Submission No. 005
11.1.13

LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

13 July 2015

Attn: Erin Pasley, Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House, George Street
BRISBANE QLD 4000

Dear Ms Pasley

Re: Planning and Development (Planning for Prosperity) Bill 2015, Planning and Development (Planning Court) Bill 2015, Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015

The Local Government Association of Queensland (LGAQ) welcomes the opportunity to provide feedback to the Infrastructure, Planning and Natural Resources Committee on the above noted Bills. Many provisions in the proposed legislation will have significant time, effort and financial impacts on local government and industry. Of the forty-two (42) recommendations contained in the enclosed submission, the matters of primary concern for local government include:

- the inclusion of compensation provisions for planning scheme changes managing risks associated with natural hazards;
- the removal of the ability for local governments to utilise the infrastructure designation process;
- the broadened powers for private entities to use the infrastructure designation process without a statutory role for local government;
- the proposed new levels of assessment;
- the lack of an automatic indexation of the maximum adopted infrastructure charges;
- the retention of an inequitable methodology for calculating offsets and refunds;
- the lack of ability for councils to set conditions relating to trunk infrastructure;
- the retention of an unnecessary and ambiguous process to convert non-trunk infrastructure conditions;
- the retention of an untenable transition timeframe for LGIPs and 3rd party State Interest review process;
- the expanded definition of "use" and need for limitation on the definition of "ancillary uses"; and
- the removal of the core planning process in principal legislation.

The LGAQ has developed this feedback, and provides this submission, based on consultation with our members and particularly the twenty-four (24) Queensland local governments experiencing the highest growth and development pressures.

If further information and/or clarification is required, please feel free to contact Mr Luke Hannan, Manager – Advocacy (Planning, Development & Natural Environment) directly at [redacted].

Yours sincerely

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

Submission

Local Government Association of Queensland Ltd
13 July 2015

The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association setup solely to serve councils and their individuals' needs. The LGAQ has been advising, supporting and representing local councils since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional, and political excellence.

Introduction

On 4 June 2015 the Shadow Minister for Infrastructure, Planning, Small Business, Employment and Trade, Mr Tim Nicholls MP, introduced the *Planning and Development (Planning for Prosperity) Bill 2015*; the *Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015;* and the *Planning and Development (Planning Court) Bill 2015* to Parliament. The *Planning and Development (Planning for Prosperity) Bill 2015* (Bill) is predominantly consistent with the now lapsed *Planning and Development Bill 2014* (lapsed P&D Bill 2014) apart from minor changes to sections 46(4); 46(5); 176; and 177.

In consideration of the lapsed P&D Bill 2014, local governments identified extensive limitations which were outlined through forty-two (42) recommendations in the LGAQ's submission to the Department, dated 6 February 2015. Given the extent of concerns, the LGAQ Policy Executive unanimously resolved, in February 2015, to seek immediate feedback from the Mayors of the State's twenty-four (24) high growth councils on whether their council supports:

i. the continued development of the lapsed planning Bills having regard to the identified concerns in the LGAQ Submission; or
ii. the retention of the current *Sustainable Planning Act 2009* with appropriate/relevant reforms to address previously identified concerns.

The results received indicated twenty-one (21) councils' preference to retain the current *Sustainable Planning Act 2009* with appropriate/relevant reforms to address previously identified concerns. The remaining three (3) council responses were non-committal to either option.

These survey results confirmed the feedback previously received from local government officers that the lapsed P&D Bill 2014 was deficient and that they had neither identified a need for, nor sought, holistic change to Queensland's planning legislation.

It is important to recognise local governments' long-standing commitment to planning reform. Individually, councils have made significant investments over the past decade toward many successful business improvement projects and initiatives. Councils have also invested in, and collaborated on, sector-wide initiatives including: *Regulation Reduction Incentive Fund* (RRIF); *RiskSmart*; *Housing Affordability Fund Target 5 Days* (HAF-T5); and *Development Assessment Partnership Process – Operational Works and Large Subdivisions Project* (DAPR-OWLS). Most recently, the *Concept to Construction – Development Assessment Innovation* (DAI) *Project* was widely applauded by industry and has already proven successful on the ground, enabling local governments to adopt innovative development assessment systems by leveraging off verified development assessment best practice in Queensland.

Local governments have also broadly supported many of the recent State Government-led planning reforms that are making positive changes in terms of increased consistency and red tape reduction. These include:

- improvement of the State's involvement in the development assessment process through the establishment of the State Assessment Referral Agency (SARA);
- implementation of the single State Planning Policy (SPP);
- review and reduction in number of Integrated Development Assessment System (IDAS) forms;
- the increase in the currency period of Temporary Local Planning Instruments (TLPIs) to two (2) years;
- moving the establishment and jurisdiction of the Planning and Environment Court (as part of the lapsed P&D Bill 2014 and in the proposed Bill) to specific court legislation;
- the proposed increase (as part of the lapsed P&D Bill 2014 and this proposed Bill) in penalties for development offences from 1665 penalty units to 4500 penalty units, thereby increasing councils' confidence in lowering levels of assessment in the preparation of new planning schemes;
- the proposed introduction (as part of the lapsed P&D Bill 2014 and this proposed Bill) of exemption certificates for some assessable development, pending the development of appropriate limitations and guidance;
- the proposed simplification (as part of the lapsed P&D Bill 2014 and this proposed Bill) of State Planning Instruments; and
- the proposed (as part of the lapsed P&D Bill 2014 and this proposed Bill) express statutory exemption from liability for councils in complying with a Ministerial direction for something being removed from a local planning instrument.

