Submission No. 109
11.1.13

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Redland
CITY COUNCIL

18 January 2016

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

Dear Sir/Madam,

Re. Draft Planning Bills

Redland City Council welcomes the opportunity to make a submission on the Planning Bills currently before the Infrastructure, Planning and Natural Resources Committee, inclusive of both the State Government's and opposition Private Member's Bills, intended to reform the Queensland planning system. Please accept this letter and attachment as a formal submission on the bills.

Having regard to the Private Member Bills currently before the Committee, it should be noted that Council is not supportive of any reform process being driven through an opposition private member's Bill. Rather, acknowledging the additional community consultation that has been undertaken by the Department of Infrastructure, Local Government and Planning over the past year, it is more appropriate to align any reform with that of the State Government agenda of the time. This is considered critical to ensure certainty throughout the industry that any reform has the complete backing of the government and will not be the subject of further incremental changes throughout the current political term.

Having regard to the Government's Bills before the Committee, on a general note, Council is broadly supportive of the proposed changes identified within the bills. In principle, these changes are seen as a positive step forward in progressing the State's planning reform, providing greater flexibility to local government in its plan making processes and ensuring appropriate public participation is maintained in the planning system.

While generally supportive of key elements within the proposed legislation to replace the *Sustainable Planning Act 2009*, Council has identified a number of concerns with the draft Bills which it believes require further consideration and clarity of interpretation. These matters are outlined in the attachment to this letter and have previously been raised in a submission to the Department of Infrastructure, Local Government and Planning during the public consultation

period on the draft Bills undertaken last year.

Thank you for the opportunity to review and provide comment on the Bills. If you or any of your officers require further information or clarification on any matters raised in Council's submission please contact City Planning and Assessment, on

Yours sincerely,

David Jeanes
Group Manager – City Planning and Assessment

Attachment – Submission items for further consideration

The following points are provided for further consideration by the Infrastructure, Planning and Natural Resources Committee before reporting to Parliament by 21 March 2016.

1. Review the proposed definition of "use"

The definition of a "use" as proposed in the Planning Bill 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. While the flexibility of including broader activities as part of a use may be beneficial in certain circumstances, it is suggested that the regulation and enforcement of activities that were not contemplated as part of a development approval (although ancillary) may prove problematic for Councils and potentially undermine local communities' understanding of the development process.

Recognising these circumstances, it is recommended that the existing Sustainable Planning Act definition be retained, requiring an ancillary use to be both incidental to and necessarily associated with the use of the premises. Maintaining the current definition will provide greater certainty for both the public and local governments when considering development applications.

2. Deciding Code Assessable Applications

It is noted that as part of the consultation draft of the Planning Bills, the Department of Infrastructure, Local Government and Planning offered two options for the assessment of Code Assessable applications, with the option establishing a presumption in favour of development carried forward to the Bills before the Committee.

Redland City Council recommends the removal of the presumption in favour of approval for code assessable applications and reinstatement of option 2 presented in the consultation draft Bills. This option effectively operates under similar decision rules as 'merit applications', however within a bounded assessment process, considered against only the prescribed benchmarks. Under this process, any presumption in the decision would effectively be derived directly from the relevant assessment benchmarks for the development.

This bounded assessment process is considered to provide greater certainty to applicants and practitioners as well as the broader community in terms of development outcomes that can occur under a code assessable application.

3. Support for ongoing concerns raised by LGAQ regarding infrastructure reform

The infrastructure provisions included in the Planning Bill largely replicate the provisions from the Sustainable Planning Act 2009 that commenced on 4 July 2014, with requisite changes to terminology, and in recognition of the discontinuance of State Planning Regulatory Provisions. Redland City Council, principally through representations made by LGAQ, have remained vocal on a number of the infrastructure reform items that continue to remain of relevance moving forward under the draft planning bills, including:

- Restoring the ability for a local government to set conditions relating to trunk infrastructure;
- Providing equitable offset or refund requirements to ensure financial sustainability of Council's;
- Removing the unnecessary red-tape application process of converting trunk infrastructure conditions; and
- Improved Community Infrastructure Designation processes, including for local government.

Redland City Council continues to support LGAQ in its representations to the State Government and through its submission to the Committee to have the above reform matters taken into further consideration as part of the review of submissions for the draft Planning Bills.

4. Publication of reasons for decision on the decision notice

Council is supportive of introducing new measures intended to create a more open, transparent and accountable planning system. Notwithstanding, it is considered that the requirement to include reasons for a decision within the decision notice is unnecessary, placing an additional administrative burden upon local government. Further, it is seen that the publishing of reasons for a decision on a decision notice may not provide the full context behind a planning assessment decision.

It is recommended that the requirement for a decision notice to include reasons why the application was approved be removed from the Planning Bill.

