Mackay REGIONAL COUNCIL

Your REF: 11.1.13C
Our REF: SP – Submissions for State Government Bills

Submission No. 062
11.1.13

15 January 2016

Mr Jim Pearce MP
Chair Infrastructure, Planning and Natural Resource Committee
Parliament House
George Street
Brisbane Qld, 4000

**RE: Submission to the Planning Bill 2015**

Dear Sir,

Thank you for your invitation to make a submission to the Infrastructure, Planning and Natural Resources Committee regarding the above proposed legislation. Council welcomes the opportunity to comment and matters of concern are raised below.

Recent change in Queensland's planning system has been significant. The reshaping of the State's focus through the release of the Single State Planning Policy (SPP) and the single referral process through State Assessment and Referral Agency (SARA) is welcomed. Generally, the industry has adapted through a number of reform changes in recent years: infrastructure charging policy, the introduction of the *Sustainable Planning Act 2009* (SPA), SPA amendments Acts, amalgamations, Smart eDA, SARA, SPP changes, the private member's bill, and now this bill. Given the significant changes to date, it is important that further change has tangible benefits for planning and development.

Through continued participation in reform discussion, led by the Department of Infrastructure Local Government and Planning and fostered by other agencies such as the Local Government Association of Queensland and the Planning Institute of Australia, planning reform has matured, with many of the concerns raised in previous versions of the draft legislation addressed or partly addressed in this bill. The following initiatives are supported:

- streamlining the Queensland Planning Provisions and including simplified guidance in the regulatory provisions rather than lengthy mandatory provisions
- removal of complicated rollover provisions and simply extending a development permit currency period to either six or four years
- limiting local government liability for matters of Ministerial direction in planning schemes; and
- compensation exemptions for natural hazards

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In addition, amendments as a consequence of consultation since the draft bill was issued are welcomed including:

- flexibility in time allowed to prepare the Local Government Infrastructure Plan (LGIP) after 1 July 2016, subject to Ministerial approval
- the ability for infrastructure charges to be indexed on a three-year rolling average
- significantly broadening the purpose of the bill to include the environment and intergenerational equity among other matters; and
- the simplification of the final wording of the code assessment decision rules.

There are issues of minor nature which could be mentioned, however, focussing on reform outcomes, council would like to address only four key issues with the committee. These matters are of considerable concern for their potential to have substantial bearing on planning reform success or represent a lost opportunity for significant improvement. They are:

1. Removal of the lowest assessment levels. Concerns are again raised at the loss of compliance assessment, the impacts to performance-based planning and how transition will be managed.
2. The philosophical direction that assessment streamlining will take planning over time using the 'benchmark' rationale. Unintended long-term consequences for plan making through overt reliance upon codification may negate all the work achieved in the last decade towards performance-based planning emerging in SPA schemes.
3. The retention of complex and contradictory development permit lapsing provisions; and
4. The provisions for 'necessary' trunk infrastructure outside a Priority Infrastructure Area (PIA) or Local Government Infrastructure Plan (LGIP) remains uncertain with regard to local government duty to offset out of sequence development.

Further, the reform process has taken considerable time. In previous legislative changes the State has given little time to adapt and certainly almost no assistance in interpretation or implementation of new processes for industry and especially the assessment managers. That feedback on past experiences prompted initial implementation timeframes of around three months from enactment to commencement allowing training and new systems to be set-up. This timeframe was welcomed and later expanded to six months after further consultation. Now, the Department's advice is that the new legislation will not commence until 2017 a full 12 months after enactment. This is a considerable timeframe for reform that has been in the public arena for some years and assessment managers are well aware change is coming. Already, the level of consideration given to feedback indicates that the commencement of the planning bill will be facilitated in partnership rather than 'handover' which was the experience with SPA in 2009. In summary, 12 months seems an extended period in consideration of the work done to date and the knowledge of change already in the industry and retaining the six month timeframe will allow industry to get on with business.

