

Privately Funded Code Amendments Policy

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| Reference Number: | Section 4 No. 18 |
| Responsible Department: | Strategy & Development |
| Related Policy/Procedure: | Separate Rate Policy |
| Date of Adoption: | 25 May 2021 |
| Current Review Date: | 25 May 2021 |
| Minute Reference: | STR9.3.9/2021 |
| Version Number: | Original |
| Applicable Legislation: | Local Government Act, 1999 Planning, Development and Infrastructure Act, 2016 |
| Next Review Date: | May 2024 |
| Review Frequency: | Triennially |

1. Purpose

To assist Council with responding to Privately Funded Code Amendment proposals.

2. Background

The *Planning, Development and Infrastructure Act, 2016* (the Act) enables Council to initiate a process to amend the South Australian *Planning and Design Code* (Code) subject to approval from the Minister.

Council may also initiate a Code Amendment process on behalf of another party (Proponent). The Proponent is a person who has an interest in land who is seeking to alter the way in which the Code affects that land.

The Act also enables a Proponent to approach the Minister directly to seek approval for the Chief Executive of the Department to undertake a Code Amendment on the Proponent's behalf, on the basis that reasonable costs will be charged to the Proponent for doing so.

Council therefore may choose whether it wishes to conduct a Privately Funded Code Amendment or not. This policy has been prepared to assist Council with its consideration of any approach from a Proponent requesting that Council undertakes a Code Amendment on their behalf.

Where a council decides to undertake a Council-initiated Code Amendment process for a Proponent, section 73(9) of the Act enables that council to enter into an agreement with a Proponent for the recovery of costs incurred by the council.

Council has adopted a position on funding statutory planning policy amendment processes on behalf of initiating landowners and/ or land occupiers who would derive a benefit as a result in its Separate Rate Policy. This outlines that Council will generally apply a separate rate (pursuant to section 154 of the *Local Government Act, 1999*) where it deems this is appropriate.

3. Policy Statement

Having regard to its Separate Rate Policy, Council considers that:

- 3.1. Code Amendment proposals involving rezoning that would benefit only a limited number of landowners should generally be progressed by the Proponent/s engaging directly with the Minister/ Department, rather than in a partnership involving Council; and

- 3.2. Council may decide to become involved in a Privately Funded Code Amendment if it is satisfied that there is the potential for sufficient community benefit to warrant a commitment of its limited resources (including staff and administrative time). This is a matter for Council to determine at its sole discretion. An example may include circumstances where Council would be assisting many landowners by coordinating the process on their behalf.

4. Scope

Where Council resolves to conduct a Privately Funded Code Amendment, one of the following options will apply:

Option 1 – Code Amendment undertaken by Council

Council will secure the funds required (having regard to its Separate Rates Policy) and, subject to any required Agreement with the Proponent/s being in place, initiate and progress the Code Amendment process, either internally or through the procurement of external consultants (or a combination of both).

Option 2 – Code Amendment undertaken by Proponent

The Proponent funds, procures and manages certain aspects of the Code Amendment process (as agreed between the parties) and provides funds for Council to:

- undertake the remaining aspects of the process; and
- at the discretion of the Council - procure external consultants to undertake independent peer review of work undertaken by the Proponent.

It is Council's decision which of the two Privately Funded Code Amendment options is appropriate based on its consideration of the nature of the proposal and available Council resources at the time.

5. Definitions

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

Chief Executive – means the Chief Executive of the Department.

Code - means the South Australia *Planning and Design Code*.

Code Amendment - means a proposal to amend the Code under, and in accordance with, section 73 of the Act. The Code Amendment process involves a series of stages and approvals and includes undertaking and documenting investigations to inform and justify the proposed policy changes to the Code.

Commission - means the State Planning Commission

Council - means the elected member body and includes a duly authorised committee or delegate of the Council.

Deed of Agreement - means a legally binding agreement signed by the Proponent and the Council containing the agreed legal obligations and responsibilities of both parties in undertaking a

Privately Funded Code Amendment.

Department – means the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Act.

Minister – means the Minister responsible for the Act.

Practice Direction - means *Practice Direction 2 - Preparation and Amendment of Designated Instruments* as issued on the SA Planning Portal.

Proponent - means one or more persons or entities with an interest in land who are seeking to alter the way in which the Code affects that land by proposing to fund the undertaking of a Code Amendment affecting land (and potentially adjacent land) to facilitate future development outcomes on the land.

Privately Funded Code Amendment - means a Code Amendment that is undertaken by Council on behalf of a Proponent with the approval of the Minister.

Regulations - means the *Planning, Development and Infrastructure (General) Regulations 2016*.

Statement of Justification (SOJ) - means a document prepared by a Proponent that describes, and provides justification for, the Proponent's proposal for a Privately Funded Code Amendment. The purpose of a SOJ is to assist the Council to determine whether to proceed with the Privately Funded Code Amendment (subject to approval of the Minister).

6. Considerations

6.1. Statement of Justification

A Proponent (or Proponents) seeking Council support for a Privately Funded Code Amendment will be required to prepare a brief Statement of Justification (SOJ) to support their proposal. This statement should clearly identify the following:

- (a) The subject land and current land ownership;
- (b) In broad terms, the policy outcomes that are being sought in undertaking the Code Amendment;
- (c) Consistency with criteria (6.2.1 to 6.2.4) in Section 6.2;
- (d) The preferred Code Amendment option identified in Section 4 of this Policy.

On receipt of a SOJ, the Council will assess the proposal, consider any resource implications, undertake preliminary investigations, and/or consult State Government departments / agencies in determining whether to support the proposal or not.

