Ms Erin Pasley
Acting Research Director
State Development, Infrastructure and Industry
Committee
Parliament House
George Street
BRISBANE QLD 4000

12 October 2012

By Email Only : sdiic@parliament.qld.gov.au

Dear Ms Pasley

SUBMISSION IN RELATION TO THE SUSTAINABLE PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2012

This submission on behalf of Stephen Keim SC Barrister-at-Law, David Fahl Barrister-at-Law and Mark Baker-Jones solicitor, is directed at the proposed amendments to the costs provisions of the *Sustainable Planning Act 2009* (Qld) (**SPA**) by the Sustainable Planning and Other Legislation Amendment Bill 2012 (the **Bill**).[1]

As legal professionals practicing in planning and environmental law, we are concerned the amendments to the Bill, which require the unsuccessful party in a proceeding to pay the costs of the proceeding in the Planning and Environment Court (**PEC**),[2] could (in practical effect) create a denial of access to the PEC by creating a strong disincentive to parties who entertain proper and legitimate concerns about proposed development, to pursue their rights before a Court.

The SPA provides individuals with the right to make submissions about a development application during the IDAS process, without penalty.[3] An appeal to the PEC is a hearing a new, therefore the right to make an appeal to the PEC without the risk of penalty should be preserved.

The PEC was established by the *Local Government (Planning and Environment) Act 1990* (Qld)[4] and subsequent legislation has always provided that each of the parties to an appeal or proceedings is to bear its own costs.[5] This has created the understanding by the public and legal community that the PEC is a public interest court. Further to this, when the Local Government (Planning and Environment) Bill was debated in Parliament, it was stated that an important factor of the Court was its operation in relation to the public interest (this was evident in the

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[1] Those proposed by Clause 61 of the Bill.

[2] Explanatory Notes, Sustainable Planning and Other Legislation Amendment Bill 2012 (Qld) 6.

[3] *Sustainable Planning Act 2009* (Qld) Chapter 6, Part 4, Division 3.

[4] *Local Government (Planning and Environment) Act 1990* (Qld) s 7.3(1).

[5] *Local Government (Planning and Environment) Act 1990* (Qld) s 7.6(1); *Integrated Planning Act 1997* (Qld) s 4.1.23.(1); *Sustainable Planning Act 2009* (Qld) s 457(1).

proposed costs provisions), which removed the previous deterrent to exercising their right of appeal.[6]

The amendments propose to require costs to follow the event (effectively, the loser pays). This shift in policy will all but deny concerned members of the public the opportunity to utilise the court process to raise and argue concerns that are in the interests of the general public. But in addition, it will provide a disincentive to assessment managers (commonly local governments) to exercise their discretion to refuse development applications because of the risk the assessment will face of bearing the applicant's costs should it be drawn, without choice, into an appeal of the decision.

The High Court has held that when the primary motivation for a party to litigate is to protect the environment in the public interest, costs normally should not be awarded against that party.[7] While this is obviously not binding upon decisions of executive government directed by policy, the decision (and others following it to the present day) provides compelling judicial guidance as to the broader policy reasons why public interest litigation ought to be given unique consideration in relation to this issue.

The Explanatory Notes to the Bill (the **Notes**) clarify the policy bases for the proposed amendment. As a general observation, none of the reasons articulated compel what is a major change to an approach to costs that has been legislatively supported for in excess of two decades. Further, none of the rationale put forward by the Notes are compelling or proper reasons to set aside long developed judicial principle on this issue.

While the proposed amendment preserves a broad discretion in the Court, as a matter of statutory construction, the change is significant.

The current prevailing rule is that each party bears its own costs unless certain preconditions arise, at which time the Court's discretion is enlivened. The amendment places at the forefront of judicial consideration the 'usual rule' that the costs will 'follow the event'. While the latter expression is a matter of common understanding, its use in this context will inevitably lead to a litany of argument about the 'event' that gives rise to the order. In the appeal process, the 'event' may refer to a number of types of outcome. For example, a party may appeal to the Court about the approval of a development and (as often happens), have the appeal dismissed, with the Court directing that conditions be imposed to address matters raised in the course of the appeal. Such matters may have been agitated at mediation, but rejected by one or more of the other parties. The 'event' in that case is unclear. If the appellant pleaded its appeal on alternate bases (one of which is substantially embraced by the decision of the Court), then it may well be argued that the 'event' is that the appellant is successful, despite the formal dismissal of the appeal. Nevertheless, that party is placed at risk as to costs.

The assertion in the Notes that the new provision will bring the Act more into line with practice in the District and Supreme Courts identifies a flaw in the reasoning behind the policy. The P&E Court is rendered a specialised jurisdiction for very important reasons. One of those is that it is a Court in which, in contrast to the other jurisdictions, matters of both local and

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[6] Queensland, *Parliamentary Debated*, Legislative Assembly, 22 August 1990, 2989 (Dr Clark, Barron River).

[7] *Oshlack v Richmond River Council* (1998) 193 CLR 72.

broader public importance are frequently litigated and decided, as distinct from the determination of private disputes.

Such matters include, but are certainly not limited to, issues of environmental management and impact. Important social and public safety decisions emerge from the Court, frequently and often after agitation by public interest groups or groups seeking to protect the amenity and safety of their locality. There is indeed a significant number of cases in which interested community members have succeeded in obtaining improved planning outcomes; these have included traffic management, visual amenity, odour and dust controls, vegetation and local waterway management.

