Mackay REGIONAL COUNCIL

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The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: sdiic@parliament.qld.gov.au

**Submission on Sustainable Planning (Infrastructure Charges) and other Legislation Amendment Bill 2014**

Dear Sir/Madam,

Mackay Regional Council hereby submits its comments on the State Government's *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill, 2014.*

Mackay Regional Council is supportive of the objective of the Bill to establish a long-term local infrastructure planning and charging framework that is certain, consistent and transparent and which supports local authority sustainability and development feasibility in Queensland.

However, Council has a number of concerns, particularly in relation to the impact of the Bill on the financial sustainability of Local Government and ultimately, development feasibility in Queensland.

These concerns are articulated in Attachment 1. The capping of infrastructure charges, new deemed infrastructure charges provisions and the risk in applying the transitional provisions are of major concern. Further limitations on eligibility of applying for grant funding, in addition to the shortfall in excess of $80 million as a result of the Government's withdrawal of various grants such as the Roads and Drainage Grant and Water and Sewer subsidies, would significantly impact the financial viability of Mackay Regional Council. Your serious consideration of the matters raised is thus requested.

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If you have any questions regarding the matters raised, please feel free to contact Melaina Voss at (07) 4961-9803.

Yours sincerely,

**Kevin Jefferies**
*Director Development Services*

*ATTACHMENTS:*
*Attachment 1: Submission on the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill, 2014*
*Attachment 2: Attachment 2: Interpretation of establishment cost of the infrastructure made necessary by the development*

## Attachment 1: Submission on the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill, 2014

### 1. Consultation for review of LGIPs (Clause 5 – insertion of a new s 91A)

Existing PIPs are to be transitioned as LGIPs from 1 July 2014 and local governments must review their LGIPs every 5years. In reviewing LGIPs, the Bill requires a local government to consult with entities that have participated in preparing the LGIP.

*It is not clear whether "an entity" includes the original consultants engaged to prepare the LGIP. This matter needs to be clarified as in some cases a local government may not wish to consult with its original consultants.*

*It is recommended Section 91A (2)(a) be amended to exclude the original consultants.*

### 2. Guidelines (Clause 6 – amendment of s 117)

The Bill requires an LGIP must be prepared and made or amended as required under a guideline made by the Minister or prescribed under a regulation.

*Council is concerned about the absence of such guidelines at this late stage. Councils will have 24 months to prepare its LGIP and it is crucial such guidance be ready and available prior to the Act coming into effect on 1 July, 2014. Council is unable to consider the full impact of the proposed infrastructure charges framework without the concurrent consideration of the guidelines.*

### 3. Definition of Establishment costs (Section 627)

The definition has been amended to mean that it will no longer possible to include the financing costs for the infrastructure as part of the establishment costs. Similarly, for existing infrastructure, it is no longer possible to include the residual financing cost of the infrastructure.

*These changes may have considerable financial implications for Councils and it is recommended the changes be re-considered or withdrawn. The financing cost of trunk infrastructure will be considerable, especially for high growth councils investing in major simulations infrastructure schemes to support growth.*

### 4. Indexation of maximum charges (Section 629)

The provisions retain the ability to index the maximum charges prescribed under the SPRP at the discretion of the Minister. Since the introduction of the maximum capped charges framework in 2011, charges have not been escalated in line with construction cost indices. Consequently, charges have reduced in value by approximately 8% in real terms (2011-2013) since introduction in 2011. At the same time, the State Government currently applies a 3.5% annual indexation to its own fees and charges.

*It is recommended the section be amended to include a mandatory and automatic annual indexation of the current maximum capped charges, preferably using the Queensland road and bridge construction index, to reflect increasing building and construction costs of providing infrastructure. The methodology should set a base date and automatically index at the time of issue and again at the time of approval.*

## 5. Working out cost for required offsets and refunds (Section 633)

Section 633 requires a local government to include in its charges resolution a methodology for working out the cost of infrastructure, the subject of an offset or refund pursuant to clause 657 of the Bill. The clause makes provision for the methodology to be confined to parameters identified in the SPRP (adopted charges) or alternatively a guideline made by the Minister.

