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Dear Committee Members

Submission on *Planning Bill 2015* and *Planning and Environment Court Bill 2015*

This submission is made by me in my personal capacity and not in my capacity as a partner of HopgoodGanim Lawyers and the views expressed in it are mine alone.

I have made this submission because of my strong interest in Queensland's planning laws over many years. In September 2013 I was invited by the then Deputy Director of Planning, Mr Greg Chemello, to serve on a small focus group of professional people involved with planning and development that was being formed to peer review draft planning legislation. Since that time I have reviewed working drafts of various iterations of the *Bills* that are now before the Parliament. This submission is the culmination of that involvement.

Before outlining my remaining concerns relating to the *Bills* I wish to recognise the outstanding work of the dedicated officers of the Department of Infrastructure, Local Government and Planning, past and present, who have undertaken the important work of formulating the legislation and engaging in detailed community consultation with respect to it.

My concerns focus on four aspects of the Bills:

1. Compensation – Sections 30(4)(e) and (5);
2. Decision rules for code assessment;
3. Infrastructure – offset or refund requirements;
4. *Planning and Environment Court Bill 2015* – Section 60, Costs.

1. **Compensation – Sections 30(4)(e) and (5)**

The statutory provisions concerning compensation for injurious affection to land caused by a change to a planning instrument are very important. They have been a feature of Queensland's planning system since the first planning schemes commenced. The provisions are very important because changes to planning instruments usually affect the way land may be used, sometimes quite adversely, and thus may impact on private property rights. Such changes obviously have the potential to reduce the value of privately owned land. The right to claim compensation therefore counter-balances a local government's right to adversely affect the ability to use or develop land by changing a planning instrument. In that way the compensation provisions are a mechanism by which citizens who own land may derive equitable treatment when their

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property rights are injured by changes to planning instruments. This is explained in the following paragraphs.

It should be kept in mind when considering changes to the compensation regime under planning legislation that when land is down-zoned, there is no obligation on local governments to notify affected landowners of the change. Also, when land is down-zoned so that the only purpose for which the land can be used (other than the actual purpose for which it was being lawfully used at the time of the scheme change) is a public purpose, the local government is **not** obliged to compulsorily acquire the land and pay compensation for it. Consequently, land may be down-zoned and devalued without the landowner's knowledge and the landowner will have no means of forcing a local government to acquire the land in those circumstances.

Making a claim for compensation in respect of any injurious effect caused by down-zoning is one way in which local governments can be encouraged to compulsorily acquire land that has been injuriously affected. If compensation must be paid for the reduction in value of the land then compensation might as well be paid for the whole freehold interest in the land. The legislation expressly gives local governments the right, but not an obligation, to resolve an injurious affection compensation claim by compulsorily acquiring the land, and in many instances that is exactly the way in which the claim is resolved.

It is necessary to bear all of this in mind whenever consideration is being given by legislators to reducing the rights of landowning citizens to claim compensation in consequence of changes to planning instruments.

Against this background the Committee should also note that the original statutory rights to claim compensation have been whittled away by the legislature over many years largely because of the philosophical perspective that local governments planning powers should be co-extensive with those of the State (which is not required to pay compensation as a result of anything which the State does that injuriously affects land). Thus some would argue that local governments ought to be able to restrict the use of private land without being exposed to any risk of a claim for compensation.

The last occasion on which compensation rights were significantly reduced was upon the introduction of the *Integrated Planning Act 1997*. At that time the concept of "use it or lose it" was introduced into the legislation whereby (in simplified terms) landowners were required to make a request that a superseded planning scheme apply to the development of affected land and the local government had to refuse the request before any right to compensation could arise. These changes placed upon affected land owners the non-recoverable cost of making a development in order to protect their rights. When the *Sustainable Planning Act 2009* was introduced, the time limits for invoking the development application (superseded planning scheme) process that can lead to compensation were reduced.

The compensation system is now attended by numerous difficulties and roadblocks for applicants. Notwithstanding that, it remains useful as a check and a balance against the ability of local governments to introduce harsh changes to planning instruments, as it remains as a potential incentive by which affected landowners may encourage local governments to fully resume their land in order to gain effective compensation for not being able to use the land to its full potential, or possibly for not being able to use it at all.