For the benefit of the Infrastructure, Planning and Natural Resources Committee, the LGAQ has again outlined, in detail, local governments' concerns. This LGAQ submission is generally formatted to follow the relevant chapters of the proposed legislation and focuses significantly on the *Planning and Development (Planning for Prosperity) Bill 2015.* Please note the following shorthand for ease of reference:

- *Sustainable Planning Act 2009* (SPA)
- *Planning and Development (Planning for Prosperity) Bill 2015* (Bill)
- *Planning and Development (Planning Court) Bill 2015* (Court Bill 2015)
- *Lapsed Planning and Development Bill 2014* (lapsed P&D Bill 2014)
- *Lapsed Planning and Environment Court Bill 2014* (lapsed P&E Bill 2014)
- *Draft Planning and Development Regulation 2014* (draft P&D Reg 2014)
- *Consultation draft Planning and Development Bill 2014* (draft P&D Bill 2014)
- *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014* (SPICOLA)
- *Local Government Infrastructure Plan* (LGIP)
- *Temporary Local Planning Instrument* (TLPI).

Executive Summary

Many provisions in the proposed legislation will have significant time, effort, and financial impacts on local government and industry. Of the forty-two (42) recommendations contained in this submission, matters of primary concern for local government include:

- the inclusion of compensation provisions for planning scheme changes managing risks associated with natural hazards;
- the removal of the ability for local governments to utilise the infrastructure designation process;
- the broadened powers for private entities to use the infrastructure designation process without a statutory role for local government;
- the proposed new levels of assessment;
- the lack of an automatic indexation of the maximum adopted infrastructure charges;
- the retention of an inequitable methodology for calculating offsets and refunds;
- the lack of ability for councils to set conditions relating to trunk infrastructure;
- the retention of an unnecessary and ambiguous process to convert non-trunk infrastructure conditions;
- the retention of an untenable transition timeframe for LGIPs and 3rd party State Interest review process;
- the expanded definition of "use" and need for limitation on the definition of "ancillary uses"; and
- the removal of the core planning process in principal legislation.

Chapter 2 – Planning

1. Making or amending TLPIs

1.1. Section 19(1)(a) states that a local government may make a TLPI if the local government (and Minister) is satisfied that there is significant risk of serious adverse cultural, economic environmental or social conditions happening in the local government area.

1.2. Based on the intention for a TLPI to avert the serious risk identified in section 19(1)(a) and the risk of delaying implementation through bureaucratic processes, it is deemed reasonable for a risk-based approach to be adopted by the State Government where a local government can nominate the TLPI to have 'automatic operation' once endorsed by council and prior to Ministerial approval. In effect, this will create an 'interim TLPI' that would still go through due process and receive full Ministerial approval. The LGAQ appreciates the apprehension with a TLPI becoming immediately effective due to the potential for changes during the Ministerial review process. Regardless, it should be a local government's responsibility to consider the associated risks and the needs for the TLPI.

Recommendation 1: The LGAQ recommends provisions are included in the Bill to allow for local governments to enable the 'automatic operation' of a TLPI when resolved by a local government, prior to Ministerial approval.

2. State powers for local planning instruments

2.1. Section 21 allows for direct Ministerial intervention regarding the contents of a local planning instrument in circumstances where it may be at odds with the interests of the State. Section 21(9) states that a local government does not incur liability for anything the local government does, or does not do, in complying with a direction by the Minister to remove something from:

- an existing or proposed local planning instrument; or
- a proposed amendment of a local planning instrument.

2.2. Section 21(9) therefore seeks to insulate a local government from potential liability arising out of any forced adoption or amendment to a local planning instrument in compliance with a direction from the Minister. It is noted however that this provision is limited to a direction by the Minister 'to remove' something from a local planning instrument and does not refer to directions 'to include' something.

Recommendation 2: The LGAQ recommends amending and simplifying section 21(9) of the Bill to extend the liability provisions to all Ministerial directions.

3. Superseded planning schemes

3.1. Section 23(2) defines what constitutes a superseded planning scheme. The LGAQ notes that TLPIs are erroneously not included in this section.

Recommendation 3: The LGAQ recommends that section 23(2) of the Bill be amended to specifically include TLPIs.

3.2. Section 23(5)(c) states "how a local government may set a fee for considering the request". The LGAQ notes this section provides for a different method for local government to set fees than normally used (i.e. made by resolution) under the *Local Government Act 2009*.

Recommendation 4: The LGAQ recommends deleting section 23(5)(c) of the Bill to align with setting fees for other development application types 'as prescribed in a local government's resolution'. This is already captured in the Bill as part of Schedule 2 under the definition of "required fee".

4. Compensation

4.1. The LGAQ's policy statement clearly identifies local government's long-held position related to compensation provisions. Specifically, the policy statement identifies:

> *6.1.1.12 Local government opposes the extent of the compensation provisions in current planning legislation, and only supports limited provisions for compensation based upon certain criteria being met before councils would be liable. Compensation rights should only be preserved where an applicant can establish that they have suffered an immediate and demonstrable loss, and claims for compensation should be eliminated where there is no substantive restriction on continuing use of the land for existing lawful purposes and where the only loss is loss of the speculative possibility of future development for some other purpose.*
>
> *6.1.1.13 Compensation should not be available where local planning instruments are made or amended to manage risks associated with natural hazards, including flood, bushfire, landslide, storm tide inundation and coastal erosion.*

4.2. Section 24(4)(e) of the Bill does not address the issue identified as part of the *Queensland Floods Commission of Inquiry Final Report* dated March 2012 (pages 98-99,128-132) where the existing provisions of the SPA were identified by councils as a deterrent to the including flood controls in local planning instruments.

4.3. The proposed version of section 24(4)(e) in the Bill requires that, had development happened, it would have resulted in "significant risk" that could not have been "substantially reduced" by development conditions.

4.4. The underlying concern for local government is that, should a change be made to a planning scheme to address risk associated with a natural hazard, there will always be room for a potential claimant to argue that a condition of approval could have been imposed to remove the risk. Such hypothetical arguments give councils little or no certainty that they will be exempt from paying compensation upon amendments to a local planning instrument.

