Housing Availability and Affordability (Planning and Other Legislation) Amendment Bill 2023

Submission No: 5

Submitted by: Brisbane City Council

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Submitter Comments:

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31 October 2023

Committee Secretary
State Development and Regional Industries Committee
Parliament House
George Street
Brisbane Qld 4000
sdric@parliament.qld.gov.au

Dear Sir/Madam

I write to provide Brisbane City Council's submission on the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023* (the Bill), which was introduced to Parliament on 11 October 2023.

Council is supportive of measures to increase housing supply and diversity, and to respond to the current pressures and challenges of the housing market. However, these measures should be undertaken in a considered and transparent way that provides certainty in process and outcomes for the community, development industry, and local government. This is vital for Council's ability to effectively facilitate liveable and affordable housing outcomes, in the right locations. supported by the right infrastructure.

Council holds significant concerns in relation to several of the proposed changes which this Bill introduces. Broadly, Council's concerns relate to:

- a lack of transparent process and decision making, through increased powers for the State to direct changes to local planning frameworks and approve development applications inconsistent with current local planning schemes
- the creation of uncertainty for the community and development industry, by introducing powers that include significant limitations to appeal rights and consultation opportunities
- the potential to significantly and immediately impact Council resources by introducing obligations for Council to make amendments and assess applications at the direction of State, with likely consequential impacts through compliance management.

The attached table contains the detail of Council's submission. If you would like to discuss Council's submission, please contact [redacted], Team Manager, City Planning and Economic Development on [redacted] or via email at [redacted]. I encourage you to consider these concerns and ensure that the right balance is struck between enabling the efficient delivery of housing and providing fair and transparent processes for the community, development industry and local government.

Yours sincerely

[redacted]

Colin Jensen
CHIEF EXECUTIVE OFFICER

Att. Brisbane City Council's submission on the Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023

Appendix A - Council's submission on the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023*

Council appreciates the opportunity to provide comments on the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023* (the Bill). Council holds significant concerns and seeks clarification on several matters and suggests amendments to ensure there is clarity in the provisions. Key matters within the submission include:

- Request for substantially more consultation with local governments and the community on key proposals such as, state facilitated applications, temporary accepted development, temporary use licences, and directions from the Minister.
- Clarity on the process for the taking of land and easements by the State.
- Clarity on infrastructure charges notices and infrastructure agreements within the proposed processes in the Bill.
- Suggested amendments to the Bill drafting to enable improvements to the assessment process for change applications.

The proposed amendments represent a significant reduction in local communities' participation in the planning system. The community should be given adequate opportunity to consider their impacts and make appropriate and well-informed representations. The timeframe for providing submissions on the Bill was very limited considering the scale and likely impacts of the proposed legislation on local government. Given the Bill will be followed by changes to the *Planning Regulation 2017* (Planning Regulation), which contain essential information on how the amendments will operate, Council requests a minimum of 60 business days to consider the changes and to provide submissions, and to allow the community and development industry to do the same.

Council has concerns that the Bill does not address the infrastructure charging and delivery frameworks which are key impediments to the delivery of housing. Council has also previously requested a more streamlined planning scheme amendment process to enable quick and responsive scheme amendments to address emerging issues, such as housing supply and diversity. This has not been included in the Bill.

Part 3 – Amendment of Economic Development Act 2012		
Section	**Section heading**	**Comment / Question**
Division 2, Subdivision 4	Applications for temporary use licences	S171FA states that the Minister, Economic Development Queensland (MEDQ) may consult about applications for temporary use licenses. Council requests that provisions be added to allow for local governments to be consulted prior to a licence being granted. In addition, this amendment provides no clarity to whom, and if, MEDQ considers appropriate as to consultation.
Part 5 – Amendment of Planning Act 2016		
Section	**Section heading**	**Comment / Question**
Division 3, Subdivision 1	Amendments relating to acquisition of land	In principle, Council supports changes to resolve land ownership fragmentation that prevents the delivery of housing, however these processes should be undertaken in a considered and collaborative way with local governments, particularly when dealing with local government infrastructure networks and assets. Council's fundamental concern with this process is that land could be taken by the State, and ultimately vested in Council under section 263C, for development infrastructure networks which Council maintains and operates, without any requirement for Council to agree to the nature, scope or appropriateness of the infrastructure to be provided. These amendments provide for new powers to the State to take land (including easements) for development infrastructure. These powers are similar to powers available to local governments under s263 of the *Planning*