Based on current drafting, the clause 633 essentially provides the ability for the proponent to require the local government to use the methodology under the charges resolution if it disagrees with the details of the offset or refund. As such, an applicant will always select the option which provides the highest return. If the actual cost is less than the planned cost, then the planned cost will be selected. If the actual cost is higher than the planned cost, the actual cost will be selected. This clause removes the relied upon 'overs and unders' balance and could actually result in all costs to be offset being equal to or greater than the planned cost, resulting in greater infrastructure cost to the community.

*The provision has the potential for significant cost impost on ratepayers and should be re-considered. The provisions will increase the under recovery of trunk infrastructure costs, especially in major greenfield areas and contributes to additional uncertainty in the long term financial forecasts in order to fund trunk infrastructure. In addition, without the detail of the relevant parameters, it is not possible to assess or comment on the magnitude of the effect of this change.*

## 6. Levy and recovery of charges (Section 635 onwards)

*Uncertainty whether infrastructure charges are only payable by the "applicant"*

While the intention appears to be that infrastructure charges will run with the land, it is arguable that the Bill only requires charges to be paid by an "applicant" and (not be binding upon successors in title).

Clause 635(2) requires the local government to levy a charge on the applicant. Further, clause 635(6)(b) provides that a levied charge under the notice is payable by the applicant.

However, these statements are seemingly contradicted by the statements in clause 635(6)(c) that the levied charge attaches to the land and clause 664(1) that, for the purpose of recovery, charges are taken to be rates. Currently, under section 648F of SPA, it states that Council must give the infrastructure charges notice to the applicant or person who requested compliance assessment. However, it does not state who is responsible for paying the charge.

*It is recommend the words "on the applicant" be removed from clause 635(2). Clause 635(6)(b) should also be removed.*

<u>Limitation on Local Governments when an infrastructure charges notice can be given</u>

Clause 635(3) specifies the time within which an infrastructure charges notice can be given. It specifies three instances where such notices can be given, being where a local government is:

(a) the assessment manager;

(b) a concurrence agency; or

(c) in receipt of a deemed approval notice.

However, there are currently circumstances where adopted infrastructure charges notices are issued and in future, should be issued by local governments without any of the above triggers applying. An example of this is where a building approval is issued by a private certifier and the council issues an adopted infrastructure charges notice for the building work within 10 business days of receiving the private certifier's decision notice. This could no longer occur under clause 635 of the Bill.

Clause 635 will effectively limit councils from giving an infrastructure charges notice to circumstances where they are an assessment manager or a concurrence agency. Presently under SPA, councils have the ability to give an infrastructure charges notice upon receipt of a development approval by others (e.g. a private certifier for building work).

*This interpretation is supported by clause 635(1)(a) as it states that the clause only applies if a local government has given a development approval. The way clause 635(3) is currently drafted, a local government effectively cannot issue an infrastructure charges notice on development approvals where it is not an assessment manager or concurrence agency, which will exclude almost all development not governed by the planning scheme, including development authorised under ministerial designation or Environmental Impact Statements, development managed by other schemes including Mackay Airport and Mackay Seaport, and self-assessable development.*

In contrast, Section 648F(3)(b) of SPA provides for a local government to be able to issue an infrastructure charges notice after it receives a copy of the approval, permit or deemed approval notice (e.g. from a private certifier for building work).

As this will encourage local governments to ensure it is the assessment manager for as many as possible developments (for development managed by its planning scheme), this limitation is counter-intuitive to the agenda of promoting planning schemes to fast-track development at the lowest level of assessment.

*It is recommend rescinding the proposed amendments to the Bill regarding the issuing of charge notices and allow for the ability to issue charge notices triggered by all relevant development managed by planning schemes or similar mechanism.*

## 7. Conditions about necessary trunk infrastructure (Section 647 onwards)

Section 647 (1) states "the section applies if the LGIP does not identify adequate trunk infrastructure to service the subject premises"

This wording is open to a number of interpretations.

One possible interpretation is that the clause only operates where the trunk infrastructure is identified in an LGIP but it is inadequate. The other interpretation is that it also applies to the situation where an LGIP does not identify an item of trunk at all and therefore the LGIP does not identify adequate trunk infrastructure. As SPA currently operates, it is the former interpretation which councils have conditioning powers for. It is deemed unlikely DSDIP intended to move away from this position.

