

# Access to Development Application Plans Policy

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<b>Responsibility:</b>	Director City Growth and Development
<b>Responsible Officer (s):</b>	Manager Development Services
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<b>Legislation:</b>	<i>Copyright Act 1968</i> <i>Development Act 1993 (SA)</i> <i>Freedom of Information Act 1991 (SA)</i> <i>Local Government Act 1999 (SA)</i> <i>Planning, Development and Infrastructure Act 2016 (SA)</i> <i>State Records Act 1997 (SA)</i>
<b>Related Documents:</b>	Anti-Fraud and Anti-Corruption Policy Behavioural Management Policy Internet Policy Privacy Policy Record Management Policy

## 1 Purpose

- 1.1 The Access to Development Application Plans Policy (the Policy) has been developed to provide a practical and risk-management focussed approach to balancing Council's legislative obligations with managing and minimising risks of infringing copyright law.
- 1.2 City of Prospect acknowledges the need to balance legislative obligations with providing access to information, whether it is through an individual, formal application or through publishing information on a public forum such as Council's website.
- 1.3 The Policy provides consistency in managing access, reproduction and publication of records received for the development assessment process under the Development Act 1993, or provided through the determination of applications under the Freedom of Information Act 1991, while considering how best to manage Council's records-management obligations under the State Records Act 1991 and ensuring ongoing compliance with the Copyright Act 1968.

## 2 Definitions

- 2.1 In the Policy:
  - 2.1.1 "work" has the same meaning as this term in the Copyright Act, i.e. a literary, dramatic, musical or artistic work;

- 2.1.2 "record" has the same meaning as the State Records Act, being:
- (1) written, graphic or pictorial matter; or
  - (2) a disk, tape, film or other object that contains information or from which information may be reproduced (with or without the aid of another object or device);
- 2.1.3 "Official record" has the same meaning as the State Records Act, being a record made or received by Council in the conduct of its business, but does not include:
- (1) a record made or received by an agency for delivery or transmission to another person or body (other than an agency) and so delivered or transmitted; or
  - (2) a record made by an agency as a draft only and not for further use or reference; or
  - (3) a record received into or made for the collection of a library, museum or art gallery and not otherwise associated with the business of the agency; or
  - (4) a Commonwealth record as defined by the *Archives Act 1983* of the Commonwealth; or
  - (5) a record that has been transferred to the Commonwealth.

### **3 Scope**

- 3.1 The policy applies to Elected Members, employees (including full-time, part-time, contract, casual, work experience, trainees, contractors and agents) and volunteers of City of Prospect who have access to records maintained by Council.

### **4 Legislative and Corporate Requirements**

- 4.1 The Access to Development Application Plans Policy is to be read and implemented in conjunction with relevant legislation and Council's other relevant policies, strategies and documents, including:
- 4.1.1 Anti-Fraud and Anti-Corruption Policy
  - 4.1.2 Behavioural Management Policy
  - 4.1.3 Internet Policy
  - 4.1.4 Privacy Policy
  - 4.1.5 Record Management Policy
  - 4.1.6 Local Government Act 1999

## **5 Policy Statement**

- 5.1 Under the Development Act 1993 and Development Regulations 2008 members of the public have various entitlements to information held by Council that are relevant to development applications and approved building work.
- 5.2 The Freedom of Information Act 1991 provides a legally enforceable right for members of the public to access other Council information which is not required to be made publicly available.
- 5.3 Providing information to members of the public may require the reproduction of documents. Council is also obligated to reproduce documents in the course of adhering to records management obligations under the State Records Act 1997.
- 5.4 As well as being bound by the requirements of the above Acts, Council is subject to the Copyright Act 1968, which restricts the reproduction of written material, artistic works and other creative works, without permission of the copyright owner.
- 5.5 The Policy affirms Council's commitment to openness and transparency in the provision of information to the public in accordance with its legislative obligations and its commitment to high standards of records management while avoiding copyright infringement.

## **6 Application of Policy**

- 6.1 The Policy applies to the reproduction of documents under the Development Act 1993 and Development Regulations 2008, State Records Act 1997 and Freedom of Information Act 1991 and the provision or publication of copies of documents available to members of the public.