4.5. Conversely, councils are also concerned that if they decide not to change a planning scheme and instead rely upon conditions of approval to mitigate the impact of a natural hazard, such conditions can be challenged on appeal. Given that conditions of this nature are intended to 'substantially' reduce the impact of the hazard, which in turn may significantly constrain development, there is a real risk that they can be found to be invalid by the Planning and Environment Court. This is due to being what is arguably an 'unreasonable imposition' on the development, leaving councils with no unhindered means of addressing the impact of the hazard on development.

4.6. Notwithstanding, the alternative paragraphs identified for section 25(4)(e)(i) in the draft P&D Bill 2014 required the change be made to "reduce the risk … in good faith, having regard to an assessment of the risk to the persons or property carried out by a person appropriately qualified". These provisions predominantly addressed the concerns identified by councils in the Queensland Floods Commission of Inquiry. The LGAQ understands these provisions were broadly supported

by numerous stakeholders in the consultation process, including representatives of the legal and planning profession. However, no rationale has been provided as to why the alternative wording proposed in the draft P&D Bill 2014 was not adopted in this Bill.

Recommendation 5: The LGAQ seeks amendments to the Bill to remove compensation provisions where local planning instruments are made or amended to manage risks associated with natural hazards.

4.7. Section 40(7)(b) of the Bill expressly excludes from consideration matters the subject of a direction given to the local government in section 21. As such, no duty will arise on behalf of the assessment manager to consider excluded matters given the strict constraints imposed by the legislation that effectively prohibit the adoption of the identified excluded matters for consideration, whether directly or indirectly.

4.8. Regardless, the limitation of liability contained within section 21(9) of the Bill does not extend to cover the actions of an assessment manager performing a merit assessment in the proposed circumstances since the relevant exclusion will be limited to only those matters pertaining to the adoption or amendment of a local planning instrument.

Recommendation 6: The LGAQ recommends amending section 40 of the Bill to place beyond doubt that no liability will attach to an assessment manager performing their statutory obligations under the circumstances promoted by section 40(4)(b)(iii), with such wording proposed as:

> *An assessment manager is not liable in any legal proceeding for any failure to have regard to any other relevant matter, including a matter the subject of a Ministerial direction or action taken under Part 3 Division 3 of this Act, when performing an assessment under this section.*

Recommendation 7: The LGAQ recommends the inclusion of a transitional provision that provides an indemnity for anything a local government does, or does not do, in complying with a direction made by the Minister under the existing provisions of the SPA in order for existing directions to also be captured.

5. Designation of premises for development of infrastructure

5.1. Chapter 2, Part 5 of the Bill deals with infrastructure designations. The LGAQ acknowledges that the current legislation related to designations is not widely utilised by local government. However, due to the proposed process for designations purportedly having been improved, it may now lend itself as an efficient and effective tool for local government.

Recommendation 8: The LGAQ recommends that councils not be excluded from the designation process until the proposed processes are comprehensively tested in regard to its benefit and usefulness for councils.

5.2. While an intention to contemporise the infrastructure designation process is commended, there remains concern from local government that a new process will continue to have inadequate regard to local planning, infrastructure, and community matters. Local government experience suggests a lack of transparency and poor formal engagement practices often lead to unintended impacts, particularly on local infrastructure networks. If local government interests are not considered adequately, cumulative impacts on local infrastructure resulting from increased demand may not be resolved resulting in unintended consequences e.g. road capacity failures and safety issues.

5.3. The LGAQ notes a proposed infrastructure designation (formerly known as Community Infrastructure Designation) process was outlined in the document *Proposed Plan Making System* and in particular *Appendix B – Infrastructure Designation Draft Guideline* (previously released for consultation and associated with the lapsed P&D Bill 2014). This process is not restricted to publicly-owned infrastructure and explicitly refers to privately-owned infrastructure proposals in-line with Schedule 3 of the draft P&D Reg 2014. This represented a significant policy shift by the former State Government that could have significant cost and resource implications for local government and broader cumulative impacts on local communities and local infrastructure. For example, extending infrastructure designations of high impact uses more broadly to private schools, private aged care facilities and private sports and leisure facilities removes due consideration by the

community (including 3rd party appeal rights) and compliance with relevant local planning instruments (i.e. council cannot apply necessary conditions of approval or levy infrastructure charges).

5.4. The LGAQ does not support an infrastructure designation process that extends to privately-owned infrastructure. The forfeited infrastructure charges revenue alone is an indisputable cost shift onto councils and their local communities. Examples of the cost impacts of recent development approvals in South-East Queensland involving privately owned / commercially operated facilities include:

Example 1 – Material Change of Use (MCU) for an Aged Care Facility consisting of a 108 rooms – Infrastructure Charges Payable – $916,296.00

Example 2 – Material Change of Use (MCU) for an existing Education Establishment to be extended over 3 levels – Infrastructure Charges Payable – $275,250.00

Recommendation 9: The LGAQ does not support the proposed infrastructure designation process in its current form. The LGAQ recommends a formal partnership approach and focused consultation be undertaken by the State Government with local government where councils are not simply considered as another stakeholder. Such an approach must include statutory requirements that do not wholly rely on the 'good will' of both parties.

Recommendation 10: The LGAQ recommends that any infrastructure designation process, at a minimum, culminates in local government being provided a statutory role similar to that of a referral agency.

Chapter 3 – Development Assessment

6. Categories of development and levels of assessment

6.1. Transitioning to the new categories of development and assessment will have significant time, effort and financial impacts on local government and industry.

6.2. No rationale or evidence has been provided to demonstrate the purported benefits of the changes to the levels of assessment outweigh the costs to local governments (and industry) to change established business systems and processes. Local governments maintain the levels of assessment are not fundamentally broken and that the proposed marginal changes will not provide the tangible outcomes sought-after, rather merely distract limited resources and priorities from other proactive processes and structural initiatives already underway.