The other factor the Committee should consider in relation to the changes proposed is the manner which natural hazards are usually dealt with under planning instruments. Take coastal erosion and flooding hazards as an example. Potential sea-level rise in consequence of projected global warming is now a mandated consideration for local governments. Planning instruments may deal with this through broad scale overlay

mapping, without any site specific ground truthing or consideration of possible engineering solutions. The result of an overlay which maps a site as potentially affected by sea level rise is likely to be that the site is incapable of being developed. In the context of future sea level rise and storm surge the hazard is a long term projected one and the risk of harm will vary on a long term basis. Depending on events that occur over the next 50-100 years, the risk may or may not mature into one that is a high or even medium one.

Some of the impetus for excluding compensation claims in relation planning for natural hazards has come from the Commission of Inquiry into the 2011 floods. It is important to bear in mind that those floods involved unusual and locationally diverse natural phenomena. Clearly, communities need to be protected through appropriate controls to prevent development in the known pathways of floodwaters, such as in areas downstream of dams which could overtop. Those situations are more likely to be susceptible to locational engineering studies, and should be contrasted with broad scale overlay mapping involving natural hazards that are more variable in area, scale, frequency and time frame.

Considering all of the above, the proposed statutory exclusion recognises that both the risk of the occurrence of the natural phenomena and extent of the potential damage will vary between low and high, and has chosen "material" as the relevant level of "risk" and "serious" as the relevant level of harm. This reflects changes to the draft Planning Bill that were made at my suggestion and are strongly supported.

However, instead of the discretionary regulatory approach now proposed, which would be impossible for private landowners to "enforce", the exclusionary provision should be tightened up by placing some specific conditions on its availability. I suggest that the provision be reworded as follows:

"(e) is made -

(i) to reduce the material risk of serious harm to persons or property from natural events; and

(ii) the risk cannot be adequately mitigated by a planning change involving the application of objective performance measures or the imposition of lawful development conditions; and

(iii) before adopting the planning change the local government considered a risk assessment that:

(1) was undertaken in good faith by an appropriately qualified independent person;

(2) stated that the risk could not be adequately mitigated through measures such as those mentioned in (ii);

(3) is publicly exhibited with the proposed planning change;

(4) remains available for public scrutiny after adoption of the planning change."

As mentioned above, the Committee should bear in mind that the compensation regime under the State's planning laws has already been significantly weakened over life of the IPA and the SPA and should not be further reduced without careful consideration of the circumstances in which it is proposed to do so and the likely consequences. The circumstances need to be carefully limited so as to avoid potential injustice. The changes

suggested in the drafting of subsection (e)(ii) and (iii) above are designed to ensure that the changes to a planning instrument don't happen without proper consideration being given to workable performance based measures that allow for site specific solutions.

2. **Decision rules for standard/code assessment**

The Planning Bill's simplification of the decision rules that are contained in the following sections – sections 43, 44, 45, 46, 59, 60 and 61 is strongly supported. However, as the drafting of these provisions has evolved over the past few years an unanticipated problem has arisen in relation to code assessable development. In order to explain how this has arisen it will be useful to provide an explanation as to why the decision rules need to be reformed.

Currently under the Sustainable Planning Act 2009 (SPA) there is a rule that applies to both impact and code assessment which says the decision to approve development cannot be made if the decision would conflict with the planning scheme unless there are sufficient public interest grounds to approve the application despite the conflict.

This rule has been at the centre of the vast majority of disputes in the Planning and Environment Court over the last decade or more. It has occupied a significantly large proportion of the Court's time and has been the cause of many, if not most, of the appeals from the Planning and Environment Court to the Court of Appeal on errors of law.

In one such case recently the same development application was dealt with twice by the Queensland Court of Appeal and three times by the Planning and Environment Court (**P&E Court**), the ultimate result being that the P&E Court's original approval was eventually granted again after a third hearing in the P&E Court. Each of the hearings in the P&E Court involved substantial argument about what constituted conflict with the planning scheme and what constituted sufficient grounds for approval despite the conflict. The first hearing in the Queensland Court of Appeal concerned what constituted conflict with a planning instrument and the second hearing involved whether grounds identified by the P&E Court constituted sufficient grounds for the purposes of the SPA. The fact that five hearings were required in respect of the same development application because of the form of the current assessment and decision rules confirms the need for reform.[1]

The Planning Bill 2015 removes those complicated rules and replaces them with a simple and more flexible assessment and decision matrix. Under the Planning Bill it will simply be a case of deciding whether the development proposed complies with the relevant assessment benchmarks and ought to be approved or refused, while allowing for the balancing of different, competing assessment benchmarks as well as other appropriate relevant considerations (which cannot include matters of private economics). This will be a vastly superior statutory regime for assessing and deciding development applications than that which is currently in force.