*It is recommended the clause be re- worded to state "this section applies if the LGIP identifies trunk infrastructure to service the subject premises and the identified infrastructure is inadequate".*

## 8. Conditions about additional trunk infrastructure (Section 650 onwards)

It is understood the purpose of the maximum charge was to allow Local government to recover the cost of infrastructure *(existing and new)* that was necessary to provide a level of service to new development. This approach is consistent with the States "Average Cost" methodology outlined in the DSDIP paper of June, 2013

It is accepted that, in the case of development which is consistent with the planning scheme (including the assumptions underpinning the provision of planned trunk infrastructure as outlined in the LGIP)), the $28,000 maximum charge has been adopted as reflecting the cost of providing a level of service to the development. However, it is essential that Local Government be able to levy additional costs on development which is inconsistent with the Planning Scheme. Such additional costs are required to support efficient development of the region (ideally within the PIA)

The requirement to seek costs from inconsistent development appears in Section 650-653 of the Bill which provides a Local Government with the power to levy an *"Additional Payment Condition"* equivalent to *"the establishment cost of the infrastructure made necessary by the development"*. The condition only applies to "*infrastructure that is necessary but not yet available*". At face value, this implies that development which is inconsistent with the planning scheme could be required to make an additional contribution (over and above the $28,000 maximum charge) which reflects the cost of providing the trunk infrastructure (existing and new) which delivers services to that premises. Such a regime would allow a local government to apply location based pricing (presumably using an average cost methodology) for inconsistent development. However, a more detailed reading of the Bill shows that this is not the case and we believe the structure of the bill will lead to inequitable outcomes.

Four examples detailing and illustrating the reasons for this concern is provided in Attachment 2.

*While it is believed to be an unintended outcome, it is considered that these provisions of the Bill directly contradict the stated intention for the framework to be "certain,*

*consistent, transparent and supportive of Local Government and development feasibility in Queensland" and should be urgently re-considered.*

**9. Conversion of non-trunk infrastructure (Subdivision 1, Section 658 onwards)**

Applicants will have the ability to apply to convert non-trunk infrastructure to trunk infrastructure. The Bill does not include any detail of what a local government must consider when deciding a conversion application. Nor does it foreshadow considerations being identified in a regulation or guideline. It appears to leave this solely to the discretion of the council. This is beneficial when a council is the decision maker. However, these decisions are subject to appeal and the P&E Court or a BDDRC may well take a completely different view of the matter given the broad discretion afforded under the provisions.

Councils will need to closely consider the financial ramifications of having non-trunk infrastructure converted to trunk infrastructure under their PIP s/LGIPs, given the offset and refund implications and the fact that such converted infrastructure is unlikely to have been planned for. This poses significant implications for local governments' infrastructure planning, budgeting, capital programming / prioritization and legal costs.

The additional process is seemingly unnecessary and adds an additional layer of duplicative red tape. The IDAS process already provides for these matters to be dealt with during the application stage or an applicant can challenge conditions during the negotiated decision notice phase of IDAS. This is the most appropriate time to change the status of an infrastructure item, not through a duplicated regulatory process. The detailed cost estimates of the infrastructure item can then be determined post the issue of a development permit.

Regardless, further details are necessary in Subdivision 1 regarding process to limit unintended consequences, particularly regarding the timing of valuation and claims. It is inequitable to allow a situation where developers are able to 'bank' their offset in the knowledge that construction values are increasing greater than CPI. They could easily choose to delay making a claim in order to extract a financial return on infrastructure they contributed (potentially) years earlier.

*The proposed conversion process has potentially unacceptable and unknown financial ramifications on local governments. The Council is unable to support the principle of converting on trunk infrastructure until further regulation and guidance is provided for consideration by all stakeholders.*

**10. Transitional Arrangements**

The provision of the proposed Bill comes into effect on 1 July, 2014 with the attendant new avenues available to developers, and its impacts and implications for local governments. However, the new Act will apply to PIP's and resolutions prepared and made under SPA, without the reasonable opportunity to mitigate these impacts through the planning component of PIPs and resolutions. The earliest opportunity to do so is seemingly when local governments make their new Local Government Infrastructure Plans.