6.3. In the absence of a transparent and comprehensive regulatory impact process, Logan City Council estimates that the cost of transitioning existing SPA schemes to be compliant with the provisions of the Bill is in the order of $1,221,000 (+ contingency). Further broken down these transitional costs include:

Officers:*
Updates to the Planning Scheme - $325,000:
- 3 x officers (8 months)
- 1 x senior officer (8 months)

Business System Officers - $280,000:
- 4 x officers (8 months)

Updates to DA Processes - $250,000:
- 2 x officers (8 months)
- 1 x senior officer (8 months)

Business Analyst (4 months) - $96,000

External Costs:
- Legal Review - $150,000
- Pathway System Update - $30,000
- Reporting Software - $50,000
- Marketing Collateral - $30,000
- Website Updates - $10,000

Total: $1,221,000 + contingency

6.4. Logan City Council has also estimated the costs of transition for a new Act which retains the Integrated Development Assessment System (IDAS), including current levels of assessment, and with reduced statutory development assessment timeframes as follows:

Officers:*
Updates to the Planning Scheme - $22,500:
- 3 x officers (1 month)
- 1 x senior officer (2 months)

Business System Officers - $23,000:
- 4 x officers (2 months)

Updates to DA Processes - $43,750:
- 2 x officers (3 months)
- 1 x senior officer (3 months)

Business Analyst (1 month) - $24,000

External Costs:
- Legal Review - $10,000
- Pathway System Update - $10,000
- Marketing Collateral - $10,000

Total: $143,000 + contingency

**Please note, some of the time commitments (months) in these scenarios are not FTE and may include other work priorities.*

6.5. As a way of comparing with a regional local government, Mackay Regional Council conservatively estimates the costs associated with transitioning to a new Act is in the order of $700,000 plus. These costs include: changing internal IT systems, templates, processes, procedures, planning scheme amendments, internal training and public consultation.

6.6. Further, as per previous LGAQ and local government submissions, compliance assessment has not been widely utilised due to its cyclical process and the inability to 'finalise' an application. In addition to avoiding significant and largely unnecessary transitional costs, improvements to compliance assessment will provide the 'missing piece' of the development assessment framework that will enable lower levels of assessment to be more readily utilised. In practice, it is envisaged these amendments will allow more operational works and code assessable applications to be moved to compliance assessment.

Recommendation 11: In the absence of demonstrable net benefit, the LGAQ recommends the existing categories of development and levels of assessment, except for the 'compliance' level of assessment, remain unchanged. In addition, The LGAQ recommends amendments to the compliance level of assessment to include refusal provisions (with associated appeal rights), or where considered appropriate, the ability to progress the application at a higher level of assessment.

7. Exemption certificate for some assessable development

7.1. Section 41 enables the chief executive or a local government to give a land owner an exemption certificate that exempts assessable development from the requirement to obtain a development approval. The LGAQ understands an exemption certificate is current for a period of two years, but may be withdrawn at an earlier time by the entity that gave the certificate. Any development started under an exemption certificate that is not completed when the certificate lapses or is withdrawn may be completed as if the certificate had not lapsed or been withdrawn.

Recommendation 12: The LGAQ recommends that, given the array of case law available, the provisions related to lapsing of exemption certificates utilise the term "substantially start" rather than just "start".

7.2. In addition, the Bill is unclear whether an exemption certificate may be given subject to conditions and whether a right of review applies to give or withdraw an exemption certificate.

Recommendation 13: The LGAQ recommends including necessary amendments to ensure an exemption certificate may be given subject to conditions.

8. Development applications

8.1. Section 43(5) states that a regulation may identify the assessment manager for a development application as "any person from a class of persons who have stated qualifications or characteristics". It is not clear whether this provision is intended to result in an additional class of private entity (chosen by the Minister rather than councils) being identified as an assessment manager in place of local governments for particular applications.

8.2. The LGAQ provides in-principle support for the ability for a local government to nominate accredited persons as alternative assessment managers, however opposes the use of alternative assessment managers if not solely at a local government's discretion.

Recommendation 14: The LGAQ seeks confirmation that the use of alternate assessment managers is solely at a local government's discretion and that the new planning legislative framework continues to empower local government as the recognised sphere of government immediately responsible for integrated land use planning, management and development assessment.

8.3. Section 44(4) identifies that a preliminary approval prevails over a "later" development permit to the "extent of any inconsistency". Local governments have raised concern with this section and the corresponding section 63(2) of the Bill such that these provisions taken together could limit contemporary practices and conditioning of development.

Recommendation 15: The LGAQ seeks clarity how sections 44(4) and 63(2) of the Bill will function in practice and recommends further consultation is undertaken with the LGAQ and local governments to avoid unintended consequences.

9. Public notification requirements

9.1. It remains unclear how public notification (and re-notification) requirements will fit within the provisions associated with a prescribed minor change of use and whether the community could potentially be misled about the nature of an application under such a process. For applications requiring public notification, the Bill remains silent on whether local governments have the ability to ask the applicant to re-notify the application where an application changed substantially.

Recommendation 16: The LGAQ recommends that the Bill, or at a minimum the Development Assessment Rules, deal with the issues stated related to both changes to an application and public notification requirements to adequately protect local government interests in ensuring the public is suitably informed about a change and councils are able to recoup appropriate additional fees.

10. Response before application

10.1. The LGAQ suggests there may be an increase in disputes and confusion about whether an application is "not substantially different" in the context of whether it needs to be referred to a referral agency that has already given an early response under section 52 of the Bill.

10.2. Under section 54 of the draft P&D Bill 2014, a referral agency's early response becomes the referral agency's response for the subsequent application (and need not be referred) provided the application is the same or "substantially the same" as that proposed to the referral agency earlier. In effect, this requires a council, as the assessment manager, to be satisfied that any changes to the proposal would not require the application to be referred to the referral agency again.

10.3. This Bill adopts the same language for a minor change so that an application need not be referred again where it is "not substantially different". While the change is subtle, the term "not substantially different" is interpreted broadly by the courts, and it is not clear whether the intention was to widen the test for when application should be re-referred.

