Sunshine Coast Council

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12 October 2012

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

Sent by email: SDIIC@parliament.qld.gov.au

Dear Sir/Madam,

Sustainable Planning and Other Legislation Amendment Bill 2012

I refer to the *Sustainable Planning and Other Legislation Amendment Bill 2012* (**Bill**) that was referred on 13 September 2012 to the State Development Infrastructure and Industry Committee (**Committee**) for consideration by the Hon Jeff Seeney MP, Deputy Premier and Minister for State Development, Infrastructure and Planning.

The Sunshine Coast Regional Council (**Council**) at its Special Meeting of 8 October 2012 endorsed the preparation of a submission for the Bill. This submission has been prepared under delegated authority from the Council in consultation with the Council's officers and legal advisers.

Submission

The Council is generally supportive of the State government's intention to reform the Queensland planning system, and in particular, to streamline planning, assessment and approval processes and re-empower local governments.

However, the Council wishes to raise with the Committee its concerns in respect of a number of issues arising from the Bill together with suggestions on how the Bill could be amended to address the concerns raised by the Council.

A response to each of the seven (7) key areas of reform is provided in this Submission

1. Single State referral and assessment manager

The Council supports the Bill's proposal for a single State agency referral and assessment manager given the clear benefits for the Council and applicants only having to deal with one State government agency for a development application under the integrated development assessment system (**IDAS**). It is considered important that the relevant agency be provided with the authority to reconcile state issues and provide to Council a single view of State government for this reform to be effective.

2. *Changes to requirements for a 'properly made' development application*

The Council supports the Bill's proposal for the assessment manager to have the discretion to accept a development application without the mandatory supporting information.

3. *Development applications lodged without a State resource entitlement*

The Bill's proposal effectively allows for a development application to be lodged without 'owner's consent' in the form of a State resource entitlement, being provided for a development proposal on public land.

The Council has some concerns with this proposal and considers that the inclusion of public land in a development application should be afforded the same rights as private land; that is a development application cannot be made over private land that is not owned by the proponent without the owner's consent.

However it is recognised that there may be situations where a State resource entitlement is routinely provided by the State government and that it would in those circumstances be efficient to allow a development application to be lodged without the State resource entitlement.

The Council respectfully submits that the Bill be amended to provide for the *Sustainable Planning Regulation 2009* to define the situations where a State resource entitlement is routinely granted by the State government and where a development application can be lodged without the State resource entitlement.

The Council also submits that the Bill should be amended to make it clear that the giving of a development approval will not be a sufficient basis to obtain a State resource entitlement.

4. *Maximum level of assessment for operational work through 'IPA standard planning provisions'*

The Council supports the Bill's proposal to 'cap' certain operational works to compliance assessment (or less).

However the Council respectfully submits that this should be implemented through the *Sustainable Planning Regulation 2009* rather than having to introduce IPA standard planning provisions as an amendment to an existing IPA planning scheme at the same time that local governments are preparing new planning schemes under the *Sustainable Planning Act 2009.*

5. *Alternative Dispute Resolution Registrar*

The Council supports the Bill's proposal to reduce the number of cases that are heard by the Planning and Environment Court (**Court**) by providing for some matters to be managed and determined by the Alternative Disputes Resolution Registrar.

6. *Removal of master planning and structure planning provisions*

The Council has a long and successful experience in the planning, assessment and delivery of major master planned communities on the Sunshine Coast, including Kawana Waters, Pelican Waters, Twin Waters, Brightwater and Coolum Ridges under the repealed

Local Government (Planning and Environment) Act 1990 and *Integrated Planning Act 1997* and more recently in respect of the Maroochydore Principal Regional Activity Centre and Palmview declared master planned areas under the *Sustainable Planning Act 2009.*

The Council has invested considerable time and financial resources in developing structure plans for the declared master planned areas of the Maroochydore Principal Activity Centre and Palmview. Maroochydore is identified as a Principal Regional Activity Centre in the *SEQ Regional Plan 2009-2031*. Palmview is a 926 hectare future greenfield development area which will house up to 18,000 residents and provide for around 3,000 jobs by 2021. A significant infrastructure agreement in respect of Palmview was signed in September 2010, prior to the gazettal of the structure plan.

