

Legislative Council—No 75

As introduced and read a first time, 23 November 2006

South Australia

**Development (Assessment Procedures)
Amendment Bill 2006**

A BILL FOR

An Act to amend the *Development Act 1993*; to make related amendments to the *Highways Act 1926* and the *Local Government Act 1999*; and to repeal the *Swimming Pools (Safety) Act 1972*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Development Act 1993*

- 4 Amendment of section 4—Interpretation
- 5 Amendment of section 33—Matters against which a development must be assessed
- 6 Amendment of section 34—Determination of relevant authority
- 7 Amendment of section 35—Special provisions relating to assessment against a Development Plan
- 8 Amendment of section 36—Special provisions relating to assessment against the Building Rules
- 9 Insertion of section 37AA
37AA Preliminary advice and agreement
- 10 Amendment of section 38—Public notice and consultation
- 11 Amendment of section 39—Application and provision of information
- 12 Amendment of section 50—Open space contribution scheme
- 13 Amendment of section 50A—Carparking fund
- 14 Amendment of section 53—Law governing proceedings under this Act
- 15 Amendment of section 53A—Requirement to up-grade building in certain cases
- 16 Amendment of section 57—Land management agreements
- 17 Amendment of section 57A—Land management agreements—development applications
- 18 Amendment of section 68A—Private certifiers
- 19 Insertion of section 71AA
71AA Swimming pool safety
- 20 Amendment of section 75—Applications for mining tenements to be referred in certain cases to the Minister
- 21 Insertion of section 75A
75A Ministerial declarations—related matters
- 22 Amendment of section 84—Enforcement notices
- 23 Amendment of section 86—General right to apply to Court
- 24 Amendment of section 88—Powers of Court in determining any matter
- 25 Amendment of section 89—Preliminary
- 26 Amendment of Schedule 1—Regulations

Schedule 1—Related amendments, repeals and transitional provisions

Part 1—Amendment of *Highways Act 1926*

- 1 Amendment of section 20—General powers of Commissioner

Part 2—Amendment of *Local Government Act 1999*

- 2 Insertion of section 245A
245A Council may require bond or other security in certain circumstances

Part 3—Repeal *Swimming Pools (Safety) Act 1972*

- 3 Repeal of *Swimming Pools (Safety) Act 1972*

Part 4—Transitional provisions

4 Transitional provisions

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Development (Assessment Procedures) Amendment Act 2006*.

5 **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 **Part 2—Amendment of *Development Act 1993***

4—Amendment of section 4—Interpretation

- (1) Section 4(1)—after the definition of *Building Rules Assessment Commission* insert:

building rules consent means a consent granted under section 33(1)(b);

- (2) Section 4(1)—after the definition of *Development Plan* insert:

15 *development plan consent* means a consent granted under section 33(1)(a);

- (3) Section 4(1), definition of *provisional building rules consent*—delete the definition

- (4) Section 4(1), definition of *provisional development plan consent*—delete the definition

20 **5—Amendment of section 33—Matters against which a development must be assessed**

- (1) Section 33(1)(a)—delete "*provisional*"

- (2) Section 33(1)(b)—delete "*provisional*"

- (3) Section 33(3)—delete "provisional"

6—Amendment of section 34—Determination of relevant authority

(1) Section 34—after subsection (1a) insert:

(1b) To avoid doubt, a council may act as the relevant authority in relation to a proposed development even though it has been involved in preliminary planning or other work associated with the proposal for the particular development, or has entered into an associated agreement or agreements in connection with that preliminary planning or other work (unless the Development Assessment Commission or a regional development assessment panel is constituted as the relevant authority by virtue of the operation of subsection (1)(ab) or (b) (including in a case where the Minister decides to take action under subsection (1)(b)(vi) in the particular circumstances)).

(2) Section 34(2)—after "for the purposes of this Act" insert:

and, subject to any provision made by the regulations, to be the relevant authority to determine whether the development should be approved

(3) Section 34(3)—delete subsection (3) and substitute:

(3) The Governor may, for the purposes of this section, by regulation, constitute a regional development assessment panel in relation to an area or areas of the State comprising parts or all of the areas of 2 or more councils and, if the regulation so provides, a part or parts of the State that are not within the area of a council.