Recommendation 17: The LGAQ requests further rationale be provided related to how section 52 of the Bill is intended to function in practice.

Recommendation 18: The LGAQ recommends that Guidance on Substantially Different Development be developed in full consultation with local government.

11. Development assessment rules

11.1. Section 65(2)(a) of the Bill states "… circumstances under which a development application is taken to be properly made for section 46(6) …" The LGAQ notes that section 46(6) does not exist. This appears to be a drafting error.

Recommendation 19: The LGAQ recommends the Bill be amended so that an accurate reference is identified in section 65(2)(a)).

12. Assessing and deciding extension applications

12.1. A developer may continue to act upon an approval while a local government's decision about an extension application is being appealed under section 84(9)(c). This is counter-intuitive and effectively renders a decision futile unless the local government applies to the court for an order that the development not start until the appeal is decided.

Recommendation 20: The LGAQ recommends amending section 84(9)(c) to ensure development not start until the relevant appeal has been decided.

13. Lapsing of approval for failing to complete development

13.1. Section 85(1) identifies that a development approval lapses if the development is not completed within the relevant periods imposed by condition(s). Section 82 of the Bill sets out currency periods for particular development types, however there is no link to section 85(1).

Recommendation 21: The LGAQ seeks clarification on the relationship between sections 82 and 85(1).

Chapter 4 – Infrastructure

14. Power to adopt charges

14.1. Section 107 of the Bill leaves the changes in the amount of a maximum charge to the discretion of the Minister.

14.2. The maximum adopted charges, introduced by the previous ALP State Government, have been left unchanged since their introduction in 2011 (e.g. $28,000 for a detached dwelling). Infrastructure charges have already dropped in value by over 10% in real terms since 2011 due to indexation not being applied, essentially prohibiting the maximum charges from reflecting the increasing building and construction costs of providing infrastructure.

14.3. Conversely, the State Government currently applies a 3.5% annual indexation to its own fees and charges.

14.4. Local governments are already subsidising the cost of providing development infrastructure, with recent consultancy work indicating that the current maximum capped charges provide only 69.9% revenue sufficiency of the cost of providing the infrastructure. This has the effect of transferring higher proportional costs from new development to the existing community to cater for new development infrastructure.

Recommendation 22: The LGAQ recommends amending section 107 of the Bill to include an annual automatic indexation of the current maximum capped charges using the Queensland Road and Bridge Construction Index to reflect increasing building and construction costs of providing infrastructure.

Recommendation 23: The LGAQ recommends applying a methodology to set a base date and automatically index to the time of issue and then again to the time of approval and payment. Such basic indexation is general practice in most government and private industry supply and construction contracts.

15. Limitation of levied charge

15.1. Section 115(1) of the Bill provides that "a levied charge may only be for additional demand placed on trunk infrastructure that the development will generate". This and associated sections are consistent with the amendments enacted through SPICOLA that require local government, when working out additional demand, to ignore the demand generated by uses that have been abandoned, provided that those uses were lawful at the time they were carried out.

15.2. The LGAQ highlights concern that there is no limit upon how far back the use was carried out in order for the additional demand to be ignored. This is particularly problematic regarding abandoned uses and amalgamated lots. The changes in SPICOLA have already contributed to increasing both the administrative burden on councils and the number of disputes with applicants regarding evidence.

15.3. In addition, it is likely that when the use was first carried out there was no requirement to pay charges or provide infrastructure. Accordingly, a local government has not had the benefit of receiving contributions or infrastructure required by the previous use. If the previous use occurred so long ago that there were no infrastructure requirements at all, the local government will miss out on the ability to recover those costs on a new application.

15.4. Section 115(3)(a) seeks to limit the uses excluded in section 115(2). This section provides that the demand generated may be included "if an infrastructure requirement that applies, or applied to the use or development, has not been complied with". Infrastructure requirement is then defined in section 115(4). While section 115(3) addresses certain issues raised in the LGAQ's previous submissions, it does resolve the above concern whereby additional demand related to a previous use is ignored where there was no infrastructure requirement for the use.

Recommendation 24: To remove any doubt, reduce unnecessary disputes, and maintain equity of existing use rights, the LGAQ recommends amending section 115(3)(a) to state that the demand generated by a previous use that is no longer taking place may be included where:

i. an infrastructure requirement that applies or applied to the use or development has not been complied with; or
ii. there was no infrastructure requirement for the previous use.

16. Offset or refund requirements

16.1. The framework for offsets and refunds introduced by the former State Government in the 2014 SPICOLA amendments are inequitable. Applicants now have the ability to apportion 100% of the trunk infrastructure costs to councils (even where most of the infrastructure is necessary for the development) and councils are being forced to commit to offset and refund the full market cost of the infrastructure associated with new development. This heavily benefits the developer, shifts their costs to councils and the community, and creates significant incentives for developers to exploit the system to maximise their access to councils' money. It also is likely to result in inefficient infrastructure delivery. These changes, in conjunction with the conversion application process (outlined in section 19), are undermining local governments' ability to effectively program capital expenditure in the short and medium terms without risk of change and budget blow-outs. The major elements of the malfunctioning and inequitable offsets and refunds framework are discussed further below.

16.2. The 2014 SPICOLA amendments to the offset and refund provisions for the application of necessary trunk infrastructure conditions inside of the Priority Infrastructure Area (PIA) now require the full cost of the infrastructure to be fully offset against the infrastructure charge and/or refunded, irrespective of whether the infrastructure will service other development. In-light of the fact that the maximum infrastructure charges were set according to the estimated costs in the Priority Infrastructure Plans (PIPs) and similar policies prior to 2011 (which were conservatively low in many LGAs), the offsets are inequitably provided at the full commercial rates claimed by the developer.

