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To Whom It May Concern

No Planning Approval Required Certificates – Options Paper

Thank you for the opportunity to comment on the Tasmanian Government's Options Paper for No Planning Approval Required Certificates.

The Local Government Association of Tasmania (LGAT) consulted its member councils and received a variety of responses, from informal discussions and comments to formal submissions.

Please note that the Consumer, Building and Occupational Services (CBOS) Options Paper misrepresents the work LGAT undertook both with the Tasmanian Government and with our membership base, particularly the full set of options discussed, with the preferred option of the sector prior to the Options Paper release, being the status quo. This caused difficulties for LGAT and forced us to respond to false suggestions that these options, entirely initiated and owned by the Tasmanian Government, were preferred by LGAT. This had the potential to erode trust with our councils and impact our ability to properly consult and present a distilled sector view to CBOS.

The correct course of events was:

1. As part of its Red Tape Reduction Project, the Tasmanian Government approached LGAT regarding addressing timeframes in scenarios when no planning approval is required;
2. LGAT sought views from councils;
3. In August 2020, LGAT presented the preferred way forward as the status quo with better support for building practitioners to enable them to determine if a permit is

required for their development projects, along with four not-preferred alternative options that the Tasmanian Government could explore.

Our original feedback on the matter provided in August 2020 is still the majority view of the sector and contains a range of important considerations still relevant to this Options Paper. This feedback is provided again at **Attachment 1**, for your further consideration.

It is important that CBOS to consider carefully the way it presents its proposals and how it represents other organisations in its work, such as LGAT and councils, and to seek confirmation if it wants to represent LGAT in its publications.

Overall

Councils largely rejected Options 1 and 2, expressing concerns for a no planning approval required certificate, and generally supporting Option 3, the status quo. Only two councils supported the use of certificates, but only with the formal requirement for licensing, as detailed in Option 2.

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

Councils raised a number of issues with a certificate process including increasing red tape, no demonstrated need for a certificate process, the legality of the options, among others. These are discussed below.

Increasing red tape, not reducing

As LGAT has noted in previous communications, creating a formal certificate process when no planning approval is required increases red tape, rather than reducing it. It seems contradictory to establish a formal requirement where currently none is required in the interests of red tape reduction. It therefore should be subject to demonstrating sufficient need to create this new regulatory process.

Need not demonstrated

Councils rightly point out that the Options Paper describes a possible issue but provides no evidence and no demonstration that the problem exists or that sufficient need exists to justify developing and maintaining a new regulatory process.

In addition, councils dispute the claim of delays (for something with no statutory basis and is not a statutory requirement) and are right to do so when the Options Paper provides no hard data or evidence of this. Indeed, several councils have implemented a planning review service and have worked hard to ensure a consistent 5-business day / 7-day turnaround for such requests; they are justifiably proud of that work and reject claims of delays. What delays may

occur are at best isolated and case-dependent. The motivation for these options appears to rely on unreliable anecdotes, not a reliable review.

Furthermore, the case for a formal certificate process is not justified when private planning consultants can already provide written advice and evidence of no planning permit being required. What needs to be addressed is the willingness of building practitioners to rely on the evidence provided by qualified planning professionals.

One council made a critical point. It is not properly acknowledged in the Options Paper, but it must be understood that there is currently no legislative requirement or mechanism (and so, no timeframe) for a planning authority to issue confirmation of no planning approval required. With no statutory mechanism, it follows therefore that any confirmation given is not provided by a council fulfilling its statutory role as planning authority; rather, it is provided as a *technical service*, utilising its own internal trained planning expertise to undertake a professional assessment against the planning scheme. This is a professional assessment; not a statutory/legal determination. As such, these are usually issued by technical council officers, not the elected council (planning authority) itself.

This is an important distinction because the tendency of building surveyors to overwhelmingly direct their clients to obtain no planning approval required advice from their council and not from a private planner shows that they believe they are getting some sort of approval or authorisation from the planning authority to proceed. But this is not the case: rather, they are receiving a technical assessment from a trained professional demonstrating (not authorising or approving) that the proposal (as presented) does not trigger the need for planning approval. This means that there is no need to seek this from a council; all that is required is the competent technical expertise from a trained professional.