**Issue 1: The bill will increase levels of assessment through the deletion of the two simplest and lowest assessment categories: self assessment and compliance assessment, making development require *more* assessment and not less.**

**Facts:** Section 44 and 45 of the bill sets out the categories of development. Changes add complexity because SPA clearly just states five levels in s231 while the bill separates this into two: Categories of *development* (s44) and Categories of *assessment (s45).* It is unclear why this is necessary:

> ***44 Categories of development***
> *(1) There are 3 categories of development, namely prohibited, assessable or accepted development.*
> ***45 Categories of assessment***
> *(1) There are 2 categories of assessment for assessable development, namely code and impact assessment.*

> ***231 Categories of development under Act***
> *(1) The categories of development under this Act are as follows—*
> *(a) exempt development;*
> *(b) self-assessable development;*
> *(c) development requiring compliance assessment;*
> *(d) assessable development;*
> *(e) prohibited development.*

The bill removes the two lowest levels of assessment: self-assessment and compliance assessment and splits the two assessable levels (code and impact). The net result is that assessment options require more input from the assessment manager than is currently the case. That is, it skips directly from accepted development which does not require a development permit to a full code assessment.

The legislation assumes that assessment managers and planning schemes are arranged in such a manner that assessment of 'accepted development' has an existing and robust framework upon which these 'accepted development' matters can be decided. The supporting notes state:

*For example, a categorising instrument may state that development for a multiple dwelling of no more than two storeys, within stated site coverage or plot ratio limits, and no higher than a stated height is accepted development in a medium density residential area.*

*If development does not have some or all of the stated characteristics to make the development accepted, the categorising instrument may state that development for the purpose is instead assessable development. (Planning Bill Explanatory Notes, p.50)*

This example is overly simplistic. It is unlikely that assessment is entirely based upon the three elements described and more likely that an extensive prescriptive code would be required to truly demote development to 'accepted'. This type of planning

has been slowly retracted in the transition from the highly prescriptive and codified *Integrated Planning Act (1999)* to the more flexible and performance-based *Sustainable Planning Act (2009).* Without lower assessment levels, where doubt exists and robust codes are not evident, simple development may be elevated to full code assessment.

**Discussion:**

The net result of the removal of the two low-risk assessment levels can also be expressed through the following concerns:

1. Council is concerned that removing these levels of assessment will have the opposite of the desired simplification effect: It is anticipated that current low-risk assessments will be pushed into higher standard assessment categories. Assessment managers will elevate development to a higher assessment category because they do not have robust codes which allows development to proceed as acceptable. That is, paragraph one (above) from the explanatory notes ***assumes*** schemes are written with a detailed code allowing this scenario to proceed. This is simply not the case.

2. Where development is currently self-assessable and compliance assessment – which require minimal assessment and lower fees, these will translate under the bill to a high levels of assessment (code) requiring application to be lodged and assessment under the ***full IDAS process*** as prescribed by the bill and full fees to be paid, adding cost to development in fees and time, unwanted applications and a rigid three tiered level of assessment system. All simple works will involve code assessment and require a decision notice and follow the IDAS timeframes. The characteristics of this are likely to be:

    - increased volume of work for council in following IDAS process and issuing decision notices so fees would not be as cheap as current compliance assessment
    - likely to be processing large numbers of permits which have little weight (i.e. processing time exceeds assessment times)
    - assessment criteria is set at the benchmark and not judged on merits (prescription and not performance)
    - industry may see this as additional time required or over regulation of minor matters because almost all permits will have a further approvals required.

3. Assessment mangers do not want to process and entire IDAS application to approve landscaping, survey plans, stormwater management plans and the like. Therefore, it is likely that parallel systems will be developed outside the bill which is neither ideal nor desirable. There are two scenarios for this:

    Option one would be to create a system which mirrors compliance assessment outside the IDAS process and charge a fee for assessing documents such as storm water management plans and landscaping and footpath plans or survey plan endorsement. This scenario would have the following characteristics:

    - likely to be seen as additional red-tape by industry

- outside the IDAS process so it does not appear as a further approval required on the decision notice, adding a level of complexity for landowners and opportunity for the development requirements to be misunderstood.
- thus, non-standard conditions would then need to reflect further actions to be taken
- no timeframes
- no decision notice, just an exchange of letters
- assessment criteria is flexible
- no appeal rights

Option two would involve drawing all the compliance matters into the benchmark system. This will significantly increase the size of the assessment tables within the planning scheme, require planning scheme amendments and adding assessment benchmarks for all simple compliance assessment task including:

- engineering standard drawings and construction guides/ drawings
- survey plan endorsement guidelines
- policy documents
- landscaping guidelines
- Australian standards, WSUD and Austroads sections where applicable etc.

Developers would then be required to lodge a full code-assessable application for minor matters as they cannot be simply 'accepted' without Council approval when council assets or survey plan endorsement is considered.

