Submission No. 12
11.1.13

13 January 2016

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The Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir /madam,

RE: INQUIRY INTO THE PLANNING BILLS 2015

I am a retired building surveyor having just completed 12 plus years in statutory compliance at BCC (Brisbane City Council) do not represent any external party and make this submission on behalf of myself.

My concerns relate to how the building assessment provisions contained in section 30 of the *Building Act* effects the application for development (building) processes under the changes proposed for transitioning to the new Planning and Development Act 2016.

I refer to the manner in which some the local governments have structured their recent SPA planning schemes under the QPP (Queensland Planning Provisions) and when it comes to the integration of the building assessment provisions into their planning schemes and how the resultant processes adopted to address variations/change applications appears to fail what planning schemes should be designed to achieve.

Whilst I fully appreciate that the processes to adopt to achieve change is a structured one and timings for submissions etc. are paramount, I have reviewed what I have been able to with regard to the existing BA *(Building Act 1975)*, SPA (*Sustainable Planning Act 2009)* and the proposed P and D Bill (Planning and Development Bill 2014) and subordinate regulations on the DILGP website and make the following observations.

- The QPP indicates to me that in a local government planning scheme when addressing building assessment provisions that so long as they are integrated into the planning scheme by declaration under 1.6 (QPP) then this satisfies *the local government development assessment requirements* (my italics) and the process to adopt to address variations/changes should continue on as being planning assessment provisions, and

- They lose their status of being building assessment provisions by default.

In addressing the procedural requirements for variations/changes it appears that the State has accommodated this function by nominating a procedure contained in a template at 1.6 (QPP) which reads as follows:

QPP *1.6 Building work regulated under the planning scheme*

*(1) **Section 78A** of the Act states that a local planning instrument must not include provisions about building work to the extent the building work is regulated under the building assessment provisions, unless permitted under the Building Act 1975.*

(2) The building assessment provisions are listed in section 30 of the Building Act 1975.

> *Editor's note—The building assessment provisions are stated in section 30 of the Building Act 1975 and are a code for the integrated development assessment system for the carrying out of building assessment work or self-assessable work (see also section 31 of the Building Act 1975).*

(3) This planning scheme, through Part 5, regulates building work in accordance with sections 32 and 33 of the Building Act 1975.

> *Editor's note—The Building Act 1975 permits planning schemes to:*
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> *regulate, for the Building Code of Australia (BCA) or the Queensland Development Code (QDC), matters prescribed under a regulation under the Building Act 1975 (section 32). These include variations to provisions contained in parts MP1.1, MP 1.2 and MP 1.3 of the QDC such as heights of buildings related to obstruction and overshadowing, siting and design of buildings to provide visual privacy and adequate sight lines, on-site parking and outdoor living spaces. It may also regulate other matters, such as designating land liable to flooding, designating land as bushfire prone areas and transport noise corridors.*
>
> *deal with an aspect of, or matter related or incidental to building work prescribed under a regulation under section 32 of the Building Act 1975*
>
> *specify alternative boundary clearances and site cover provisions for Class 1 and 10 structures under section 33 of the Building Act 1975.*
>
> *Refer to Schedule 3 of the Regulation to determine assessable development and the type of assessment.*

(4) ……..

> *Editor's note—A decision in relation to building work that is assessable development under the planning scheme should only be issued as a preliminary approval. See section 83(b) of the Building Act 1975.*
>
> ***Editor's note—In a development application the applicant may request preliminary approval for building work. <u>The decision on that development application can also be taken to be a referral agency's response under section 271 of the Act, for building work assessable against the Building Act 1975</u>. The decision notice must state this.***

The last ***Editor's note*** is the reason for concern wherein it gives the local governments the opportunity and capacity to integrate both a planning assessment response (decision notice) against the planning scheme together with any referral agency requests for assessment (statement of reasons) into the one approval document against the requirements of 2 distinct and separate forms of applications.

From any laypersons reading of the contents of 1.6 (QPP) it would indicate that if any declared aspect of a development application (building) that does not satisfy the requirements of a predetermined QDC (Queensland Development Code) or a NCC (National Construction Code) and captured by the position contained in 1.6.1 (QPP) is regulated by the planning scheme and to be managed out through the planning scheme procedural requirements contained in the planning scheme.

In the main the managing out processes adopted by local governments to date to address variations/changes have been primarily achieved by either elevating levels of assessment or changing categories of development within the scheme itself.