A decision to proceed with or reject a proposal for a Privately Funded Code Amendment will be made by the Council. Council is under no obligation to accept a proposal for a Privately Funded Code Amendment.

6.2. Criteria to consider Privately Funded Code Amendments

To determine whether to proceed with a Privately Funded Code Amendment, Council may have regard to any matter it considers relevant, including (but not necessarily limited to) the following criteria:

- 6.2.1. The proposed policy change(s) is/ are consistent with the Government's State Planning Policies and/ or Regional Plan applying to the subject land (presently the *30 Year Plan for Greater Adelaide*);
- 6.2.2. The proposed policy change(s) is/ are consistent with relevant key Council Strategic Documents;
- 6.2.3. The existing zoning and/or planning policy arrangements for the subject land are considered to be outdated and limit reasonable development expectations for the subject land;
- 6.2.4. When considered with regard to potential 'triple bottom line' outcomes (i.e. social, environmental and economic), the resultant development is likely to have a net positive impact on the subject and adjoining land, any potentially affected communities of interest, the broader Council area and the State;
- 6.2.5. Whether the Privately Funded Code Amendment process can be effectively managed and resourced by Council staff given other Council priorities and ongoing demands on Council resources.

6.3. Project Management and Procurement Process

6.3.1. Option 1: Code Amendment undertaken by Council

The cost of the Privately Funded Code Amendment investigations, document preparation, consultation and other costs will be funded by the Proponent/s and secured via a separate rate or otherwise in a form of legal agreement with Council as may be deemed appropriate by Council, acting reasonably.

Council will either manage the procurement process for engaging a consultant to undertake a Privately Funded Code Amendment, undertake the investigations internally, and/or procure specific external advice as required.

A consultant undertaking the Privately Funded Code Amendment (or specific investigations) will report directly to Council staff, and project management of the process will be undertaken by Council staff.

In selecting a consultant to undertake the Privately Funded Code Amendment an open or select tender process will be undertaken in accordance with Council's procurement policies.

6.3.2. Option 2: Code Amendment undertaken by Proponent

The Proponent undertakes to engage suitably qualified consultants to do any one or more of the following (as would be outlined in a legal agreement with Council as may be deemed appropriate by Council, acting reasonably):

- (a) prepare a proposal to the Commission as required under clause 7(1) and (2) of the Practice Direction;
- (b) subject to agreement of the Minister - prepare a draft of the relevant proposal under section 73(6)(a) of the Act;
- (c) carry out such investigations or obtain such information specified by the Commission;
- (d) prepare the required documentation in accordance with the Act, Regulations and Practice Direction;
- (e) assist to prepare materials as necessary to meet public and agency consultation requirements;
- (f) review and prepare a draft response to written and verbal submissions received through public and agency consultation;
- (g) prepare the approval version of the draft Code Amendment;
- (h) prepare a draft report to the Commission under section 73(7) and publish same under section 73(8) of the Act;
- (i) such other matters as may be necessary or expedient.

The Proponent also agrees to reimburse the Council for costs and disbursements associated with undertaking those parts of the process which the Proponent cannot undertake, or as otherwise agreed.

At the discretion of Council, the Proponent will also agree to meet the costs of undertaking an independent peer review of any work undertaken by, or on behalf of, the Proponent. The cost of the peer review(s) will be borne by the Proponent. Council will be responsible for procuring the services of a suitably qualified consultant to undertake the independent peer review(s). The consultant undertaking the independent peer review will report directly to Council staff.

Under both options, at key stages of the Code Amendment process (e.g. endorsement of the SOJ, endorsement of the Code Amendment initiation, endorsement of the draft Code Amendment for consultation, endorsement of the approval version of the Code Amendment) the Council will need to approve the documentation prior to proceeding to the next stage.

6.4. Legal Arrangements

At the Council's discretion, a legal instrument may be required to be entered into between Council and a Proponent. The purpose of the legal agreement is to create a legally binding framework between the parties with an acknowledgment that the process is undertaken at the cost and risk of the Proponent.

As a minimum, the legal agreement will include references to the following:

- State that a Proponent is funding an open and transparent Code Amendment process, which provides no guarantees that any Code Amendment outcome sought

by the Proponent will be provided;

- Outline the heads of agreement and legal procedures, including the roles of the parties, legal requirements and procedures, and project and financial management;
- Define in detail the nature of the Code Amendment including the area to be covered, the purpose of the Code Amendment and what the Code Amendment investigations will encompass;
- Acknowledge that Council maintains ultimate control of the Code Amendment process, in that key stages are presented to the Council for consideration and endorsement prior to proceeding to the next stage;
- Acknowledge that some parts of the Code Amendment process cannot be outsourced and management, policy oversight and processing will remain the responsibility of Council staff, and therefore managed according to Council priorities, meeting schedules and timeframes;
- Acknowledge that while Council may initiate a Code Amendment, ultimately the decision on its authorisation rests with the Commission and the Minister;
- Detail what may happen if the Code Amendment is either not authorised or authorised with amendments that may not suit the Proponent;
- State that the Code Amendment process will proceed at the expense of the Proponent and acknowledge that the Proponent will fund any additional investigations that may be required by Council following consideration of a draft Code Amendment and/or following consultation;
- Acknowledge that the Proponent will fund any legal costs associated with the Code Amendment process, including legal review, legal proceedings or judicial review proceedings.

Council is under no obligation to commence the Code Amendment process (by submitting a proposal to the Minister for approval under section 73(2)(b)) until the Deed of Agreement is signed by all relevant parties. All Code Amendment documentation will explicitly indicate that the Code Amendment is a Privately Funded Code Amendment.

7. History

1. Policy adopted by Council on 25 May 2021, Minute Reference STR9.3.6/2021, Page Reference 115