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11 October 2012

By email: SDIIC@parliament.qld.gov.au

State Development, Infrastructure and Industry Committee

Dear committee

Sustainable Planning and Other Legislation Amendment Bill 2012 (Bill)

This submission relates to the changes proposed by the Bill to the costs provisions of the *Sustainable Planning Act 2009* (**SPA**). It specifically relates to the proposal that costs follow the event.

The proposed amendment is stated to be aimed at:

- discouraging commercial competitor appeals instituted to delay development;
- removing a perceived disincentive to appeal conditions; and
- preventing appeals where a party appeals on weak town planning grounds.
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It is my view that the proposed amendments do not achieve the above aims and will cause other, serious, unintended effects.

The attraction of the current costs provisions is that they allow an entity that has a genuine cause to engage in an appeal if it is satisfied that it can afford to pay its own costs in that appeal. In instances where there is a clear imbalance in finances between parties in an appeal, a party with a genuine cause would not need to be concerned about whether it should enter into proceedings for fear of having to bear the costs of one or more additional party.

The proposed amendments would provide a distinct advantage to larger competitors and, indeed, local governments because they can defray any costs across a larger organisation. They will know that a smaller entity will not have that advantage and there will therefore be a significantly greater financial incentive for the larger organisation not to settle proceedings and a larger financial disincentive for a smaller entity to continue proceedings. In fact, the incentive and disincentive would be exacerbated by inserting proposed section 457(2), which makes settlement at mediation a factor in determining whether each party ought to bear its own costs. A smaller entity will be at a distinct disadvantage in mediation because it will need to settle in order to avoid the prospect of having costs awarded against it. Other parties will know this. These advantages and disadvantages exist to a far lesser extent in the current costs provisions.

The proposed amendments also raise a difficulty for local governments and concurrence agencies (even after the proposed amendments to the referral agency arrangements). Often a local government or a concurrence agency will be faced with a development application where

the line between approval and refusal is very fine. By way of example, frequently development is proposed that conflicts with a local government's planning scheme. In that scenario the local government must assess whether sufficient grounds exist to justify approval of the application, despite that conflict. This decision is rarely a simple one. At times the grounds put forward by a developer may not be persuasive and it may only be during the rigour of an appeal that all relevant grounds are developed. Of course in that instance, the local government doesn't know what those grounds are at the time of its initial decision. The proposed amendments mean a local government will be forced to consider the likelihood of an appeal about its decision and whether it is prepared to take the risk that the Court will arrive at a different decision. This would be most concerning for smaller local governments, particularly when faced with a well-resourced development application. This a factor that a local government should not need to consider.

The proposed amendments have significant implications for community groups also. In the current costs environment, community groups would generally take comfort that they can participate in an appeal without fear of a costs order against them, provided they do so genuinely. Despite this general position, even in the current regime, community groups still genuinely fear that they will be subject to a costs order - I have had the fear of a costs order expressed to me as a specific reason for a community group not to participate in an appeal. The proposed amendments mean that the prospect of a community group participating in appeal would be low. This cannot be an acceptable outcome.

An appeal is a hearing anew, on fresh evidence. If it is considered appropriate that the community be entitled to make submissions during the assessment process, it is similarly appropriate that they be entitled to voice their views in a hearing anew. The proposed costs provisions would provide real disincentive for the community to participate in an appeal.

The committee ought to be made aware of the following judicial commentary, relevant to the exercise of the Court's discretion to award costs and the role of the Court:

- "*It seems likely that one purpose* [of Section 7.6(1)] *is to ensure that citizens are not discouraged from appealing or applying to the Planning and Environment Court because of fear that a crippling costs order might be made against them. The provision no doubt also recognises the public interest character of some applications to the Planning and Environment Court.*" (In *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271 at [34], per McMurdo P and Atkinson J (the commentary was of the costs rule in the repealed *Local Government (Planning and Environment) Act 1990*)).

- *"A matter of importance, when allegations of frivolity and vexatiousness are raised, is the public policy consideration implicit in the legislation and recognised in Mudie, which dictates that a balance be struck between not discouraging citizens from approaching the court, while not encouraging manifestly groundless actions"* (*Walsgott v Maroochy Shire Council & Anor* [2005] QPEC 012 at [18]).

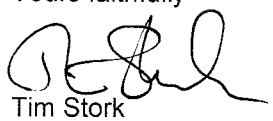
- In *Hall & Ors v Nanango Shire Council & Ors (No. 2)* [2005] QPEC 105 at [9], the Court said:

  "There is, in my view, no necessary connotation of deliberate conduct in these expressions. Rather it is a question of whether the proceeding or part of it, including the conduct thereof by the relevant party, should be seen upon an objective examination to have been frivolous or vexatious, that is, characterised by a lack of seriousness or sense, or vexing or annoying. That would normally involve conclusions about the proceeding itself, and about the conduct of the party concerned in relation to the proceeding."

I support change to the SPA to streamline the development assessment process, including in appeals. However, the better approach to the costs provisions would be to strengthen the

existing discretion by allowing the Court to consider whether parties to an appeal are commercial competitors who stand to gain from an appeal or whether the parties to the appeal offered evidence or reasoned lay-evidence in support of the grounds they advanced in the appeal.

Yours faithfully



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