The Bill's proposal to omit the structure planning and master planning arrangements is based on the State government's assessment that these processes are considered inefficient and can be addressed in other ways, including the following:

- clearer and more focussed regional planning;
- by enabling local governments to carry out effective integrated strategic land use and infrastructure planning in their planning schemes using reformed and streamlined scheme making processes; and
- through a partnership approach with industry in development assessment in key growth areas, including the 'effective use' of section 242 preliminary approvals under the *Sustainable Planning Act 2009*.

The Council has significant concerns with the ability to achieve through the section 242 preliminary approval application process the integrated strategic land use and infrastructure planning outcomes for the Maroochydore Principal Activity Centre Structure Plan and Palmview Structure Plan.

In particular the Council is concerned as follows:

- A section 242 preliminary approval can vary and override the integrated land use and infrastructure planning outcomes for Maroochydore and Palmview.
- A section 242 preliminary approval application can be limited by an applicant to particular types of development and particular parts of premises stated in the application in a manner which can ensure that the integrated land use and infrastructure planning outcomes for these areas is not achieved. Indeed it has been the Council's experience in respect of the Maroochydore Principal Regional Activity Centre in particular and other master planned communities that preliminary approval applications under section 242 of the *Sustainable Planning Act 2009* are lodged in a tactical manner to avoid the integrated infrastructure and land use outcomes that the Council is seeking for these critical growth areas.

It is also recognised that the Bill's proposal will affect local governments in Queensland to different extents depending on the progress that each local government has made in respect of structure planning and master planning. In the case of both the Maroochydore Principal Regional Activity Centre and Palmview, structure plans have been in place since 17 December 2010 and 5 November 2010 respectively. Both structure plans are already incorporated in the relevant local government planning schemes, and rely on the current

master planning provisions of the *Sustainable Planning Act 2009* for their effective implementation.

The Council therefore respectfully submits that the Bill's proposals be amended consistent with the State government's stated intention to empower local government, to enable each relevant local government to 'opt in or opt out' of maintaining the current structure planning and master planning arrangements.

The Bill could implement this submission by adopting transitional arrangements similar to that which apply for master plans made under a development control plan prepared under the repealed *Local Government (Planning and Environment) Act 1990* such as that which is applicable to Kawana Waters on the Sunshine Coast and which have been preserved by transitional provisions under the repealed *Integrated Planning Act 1997*[1] and the *Sustainable Planning Act 2009*.[2] That transitional provision could enable a structure plan to be included by reference in a SPA planning scheme and could identify the relevant provisions of the *Sustainable Planning Act 2009* prior to their removal by the Bill which would apply to master plans under the structure plan.

7. Cost awards in the Planning and Environment Court

The Bill omits the current cost provisions which provide as a general rule that each party to proceedings in the Court must bear their own costs of the proceedings. However there are specific circumstances where the Court can order a party to pay costs.[3]

The Bill inserts new cost provisions that are taken from the *Uniform Civil Procedure Rules*[4] (**UCPR**) that apply to the Supreme and District Courts; which provide as a general rule that costs are to follow the event so that the unsuccessful party in a proceeding will be required by the Court to pay the successful party's costs. Whilst the Bill provides that the Court has a discretion to depart from the general rule where it would be unfair for costs to follow the event, the High Court has recognised that these circumstances are very few. Instances include where the conduct of the successful party disentitles it to the beneficial exercise of the discretion or where the successful party in effect lost the proceeding and the unsuccessful party won the proceeding.[5]

The Bill's approach to costs will therefore generally result in the unsuccessful party to a proceeding being required by the Court to compensate a successful party for its costs.

