TOOWOOMBA REGION

Rich traditions. Bold ambitions.

Contact: Toowoomba Office, 4688 6741

Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
Brisbane Qld 4000

By email: ipnrc@parliament.qld.gov.au

21 December 2015

Dear Sir/Madam,

Submission – Planning Bill 2015

I refer to the invitation to provide feedback on the above Bill and thank you for the opportunity to provide the following submissions:

Chapter 2 Planning

1. **Section 9 When planning instruments and designations have effect – Section 9(4)** – It is considered that there should be the ability for an interim TLPI to commence immediately the local government resolves to give the TLPI or amendment to the Minister for approval, particularly if there is a significant risk of serious adverse cultural, economic, environmental or social conditions happening in the local government area.

2. **Section 23(1)(a) – Making or amending TLPIs** – Section 23(1)(a) provides that a local government may make a TLPI if the local government (and Minister) are satisfied that there is significant risk of serious adverse cultural, economic, environmental or social conditions happening in the local government area.

   In order to ensure avoidance of serious risk it is considered that a risk based approach should be adopted by the State Government whereby a local government can nominate the TLPI to have immediate interim operation once endorsed by Council and prior to Ministerial approval. This would in effect create an interim TLPI which would still ultimately go through due process to receive Ministerial approval.

   It is noted that section 9(4) provides that, with the Minister's agreement in writing, the effective day for the making or amendment of a TLPI is the day when the local government, at a public meeting, resolved to give the TLPI or amendment to the Minister for approval. Provided the process of obtaining the Minister's agreement in writing could occur expeditiously, this may

P 131 872 | F 1800 448 882 | info@tr.qld.gov.au | www.tr.qld.gov.au | PO Box 3021 Toowoomba QLD 4350
Toowoomba Regional Council ABN 99 788 305 360

address the above issue, however, concern is expressed that delays may be experienced in seeking a Minister's agreement in writing. Further, the circumstances in which this would be permitted would need to be clearly stated. Allowing immediate operation once endorsed by Council, with due process required to receive Ministerial approval is the preferred option.

3. **Section 23(6) – Making or amending TLPIs** – Council supports the proposal to give TLPIs a 2 year life. However, it is considered appropriate to enable the Minister to extend the life of a TLPI beyond 2 years where the process to amend the planning scheme to implement the intent of the TLPI on a permanent basis is well progressed.

4. **Section 26 – Power of Minister to direct an action be taken** – Under Section 26 the Minister has been given power to give a local government direction about an existing or proposed designation and a proposed amendment to a designation. The Minister does not currently possess these powers pursuant to the *Sustainable Planning Act 2009*. Subsection (5) also grants two new directions that the Minister may issue to a local government, those being to review a local planning instrument, in accordance with section 25, and report on the results of the review to the Minister and to review a designation and report the results of the review to the Minister. Clarification is sought as to the rationale for inclusion of these extensions of powers to the Minister.

5. **Section 29(2) – Request to apply superseded planning scheme** – Section 26(2) defines what constitutes a superseded planning scheme. Section 26(2) should be amended to include TLPIs.

6. **Section 29(5)(c) – Request to apply superseded planning scheme** – Section 26(5)(c) provides that a regulation may prescribe how the local government may set a fee for considering a superseded planning scheme request. This sub-section should be deleted to provide for the fee to be set by local government resolution, as this is the method local governments normally uses to set fees under the *Local Government Act 2009*.

7. **Section 30 – When this division applies** – Council suggests that a section similar in effect to section 77(1)(f) of the *Planning For Prosperity Bill 2014* be included.

8. **Section 30(4)(e) and 30(5) – When this division applies** – While consideration of an assessment for alternatives for reducing risk is valid, concern is expressed regarding the imposition of conditions on development approvals as being a feasible alternative for reducing risk. Conditions may be challenged on appeal and potentially declared invalid by the Planning and Environment Court on the basis of an unreasonable imposition on the development. The alternative option proposed in the Planning Bill 2015 Consultation Draft is preferred.

9. **Section 31(6)(a) – Entitlement to compensation** – One year should be sufficient time to make a claim for compensation. Two years is excessive.

10. **Section 32(2) – Deciding compensation claim** - Seventy business days is generally insufficient time to make a decision in relation to a claim for compensation. This process can take a number of months, if not years. A period of 6 months would appear to be more reasonable to enable local government to seek appropriate expert advice.

11. **Types of Community Infrastructure** – Council raises a concern with the proposal that the Infrastructure Designation process is not proposed to be restricted to publicly-owned infrastructure and is intended to also include privately-owned infrastructure. It is noted that this includes hospitals, education facilities, community facilities and the like.

    This proposal will have very significant cost and resource implications for local government and broader impacts on the community and local infrastructure. For example, extending infrastructure designations to private schools removes the ability of the community to potentially make submission on a proposal and ultimately third party appeal rights. Further, this process would remove the ability of Council to impose reasonable and relevant conditions of development and to impose infrastructure charges. The quantum of forgone infrastructure charges could be quite significant.

    The infrastructure designation process should be restricted to publicly-owned infrastructure only.

12. **Section 36 – Criteria for making or amending designations** – Section 36(7)(e) provides for the Minister to take into account any properly made submission made by a local government. However, it is considered that the local government should have the ability to require the imposition of conditions of approval of a designation. The Minister should also be required to take into account the assessment benchmarks contained in planning instruments, which are excluded by Section 36(7)(b).