7—Amendment of section 35—Special provisions relating to assessment against a Development Plan

(1) Section 35(1)—delete "provisional"

(2) Section 35(3)—delete "provisional"

(3) Section 35(3)(b)—delete paragraph (b) and substitute:

(b) in any other case—

(i) unless subparagraph (ii) applies—the Development Assessment Commission;

(ii) in prescribed circumstances—a regional development assessment panel,

concurr in the granting of the consent.

(4) Section 35—after subsection (4) insert:

(4a) To avoid doubt, nothing in a preceding subsection prevents a relevant authority refusing at any time to grant a development authorisation with respect to a *non-complying* development.

8—Amendment of section 36—Special provisions relating to assessment against the Building Rules

(1) Section 36(1)—delete "provisional"

(2) Section 36(2)—delete "provisional"

(3) Section 36(2a)(b)—delete "provisional"

(4) Section 36—after subsection (2b) insert:

(2c) In addition, regulations made for purposes of this subsection may provide that building work of a prescribed class must not be granted a building rules consent unless the Building Rules Assessment Commission concurs in the granting of the consent.

(5) Section 36(3)(b)—delete "provisional"

(6) Section 36(7)—delete "provisional"

9—Insertion of section 37AA

After section 37 insert:

37AA—Preliminary advice and agreement

(1) A person may seek the opinion of a prescribed body under section 37 in relation to proposed development before lodging an application for development plan consent with respect to the development.

(2) If—

(a) a proposed development is referred to a prescribed body under subsection (1); and

(b) the prescribed body agrees to consider the matter under this section after taking into account any matter prescribed by the regulations; and

(c) the prescribed body agrees, in the manner prescribed by the regulations, that the development meets the requirements (if any) of the prescribed body (including on the basis of the imposition of conditions),

then, subject to subsection (4)—

(d) if an application for development plan consent with respect to the development is lodged with the relevant authority within 3 months after the prescribed body has indicated its agreement under paragraph (c); and

(e) if the relevant authority is satisfied that the application accords with the agreement indicated by the prescribed body (taking into account the terms or elements of that agreement and any relevant plans and other documentation),

the application will not be referred to the prescribed body under section 37.

(3) A prescribed body under section 37 may, in connection with the operation of subsections (1) and (2)—

(a) require the payment of a fee prescribed by the regulations (if the prescribed body agrees to consider the matter under subsection (2)(b)); and

- (b) in relation to the proposed development—exercise any power (including the power to impose conditions) that it would be able to exercise if the development were to be referred to it under section 37.

- 5
- (4) Any agreement under this section will cease to have effect (and an application will need to be referred to a prescribed body under section 37 despite the operation of subsection (2)) if the relevant authority determines that the agreement is no longer appropriate due to the operation of section 53.

10 **10—Amendment of section 38—Public notice and consultation**

- (1) Section 38(1)—delete "There will be three" and substitute:

Subject to this section, there will be 4

- (2) Section 38(1)—after paragraph (a) insert:

(ab) *Category 2A development*; and

- 15
- (3) Section 38(2)—delete subsection (2) and substitute:

- (2) Subject to subsections (2a) and (2b), the following provisions apply in relation to the assignment of developments to those categories:

- (a) the regulations or a Development Plan may assign a form of development to Category 1 or to Category 2 and if a particular form of development is assigned to a category by both the regulations and a Development Plan, the assignment provided by the Development Plan will, to the extent of any inconsistency, prevail within the area to which the Development Plan relates (but an assignment to Category 1 under this paragraph will be subject to the operation of paragraph (b));

- (b) Category 2A development is any form of development that would, but for this paragraph and subsection (2b), be assigned to Category 1 but that is to be taken to be categorised as Category 2A development because the development—

- (i) involves building work along the whole or a part of the boundary of the relevant site (disregarding any building work constituted by the construction of a fence that does not constitute development under this Act or that is excluded from the ambit of this subparagraph by the regulations) and an allotment on the other side of the boundary is being used for residential purposes; or

- (ii) involves a prescribed kind of use of land where the use is proposed to be undertaken within a building within a prescribed distance from a boundary of the relevant site; or

(iii) is another kind of development prescribed by the regulations for the purposes of this paragraph;

(c) any development that is not assigned to a category under paragraph (a) or (b) will be taken to be a Category 3 development for the purposes of this section.

