Planning SA Guide

Pre-Lodgement Agreements
Section 37AA of the Development Act 1993

February 2008
Purpose

On 29 November 2007 amendments to the Development Act came into operation to allow for the recognition of formal agreements between applicants and prescribed referral bodies made prior to the lodgement of a development application (‘Pre-Lodgement Agreements’).

This Guide has been prepared to assist applicants, referral body staff, the community and councils to understand the processes, benefits and obligations relating to the pre-lodgement option now available under the Development Act.
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Under South Australia’s integrated planning and development system, an applicant is required to obtain a single development approval from the appropriate ‘relevant authority’ prior to undertaking any development.

The ‘relevant authority’ will usually be the relevant local council or the Development Assessment Commission; the relevant authority is determined under the Development Act and associated Regulations.

The development approval will usually be issued after the granting of two separate consents - planning consent and building consent (other consents may be required for some types of application, for example land division consent if land division is involved).

Before issuing a planning consent (formally called a ‘Development Plan Consent’) the relevant planning authority will assess the application against the zoning and other provisions of the relevant local area Development Plan; there may also be a requirement for referral of the development application to prescribed statutory bodies.

Schedule 8 of the Development Regulations lists the kinds of development applications which must be forwarded to particular referral bodies for advice or direction before a planning consent decision is made. This referral is undertaken by the relevant authority as part of the assessment process.

This process avoids the need for an applicant to obtain separate planning decisions from different bodies under different Acts.

Historically, applicants with large or complex proposals have often held informal discussions with referral bodies during the final stages of the preparation of development proposals/applications to try and ensure that various key elements are appropriately addressed in the application.

From 29 November 2007, Section 37AA of the Development Act has been amended to enable applicants to enter into formal discussions with one or more such referral bodies prior to lodging an application. These discussions may result in a formal agreement between the parties (a Pre-Lodgement Agreement).

If a Pre-Lodgement Agreement is reached and signed by both parties, this obviates the need for a referral to that body or bodies during the assessment process. The agreement must be lodged with the development application, and the application lodged within three months of the agreement being signed.

This approach provides the opportunity for a better application, greater certainty for the applicant and potential for reduced assessment times.
The Development Regulations incorporate a standard form for applicants to initiate formal pre-lodgement discussions with referral agencies. That form is available on the Planning SA website and discussed in the next section of this Guide.

In the event that formal discussions are commenced but not concluded, an application can be lodged and a standard Schedule 8 referral undertaken.

NOTE: Applicants associated with complex development proposals may wish to contact the Case Manager Secretariat in the SA Government’s Department of Trade and Economic Development to determine whether a case manager should be assigned to assist in consideration of proposals by relevant agencies.
Initiating Formal Pre-Lodgement Discussions

In order to commence formal discussions on a proposed development, an applicant will need to complete a Pre-Lodgement Agreement Request Form as set out in the Development Regulations. This form is available online at www.planning.sa.gov.au/go/forms-and-fees

A decision to commence formal discussions does not commit any party to sign a pre-lodgement agreement and any party can discontinue formal discussions at any stage.

The applicant will need to attach with the Request Form appropriate plans and information of sufficient detail to enable the referral body to determine whether:

- the proponent has advanced the proposal to a sufficient degree to commence meaningful discussions
- there is a reasonable chance of an agreement being reached
- there is a reasonable chance of an application being lodged
- there is a reasonable chance that the proposal will be undertaken if granted consent.

Without this information the referral body is unlikely to agree to a pre-lodgement request, as it will divert resources from Schedule 8 referral assessment without there being a reasonable chance of the proposal progressing.

Upon receipt of a completed Pre-Lodgement Request Form the referral body will:

- assign a ‘proposal number’ to the Form and record the fee payment
- record the request in a similar office management program as Schedule 8 referrals, in order to manage timeframes
- assign an officer responsible for administering the request
- determine whether to commence discussions on a proposed pre-lodgement agreement.