Chapter 3 Development Assessment

13. It is submitted that there is no demonstrated benefit in changing the categories of development. This will have a significant time, effort and financial impact on Council for no demonstrated benefit to Council or the industry/community.

14. **Section 44(6)(a) – Categories of development** – Concern is expressed at the proposed default that if a categorising instrument does not categorise a particular type of development, the development is accepted development. It would be preferable to replace the category of 'accepted' with 'assessable'.

15. **Section 45 – Categories of assessment** – The new standard assessment provisions will reduce the scope of Council's decision making discretion, given the presumption in favour of approval. This could cause concern for Council where certain development proposals are appropriate having regard to the planning controls, but the development application is poorly compiled or hasn't provided adequate information.

16. **Section 46 – Exemption Certificates** – Council is generally supportive of the introduction of exemption certificates.

    While there are specific circumstances in which an exemption certificate may be given, there is potential for the power to be abused.

    The use of the terms *"minor or inconsequential"*; *"no longer apply"* and "error" in Subsection (3)(b)(i)-(iii) respectively, could lead to argument as to when these triggers are applicable. They

should be clearly defined, or there is the potential for legal challenges (in the nature of declaratory proceedings on administrative law grounds) brought by commercial competitors against a decision of Council to grant an exemption certificate. To reduce the potential for such challenges it is desirable that the circumstances surrounding the giving of an exemption certificate be subject to the requirement that *"if the entity is reasonably satisfied that..."*.

There should be the ability for an exemption certificate to be given subject to conditions. This may be critical to whether Council would agree to grant an exemption certificate.

While it is possible for Council to grant an exemption certificate to state that assessable development is not assessable, it may also be useful for Council to have the power in circumstances to determine that development which may require impact notification assessment may be assessed as code. Criteria around this would also need to be included in the Act.

There should also be the ability for a local government to withdraw an exemption certificate.

17. **Section 48 – Who is the assessment manager** – Council supports the proposal for external qualified persons to act as Assessment Manager for standard assessment applications **only** on the basis that the ability to appoint such assessment managers is completely at Council's discretion (ie: the State may not enforce this upon Council).

    It is queried how non-compliance issues would be addressed where Council was not the assessment manager and therefore did not have the opportunity to impose conditions on an approval.

18. **Section 51 – Making development applications** - The requirement for development applications to be accompanied by the required fee (if any) should also extend to any 'requests'. On many occasions applicants are lodging requests eg: to change approvals, extend currency periods etc without lodging the required fees.

19. **Section 52(3) – Changing or withdrawing development applications** – It is not clear how the development assessment process is affected if the change is not 'minor'.

    It should be ensured that Council is able to recoup any fees associated with a change to development application which would result in additional application fees being payable.

20. **Section 52 and 53 – Public Notification** – It is not clear how public notification (and re-notification) requirements fit within the provisions for change of application. The Bill does not address the situation of whether local governments have the ability to ask an applicant to re-notify an application where changes to an application are not 'minor'. Any requirements should be totally contained in the Bill or the Decision Rules/Regulations, not split between both.

21. **Section 53 - Public Notification** - Council should not be obligated to carry out public notification on behalf of an applicant. Council does not have the resources to provide such a service to an applicant. The option to provide this service should be discretionary. The use of the word 'may' is not clear enough. It should read "may, at its sole discretion".

22. **Section 57 – Response before application** - Section 57(3) provides for a referral agency to provide a referral agency response prior to an application having been made with the local government.

    Section 57(3) provides that the response is the referral response if the application lodged is the same or is not substantially different from the proposed application.

    This section appears to require 'Council' who may not have seen what was actually referred to the referral agency in order to seek a pre-referral response, to be satisfied that any changes to the proposal would not require the application to be referred to the referral agency again.

    Further, it is not clear what is meant by the term 'substantially different' for the purposes of changes to an application (as opposed to a 'development') between pre-referral and lodgement.

    It is submitted that the State needs to provide further clarification as to how section 57 is to function in practice and that clear direction be given on what is meant by the term 'substantially different' application.

23. **Section 63(1)(c) – Notice of decision** – Section 63(1)(c) does not contain a separate trigger for the giving of a decision notice to each principal submitter. Unless there is a separate trigger, this subsection may lead to the lodgement of premature submitter appeals where the submitter is unaware that an applicant has sought to make representations on a decision.

24. **Section 63(4) and (7) – Notice of decision** – There is a numbering issue. Jumps from ss(4) to ss(7). These requirements are unduly onerous on the local government. These requirements could be addressed by requiring that those Council's that have PDOnline or similar systems must publish the Notices of decision and assessment reports on their website. The requirements of Section 63(7) simply repeat what would already be contained in the Council officer's assessment report. These provisions create unnecessary duplication of effort between the officer's assessment report and the notice of decision and are unreasonable in their current form.

25. **Section 64(3) – Deemed approval of applications** – This sub-section should be amended to provide that the notice can only be given after the decision making period has expired. Council has had issues where an applicant purports to submit a 'deemed approval' notice prior to the decision period expiring. The right to deemed approval only arises after the decision period has expired and Council has failed to make a decision. It should only be able to be submitted once the decision period has expired ie: the next business day.

    Subsection (3) as currently drafted does not make sense when read in conjunction with subsection (5) as this would mean that if the assessment manager receives a deemed approval notice the day before the decision period expires, subsection (5) would mean that the assessment manager is deemed to have given an approval the day before the decision making period is up. In reality the assessment manager could, anytime prior to the decision making period expiring make a decision to refuse the application but applicants could use the unintended meaning of this section to force Council to approve an application when it still has time to refuse it.