The Planning and Development Bill 2014 proposed a category of development called "standard assessment" that was to replace both compliance assessment and code assessment under that Bill. It was clear that standard assessment, like code assessment under the SPA, involved assessment only against code or standard criteria rather than, as in the case of impact assessment, against the whole planning scheme.

[1] *Westlink Pty Ltd v Lockyer Valley Regional Council* [2012] QPELR35; *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] 185 LGERA; *Westlink Pty Ltd v Lockyer Valley Regional Council* [2012] QPEC 31; *Lockyer Valley Regional Council v Westlink Pty Ltd* (2012) 19 LGERA 452; *Westlink Pty Ltd v Lockyer Valley Regional Council* [2013] QPEC 35

The Planning and Development Bill 2014 and the Planning and Development (Planning for Prosperity) Bill 2015 each contain what was in effect a kind of sub-category of impact assessment (or merit assessment as it was called under those Bills) for impact assessment that is not required to be publicly notified (compare for example section 48(2) and (3) of the Planning and Development (Planning for Prosperity) Bill 2015 with section 53 of the Planning Bill 2015).

The Planning Bill 2015 does not persist with the name "standard assessment" or non-notifiable impact assessment. Code assessment has emerged under the Planning Bill 2015 as a category of development assessment covering everything from compliance assessment right through to the equivalent of impact assessment, but without public notification. This is a result which to the best of my knowledge, having been involved in the DILGP's focus group which has discussed and debated aspects of all of the Bills, was not intended or anticipated.

It needs to be understood that the existence of a category of development assessment which can only be undertaken against codes is absolutely critical to the efficiency of the planning and development system. The financing of many significant development projects depends upon achieving a degree of certainty that compliant code assessable development will achieve approval. If code assessable development can be certified as compliant then funding will be available to enable detailed design to be undertaken, because the risk of failing to gain an approval will be low and there will be no risk of third party appeals.

The Planning Bill 2015 as it presently stands effectively **removes** the relative certainty of approval being achieved because the "assessment benchmarks" for code and impact assessment can be identical. This means that instead of a code assessable development application being assessed only against applicable codes the assessment benchmarks may in effect include the whole or at least most of the planning scheme, including provisions of planning schemes that concern broad strategic intent. This is a very significant departure from the position as it presently exists under the SPA and one which is going to cause massive disruption to the development industry and result in serious adverse economic consequences.

The other unintended change is that the "sufficient grounds" factor that presently exists for both code assessment and impact assessment has disappeared in relation to code assessment. It is essential that code assessment under the Planning Bill 2015 operate in the same way as code assessment operates under the SPA such that in deciding whether to approve code assessable development other relevant considerations (except for private economic considerations) may be taken into account.

The following amendments will achieve maintaining the status quo in relation to code assessment:

(1) Insert a new section43(4)(d) as follows:

> *"(d) may not, for development that requires code assessment, set out assessment benchmarks other than applicable codes."*

(2) Insert a definition of "applicable code" as follows:

> *"Applicable code, for development, means a code that can reasonably be identified as applying to the development."*

(3) Insert a definition of "code" as follows:

"Code means a document or part of a document identified as a code in a categorising instrument."

(4) Amend section 45(3)(a) to read:

"(a) against the assessment benchmarks for code assessment in a categorising instrument for the development."

(5) Amend section 60(2)(b) to read:

"(b) may decide to approve the application even if the development does not comply with some or all of the assessment benchmarks if a relevant matter, other than a person's personal circumstances, financial or otherwise, justifies approval."

(6) Expand the list of examples given under section 60(2)(b) to include:

- a planning need;
- the current relevance of assessment benchmarks in the light of changed circumstances;
- whether assessment benchmarks or other prescribed matters were based on material errors.

(7) Amend the explanatory notes appropriately for all of the above changes to reflect the policy intent of retaining the status quo for code assessment. In particular the explanatory notes for "assessment benchmarks" on page 52 and for "other relevant matters" on page 53 will have to be redrafted.

