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Research Director
Infrastructure, Planning and Natural Resources Committee
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Dear Reform Team,

Submission on the Draft Planning Bills

This submission is made to you following an examination by the Urban Development Institute of Australia (Qld) (the Institute) of the contents of the Planning and Development (Planning for Prosperity) Bill 2015, the Planning and Development (Planning Court) Bill 2015, and the Planning and Development (Planning for Prosperity - Consequential Amendments) and Other Legislation Amendment Bill 2015.

The current planning legislation, the Sustainable Planning Act 2009 (SPA), is in substance the same as its predecessor the Integrated Planning Act 1997 (IPA). The IPA and the SPA together are 17 years old, and over that period the legislation was amended on numerous occasions which added to its complexity and reduced the planning system's capacity to deliver responsive performance based planning outcomes. The planning system is now overdue for reform.

The Institute therefore supports replacing the Sustainable Planning Act 2009 with new legislation.

The package of private members Bills before the IPNRC involves sensible reforms premised on robust planning principles with the potential to deliver increased job creation, growth and diverse and affordable housing for all Queenslanders. Further, the Bills have the potential to deliver an improved planning culture, better planning schemes and improved planning and development outcomes that meet community expectations.

The Institute and many other stakeholders have been involved in more than two years of good quality engagement with the Department on the topic of planning reform. The package of Bills reflect this two years of consultation and hard work. The Institute congratulates the Opposition for introducing these Bills into the Parliament and also congratulates the Government for also arriving at the view that the SPA must be repealed and replaced by new efficient and effective laws.

There appears to be far more commonality than differences between the Government and Opposition in relation to new planning laws. As such, we urge both sides of politics to proceed in a bipartisan way.

The Institute welcomes in particular a number of aspects of the Bills including:

- The straightforward and logical structure of the Bills, including ease of navigation;
- Removal of unnecessary planning instruments;

- Inclusion of development assessment processes in a regulation thus facilitating speedier amendment as and when required;
- Retention of the approach in the SPA to Planning and Environment Court cost rules, natural hazard exemptions from compensation, infrastructure charging arrangements, and preliminary approvals overriding a planning scheme.
- Streamlining of the process for making and amending planning schemes to ensure schemes can be kept up to date and responsive to the needs of the communities
- Replacement of the 'conflict' and 'sufficient grounds' tests with simpler decision rules that will encourage performance based planning, allowing for the proper balancing of all relevant factors, and reducing costs associated with technical legal arguments;
- Flexibility and associated reductions in risk and cost associated with change applications and missed referrals;
- Formulation of standard assessment according to the IPAs original approach to code assessment involving a presumption in favour of approval for compliant development. This will facilitate a positive change in attitude and approach from assessment managers.
- Simplification of the process for extending approvals and making amendments to approvals
- The introduction of a new 'exemption certificate' process allowing for a quick and inexpensive option for assessing minor, low risk alternatives to the defined 'acceptable solutions' in schemes.

Our predominant concern with the Bills is that there is a risk that too much development will transition from code assessable under the SPA to merit assessable under proposed new laws. Arguably if a development proposal were to be subject to merit assessment (despite improved decision rules proposed in the Bills) when it had previously been code assessable, then this could effectively increase the level of risk faced by the proponent. To avoid this outcome, amendments are required to the transitional provisions in the Bills as well as a strong focus from the Department on implementation and transition to ensure that best practice and best use of the legislation is achieved. An outcome whereby local governments avoid using the proposed new standard assessment could have a significant impact on the industry's ability to deliver affordable and thriving communities.

The remainder of this submission highlights what we see as some of the more fundamental and positive aspects of the Bills and provides some recommendations for amendments that will ensure that the objectives of the Bills are achieved.

Decision rules and levels of assessment

Perhaps the most fundamental and important proposed change in the Planning and Development (Planning for Prosperity) Bill 2015 (PD Bill) is to the assessment streams and decision rules.

The PD Bill proposes to replace the 'conflict' and 'sufficient grounds' test contained in the SPA with simpler decision rules that will encourage performance based planning. This will result in developments being approved that meet the clear policy intent of a planning scheme while balancing social, economic and environmental concerns.

Standard assessment is proposed to be reformulated to provide a presumption in favour of approval for compliant development. To the extent that development complies with the assessment benchmarks (in the current language, the applicable codes) the PD Bill proposes that it must be approved. It can only be refused if it does not comply, and compliance cannot be achieved by imposing lawful conditions. This reverts to the way in which the IPA originally intended code assessment to operate. This will reduce risk and cost to proponents and in turn facilitate housing supply.