26. **Section 66(1)(b) – Prohibited development conditions** - The requirement that a development condition must not require an entity to enter into an infrastructure agreement may be

problematic. This will require infrastructure agreements to be entered into prior to approvals being issued which may be impossible given the tight assessment timeframes proposed. Further this may result in local government having no choice but to refuse development applications if issues are unable to be resolved through agreement prior to the assessment period expiring.

27. **Section 72(1) – When development may start** - This section provides that "Development may start when – *"(a) all development permits given by assessment managers have started to have effect"* and *"(b) all development conditions of the permits that are required to be complied with before development starts have been complied with"*. How does this apply to a 'variation approval'? Should the reference to 'development permit' be a reference to 'development approval', which would usually cover a development permit and a variation approval – otherwise where are the provisions relating to when development pursuant to a variation approval may commence?

28. **Section 78(4) – Making change application** – There are occasions where a change application to an approval which was given through P&E Court Order is made and there were properly made submissions for the application. Consideration should be given to setting criteria where a change could be assessed and determined by Council where changes are not material to issues raised by submitters. This would result in substantial cost and time savings to both developers and Council.

29. **Section 80 – Notifying affected entities of minor change application** – Council still often has differences of opinion with proponents as to what constitutes "substantially different development" for the purpose of a 'minor change'. It would be of great assistance to have greater clarity, whether in the legislation, or through Guidelines etc as to the circumstances in which development would constitute 'substantially different development'.

30. **Section 82 – Assessing and deciding application for other changes** – It is not clear what this section is proposing to achieve. If a change is not a 'minor change' it is argued that an applicant should be required to lodge a development application. This appears to unnecessarily repeat the full application process. It is considered that this section should be deleted as it is confusing and lacks clarity.

31. **Section 83 – Notice of decision** – The same comments as previously provided in relation to Section 63(4) and (7) – Notice of decision, are applicable here. Requiring publishing of the assessment officer's report on Council's website would provide the information required by this section rather than requiring a duplication of effort to transcribe the relevant information into a notice of decision.

32. **Section 86(1)(c) – Lapsing of approval at end of currency period** – It would be helpful to have some further clarity around what constitutes "substantially start".

33. **Sections 86 and 87 – Extension Applications** – These sections pose a number of issues for Council:

    - There should be the option for an extension application to be withdrawn;

    - While Section 87(1) does allow Council to consider *"any relevant matter"* in making a decision, it is considered that the section should expressly provide that Council may take into account

and require payment of infrastructure charges at current rates in deciding an extension application;

- There should be the ability for Council to impose conditions on the approval of an extension request. Often Council has to negotiate with an applicant to concurrently lodge a change request with their request to extend so that amendments may be made to conditions of approval or additional conditions incorporated to ensure development complies with current development standards etc;

- The timeframe of 20 business days to make a decision is inadequate to provide Council with sufficient time to consider and assess the implications of approving or refusing an extension request, particularly if the applicant also needs to make a concurrent request to change approval in the absence of the ability to place conditions on an extension request;

- Section 87 – This section allows a developer to continue to act upon an approval (ie: the section only appears to refer to development which does not appear to have started – "the applicant may not start" – what if they have already started?) while Council's decision to refuse an extension request is being appealed. This means a developer could continue to undertake development during the appeal period that they had already commenced and potentially complete it prior to the appeal being determined. Section 87(8) should reflect that development should not be able to start or continue once an appeal is lodged, until the appeal is determined.

34. **Section 88 – Lapsing of approval for failing to complete development** – clarity is required as to how Section 85 relates to Section 88(1). Section 88 relates to development being completed within the period or periods required under a development condition, whereas Section 85 sets out currency periods for particular development types. Does a condition under Section 88 override the provisions of Section 85?

35. **Section 104(1)(b) – Deciding called in application** – This subsection provides that the Minister may assess and decide all or part of an application that is called in. Clarity is required around what happens to that part of an application that the Minister does not determine if the Minister decides only part of an application.

Chapter 4 Infrastructure

36. **Section 119 – Limitation of levied charge** – This subsection provides that a levied charge may only be for additional demand placed on trunk infrastructure that is generated by a development. Subsection (2)(b) provides that in working out additional demand, the demand on trunk infrastructure generated by a previous use that is no longer taking place on the premises (has been abandoned) if the use was lawful at the time the use was carried out, must not be included.

    This provision is of concern as there is no limitation on how far back the use was carried out in order for the additional demand to be ignored. A use may have been taking place long prior to the adoption of any planning legislation in Queensland. In that instance demand associated with such use cannot be included in the calculation of infrastructure charges. It is anticipated that

disagreements will arise about whether a prior use was undertaken lawfully on a site at a particular point in time. What evidence would be required to establish that a use was carried out?

The qualifications included in sub-section (3)(a) do not overcome this issue.

It is submitted that Section 119(3)(a) should be amended to provide that the demand generated by a previous use that is no longer taking place may be included where:

(a) An infrastructure requirement that applies or applied to the use or development has not been complied with; or

(b) The previous use was not serviced by the trunk infrastructure networks that now serviced or are planned to service the premises.

It is further submitted that the application of sub section (3)(b) is unclear. It is recommended that an example be included (either in the Bill or accompanying explanatory notes) to demonstrate the circumstances under which this provision might apply.