		Act 2016 (the Act), however include some key changes on criteria that must be met before the land can be taken, as well as the process for the taking and disposing of the land. At present there is no requirement for the development infrastructure to be identified as being required in a relevant planning instrument before it may be taken under this process. Under the drafting of s263B, an easement can only be created if the local government agrees to the terms of the easement. However, there is no equivalent provision requiring agreement from a local government if the development infrastructure is facilitated by the taking of land that is not an easement. Given that Council may be vested with an asset, whether it is an easement or land dedication, Council requests that agreement from the local government is required for all land taken for local government development infrastructure under new Division 2 'Taking of land by State'. This is entirely appropriate where: a) the land is only part of Council's network of development infrastructure and broader network considerations may inform the specific requirements for land; b) Council would need to carry out, or consent to the carrying out, of any future works on the land c) Council will be required to operate and maintain the development infrastructure. Under s263A(2)(b) and (c), the State may only take the land if an infrastructure agreement (IA) has been entered into under chapter 4 and 263D. It is not clear in the drafting or explanatory notes whether the owner of the land must be a party to the IA or not. It is assumed they would not be a party, on the basis that reasonable attempts to secure the agreement from the landowner would be unsuccessful and they would therefore not be willing to enter an agreement through an IA. Therefore, it is assumed that the IA would solely facilitate funding and cost recovery matters between the applicant and State. The concept of an applicant agreeing to provide funding to the State in order for it to then exercise its power to take land from a third party (who is not a party to that agreement) is problematic, particularly as there is not guidance on how that cost should be determined. Not only does it appear from the construction of this section that the State will only exercise powers if a developer agrees to provide funds to the State, it is also unreasonable for an applicant to fund what may be trunk infrastructure (regardless if it is of a benefit to the applicant). There is no clarity on how infrastructure delivery will be managed where there are works required, for example a pipe or constructed channel. These new provisions give the State the ability to take land or create easements only, and the developer will have no ability to deliver infrastructure on land that does not form part of their development approval and that is not in their ownership. Council plans, budgets, and delivers infrastructure based on citywide priorities. More detail is requested on whether these powers are intended to be used where delivery of the infrastructure involves works, and if so, what the process is and how Council will be consulted prior with to the State proceeding to take the land for that purpose. Council also raises the following matters for consideration: • Council's consent to the form and scope of any land to be acquired for Council's infrastructure networks should be required as Council will ultimately be responsible for the ongoing operation and maintenance of the infrastructure.

		• Because of the vesting provision in section 263C, Council would be the owner of land at the time any required works are to be carried out and accordingly Council should be required to be a party to the any infrastructure agreement for the provision of works. There are inconsistencies in the explanatory notes and the drafting of the Bill. The Explanatory notes (p.29) for s263B 'clarifies that an easement created under this section is a public utility easement under the Land Act or the Land Title Act', however the drafting of the Bill states under s263B(4) that in this section 'easement includes a public utility easement under the Land Act or the Land Title Act', meaning that the type of easement is not limited in the way suggested in the supporting notes. Clarity is requested.
Division 3, Subdivision 4	Amendments relating to State facilitated applications and compensation	Council has concerns with the proposed amendments to provide for the Minister to declare relevant applications as State facilitated applications. Council's concerns relate primarily to a lack of clarity on criteria that must be met to make a declaration, a lack of information required to fully understand the proposed process under the Act and Planning Regulation, the introduction of uncertainty for Councils, development industry and community, and the high likelihood of potential resource impacts to local governments. In addition, the process outlined for state facilitated applications is not considered necessary given the existing mechanisms available to the State, including the power to declare Priority Development Areas, give directions to assessment managers, and call in development applications. There is little guidance on key criteria that must be met prior to an application being declared a State facilitated application, specifically the term 'identified priority for the State', which is not defined or consistent with terminology used within the Queensland planning framework. Within the explanatory notes there are several examples of what an identified priority for the State could include, such as housing supply and affordable housing, but no guidance is provided in the legislative changes to give certainty to Council, the development industry and the community. Clarification is requested if the regional priorities identified on page 35 of the Draft ShapingSEQ 2023 Update are examples of State priorities for declaration. It is requested that 'identified priority for the State' is defined within the criteria proposed for the Planning Regulation. At a minimum, it is suggested that criteria should be set to determine what types of applications are priorities for the State. It is also not clear what relationship a relevant application must have to the identified priority for the State to meet the criteria. The proposed drafting of 106D(2)(a) states that the Minister may only make a declaration where the application is considered to 'assist in delivering development that is for an identified priority for the State'. However, the explanatory notes (p.9) states that "these powers are intended to deal with occasions that may arise where a State priority (such as affordable housing to ease housing challenges) could be severely affected by the implementation of a development approval". These two statements create uncertainty on the circumstances that an application can be considered to meet the criteria, and how an assessment of an individual development's impact on the ability to deliver an identified priority for the State can be carried out at a site scale. It is suggested that this inconsistency be addressed, so that it is clear the relationship that an application must have to an identified priority for the State.