## **7 Prevention of Copyright Infringement**

- 7.1 Copyright is a form of property that exists in written, artistic and other "works". Copyright only exists through the operation of the Copyright Act. As with other forms of property, copyright may be sold or transferred, and allows persons who create works to derive an income from them.
- 7.2 The Copyright Act creates legally enforceable intellectual property rights in works by ensuring that works cannot be reproduced without the prior permission of the copyright owner. Where a work is reproduced without permission, a copyright infringement occurs which, in turn, gives rise to a right for the copyright owner to take civil (and in some cases, criminal) action against the infringer.
- 7.3 Copyright does not protect mere ideas, rather, it protects the way that ideas and information are described, illustrated or documented. The term "literary works" in the Copyright Act is not exhaustively defined, although in some circumstances can include documents such as letters where they contain original creative written "works".
- 7.4 Copyright protection automatically arises as soon as a work is recorded or fixed onto a medium which can be reproduced. Copyright exists in works regardless of whether or not a work is endorsed with a "©" symbol and whether or not it contains a copyright warning.
- 7.5 Generally, copyright is owned by the individual creator or author of the work or, where a work is created by a person during the course of their employment, their employer will own copyright. Copyright ownership can be transferred ("assigned") by way of a written agreement.
- 7.6 Unless copyright has been assigned to Council:
  - 7.6.1 copyright in building plans is owned by the architect or draftsman who drew them;
  - 7.6.2 copyright in a report is owned by the author of the report; and
  - 7.6.3 copyright in a table or graph or other technical information is owned by its creator.
- 7.7 A copyright infringement is an unauthorised reproduction of a work where it is (amongst other things):
  - 7.7.1 photocopied;
  - 7.7.2 scanned;
  - 7.7.3 published on a website;
  - 7.7.4 displayed on an overhead screen; and
  - 7.7.5 e-mailed.

- 7.8 Works can be reproduced without committing a copyright infringement where Council is the owner of the copyright, or where Council has permission, called a "licence", which allows it to lawfully reproduce a document.
- 7.9 Council relies upon implied licences to allow it to reproduce works where:
- 7.9.1 reproduction is necessary by way of legal obligation; or
  - 7.9.2 reproduction is necessary out of practical necessity and in the circumstances, it is reasonable to expect that the owner of copyright would know that their work is required to be reproduced.
- 7.10 In addition to licences, there are a number of legislative exemptions which allow Council to reproduce documents for certain purposes, including:
- 7.10.1 where reproduction of a work is required for the purpose of giving professional advice by a legal practitioner or for the purposes of litigation; and
  - 7.10.2 where reproduction of a work constitutes a "fair dealing" for the purpose of research or study.

## **8 Review**

- 8.1 The internal reproduction of documents for assessment purposes is required during the assessment of a development application, as Council staff need to make reproductions of plans and other works so that they may be marked, or drawn upon, and so that the original copies may be preserved. Further, such documents need to be scanned so that they can be saved into Council's electronic data and records management system.
- 8.2 As the reproduction of works is necessary for development assessment purposes, such works can lawfully be reproduced by Council for internal purposes.
- 8.3 For the public notification of category 2 and 3 development applications, Regulation 34(1) of the Development Regulations provides that Council must ensure that the following documents, lodged with category 2 and 3 development applications, are made available for inspection by the public:
- 8.3.1 the application;
  - 8.3.2 any supporting plans, drawings, specifications or other documents or information provided to Council; and
  - 8.3.3 any statement of effect (where applicable).
- 8.4 Regulation 34(2) and regulation 34(3) state that Council must provide to a member of the public, a copy of any information available for inspection where:
- 8.4.1 a request is made within the inspection period (i.e. for 10 business days after notice is given by Council – see Regulation 35, Development Regulations); and
  - 8.4.2 a fee fixed by Council is paid; and