37. **Section 120(1)(f) – Requirements for infrastructure charges notice** – To allow the operation of section 136, Council must under section 120 (1)(f) calculate the establishment cost of trunk infrastructure subject to an offset or refund and state in the infrastructure charge notice the amount of the offset or refund. Calculating the establishment cost of trunk infrastructure can be difficult and time consuming, particularly if only part of an infrastructure item identified in the LGIP is being supplied by the developer or the trunk infrastructure was not identified in the LGIP.

    It is recommended that section 120(f) should only require the local government to advise an applicant that an offset or refund is applicable and that a refund will be given. A further mechanism could be included in this section to permit a local government to advise the applicant of the establishment cost of the infrastructure to be offset or refunded once this has been calculated, and when the refund will be given. This would be subsequent to the infrastructure charge notice being issued. This would also require an amendment to section 136.

    The inclusion of subsection (2) which did not appear in previous iterations of the Bill does not overcome the above issue.

38. **Section 120(3) – Requirements for infrastructure charges notice** - The obligation to require an ICN to be accompanied by a decision notice about the decision to give the notice is unnecessary and burdensome on Council. An ICN already clearly relates to the relevant related Decision Notice and is issued under the power exercised by the legislation.

39. **Section 124 - Representations about infrastructure charges notice** – There is no period stated for a local government to consider representations and make a decision on the representation.

40. **Section 124 – Representations about infrastructure charges notice** – Section 124(4) only allows one (1) negotiated notice to be issued (Section 76 does the same). It would be beneficial to permit the issue of more than one negotiated notice. This would potentially avoid unnecessary appeals.

41. **Sections 126 and 127 – Application and operation of subdivision and Necessary infrastructure conditions** – These sections should be amended to state that necessary trunk infrastructure includes infrastructure that is necessary for the functioning of the trunk infrastructure network, which services the relevant premises.

42. **Sections 127 and 128 – Necessary infrastructure conditions and Offset or refund requirements** – These sections should be amended to:

    (a) limit refunds to the money collected in relation to the relevant trunk infrastructure;

    (b) remove the ability for the applicant to offset the share of the infrastructure servicing the development site; and

    (c) limit offset and refunds to infrastructure identified in Council's LGIP.

43. **Section 138 – Application to convert infrastructure to trunk infrastructure** – The conversion process is unnecessary. All development applications should follow the standard development assessment process by representations made through changes during the appeal period following the issue of a decision notice.

    If the conversion process is maintained it is contended that the period of 1 year for an application to be made is excessive. This time period should be reduced to the relevant appeal period ie: 20 business days.

44. **Section 149 – Obligation to negotiate in good faith** – The purpose of this section is not understood. Further, what is meant by the term "act in good faith"? How is this enforceable or measured? It would be useful to have some guidance/clarification around the use of this term.

Chapter 5 Offences and Enforcement

45. **Section 171(b) and (c)** – Application required by show cause or enforcement notice – These sections provide that a person "must take all necessary and reasonable steps" to enable an application to be decided as quickly as possible or an appeal to be decided as quickly as possible. This obligation needs to be quantified or further explained to provide clarity around the obligations of an applicant and to ensure that they don't create intentional delays.

Chapter 7 Miscellaneous

46. **Part 4 - Urban Encroachment -** Part 4 introduces the concept of urban encroachment. There does not appear to be any requirement for there to be consultation with the local authority through this registration process. It is considered there should be a requirement for the local authority to have the ability to make a submission or be consulted on a request to the Minister for registration.

Schedule 2 Dictionary

47. **'minor change'** – There should be clear direction given around what constitutes 'substantially different development'.

48. **'submitter'** – the definition should include reference to 'principal submitter'.

49. **'use'** – The definition in the Bill provides that the 'use' "for premises, includes an ancillary use of the premises". The definition of use in the Sustainable Planning Act 2009 provides that 'use' "includes any use incidental to and necessarily associated with the use of the premises". The SPA definition means that secondary uses forming part of a primary use must not only be incidental, but also necessarily associated such that it would be impossible for the primary use to be carried out in the absence of the incidental use.

    The proposed amendment to definition inappropriately expands the activities that may be carried out because secondary activities need not be necessarily associated with the primary use to be considered part of that use and as a result, lawful. The definition only requires secondary uses to be ancillary but provides no definition of the term. The Macquarie Dictionary defines ancillary to be: accessory, auxiliary, subsidiary, and providing support to the main activities. There is no requirement for something to be necessary for it to be ancillary.

    It is noted that some QPP defined uses contemplate the concept of ancillary uses. The table of defined uses in QPP identifies ancillary uses that may form part of a use, as well as those that may not. The proposed broader definition of 'use' conflicts with the QPP provisions, which means that amendments to Council's QPP compliant Planning Scheme will need to be made in order to address the inconsistency. The recent case that Council was a party to Witmack Industrial Pty Ltd v Toowoomba Regional Council [2015] QPEC 007 clearly indicates that dispute as to what constitutes an ancillary use still exists. A broader definition of use would only increase the number of disputes.

    It is submitted that the existing SPA definition should be retained, or at the very least, some limitation be placed on ancillary uses to provide certainty to both the community and Council when assessing development applications.

Thank you again for the opportunity to make submission in relation to the Bill. If there is any additional feedback we can provide, or any clarification you would like in relation to any of the matters raised in this letter please contact Danielle Fitzpatrick on (07) 4688 6741.

