

8 November 2021

Department of Justice
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Via email: haveyoursay@justice.tas.gov.au

To Whom It May Concern

**No Planning Approval Required Certificates
Proposed 'Option 2'—Determinations on Certificates by Qualified Persons and Licensing**

Thank you for the opportunity to comment on the proposed draft determinations for No Planning Approval Required (NPAR) Certificates. This submission is made in response to the State Government's decision to proceed with the 'Option 2' proposal for a Direction under the *Building Act 2016* to allow licensed persons to issue 'No Planning Approval Required' certificates and establish the licensing requirements.

The Local Government Association of Tasmania (LGAT) has consulted its member councils both via informal discussions and comments to formal submissions. This follows our previous submission on this issue in March 2021.

Unfortunately, it seems that the issues raised by councils and LGAT in our March 2021 submission have not been resolved and an unacceptable level of concern about the effects of this proposal remain. The key issue of the delineation of where this proposal sits between the *Land Use Planning and Approvals Act 1993* (LUPAA) and the *Building Act 2016*. This has not been well communicated, creating confusion around what the proposal actually means, functionally and legally and worse, creating an expectation that the proposed certificates will function like a de facto planning approval. This in turn, will create compliance confusion for proponents, slowing development and create ongoing enforcement headaches for councils.

Following, we recommend that Consumer, Building and Occupational Services (CBOS) abandon this proposal.

Previous Submission

In our previous submission from March 2021, LGAT cited the concerns of the local government sector which highlighted that:

- This proposal increases red tape, rather than reducing it.
- The need for the proposal was not demonstrated, without evidence that might illuminate the nature and scale of the problem and help inform an adequate consideration of a solution.
- There are concerns for the legality of issuing certificates under a Direction of the *Building Act 2016*, citing the questionable method to demonstrate compliance with LUPAA.
- If introduced, councils would be compelled to trigger competitive neutrality with certified professionals participating in a private certificate process to maintain their planning review services.

These issues remain largely unresolved under the current proposal.

In our previous consultation and submission, LGAT advised that councils largely rejected Options 1 and 2 of the Options Paper. The overwhelming majority of councils expressing concerns for a no planning approval required certificate and instead generally supporting Option 3, the status quo.

Some councils did support the use of private planners but in principle only, supporting the greater choice provided for development proponents, while holding reservations for the problems provided by the certificate options presented.

Our submission below will focus on new comments and the core of the problem. LGAT's previous submission provides further details on these ongoing issues.

Council Feedback on Discussion Points

In the comments and submissions that LGAT received from the sector, councils largely reiterated their previous feedback and concerns on the broader implications and rationale for the proposal. Few councils directly addressed the discussion points of the infosheet given the larger concerns.

Two councils provided comments addressing the Discussion Points. These councils were primarily concerned with the minimum qualifications, citing the preference for 'Full Member' and additionally sought clarification on the scope of work and process. This feedback is laid out in more detail at Attachment 1.

Consultation has Failed; Implementation is not Advised

Despite two rounds of consultation, substantial confusion still remains around the nature and implementation of this proposal. This is evidence that the consultation has failed.

Critically, councils, as planning authorities who will need to manage much of the regulatory and compliance fallout from this proposal, remain confused and contest the purpose. It is inappropriate for CBOS to enact this, and other regulatory change with its key implementor still unclear about their role and function.

For many end users, the NPAR Certificates will appear as a formal planning approval and they will act as such. This will create problems when errors occur, as they will, and councils will be required to step in and correct these errors through compliance action. Errors can occur as technical mistakes, such as misinterpreting planning scheme requirements or details of the proposal. They can also occur from lacking specific knowledge about the proposal site and its history. For example, a proposed use may not require a planning approval, but if the existing use was not established legally it could cause the new use to not be legally established as well. Private planners would not have access to councils' files of approval history and could miss this important information, compounding compliance problems. Correcting issues like this will be contested and costly for all parties.

We recommend that consultation return to the beginning, and reengage councils around the question of: "How can we responsibly enable planning advice in no planning permit required situations and support building surveyor trust in relying on that advice?"

