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The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
Corner George and Alice Streets
Brisbane QLD 4000

BY POST / EMAIL - sdiic@parliament.qld.gov.au

Dear Committee

Sustainable Planning and Other Legislation Amendment Bill 2012

This submission is made to you following an examination by UDIA (Qld) of the contents of the Sustainable Planning and Other Legislation Amendment Bill 2012 (SPOLA Bill 2012).

The Government is to be commended for demonstrating a strong commitment to our industry by responding to our concerns regarding planning in a timely and efficient manner.

UDIA (Qld) support in principle the majority of the legislative changes being proposed. We do, however, urge the Government to consider the following:

Planning and Environment Court – Costs

UDIA (Qld) agrees that the existing provisions of SPA are open to abuse. For example, commercial competitors who engage competent planning lawyers are able to run submitter appeals right up until a few weeks before the hearing and then discontinue without too much risk of adverse costs orders.

To take another example, however, currently a developer may commence an appeal against conditions and seek a negotiated outcome through the Court's ADR processes, and/or through direct "without prejudice" negotiations with a Council. Presently, if the negotiations fail to achieve an outcome the developer can discontinue the appeal if the expense of continuing the proceeding to trial is not economically justified, or is too risky, without exposing itself to adverse costs orders. The Institute is concerned that this may not be possible under the new rules proposed in the SPOLA Bill 2012.

The justification for this concern is outlined below.

The SPOLA Bill 2012 in clause 61(2) amends section 457(1) and (2) of the SPA by omitting them and inserting a set of new provisions. The Institute's concern with the drafting of these new

provisions is the inclusion of the words “but follow the event”, meaning that the loser pays the costs of the other parties. These words substantially shackle the Court’s discretion to achieve a just outcome in relation to the costs of the proceeding. It is the Institute’s opinion that the Court will not be able to formulate Rules and / or Practice Directions which are contrary to those words which will limit the Court’s discretion.

The Institute is concerned that with the proposed changes a small developer that wishes to challenge, for example, Council conditions in the Court will be deterred from doing so because, if the appeal failed despite having some merit, the Court would be compelled to order costs. The prospect of costs being ordered would not be as big a deterrent for Councils as they have substantially deeper pockets.

In addition, under the new costs rules, as they are proposed, a developer appealing against conditions who does not wish to proceed after failing to achieve an outcome through ADR would need to discontinue “soon” after the ADR process has been finalised, and be able to argue that this constitutes the proceeding being “resolved”. There is apparently no scope for “without prejudice” negotiations outside the Court’s ADR process. This is likely to be quite constraining when conducting negotiations. If a developer felt that that he had a good case and wished to push on in the hope of settling at the “door of the Court”, that option will be attended by the risk of having to pay the other side’s costs including the costs of the ADR process itself, because discontinuance on the door of the Court is not “resolution of the proceeding” in the sense in which that term is used in the section with reference to the ADR process, and it certainly isn’t “soon” enough to satisfy the section. Also, consensual resolution of a proceeding at any time should be possible on the basis that there is no order as to costs. This is not provided for under subsections (2) and (3) of proposed section 457.

In summary, if the words “but follow the event” were deleted from the Bill, the Court would have more discretion to develop a set of sensible workable rules to be applied to the exercise of its discretion.

Alternative Dispute Resolution

UDIA (Qld) welcome the introduction of a new alternative dispute resolution process that allows minor matters to be resolved quickly, cheaply and effectively without the burden of an expensive trial. The Institute would urge the Government to provide the necessary funding to employ a second Registrar with suitable experience as the current Registrar is often already struggling with capacity issues for mediations.

Omission of section 264 (Development involving a state resource) and Changes to section 261 (Acceptance of applications as ‘properly made’)

UDIA (Qld) supports moves towards reducing red tape associated with development involving a state resource.

Seeking evidence of an allocation or an entitlement to the resource (RE) prior to lodgment can be costly, time consuming and unnecessary if the development does not proceed. Cumbersome examples of seeking RE upfront include where the allocation or entitlement, such as a lease or permit, is required to be applied for, or worse still, the offer of tenure agreed to, prior to the RE being issued. Another example is where a separate approval is required to be sought from another agency prior to the RE being issued.

While the Institute supports the removal of section 264, we note that in some instances the State's consent as the owner of land will still be required by operation of sections 260(1)(e) and 263 of the SPA.

In this regard, the Institute urges the Government to implement further measures to ensure that State owner's consent is issued efficiently and is not unnecessarily delayed by cumbersome requirements such as having to seek land tenure or other agencies' approvals first as is presently the case with seeking RE.

Section 263(1)(b) requires consent of the owner of land where the application is for work below the high water mark. The Institute is of the view that the existing cumbersome tidal works process could be further streamlined and a "general authority" (similar to that for some road activities and water resources) could apply for some low impact tidal work.

UDIA (Qld) also supports the proposed change to section 261 of the SPA to enable local governments, in particular circumstances, to accept applications as 'properly made' even if certain mandatory supporting information (prescribed by lengthy, and sometimes complex, forms) is not provided at that stage.