Yours faithfully

Stewart Somers
General Manager
Planning and Development

Contact: Toowoomba Office, 4688 6741

Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
Georg Street
Brisbane Qld 4000

By email: ipnrc@parliament.qld.gov.au

21 December 2015

Dear Sir/Madam,

Submission – Planning and Development (Planning for Prosperity) Bill 2015

I refer to the invitation to provide feedback on the above Bill and thank you for the opportunity to provide the following submissions, which reflect the submission previously made by Council in relation to the Bill dated 9 July, 2015:

Chapter 2 Planning

Making or amending planning schemes

1. Section 19(1)(a) – **Making or amending TLPIs** – Section 19(1)(a) provides that a local government may make a TLPI if the local government (and Minister) are satisfied that there is significant risk of serious adverse cultural, economic, environmental or social conditions happening in the local government area.

   In order to ensure expedient avoidance of serious risk it is considered that a risk based approach should be adopted by the State Government whereby a local government can nominate the TLPI to have immediate interim operation once endorsed by Council and prior to Ministerial approval. This would in effect create an interim TLPI which would still ultimately go through due process to receive Ministerial approval.

2. Section 19(7) – **Making or amending TLPIs** – Council supports the proposal to give TLPIs a 2 year life. However, it is considered appropriate to enable the Minister to extend the life of a TLPI beyond 2 years where the process to amend the planning scheme to implement the intent of the TLPI on a permanent basis is well progressed.

Applying superseded planning scheme

3. Section 23(2) – Request to apply superseded planning scheme – Section 23(2) defines what constitutes a superseded planning scheme. Section 23(2) should be amended to include TLPIs.

4. Section 23(5)(c) – **Request to apply superseded planning scheme –** Section 23(5)(c) provides that a regulation may prescribe how the local government may set a fee for considering a superseded planning scheme request. This sub-section should be deleted to provide for the fee to be set by local government resolution, as is the method local governments normally use to set fees under the *Local Government Act 2009*.

Compensation

5. Section 24 – **When this division applies** – Council suggests that a section similar in effect to section 77(1)(f) of the Planning For Prosperity Bill 2014 be included.

6. Section 24(4)(e) - **When this division applies** – What is meant by the term "significant risk" and what is meant by "substantially reduced"?

   Section 24(4)(e) of the Bill does not address the issue identified as part of the Queensland Floods Commission of Enquiry Final Report dated March 2012 where the existing provisions of the Sustainable Planning Act 2009 were identified by Council's as a deterrent to including flood controls in local planning instruments.

   Section 24(4)(e) as currently drafted requires that, had development happened, it would have resulted in "significant risk" that could not have been "substantially reduced" by development conditions.

   Should a change be made to a planning scheme to address risk associated with a natural hazard, there will always be the potential for a claimant to argue that a condition of approval could have been imposed to remove the risk. This does not provide Council with certainty that they will be exempt from paying compensation upon amendments to a local planning instrument.

   Further, should Council decide not to change its planning scheme, but rely on conditions of approval to mitigate the impact of a natural hazard, such conditions could be challenged on appeal, and potentially declared invalid by the Planning and Environment Court on the basis of an unreasonable imposition on the development.

   A requirement that the change be made to reduce the risk in "good faith", "having regard to an assessment of the risk to the persons of property properly carried out by a person appropriately qualified", is supported.

7. Section 25(6)(a) – **Entitlement to compensation** – One Year should be sufficient time to make a claim for compensation. Two years is excessive.

8. Section 26(2) – **Deciding compensation claim** - Seventy business days is generally insufficient time to make a decision in relation to a claim for compensation. This process can take a number of months, if not years. A period of 6 months would appear to be more reasonable to enable local government to seek appropriate expert advice.

Designation of premises for development of infrastructure

9. Section 30 – **Criteria for making or amending designations** – Section 30(5)(c) provides for the Minister to take into account any properly made submission made by a local government under Section 31. However, it is considered that the local government should have the ability to require the imposition of conditions of approval of a designation.

Chapter 3 Development Assessment

Types of development and assessment

10. It is submitted that there is no demonstrated benefit in changing the categories of development and assessment. This will have a significant time, effort and financial impact on Council for no demonstrated benefit to Council or the industry/community.

11. Section 39(6)(a) – **Categories of development** – Concern is expressed at the proposed default that if a categorising instrument does not categorise a particular type of development, the development is accepted development. It would be preferable to replace the category of 'accepted' with 'assessable'.

12. Section 40 – **Categories of assessment** – The new standard assessment provisions will reduce the scope of Council's decision making discretion, given the presumption in favour of approval. This could cause concern for Council where certain development proposals are appropriate having regard to the planning controls, but the development application is poorly compiled or hasn't provided adequate information.

13. Section 40(7)(b) – **Categories of assessment** – This section provides that a 'relevant matter' does not include a matter that is the subject of a direction given to the assessment manager under section 21(9).

    The Bill does not extend to cover the actions of an assessment manager performing a merit assessment in the proposed circumstances as the relevant exclusion is limited to only those matters pertaining to the adoption or amendment of a local planning instrument.

    It is submitted that Section 40 should be amended to make it clear that no liability will attach to an assessment manager performing their statutory obligations under the circumstances specified by section 40(4)(b)(iii).

    It is further submitted that a transitional provision should be included which provides an indemnity for anything a local government does, or does not do, in complying with a direction made by the Minister under the existing provisions of the SPA in order for existing directions to also be captured.

14. Section 41 – **Exemption Certificates** – Council is generally supportive of the introduction of exemption certificates.

