Submission No. 104
11.1.13

NOOSA COUNCIL

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18 January 2016

Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Sir/Madam

RE: Submissions on State Government Planning Bills and Shadow Ministers Planning & Development Bills

Noosa Council wishes to make the following submission in relation to the three Government Planning Bills introduced by the Deputy Premier, Hon Jackie Trad MP on 12 November 2015 and to the three Private Member's Bills introduced on 4 June by the Shadow Minister for Infrastructure, Planning, Small Business, Employment and Trade, Mr Tim Nicholls MP.

Below is specific feedback on these respective Planning Bills.

Submission to the Planning Bill 2015, Planning and Environment Court Bill 2015, and Planning (Consequential) and other Legislation Amendment Bill 2015

A. The Planning Bill and Planning & Development Regulations are not clear in the decision rules, particularly for those applications which conflict with the planning scheme. It is considered that where an application conflicts with the planning scheme, the onus of proof should be on the applicant to prove the merits of the proposal and justify any inconsistencies. Further, clear grounds and/or reasons should be required to be provided as part of the decision in order to ensure a transparent, accountable development assessment system for the community;

B. The definition of material change of use should not be limited to only increases in scale and density of the premises, as there are circumstances where reducing the scale of the development does materially change the site's use. This is particularly relevant for developments which include an important community use or the like. For example removing the nursing home component from a retirement village may have a significant social impact on an area;

C. Case law on the SPA definition of 'use' makes it clear 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 definition proposed in the Bill related to 'use' fundamentally 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 regulation and enforcement of activities that were not

contemplated as part of a development approval (although ancillary) may prove problematic for councils and undermine local communities' understanding of the development process;

D. The removal of the requirement to consider whether a person may make a properly made submission objecting to change from the minor change test is likely to undermine the communities input into development assessment matters, particularly where they may be impacted upon by a proposed change;

E. The Planning Bill maintains and extends the time frame for applicants to be able revive a development application where it lapses. This ability is not consistent with the principles for the DA Rules of being an applicant driven process, and is likely to create administrative problems for councils and lead to significant confusion for the community, particularly submitters;

F. In the absence of demonstrable net benefit, no change is sought to the existing levels of assessment or the terms used (i.e. code and impact) in the new legislation;

G. The proposed extension of Infrastructure Designation to privately owned infrastructure is a significant policy shift and would remove due consideration by the community, third party appeal rights and the need to comply with the planning scheme. Infrastructure charges revenue would be forfeited and would result in a considerable cost shift onto councils and their local communities. Statutory requirements around community infrastructure should at a minimum enable council to have a statutory role similar to a referral agency and allow consideration of local planning instruments in the designation process;

H. Key process matters (including the development assessment process) should not be moved from the principal legislation and into subordinate legislation, given the potential negative outcomes for Councils and the broader community. The framework should be located in one statutory instrument to ensure genuine review processes cannot be expedited without due consultation and engagement;

K. The ability to opt-out of an information request in the Development Assessment Rules is likely to add significant complexity to the development assessment process without adding value as an applicant has multiple options in regard to giving a response to a request for further information. It is critical that Council's and state agencies retain the ability to raise issues and identify further information that is required in order to fully understand and assess development proposals. The opt-out step should be deleted from the Development Assessment Rules;

L. The ability for applicants to determine at what point during the assessment stage public notification will occur is likely to significantly complicate the development assessment process in contravention of the intended outcome. This 'floating' public notification will also impact on local government systems and process due to inconsistency in regard to when public notification will take place. Further the purpose of public notification is to assist community members in being informed of the proposed development, yet a floating public notification undermines certainty and community confidence in understanding the planning processes and development proposals. It is critical that the community have all the information about a

development proposal, including responses to Council's information request, when making submissions to a development application. The removal of existing requirements for notices to be placed in local newspapers is also not supported as it may limit the ability for the community to be aware of development proposals and engagement in planning and development decisions;

M. The Planning Bill introduces the ability for costs to be awarded in regard to enforcement notice appeals. However it is unclear in the drafting as to the rules when costs would be awarded and it is considered that the same criteria as proposed for development application appeals should apply to enforcement notice appeals; and

N. Attachment 1 includes specific comment on the Planning Bill provisions relating to Infrastructure Charges.

Submission to Planning & Development (Planning for Prosperity) Bill 2015, Planning & Development (Planning Court) Bill 2015 and Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015