Merit assessment replaces impact assessment. Merit assessment only involves public notification if required by a planning scheme, and assessment of the proposed development against all relevant parts of the planning scheme.

The Institute strongly supports these elements of the PD Bill. Existing SPA decision rules that require applications to be refused if they conflict (textually) with a planning scheme (absent sufficient grounds) have driven a culture of local planning scheme drafting that is the antithesis of performance based planning. Indeed SPA decision rules combined with scheme drafting techniques amount to de facto prohibition. SPA decision rules frustrate appropriate development and too frequently result in legal technicalities and complications.

Merit assessment and its decision rules will deliver much greater decision making flexibility to allow for genuine performance based planning, the balancing of competing considerations and therefore better outcomes for the community. The Institute notes that decision rules for merit assessable applications refer to 'any other relevant matter (section 40(4)(b)) with 'planning need' provided as an example. It is often challenging to demonstrate 'planning need' for residential development as there are no established standards such as those that exist for retail development. The Institute therefore recommends that an additional italicized example be provided in section 40(4)(b) indicating that a shortfall in supply of housing relative to underlying demand or a lack of diversity or affordability within a locality be a relevant matter.

Turning to standard assessment, the Institute is of the view that the associated decision rules will reduce risk relative to code assessable processes under the SPA. The requirement in section 56 of the PD Bill to approve if an applicant meets assessment benchmarks or where it can be reasonably conditioned to be able to achieve those benchmarks is particularly positive. This will facilitate a cultural change and shift the mindset of development assessment managers. More complex and sophisticated planning schemes are such that development applications rarely comply with all Acceptable Outcomes and as such cultural change will be critical in delivering 'presumption of approval' in a performance-based environment.

In summary, the changes allow the flexibility needed to reach properly balanced development decisions.

Our support outlined above is qualified, however. Steps must be taken to ensure that the transitional arrangements in the Bill and the supporting regulations produce an outcome whereby development that is currently code assessable is subject to the proposed new standard assessment. If local governments take steps that result in code assessable development being transitioned to merit assessable (without notification) then this increases the risk for these developments because merit assessment is effectively unbounded, that is, assessment is against all relevant parts of the planning scheme and other relevant matters. Steps that must be taken to avoid this outcome include:

1. That the 'assessment benchmarks' in a regulation include all of the matters that are currently included in codes in a planning scheme. Assessment benchmarks should not be limited to just quantifiable acceptable outcomes but also include performance based criteria. If developments with any degree of subjectivity in their assessments are excluded from standard assessment, it will effectively be the same as compliance assessment under the SPA. Compliance assessment has proven to be unsuccessful and rarely used.
2. That the statutory maximum assessment timeframes prescribed in a regulation are not so short or demanding that local governments react by drafting their planning schemes to place more development into merit assessment.
3. That section 249 of the transitional provisions in the PD Bill be amended such that if a local government seeks to have any code assessable development transitioned to merit assessment that this be deemed a 'major scheme amendment' and subject to a State interest check and statutory consultation (rather than just Ministerial approval as proposed in section 249).

This outcome would be further assisted if the State Government produced 'model schemes' including 'model assessment benchmarks' and encouraged their use by local government through the provision of reward funding.

The industry has worked hard for many years to encourage reductions in levels of assessment commensurate with risk and this approach has been encouraged by State Governments. For too long, local governments have applied unnecessarily high levels of assessment to what are fundamentally low risk activities. In addition, local planning schemes too often apply impact assessment to development even when that development type is anticipated and is consistent with the intent of a zone. Unnecessarily high levels of assessment add time, cost and risk and ultimately the community suffers due to a resulting lack of economic development and supply of diverse and affordable housing.

In summary, the Institute supports the proposed levels of assessment and decision rules in the PD Bill provided that steps are taken to ensure all compliance and code assessable development is captured by standard assessment under the new system.

Costs in the planning and environment court

The Institute supports the proposed carry-over from the SPA to the PD Bill of the rules relating to when the Planning and Environment (P&E) Court can award costs against particular parties.