		There a several key matters that are to be prescribed by Planning Regulation where details and drafting are not included in this Bill, including criteria that an application must meet to be declared a State facilitated application, as well as additional information that must be included in a Declaration notice. Without this information, Council is unable to fully assess the impact of the proposed changes to make a fully informed submission. It is suggested that consultation be undertaken with local governments on the drafting for the Planning Regulation. It should be noted that local governments within Queensland will be within a caretaker period for the local government elections in early 2024 and would not be in a position to provide feedback during that time. Council is concerned that the amendments to provide for State facilitated applications will introduce significant uncertainty to the development industry, community and local governments. Without additional clarity on what grounds an application can be declared as a State facilitated application, there may be concern from the development industry that a development application, or development approval, may be perceived as significantly affecting the ability to deliver an identified priority for the state, which is otherwise reasonably complying with the planning scheme. The ability for the Chief Executive of the Act (the Chief Executive) to assess and decide applications where they are not bound by current planning instruments may result in development being approved which is significantly different to what is provided for under the planning scheme. This creates uncertainty for the community, as the planning scheme currently provides an expectation of development within an area, and by further removing submitter and third party appeal rights against a decision made by the Chief Executive will both provide less certainty and no voice for the community. The justification provided in the explanatory notes is that despite the lack of voice for applicants and potential submitters, this is balanced by the fact that the Chief Executive will still be held accountable to the Queensland Parliament for decisions made, is not considered adequate. It also makes it difficult for Council to know and understand the outcomes and priorities being sought/ achieved in a State facilitated application, in situations where Council is responsible for assessing and deciding applications on adjoining or nearby sites, or within the same 'context'. There is a risk that outcomes will not align or be consistent with broader planning outcomes being sought. This ability for the Chief Executive to assess and decide development that is inconsistent with the type, scale, location and timing assumed within Council's Local government infrastructure plan (LGIP), has the potential to put significant additional strain on Council's trunk infrastructure networks. It is not clear in the material provided how matters relating to the conditioning, delivery and funding of trunk infrastructure will be dealt with in this process. Will Council be required to fund infrastructure that is conditioned by the chief executive? There is potentially a significant impact to Council resources through the broad ability for the Chief Executive to direct Council to assess all or part of a State facilitated application, and also request any further information from Council considered relevant. This represents an unknown impact to resources that will be obligated to provide help in the assessment of an application, as well as continue to assess and decide applications made to Council within statutory timeframes. Given the ability for the Chief Executive to delegate to another