3. Infrastructure – offset or refund requirements

Section 128 of the Bill seeks to account for the cost of infrastructure provided under a lawful condition about necessary infrastructure in a development approval, against an adopted charge levied in respect of the approved development. This will either result in a reduction of the amount of the infrastructure charge payable or a refund to the developer depending on whether the cost of the works is less or more than the amount of the charge. The purpose of section 128 is to avoid a "silo approach" to offsetting/refunds whereby the cost may only be offset against the same class of infrastructure, and to give full effect to the equity principles underpinning the infrastructure charging regime.

Section 128(3)(b) requires the local government to refund the difference between the establishment cost and the adopted charge where the cost of the work exceeds the amount of the adopted charge. However the section does not specify when the refund must be paid. The draft Planning Bill contained an optional proposal to allow the local government to withhold the refund until the date of the construction of the infrastructure specified under the local government's LGIP. The rationale appeared to be the concept that local governments collect money to be spent on infrastructure progressively but they don't actually "account" for its use until the infrastructure is built. Until then the relevant "pot of money" for the infrastructure item may or may not be full and the actual cost of the infrastructure may or may not be known. Consequently, until the end point is reached money may or may not be available to make the refund. However, where the infrastructure is planned for under a LGIP and a date is specified for it to be constructed all of the assumptions underpinning the LGIP lead to a reasonable expectation that by the identified date the "pot" will be full and the

construction costs will be known, or funding for the infrastructure will be provided by the local government from other sources.

The underpinning concept is that infrastructure must be planned and provided for in a logical sequence as anticipated by the planning scheme. The system allows for money to be collected for this infrastructure subject to an overall cap imposed in the interests of equity and ensuring that housing does not become unaffordable. The effect of imposing a condition requiring necessary infrastructure is that the local government will not need to construct the infrastructure (because a developer, sometimes referred to as the 'first mover' will construct it), and the forward infrastructure planning in the LGIP is fulfilled by the developer rather than by the local government. Thus the developer may "pay" more than the share of the cost of the infrastructure that would otherwise be lawfully payable if a contribution had been calculated through an adopted infrastructure charge.

There were a number of problems with the option floated in the draft Bill:

- it did not make provision for the timing of the refund where the LGIP does not identify the relevant infrastructure;
- it would have allowed the refund to be deferred until the date for construction of the infrastructure regardless of whether the local government had collected all, or substantially all, of the infrastructure charging funds generated by development anticipated under the planning scheme;
- it didn't prevent local governments including long and unrealistic timeframes in their LGIPs with a view to deferring the obligation to make the refund; and
- it didn't account for LGIPs being amended so as to defer the date of construction of an infrastructure item and thus defer simultaneously the date for payment of the refund.

Therefore, its non-inclusion in the Planning Bill is supported. However, while there is a legal obligation created by the Bill to make the refund there will be uncertainty as to how to enforce the obligation in the absence of an agreement with the local government regarding the timing of payment. When legislation intends to impose obligations it should do so in a way which makes the obligations certain and enforceable by the person who it is intended to benefit. The Planning Bill 2015 fails to do so.

I would recommend the following approach:

- Local governments should be obliged to make the refund no later than a date when revenue from charges paid and accumulated is sufficient to meet the amount of the refund or the construction date for the infrastructure stated in the LGIP; or
- If the LGIP does not identify the infrastructure, the refund should be made no later than the date when revenue from charges paid and accumulated is sufficient to meet the amount of the refund or the construction date for the infrastructure stated in the necessary infrastructure condition; and
- There should be an absolute "drop dead" date of three years from date of the infrastructure coming "off maintenance" to pay the refund.

4. Planning and Environment Court Bill 2015 (P&E Court Bill) – Section 60 – Costs

The basis for some of the changes to the costs rules in Section 60 of the *P&E Court Bill* reflects a policy position concerning the perceived exposure to costs orders of citizens who become parties to appeals in the Court (either by instituting submitter appeals or by electing to become co-respondents to an applicant's appeal). Based upon that policy position the reduced discretion to award costs should be confined to appeals in respect of impact assessable development applications and there should be no change to the costs rules with respect to code assessable development appeals (which don't involve submitters) and declaratory proceedings. On that basis alone section 60(1) should be amended by inserting a new sub-paragraph (a) and (b) as follows:

> *"(a) the proceeding is an appeal about development that is subject to code assessment under the Planning Act;*
>
> *(b) the proceeding is an application seeking declarations under part 2 division 3 of this Act."*

The justification for these changes to the Bill is discussed below.