A. The Planning & Development (Planning for Prosperity) Bill and associated Regulations are not clear in the decision rules, particularly for those applications which conflict with the planning scheme. It is considered that where an application conflicts with the planning scheme, the onus of proof should be on the applicant to prove the merits of the proposal and justify any inconsistencies;

B. The Planning & Development (Planning for Prosperity) Bill includes a clause that allows the chief executive to keep a list of persons who are appropriately qualified to be an assessment manager for a development application (other than local governments). It is unclear whether this will result in an additional class of private entities being identified as assessment managers in place of councils for particular applications. This is of significant concern as experience has demonstrated that private building certification has not always been successful in implementing planning scheme requirements. This is particularly important for any operational works applications that include works which are to become a public asset and be maintained at ratepayers expense;

C. The Planning and Development (Planning Court) Bill maintains the specific criteria for making a costs order introduced with the Sustainable Planning and other Legislation Amendment Bill 2012. These rules do not serve the public interest of enabling the community, submitters, local governments and developers to dispute planning decisions due to the risk and uncertainty of the Court awarding costs against them. The previous Court powers to award costs in circumstances where cases were frivolous or vexatious or instituted primarily to delay or obstruct are considered sufficient protections from abuse of the system;

D. Particularly inappropriate is the power to order costs against someone who has an interest in the proceeding but is not a party to the proceeding (such as a submitter). This would effectively mute a community concerned about a development proposal.

E. The definition of material change of use should not be limited to only increases in scale and density of the premises, as there are circumstances where reducing the scale of the development does materially change the site's use. This is particularly relevant for developments which include an important community use or the like. For example removing the nursing home component from a retirement village may have a significant social impact on an area;

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F. The Planning & Development (Planning for Prosperity) Bill maintains and extends the time frame for applicants to be able to revive a development application where it lapses. This ability is not consistent with the principles for the DA Rules of being an applicant driven process, and is likely to create administrative problems for Councils and lead to significant confusion for the community, particularly submitters.

G. As Noosa Council values community engagement in its planning and development decisions, we have concerns regarding changes that may serve to inhibit, obstruct or minimise resident input. Reductions in public notification periods and removal of existing requirements for notices to be placed in local newspapers are thus not supported and there should be a minimum notification period for applications of 20 business days. We also have concerns about the proposal that an applicant may choose to publicly notify a development application as early as 5 days after the development application is properly made. We believe submitters are better served under the current arrangement where public notification is able to occur following the information request period;

H. Noosa Council has long enjoyed a locally popular planning scheme that is in part premised on studies and deliberations concerning the ideal carrying capacity for our shire. We have concerns that these bills elevate the power of the State and the Minister and may herald arbitrary enlargements of the Urban Footprints within the Noosa Shire area;

I. Noosa Council does not support proposed changes relating to Community Infrastructure designation that will remove local government powers to designate infrastructure. Nor do we support the proposal for the State Planning Minister to be the sole designating Minister for Infrastructure Designation in Queensland and to thus choose what developments can proceed, be they public or private infrastructure, and have them exempt from planning scheme requirements and from infrastructure charges; and

J. The maximum infrastructure charges prescribed by legislation remain unchanged since being introduced in 2011. Infrastructure charges have dropped in real terms due to indexation not being applied. This prohibits councils from making charges that reflect the actual current costs of building infrastructure. Thus the proportional costs of public infrastructure related to new development are being met by the community. Meanwhile the State Government adds 3.5% annual indexation to its own fees and charges. Noosa Council thus requests that annual automatic indexation of the current maximum capped charges be introduced to reflect increasing costs of providing infrastructure.

Yours faithfully

Brett de Chastel
Chief Executive Officer

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ATTACHMENT 1

Review of Draft Planning Bill 2015_Chapter 4 Infrastructure

Part 2 Provisions for local governments

Clause 110 Regulation prescribing charges: Item (2)&(3): and

Clause 112 Contents—general: Item (4)(b)(ii) & (5)

Indexation is an ongoing issue since the Minister has not changed the maximum amount since its introduction in June 2011 yet costs for providing infrastructure have continually increased and offsets for trunk infrastructure are subjected to actual costs.

Also, the proposal should a change to the charge ever occur, is convoluted and over complicated. The maximum charges per the SPRP or new Regulation should simply be applied from a base date and then simply indexed by an appropriate ABS QLD index such as CPI or Road & Bridge index from the base date to the date of issue and to the date payment is made.