		officer, there is potential that there will be a high volume of State facilitated applications. Council utilises fees and charges to ensure that adequate resourcing can be maintained for carrying out the assessment and deciding of applications, and those fees do not currently account for resources being made available when directed to help the Chief Executive assess a State facilitated application. Council makes available all development applications for the community through Development.i and meets the requirements under planning legislation. Council has concerns about the transparency of assessment and decisions on development applications that may not be available for the public to review through the assessment process. In addition, clarification is requested on how applications through the proposed process will be made available to the public during and post assessment, and how this would then be available for enquiries received through local governments. Council also has concerns about the proposed compliance of applications and suggests that the State should be responsible for the end to end process for State facilitated applications including compliance, plan sealing and community engagement. Council seeks clarification on whether the Chief Executive is taken to be the assessment manager for a State facilitated application or must comply with the requirements of the Act and DA rules as though they were the assessment manager. This impacts Council's ability to issue an infrastructure charges notice. Finally, Council has concerns about wording relating to IAs that may apply to a relevant approval. Council executes and administers IAs for a variety of reasons, and in some cases these IAs affect a large number of development sites, where the development entitlements and infrastructure obligations are closely linked. By removing the effect of an IA, unless the State 'approve' the agreement, there is significant risk that this decoupling of development entitlements and infrastructure obligations will create financial implications for Council. Council requests that the amendment is changed to ensure that in the instance an IA would affect a relevant application, Council is engaged early and the outcomes are agreed prior to the declaration of the relevant application.
Division 3, Subdivision 6	Amendments relating to other matters	Council has concerns about transparency and fairness of amendments proposed to provide further powers for the State to direct amendments to local planning instruments. Council's concern is specifically in relation to the ability for the Minister to direct a change to a planning scheme as a minor amendment to protect or give effect to a state interest where adequate public consultation has been carried out. This change does not acknowledge the detailed drafting that is required for a planning scheme amendment to achieve an objective that will affect different properties in different ways. Nor does it consider or provide clear direction for changes to Council's infrastructure planning. How these changes will materialise as a local level is not clear at the state and regional level, and will have considerable impacts to a community and significant impacts to affected property owners. Traditionally the integration of state interests into a planning scheme is the responsibility of local governments, who are best placed to determine how these policy objectives can be met while balancing the needs of the community, ensuring that the planning framework is catering for expected growth in a responsible way, and efficient and cost-effective delivery of infrastructure. Council is concerned that an

		amendment initiated by the State to integrate broad statewide interests at a local level will not achieve this balance and may not integrate effectively within the wider planning scheme context. Council is also concerned that 'adequate consultation' is not defined outside of an example provided in the 'Ministers Direction Powers' factsheet, which states that these are where there has been 'community level consultation where it is clear what an amendment to the planning scheme would be and how the community would be affected'. It can be reasonably inferred based on the drafting of this section that a Minister's direction to make an amendment to the planning scheme under s26A would not include public consultation in this instance. To improve transparency, the State should confirm the state interests (or aspects of state interests), which have been through adequate consultation, and maintain this list on its public website. Council does not agree that consulting at a state or regional level (e.g. the *State Planning Policy* or *draft ShapingSEQ 2023 Update*) would provide communities and development industry sufficient information for how this will be integrated at the local level, such as direction on specific land use or development requirements, or how they may be affected by infrastructure required to support the changes. Removing consultation on what would otherwise be considered a major amendment would significantly impact the ability for the community to be fully informed and have a meaningful say in planning changes that directly affect them.
Division 2, clause 28	New Temporary Accepted Development	Council has concerns about the introduction of temporary accepted development into the planning framework. Information provided to support this change indicates that changing the use of a premises can help State and local governments to meet an urgent need or emerging issue. No further explanation or example is provided of how this may apply at either level of government. An urgent or emerging issue is not defined within the Act or Planning Regulation and there is no requirement that an urgent or emerging issue exists before a regulation may declare a particular material change of use of a premises is temporary accepted development under the proposed new section 46A. Clarification is sought on if this relates to a State interest or State priority. It is unclear whether the provisions will only apply to residential development, for the purpose of increasing housing supply and addressing housing affordability. Council has significant concerns about the introduction of temporary accepted development without community engagement and consultation about the change to the Planning Regulation and for the length of the stated period. Before declaring any temporary accepted development consultation should be required with the community and with local government. This is essential for a change that may help a local government and our community, and ensures that Council is able to assess the wider impacts, such as whether additional infrastructure may be required to support these uses (if the intent is to allow development which obtains an approval to continue lawfully operating after the temporary period ends). Clarification is requested on whether the introduction of a temporary accepted development is a prelude to a direction from the Minister to amend the Planning Scheme and if the temporary accepted development may apply to one, some or all local governments. Council is concerned that the introduction of a temporary accepted development will create uncertainty for local governments, developers and the community by allowing planning change with no prior notice or

