



PLANNING REFORM ISSUES PAPER

MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESS

May 2014

1. INTRODUCTION

The Local Government Association of South Australia (LGA) has prepared a series of papers in preparation for the release of an 'Options Paper' by the Expert Panel on Planning Reform, which is due in August 2014. The focus of this paper is the assessment of major projects and the paper will canvass the key issues that have been raised by Councils and provide a number of recommended solutions, which may assist Councils in forming a response to the Expert Panel's Options Paper.

Local Government has generally supported the need to have a separate assessment process within the legislation to deal with major developments or projects. This is particularly the case for developments that have far reaching impacts beyond the boundaries of one Council, are of state significance or introduce new technologies that are yet to be tested by the mainstream planning system. The merits of these developments need to be tested through a rigorous and participatory assessment process.

However, there have been circumstances in which the use and objectivity of the major projects assessment process has been questioned by Councils and there have been calls for more rigour and transparency. This paper provides an overview of the current process, identifies the key issues that have been experienced from the Local Government perspective and provides a number of considerations for a reformed planning systems.

2. MAJOR PROJECTS IN SOUTH AUSTRALIA

There are specific legislative provisions in the *Development Act 1993* ('the Act') for processing major projects or development in South Australia, as well as other legislative controls. The following discussion provides an overview of the existing system.

2.1 Major Development or Project

Under Section 46 of the Act the Minister for Planning can declare that a proposed development is 'a major development or project', generally referred to as 'a Major Project'. The declaration may be made if the Minister is of the opinion that:

- it is appropriate or necessary for the proper assessment of the development; and
- the development or project is of major environmental, social or economic importance.

Whilst the Minister must form an opinion that the development or project is of 'major environmental, social or economic importance', there are no specific criteria prescribed in either the Act or Regulations to guide the Minister in forming this opinion.

Once deemed as a major development or project, the development is subject to three possible levels of assessment:

1. an environmental impact statement (EIS); or
2. a public environmental report (PER); or
3. a development report (DR).

The process for each level of major project assessment is outlined in sections 46B, 46C, and 46D of the Act. The EIS is the highest level of assessment. The level of assessment will be determined by the Development Assessment Commission.

A Council will only be involved after a decision has been made to declare a proposed development as a Major Project. A Council is given the opportunity to comment following the production of an EIS, PER or DR.

The Minister makes a decision following the consultation process and following this, the final decision is taken by the Governor under section 48 of the Act. This section sets out a number of specific issues to which the Governor must have regard, including (but not limited to) the appropriate Development Plan (planning or zoning scheme), the Building Rules, the

relevant volume of the Planning Strategy and the *Environmental Protection Act 1993* as appropriate.

There is no right of appeal against a decision made by the Minister under Section 46, nor the Governor under Section 48.

2.2 Crown Development

Crown Development is dealt with under Section 49 of the Act and may include State agency development, a State agency proposal for the provision of public infrastructure; or development by a person where the development is initiated or supported by a State agency for the provision of public infrastructure. Use of this Section of the Act enables public-private partnerships to be undertaken outside the 'normal' development assessment procedures and, as an example, has been used in South Australia to initiate the development of private wind farms.

No appeal rights exist against a decision of the Minister under Section 49 of the Act.

2.3 Development Involving Electricity Infrastructure

In addition to the public infrastructure procedures under Section 49, certain electricity infrastructure development has a separate process under Section 49(A). An application may be made by a 'prescribed person' within the meaning of the Electricity Act 1996 for the provision of electricity infrastructure (as defined).

No appeal rights exist against a decision of the Minister under Section 49A

3. ISSUES RELATING TO MAJOR PROJECTS IN SOUTH AUSTRALIA

It is generally supported that development which is highly complex, of significance to the State and will have serious impacts (positive or negative) across several jurisdictions should be subject to a higher level of assessment and Government coordination than the 'normal' assessment stream. However, there is valid concern that Major Project status can be misused as a mechanism to 'fast-track' proposals such as residential apartment complexes, shopping centres and tourist accommodation which are not of 'major' environmental, social or economic importance.

It should be noted that since August 2011, there has been a significant roll-back in the use of Major Project status to 'push through' State Government favoured developments in South Australia. Local Government has been supportive of this conservative approach to the use of Ministerial authority/power. However, notwithstanding this 'revised' approach, there have been no changes to the legislative framework and Local Government has identified a number of shortfalls with the Major Project provisions that could be applied, as outlined in the following discussion.

3.1 Criteria for Declaring Major Project Status

The main issue of concern with Major Projects is that the only criteria by which something is deemed to be a Major Project is if it is of major environmental, social or economic importance. This is a vague and subjective manner in which to determine that a project or development is a 'Major Project'.

Section 46 1(a) and 1(b) of the Act provide some guidance as to the extent a major project status can be applied in that, "the cumulative effect" of the development can be considered. In this situation, the proposal itself may not be a 'major development', but when considered in conjunction with existing development in the vicinity, it may be considered as a component of more significant or 'major' development. However, this still does not offer criteria to determine what constitutes 'major' environmental, social or economic importance.