    While there are specific circumstances in which an exemption certificate may be given, there is potential for the power to be abused.

    The use of the terms *"minor or inconsequential"*; *"no longer apply"* and "error" in Subsection (3)(b)(i)-(iii) respectively, could lead to argument as to when these triggers are applicable. They should be clearly defined, or there is the potential for legal challenges (in the nature of declaratory proceedings on administrative law grounds) brought by commercial competitors against a decision of Council to grant an exemption certificate. To reduce the potential for such challenges it is desirable that the circumstances surrounding the giving of an exemption certificate be subject to the requirement that *"if the entity is reasonably satisfied that..."*.

    There is inconsistency between the 'lapsing' provisions in Section 41(7) and Section 82 of the Bill. Section 41(7) should be amended to refer to 'substantially start' to ensure consistency in use of terminology, rather than 'start'.

    There should be the ability for an exemption certificate may be given subject to conditions. This may be critical to whether Council would agree to grant an exemption certificate.

    While it is possible for Council to grant an exemption certificate to state that assessable development is not assessable, it may also be useful for Council to have the power in circumstances to determine that development which may require merit notification assessment may be assessed as merit non-notifiable or standard. Criteria around this would also need to be included in the Act.

    There should also be the ability for a local government to withdraw an exemption certificate.

Development Applications

15. Section 43 – **Who is the assessment manager** – Council supports the proposal for external qualified persons to act as Assessment Manager for standard assessment applications **only** on the basis that the ability to appoint such assessment managers is completely at Council's discretion (ie: the State may not enforce this upon Council).

    It is queried how non-compliance issues would be addressed where Council was not the assessment manager and therefore did not have the opportunity to impose conditions on an approval.

16. Section 44 – **What is a development approval** – Section 44 (4) of the Bill identifies that a preliminary approval prevails over a 'later' development permit to the 'extent of any inconsistency'. Concern is raised as to how this section will work with proposed section 63(2), as these sections when taken together, could limit the conditioning of development.

Making or changing applications

17. Section 46 – **Making development applications** - The requirement for development applications to be accompanied by the required fee (if any) should also extend to any 'requests'. On many occasions applicants are lodging requests eg: to change approvals, extend currency periods etc without lodging the required fees.

18. Section 47(3) – **Changing or withdrawing development applications** – It is not clear how the development assessment process is affected if the change is not 'minor'. What constitutes a 'minor change'?

    The Bill or DAQ System should ensure that Council is able to recoup any fees associated with a change to development application which would result in additional application fees being payable.

19. Section 48) – **Public Notification** – It is not clear how public notification (and re-notification) requirements fit within the provisions for change of application. The Bill does not address the situation of whether local governments have the ability to ask an application to re-notify an application where changes to an application are not 'minor'.

20. Section 48(8) - **Public Notification** - Council should not be obligated to carry out public notification on behalf of an applicant. Council does not have the resources to provide such a service to an applicant. The option to provide this service should be discretionary. The use of the word 'may' is not clear enough.

Referral agency's assessment

21. Section 52 – Response before application- Section 52 provides for a referral agency to provide a referral agency response prior to an application having been made with the local government.

    Section 52(3) provides that the response is the referral response if the application lodged is the same or is not substantially different from the proposed application.

    This section appears to require 'Council' who may not have seen what was actually referred to the referral agency in order to seek a pre-referral response, to be satisfied that any changes to the proposal would not require the application to be referred to the referral agency again.

    Further, it is not clear what is meant by the term 'substantially different' for the purposes of changes to an application (as opposed to a 'development') between pre-referral and lodgement.

    It is submitted that the State needs to provide further and clear clarity as to how section 52 is to function in practice and that clear direction on what is meant by the term 'substantially different' application should be provided.

Assessment manager's assessment and decision

22. Section 57(5) – **Assessing and deciding variation requests** – Sub-section (5) provides that *"In subsection (4), **development** includes any development that is the natural and ordinary*

consequence of the development that is the subject of the application". It is unclear what is meant by the term "*natural and ordinary consequence of the development that is the subject of the application*." It is considered that this subsection should be deleted or if the State chooses not to delete the subsection that the terms need to be clearly defined in order to prevent confusion and unnecessary issues with Council enforcement processes.

23. Section 61(3) – **Deemed approval of applications** – This sub-section should be amended to provide that the notice can only be given after the decision making period has expired. Council has had issues where an applicant purports to submit a 'deemed approval' notice prior to the decision period expiring. It should only be able to be submitted once the decision period has expired ie: the next business day.

Development conditions

24. Section 63(1)(b) – **Prohibited development conditions** - The requirement that a development condition must not require an entity to enter into an infrastructure agreement may be problematic. This will require infrastructure agreements to be entered into prior to approvals being issued which may be impossible given the tight assessment timeframes proposed. Further this may result in local government having no choice but to refuse development applications if issues are unable to be resolved through agreement prior to the assessment period expiring.

Development assessment rules

25. Section 65 – **Development assessment rules** – It is difficult to appropriately make a comprehensive submission in relation to the Bill without the associated proposed Development assessment rules being released for concurrent comment/submission.

Effect of development approval

26. Section 69(1) **– When development may start** - This section provides that "Development may start when – *"(a) all development permits given by assessment managers have started to have effect*" and *"(b) all development conditions of the permits that are required to be complied with before development starts have been complied with*". How does this apply to a 'variation approval' or a 'preliminary approval'? Should the reference to 'development permit' be a reference to 'development approval', which would usually cover a development permit and a preliminary approval?