4. Over time, in order to achieve the perceived lower / simpler assessment against benchmarks (as described in the example in the explanatory notes above) planning schemes will become overly codified and threaten the culture of performance-based planning. That is, assessment will focus on achieving the measureable benchmarks of plot ratio, height, density or what is commonly refer to as box-ticking, instead of focussing on overall outcomes. The example given in the explanatory notes assumes a one-size-fits-all codification approach which planners know is simply not achievable due a range of localised, site and infrastructure issues which make assessment necessary and thus the transformation to performance-based planning.

5. The public is not well enough informed about the planning system to rely upon compliance with 'accepted' development which will place pressure on compliance activity in the future. That is, the current framework allowed the planning system to slowly inform stakeholders about their responsibilities through compliance and self-assessment while still maintaining a minor link with the assessment system. Great progress has been made simplifying assessment through compliance, risk smart, and self-assessment codes. Without lower levels of assessment this slow education and risk lowering is not possible.

A significant number of local governments have only recently completed the adoption of new schemes under SPA using a low-risk performance-based approach including Gold Coast, Brisbane, Townsville, Morteon Bay, Mackay, Whitsunday, Rockhampton,

Western Downs and the list goes on. Transitioning new schemes to a different philosophy is problematic for translation because codes will not be drafted to facilitate 'accepted development' and thus self and compliance will convert to higher assessment levels.

**Recommendation:** That the compliance assessment level remains unchanged, to offer low-risk low-cost, shorter timeframe assessment opportunities.

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**Issue 2: The philosophical direction that the 'benchmark' rationale may take planning over time. Unintended long-term consequences for plan making through overt reliance upon codification may negate all the work achieved in the last decade towards performance-based planning emerging in SPA schemes.**

**Facts:** Section 43 outlines the definition of a categorising instrument and specifically s43 (1) (c) mentions the assessment benchmarks against which development can be assessed.

Importantly, this means that an assessment benchmark **must be a document or matter mentioned in planning scheme** (categorising instrument). It cannot be a survey plan endorsement guideline, a landscaping for private development guideline or any other policy which is not specifically identified in the categorising instrument. All benchmarks must be reflected in the planning scheme tables of assessment. The explanatory notes state:

*The description of the matters against which development must be assessed under both code and impact assessment has been simplified and consolidated into the single term - "assessment benchmarks", as indicated in clause 43. This reflects the intention that, regardless of the category of assessment, or the degree of specificity with which they are expressed, assessment benchmarks are essentially all essentially the same type of thing – a "ruler" or "gauge" against which proposed development is measured to determine compliance.*

*The Bill does not seek to define or constrain what a benchmark can be. It is deliberately intended that this be left to individual planning instruments. Under the old Act, the concepts of "codes" and other laws and policies relevant to assessment were similarly unconstrained, however it is appears clear assumptions had developed about the nature and form of each, which may among other things have contributed to a proliferation of codes under planning instruments.*

*An assessment benchmark may take the form of a "traditional" code, with a code purpose, "performance outcomes" and "acceptable solutions". Alternatively for simple works or other development of a technical nature, an assessment benchmark may take the form of a simple list of standards to be met.*

There are fundamental concerns surrounding the long-term consequences of the benchmark assessment philosophy. Not especially because of the way it may function,

in fact the description in the notes is extremely similar to the situation which now occurs. The concern lies with the word, its meaning and inference and, as stated in the note that fact that it is a rule or gauge. This reliance upon benchmarks infers that the benchmarks are:

- comprehensive - covering all potential scenarios a planner may expect from a particular defined use in that zone
- measureable - accompanied by statistical benchmarks for compliance such as heights, distances, density, site cover, car parking numbers, etc.; and
- certain - that there are no other options, solutions, innovations, methodologies that this land use could employ in that zone to allow approval.

Whilst it is understood that the benchmark can be in any format (provided it is mentioned in the scheme), the inference that somehow utilising a 'benchmark' will alleviate the *'proliferation of codes'* is not understood. In fact, the focus on a measureable benchmark is thought to exacerbate this situation.

According to the benchmarking philosophy, proposals would generally be approved and any solution other than the performance outcome could still be allowed if it could be conditioned to comply. Whilst it is absolutely understood that the intention is that the benchmarks can encompass performance based statements, overall outcomes or statements of intent, the concern is that this will not be elucidated to the wider industry. Over time, or through lack of understanding, the simpler route may be taken in the form of statistical benchmarks. These concerns have been raised with the department who assure planners that on-going assistance and education will not allow codification of planning.

