

Agenda Report for Noting

Meeting Date: 22 July 2021

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