Should the referral body determine that it does not wish to undertake discussions on a pre-lodgement agreement, it must notify the applicant in writing and indicate the reasons why it does not propose to enter such discussions.

Should the referral body determine that it is prepared to consider the request for a pre-lodgement agreement it must:

- arrange an initial meeting to discuss the proposal; determine whether additional initial information is required; and set out an indicative timetable for discussions (representatives of other referral bodies may be invited to this meeting)
- send a letter indicating acceptance of the request for formal discussions to the applicant after the initial meeting and requesting payment of the fee.
What is in the Pre-Lodgement Request Form?

The Pre-Lodgement Request Form requires:

**Applicant Details**
- Applicants Name/Postal Address/Phone Contact
- Contact Person/Postal Address/Phone Contact

**Details of the Proposed Development**
- Project Name
- Full site address of the proposed development
- Section No./Hundred/Volume/Folio
- Council Area
- Description of the proposed use

**Pre-Lodgement Request**
- Name of Referral Body being Requested
- Names of other Referral Bodies that have or will be requested

**Attached Plans and Data**
- Names and Numbers of Plans attached for discussion
- Names and Numbers of Data/Reports attached for discussion

**Pre-Lodgement Request Fee**
- Payment lodged

**Signature**
- Name /Date
The formal discussions between the applicant and referral body are likely to relate to:

- refinement of the proposal and technical information in light of the policies and standards of the referral body
- requests for additional information to move towards reaching an agreement
- timeframes for the provision of further information by the proponent and assessment by the prescribed body
- discussion on conditions and reserved matters to be included in a draft pre-lodgement agreement
- identification and registration of any plans and reports that will form part of the draft pre-lodgement agreement.

An important part of the formal discussions is for both parties to agree on the next steps and the response period. The degree to which both parties adhere to these response times is likely to influence any decision by either party to withdraw from the discussions and terminate the process.

If either party decides to terminate the process this should occur in writing so all parties are fully aware of the situation and can record the outcome.

Each meeting and request for additional information should be recorded by the referral body in the office management program so that delays can be avoided and timelines recorded for inclusion in future System Indicator reporting.
At the end of the formal discussion process, the applicant and the referral body need to determine whether they can both sign a pre-lodgement agreement based on the formal discussions and refined plans/reports.

If it is believed agreement can be reached, a draft pre-lodgement agreement should be developed between the parties.

**Form of the agreement**

The agreement will be based on the formal discussions, with the referral body being able to take into account policies on the date that the pre-lodgement agreement is to be signed.

The agreement can only relate to those matters which are subject to the Schedule 8 referral and hence are in the responsibility of the referral body. The pre-lodgement agreement must also be within the purview of the relevant Act administered by the referral body and accord with the policies in the relevant Development Plan.

The form of the agreement will vary depending on the proposal but in many cases is likely to be similar to the Schedule 8 referral letters to the planning authority (however the pre-lodgement agreement, when finalised, will form part of the application and hence be a mandatory part of any approval).

The pre-lodgement agreement will consist of the signed and dated agreement itself and any attached signed and stamped plans and reports. The agreement will include a list of attachments that form part of the agreement. The list of attachments (including plan and report numbers) will enable the planning authority to ensure that the full agreement package has been lodged as part of the application.

**Signing**

The applicant can decline to sign the draft pre-lodgement agreement if not satisfied with all of the provisions in the agreement. In such circumstance the applicant can lodge an application without the agreement and the application will be subject to the standard Schedule 8 process and referral fee.

The referral body can decline to sign the draft pre-lodgement agreement if not satisfied with all provisions in the agreement.

The applicant and the referral body will each need to have signed copies of the pre-lodgement agreement. The applicant will need a copy to lodge as part of the application and the referral body will need a copy for any verification, appeal or compliance purposes.