LGAT's understanding is that the certificates are not approvals and certify only two things:

1. That the assessed proposal does not trigger any approval requirements of the LUPAA, so may proceed to building certification under the *Building Act 2016*; and
2. That the person who undertook the assessment is:
 - a. technically capable of making a reliable assessment of proposals, including development plans, site conditions, and planning scheme requirements as they apply to the proposal; and
 - b. has sufficient professional indemnity to cover situations of liability.

The proposal (as we understand it) is certification of technical advice, however proponents are likely to treat certificates as a legal declaration of approval to proceed under the LUPAA. Consequently, councils will have to devote resources to fighting these when they are incorrect, and proponents' expectation of an approval will make them more willing to challenge and more resistant to finding reasonable dispute resolution.

If it is true that the certification is technical advice and not any formal approval, then this must be properly communicated in the proposal and reflected in its title. For example:

“Certified No Planning Approval Advice”, or similar, to remove connotations that a certificate has to an approval and to express clearly that this is a piece of advice only that, while reliable for acting upon, can be overridden by the regulators.

It is a clear signal of risk in proceeding given that councils, as planning authorities, have significant remaining doubts, or uncertainties, about this proposal and its functioning under LUPAA and the Building Act. It is critical that councils and the Tasmanian Government share a consistent understanding of the proposal’s legal basis and functioning before being forced to manage its real effects in the development environment.

There are further issues to be properly examined and evidenced when these matters are addressed, including:

1. Liability and indemnity – how are the liability issues likely to play out and are the indemnity provisions, including professional indemnity of private planners, sufficient to cover the issues likely to arise?
2. Resourcing compliance effects – what are the likely compliance effects of the proposal and are current cost recovery mechanisms sufficient to manage these sustainably and maintain appropriate levels of service?
3. Mitigations and process improvements – how can compliance issues be reduced or prevented? What process improvements could be included to improve reliability of the service, such as standard forms, checklists or training?

We recommend that the proposal in its current form be abandoned given that consultation has not achieved its key objective of establishing a shared understanding between key regulatory partners and other matters outlined above remain unclear. Instead, we recommend that the Tasmanian Government work with LGAT and councils on supporting the planning review and advice services offered by many councils.

Thank you again for the opportunity to make a submission. Should you wish to discuss anything in this submission, please contact Michael Edrich at michael.edrich@lgat.tas.gov.au or 03 6146 3740.

Yours sincerely



Dion Lester
CHIEF EXECUTIVE OFFICER

Attachment 1 – Summary of Council Feedback from October 2021

Discussion points of Proposed 'Option 2' – Determinations on Certificates by Qualified Persons and Licensing discussion

Council Feedback on Discussion Points
<p>1. Are the minimum qualifications required of AQF 7 an appropriate level?</p> <p>The preference was for a 'full member category of the PIA'. This minimum level of qualification would ensure that planning consultants were appropriately qualified. Additionally, it was noted by one council that this would negate the need for Continuing Professional Development as this is monitored by the PIA.</p>
<p>2. Is the minimum experience requirement of five years' experience as a town planner at a local government or private planning consultancy appropriate experience?</p> <p>One council commented that the experience requirements align with those outlined within the Full Membership Requirements of the PIA.</p>
<p>3. Is the scope of work and license restrictions/conditions sufficiently clear?</p> <p>Two councils provided responses. Both councils sought clarification on this issue of scope as there appears to be no correlation between a No Planning Approval Required determination and LUPAA.</p> <p>Furthermore, the scope of work prescribed under the determination has not been made clear. For instance, external parties do not have access to council files and external planners may not be aware of existing lawful uses of a site. By issuing a No Planning Approval Required Certificate, an external planner may issue a change of use when the first use was not legally established, which would compound the problem and cause the 'new use' to not be legally established as well.</p>
<p>4. If you are a planning consultant in private practice, is your existing insurance policy likely to provide the necessary professional indemnity insurance to satisfy Part 9 of the Administrator's Determination?</p> <p>No comment.</p>