(4) Section 38—after subsection (2a) insert:

(2b) The assignment of a form of development to Category 2A does not extend to—

(a) development of a kind described as a *complying* development under the regulations or the relevant Development Plan; or

(b) development that would otherwise be within the ambit of subparagraph (i) of paragraph (b) of subsection (2) (and no other subparagraph) where the boundary, or the part of the boundary, that is relevant under that subparagraph is wholly within a scheme of community division under the *Community Titles Act 1996* or a strata scheme under the *Strata Titles Act 1988* (and accordingly does not form any part of the outside boundary of such a scheme); or

(c) development of a kind excluded from the ambit of Category 2A by the regulations (including regulations which exclude all development within a prescribed area from the ambit of Category 2A).

(2c) For the purposes of subsection (2)(b), building work will be taken to be along a boundary if there is no set-back or separation from that boundary.

(5) Section 38—after subsection (3) insert:

(3a) Where a person applies for a consent in respect of the Development Plan for a Category 2A development—

(a) the relevant authority must, subject to any exclusion or qualification prescribed by the regulations—

(i) give an owner or occupier of land on the other side of the relevant boundary (being, in a case where subsection (2)(b)(i) applies, an owner or occupier of the allotment being used for residential purposes) notice of the application; and

(ii) give consideration to any representations in writing made by any owner or occupier of that land in accordance with the regulations; and

(iii) forward to the applicant a copy of any representations that the relevant authority must consider under subparagraph (ii) and allow the applicant an opportunity to respond, in writing, to those representations within the period prescribed by the regulations; and

(b) if a representation is received under paragraph (a) within the prescribed number of days, the relevant authority may, in its absolute discretion, allow the owner or occupier to appear personally or by representative before it to be heard in support of the representation.

(6) Section 38(6)(d)—delete "provisional"

(7) Section 38(7)—delete "Where" and substitute:

Subject to subsection (17), where

(8) Section 38—after subsection (16) insert:

(17) Where a relevant authority is acting under this section in relation to a Category 2A or Category 2 development, a representation made by a person who is not entitled to be given notice of the relevant application under this section is not required to be taken into account under this section and will not have effect for any relevant purpose under this section.

(18) In addition, a representation that is not made in accordance with any requirement prescribed by the regulations for the purposes of this section is not required to be taken into account under this section and will not have effect for any relevant purpose under this section (including, in the case of a Category 3 development, in connection with the operation of subsection (12)).

11—Amendment of section 39—Application and provision of information

(1) Section 39(6)—delete "subsection (7)" and substitute:

this section

(2) Section 39(6)—after "this Act" insert:

(including by seeking the variation of a condition imposed with respect to the development authorisation)

(3) Section 39(7)(b)—delete paragraph (b) and substitute:

(b) will, for the purposes of this Part, but subject to any exclusion or modification prescribed by the regulations, to the extent of the proposed variation (and not so as to provide for the consideration of other elements or aspects of the development or the authorisation), be treated as a new application for development authorisation; and

(c) unless otherwise approved by the relevant authority, cannot seek to extend the period for which the relevant authorisation remains operative.

(4) Section 39—after subsection (7) insert:

(7a) In addition, the variation of a development authorisation on application under subsection (6)—

- (a) cannot have effect so as to impose a new condition, or to vary an existing condition, with respect to a matter that does not fall within the ambit of the application for variation; and
- (b) cannot affect the operation of a condition imposed with respect to the original authorisation unless the relevant authority has made specific provision for the variation of the condition in its decision on the application for variation.