If any part of the agreement is not included in the application material or plans have been changed without subsequent signing and stamping by the referral body, then the pre-lodgement agreement is null and void and a Schedule 8 referral (with the prescribed referral fee) will be required.
Decision

A pre-lodgement agreement between the applicant and the referral body does not bind the relevant planning authority to approve a subsequent development application; a pre-lodgement agreement will relate to only that aspect of the proposal that the referral body has responsibility for, and the relevant planning authority has to balance those matters against other relevant planning issues and considerations in its assessment.
Signed Pre-Lodgement Agreement Period And Variations

The Development Act specifies that a pre-lodgement agreement is only valid if the application, including the agreement and associated stamped plans and reports are lodged with the planning authority within three months of the agreement being signed and dated.

The expiration of the pre-lodgement agreement after three months provides certainty for the applicant for that period and enables the referral body to take into account new policy requirements after that period.

An applicant can initiate a request to vary a signed agreement before a Development Plan Consent is issued by the planning authority, by lodging a subsequent Pre-Lodgement Request Form, the prescribed fee and the refined plans/reports. If a refined agreement is signed it can be submitted to the planning authority as a variation to the application as part of the assessment process.

An applicant can also request to vary an agreement as part of a proposal to lodge an application to vary an existing Consent or Approval.

An applicant can initiate a request to renew an expired agreement by lodging a subsequent Pre-Lodgement Request Form, the prescribed fee and the same or refined plans/reports. In such cases the referral body would have regard to the policies applying at the time the second agreement is to be signed rather than those applying at the time of the signing of the first agreement.

In addition, the location of aquaculture development should have regard to the availability of an employee base and supporting infrastructure. It should also be located away from other sensitive land uses, such as residential development, as there can be odours and transport noise associated with such developments.
If a pre-lodgement agreement is included in an application then it forms part of any Development Plan/Land Division Consent and subsequent Development Approval issued.

It is suggested that the notes included on the bottom of the decision issued by the planning authority make reference to the pre-lodgement agreement forming part of the application and hence any consent or approval.

In line with Development Regulation 43, the planning authority will need to provide a copy of the decision to any referral body that had entered into a pre-lodgement agreement as well as any other body formally consulted under Schedule 8. The provision of the decision form will enable the referral body concerned to align the ‘proposal number’ with the development application number and have a complete record for any subsequent applications/actions.
Although there is no applicant appeal against a referral body for not signing a pre-lodgement agreement, there is applicant appeal right against any refused merit application or in most cases any condition imposed as part of the standard Schedule 8 referral process. In such circumstances the referral body would need to provide expert evidence to the ERD Court as has occurred in the past.

In situations where a pre-lodgement agreement formed part of the development application and the applicant is appealing against a refusal, the referral body may be required to provide expert evidence on the agreement issues. The same situation applies if a third party appeal is lodged against the decision of the planning authority.
The pre-lodgement agreement forms part of the development application and hence any provisions in a pre-lodgement agreement are subject to:

- standard planning authority compliance provisions under Section 44 of the Development Act
- third party action provisions under Section 85 of the Development Act
- any prescribed bodies provisions under Section 84 of the Development Act
- any compliance provisions under the Act associated with the referral body
- any compliance provision contained in the pre-lodgement agreement itself.
When is the pre-lodgement option likely to be used?
Applicants proposing large or complex developments with mandatory referrals to specified referral bodies are more likely to consider the use of the pre-lodgement option during the preparation of an application.

Schedule 8 of the Development Regulations set out the circumstances when a referral is required if no pre-lodgement agreement forms part of the development application.

Referral bodies are more likely to agree to a request for formal discussions in circumstances where the applicant has clearly defined draft proposals which can form the basis for discussions and the setting of conditions for an agreement.

Is it necessary to have a pre-lodgement agreement?
The decision to request formal pre-lodgement discussions is a commercial decision to be made by the applicant. A referral body or DAC/Development Assessment Panel/delegated officer cannot require such an agreement.

If there is no pre-lodgement agreement included in the application, the application will automatically be forwarded to the referral bodies listed in Schedule 8 for advice or direction (as required).

The decision to enter into formal discussions is dependant on both the applicant and the referral body concerned. If the referral body declines to enter into such formal discussions or declines to enter into a pre-lodgement agreement, the applicant can lodge a development application and the body will be consulted in the standard Schedule 8 manner.

