *Review the efficacy of the checkbox facility in the DAP system after the first six months of operation.*

## **Discussion**

### Certificates of Title for Land Division Applications

It was a recommendation of PLUS prior to the Commission meeting on 22 July 2021 that there may be some merit in a Certificate of Title being required to accompany land division applications. As such, the Commission endorsed PLUS investigating this option further.

This particular matter was discussed by PLUS' Regulation Control Group (the Group) on 8 February 2022. The Group ultimately determined that there is no valid reason to distinguish between development applications involving building work and those involving the division of land.

In addition to this, and under Schedule 8, clause 7 of the *Planning, Development and Infrastructure (General) Regulations 2017*, a Plan of Division is required to identify all existing registered easements over the land proposed to be divided. As such, a requirement to provide a Certificate of Title with a land division application may provide little additional information.

### Review of the Checkbox

The checkbox was implemented in the DAP System on 26 May 2022. The question posed to the applicant is: "*Does the Certificate of Title have one or more constraints registered over the property?*".

An applicant is able to answer 'Yes', 'No', 'Unsure' or leave the question unanswered. If they answer 'Yes', they are then able to indicate whether the constraint is an easement or right of way, Land Management Agreement (LMA) or other encumbrance.

As of 14 December 2022, data extracted from the DAP System indicated that out of 32,514 applicants:

- 2,132 (seven per cent) people have answered 'Yes', with 1,458 people then selecting 'Easement or right of way', 261 people selecting 'LMA' and 672 people selecting 'other encumbrance' (people may select more than one option).
- 14,389 (44 per cent) people have answered 'No'.
- 5,728 (18 per cent) people have answered 'Unsure'.
- 10,265 (31 per cent) people have left the question unanswered.

This data suggests that of the people that were sure (i.e. answered either 'Yes' or 'No'), only 13 per cent actually had a constraint registered over the property. As it is a large sample size, it could be inferred that of the people who were unsure or did not answer the question, it is likely that approximately 13 per cent of them may have had a constraint registered over the property and not known. The above statistics also indicate that of the people that were sure, only nine per cent had an easement or right of way over the property.

The cost of requiring a Certificate of Title for all development applications could be considered unreasonable, when it may only be relevant for 13 per cent of development applications (and that is if the constraint is actually relevant to the assessment of the application). Such a requirement would also be an additional impost on, and cost to, applicants, at a time when PLUS is currently reviewing planning assessment fees and, in particular, the fees for simple development applications.

Thought has previously been given to only requiring Certificates of Title for particular development applications, such as Performance Assessed applications, but it is not confirmed whether an application is Performance Assessed until it has been lodged and verified.

Noting that the question is not mandatory, the Commission may wish to consider requesting PLUS make it so. While this will ensure all applicants answer the question, it is, however, anticipated that this will increase the number of applicants responding with 'Unsure', as opposed to answering with 'Yes' or 'No'.

**Appendices:**

- A. SPC Agenda Report – Item 5.3 – 22 July 2021 (#19468387).
- B. SPC Agenda Report – Item 4.2 – 14 October 2021 (#19468383).

Prepared by: Ben Sieben

---

Endorsed by: Chelsea Lucas

---

Date: 21 December 2022

---

## Agenda Report for Noting

**Meeting Date: 22 July 2021**

<b>Item Name</b>	Certificate of Title and Information Requirements for Development Applications
<b>Presenters</b>	Nick Buick / Anita Allen
<b>Purpose of Report</b>	Noting
<b>Item Number</b>	5.3
<b>Confidentiality</b>	Not Confidential (Release Immediately)
<b>Related Decisions</b>	Nil

### Recommendation

It is recommended that the Commission resolves to:

1. Approve the determination of this item as Not Confidential (Release Immediately); and
2. Note the rationale for Certificates of Title not being required for development applications lodged under the *Planning, Development and Infrastructure Act 2016*.

### Background

This report has been prepared to advise the Commission on why the *Planning, Development and Infrastructure (General) Regulations 2017* (PDI Regulations) do not prescribe that Certificates of Title be provided with development applications under the *Planning, Development and Infrastructure Act 2016* (PDI Act).

It is understood that this issue has arisen from concerns raised with the members of the Commission at a recent meeting of the Community Alliance South Australia.