Normal indexation of contributions/charges has been standard practice in the past for many years both in government & in private industry contracts.

This issue has been raised to the State on many previous occasions with no rectification to date (i.e. the Community is further subsidising development in this regard).

Clause 111 Adopting charges by resolution

Item (3)(a) – Concern is raised on potential legal implications in changing from: "land" to "premises".

Item (3)(c) - Appears to be simply changing the legislation location where charges don't apply to designated land i.e. SPA 205 **however,** the wording could have additional consequences where charges may now not apply as it could possibly be also designating a department rather just relating to the land?

Clause 117 When charge may be levied and recovered

Item (3)(b) - Should change 10 days to 20 days so as to match (c) & (d) & (8)(b)for consistency.

Item (12)(b) – A charge is often not paid by an applicant who may be just acting for a client and having no further involvement in the development from when an approval may be given. Also for recovery, a charge is a Rate whereby payment is ultimately obtained from the owner of the land. This has the potential to cause additional difficulty should recovery action have to be taken.

Suggest change to: is payable by a payer with the ultimate responsibility for payment lying with the land owner. (refer to definition of payer in Schedule 1).

Item (12)(c) – Concern is raised on potential legal implications in changing from: attaches to the "land" to "premises";

i.e. per section 142 (1) A levied charge is, for the purpose of its recovery, taken to be rates of the local government that levied the charge. Where a Rate is a charge against the Land & not a premises refer Local Government Act 2009 clause 93.

Clause 118 Limitation of levied charge

Item (3)(a) – A previous use that is no longer taking place may not have previously paid or contributed to all the current networks that now apply today i.e. typically for all transport

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or stormwater networks. This should be changed so that that a previous use that no longer exists, will only be credited for those networks to which they have previously contributed to.

Item (3)(b)(i)&(ii) - Concern is raised on potential legal implications in changing from: "land" to "premises".

Clause 119 Requirements for infrastructure charges notice

Item (1)(c) Concern is raised on potential legal implications in changing from: "land" to "premises".

Item (2) – Could be difficult to know when or when not to apply this. An applicant won't know whether trunk infrastructure will be conditioned in the original approval so will still cause difficulties in the first instance. How offsets & refunds are to be applied should all be stated in resolutions.

Suggest changing (1)(f) & delete (2) to:

(f) whether an offset or refund under this part applies and, if so, information about the offset or refund, including when the refund will be given may follow once details have been fully determined.

Item (3) – Changing the term from an "information" to "decision" notice is inappropriate as this term relates specifically to the development approval itself. Should therefore remain as an "information" notice as that is what it actually is in order to avoid any confusion.

Clause 123 Representations about infrastructure charges

Item (6) – Should change 5 days to 10 days for consistency with (3) & other sections for consistency.

Clause 126 Necessary infrastructure conditions

Item (2)(b) - The issue remains in that any necessary infrastructure condition is automatically considered as "trunk" and thereby is fully off-settable under clause 127 even though it may be primarily required for the development itself.

Clause 127 Offset or refund requirements

Refer also to comment to Clause 126 item (2)(b)

There are situations where necessary conditions are primarily required for the development itself & therefore such offsets should just apply that amount that can be apportioned to other users and not the full cost. It is not equitable or fair & reasonable that Local Governments (i.e. the community) should have to bear full costs to facilitate individual development's needs.

Item (4) –the latest time proposed is simply not workable & also may not be equitable to either Development or Local Government depending on the specific scenario that arises. Also LGIP provision dates may be stated over a period (i.e. 2011–2016).rather than a specific date so then which date should it be? (i.e. 2011 or 2016?)

Possible Scenario 1:

The LGIP infrastructure proposed date is say 2016 and the construction start date & completion by the developer is later say 2025. Then under this proposal, the refund would need to be given immediately before the infrastructure is even provided. This is totally unacceptable & unequitable for Local Gov't.

Possible Scenario 2 (reverse of 1):

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The LGIP infrastructure proposed date is say 2025 and the construction start & completion date by the developer is earlier say 2016. Then under this proposal, the refund would only need to be given by 2025 some 9 years after provision & would be unequitable for the developer.

The timing of refunds should be left to individual LG resolutions to cater for their particular circumstances and ability.