In a recent matter in the District Court BCC (Brisbane City Council) submitted the following (in part) in support of an appeal which has not been decided, with regard to planning approval documents having the dual capacities of satisfying the requirements of a planning application and a referral agency response and utilising the one response document:

Appeal: XXXX/14

Between: XXXXXXXXXXX Appellant

And: XXXXXXXXXXXX Respondent

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

> 15. Further, and consistent with the fact that *City Plan 2014* and the relevant Codes were not "building assessment provisions" against which the building application was to be assessed, the Council as the concurrence agency under Schedule 7, Item 17 of SPR was not "assessing" the building development application against the *Traditional Building Character (Design)* and *Dwelling House Code*. There was no assessment against the Code proper involved. An assessment of a development application against a Code involves assessing compliance with the Code as a whole, not just Acceptable Outcomes. Acceptable Outcomes are only one part a Code. Compliance with Acceptable Outcomes (which is generally a prescriptive outcome rather than a qualitative outcome) is just one way, but not the only way, to demonstrate compliance with Performance Outcomes and Overall Outcomes of a Code. There was no planning assessment by the Council acting as concurrence agency in relation to the *Traditional Building Character (Design) Code* and *Dwelling House Code*. The only task undertaken by the Council as concurrence agency under Schedule 7, Item 17 was to determine if the prescriptive Acceptable Outcomes were met, no more. Non-compliance resulted in an automatic declaration of adverse effect and conflict for the purposes of the concurrence agency role, no more. It did not result in any assessment for compliance with the Codes generally. The Codes and their more general statements of qualitative outcomes, for example, were otherwise not relevant to the Council's determination of whether, in light of those adverse effects and conflict, the building application should result in a recommendation for approval, refusal or the imposition of conditions.

This extract constitutes only part of the formal supporting documentation response and will give you some idea of the complexity the private certifier is confronted with when trying to address dual matters contained in the one document declared under 1.6 (QPP).

To suggest that a planning approval response with dual capacities may expedite the processing of applications is one thing, but it leaves assessment managers exposed to unacceptable risk that can be avoided by making planning schemes adopting and enforcing the predetermined variation/change procedures declared under section 78A contained in the *Sustainable Planning Act 2009*.

For this to work the contents of 1.6 contained in the QPP which gets its heads of power from the SPP would have to be amended to reflect the referral agency position and that is what this correspondence is about.

The issue is that once building assessment provisions have been declared for the planning scheme under 1.6.1 (QPP), in my opinion they do not change their status to what I refer to as a planning scheme assessment provision but still retain their status of building assessment provisions under section 78A (SPA) and outcomes in the form of variations/changes should be determined via the referral process contained in IDAS and should **not** be addressed through an elevated category of development or change in level of assessment and a resultant preliminary building approval being required before release of the development approval is allowed (refer s.83 (BA)).

My understanding is that this is the basic mischief which section 78A (SPA) sought to resolve when it was introduced under the SPA in 2009 and various State presented seminars and publications in the form of newsflash's (refer # 420) and explanatory notes over the years to both the BA and SPA have made this point clear and to date have supposedly supported this position.

EXTRACT FROM NEWSFLASH # 420 (2010)

> **New Local Government concurrence agency for houses and duplexes**
>
> From 26 March 2010, Local Government concurrence agency referrals will also apply for building applications for duplexes where councils choose to opt in to the approval process using self assessable planning scheme requirements. The concurrence requirements for houses will also be clarified. Previously, many local governments purported that a planning permit was required in some circumstances because the application triggered an elevation of assessment level–for example, the application did not comply with the acceptable solution of the planning scheme. Schedule 4 of the SPR now clarifies that these applications are exempt from the need for planning assessment. The SPR requires the building application in these circumstances, to be referred to Local Government for concurrence advice.
>
> For example, if a self-assessable code previously required that an application be elevated to code or impact assessment where the proposal did not comply with the acceptable solutions, then the application will now require referral to local government. The referral period will be 10 business days. Local governments will have the power to direct the building certifier to refuse the application or approve it with conditions. This decision can be appealed to the Building and Development Dispute Resolution Committees, which provide a cost effective service for appeals of this nature.

It is also my understanding is that the local governments reasoning behind the conflating of the application process is contained in a decision made in 2010 where BCC elected to appeal a building tribunal decision (ref 64.09) and ***Brisbane City Council v Mamczur & Anor*** **[2010]**

QPEC 071 (09/3303) and the private certifier lost and local Governments have relied upon this decision which is in their favour in formulating their future planning schemes.