### Discussion

The Department considers it unnecessary to require applicants to provide Certificates of Title for every development application given that:

1. Relevant authorities under the PDI Act are required to assess development applications against the Planning Rules, the Building Rules and the Land Division requirements (as relevant). Consideration of extraneous matters (such as easements, rights-of-way or encumbrances registered on a Certificate of Title) may be considered outside of the scope of the role of a relevant authority under the PDI Act.

2. In most cases there are no easements, rights-of-way or other encumbrances and Certificates of Title do not generally provide any additional information relevant to the assessment of development applications beyond that which are already required to be provided on plans, drawings, specifications or other documents submitted with an application.
3. Should a relevant authority consider that a Certificate of Title is required to assist in a particular assessment they are entitled to request one as further information under section 119(3) of the PDI Act.

### *Considerations for Development Assessment*

Section 102(1) of the PDI Act provides that a development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of each of the following matters (insofar as they are relevant to the particular development):

- Planning Rules (Planning and Design Code);
- Building Rules; and
- Land Division requirements.

Accordingly, relevant authorities are constrained by section 102(1) to assess applications only against the matters listed in the section. There is also a significant body of case law to the effect that that extraneous matters outside of section 102(1) (or the equivalent section of the *Development Act 1993*) should not be taken into account in the assessment of development applications.

In comparison, policies in relation to other matters that have been cited as extraneous to a planning assessment such as site contamination, native vegetation and State Heritage are in fact included in the Planning and Design Code and are therefore relevant as Planning Rules.

### *Consideration of Registered Property Interests*

While it is appreciated that some relevant authorities consider that they should also be checking for issues relating to easements, rights-of-way or other property specific encumbrances registered on the Certificate of Title for the land, there is no legislative basis under the PDI Act for this, nor was there under the Development Act or earlier planning legislation.

It is not the role of a relevant authority under the PDI Act to determine whether or not a building can be erected over an easement or right-of-way. This is the decision of the person or body who holds the easement or right-of-way and the responsibility of the land owner to seek approval from the easement holder if required. Easements, rights-of-way or other encumbrances (including LMAs) are registered on Certificates of Title under the *Real Property Act 1888* and any issues in relation to them should be dealt with under that Act.

Section 119(1)(c) of the PDI Act provides that an application to a relevant authority must, amongst other things, be accompanied by such plans, drawings, specifications or other documents as may be prescribed in the regulations. Schedule 8 of the PDI Regulations prescribe extensive details for plans to be submitted for various types of applications for planning, building or land division consent. The PDI Regulations do not require applicants to provide Certificates of Title as they do not generally provide any additional information that is not already required to be provided on the plans, drawing specifications or other documents (other than registered legal interests in the land, which are discussed above).

### *Previous Position under the Development Regulations*

With the exception of the limited circumstances described below, the *Development Act 1993* and the *Development Regulations 2008* did not prescribe any requirements for Certificates of Title to be lodged with applications for development plan consent.

The *Development Regulations 2008* did not initially contain any requirement for a Certificate of Title to be provided with development applications. In 2009, this position was varied by the *Development (Residential Code) Variation Regulations 2009* that inserted requirements for Certificates of Title to be provided, but only for applications for residential code development that was complying or did not require development plan consent.

In 2012, Schedule 5 of the *Development Regulations 2008* was further varied by the *Development (Residential Code) Variation Regulations 2012* which deleted the requirement for Certificates of Title for applications for residential code development that was complying but retained the requirements for applications for building work for outbuildings, carports or verandahs that did not require development plan consent. This limited requirement remained in the Development Regulations until they ceased operation on 18 March 2021 with the repeal of the Development Act.

### *Requests for Information*

Section 119(3) of the PDI Act allows a relevant authority to request an applicant to provide such additional documents or information as the relevant authority may reasonably require to assess an application. Where an applicant considers that such a request is unreasonable or unnecessary, they can appeal the request under section 202(1)(b) of the PDI Act.

It is recommended that the Commission notes the rationale for Certificates of Title not being prescribed under the PDI Regulations as required for lodgement with a development application under the PDI Act.

Prepared by: Simon Howes

---

Endorsed by: Anita Allen

---

Date: 14 July 2021

---