This lack of clearly defining criteria can lead to uncertainty for a development proponent, Local Government, and the community as to when Major Project status can or should be sought. It can also lead to accusations of lack of transparency or undue influence in the development process.

Typically, but not always, no detailed explanation is given as to the basis for the decision to grant Major Project status to a particular proposal. This contributes to concerns about transparency and also leads to a lack of precedent for future projects as they are unable to assess the criteria by which other projects have been deemed a major project.

3.2 No Right of Appeal

The majority of significant development proposals that are assessed under the 'normal' process in South Australia (not granted Major Project Status) would trigger 'Category Three' public notification under the Act, which gives the public the right to make a submission on the proposal and also provides for third party appeal rights against a decision.

There are no appeal rights against any decision that is made by the Minister in relation to a Major Project. This can be of particular concern when a Council has genuine reason to believe that the proponent has, whether by accident or design, overstated the social, environmental or economic benefits that a proposal would have. For instance, a decision to grant Major Project status might be made by the Minister based on information provided by the proponent that the proposal would create 500 local jobs. If a Council or other body has evidence that the number of jobs created will not meet this target, there is no opportunity to challenge the Minister's decision.

3.3 Level of Investigation and Assessment

Major Project status and assessment procedures are appropriate for complex proposals that can not be properly or appropriately considered by other assessment avenues. This may include proposals that cross Council boundaries, require a level of expertise and investigation that is beyond the capacity of the relevant Council or require considerable cross-agency collaboration.

Unfortunately, for a period of time it appears that the Major Project stream was used by proponents as a way of fast-tracking a development to gain an approval more quickly than they could under the standard development assessment process. This is evidenced in a recently published report by the South Australian Ombudsman, *'Investigation into the Growth Areas Report procurement'*. This investigation outlined circumstances where Major Project status had been sought from the Minister by representatives of a project proponent because the local Council had indicated concerns with a proposal. In this instance, the Major Project stream was clearly considered to be a mechanism for 'fast tracking' a development and circumventing the normal assessment process.

3.4 Role of Local Government

The focus of the Major Project assessment process is often focussed on the broader economic benefits to industry and the State (refer to Section 3.5) and may have only cursory regard to the local impacts.

The local impacts of Major Projects can be significant in terms of impact on the environment, loss of community amenity, impacts on social capital and damage to or additional demands on local infrastructure and services. As such, it might be assumed that Local Government would play an important role in the assessment of Major Projects. However, the current process in South Australia allows for limited interaction between spheres of government.

Local Government can participate in the assessment process to the extent that Councils can provide comments on the information made available during a defined public consultation

period of between 3-6 weeks. Following the consultation period, the project proponent provides a response to the comments made and may chose to make amendments to the proposal to address concerns. This information is then presented to the Minister for a decision to be made. There is no obligation for the Minister to have regard to the comments made by Local Government or any other Agency. In this sense, the role of Local Government and the influence it can have on addressing local issues is limited.

3.5 Economic Focus

Local Government understands the importance of cutting unnecessary red-tape and streamlining assessment processes to unlock investment opportunities and stimulate the economy. It is not the role, or the desire, of Local Government to create unnecessary barriers to development.

However, if too much weight is placed on the economic benefits of a Major Project the assessment process fails to make an informed and balanced judgement about whether the development is in the long-term interest of established and future communities.

There is a perception that in the singular pursuit of economic goals; other objectives such as environmental protection and social inclusion have become 'red-tape' that industry believes should be legislated out of the Major Project process.

4. RECOMMENDATIONS FOR A MAJOR PROJECT PROCESS

Based on the experiences of Local Government in South Australia, reform proposals for the assessment of Major Projects should have regard to the following considerations.

- 4.1 The use of a Major Project process should deliver the best planning and development outcomes through a rigorous assessment process, which is scalable to the complexity of the proposal.
- 4.2 Major Project status should only be granted following an assessment of the proposal against clear and specific criteria. This criteria should exclude any developments that can reasonably dealt with through the mainstream planning process.
- 4.3 In the interests of greater transparency, a publicly available report should be prepared which clearly outlines the Minister's reasons for granting Major Project status. Currently declarations often reference only the vague criteria prescribed in the Act and do not provide a clear rationale.
- 4.4 The relevant Council should have the opportunity to comment on its capacity to deal with a proposal prior to Major Project status being granted. This would also give the Council the opportunity to flag any potential issues that might have a negative impact on local communities or local service provision.
- 4.5 The role of Local Government in the assessment of a Major Project should not duplicate or add an additional layer of bureaucracy to the assessment process.
- 4.6 During the assessment of Major Projects, regard must be given to the local Development Plan and relevant volume of the planning strategy.
- 4.7 Legislative controls need to be in place to ensure that a proposal is not in direct conflict with the adopted planning strategy for the State or Region.

These recommendations have been expanded upon in the 'Development Assessment Pathways Issues Paper' prepared by consulting firm URPS. This paper is available at www.lga.sa.gov.au/planning