- 8.4.3 the person who requests the copy provides their name, address and contact details to Council.
- 8.5 Accordingly, Council will reproduce works submitted as part of a development application for the purposes of regulation 34 as this is a necessary requirement of the Development Regulations.
- 8.6 Category 3 application documents will be published on Council's website during public notification periods. Printing, copying and downloading functions will be disabled to avoid infringing copyright in those documents. Persons wishing to obtain copies of these documents must attend Council's offices in person.
- 8.7 As the persons who are entitled to make a representation in respect of Category 2 development application are limited, Council will require personal attendance at its offices to inspect development application documents during public notification periods (unless unable to do so).
- 8.8 Council will also require persons attending Council's offices to inspect Category 2 development applications to verify that they are entitled to make a representation through the provision of appropriate identification as to their name and address in accordance with Regulation 34(3) of the Development Regulations.
- 8.9 Council's Development Assessment Panel (DAP) agendas necessarily contain officer reports and all documents relevant to development applications to be determined by the DAP, including copyright-protected works. Due to this legal obligation, Council has an implied licence of necessity for providing copies of such documents to its DAP members and to staff attending a DAP meeting.
- 8.10 Section 56A(15) of the Development Act provides that members of the public are entitled to reasonable access to the DAP agendas. DAP agendas, reports and attachments are published on Council's website. These documents are locked for inspection only and printing, copying and downloading functions will be disabled to avoid infringing copyright in those documents.
- 8.11 Council asks applicants for development authorisation to obtain permission from their architects/engineers, etc for permission for their documents to be reproduced for provision to members of the public who request a copy of DAP reports and attachments. However, this practice is voluntary. Where an applicant obtains such permission, Council will provide copies of related documents to members of the public once a DAP agenda is published. Where no such permission is obtained, these documents will not be provided to members of the public.
- 8.12 Development Application forms and representations are published on Council's website as part of DAP agendas along with other attachments. Each development application form gives applicants an opportunity to request that their personal details be masked when their form is reproduced on Council's website as an attachment to a DAP report, although such information is required to be available in the register of applications.
- 8.13 Public notification letters issued by Council for Category 2 and 3 development applications notify representors that their representation may be reproduced, in full, on Council's website. Representors are given an opportunity to elect to have their details masked on their representation when published, although their names are published in the DAP agenda and minutes in accordance with the DAP Terms of Reference.

## **9 Inspection and Copying of the Applications Register**

- 9.1 Council is required to keep a register of development applications, pursuant to Regulation 98(1) of the Development Regulations.
- 9.2 The register is required to contain information about development applications, but not the application documents themselves. The register contains:
  - 9.2.1 the name and address of the applicant (or of each applicant);
  - 9.2.2 the date of the application;
  - 9.2.3 the date on which the application was received by Council or other relevant authority;
  - 9.2.4 a description of the land which is the subject of the application;
  - 9.2.5 a brief summary of the matters, acts or things in respect of which any consent or approval is sought;
  - 9.2.6 details of any referral or concurrence on the application;
  - 9.2.7 whether any decision is made on the application by Council, a regional development assessment panel, the Development Assessment Commission or the Governor (where appropriate);
  - 9.2.8 any decision on the application;
  - 9.2.9 in the case of an application for building rules consent – the fee or fees payable;
  - 9.2.10 the date of the commencement of any building work and the date of the completion of any building work; and
  - 9.2.11 if any decision on the application is the subject of an appeal, the result of the appeal.
- 9.3 Council must make the register available for inspection by the general public for no fee.
- 9.4 Regulation 98(3) provides that Council may provide to a member of the public a copy of any part of the register, or document kept for the purposes of regulation 98(1), on payment of a fee fixed by Council. Council will provide copies of documents kept for the purposes of its register where to do so would not constitute a copyright infringement.
- 9.5 Where a copyright infringement could arise, Council will not provide copies of these documents, unless the person requesting such has obtained permission from the copyright owner, or otherwise has signed a statutory declaration to the effect that the owner of copyright cannot be located after reasonable enquiries have been made.