16.3. The 2014 SPICOLA amendments require that local governments provide a refund of the cost of the infrastructure, even though the local government has not received and has no plans to receive charges in relation to that item of infrastructure. This represents a significant financial risk and liability to local governments. Conversely, the State Government would not expose itself to this risk in the forward-planning and funding of its own infrastructure.

16.4. The 2014 SPICOLA amendments failed to duly consider that infrastructure plans supporting PIAs cannot anticipate all development options and sequencing. Further, they did not consider that councils have prepared their land-use plans with sufficient over-supply of capacity to enable development proposals to come forward, with the confidence that they would not be left to cover the cost for infrastructure to support the development proposals. This is particularly a problem in councils that have a high proportion of infill or brownfield redevelopment.

16.5. The 2014 SPICOLA amendments also introduced the requirement that a charges notice must state "whether an offset or refund under this part applies". Calculated using the stated establishment cost, the offset or refund can be challenged by an applicant at any stage before the charges become payable. Given the broad timeframe for allowing for such a challenge to occur, any offset and/or refund will represent a contingent liability for councils until the charges are paid.

16.6. Conversely, local government feedback suggests it may not be possible or practical for a council to determine the precise amount if the offset is to be based on actual costs in providing/constructing the infrastructure. As anticipated in previous submissions to the Department, experiences already suggest that mandating such a requirement is slowing down development approvals, particularly for larger developments, adding unnecessary additional 'red tape'. Even if the requirement to include this information in the ICN is removed (or becomes 'optional'), the process will continue to inhibit decision processes in development assessment due to councils still being required to pause and consider their financial position (and the significant liability for the cost of potentially any infrastructure required) to allow the development to proceed.

16.7. The 2014 SPICOLA also restricted that "a levied charge may only be for additional demand placed on trunk infrastructure that the development will generate". This change requires councils, when working out additional demand, to ignore the demand generated by uses that have been abandoned, provided that those uses were lawful at the time they were carried out.

16.8. Councils have highlighted concern that there is no limit upon how far back the use was carried out in order for the additional demand to be ignored. This is particularly problematic regarding abandoned uses and amalgamated lots. These changes have already contributed to increasing both the administrative burden on councils and the number of disputes with applicants regarding evidence.

16.9. In addition, it is likely that when the use was first carried out there was no requirement to pay charges or provide infrastructure. Accordingly, a local government has not had the benefit of receiving contributions or infrastructure required by the previous use. If the previous use occurred so long ago that there were no infrastructure requirements at all, the local government will miss out on the ability to recover those network costs on a new application.

16.10. To remove any doubt, reduce unnecessary disputes and maintain equity of existing use rights the LGAQ recommends amending the SPA to state that credits will only be provided for a previous use that is no longer taking place where it is demonstrated that an infrastructure requirement that applies, or applied to, the use or development has been complied with.

16.11. The cumulative impacts of the offsets and refunds framework are already being felt by councils, particularly where large developments with substantial infrastructure require refunds, resulting in limiting councils ability to plan and budget appropriately and posing a genuine risk to councils' financial sustainability. The net effect is the potential making of a system that benefits only the larger developments (that typically build trunk infrastructure as part of the development) by drawing down the infrastructure charges revenue collected from all development that is meant to be spent on trunk infrastructure to benefit all network users.

Recommendation 25: The LGAQ recommends amending section 134 of the Bill to:

i. allow councils to recalculate the establishment cost of trunk infrastructure needed to be provided; and
ii. ensure final completion costs are verified through a transparent and accountable process.

16.12. Section 126(3)(b) of the Bill has the potential to increase the refund that a local government must give an applicant because it requires that the cost of the infrastructure required under the condition, which is in excess of the adopted charge that applies to the development, be refunded. The SPICOLA only required that a refund be the portion that could be apportioned to users of premises other than the subject premises.

16.13. The LGAQ highlights concern that local governments will be required to provide a refund if the infrastructure may be apportioned reasonably to users of other premises, even though the local government has not received and has no plans to receive charges in relation to that item of infrastructure.

16.14. The example provided in section 126(3)(b) is also of concern. The LGAQ understands that, based on the example, charges relating to one infrastructure network need to be offset against charges for other infrastructure networks. Not all local governments have historically adopted this process. In addition, the example does not appear to meet the requirements of section 126(3)(b), as the cost of the transport infrastructure to be provided under the condition is not more than the total amount of the adopted charges.

Recommendation 26: The LGAQ recommends amending the example and section 126(3)(b) of the Bill to clearly state that the local government must refund the applicant the cost of the infrastructure that can be apportioned to users of premises other than the subject premises where the cost of the infrastructure has been, is or is to be, the subject of a levied charge by the local government.

17. Ability for local government to set conditions for trunk infrastructure

17.1. The former State Government's legislative amendments in 2014 and implemented through SPICOLA imposed much greater restrictions on local governments in relation to when they can require trunk infrastructure to be constructed as a condition of a development approval. These amendments have effectively diminished councils' ability to apply trunk infrastructure conditions by increasing the requirement to demonstrate a nexus with the proposed development.

17.2. The restrictive requirements are not only contrary to the definition of trunk infrastructure but are leading to unintended consequences when assessing development. This will not only lead to a lower quality of infrastructure provision in the short term but will, in the long term, also dissuade councils from approving development or simplifying the development assessment process via reduced levels of assessment with time-limiting decision-making rules.

Recommendation 27: The LGAQ seeks amendments to the Bill to provide councils with the means to impose trunk infrastructure conditions where they are reasonable, rather than the current provisions in SPA, which only allow conditions to be imposed where the infrastructure is required by the development itself. The improved mediation processes through the Planning and Environment Court and Building and Development Dispute Resolution Committees will provide the necessary avenue to resolve related disputes.

18. Representations about infrastructure charges notice

18.1. Section 120(6) provides local government five (5) business days after making its decision to respond to the applicant accordingly.

Recommendation 28: The LGAQ recommends amending this period to ten (10) business days for consistency with other infrastructure charge timeframes and to provide an adequate period for local government response.