Questionable legality

Several councils have raised concerns regarding the legality of the approaches proposed in Options 1 and 2, particularly questioning whether it is legally sound to use a mechanism under the *Building Act 2016* to demonstrate compliance with the *Land Use Planning and Approvals Act 1993* (LUPAA) regarding a permit that is not required by LUPAA from a person with no statutory authority under LUPAA. A more detailed explanation is included at **Attachment 2**.

Other issues

Councils were in favour of better support for private planning consultants with better technical resources, especially the development of a standard form for both evidencing no planning approval required and also for standardising the assessment methodology.

Councils raised concerns that formalising a private certificate process would trigger competitive neutrality issues for them in maintaining their planning review services.

Preferred option – Option 3 with support for self assessment

From the responses we have received, a majority of councils support Option 3 – Status Quo, supplemented with support for private sector building surveyors and others to be more self-reliant and to be better able to make their own assessments on whether or not planning approval is required.

An alternative option is, instead of creating a new statutory process with certificates, for the Tasmanian Government to work with the Local Government sector on expanding the already successful planning review process operating in a number of councils – refer to Option 1 in Attachment 1 for further details.

Should Options 1 or 2 be pursued

Should either of Options 1 or 2 still be pursued, which is not supported by Local Government, then Option 2 (with formalised licensing) is preferred over Option 1. However, in this case, any certificate provided by a private consultant be found to have been made in error (for example, missing assessment of an overlay) should not override the actual planning requirements and should be able to be overturned by a planning authority or permit authority. Options 1 and 2 should not create a new statutory document that acts as a permit, it should legitimise technical advice for the purposes of the Building Act. That is, any Director's Determination made should ensure that the certificate cannot in any way erroneously legitimise illegal work and statements should be made to be explicit about that.

Furthermore, any Director's Determination made should not mandate a certificate to demonstrate compliance with the Building Act, it should merely allow one to be produced and to be relied up on by building practitioners as one pathway to compliance.

Again, thank you for the opportunity to provide comment on the Options Paper. We believe that the need for further regulatory additions to cases where no planning approval is required has not been demonstrated and currently relies on unreliable anecdotes. In addition, we believe workable options to address those anecdotal concerns exist and are available already without creating more regulation, hence the sector's support for Option 3.

Yours sincerely



Dion Lester

CHIEF EXECUTIVE OFFICER

Attachment 1 – Summary of Council Feedback from August 2020

Council Feedback	Recommendations for discussion
<p>While No Permit Required use or development must comply with the applicable requirements in the planning scheme, there is no formal test by which to determine or certify compliance.</p> <p>Despite this, in its current form, this proposal is not supported. It is difficult to see how it will do anything other than overly complicate the Act and add red tape (i.e. undermine reforms to the building legislation in 2016). The very nature of “no permit required” is that the person does not need a planning permit and there is no requirement to make an application, since no permit is required. There is no action required from the council. It follows that a proponent does not require a council’s acknowledgment of that and that developers are currently at liberty to self-assess their plans or to use a relevant private expert to do that for them. They can then simply lodge for building approval if they are satisfied that a planning permit is not required.</p> <p>However, it has become practice for building design and certification practitioners to request the applicable planning authority provide a statement verifying proposed building work is eligible as No Permit Required (NPR) development. It is understood an interest by other parties, including lending and insurance providers, for security in relation to the lawfulness of building work, is driving demand by building practitioners for tangible evidence that a proposed work is NPR. However, a NPR compliance certificate is not a permit, consent or notice in place or required under any Act, and is therefore not a relevant consideration under the <i>Building Act 2016</i>. The desire for such a statement is one of convenience rather than statutory need.</p> <p>Many councils currently work with proponents informally on development proposals (pre-lodgement) to inform design changes to achieve NPR status. This iterative process could not occur with the proposed reform, resulting in many more applications triggering Permitted or Discretionary status, particularly when combined with the tranche 1 reforms related to planning fees having to be invoiced within 5 business days.</p>	<p>The current arrangements should continue and alternatives be explored to support building practitioners to be more self-responsible for determining whether a permit is required (as was the intent with the <i>Building Act 2016</i>). In the absence of this then the following alternative options should be explored:</p> <ol style="list-style-type: none"> 1. Establish a pre-lodgement assessment process <p>A number of councils already offer a planning review service to identify NPR, with some charging a small fee for this service. Typically, this has arisen because council's building departments were receiving numerous applications for building approval that required a planning permit due to a discretion. Those councils that have adopted this service report that it is resulting in significantly more NPR, as opposed to Permitted outcomes as a result of the iterative engagement the process allows.</p> <p>By requesting customers to lodge an application for a review where they are seeking specific and comprehensive advice the councils have been able to identify deficiencies early and better prepare applicants for the lodgement of a planning application, guide applicants to "permitted " and "NPR" outcomes, and provide written confirmation for the applicants records, the Building Surveyor and any other party that the development does not require a permit. Those councils that offer this service do so with a service level target of typically 7 or 14 days.</p> 2. Abandon No Permit Required use and development - <p>Contemporary Tasmanian planning schemes identify a number of permission pathways for a proposed use or development. There is class of low risk use or development described as NPR in which a planning scheme has an interest, but for which there is no requirement for a permit.</p> <p>There is little practical distinction between dealing with a NPR compliance certificate and a section 58 permit application, other than it is not possible to impose conditions on a NPR use or development.</p> <p>The arrangement could be simplified to provide for use and development for which the planning scheme does not apply (exempt); use and development for which a permit is required (section 57 and section 58); and use or development that is prohibited. With a two-tier category of assessed use and development for Permitted applications:</p> <ol style="list-style-type: none"> a. Tier 1 use and development (currently NPR) which must be approved without conditions; and

