YANDINA CREEK PROGRESS ASSOCIATION

11 October 2012

VIA EMAIL (sdiic@parliament.qld.gov.au)
State Development, Infrastructure and Industry Committee
Queensland Parliament
Parliament House
Brisbane QLD 4000

Dear Sir/Madam,

Sustainable Planning and Other Legislation Amendment Bill 2012 (Qld) Planning Environment Court Costs – Proposed Submission

The Yandina Creek Progress Association (YCPA) is a not-for-profit community organisation based in the Sunshine Coast hinterland formed to represent the views and address issues concerning local residents. The YCPA has a proven track record of defending our local community from the threat of inappropriate developments in our area that threaten the amenity of residents.

Currently the YCPA are involved in a matter in the Planning and Environment Court as co-respondents with the Sunshine Coast Regional Council (SCRC) and other local residents defending an appeal by Parklands Blue Metal Pty Ltd (Appeal No.D247 of 2011). Parklands Blue Metal Pty Ltd made a development application to SCRC for a quarry site in our area. This application was rejected by SCRC in a unanimous vote supported by over 5,000 written submissions by local residents opposing the development. Parklands Blue Metal Pty Ltd has appealed the SCRC rejection of their development application.

For the reasons outlined in detail below in this submission the YCPA is totally opposed to any changes to existing legislation governing the allocation of legal costs in the Planning and Environment Court. Such changes as proposed would make it impossible for community based organisations such as the YCPA or local residents and individuals to defend appeals by developers and large corporations by making the financial risks of such defense prohibitive. Our organisation is already facing the prospect of needing to raise $100,000 and possibly up to $200,000 in defending this appeal. If we could also be liable for the developer's costs should we lose this case in the Planning and Environment Court we would not be able to proceed with our defense. In our opinion, changes to the legislation that brought about a situation such as this would be a denial of natural justice.

KEY POINTS

The Bill **WILL**:

- Deny all but the most wealthy the ability to take legitimate cases before the Queensland Planning and Environment Court, through fear of crippling costs orders;
- Tip the scales of negotiation and dispute resolution in favour of large Councils and developers who can afford the risk of going to trial; and
- With negligible consultation, overturn a 20+ year rule which has served an important public interest of community involvement in planning decisions which affect everyone.

The Bill **WILL NOT**:

- Reduce appeals by commercial competitors which have too much to gain to be dissuaded from "delay and obstruct" tactics, and are already at risk of costs orders;
- Reduce appeals that lack reasonable planning grounds as they are already rare and subject to the risk of costs orders;
- Improve early resolution of appeals which are already resolved 95% of the time before trial; or
- Meaningfully improve development assessment as less than 0.1% of development applications are delayed by third party trials.

DETAIL OF YCPA SUBMISSION

1. The consultation with stakeholders prior to the Bill's introduction was inadequate considering the importance of the proposed change and the general public, as far as we can tell was not consulted at all. As far as we could observe no rural stakeholders or landholder groups were consulted, even though the changes to the costs rules would make it harder for such groups to use the Court.

2. The Queensland Planning and Environment Court (**QPEC**), unlike commercial courts, hear matters that affect the whole community and future generations of Queenslanders. Examples of those matters include protection of heritage sites, survival of endangered species and protecting landholders from neighbouring mines and quarries.

3. The current rule that each party to proceedings in the Court bears its own costs, subject to limited exceptions (the 'own costs' rule) has been in place for over 20 years. All parties must pay for their own legal assistance and expert witnesses and volunteer their own time but generally do not currently have to pay the other side's costs if they lose.

4. The 'own costs' rule serves the important public interest of enabling ordinary citizens or groups to dispute planning decisions or to seek to protect the environment, which affect the whole community, without fear of crippling costs orders. It also protects local governments and State agencies from the risk of such costs.

5. Environmentalist Dr Carol Booth and grazier John Gracean are examples of people who have run cases successfully in the QPEC putting in their time as unpaid volunteers. If the costs rules were not 'own costs' none of these individuals would have dared to go to Court, for fear of losing their house or property.

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6. There are already protections in place from abuse of this system with the Court having power to award costs in circumstances such as where cases are frivolous or vexations or instituted primarily to delay or obstruct, or if there is delay in meeting the Court timetable. So ordinary citizens know that as long as they avoid any of the circumstances where the Court has power to award costs, they are safe from costs. This provides certainty whereas changing the costs rules by giving the Court a general discretion as to costs, as in the Land Court, would create high levels of uncertainty as to risks.

7. There is no evidence of widespread problems with this 'own costs' system with less than 0.1% of development applications being taken to trial by 3rd party appellants (including commercial competitors). The Court is internationally recognised for case management that sees 95% of matters resolved prior to trial. The number of appeals is declining and the number of matters resolved without trial is increasing, defeating any argument of the QPEC becoming clogged.