5. Opportunity to tighten and improve offences and enforcement provisions

It is acknowledged that the changes to offences and enforcement are minor in nature, and largely reflect the provisions provided under the Sustainable Planning Act. Notwithstanding, the review of the Planning Bills has identified a number of opportunities to improve and strengthen the offences and enforcement provisions available to local government. The following comments and suggested modifications are provided in relation to specific sections of the Planning Bill for further consideration by the Committee:

5.1 s88 – Lapsing of approval for failing to complete development

This provision, though essentially similar to the current Sustainable Planning Act 2009 provision, continues a problematic scenario where development that is not completed is also typically not unlawful either. As such there is no mechanism to have the unfinished development completed.

For example, a person commences construction of a dwelling house during the currency period but does not complete it before the lapse date. In the event that they perform no further works post the lapse date, (as often occurs in Redland City on the Southern Morton Bay Islands) there is no development offence occurring. That is, the works prior to lapsing are undertaken lawfully under the development approval and if no further physical works are performed Council cannot pursue the owner for carrying out development without an effective development approval. In addition, as the development approval has lapsed, Council cannot look to have the works completed as a breach of development conditions.

Based on these considerations, it is suggested that a development offence be added either to this section or separately in the list of development offences, stating that it is an offence to not complete development, including fulfilling all applicable development conditions and compliance within a negotiated period following the lapse date for the development approval.

5.2 Part 2 - Development Offences

The maximum penalty units have increased substantially from 1,665 to 4,500 penalty units. Whilst this is generally supported, there is concern this may be detrimental to effective compliance action if the increase in the maximum penalty translated to a significant increase in the amount of a Penalty Infringement Notice (PIN) for the offences under State Penalty Enforcement Regulation 2014 (SPER).

It is prudent to ensure that the amount of a PIN is not disproportionate to most simple offences and not significantly more than that which a Magistrates Court would hand down for a similar offence. In circumstances where this is the case, Council's ability to utilise a PIN as an effective compliance tool is likely to be reduced, given the likelihood of it being contested in the Courts for being excessive.

Redland City Council is generally of the view that the current PIN amounts set under SPER for those offences detailed under s161-164 are generally sufficient and should not be significantly increased to reflect the change to the maximum penalty units under the draft bills. More significant offences are to be prosecuted through the courts and a PIN should not be relied on in those circumstances.

5.3 s167 Enforcement Notices

The draft bill has changed the wording of the enforcement notice provision under the Sustainable Planning Act 2009 and subsequently appears to have potential drafting errors relating to issuing an enforcement notice to an owner of a property, where the owner did not commit the offence. In accordance with s167 of the Planning Bill, a person and an owner of premises may receive an enforcement notice. This appears to make it mandatory that to issue an enforcement notice to the owner of premises you must also issue it to the person who committed the offence.

This provision is deemed to be inappropriate for certain circumstances, such as for historical offences, where either the original person who committed the offence is unknown or where there has been a change in ownership of the premises. In this example, the regulatory authority would effectively be unable to issue an enforcement notice to remedy the original offence.

Further to the above, s.167(2) refers to an enforcement notice requiring only a person to remedy an offence. It is considered that it may be argued that the owner of premises has been separately identified in s167(1)(b) from a person (refer s.167(1)(a)) and therefore the provision to remedy the offence may not apply.

It is recommended these provisions be redrafted to provide for greater clarity regarding the issuing of enforcement notices, having regard to these areas of inconsistency. It is suggested that the current provisions relating to enforcement

notices under the Sustainable Planning Act 2009, namely s590, provides greater clarify regarding this issue and should be carried forward through to the new Act.

5.4 s171 Application in response to show cause or enforcement notice

Whilst it is acknowledged that it is the role of SPER to establish PINs rather than the principle planning legislation, it is noted that local government do not have the ability to issue a PIN under s171 of the planning Bill. It is highly desirable that a PIN option exist for this offence to enable it to be used effectively with time lags associated with development applications for non-compliant development works.

Currently, it is recognised that this enforcement action is not used as the time associated with going to Court for this offence generally outweighs the length of time associated with an applicant delaying unnecessarily the progress of a development application.

6. Increase prescription in local planning instruments

It is acknowledged that the Planning Bills remove the Queensland Planning Provisions (QPP) allowing for greater flexibility in the plan making process for local governments. Further, the structure of the proposed Code Assessable development stream establishes a bounded assessment approach, whereby development is only to be assessed against identified benchmarks. Together, this approach to both plan making and development assessment is seen to provide greater certainty to the community and practitioners as to what can be readily accepted under a planning scheme, characteristics sought under a prescriptive planning system.

This approach, though inherently still performance based, relies on the establishment of clearly articulated performance outcomes and will become highly dependent upon the planning scheme drafting process to ensure clarity and certainty throughout the community. Notwithstanding, it is acknowledged that lack of a clear ability for local governments to establish prescriptive criteria within the planning scheme can ultimately reduce certainty in the planning system. Considering the lack of certainty that can be inherent with a performance based planning system, it is recommended that any new planning legislative framework establish the ability for a local government to implement prescriptive standards and assessment benchmarks in a local categorising instrument.

Further, it is recommended that the ability to identify prohibited development in a categorising instrument be extended to a local government authority, ensuring inappropriate development is clearly identified, creating greater certainty for both developers and the community.