Changes after appeal period

27. Section 75(4) **– Making change application** – There are occasions where a change application to an approval which was given through P&E Court Order is made and there were properly made submissions for the application. Consideration should be given to setting criteria where a change could be assessed and determined by Council where changes are not material to issues raised by submitters. This would result in substantial cost and time savings to both developers and Council.

28. Sections 75, 77 and 78 – **Notifying affected entities of minor change application** – Council still often has differences of opinion with proponents as to what constitutes "substantially different

development" for the purpose of a 'minor change'. It would be of great assistance to have greater clarity, whether in the legislation, or through Guidelines etc the circumstances in which development would constitute 'substantially different development'.

29. Section 79 – **Assessing and deciding application for other changes** – It is not clear what this section is proposing to achieve. If a change is not a 'minor change' it is argued that an applicant should be required to lodge a development application. This appears to unnecessarily repeat the full application process. It is considered that this section should be deleted as it is confusing and lacks clarity.

Lapsing of and extending development approvals

30. Section 82(1)(c) – **Lapsing of approval at end of currency period** – It would be helpful to have some further clarity around what constitutes "substantially start".

31. Sections 83 and 84 – **Extension Applications** – These sections pose a number of issues for Council:

    - There should be the option for an extension application to be withdrawn;

    - While Section 84(1) does allow Council to consider "*any relevant matter*" in making a decision, it is considered that the section should expressly provide that Council may take into account and require payment of any additional infrastructure charges in deciding an extension application;

    - There should be the ability for Council to impose conditions on the approval of an extension request. Often Council has to negotiate with an applicant to concurrently lodge a change request with their request to extend so that amendments may be made to conditions of approval or additional conditions incorporated to ensure development complies with current development standards etc;

    - The timeframe of 20 business days to make a decision is inadequate to provide Council with sufficient time to consider and assess the implications of approving or refusing an extension request, particularly if the applicant also needs to make a concurrent request to change approval in the absence of the ability to place conditions on an extension request.;

    - Section 84 – This section allows a developer to continue to act upon an approval while Council's decision to refuse an extension request is being appealed. This means a developer could continue to or commence development during the appeal period and potentially complete it prior to the appeal being determined. Section 84(9) should reflect that development should not commence or continue until an appeal is determined.

32. Section 85 – **Lapsing of approval for failing to complete development** – clarity is required as to how Section 82 relates to Section 85(1). Section 85 relates to development being completed within the period or periods required under a development condition, whereas Section 82 sets out currency periods for particular development types.

Chapter 4 Infrastructure

Power to adopt charges

33. Section 107 – **Regulation prescribing charges** – Section 107(2) of the Bill allows the amount of a maximum adopted charge to be changed at the discretion of the Minister.

    It is submitted that there should be an amendment to Section 107 to include an annual automatic indexation of the maximum adopted charges using the real rate of increase in the Queensland Road and Bridge Construction Index over the previous twelve months. This would ensure that of the impact of inflation on the cost of providing infrastructure is reflected in the maximum adopted charges. Without such a provision, infrastructure charges will continue to decrease in real terms. Since June 2011, the maximum adopted charge has already decreased by 5% due to the impact of inflation.

    It is further submitted that a local government's charges resolution should be able to include a provision that provides for the indexation of the adopted charges stated in the regulation (at a nominated date) to the date that an infrastructure charge notice is given, using the real rate of increase in the Queensland Road and Bridge Construction Index. This would complement section 109(3)(b) which already allows for a charges resolution to include a provision which provides for the automatic increase in charges from when they are levied to when they are paid.

Levying charges

34. Section 115 – **Limitation of levied charge** – This subsection provides that a levied charge may only be for additional demand placed on trunk infrastructure that is generated by a development. Subsection (2)(b) provides that in working out additional demand, the demand on trunk infrastructure generated by a previous use that is no longer taking place on the premises (has been abandoned) if the use was lawful at the time the use was carried out, must not be included.

    This provision is of concern as there is no limitation on how far back the use was carried out in order for the additional demand to be ignored. A use may have been taking place long prior to the adoption of any planning legislation in Queensland. In that instance demand associated with such use cannot be included in the calculation of infrastructure charges. It is anticipated that disagreements will arise about whether a prior use was undertaken lawfully on a site at a particular point in time. What evidence would be required to establish that a use was carried out?

    The qualifications included in sub-section (3)(a) do not overcome this issue.

    It is submitted that Section 115(3)(a) should be amended to provide that the demand generated by a previous use that is no longer taking place may be included where:

    (a) An infrastructure requirement that applies or applied to the use or development has not been complied with; or

    (b) The previous use was not serviced by the trunk infrastructure networks that now service or are planned to service the premises.

It is further submitted that the application of sub section (3)(b) is unclear. It is recommended that an example be included (either in the Bill or accompanying explanatory notes) to demonstrate the circumstances under which this provision might apply.

35. Section 116(1)(f) – **Requirements for infrastructure charges notice** –

    To allow the operation of section 134, Council must under section 116(f) calculate the establishment cost of trunk infrastructure subject to an offset or refund and state in the infrastructure charge notice the amount of the offset or refund. Calculating the establishment cost of trunk infrastructure can be difficult and time consuming, particularly if only part of an infrastructure item identified in the LGIP is being supplied by the developer or the trunk infrastructure was not identified in the LGIP.