18.2. Section 120(4) limits local government to a single negotiated notice. Similarly, section 73(5) also limits local government to a single negotiated notice.

Recommendation 29: The LGAQ recommends amending sections 73 and 120 of the Bill to allow for more than one negotiated decision notice to be issued.

19. Application to convert infrastructure to trunk infrastructure

19.1. The 2014 SPICOLA amendments introduced a conversion process that is confusing, ostensibly unnecessary and adds a duplicative layer of red-tape. The development assessment process already provides for these matters to be dealt with during the application stage or an applicant can seek amendments to conditions during the negotiated decision notice stage.

19.2. The introduction of the conversion application process has led to an increase in the need for infrastructure agreements to remove/reduce the risk of these conversion requests being lodged in the future and to give councils certainty of offsets and refunds associated with a development approval. Infrastructure agreements are time-consuming and costly for both councils and applicants.

19.3. The LGAQ is of the view that converting non-trunk infrastructure conditions to trunk should be limited to a decision by the relevant council and not be subject to further appeals relating to development that sits outside the accepted and legislated planning process. This position is based on the fact that the trunk infrastructure detailed in a PIP or LGIP has already undergone a full preparation, development and consultative process in accordance with statutory guidelines and approved by the State Government.

Recommendation 30: The LGAQ recommends removing the conversion application process under Chapter 4, Division 4, Subdivision 1. All development applications should follow the standard development application process through representations made during the negotiation stage following the issue of decision notice.

19.4. Although noting the period allowing a conversion application has been limited to an arbitrary 1-year period, the LGAQ maintains this will still create a significant period of uncertainty and administration of approval for all parties involved, but particularly for local government.

Recommendation 31: Notwithstanding the above noted LGAQ recommendation 30, if the State Government does not remove the conversion application process, the LGAQ recommends Chapter 4, Division 4, Subdivision 1 be amended to identify that applications to convert a non-trunk infrastructure condition may only be made within the appeal period (i.e. 20 business days) that equitably aligns with the negotiated decision process.

20. Transitional Timeframe

20.1. The requirement for all local governments to have an approved LGIP by 1 July 2016 under section 258(4) of the Bill is considered unreasonable and unlikely to be achieved by many local governments.

20.2. The arbitrary 1 July 2016 timeframe is understood to be the 'stick' to encourage councils to formally amend their PIPs to LGIPs, however the timeframe does not consider the context in which councils have already developed their PIPs. Many councils have already undergone multiple State Interest reviews of their existing PIPs, including reviews by the Queensland Competition Authority. Given the inconsequential differences between PIPs and LGIPs; to now require local governments to 'jump through new hoops' for no real purpose is a complete waste of resources for councils and taxpayers' money. This is particularly wasteful, considering councils must review their LGIPs within a 5-year timeframe. A rationale approach would allow councils to continue having regard to their existing PIPs as LGIPs and for the State Government to support those councils without existing PIPs/LGIPs.

20.3. In addition to anticipated delays associated with the March 2016 local government elections, councils also anticipate additional red-tape caused by the State Government's new '3rd party appointed reviewer' requirement. Although not prescribed in the Bill, the LGAQ fundamentally disagrees with the additional requirement for a local government to engage an 'appointed reviewer' at its own cost to undertake LGIP compliance checks. The LGAQ maintains:

- The State Government is unequivocally shifting the costs of a State Interest review onto local governments. The LGIP, like a PIP, is a key component of a planning scheme and has

always been undertaken as part of the State Interest review function undertaken by the Department. All costs of a State Interest review must be borne, in principle, by the State Government. To require local governments to now pay for their own State Interest review is unreasonable and a cost shift to councils and their local communities.

- Further, to allow a local government's consultant to also be an Appointed Reviewer, but not an experienced local government officer, is unreservedly incongruous.
- No other local government instrument requires such a review that may cost councils between $19,000 to $35,000 (conservative range for a medium size LGIP).

Recommendation 32: The LGAQ recommends amending section 258(4) of the Bill to remove the 1 July 2016 deadline. The LGAQ also recommends that the State Government work with each local government to agree to a transitional timeframe (having regard to the 5 year mandatory LGIP review timeframe) that reflects each council's unique circumstances, including planning scheme drafting status and financial considerations.

Chapter 5 – Offences and Enforcement

21. Enforcement authority

21.1. The Bill does not contain similar or equivalent provisions to section 597(3) of the SPA which identifies who may prosecute a proceeding for particular offences in the Magistrates Court. The absence of such a section may lead to local governments being drawn into prosecutions by members of the public, despite resolving not to prosecute for those particular matters.

Recommendation 33: The LGAQ recommends a section similar to 597(3) of the SPA be included in the Bill.

Chapter 7 – Miscellaneous

22. Planning and Development Certificates

22.1. The provisions about planning and development certificates remain largely the same as under SPA. The LGAQ notes that the Bill contains no definition of a 'limited certificate', 'standard certificate' or 'full certificate', or the scope of what these certificates entail. The LGAQ presumes the requirements for each type of certificate will mirror the current corresponding SPA provisions.

Recommendation 34: The LGAQ recommends the Bill be amended to clarify the requirements for each type of certificate, particularly given the inclusion of compensation provisions for erroneous certificates.

22.2. The LGAQ understands that a significant number of complaints with regard to building certification are a result for non-compliance with local government planning schemes. A solution proposed as part of the review of building and building certification legislative frameworks is through implementation of local government planning scheme advice. Essentially, local governments would be required to provide advice (either directly or via an accredited planning consultant) about whether a building development application meets any applicable planning scheme provisions. While the LGAQ supports this solution in principle, where accompanied with an appropriate cost recovery mechanism, there is a need for consideration in the context of planning reforms and the consultation on the Bill.

Recommendation 35: The LGAQ recommends that the existing requirements for limited, standard, and full town planning certificates be evaluated in consideration of their use and effectiveness. It may be necessary to modify the purpose of existing town planning certificates to incorporate 'building compliance' and/or implement a new type of certificate for building certification purposes.