12—Amendment of section 50—Open space contribution scheme

Section 50(10)(a)—delete "paid into a trust fund" and substitute:

immediately paid into a special fund established for the purposes of this section

13—Amendment of section 50A—Carparking fund

Section 50A(5)(b)—delete "provisional"

14—Amendment of section 53—Law governing proceedings under this Act

- (1) Section 53(2)—delete "provisional"
- (2) Section 53(3)—delete "provisional"

15—Amendment of section 53A—Requirement to up-grade building in certain cases

- (1) Section 53A(1)—delete "provisional"
- (2) Section 53A(2)(a)—delete "provisional"

16—Amendment of section 57—Land management agreements

- (1) Section 57(2e)—delete "provisional"
- (2) Section 57(2e)—after "with respect to a" insert:

Category 2A,

17—Amendment of section 57A—Land management agreements—development applications

Section 57A(8)—after "with respect to a" insert:

Category 2A,

18—Amendment of section 68A—Private certifiers

Section 68A(1)—delete "provisional"

19—Insertion of section 71AA

After section 71 insert:

71AA—Swimming pool safety

(1) In this section—

new prescribed requirements means requirements imposed by regulations made for the purposes of this definition;

old prescribed requirements means the requirements of the (now repealed) *Swimming Pools (Safety) Act 1972* (as in existence immediately before the repeal of that Act);

owner of a swimming pool means—

- (a) where the swimming pool is a fixture to, or forms part of land—the owner of the land;
- (b) in any other case—the owner of the structure that constitutes the swimming pool;

prescribed event means an event or circumstance prescribed by the regulations as constituting a prescribed event for the purposes of this section;

prescribed swimming pool means a swimming pool—

- (a) constructed or installed before 1 July 1993; and
- (b) formerly subject to the requirement imposed by the (now repealed) *Swimming Pools (Safety) Act 1972* to be fenced or otherwise enclosed;

swimming pool means an excavation or structure that is capable of being filled with water and is used primarily for swimming, wading, paddling or the like and includes a bathing or wading pool or spa pool (but not a spa bath);

swimming pool safety features means a fence, barrier or other structure or equipment prescribed by regulation.

- (2) The regulations may require the owner of a prescribed swimming pool to ensure that swimming pool safety features are installed in accordance with the new prescribed requirements before, or on the occurrence of, a prescribed event.
- (3) Until the occurrence of a prescribed event, the owner of a prescribed swimming pool must ensure that swimming pool safety features are installed and maintained in accordance with either—
 - (a) the old prescribed requirements; or
 - (b) the new prescribed requirements.
- (4) On and after the occurrence of a prescribed event, the owner of a prescribed swimming pool must ensure that swimming pool safety features are installed and maintained in accordance with the new prescribed requirements.

(5) The owner of a swimming pool other than a prescribed swimming pool must ensure that swimming pool safety features are installed and maintained in accordance with the new prescribed requirements.

(6) A person who contravenes, or fails to comply with, a requirement under this section (including a requirement imposed under subsection (2)) is guilty of an offence.

Maximum penalty: Division 4 fine.

(7) The regulations may require a council to establish a swimming pool inspection policy that complies with any requirements prescribed by the regulations.

(8) A regulation cannot be made under subsection (7) unless the Minister has given the LGA notice of the proposal to make a regulation under that subsection and given consideration to any submission made by the LGA within a period (of between 3 and 6 weeks) specified by the Minister.

20—Amendment of section 75—Applications for mining tenements to be referred in certain cases to the Minister

(1) Section 75(4)(a) and (b)—delete paragraphs (a) and (b) and substitute:

(a) the Minister or the Authority may determine that the operations are to be subject to the processes and procedures prescribed by Subdivision 1 of Part 4 Division 2 with respect to the preparation of an environmental impact statement or a public environmental report; and

(b) in the case of such a determination, that subdivision will then apply in relation to the preparation of an environmental impact statement or a public environmental report, and a related Assessment Report—

(i) subject to the qualification that any reference under that subdivision to the Development Assessment Commission is to have effect as if it were a reference to the Minister or the Authority, depending on who has made the determination, but the statement or report will cover matters determined by the Minister after consultation with the Authority; and

(ii) subject to any other modifications as may be prescribed by the regulations.