## 10 Inspection of Copies of Approved Developments

- 10.1 In the case of applications that have been assessed and a decision made, regulation 101(1) obliges Council to retain certain development application documents relating to building work only (i.e. not significant trees, land divisions or land uses). These documents include “all technical details, particulars, plans, drawings, specifications and other documents or information relating to building works.”
- 10.2 Regulation 101(4) provides that a person may (with the consent of Council or the owner of the building to which the document relates and on payment of a reasonable fee fixed by Council), inspect at the offices of Council during its normal office hours any document retained by Council under regulation 101(1).
- 10.3 This requirement is subject to regulation 101(5) which states that a Council is not required to make available any documents, such as plans, if to do so would, in the opinion of Council, unreasonably jeopardise the present or future security of a building.
- 10.4 Regulation 101 does not oblige Council to provide copies of documents to any person. However, in recognition of the practical need for copies of such documents to be provided in certain situations, and taking into account copyright considerations, Council will provide copies where the person requesting the copies:
  - 10.4.1 is the owner of copyright in the documents;
  - 10.4.2 is the current owner of the building;
  - 10.4.3 is the applicant who obtained development authorisation of the building;<sup>1</sup>
  - 10.4.4 requires the documents for the purposes of litigation, or to seek legal advice;
  - 10.4.5 has obtained a written permission from the owner of copyright in the document for it to be reproduced; or
  - 10.4.6 has signed a statutory declaration to the effect that they have made reasonable enquiries to locate the owner of copyright in the documents and has not been able to find them.

## **11 Disclosure of Documents Under the Freedom of Information Act.**

- 11.1 According to section 13(f) of the Freedom of Information Act, applicants may request that access to Council documents be given to them in a particular way. According to section 20(1)(b) of the Freedom of Information Act, Council may refuse to grant access to documents the subject of an application under this Act if the documents are available for inspection by Council or another agency, or if they are available for inspection through a separate process under another Act.
- 11.2 Where development application documents are made available for inspection during the public notification period under Regulation 34 of the Development Regulations, Council may refuse access to those documents requested under the Freedom of Information Act.
- 11.3 Section 22(1) of the Freedom of Information Act provides that access to Council documents may be given via various means, including by giving the applicant a copy of the document. However, section 22(2)(c) of the Freedom of Information Act provides that where an applicant has requested that a copy of a document be provided to them, an alternative form of access may be given where providing a copy would involve an infringement of copyright in matter contained in the document.
- 11.4 This means that Council cannot lawfully reproduce works subject to copyright for the purpose of providing access under the Freedom of Information Act without the prior permission of the copyright owner. In order to avoid infringing copyright, Council should consider providing access to copyright-protected documents under the Freedom of Information Act by way of inspection, unless:
  - 11.4.1 the applicant is the owner of copyright in those documents; or
  - 11.4.2 the applicant has obtained the permission of the owner of copyright in those documents to have them copied; or
  - 11.4.3 where the applicant has attempted to locate the owner of copyright, but has not been successful, the applicant signs a statutory declaration to this effect.
- 11.5 If a document is over 20 years old and therefore must be disclosed under 20(2)(c) of the Freedom of Information Act, Council is obliged to provide access to that document, but must still adhere to section 22(2)(c) of the Freedom of Information Act and only allow inspection as the method of access if providing a copy would constitute a copyright infringement.

## **12 Maintenance of Records under the State Records Act**

- 12.1 Under this Act, Council has an obligation to maintain official records in its custody in good order and condition. This obligation applies not only to the capture, storage, maintenance and disposal of physical records, but also to records in electronic format.
- 12.2 An official record is defined in section 3 of the Act to mean a record made or received by Council in the conduct of its business. This means that, because Council Members and staff variously act as representatives of Council, any record created, sent, received, forwarded or transmitted by Council staff and/or Council Members in the performance and discharge of their functions and duties may be classified as an official record.
- 12.3 In order to ensure that official records are kept in safe custody in accordance with the requirements of the State Records Act, Council may cause reproductions of works to be made, including electronic copies of documents to be saved in its internal records management system, and may create additional hard copies of documents where appropriate. Where an official record is reproduced into an Electronic Document Records System, the original may be destroyed in accordance with General Disposal Schedule 21.
- 12.4 The reproductions of works for records management purposes should only be made available to the general public where the original no longer exists. In certain circumstances, original works which are digitised (scanned) may be destroyed.

## **13 Review**

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## **14 Access to the Policy**

- 14.1 The Policy is available for public inspection on Council's website [www.prospect.sa.gov.au](http://www.prospect.sa.gov.au) and from Customer Service at the Civic Centre, 128 Prospect Road, Prospect SA 5082.

## **15 Further Information**

- 15.1 For further information about the policy please contact:

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