		transition period. In addition, there is no clarification as to the impact on current development applications being assessed by local governments for a use that may be introduced as temporary accepted development, or existing development approvals whereby modifications are being sought. There are likely flow on impacts to local governments, including resourcing required to undertake compliance activities where it may be more difficult to establish whether a development has been undertaken lawfully. It is reasonable to assume that at the end of the stated period, many developments which commenced the relevant use would still be operating without a development approval or have not been able to obtain an approval from Council due to non-compliance with the planning scheme. Both scenarios result in unlawful uses, which local governments will need to manage, creating further significant resourcing impacts and uncertainty. Council is also concerned that there may be pressure to regularise unsuitable uses, or uses with unsuitable impacts that would not have been approved or approved with conditions if a development applications was made prior to a use commencing. This includes where temporary accepted development does not adequately consider interfaces with and impacts from existing lawful uses (such as residential temporary accepted development adjacent to an existing industrial use). Further, there are potential flow on impacts for developers, local governments, utility providers and consumers given the interaction between the planning and building frameworks. Council is seeking further information about how temporary accepted development will function with the building requirements. Council is also seeking confirmation that only residential uses will be included as temporary accepted development. These provisions do not clarify the treatment of building works lawfully constructed to implement a material change of use that is temporary accepted development during a stated period. Our understanding is that by operation of section 260(2) buildings works could not be required to be altered or removed after the stated period ends. Accordingly, whilst the use could no longer be lawfully carried out, the building works would remain lawful. Council's assessment of a development application would be prejudiced by the fact that built form impacts of the development could be 'locked in' during the stated period prior to making a development application and therefore not subject to meaningful assessment during or after the stated period. A possible way to address the above would be to limit temporary accepted development to a 'temporary use' as defined under the Planning Regulation given that a requirement to meet this definition is that the use "does not involve the construction of, or significant changes to, permanent buildings or structures". Additional provisions should be included to ensure that local governments are able to levy charges on a development approval for temporary accepted development, if a development approval is ultimately given for material change use by the local government. Based on the current drafting Council may be unable to levy a charge as an applicant may be entitled to a demand credit for an existing use on the premises that is lawful and already taking place on the premises, being the temporary accepted development.

		It is difficult to anticipate the impacts on local government without the required information about temporary accepted development. This includes how inappropriate and unacceptable impacts would be managed and the additional compliance and regulatory burden likely to be experienced by local governments.
Division 3, Subdivision 2	Temporary use licences	The new provisions state that the Minister may consult about applications for temporary use licenses. Council requests that provisions be added to allow for local governments to be consulted prior to a licence being granted. In addition, this amendment provides no clarity to whom, and if, the Minister considers appropriate as to consultation.
Division 2, clause 31 and 33	Representations about change representations and infrastructure charge notice	Council raised concerns during consultation of the initial changes in May 2023 about the need for adding a provision or mechanism which allows for customer identified administrative errors (for example a typographical error in a plan reference number) to be corrected post decision. These changes are currently required to go through the formal negotiated decision process which can be a significant administrative process for such a minor change.
Section 43	Categorising instruments (Local and State heritage listed places)	Council seeks clarification on the drafting of the provisions for the following: • If there is matter of local significance that may be outside of the curtilage of the area nominated within the State citation for significance and within the site • If there are matters of local significance within the curtilage of the area nominated within the State citation for significance and within the site. Noting that the tests for significance are different for local and State heritage listed places.
Amendment of Schedule 2	Dictionary - Owner	Council seek clarification from the State about whether the lease referred to in this definition could simply be stated to be a 'State lease' over the reserve as defined under the Land Act. This would avoid confusion where trustee leases may also exist over a reserve. In addition, the drafting should clarify whether both the trustee and the Minister administering the Land Act are to consent where a relevant lease only covers part of the land subject to the application.