The fact that the decision was determined under IPA *(Integrated Planning Act 2009)* appears to have escaped their attention because it was this decision that was the catalyst for the introduction of section 86 into SPA in 2009 by BCQ (Building Codes Queensland) under Glen Brumby which was sequentially changed (moved) to section 78A (SPA) in a later publication.

The recent Wallace report under Recommendation 106 reflects a similar position which reads as follows:

WALLACE REPORT - TABLE OF RECOMMENDATIONS

> 106. Section 78A of the *Sustainable Planning Act 2009* prohibits the inclusion of provisions regarding building work in a local planning instrument. To the extent that a local planning instrument does contain such a provision, the local planning instrument has no effect. It is recommended that the Minister for State Development, Infrastructure and Planning should have the ability to require a local government to remove such provisions from the local planning instrument.

CURRENT BCC CITY PLAN 2014 – AMENITIES AND AESTHETICS DECLARATION

Contained in BCC's declarations for City Plan 2014 under 1.7.4 there is also a declaration regarding Amenities and Aesthetics which, as a building concurrence agency assessment provision contained in schedule 7 table 1 item 17 (SPR) and should be determined against a building assessment provision (either policy or code refer s.46 (BA)) but has planning codes (dwelling house code, dwelling house (small lot) code, and traditional building character (design) code etc.) as their AO's which is an involuted position to say the least.

EXTRACT FROM SECTION 46 BUILDING ACT 1975

> **Section 46**
> **Concurrence agencies may carry out building assessment work within their jurisdiction**
> (1) This section applies if, under the Planning Act, a concurrence agency has jurisdiction for a part of building assessment work.
> (2) Only the concurrence agency may assess the part.
> (3) Assessment of the part by the concurrence agency must be done under the building assessment provisions.
> (4) Subject to sections 37 and 61, the assessment must be carried out under the building assessment provisions in force when the assessment is made.
> (5) ……..

Of late there have been various variations of the same theme, i.e. turning building assessment provisions into planning assessments presented in surrounding local governments SPA planning schemes and complaints from certifiers regarding this matter have been common.

PREVIOUS HISTORY

The wrongness was originally bought to my attention by BCQ (Building Codes Queensland – Peter Rourke) when he made a PP presentation to a group of Building Certifiers (AIBS

members) on 21 May 2007 (copy available if required) and the subject matter in particular siting under the new building assessment provisions contained in the rewritten *Building Act 1975* and new Schedule 2 contained in the IPR (*Integrated Planning Regulations)* which referenced who were the new agencies and what their jurisdictions were was discussed at length in particular as it related to BCC's Small Lot Code.

Undertakings that the matters were to be addressed by BCQ with BCC were given by Peter at the time in an attempt to resolve the issue but it appears that the undertakings did not prevail.

The principle issue is that there has never been a legislative process to adopt to ensure that section 78A (SPA) is complied with in that when the building assessment provisions are declared in the planning instruments under 1.6 (QPP) there is no definitive countering legislative path to ensure the building assessment provisions continue on to be building assessment provisions in their own right and not be converted to planning assessment provisions.

I note that looking through the proposed Planning and Development Regulations that Schedule 16 presents itself as being an opportunity to resolve the issue.

EXTRACT FROM PROPOSED PLANNING AND DEVELOPMENT REGULATIONS

Planning Regulation 2016
Page 190
Working draft only - not government policy

Schedule 16 Referral agency assessment for assessable development under a local categorising instrument

Part 1 Preliminary sections 21 and 25

1 About this schedule

(1) This schedule applies to a development application for development categorised as assessable development under a local categorising instrument.

(2) The tables in parts 2 to 4 of this schedule state the referral agencies for a development application mentioned in the tables and other matters for carrying out referral agency assessment of the application.

I have modified an extract from Schedule 16 (page 190 - proposed P and D regulations) and the proposed building requirements would follow a similar format to that contained in Schedule 7 table 1 items 19, 20 and 21 (design and siting) from the SPR **or** Schedule 10 table 6 item 1 (a), (b) and (c) (design and siting) contained in the proposed P and D regulations.