    It is recommended that section 116(f) should only require the local government to advise an applicant that an offset or refund is applicable and that a refund will be given. A further mechanism could be included in this section to permit a local government to advise the applicant of the establishment cost of the infrastructure to be offset or refunded once this has been calculated, and when the refund will be given. This would be subsequent to the infrastructure charge notice being issued. This would also require an amendment to section 134.

36. Section 116(2) – **Requirements for infrastructure charges notice** - The obligation to require an ICN to be accompanied by an information notice about the decision to give the notice is unnecessary and burdensome on Council. An ICN already clearly relates to the relevant related Decision notice and is issued under the power exercised by the legislation.

Changing charges during relevant appeal period

37. Section 120 - **Representations about infrastructure charges notice** – There is no period stated for a local government to consider representations and make a decision on the representation.

Infrastructure Agreements

38. Section 148 - **Infrastructure Agreements** – The purpose of this section is not understood. Further, what is meant by the term *"act in good faith"*? How is this enforceable or measured? It would be useful to have some guidance/clarification around the use of this term.

Chapter 5 Offences and Enforcement

39. **Who may prosecute a proceeding for particular offences** – It is noted that the Bill does not contain a section which reflects section 597(3) of the *Sustainable Planning Act 2009*. This section identifies who may prosecute a proceeding for particular offences in the Magistrates Court. The omission of this section may lead to Council being drawn into prosecutions by members of the public, even if they have determined not to prosecute for those particular matters.

    It is submitted that a section similar to Section 597(3) of SPA be included in the Bill.

Enforcement Notices

40. Section 169(b) and (c) – **Application required by show cause or enforcement notice** – These sections provide that a person *"must take all necessary and reasonable steps"* to enable an application to be decided as quickly as possible or an appeal to be decided as quickly as possible. This obligation needs to be quantified or further explained to provide clarity around the obligations of an applicant and to ensure that they don't create intentional delays.

Chapter 7 Miscellaneous

Public access to information

41. Section 220 – **Planning and Development Certificates** -The Bill (or Regs/Rules) should contain a definition of what 'limited'; 'standard' and 'full' certificates are and what is to be contained within them. This would ensure Council understands its obligations in relation to the issue of these certificates, particularly given Section 220(4) provides for Council to pay compensation for the issue of erroneous planning and development certificates.

Urban encroachment

42. Part 4 - **Urban Encroachment** - Part 4 introduces the concept of urban encroachment. It is not clear what the situation is if, for example, premises are registered, however an owner/occupier is operating a use which does not comply with their conditions of development approval regarding omissions etc. Does the local authority have the right to take compliance action against the owner/occupier? There does not appear to be any consultation with the local authority through this registration process. It is considered there should be a requirement for the local authority to have the ability to make a submission or be consulted on a request to the Minister for registration.

Chapter 8 Transitional provisions and repeal

Planning

43. Section 249 – **Local planning instruments requiring code assessment** – Section 249 of the Bill provides for code assessable development under the current Planning Scheme to become standard assessment. If Council wishes to transition development that is currently code assessable to development requiring merit assessment, Ministerial approval is required and must be undertaken within one year of the legislation commencing.

    This process may result in many Councils requesting Ministerial approvals for transitional matters.

    It is submitted that reconsideration should be given to the automatic transitional process and that alternate approaches be developed in consultation with local governments.

Schedule 2 Dictionary

44. '**information notice**' – Subsection (b) provides that an information notice states the reasons for the decision. If a decision is to approve a development application or approve a change application etc, then there is no necessity to include reasons for the decision. This should be clarified in the definition unless the intent is that there must be reasons given for every decision.

45. '**minor change**' – There should be clear direction given around what constitutes 'substantially different development'.

46. '**principal submitter**' – it would assist if this definition could be amended to include in relation to submissions where a principal submitter isn't identified, that this also includes petitions.

47. '**properly made**' – subsection (e) provides that to be properly made, the submission has to "*states 1 electronic address for service relating to the submission for all submission-makers*". A number of residents within the Toowoomba Regional Council area do not have email access. Therefore they would be unable to make a properly made submission in relation to a development application. This sub-section needs to be amended to provide a requirement for those who have an electronic address for service to provide it.

48. '**submitter**' – the definition should include reference to 'principal submitter'.

49. '**use**' – The definition in the Bill provides that the 'use' "*for premises, includes any ancillary use of the premises*". The definition of use in the *Sustainable Planning Act 2009* provides that 'use' "*includes any use incidental to and necessarily associated with the use of the premises*". The SPA definition means that secondary uses forming part of a primary use must not only be incidental, but also necessarily associated such that it would be impossible for the primary use to be carried out in the absence of the incidental use.

    The proposed amendment to definition inappropriately expands the activities that may be carried out because secondary activities need not be necessarily associated with the primary use to be considered part of that use and as a result, lawful. The definition only requires secondary uses to be ancillary but provides no definition of the term. The Macquarie Dictionary defines ancillary to be: accessory, auxiliary, subsidiary, and providing support to the main activities. There is no requirement for something to be necessary for it to be ancillary.

    It is submitted that the existing SPA definition should be retained, or at the very least, some limitation be placed on ancillary uses to provide certainty to both the community and Council when assessing development applications.

Thank you again for the opportunity to make submission in relation to the Bill. If there is any additional feedback we can provide, or any clarification you would like in relation to any of the matters raised in this letter please contact Danielle Fitzpatrick on (07) 4688 6741.

Yours faithfully

Stewart Somers
General Manager
Planning and Development