The reason for the Bill's approach and that of the UCPR is derived from the English law which has been articulated by the High Court in the following terms:

> *If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the* unsuccessful *party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings ...*[6]

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[1] See section 6.1.45A of the *Integrated Planning Act 1997*
[2] See section 857 of the *Sustainable Planning Act 2009*
[3] See section 457(2) of the *Sustainable Planning Act 2009*
[4] See rule 689(1) of the *Uniform Civil Procedure Rules*
[5] See *Oshlack v Richmond River Council* (1988) 193 CLR 72 at 97 [paras 69 and 70] per McHugh J
[6] See *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ

The Bill's approach to costs will have significant implications for all potential stakeholders involved in IDAS and resulting appeals under the *Sustainable Planning Act 2009,* in particular the following:

- Local governments are a co-respondent in all proceedings in the Court while State government entities are a co-respondent in all proceedings involving a concurrence agency decision.[7] As such local and State governments will be exposed to adverse cost orders for appeals lodged in respect of their decisions. This represents a significant financial risk to local governments as well as the State government given the number of IDAS decisions made by local and State governments.

- The Bill's compensatory approach to costs is based on the assumption that an unsuccessful party can know in advance that their case will fail and therefore must bear the responsibility for the expenses incurred by the successful party. However a development application is not assessed against a limited and imperative list of requirements by a local government as an assessment manager or by the Court on appeal. Rather it is judged on its merits against the applicable planning instruments which is particularly the case where there is conflict with a planning instrument and it is necessary for an applicant to establish, and the local government and the Court on appeal to determine, if there are sufficient planning grounds to approve the development despite the conflict.[8] As a result there is inevitably a range of possible outcomes for any given development application so that a party cannot realistically be expected to know that an appeal in respect of a development application will fail or succeed. Therefore the assumption underpinning the Bill's compensatory approach to costs, which is appropriate for rules based decisions involving the weighting and testing of evidence in traditional civil and criminal matters, is not applicable to a 'planning merits dispute' where the planning approval process "must allow for the exercise of a wide discretion in the balancing of public and private interests".[9]

- The Bill's compensatory approach to costs also ignores the public interest nature of a planning merits dispute. Often appeals to the Court have wide ranging effects which may be of interest to all citizens in the relevant locality or involve issues of interest to citizens beyond a given locality. As such an appeal can be of a general public interest which is beyond the interests of those persons who are parties to a proceeding. The connection between the public interest and a more liberal discretion as to costs has been recognised by the High Court:

  > *Inherent in the foregoing legislative innovation [granting "open standing" to "any person"] is a Parliamentary conclusion that it is in the public interest that ... individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so. It can be assumed that Parliament would know that, sometimes, such applications would succeed and, sometimes, they would fail. The removal of a barrier to standing might amount to an empty gesture if the public character of an applicant's proceedings could in no circumstances*

[7] See section 485 of the *Sustainable Planning Act 2009*
[8] See section 326(1) of the *Sustainable Planning Act 2009*
[9] See Franks Committee (1957) *Administrative Tribunal and Inquiries* para 272

be taken into account in disposing of the costs of such proceedings, either where they succeeded or (as here) where they failed.[10]

- The Bill's compensatory approach to costs will also increase the costs of a planning appeal and as such act as a disincentive to participation in the planning appeal process and adversely impact on access to justice. The prospect of an order for costs if unsuccessful will act as a fetter and likely deterrent to those who are least capable of accessing the planning appeal process such as community groups and the poor. This is a continuing concern to the High Court. For example:

  The oppressive burden of legal costs already constitutes a formidable deterrent to the citizen of ordinary means who seeks to invoke the jurisdiction of the courts against either an instrumentality of government or a financially powerful corporation or individual.[11]

  There is little point in opening the doors to the courts if litigants cannot afford to come in. ... The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court.[12]

- The Bill's approach to costs is also likely to give rise to applications for security of costs against impecunious opponents or opponents of limited means such as citizen submitters in particular community groups and individuals of limited financial means as well as in these financially challenging times applicants with lesser financial means. A party to a proceeding may seek an order from the Court that their opponents pay into the Court an amount decided by the Court to ensure that the prevailing party will receive at least some of its costs. This is likely to adversely impact on those applicants and submitters of lesser financial means. In this regard it is also significant to note that there is nothing in the Bill that would prevent local and State governments from seeking security of costs against a submitter or applicant who is a party to a planning appeal. There is also nothing in the Bill that would prevent such applications being made tactically to effectively defeat a party in a proceeding.