Single referral agency

UDIA (Qld) supports moves toward a single referral agency.

While moving to a single state assessment and referral agency will primarily be achieved through the Sustainable Planning Regulation 2009 rather than SPA, the Institute would like to take this opportunity to make some comments on the administrative and operational aspects of this policy change.

The Institute sees both potential significant benefits but also potential risks with this new approach and would appreciate the opportunity to review and comment on draft changes to regulation when they become available.

One of the larger potential benefits the Institute sees in this new approach is empowering DSDIP to not simply coordinate but where necessary "step-in" to override other agencies in circumstances where there are competing and conflicting State issues that require a united position. Importantly, it will also potentially remove the onus on an applicant to identify every referral trigger for an application, which is often a difficult, timely and costly exercise. While it is assumed that the new process will still require the applicant to identify triggers from a schedule similar to the current referral agency schedule, the Institute urges the Government, as part of the regulatory changes, to ensure that the risk of missed referrals is removed from the IDAS process and instead assumed by the single referral agency in charge of "referring" the application to other State agencies.

If the new process will still rely on identifying triggers from a schedule, then simply coordinating these triggers through a single referral agency while beneficial, will not deal with the wider issues raised in the past by the Institute in relation to the referral triggers, including their complexity and ambiguity, but also importantly the number of triggers and the duplication of referral triggers over staged application processes. If triggers are still to be relied on, then ongoing and thorough review of the triggers remains critical.

Also, we urge the Government to continue to work on improving the identification of triggers through Smart eDA so that the relevant triggers can be identified electronically, simply based on site location or even land use (particularly once planning schemes have consistent land use definitions under QPP).

Removal of master planning and structure planning arrangements

UDIA (Qld) welcomes the removal of inefficient master planning and structure planning arrangements. We note that there are transitional provisions in the Bill, the adequacy of which will become apparent as things progress. If the transitional provisions prove to be inadequate, the Institute urges the Government to stand ready to make quick changes so as to protect the interests of those operating under existing structure plans and master plans.

The proposed amendments to SPA provide an opportunity to ensure that the future regulatory framework supports the timely and cost effective delivery of affordable housing stock within nominated Greenfield locations and Further Investigation Areas identified under the Regional Plan.

Any future amendments to the SPA should build on the successful approach of the ULDA where strict timeframes were established and there was a clear understanding between the role of Government in establishing high level structure plans and the role of the development industry in delivering detailed master plans and development applications.

Furthermore any future amendments should also recognise and support the role of the development industry to prepare planning applications for land within the Urban Footprint and in nominated Identified Growth Areas where there are a small number of landholders and the planning can be coordinated efficiently.

Adopted Infrastructure Charges Notices

Members of UDIA (Qld) are frequently expressing concerns with Section 648F(2) of the SPA. Section 648F(2) of the SPA allows for an Adopted Infrastructure Charges Notice (AICN) to be given only in relation to a development approval or compliance permit. As a consequence, Local Authorities cannot alter infrastructure charges and issue a new AICN in relation to a permissible change that alters the intensity of a development – however small these changes may be.

This issue has been raised by the Institute on a number of occasions with the previous and current State Government and with the Department.

It appears that one way to get around the inability to issue a new AICN is for the infrastructure charges to be adjusted in relation to a permissible change via an Infrastructure Agreement (IA). Requiring an IA to be prepared to alter infrastructure charges after a simple permissible change, for example changing from a two to three bed dwelling, is unpalatable both to developers and Local Authorities. Even supposedly simple IAs involve thousands of dollars in legal fees and lengthy delays.

It would be fair to say, that it is our experience that the Local Authorities are equally frustrated by this provision, as they recognise that new AICNs as a consequence of an amendment, would be little work to produce and of no real consequence. Other UDIA (Qld) members have reported that the only solution available to members and the Local Authorities is to relodge applications and to proceed through the entire IDAS process again to in many instances obtain the same development approval and a new AICN. This would appear to be a classic example of an area of unnecessary red tape and delays to developments, without any real benefits being gained.

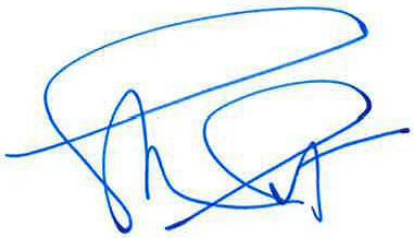
The number of UDIA (Qld) members raising concerns has accelerated in recent months and we urge the Government to incorporate what we believe would be simple and uncontroversial amendments to section 648F(2) in the current round of legislative changes.

Ongoing Consultation

UDIA (Qld) appreciate the opportunity to comment on the SPOLA Bill 2012 and would welcome the opportunity to comment on future amendments to Regulations and on other documents that give effect to the objectives of the Bill.

Yours sincerely

Urban Development Institute of Australia (Queensland)



Marina Vit

Chief Executive Officer