8. The proposed change to a rule of costs following the event will disadvantage poor and middle-income people, mums and dads, non-profit community and non-profit environmental groups. Such persons won't be able to risk crippling costs orders or risk losing their house or their group even if they have a good legal case and even if they represent many people in the community concerned about a development proposal or seeking to stop illegal activity.

9. Contrary to the stated justifications for the proposed change to the own costs rule contained in SPA s. 457:

- The change won't discourage large commercial competitors, e.g. developers of major shopping centres, if they have much to gain from instituting proceedings.
- There is no evidence of a large number of unmeritorious appeals in the Court which has a similar rate of unsuccessful matters as those courts where costs follow the event.
- Applicants already have substantial opportunities to challenge conditions of approval in the application, negotiated decision notice and ADR processes and there is no evidence that court costs are significantly curtailing applicant's rights in this regard.
- It will not substantially improve early resolution of appeals - which is already at 95% - but instead will encourage the wealthy to use the threat of costs to dissuade meritorious actions by the less wealthy.

10. Even if the change did assist in the stated justification, it would have the unintended consequence of creating a barrier to ordinary citizens from raising valid planning and environmental issues in the QPEC. It would make local governments and State agencies unwilling to go to Court to protect the public interest, as they also would risk of such costs against them. In short it would throw out the baby with the bathwater.

11. After careful thought and analysis we consider that the current own costs rule in SPA s. 457 is best left alone, as it has overall worked well and there are no compelling reasons to change it

12. However, in the event Parliament is determined to press forward with changing the long-standing own costs rule in SPA, it is possible to make a few efficient amendments to the current costs rule so as to allay the concerns outlined herein and still address the concerns identified in the Explanatory Notes and statements introducing the Bill. The YCPA's recommendations may be summarised as:

Recommendation 1:
Delete Clause 61 of the Bill to retain the current costs rules unchanged.

Recommendation 2
Alternatively, a few efficient amendments, to the existing costs rule s could implement the cost rule change solely in respect of commercial competitors and assisting enforcement by State and local governments without jeopardising access to the Court by ordinary citizens or compromising crucial enforcement of environmental and planning laws by local government and State agencies.

Conclusion – Leave the current rules in place

The proposed change would reverse the current 'own costs' rule which, for over 20 years, has served the important public interest of enabling ordinary citizens to dispute planning decisions affecting the whole community without fear of crippling costs orders.

There has been no report, no investigation and no evidence presented to support the case that there is an existing problem with this rule or that the proposed change will substantially improve perceived problems with QPEC proceedings.

The clear target of the proposed change to SPA is third-party appellants who apparently are presumed to have weak planning grounds or to be motivated by a desire to delay or obstruct proposed developments for ulterior or improper reasons (such as commercial competition). The facts recited above demonstrate that less than 0.1% of development applications are taken to trial by third parties. The facts likewise amply demonstrate that the QPEC is not overburdened with meritless appeals and other proceedings and that it is internationally recognised for its time- and cost-efficient case management and ADR processes. Finally, the evidence makes it clear that the court has ample tools already available to remedy any abuse of process or waste of time. This includes longstanding discretion to award costs against those litigants who seek to run cases that lack merit meritorious or who seek primarily to delay and obstruct the decision making process in planning and other environmental matters. In other words, there is no problem with the QPEC's 'own costs' rule that requires fixing.

More to the point, the government's proposed solution to a non-problem that requires no action will produce substantial harm to the public and communities throughout Queensland. The proposed change to the QPEC's 'own costs' rule is unlikely to affect third party appeals by wealthy commercial competitors who can afford the risk of losing appeals they run and paying costs. However, the proposed change will be potentially devastating for individuals and community groups that may have strong cases but cannot afford the risk of being wiped out by adverse costs orders if they lose. Given the fact that proceedings in the QPEC are complex and "expert-driven", meaning that the evidence of numerous experts is ubiquitous and necessary given the nature of the issues typically involved in a planning appeal and other environmental proceedings, costs predictably will be considerably higher than in other, non-specialist jurisdictions.

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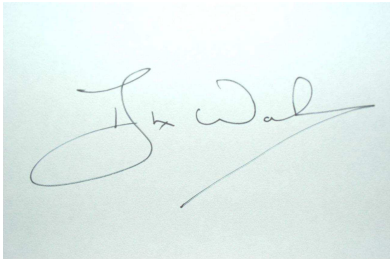
We request the opportunity to make oral submissions to the committee so that we can illustrate and elaborate on the above submission and answer any questions you may have.

Yours faithfully,



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