In terms of transitioning, some planning schemes may lack sufficient 'benchmarks' in their codes. Where existing schemes do not have sufficient rigour and automatic transitioning is required as described in the bill, Councils may decide to adopt a more cautious approach in making development impact assessment rather than risk code assessment with an older scheme absent or measurable and clear benchmarks, undoing the reform intent. In addition, this practice of benchmarking potentially reinforces the unwanted view that development must always comply with rigid measureable outcomes in order for it to be desirable.

In terms of plan making under the bill, the emphasis encouraged over the last seven years through the SPA on performance based planning and strategic intent may diminish, with a change in focus entirely upon the codes and benchmarks. As a result, schemes may lose flexibility for technical assessment, which the SPA has encouraged.

**Recommendation:**

That the long term effects of the 'benchmarks' philosophy on the culture of assessment and planning in Queensland, which has slowly been transitioning from the IPA codification to SPA performance based planning, be considered and the reference to benchmarks removed from the bill and the route to performance based planning continue as it has under SPA.

**Issue 3: The retention of complex and contradictory development permit lapsing provisions.**

**Facts:** The lapsing provisions are reflected in multiple sections of the bill. Section 85 provides lapsing provision at the end of the currency period while Section 88 deals with development that has started but is not complete.

> ***85 Lapsing of approval at end of currency period***
> *(1) A part of a development approval lapses at the end of the following period (the currency period)—*
> *(a) for any part of the development approval relating to a material change of use—if the first change of use does not happen within—*
> *(i) the period stated for that part of the approval; or*
> *(ii) if no period is stated—6 years after the approval starts to have effect;*
> *(b) for any part of the development approval relating to reconfiguring a lot—if a plan for the reconfiguration that, under the Land Title Act, is required to be given to a local government for approval is not given to the local government within—*
> *(i) the period stated for that part of the approval; or*
> *(ii) if no period is stated—4 years after the approval starts to have effect;*

This section seems clear: a permit lapses in either six years or four years. In relation to section 85 the explanatory notes state:

*"The clause [6 & 4 year terms] is intended to ensure development approvals are subject to lapsing arrangements to ensure that development conforms to* ***current public expectations*** *about the nature and standard of development. (Explanatory Notes, p.93)*

The section also gives the assessment manager the option to provide an alternative period (s 85 (1) (a) (i)) which is currently the case and supported by Council:

*The ability for the assessment manager to vary the currency period as part of the development approval is important, as the nature, scale and staging of development can vary greatly across development approvals. For example, a large, complex residential project may have one or more preliminary approvals for different aspects of the use and require reconfiguration of the premises. In this case it is important that the overarching approvals remain in place for the life of the construction phase of the development, which could be planned to occur over a ten or more year period.*

These initiatives are supported including lengthening of timeframes for the Material Change of Use component and deletion of the complicated roll over provision.

However an additional section in the notes complicates and contradicts the currency periods matter. The fact that developments which are very old and partially started are able to stay alive under the current SPA legislation was raised at a department-facilitated workshop, where the verbal response given indicated that this is not the Department's intent. This is supported by the above statement from the notes about **permits remaining in line with current community expectations.**

Therefore, it was a surprise to see these contradictory and complicated provisions remain. In contrast to that statement on page 93 of the notes, page 94 states (emphasis added):

*A development approval **does not lapse** if the first change of use happens or a plan for the reconfiguration is given to the local government or the work substantially starts within the currency period. **For a material change of use the entire use is not required to commence in order to preserve the approval. Likewise, for reconfiguring a lot** "a" plan of subdivision (not all of the plans for the approval) is required to be submitted.(p.94)*

This note effectively means that permits cannot lapse once partially started.

**Discussion:**

The ability of a permit to remain alive in perpetuity is given effect through the use of the word 'part' in section 85:

*(1) A **part** of a development approval lapses at the end of the following period (the currency period)—*
*(a) for **any part** of the development approval relating to a material change of use—if **the first change of use** does not happen within—*
*(i) the period stated for that part of the approval; or*
*(ii) if no period is stated—6 years after the approval starts to have effect;*
*(b) for any **part** of the development approval relating to reconfiguring a lot—if **a** plan for the reconfiguration that, under a regulation, is required to be given to a local government for approval is not given to the local government within— the period stated for that part of the approval; or*
*(ii) if no period is stated—4 years after the approval starts to have effect;*

This means that if a permit is given for 500 lots, simply by having one lot created or one small stage, the permit can never lapse. Similarly, a single permit for multiple uses: dwelling units, catering shop and shops, under these provisions need only have one part of the use commence in order for the permit to never lapse. This has resulted in permits remaining alive for many years and no opportunity for Council to levy current developer contributions, bring the development in line with current storm water management practices or update to current policy and legislation– thus these developments are not in **line with current public expectations** as is the stated intent in the explanatory notes.