The starting point for any consideration of reform of the current costs rules involves having regard to the purpose of costs orders. Fundamentally, the philosophy behind Courts exercising powers to award costs is based on concepts of fairness and justice, in that a person who successfully resorts to judicial adjudication to protect their legitimate rights should be indemnified by the opposing party whose actions forced the successful party to incur legal costs in pursuing judicial adjudication or in defending the proceeding. Viewed in that way costs orders are not meant to "punish" the unsuccessful party, nor are they meant to be a deterrent to people agitating their rights in the Courts. Rather, they reflect the simple proposition that costs properly incurred by a successful party whose rights have been protected through the judicial process should be recompensed, at least in part (standard costs orders) and potentially in full where the proceeding was for an improper purpose (indemnity costs orders).

The above concepts should then be considered in the particular context of the P&E Court. It has been said on many occasions that the P&E Court exercises jurisdiction in respect of matters of "public interest". Planning does, of course, involve matters of public interest in common with almost all legislation that sets up regulatory systems. For example, when the Supreme Court is dealing with judicial review proceedings, it is often adjudicating in respect of the rights of citizens against the State or local government or other statutory bodies. In many cases public interest issues will underpin the relevant legislation under consideration by the Supreme Court. The role of the Court in determining whether to grant a statutory order for review doesn't change because the legislation under consideration was enacted in the public interest. The position is precisely the same in the P&E Court when it is dealing with purely legal issues by way of determination of preliminary points of law, or in declaratory proceedings.

On the question of the public interest nature of proceedings in the P&E Court it is irrefutable that more often than not the conduct of parties to proceedings is motivated by self-interest rather than by public interest. Opposition to development applications will always involve a spectrum of motivations from noble to selfish, for example:

- Preference for the status quo especially, for example, where adjoining or adjacent land is unused and is a de facto park or backyard extension.
- Perceived adverse effects on the value of a person's property.

- Commercial anti-development motivation relating to loss of market share, or a desire to secure profit margins for a period of time by delaying a project.
- Idiosyncratic personal concerns.
- Concerns about loss of vegetation/habitat.
- Concerns about potential amenity impacts.
- Concerns about "reverse-amenity" affects.
- General anti-development sentiment.
- Internal political or philosophical bias within local governments at both officer and councillor levels.

In every case the legitimate expectations of a citizen who is a potential submitter must be gleaned from the relevant planning instruments and then balanced against the legitimate expectations of the citizen who wishes to undertake development. Where the expectations are finely balanced due to competing planning considerations evident in the planning instruments it would **not** be appropriate to award costs in favour of either party. The decisions of the P&E Court since the costs rules were amended have, without exception, followed that approach. The situation should, of course, be otherwise where on any reasonable interpretation of the relevant planning instruments the balance is all one way or the other. There should be an ability for the Court to use its discretion where a party, be it a submitter or an applicant, chooses to pursue a case with poor or no prospects in the Court. Why should someone be able to put another person to huge expense, without any recourse to costs orders, in pursuing through the Court something which the relevant planning instruments don't support? The same considerations arise where a local government refuses a development application, or otherwise exercises powers, with a view to preventing development that is legitimate under the planning scheme.

The list of planning and environment legislation in respect of which the P&E Court has jurisdiction continues to expand. The Court hasn't for many years been restricted only to adjudicating in matters arising under planning legislation. The list is now quite long and includes various statutes under which the State and local government are empowered to injuriously affect, often quite severely, private property rights. The *Queensland Heritage Act* is an example of legislation under which the P&E Court is called upon to determine issues relating to the Heritage listing of private properties. That Act involves the application of clear processes and criteria for heritage listings and affords affected parties appeal rights. Using that *Act* as an example, the question may be asked – why should a property owner who is successful on appeal against listing bear his or her own costs? Conversely, if the Queensland Heritage Council is successful in upholding a listing why should it bear its own costs? Surely it would be appropriate for the Court to be invested with the discretion to award costs. The way in which the Court chooses to exercise that discretion will depend upon the individual circumstances of each case, usually making no orders for costs where the evidence is finely balanced.