Chapter 8 –Transitional provisions and repeal

23. Local planning instruments requiring code assessment

23.1. The default transition for code assessable development under current local planning instruments is that it becomes standard assessment in accordance with section 245 of the Bill. If local governments wish to transition development that is currently code assessable to development

requiring merit assessment, Ministerial approval is required under section 249 and must be undertaken within one (1) year of the legislation commencing.

23.2. Numerous local governments have indicated that Ministerial approval will be required due to how their existing planning schemes and codes are calibrated and the real risks of unintended consequences from an automatic transition process. As such, this will result in significant pressure on the Minister for approvals for transitional matters. The LGAQ acknowledges the intention is to ensure councils go through due process when considering how their schemes transition however; the genuine concerns of local government regarding the consequences of the automatic transition process are considered profound and require alternate approaches to be developed.

Recommendation 36: The LGAQ recommends reconsideration of the automatic transitional process stated under section 249 of the Bill and that alternate feasible approaches are developed in full consultation with the LGAQ and local governments.

Schedule 2 - Dictionary

24. The definition of "use"

24.1. 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. While the flexibility of including broader activities as part of a use may be beneficial in certain circumstances, the LGAQ suggests 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 undermine local communities' understanding of the development process.

24.2. In any event, the QPP already contemplates the concept of ancillary uses in the mandatory suite of defined uses. The table of defined uses clearly identifies ancillary uses that may form part of a use, as well as those that may not. The proposed broader definition of 'use' conflicts with these provisions, meaning amendments to existing QPP planning schemes would have to be made in order to address this inconsistency.

24.3. As evidenced in the recent decision in *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 007, disputes about what constitutes an 'ancillary use' still exist. If the broader definition were to be introduced, such disputes would only be exacerbated.

Recommendation 37: The LGAQ recommends that limitation be placed on the definition of 'ancillary uses', similar to the current SPA definition, to provide certainty to both the public and local governments when considering development applications.

25. Assessing and Deciding Applications

25.1. Sections 57(4) and (5) of the Bill appear to incorporate the lawful use definition to set the scope of development approved under a variation approval. The LGAQ suggests this will have implications for enforcement purposes when a use that was not expressly contemplated by the variation approval nevertheless commences under the approval because it is a "natural and ordinary consequence" of a use in the variation approval, particularly given the changed, broader definition of use discussed in the item above.

Recommendation 38: For certainty, the LGAQ recommends a variation approval should be clear in its terms without the need for any apparent 'deeming' provisions.

25.2. Alternatively, if sections 57(4) and (5) are only intended to be permissive (i.e. to state the type of development that may be accepted, assessable or prohibited in a variation approval) rather than as a deeming provision, it appears to be unnecessarily restrictive. A variation approval should be able to identify any development as being accepted, assessable or prohibited (subject to the assessment process).

Recommendation 39: The LGAQ recommends section 57(5) of the Bill is deleted.

Specific to the Planning and Environment Court Bill 2014

26. Criminal Jurisdiction of the Planning and Environment Court

26.1. The LGAQ identifies that giving the Planning and Environment Court criminal jurisdiction would be beneficial to local governments, particularly having judges with specialist knowledge of planning-related matters and the cost savings of not having to prosecute a criminal matter in the Magistrates Court as well as a civil matter in the Planning and Environment Court.

Recommendation 40: As per previous representations, the LGAQ recommends the Planning and Environment Court be given criminal jurisdiction.

27. Additional comments related to dispute resolution

27.1. The LGAQ proposes a range of options with differing levels of formality should be available to resolve planning and development disputes. These options could include:

- a meeting before a development tribunal or panel (does not involve legal representation);
- an informal 'without prejudice' meeting between the parties which would be chaired by the Planning and Environment Court's ADR Registrar (optional legal representation);
- an informal hearing before the ADR Registrar (legal representation may be involved but hearings are generally 'on the papers' so that no court appearance required); and
- a formal hearing by the Planning and Environment Court.

27.2. The LGAQ proposes that planning and development disputes should be resolved with the lowest level of formality possible, as appropriate for the matter. A reformed dispute resolution system should allow a planning and development matter to be initiated with the relevant parties determining the appropriate forum in which the dispute is to be resolved. Alternatively, where the parties are unable to agree on the appropriate forum, the matter can be appraised by an independent person (e.g. the ADR Registrar) whereby the matter is allocated to the appropriate forum. All decisions made by a tribunal, panel, the ADR Registrar and/or the P&E Court remain reviewable/appealable, subject to certain limitations (e.g. error in law).

Recommendation 41: The LGAQ recommends that the current Queensland system of planning and development dispute resolution undergo a reform process with the goal of achieving a range of resolution options with differing levels of formality with the aim for disputes being resolved with the lowest level of formality possible, as appropriate for the matter.

Additional commentary not directly related to specific provisions in the proposed legislation

28. Review the need to retain core planning process in principal legislation to provide confidence and transparency

28.1. The Bill removes processes, such as the development assessment process, from the principal planning legislation to a subordinate statutory instrument.

28.2. Although the rationale to improve processing and navigability is understood, removing the need for consultation prior to fundamental legislative amendments does not provide certainty for the end-user nor instil confidence that amendments will not be continually occurring or ongoing. It is arguable this places excessive power in the Minister's hands.

28.3. The development assessment process is a core component of planning legislation. While legislation must be navigable, the previously proposed framework in the lapsed P&D Bill 2014 (and mirrored in this Bill) was mapped across several instruments that may have confused all end users.

Recommendation 42: Given the potential negative outcomes for local governments, industry and the broader community, the LGAQ recommends that key process matters (including the development assessment process) should not be moved from the principal legislation into subordinate legislation. The core framework must be located in one statutory instrument and must ensure a genuine review processes cannot be expedited without due consultation and engagement.