Part 2

Building Work (example)

Table 1—State transport infrastructure

Column 1		Column 2
1	Application requiring referral	Application for a material change of use of premises if any part of the premises— (a) is within 25m of— (i) a State-controlled road; or (ii) a public passenger transport corridor; or (iii) a railway or future railway land; or (b) is future State-controlled road; or (c) adjoins a road that intersects with a State-controlled road within 100m of the premises; or (d) is future public passenger transport corridor; or (e) is future railway land; or (f) is a State-controlled transport tunnel; or (g) is a future State-controlled transport tunnel; or (h) is within 50m of a State-controlled transport tunnel or future State-controlled transport tunnel
2	Referral agency	The chief executive **[schedule 7, table 3, items 1, 14, 15A and 15C]**
3	Limitations on referral agency's powers	—
4	Matters referral agency's assessment must be against	The State development assessment provisions
5	Matters referral agency's assessment must have regard to	—
6	Matters referral agency's assessment may be against	—

"The local government"

[Schedule 10 table 1 (example) items 1(a), (b) and (c)]

Proposed P and D regulations

The building assessment provisions contained in section 30 (BA)

SUPPORTING MATERIAL

Extract from Schedule 10 table 6 item 1 (a), (b) and (c) (design and siting) contained in the proposed P and D regulations which is a reflection of schedule 7 table 1 items 19, 20 and 21 (SPR) which would be inserted into columns 1 and 2 of the example.

Table 6—Design and siting	
Column 1	**Column 2**
1 Application requiring referral	Application for building work mentioned in section 2 if— (a) the QDC, part 1.1, 1.2 or 1.3 applies to the building work and, under the part, the proposed building or structure does not include an acceptable solution for a relevant performance criteria under the part; or (b) under the Building Act, section 33, an alternative provision applies for the building work and, under the provision, the proposed building or structure is not of the quantifiable standard for a relevant qualitative statement under the provision; or (c) all of the following apply— (i) under the *Building Regulation 2006*, section 10, the planning scheme includes a provision about a matter provided for under performance criteria P4, P5, P7, P8 or P9 of the QDC, part 1.1 or 1.2; (ii) the provision applies for building work; (iii) under the provision, the proposed building or structure is not of the quantifiable standard for a relevant qualitative statement under the provision

SUPPORTING MATERIAL (continued)

Table 6—Design and siting		
Column 1		**Column 2**
2	Referral agency	The local government **[schedule 7, table 1, items 19, 20 and 21]**
3	Limitations on referral agency's powers	—
4	Matters referral agency's assessment must be against	For building work mentioned in item 1, column 2, paragraph (a)—whether the proposed building or structure complies with the performance criteria mentioned in the paragraph For building work mentioned in item 1, column 2, paragraph (b) or (c)—whether the proposed building or structure complies with the qualitative statement mentioned in the paragraph
5	Matters referral agency's assessment must have regard to	—
6	Matters referral agency's assessment may be against	—
7	Matters referral agency's assessment may have regard to	—

SUMMARY CONCLUSIONS

Since private building certification was introduced in 1998 building certifiers have been marginalised and to have continual adversarial contests with certifiers who are relying on section 78A (SPA) , ss.31.32 (BA) and schedules 3 and 5 SPR (Sustainable Planning Regulation) to defend their position, only causes grief and uncertainty and if something positive can counter the position adopted by local governments in their planning schemes would be a positive move and give them greater certainty in the determining process.

I am quite confident that in any legal challenge relating to my Schedule 16 (proposed P and D regulations) relating to building that is supported by the insertion of a section equivalent to s.78A (SPA) in the proposed regulations and the processes adopted by local governments in their SPA planning schemes by 1.6 (QPP) do not change, that the priority of Schedule 16 would prevail.

The knock on consequences of an application triggering Schedule 16 would have the effect of forcing the local governments to effectivly partition their planning codes into AO's (Acceptable Outcomes) that are required to be achieved via:

- a request for assessment (referal agency application and essentially adressing all the matters contained in Schedule 7 Table 1 (SPR) that local government as the referal agent is responible for), or
- a planning assessment application for the residual matters not captured by the building assessment provisions,

for which, in the latter they have every right to do.

In my conversations with management over the years I don't believe that they are not aware that this day was going to come – that position was telegraphed after the *Mamczur* decision it is just that to do it has not satisfied the political imperative.

With Brisbane City Council there are only 3 primary codes that I am aware of being the dwelling house code, dwelling house (small lot) code, and traditional building character (design) code, that are impacted so it is not a big job.

There would be some local plans that would require change but they would be miniminal.

In my opinion this would satisfy the requirements of section 78A (SPA), sections 30.33 (BA) and Schedules 3 and 5 (SPR) by default and be a relief and give certifiers greater certainty who are confronted with having to achieve planning applications for preliminary building approvals which are really request for assessment siting variations disguised as planning applications.

Thanking you for allowing me to make this submission,

I remain,

Yours faithfully,

Angus D McKinnon