(2) Section 75(6)—after "should adhere to the advice" insert:

(after considering the terms of any relevant environmental impact statement or public environmental report)

(3) Section 75—after subsection (6) insert:

(7) The appropriate Authority may, with the concurrence of the Minister, determine that it is appropriate that proposed development associated with mining operations within the ambit of subsection (4)(a) also be assessed under this section and, if the Authority makes such a determination, the Authority may, by notice in the Gazette, combine the assessment of the proposed development with the assessment of the relevant mining operations and, in such a case—

(a) the proposed development associated with the mining operations must also be considered under the relevant environmental impact statement or public environmental report; and

(b) the Governor may deal with the development under Subdivision 2 of Part 4 Division 2 as if it were within the ambit of a declaration of the Minister under section 46 (and that Subdivision, together with Subdivision 3 of Part 4 Division 2, will then apply in respect of the development).

21—Insertion of section 75A

After section 75 insert:

75A—Ministerial declarations—related matters

(1) This Part does not limit the ability of the Minister to make a declaration under Part 4 Division 2 Subdivision 1 in respect of a proposal that involves—

(a) proposed mining operations on a mining tenement; and

(b) proposed development associated with the mining operations.

(2) For the avoidance of doubt, a determination under this Part with respect to the preparation of an environmental impact statement or public environmental report does not bring the relevant mining operations within the ambit of Subdivision 2 of Part 4 Division 2 (but may bring an associated development within the ambit of that Subdivision by virtue of the operation of section 75(7)).

22—Amendment of section 84—Enforcement notices

Section 84(1), definition of "relevant authority"—after paragraph (c) insert:

or

(d) a prescribed body under section 37 that is brought within the ambit of this definition by a regulation made for the purposes of this section.

23—Amendment of section 86—General right to apply to Court

(1) Section 86(1)(e)(iii)—delete "provisional"

(2) Section 86(1)—after paragraph (e) insert:

- (f) a person who can demonstrate an interest in a matter that is relevant to the determination of an application for a development authorisation by a relevant authority under this Act may apply to the Court for a review of that matter.

24—Amendment of section 88—Powers of Court in determining any matter

(1) Section 88—after paragraph (d) insert:

- (da) if appropriate in the circumstances of the proceedings—make any determination or declaration, or grant any other remedy or relief as the Court thinks fit;

(2) Section 88—after its present contents as amended by this section (now to be designated as subsection (1)) insert:

(2) The following provisions apply in connection with the exercise of the Court's jurisdiction in any proceedings under this Act:

- (a) subject to paragraph (b), the Court should only seek to deal with and resolve those issues in dispute between the parties and should not, unless the Court considers it to be necessary or appropriate to do so, consider any aspect of the decision, assessment, consent, approval, direction, act, order or determination that is not being challenged;

(b) if—

- (i) a person who has applied for a development authorisation is appealing against a refusal to grant the authorisation; or

- (ii) a third party is appealing against a decision to grant a development authorisation,

the Court may (if the Court thinks fit) proceed to consider the matter *de novo* (adopting such processes and procedures as it thinks fit and taking into account any material that was before the relevant authority when it refused to grant the authorisation and such other evidence or material as the Court thinks fit);

- (c) the Court may, in dealing with an application from a person to be joined as a party to the proceedings (other than the Crown or a person who was entitled to be given notice of a decision in respect of a Category 3 development under section 38 (if relevant)), determine not to grant the application—

- (i) on the ground that the Court is not satisfied that the person has a special interest in the subject-matter of the application; or

(ii) on the ground that, whatever the interest of the person may be, the Court is not satisfied that the interests of justice require that the person be joined as a party; or

5 (iii) on any other ground determined to be appropriate by the Court.

25—Amendment of section 89—Preliminary

Section 89(3)—delete "provisional"

26—Amendment of Schedule 1—Regulations

10 (1) Item 10—after "prescribed class" insert:

(including so as to provide that a particular step must be taken by a relevant authority or other body or person within a prescribed period)

(2) After item 10 insert:

10A The review of delegations made by a person or body under this Act.