Clause 132 Refund if development in PIA

Item (2)(a) - Why should any refund apply if the development exceeds the scale of development from that assumed in the LGIP per clause 130 (2)(b). This is inequitable to Local Government where the development is not complying with Planning Schemes, LGIP's & the integrity of the infrastructure planning statutory guidelines.

Item (2)(b) – How can this be the subject of a charge when the charge is not directly linked to the cost of infrastructure & cannot change the maximum allowable charge to include this cost?

Clause 136 Application of this subdivision

Priority Infrastructure Plans (PIPs) / Local Government Infrastructure Plans (LGIPs) are prepared in accordance with specific statutory guidelines for the purpose of identifying "trunk" infrastructure which is:

- *integrated with the land use planning identified in the planning scheme;*
- *necessary to support future urban development efficiently (cost effective); and*
- *financially sustainable (capable of being funded by the local government) and aligns with the local government's Long term financial forecast (LTFF) and Asset management plans (AMPs).*

Non-trunk infrastructure by its definition is development infrastructure that is not trunk infrastructure and is applied under clause 143 (2) being primarily required by or due to the development itself i.e.

- *(a) a network, or part of a network, internal to the premises;*
- *(b) connecting the premises to external infrastructure networks;*
- *(c) protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.*

The concept of allowing applications to convert non-trunk infrastructure to trunk at a later time is fundamentally disagreed with since it:

1. is contradictory to the infrastructure planning process that has already undergone full public consultation and State reviews;
2. allows development the potential to transfer its own development costs to be instead funded by the local government and community; and
3. has the potential to undermine the local government's ability to provide and fund an efficient and sequentially planned "trunk" networks should unknown offsets arise to reduce the anticipated funding stream.

Clause 137 Application to convert infrastructure to trunk infrastructure

Item (2) – whilst the time for making such applications is proposed to be limited to 1 year, it still creates bureaucratic duplication of additional work for Local Government at a later time. All this should be undertaken through representations during the normal negotiation stage process.

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Clause 138 Deciding conversion application

As per clause 137 comment

Clause 139 Notice of decision

Item 139 (1) – As for comment to 119 Item (3) – Changing the term from a "notice " to "decision" notice is inappropriate as this term relates specifically to the development approval itself. The wording should therefore remain simply as a "notice" to avoid any confusion.

Clause 140 Effect of and action after conversion

As per clause137 comment

Item (5) – Incorrect cross-reference to 248 that has no relevance to this section (i.e. refers to Enforcement notices in Part 4 Appeals to P&E Court)

Part 4 Infrastructure agreements

Clause 150 Content of infrastructure agreement; and

Clause 153 When infrastructure agreement binds successors in title

Concern is raised on potential legal implications in changing from: "land" to "premises".

Chapter 6 Dispute resolution

Part 3 Appeals to tribunal, Item 242 Conversion applications; and

Part 4 Appeals to P&E Court, Item 253 Conversion applications:

Item (1) – The conversion application has already undergone the assessment process under Local Government resolutions as governed by State regulation. A decision under this process should therefore be binding and not subject to further appeal. Furthermore, the clause provides an open ended avenue of appeal as there are no grounds provided on the basis for making such an appeal against the refusal that has already followed due process.

Chapter 8 Transitional provisions and repeal

Clause 320 Infrastructure charges notices

Item (2) – The statement "before or after" is confusing & unclear.

- if a notice relates to an approval that is changed or extended before the old act is repealed then surely it has already been finalised under the old Act & should continue to apply under 320 Item (1) & Item 321.
- Only "after" should apply to Item (2)

Clause 321 Levied charges

Item (2) – Ok but should change "after 3 July 2014" to "from 4 July 2014" for simplicity & consistency in referencing the stated legislative date.

Clause 323 Infrastructure charges resolutions

Item (1) appears a bit confusing as a PIP is also taken to be a LGIP under the old act.

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Item (4)(b) - The date for having a LGIP has been automatically extended to 1 July 2018 without the need for an application to the Minister to extend.

Suggest proposed amendment to SPA in "Local Government and Other Legislation Amendment Bill" is also changed to match this bill for consistency & simplicity.

Clause 326 Infrastructure conditions—change or extension approval

Item (5) – The statement " before or after" is confusing & unclear.

- if a notice relates to an approval that is changed or extended before the old act is repealed then surely it has already been finalised under the old Act & should continue to apply under 320 Item (1) & Item 321.
- Only "after" should apply to Item (5)