While the Notes make reference to particular instances of unmeritorious types of litigants, these, we suggest from long experience, comprise a small percentage of matters. The majority are those with genuinely held concerns and who play a crucial role in providing additional support to local authorities and State Agencies in the presentation of those issues to the Court.

In contrast to most private legal disputes, the matters entertained by the P&E Court almost inevitably impact upon the interests of third parties, which can range from a next door neighbour to large sections of the community, and the integrity of the planning process itself.

The imposition of the 'usual rule', notwithstanding the retention of a discretion in the Court, must necessarily invite different considerations of legal construction. The starting point for the Court is the award of costs: but after it has actually established the degree to which any party has been successful and thus defined, in the first instance, who should receive the prima facie benefit of the provision. That of itself will operate to strongly discourage any litigant (including many applicants for development approval) to pursue their rights.

In this respect, the Notes identify certain unsatisfactory outcomes that are sought to be avoided by the amendments. While these are understood not to be exhaustive, a review of those identified in the Notes assists in demonstrating that the amendment is unlikely to impact meaningfully on these instances.

Below, we have reproduced the relevant part of the Notes, together with our observations:[8]

...The usual rule in court proceedings is that the losing party pays the winning party's costs. The departure from this norm has led to a number of unsatisfactory outcomes including:

- *applicants being reticent to challenge conditions placed on development because the cost of litigating outweighs the benefit of a successful outcome*

  Comment: The amendment only serves to further discourage the applicant from pursuing their appeal rights, the result being that oppressive and unreasonable conditions will either render a development unviable, or (for example) drive up base housing costs. There is no element within the amendment which would provide an improved outcome. The Court already provides for ADR procedures

[8] Extracts taken from Explanatory Notes, Sustainable Planning and Other Legislation Amendment Bill 2012 (Qld) 6.

and encourages these proactively – this has become a major source of resolved appeals relating to development conditions.

- *commercial competitors fighting in court for the purposes of delay – knowing that even if the case is unsuccessful they will not be penalised in costs yet will have achieved their desired outcome*

  Comment: In most cases, commercial competitors availing themselves of the Court process are able to budget for cost contingencies, as part of their overall investment commitment to their own assets. In addition, such costs can be claimed as legitimate expenditure against tax liability. Accordingly, the amendments will have little, if any, effect on such instances.

- *developments approved by the council being litigated by third parties on weak town planning grounds – even though these grounds might not fall into the category of 'frivolous or vexatious'.....*

  Comment: While the amendment may have some effect on such litigation, this is not a compelling policy basis upon which to discourage those potential litigants who have proper reasons to pursue an appeal to the Court. This perceived mischief may be addressed in other ways more consistent with the existing costs provisions. The principles as to whether litigation is frivolous or vexatious are well developed from close judicial consideration. More often in recent times, the Court has invoked these provisions to good effect. If it is now considered that the test does not adequately capture instances where there is a lack of merit, then the existing provisions may be amended to broaden the circumstances in which the discretion is enlivened. By way of example only, the current list of exceptions to the normal costs rule may include instances where the Court considers that the appeal was instituted and conducted while lacking reasonable grounds. That, coupled with relevant statutory guidelines to assist the Court, will still achieve the policy outcome without creating the powerful disincentive that is created by the proposed amendments. Further still, provisions relating to conduct of a party (that already exist) can (and should) be availed of more frequently by parties on the advice of their legal representatives.

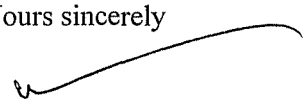
The provision proposed, which places some primacy on whether a party has participated in ADR procedures is commendable, but misplaced, in terms of it being a part of the Court's consideration whether to apply the "usual" costs order. As we have stated above, the degree of success or otherwise of a party's case is not always apparent on the face of a decision whether to dismiss or allow an appeal. Further, a party may have participated genuinely in ADR processes, only to have their proposals rejected. Yet, that party may partly succeed before the Court. The proposed proviso does not envisage such instances to any effective degree. While that proviso is stated to not be exhaustive or limiting on the Court's discretion, it must be interpreted as having some purpose (i.e. as a consideration of primacy). As drafted, it will have unintended consequences.

The matter of Alternative Dispute Resolution referral is more properly a matter for the Court's management. Indeed, legal representatives are actively encouraging parties to avail themselves of ADR procedures; professional conduct rules also serve to ensure that lawyers make clients conscious of this procedure. Current Court statistics (presumably readily accessible by your office) indicate the obvious success of the current structure. However, to predicate cost decisions on the fact of participation in ADR and early resolution of the matter is, for the reasons discussed above, misplaced and unnecessary.

For the reasons stated above, we submit that the proposed amendments will be unlikely to achieve the policy objective, while resulting in effectively denying unfettered access to the Court on wide and varied matters important to the public interest. That access has, and should remain, fundamental to the integrity of the legal system in this area.

If the amendments are to be pursued then, in addition to matters suggested above, we recommend there be a mechanism put in place for a party to be declared a 'public interest party' at the beginning of proceeding if they meet certain criteria.[9] This will allow a submitter or local authority, who is motivated only by an environmental or public interest concern, or raises a significant and important questions of law, to have peace of mind that they will not be exposed to an order for costs at the conclusion of proceedings.

Yours sincerely



Mark Baker-Jones, *on behalf of*
Stephen Keim SC
David Fahl

[redacted]

[9] Similar to those set out in *Oshlack v Richmond River Council* (1998) 193 CLR 72