Existing cost provisions in the SPA were the result of changes made in 2012 that removed the default position that parties pay their own costs except for vexatious actions. The 2012 changes provided discretion to the P&E Court in relation to costs and provided a non-exhaustive list of circumstances where costs could be awarded. These changes addressed significant concerns including that commercial competitors were using the Court to delay development in the knowledge that they will not be penalised with costs. This was harming economic development and job creation. Another concern prior to the 2012 changes to the SPA was that well organised third parties were frequently litigating on weak town planning grounds in relation to approved developments on the basis of a general philosophical objection to development without any real prospect of cost being awarded against them. This was harming housing affordability, in particular by limiting much needed infill development by adding considerable risk to the development process. Whilst prior to 2012 costs could be awarded in the event of "frivolous or vexatious" actions, this threshold was so high that cases run on very weak town planning grounds faced negligible risk of an adverse costs order.

The existing cost arrangements are balanced and their operation since 2012 demonstrates that members of the community should not fear costs being awarded against them so long as they take some basic steps to evaluate their case so as to ascertain whether there are any legitimate town planning grounds for their appeal. Current arrangements provide the community with free access to 'without prejudice' conferences and mediation services offered by P&E Court Alternative Dispute Resolution (ADR) Registrar. These ADR services in practice provide members of the community with an opportunity to ascertain whether there are any legitimate town planning grounds to their case and provide them with the opportunity to reassess whether or not they should proceed to Court. In fact, the 2012 changes to cost provisions have reportedly had the effect of making 'without prejudice' conferences more useful and productive and thus more likely to result in an early resolution.

The Courts are taking a very reasonable approach to costs and the Institute is not aware of any adverse cost orders being made against individuals since the 2012 changes. Adverse cost orders have been awarded in a small number of cases against local governments and commercial competitors and we are aware of no instances where an individual or community groups have paid the other parties costs.

The Institute understands that the current State Government may favour an alternative approach to costs in the P&E Court. The alternative approach may involve reinstating pre-2012 SPA provisions that only allow costs to be awarded against individuals or community groups in the event of vexatious or frivolous cases but retaining greater discretion for costs to be awarded against commercial competitors. The Institute does not support this alternative approach for the following reasons:

1. Commercial competitors could easily 'get around' such arrangements by supporting a community member to pursue the matter on their behalf.
2. Individuals and community groups are not disempowered due to facing the 'threat of costs' under current SPA arrangements so long as they take some simple steps to ensure that there are some town planning grounds on which to base their case.
3. Mediation and Alternative Dispute Resolution processes are freely available to everyone so that community views can be heard. It is very common for changes to be made to an approval as a result of these ADR processes eliminating the need to go to Court.

Compensation provisions

The Institute supports the proposed carry-over from the SPA of compensation provisions, particularly the natural hazards exemptions, as detailed in sections 24 to 26 in the PD Bill.

During consultation on planning reform over the past two years an alternative proposal was being considered whereby there was greater scope for a local government to down zone land in response to what they perceived as a hazard without triggering compensation.

The right to a conditional approval to address a hazard and then to appeal that condition if necessary is of fundamental importance. The right to lodge an application and appeal the decision, including conditions, is a core value of the system and ensures its accountability. Removing the opportunity to address a hazard through appealable conditions would substantially dilute the test of whether the local government, (i) gets the hazard mapping right in the first place and (ii) gets the technical requirements and solutions right. The previous experience of our members is that planning scheme overlay mapping is never absolutely precise (and is often very imprecise). It also potentially limits technical solutions to those that the local government has foreseen and removes the opportunity for new innovative solutions to be found to address an issue, and then for disagreements about those conditions to be tested in Court. It is important that we maintain this level of protection to land owners and accountability in the system.

Further, in circumstances where there are clear and significant flood risks, for example, the alternative proposal that was considered during consultation would be unnecessary in any case as essentially where land is significantly and unarguably flood prone, the prospect of approval for development is likely to be low in any event so a claim for compensation with respect to a zoning change that merely reflects that fact is unlikely to succeed.

Making a development application

Section 46 requires that for a development application to be properly made it must be made in the approved form and accompanied by particular documents and the correct fee. The Institute recommends some amendments to Section 46 to remove unnecessary risk from the development assessment process. Specifically the Institute recommends that the PD Bill be amended such that

1. Notwithstanding section 46, an assessment manager has the flexibility to accept an application as properly made under any circumstances (with the exception of requiring owner's consent for privately owned land)
2. If, within five business days of lodging an application and in the absence of a notice from local government to the contrary, that development applications be deemed properly made. The only exception would be where owner's consent for privately owned land were not provided (see discussion on owner's consent below).