15 (3) Schedule 1—after item 17 insert:

17A Without limiting any other item, the requirement that—

(a) a building; or

(b) building products, building methods, designs, components, equipment or systems (including systems used in connection with a building); or

(c) land used in conjunction with a building; or

(d) fixtures, fittings or other items associated with land comprising the site of any building,

25 comply with any requirement relating to the sustainability of a building, or of the occupation or use of a building, from an environmental perspective, including so as to provide efficiencies with respect to the use of water, electricity or other resources or forms of energy, to reduce greenhouse gas emissions or the use of resources or energy, or to provide a rating system to facilitate the assessment of proposed development or to regulate the use or development of any building in accordance with prescribed standards.

30 (4) Schedule 1, item 46—after "greater)" insert:

and the designation of persons who are authorised to give expiation notices

Schedule 1—Related amendments, repeals and transitional provisions

Part 1—Amendment of *Highways Act 1926*

1—Amendment of section 20—General powers of Commissioner

- 5 (1) Section 20(5)—delete "The" and substitute:
Subject to subsection (6), the
- (2) Section 20—after subsection (5) insert:
- (6) Subsection (5) does not apply—
- 10 (a) in a case that involves development in relation to a State heritage place in the circumstances contemplated by paragraph (e) of the definition of *development* under the *Development Act 1993* (on the basis that the *Development Act 1993* will only apply insofar as is relevant to the State heritage place); or
- 15 (b) in a case that falls within the ambit of regulations (if any) made for the purposes of this paragraph.

Part 2—Amendment of *Local Government Act 1999*

2—Insertion of section 245A

After section 245 insert:

- 20 **245A—Council may require bond or other security in certain circumstances**
- (1) Subject to this section, if—
- 25 (a) a person has approval to carry out development under the *Development Act 1993*; and
- (b) the council has reason to believe that the performance of work in connection with the development could cause damage to any local government land (including a road) within the vicinity of the site of the development,
- 30 the council may, by notice in writing served on the person who has the benefit of the approval, require the person to enter into an agreement that complies with any requirements prescribed by the regulations so as to ensure that money is available to address the cost of any damage that may be caused.

- 5 (2) The regulations may prescribe or limit the terms or conditions of any agreement that may be required under subsection (1) (including by providing the maximum amount that may be payable under such an agreement or by providing that a prescribed form of guarantee or indemnity may be given in substitution for any bond or other form of security).
- 10 (3) A person required to enter into an agreement under subsection (1) may, within 28 days after service of the notice under that subsection, appeal to the Environment, Resources and Development Court against the imposition of the requirement, or against the terms or conditions of the agreement.
- 15 (4) The Court may, on hearing an appeal—
- (a) confirm, vary or reverse any requirement that has been imposed (but not so as to create any inconsistency with the regulations);
 - (b) remit the matter to the council for further consideration;
 - (c) make any consequential or ancillary order, or impose any condition or requirement, that it considers necessary or expedient.
- 20 (5) Subject to the outcome of any appeal under this section, a person who fails to comply with a requirement under this section within a period prescribed by the regulations is guilty of an offence.
- Maximum penalty: \$5 000.
Expiation fee: \$500.

25 **Part 3—Repeal *Swimming Pools (Safety) Act 1972***

3—Repeal of *Swimming Pools (Safety) Act 1972*

The *Swimming Pools (Safety) Act 1972* is repealed.

Part 4—Transitional provisions

4—Transitional provisions

- 30 (1) The Governor may, by regulation, make provisions of a saving or transitional nature consequent on the enactment of this Act.
- (2) A provision of a regulation made under subclause (1) may, if the regulation so provides, take effect from the commencement of this Act or from a later day.
- 35 (3) To the extent to which a provision takes effect under subclause (2) from a day earlier than the day of the regulation's publication in the Gazette, the provision does not operate to the disadvantage of a person by—
- (a) decreasing the person's rights; or
 - (b) imposing liabilities on the person.

- (4) The *Acts Interpretation Act 1915* will, except to the extent of any inconsistency with the provisions of regulations made under this Schedule, apply to any amendment effected by this Act.