A clear distinction should be drawn between proceedings involving issues of merit and those which involve administrative process and interpretation of the law. This is important because the regulatory system is replete with processes incorporating checks and balances aimed at ensuring transparency, efficiency, cost reduction, and ultimately fairness. So when a statutory body goes down a path intended to secure an outcome that is not in accordance with the statutory charter and in doing so causes the private citizen expense and delay,

surely the Court should have the discretion to award costs either on the standard or the indemnity basis depending on the circumstances.

This is particularly pertinent to the use of declaratory proceedings in the P&E Court (which are akin to judicial review proceedings in the Supreme Court) to attack decisions in respect of code assessable applications made in good faith by Councils or private certifiers. The motivation for proceedings of this kind is likely to be as varied as the motivations behind submitter appeals. However the context is completely different. The proceedings cannot determine merit issues. The applicable regulations may make the development code assessable or this may arise because the local government, duly elected, has adopted a local planning instrument that makes development code assessable. In those circumstances there is an underpinning anti-democratic bias in the attempted circumvention of the system through the use of declaratory proceedings. This is not to say that the motivation for declaratory proceedings always exhibit such bias. Obviously, it depends upon the circumstances and the personal concerns of the litigant. Examples of circumstances where declaratory proceedings would be appropriate are:

- where genuine doubt exists, in order to resolve the question of whether the development application is code or impact assessable development under the relevant planning instrument; or

- where the assessment process has arguably miscarried in a material and significant way (e.g. an irrelevant consideration has been taken into account).

Recognising that there may be circumstances where the use by a citizen of declaratory proceedings to clarify rights is an appropriate course, and balancing this against the rights of another citizen to apply for assessable development and have the development application processed according to law within the appropriate lawful timeframe, there is clear scope for the Court to be able to apply general discretionary considerations in deciding who should pay the costs of such proceedings. This is particularly so in the context where declaratory proceedings may be used to advantage by commercial competitors, and also in light of evidence that such proceedings are starting to take the form of merit hearings with extensive expert evidence being called by applicants in order to establish the factual basis for a declaration, resulting in respondents having to match the expert evidence of the applicant for the declaration. This is not the way declaratory proceedings in the P&E Court were ever intended to the used.

I have acted in defence of declaratory proceedings involving the decision of a private certifier that was subsequently acted on by a developer to construct an apartment building. Those proceedings were started well after the building had been completed and the sales of units in the buildings had settled. The builder/developer incurred millions of dollars in legal and expert witness costs in defending the proceedings. Costs were awarded against the company which sought the declaration on the basis that the proceeding was frivolous or vexatious, but clearly it was a situation which called for an award of costs on the basis of ordinary discretionary considerations (see *Stevenson Group Investments Pty Ltd v Nunn & Ors* (2012) QPEC7).

There is no justification for the rules not allowing the use of ordinary discretionary considerations with respect to the award of costs in the case of applications for declarations in the P&E Court. If the general discretionary power to award costs in such proceedings were retained the power would still be one shade lighter (being discretionary) than in Supreme Court declaratory proceedings where the costs would ordinarily follow the event. Therefore the suggested amendment to section 60(1) set out earlier is well and truly justified.

The power to award costs should be framed in a balanced way. It is always necessary to look at the obverse of an envisaged scenario and ask whether the discretion to award costs should also arise in the reverse situation. Section 60(1)(a) fails this test because there seems to be an inherent bias in its language against the "moving party" in proceedings (the appellant or applicant) and in favour of the "decision maker". This is unfair. For example section 60(1)(a) of the Bill speaks of a proceeding being "started or continued primarily for an improper purpose". If a decision maker takes an unlawful action, motivated by a desire to otherwise achieve a particular outcome that couldn't be achieved by lawful means, it would be engaging in abuse of process, but it won't necessarily have "started or continued" the proceeding. It may merely be a respondent to proceedings commenced by the person who has been the unfortunate subject of the unlawful actions of the decision maker and had to commence the proceeding to have the unlawful outcome corrected. Also why include the word "primarily"? Whether the improper "unlawful" purpose is the primary or secondary motivating factor seems to me to be irrelevant; its mere presence (difficult to prove as it may be) should be enough. This subsection should be recast as follows:

> *"The P&E Court considers the proceeding was started, continued, or conducted by a party to the proceeding, for an improper purpose including, for example, to delay or obstruct."*

In conclusion, may I thank the Committee in advance for its consideration of the matters raised in this submission.

Yours sincerely

HopgoodGanim Lawyers