These additional provisions would represent significant reform that facilitates cultural change by re-orientating assessment managers to the content of a proposal rather than procedural and process components.

It would not be uncommon, for example, that after the lodgment of a development application that it be discovered that the incorrect fee was paid. If this were to occur, a third party could seek to have a development approval invalidated on the basis that the incorrect fee was paid and therefore the application was not properly made. In the event it is discovered after lodgment that the incorrect fee was paid, unless local government issued a notice to rectify the problem within five business days of lodgment, the application ought to be deemed to be properly made. Further, to remove any doubt in relation to fees, section 46 should be amended to state that any fee is only payable within 10 business days following issuing of an invoice or notice by the assessment manager. This is important because electronic lodgment facilities do not always anticipate all forms of applications.

Owner's consent

Applicants can often experience unreasonable delays in receiving owner's consent. Delays are most common for State owned land. For example, receiving owner's consent for something as minor as a driveway crossover on a road reserve can take months and potentially delay the lodging of a development application. In addition, changes to the SPA in 2012 that removed the requirement to obtain a resource entitlement prior to lodging a development application did not have the desired effect in many cases. The reason was that State agencies did not act in the spirit of the changes. For example, our members have reported that in many cases, the Department of Natural Resources and

Mines has continued to require the same process that was required under the old 'application for resource entitlement' to occur as a prerequisite for providing owner's consent.

The Institute therefore recommends an amendment to section 46 of the PD Bill that has the effect of removing the requirement for owner's consent for state owned land to be obtained prior to lodging a development application. A development approval does not grant proprietorial rights and therefore the PD Bill ought to simply contain a clause stating that owners consent from the State must be obtained at any time prior to a development approval becoming effective.

The Institute is comfortable with the PD Bill requirement for owners consent to be obtained prior to lodging a development application when the land is privately owned land. Whilst a development approval does not grant proprietorial rights, we understand that many in the community would be uncomfortable with the notion that a development application could be lodged over their land without their upfront consent.

Public notification

The Institute supports the decoupling of levels of assessment from public notification. There are many instances where a project deserves to be subject to a higher level of assessment (i.e. merit) but need not also require public notification and associated appeal rights. For example, a medium density multi-unit dwelling proposed in a zone that anticipates that use but where there is some departure from a code (or assessment benchmark). In some local government areas such developments are often referred to as 'impact (generally appropriate)'.

This flexibility will allow for the reduction of risk and cost on projects and in turn will improve feasibilities and increase the supply of affordable housing. It is critical, however, that planning instruments clearly identify when public notification is required.

Certainty on whether an application is merit (non-notifiable) or merit (notifiable) must be clearly discernible prior to the lodgment of any application. Upfront certainty about notification is absolutely critical where the risk of submitter appeal exists. Developers will want certainty on this aspect during tender and due diligence periods as will potential financiers. In many cases developers or financiers will simply avoid a potential development site if third party submissions and appeals are permitted due to the impact on risk and costs and therefore project feasibility.

The Institute also supports the scope provided in section 48 for non-compliance where satisfying certain requirements (e.g. public awareness is not adversely affected). This adequately deals with some of the uncertainties regarding public notification non-compliance under the SPA. For example, if the post is slow and the notification is not received immediately but does ultimately arrive, section 48(5) appears to provide some scope for the application process to continue without the applicant being penalised by delays for a situation not of their doing.

Lapsing and Currency Periods

Existing currency period and lapsing provisions under the SPA are complex and onerous resulting in added risk and cost to development. Current rules in the SPA allow four years as default for Material Change of Use (MCUs) and Reconfiguring a Lot (RoL) with subsequent Operational Works (OPW).

The proposal in the PD Bill to extend this to six years is supported. Six years better reflects the realities of economic and property cycles.

The PD Bill does, however, remove the 'roll-on' provisions that existed under the SPA. Whilst these provisions were complex, they did allow proponents to achieve substantially more time before an approval lapsed. Replacing these roll-on provisions with an automatic two years is not sufficient in our view unless further measures are included in the PD Bill to remove the risk associated with the lapsing of approvals. Specifically, the Institute recommends that the Bill be amended such that currency periods stipulated in the Bill are in fact a minimum currency period and that lapsing would only occur if local governments choose to enforce that currency period through the issuing of a notice to applicants. It is

recommended that the issuing of a notice be required to occur within 40 days of a local government's intention to enforce a currency period thus allowing a proponent sufficient time to request an extension or take some other action. Strict currency periods are unnecessary and they add cost for the applicant and consultant due to a need to constantly monitor timeframes.