The Bill's approach to costs will therefore have significant financial implications for local governments; have significant implications for citizen submitters in particular community groups and individuals of limited financial means in terms of their access to justice; and have implications for those applicants who may be financially constrained in the current financially challenged period.

The Council therefore respectfully submits that the Bill's approach to costs should be reassessed. In particular the Council submits as follows:

- In order to achieve the State government's stated intentions and address the Council's concerns the current cost provisions should be modified to provide a wider power for the Court to impose costs on a party where its conduct in respect

[10] See *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 113-114 per Kirby J
[11] See *Jamieson and Brugmans V The Queen* (1993) 177 CLR 574 per Deane and Dawson JJ
[12] Justice Toohey of the High Court speaking extra judicially to a 1989 international conference on environmental law; quoted in Stein J in *Oshlack v Richmond River Council* (1994) 82 LGERA 236 at 238

of an appeal is not considered reasonable by the Court. This is the position that operates for the Environment Court of New Zealand under the *Resource Management Act 1991* (NZ) and for the Planning Inspectorate in the United Kingdom under the *Town and Country Planning Act 1947 (UK)*.

- If the Bill's approach to costs is to be retained, the Bill should as a minimum be amended to address the following issues in particular:
  - section 457(2) of the Bill should be amended to empower the Court to order each party to bear the party's own costs in circumstances where at a minimum the proceedings are conducted in the public interest or preferably in the circumstances identified by the Court in the rules of the Court made under section 445 of the Bill;
  - section 445(2) of the Bill should be amended to enable the Court to establish rules as to where the Court may order each party to bear their own costs;
  - section 445(2) of the Bill should be amended to enable the Court to establish rules for applications for security of costs that are anticipated to occur.

Submission Summary

The Council is supportive of the Bill's proposals for streamlining the lodgement and assessment processes for development applications through amendments to the arrangements for accepting development applications as properly made and reducing the levels of assessment for certain types of operational work.

The Council is also supportive of the greater use of alternative dispute resolution mechanisms to manage and resolve planning appeals.

The Council is also generally supportive of allowing limited development applications to be lodged without a State resource entitlement in those situations where the State government routinely grants a State resource entitlement. However the Council considers that the Bill should provide for these situations to be stated in the *Sustainable Planning Regulation 2009* and that the Bill should also state that the giving of a development approval is not a sufficient basis to obtain a State resource entitlement.

The Council is not supportive of the Bill's proposals in respect of the omission of the current provisions in respect of structure planning and master planning arrangements for declared master planned areas given that the Council has completed structure plans for the Maroochydore Principal Regional Activity Centre and Palmview which have been included within its IPA planning schemes and given the Council's experience that the section 242 preliminary approval application process has and can be used to frustrate the integrated land use and infrastructure planning outcomes of these critical growth areas. The Council respectfully submits that structure plan and master plan arrangements for these declared master planned areas be preserved in a similar manner to the arrangements for master plans made under development control plans under the *Local Government (Planning and Environment) Act 1990* applicable to Kawana Waters on the Sunshine Coast, that are preserved by the transitional provisions of the repealed *Integrated Planning Act* 1997 and the Sustainable *Planning Act 2009*.

The Council is also not supportive of the Bill's proposals for costs to 'follow the event' and respectfully submits that the current costs provisions be amended to provide the Court with a discretion to order a party to pay costs where a party has acted unreasonably. This amendment will achieve the State government's stated intentions whilst addressing the significant financial and access to justice concerns identified by the Council in respect of the Bill's proposals for costs.

If you require further information or clarification of this submission, please contact Raul Weychardt, Director Strategic Planning on 5420 8785.

Yours faithfully

Greg Laverty
ACTING CHIEF EXECUTIVE OFFICER