In addition, it is unclear what section 88 is meant to be achieved. It states:

> ***88 Lapsing of approval for failing to complete development***
> *(1) A development approval, other than a variation approval, for development lapses to the extent the development is not completed within any period or periods required under a development condition.*

Section 88 of the bill only relates to a currency period written in the *conditions* and is drafted different to s85 which talks about lapsing of the *permit*. If the intent of s85 is that all permits should lapse after six or four years then s88 is not necessary. The decision conditions rules in Ch 3, Div 3, s63 already states that conditions can apply timeframes.

**Recommendation:** That section 88 is deleted and the wording of section 85 is amended as follows:

~~**88 Lapsing of approval for failing to complete development**~~

~~*(1) A development approval, other than a variation approval, for development lapses to the extent the development is not completed within any period or periods required under a development condition.*~~

**85 Lapsing of approval at end of currency period**

*(1) A* ~~***part of a***~~ *development approval lapses at the end of the following period (the currency period)—*
*(a) for* ~~***any part of the***~~ ***a*** *development approval relating to a material change of use—if the* ~~***first***~~ *change of use does not happen within—*
*(i) the period stated for that part of the approval; or*
*(ii) if no period is stated—6 years after the approval starts to have effect;*
*(b) for* ~~***any part of the***~~ ***a*** *development approval relating to reconfiguring a lot—if* ~~***a the***~~ *plan for the reconfiguration that, under a regulation, is required to be given to a local government for approval is not given to the local government within— the period stated for that part of the approval; or*
*(ii) if no period is stated—4 years after the approval starts to have effect;*

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**Issue 4: The provisions for 'necessary' trunk infrastructure outside a Priority Infrastructure Area (PIA) or Local Government Infrastructure Plan (LGIP) remains uncertain with regard to local government duty to offset out of sequence development;**

The bill retains the trunk conversion provisions with the addition to limiting the timeframe for an application to be lodged within one year of the development approval having effect – Clause 138(2). The conversion process is unnecessary and adds an additional process. The applicant has the opportunity to pursue a negotiated decision notice and if still not satisfied, appeal the council's decision.

Furthermore, a trunk conversion has the potential to impact council's infrastructure planning, Long Term Financial Forecast (LTFF) and financial sustainability by introducing potential offset/refund requirements for development that was not anticipated. To minimise the potential for this into the future it is likely that councils will utilise infrastructure agreements more regularly and/or reduce the risk of potential trunk conversions through the trunk conversion provisions within an AICR.

If the trunk conversion provisions are to remain several issues should be addressed including the time at which an application can be made and the power for council to then amend the development approval (for a conversion of non-trunk to trunk).

The inclusion of Clause 138(2) will help to provide certainty for council in relation to the timeframe for which an application for trunk conversion could be made, but the increase in the timeframe from other appeal provisions is queried. What is the rationale for providing 12 months for this element of development where appeal provisions on other elements is 20 business days? Where change is required outside the normal appeal timeframes, a change application can be made.

In relation to Council's ability to amend a development approval, the existing provisions of SPA and the proposed Bill, only allow for Council's to impose necessary infrastructure conditions (Clause 141(3)). This does not address additional trunk infrastructure costs, as there is no provision to include extra payment conditions. This has the potential for additional trunk requirements to be either considered as necessary trunk then eligible for offset/refunds, or not implemented as part of the development and becoming an additional cost to the Council and ratepayers. If trunk conversions provisions are to remain, Council should as a minimum be able to condition for trunk infrastructure in the same way as if it were a development application.

**Recommendation:** The preferred option would be to remove the trunk conversions provisions altogether. If this does not occur then it is recommended that:

- their application is limited to development within the PIA only; and
- section 138 (2) should state that conversions must be lodged in the accepted appeal timeframe of 20 business days; and
- Section 141(3) should be amended as follows:

*(3) Within 20 business days after making the decision, the local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure and/or a condition for extra trunk infrastructure costs.*

I trust this submission contribution is helpful. Please contact Gerard Carlyon, Director Development Services, in relation to the submission on 4961 9110. I look forward to further consultation with the legislative committee.

Yours faithfully,

**Jason Devitt**
*A/ Chief Executive Officer*