Further, it has not been uncommon under the SPA for both applicant and local government to be unaware that a development approval has lapsed. Current SPA provisions make it costly and difficult for lapsed approvals to be revived, even if both applicant and local government are supportive of its revival. The Institute therefore recommends that the PD Bill be amended to contain transitional provisions that allow local government to revive an existing SPA approval retrospectively after they have lapsed.

Removal of QPP and SPRP as planning instruments

The Institute supports the abolition of State Planning Regulatory Provisions (SPRPs) as a planning instrument and agrees that as a tool, they limit the scope and flexibility of performance based development assessment to the extent that they impose regulatory outcomes.

With regards to Queensland Planning Provisions (QPP), the Institute acknowledges that the level of detail and prescription in QPP exceeds that which was originally envisaged and we support its abolition as a separate planning instrument. The Institute does, however, believe that certain aspects of QPP should remain mandatory and ought to be included in a regulation. The State should be setting a limited number of standard provisions for planning schemes. These standard provisions would ensure consistency across the state, but also the flexibility for each planning scheme to respond to the specific nature of planning within an area. It is considered that the following be mandatory and incorporated in a regulation:

- Standard definitions, including administrative definitions and terminology (e.g 'Acceptable Outcomes');
- Standard zones;
- Common colours and descriptors for maps;
- A standard order for the table of contents and a compulsory requirement for a strategic framework; and
- Hierarchy of planning controls.

Changing development approvals

The Institute broadly supports sections 71 through 79 of the PD Bill that deal with changing development approvals. These requirements are less onerous than under the SPA and provide a fair balance between facilitating efficient processes and protecting community interests. In particular, the Institute supports the removal of the subjective requirement for the responsible entity to determine whether an objection might be made to the proposed change and enabling changes other than a minor change to be made with the process limited to the scope of the requested change only.

The Institute does, however, recommend some changes to section 75(3)(c) of the PD Bill. Section XX identifies that the Planning and Environment (P&E) Court is the responsible entity if the development approval was given because of a P&E Court order and that there were properly made submissions for the application. It is not clear what the policy reason for choosing the Court to be the responsible entity is in this instance.

The Institute understands that some local governments would prefer to be able to decide change applications to avoid the cost of seeking orders from the Court. The current wording requires the Court to be the responsible entity every time there is a properly made submission regardless of whether the submitter actually takes part in the appeal.

Planning and Plan Making

Chapter 2 of the PD Bill contains a number of positive changes that provide flexibility and facilitates more efficient and timely amendments to planning instruments. In particular, the Institute supports the following changes:

- A recognition that State planning instruments are not the only way to give effect to State interests. This allows scope for planning debate about broader matters of State interest and provides flexibility for changing circumstances;
- The ability to make a minor amendment to State planning instruments without requiring consultation. This change is positive as it will avoid unnecessary delays when fixing errors or inconsistencies in a State Planning Instrument. Scope for minor amendments included in any future regulation must, however, not be so broad as to result in potential uncertainty and disadvantage; and
- The flexible approach to preparing a planning scheme or amendment (section 16). The process for preparing a planning scheme or an amendment is subject to discussion with the Minister, and is not standard across all local governments. This flexible approach is welcomed given the diversity of local governments throughout Queensland. Notwithstanding the process agreed with the Minister, section 13 still requires the necessary consultation and section 16(8) states what the planning scheme must achieve. As such, the Institute believes that the flexible process still has appropriate structure.

Summary

In summary, the package of private members Bills before the IPNRC involves sensible reforms premised on robust planning principles with the potential to deliver increased job creation, growth and diverse and affordable housing for all Queenslanders. There is scope for some improvements as outlined in this submission – in particular amendments that facilitate the transition of code assessable development to standard assessment.

The Institute congratulates both the Government and Opposition on their commitment to repeal the SPA and replace it with a more efficient and effective planning system that is truly performance based.

There appears to be far more commonality than differences between the Government and Opposition in relation to new planning laws. As such, we urge both sides of politics to proceed in a bipartisan way to ensure that Queensland gets the best possible planning system that delivers growth, jobs and thriving communities.

Yours sincerely

Urban Development Institute of Australia (Queensland)

Marina Vit

Chief Executive Officer