*It is recommended the transitional arrangements include a reasonable time period for Councils to review and amend the planning component of their PIPs and resolutions before the provisions of the Act takes effect.*

## 11. General

The introduction of a co-investment program for catalyst infrastructure (Priority Development Infrastructure) and associated incentive to adopt "fair value" infrastructure charges are key components of the new infrastructure planning and charges framework. However, two matters are of immediate concern:

1. *The components are not referenced, included or otherwise recognised or entrenched in the Draft Bill. As such, the commitment of the State Government to these measures is uncertain. The exclusion of the Priority Development Infrastructure / Co-investment program from the Bill, and inclusion of this detail in a guideline or other format, may result in amendments or withdrawal with limited or no consultation. This will place unnecessary risk and uncertainty on the availability and eligibility of potential co-funding opportunities.*

2. *The lack of detail on how these arrangements are to be funded and applied makes it difficult, if not impossible for local government to consider the potential of co-investment to mitigate the impacts of the provisions of the draft Bill. For example, if existing funding earmarked to assist resource towns are now to be made available for broader eligibility, there are no guarantee that local government will receive funding to assist in covering shortfalls when and if they apply. In addition, it is not clear what arrangements will apply if the co-investment is considered to be neither a loan nor a grant or what the processes will be where local government is not the applicant.*

*It is recommended the Government commit to the co-investment program through statute and provide details of its implementation as soon as possible.*

## Attachment 2: Interpretation of establishment cost of the infrastructure made necessary by *the development*

Example 1 – Inconsistent development that triggers the need for additional trunk infrastructure:

Section 650 (1) (b) (i) states that the additional payment condition only applies if the development "*would impose additional trunk infrastructure on the local government after taking into account* ....(the) *levied charges for the development*". This implies that an inconsistent development would only be required to make an additional payment if the cost of "additional trunk infrastructure relevant to that development" *exceeded* the levied charges for the development. As such, development could trigger the need for additional trunk infrastructure up to a value of $28,000 per lot - yet this would be offset against the levied charges. Under this scenario, Council becomes responsible for providing (at its cost) unanticipated "additional" infrastructure necessary to service inconsistent development. These costs would not be planned by Council and could have an adverse impact on Council financial forecast. Ultimately such cost of inconsistent development would have to be recovered from the existing ratepayer base which seems inequitable

Example 2 – Inconsistent development that doesn't trigger the need for additional trunk infrastructure:

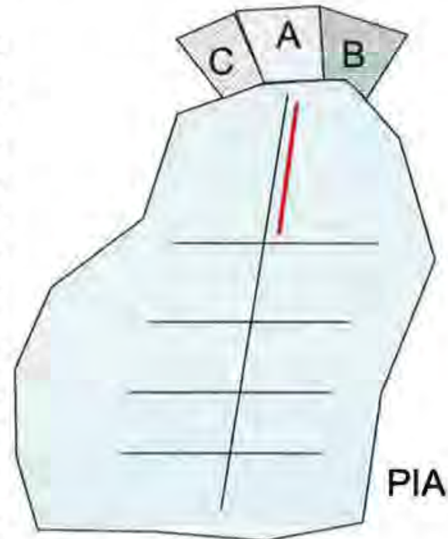
In the case where there is no "infrastructure made necessary by the development" the Local Government could only recover the adopted charge (up to a maximum of $28,000 per lot). This applies everywhere within the Council boundaries (i.e. inside and outside the PIA). This significantly lessens the value of the PIA as inconsistent development which is remote from existing networks (and hence may use proportionately more trunk assets to receive a given standard of service) will pay the same as a consistent development within the PIA which imposes far less demand on Councils trunk infrastructure. Such an outcome seems inequitable.

Example 3 – The marginal cost impact on inconsistent development

Section 653 applies restrictions to the "*Additional payment condition imposed by a local government for development that is completely or partly outside the PIA*". This clause limits the "*establishment cost of infrastructure (additional infrastructure) that is made necessary by the development....*"

Consider a case where a development application arises for a site outside the PIA Development "A"). In this instance, the development can utilise the capacity of the existing network to service its development and therefore triggers no "additional infrastructure".

In this instance, the charge for Developer A is limited to the maximum charge under SPRP ($28,000/lot). An equivalent adjacent development (Developer B) also proceeds and consumes the last of the spare capacity in the existing networks. A third equivalent developer (developer C) seeks to develop but the additional (marginal) demand created by this development triggers the need for "Additional trunk infrastructure".