Council Feedback	Recommendations for discussion
<p>This proposal is unworkable unless there is a process introduced into LUPAA for there to be a formal application, with minimum information and documentation. Without these expectations being placed on applicants, the council could find itself having to make an assessment of grossly inadequate documentation or have to refuse to issue confirmation of NPR.</p> <p>It was also noted that care needs to be taken with drafting any changes to this aspect of the system, as we certainly don't want to inadvertently call in everything that could trigger NPR status to require council confirmation. The definition of development, building and works in LUPAA is so broad that this could require a formal process for thousands of development applications that are unnecessary and are currently dismissed as common practice (i.e. internal works, recladding a building, replacing windows etc).</p>	<p>b. Tier 2 (currently Permitted) which must be approved with or without conditions.</p> <p>The approach ensures a common application and assessment process, and the issue of a document confirming compliance to the planning scheme.</p> <p>Separate timeframes could apply under the Act for determining Tier 1 and Tier 2 applications.</p> <p>3. Legislate a No Permit Required compliance certificate The legitimacy of compliance certificates can be established by legislating an arrangement for application, assessment and decision.</p> <p>The <i>Land Use Planning and Approvals (Amendment) Act 2013</i> provides for issue of a planning compliance certificate in relation to use or development with no permit required status under a planning scheme.</p> <p>The provision is rather complicated and unnecessarily detailed. It also makes it mandatory to obtain a planning compliance certificate before commencing a single dwelling development; therefore blurring distinction between a no permit required and a section 58 permit. However, with substantial modifications this Amendment / concept could support a NPR compliance certificate.</p> <p>The modifications would need to include matters such as (but not limited to) the planning authority must have available to it all of the information necessary to establish the proposed use or development will satisfy all the applicable requirements of the planning scheme and a planning compliance certificate should be optional – as a means of confirming compliance rather than as mandatory for compliance.</p> <p>4. Director Determination Pursuant to the <i>Building Act 2016</i> that a building surveyor may rely upon a statement by a private planning consultant that a proposal does not require planning permission.</p>

24 February 2021

Mr Michael Edrich
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By Email: michael.edrich@lgat.tas.gov.au

Dear Mr Edrich

Options Paper - No Planning Approval Required Certificates– Feedback for CBOS

Thank you for your email dated 20 January 2021 attaching the Options Paper regarding “No Planning Approval Required Certificates”. We support the overarching intent of the proposals to reduce re-tape and to facilitate a more efficient and timely approach to dealing with planning outcomes.