If formal discussions commence, does this mean that an agreement is guaranteed?
No. The first step is for the applicant and the relevant referral body/bodies to agree to enter into formal discussions. If at the end of these discussions both the applicant and the referral body/bodies are satisfied with the outcomes, then an agreement can be produced and signed by both parties. However, if the agency or applicants are not fully satisfied that the requirements can be met then the body will not sign an agreement.

In those circumstances where an agreement is not signed the applicant can still lodge the application with the council and the referral body will provide advice through the standard Schedule 8 referral process.

Can an applicant continue to obtain informal advice?
Government agencies will continue to provide informal advice to applicants on draft proposals in order to assist in the preparation of applications. However, if these discussions proceed past the initial stage of outlining agency requirements then a formal pre-lodgement process will more than likely be suggested.
How can an applicant start the pre-lodgement process?

In order to formalise pre-lodgement discussions, a Pre-Lodgement Request Form has been prepared. This form provides clear identification of the details of the proposed development and its location, as well as a commencement date of formal discussions for administrative management purposes. When lodging this form the appropriate plans and other detailed information needs to be supplied so the referral body can quickly determine whether or not to enter into formal discussions about a potential agreement.

If a referral body declines to commence formal discussions the request fee will be refunded.

If formal discussions commence can either party withdraw from discussions?

The pre-lodgement option is a voluntary procedure involving both the applicant and the referral body. The applicant or the referral body can terminate formal discussions at any stage.

A referral body is likely to withdraw if it is considered that insufficient progress is being made towards reaching an agreement between the two parties or if requested detailed information is not provided within a specified period.

Can an applicant undertake pre-lodgement discussions with a range of referral bodies?

If a development application is to be subject to a number of statutory referrals, there are advantages in an applicant holding simultaneous discussions with a range of referral bodies. Such joint discussions can ensure the requirements of all bodies concerned are addressed, with potential conflicts identified and the need for subsequent variations to proposals minimised. In such cases a separate form and fee needs to be provided to each referral body and after joint formal discussions; separate complementary agreements would be proposed if negotiations are successful.

For large, complex proposals a case manager may be assigned to facilitate discussions between the range of parties.

How much does the pre-lodgement option cost?

The Development Regulations set out a pre-lodgement fee which is similar to the referral fee. While there is no other statutory fee, the applicant may need to provide technical information at its own cost to the referral body as part of the formal discussions about an agreement.

How long are agreements valid?

The Development Act specifies the agreement is valid as long as it forms part of an application that is lodged within three months of the agreement being signed. This provision provides certainty for the applicant while enabling the referral body to take into account policy variations outside of the three month period. If an agreement expires (i.e. it is more than three months between the agreement being signed and the application being lodged) the applicant can seek a new pre-lodgement agreement by submitting a new pre-lodgement form and fee.
Does the existence of an agreement guarantee approval?

No – a pre-lodgement agreement with one or more referral bodies does not guarantee approval by the relevant assessing authority. Such an agreement only guarantees that the referral body requirements have been met for their area of expertise and responsibility. Any agreement with a referral body can only relate to those matters within the purview of the Schedule 8 referral; the assessing authority considers a broader range of issues.

Is the planning authority bound by the agreement?

A pre-lodgement agreement forms part of the application and hence any approval of the application includes approval of the provisions of the agreement. If the agreement is not included as part of the application then a Schedule 8 referral to the relevant agency is required.

Is these appeal right?

An applicant cannot appeal against the refusal of an agency to enter into formal discussions or to sign a pre-lodgement agreement.

If the applicant does not agree with the proposed requirements of the referral body during formal pre-lodgement discussions, the applicant can withdraw from the formal discussions and lodge a development application.

After development approval: The agreement forms part of the application and the applicant cannot appeal against an agreement to which they are a party. Any third party objector who has an appeal right against the Development Plan Consent decision can question the pre-lodgement agreement as part of the appeal.
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