Under this scenario, it appears that Developers A and B get a "free ride" while developer C may be subject to additional payment conditions. However, under clause 649, Developer C may be able to reasonably argue that the additional trunk infrastructure will be used by Developers A and B and hence only the proportional cost of the "additional trunk infrastructure" should be considered in the additional payment condition. At face value, this in itself seems inequitable from the developer's perspective as Developer C is levied with a charge that wasn't applied to Developers A and B. However, as indicated above, the provisions of clause 650 seem to imply that the developer would only be levied with charges to the extent that they exceeded the "levied charges for the development".

The implication is that developers would receive different treatment depending on the timing of their development and their relationship with the capacity of the existing network. In addition, the cost associated with providing the existing infrastructure necessary to service these inconsistent developments (where the costs may exceed the max charge) seems to be largely (if not wholly) unrecoverable by Council. In addition, Council could be required to fully fund the cost of such unanticipated additional trunk infrastructure made necessary by such inconsistent development.

This scenario seems to be inconsistent with the states intention of providing consistency, certainty, transparency and supporting local authority sustainably.

Example 4 – Planned Infrastructure:

Mackay Regional Council has undertaken extensive planning for the future development of its region. This has including the identification of future land use needs over the long term (beyond 15years) and the trunk infrastructure necessary to develop a nominated level of service to these areas.

As an example, studies undertaken to date demonstrate that the cost of providing the trunk infrastructure necessary to service the 5,000 lots intended at the Ooralea future growth area will be in the order of $250m (around $50,000 per lot). These costs reflect the fact that the "cheaper" land within Mackay has been developed and the remaining growth fronts are typically constrained. In the case of Ooralea, the area will require significant stormwater infrastructure to provide flood immunity.

The works required to service Ooralea have been planned to service the demand that arises from the development of the area *as a whole*.

The Ooralea area had been identified as a possible location for future expansion and is largely located outside the Councils PIA.

Clause 653 states that"... if *the relevant local governments planning scheme indicates the premises is part of an area intended for future development for non-rural purposes* – (then the scope of additional infrastructure includes that which is)... *necessary to service the rest of the area*". At face value, this provision appears to suggest that Council could recover the cost of delivering the $250m of additional planned infrastructure necessary to service Ooralea. However, this may not the case.

The Bill clearly states that "the additional payment condition may only require the payment of .....additional trunk infrastructure....*made necessary by the development"*. Our understanding of such clauses is that any reference to "the development" is typically interpreted by the Courts as a reference to "the development which is the subject of a given application". In this case, were Council to allow development to proceed at Ooralea then it's probable that none of the initial developers would trigger infrastructure made necessary by *their development.* Hence, no additional payment could be levied. Council would be limited to recovering only the maximum charge (of $28,000 per lot) from these developers.

If development of the area were to proceed, the residual capacity of the existing network would be consumed to the point where one developer (the marginal developer) would trigger infrastructure "made necessary by their development". In this instance, Council could seek to recover an "additional payment condition". However, the developer would rightly contest that, in many cases, the other preceding developments would also be using the

infrastructure and hence it is only the proportional cost of the additional infrastructure that could be considered in the payment condition. In addition, Section 650 seems to imply that the costs would be offset against "charges levied for the development".

Our interpretation of these clauses is that:

a) Council could only ever recover the maximum charge (at best);
b) Developers would be treated differently depending on their location (proximity to trunk infrastructure networks that have capacity vs. those that don't); and
c) Council would have to finance any shortfall between the cost of providing trunk infrastructure necessary to service the area and the maximum charge. In the case of Ooralea, this would be a cross subsidy by existing ratepayers of at least $110m ($250m in cost less charges revenues of 5,000 lots x $28k). This estimate excludes finance and holding costs.

Our conclusion from these cases studies is that:

- Council will not be able to apply any "location based price signals" to support development within the PIA, which would undermine the ability to plan the growth in an efficient and effective manner;
- The Bill provides little or no incentive for Council to undertake long term infrastructure planning (as the financial outcome from the well planned scenario in Case 4 is little different from the "ad hoc" scenario in Case 3);
- The financial impact of the limitations identified above mean that Council will not be able to support development of the region without adversely impacting its financial sustainability; and
- Treatment of development applications will vary depending on the location of the proposed site and its proximity to trunk networks with capacity.