At officer level, there are some significant reservations regarding the legal framework of the proposed options. We consider that the most appropriate mechanism for resolving the relevant issue would be pursuant to the *Land Use Planning and Approvals Act 1993* (Tas) rather than the *Building Act 2016* (Tas) or the *Occupational Licensing Act 2005* (Tas).

Option 1

Option 1 proposes that the Director of Building Control issue a Determination under the *Building Act 2016* (Tas) which would allow private planning consultants to issue “No Planning Permit Required” Certificates, which can then be relied upon by the Building Surveyor and Permit Authority when determining an application for building approval.

Option 1 is not within the intent of the remit of power provided to the Director of Building Control under the *Building Act 2016* (Tas). The *Building Act 2016* (Tas) provides for regulatory controls of building work, it does not provide for regulatory controls of planning matters. As a matter of legislative interpretation, the powers of the Director of Building Control must be considered in this context.

As such, despite the broad drafting of regulation 8(f) of the *Building Act 2016* (Tas) and the fact that the building surveyor must consider all relevant permits under any Act, any such power conferred upon the Director of Building Control does not appear to extend to regulating planning matters and to consider otherwise would be a strained interpretation.

Option 2

Option 2 proposes that Option 1 be extended such that there is also a requirement that private planning consultants be licensed to issue a statement or report that no planning approval is required. The proposal is for the Administrator of Occupational Licensing to amend the Administrator's Occupational Licensing (Building Services Work) Determination pursuant to the *Occupational Licensing Act 2005* (Tas).

For reasons similar to as outlined in Option 1 above, Option 2 is at best only tenuously within the intent and remit of power provided to the Administrator of Occupational Licensing under the *Occupational Licensing Act 2005* (Tas).

We note that:

1. The *Occupational Licensing Act 2005* (Tas) pursuant to section 7(1BA) and Schedule 2, Part 4 sets out the application of the Act to certain occupations involved in "building services work". It applies to the assessment and certification of "buildings" and "building work" and authorisations and approvals to perform building work.
2. Within the *Occupational Licensing (Building Services Work) Regulations 2016* (Tas), Schedule 1, Part 1, Item 3, "building services work" is defined as including assessment and certification of proposed "building work" and including statutory approvals and authorisations "to perform that building...work", and certification of "building work" and "buildings".
3. Pursuant to section 3(2) of the *Occupational Licensing Act 2005* (Tas), terms such as "building" and "building work" import the meaning as defined within the *Building Act 2016* (Tas).

As a matter of legislative interpretation, the focus of the above is on structures at the building stage within the meaning of the *Building Act 2016* (Tas) rather than at the planning stage within the meaning of the *Land Use Planning and Approvals Act 1993* (Tas). The *Occupational Licensing Act 2005* (Tas) clearly operates to support the *Building Act 2016* (Tas).

The *Occupational Licensing Act 2005* (Tas) refers to the *Building Act 2016* (Tas) and the *Building Act 2000* (Tas) over 50 times, whereas it refers to the *Land Use Planning and Approvals Act 1993* (Tas) on nil occasions. The planning occupation is never identified within the *Occupational Licensing Act 2005* (Tas) expressly, or in our view impliedly.

The Tasmanian planning and building regulatory framework operate as two very distinct and separate legislative domains (ie. the *Building Act 2016* (Tas) and the *Land Use Planning and Approvals Act 1993* (Tas)). The proposal unnecessarily blurs these boundaries.

Option 3

Option 3 proposes that the status quo remain. As a result of the above, council officers support the status quo. There is nothing preventing a private planning consultant from providing an opinion that a planning permit is not required for a proposed development. From a legal perspective, if a building surveyor were to rely on such an opinion, we consider that section 326(1) and section 326(2)(c) of the *Building Act 2016* (Tas) provides immunity.

Summary

In summary we support the intent of the proposals, but due to concerns regarding the legal framework, we are unable to support Option 1 or Option 2. Of the options presented we support Option 3 only and consider that the existing immunity under the *Building Act 2016* (Tas) protects building surveyors.

The functional issue which therefore remains, is whether private planning consultants are prepared to put in writing, an opinion that no planning permit is required, and whether consumers are adequately protected. The most appropriate approach to dealing with such issues appears to us to be pursuant to the legal framework of the planning legislation.

Yours sincerely



Clare Shea
MANAGER GOVERNANCE