Sub 43

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TLGC

The Research Director
Transport, Local Government and Infrastructure Committee
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Dear Sir/Madam

SUBMISSION IN RESPECT OF THE SUSTAINABLE PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2011

This submission has been prepared by the Sunshine Coast Regional Council (**Council**) in respect of the Sustainable Planning and Other Legislation Amendment Bill 2011 (**Bill**) which amongst other matters proposes amendments to the *Sustainable Planning Act 2009* (**SPA**) and the *Urban Land Development Authority Act 2007* (**ULDA Act**).

Ministerial decisions without consultation

Clauses of Bill

1. Clauses 65, 67, 68 and 74 of the Bill provide for amendments to the SPA to state that the Minister is not required to consult with anyone before making decisions in respect of the following:

   (a) making or amending a local planning instrument without giving a direction to the local government about the making or amendment of the local planning instrument under section 129 (Power of Minister to take action about local planning instrument without direction to local government) of the SPA;

   (b) directing a local government or an applicant to take an action required of it under chapter 4, part 3, division 3 (Applying for and obtaining approval of proposed master plan) of the SPA;

   (c) directions made under chapter 6, part 11, division 1 (Ministerial directions).

2. Moreover, clause 99 of the Bill provides for the insertion of a new section 758A (No requirement to consult for particular decisions under repealed IPA) in the SPA which provides that for the avoidance of doubt, the Minister was not required to consult with anyone about making certain decisions under the repealed *Integrated Planning Act 1997*.

3. It is also noted that the Bill provides for the replacement of section 424 (When a development application may be called in) of the SPA to insert new provisions which set out a process by which the Minister is to give written notice of a proposed call in to relevant parties that are afforded the opportunity to make representations in respect of the proposed call in prior to the Minister making a decision.

Explanatory Note

4. The Explanatory Note to the Bill provides that the new provisions which replace section 424 (When a development application may be called in) of the SPA achieve policy objectives in relation to natural justice. (page 10)

5. The Explanatory Note also provides that the proposed amendments in clauses 65, 67, 68 and 74 of the Bill raise potential issues in relation to fundamental legislative principles in

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respect of the rights and liberties of individuals and the exercise of administrative power and states that the departure from these principles is justified on the basis that the proposed amendments simply clarify that consultation was not intended under the IPA or the SPA. (page 17)

Contrary to fundamental legislative principles

6. Whilst the introduction of the amendments to replace section 424 (When a development application may be called in) of the SPA are supported, the proposed amendments to the SPA which provide that the Minister is not required to consult with anyone before making a decision in respect of the matters outlined in paragraph 1 above are not supported for the following reasons:

   (a) First, the proposed amendments offend fundamental legislative principles under sections 4(2)(a) and (3) (Meaning of *fundamental legislative principles*) of the *Legislative Standards Act 1992* (**LSA**) in relation to the rights and liberties of individuals in that:

      (i) the rights and liberties of individuals are dependent on administrative power that is not sufficiently defined and is not subject to appropriate review; and

      (ii) the proposed amendments are inconsistent with principles of natural justice.

   (b) Second, the departure from fundamental legislative principles has not been justified on the basis of sound reasoning in the Explanatory Note as required by section 23 (Content of explanatory note for Bill) of the LSA.

7. The Minister's decisions would materially affect the rights and liabilities of individuals in that:

   (a) the exercise of the administrative power is not sufficiently defined as identified by section 4(3)(a) (Meaning of *fundamental legislative principles*) of the LSA;

   (b) the exercise of the administrative power is not subject to appropriate review, in particular a merits review as identified by section 4(3)(a) (Meaning of *fundamental legislative principles*) of the LSA;

   (c) the exercise of the administrative power will deprive an individual of a right, interest or legitimate expectation of a benefit without that person being given an adequate opportunity to present the person's case to the Minister contrary to the principles of natural justice as identified by section 4(3)(b) (Meaning of *fundamental legislative principles*) of the LSA;

   (d) the exercise of the Minister's power without consultation to an affected individual does not involve the adoption of procedures that are appropriate and adaptive to the circumstances contrary to the principles of natural justice identified in section 4(3)(b) (Meaning of *fundamental legislative principles*) of the LSA.

8. In particular, a failure to consult with a local government in respect of the making or amendment of a local planning instrument which is the responsibility of a local government as the planning authority for the local government area under the SPA and the *Local Government Act 2009* (**LGA**):

   (a) would make the exercise of a local government's rights and obligations under the SPA and the LGA subject to an undefined power without review; and

   (b) is clearly inconsistent with the principles of natural justice in section 4(3)(b) (Meaning of *fundamental legislative principles*) of the LSA.

9. The Explanatory Note does not accord with the LSA in the following respects:

   (a) First, the Explanatory Note does not identify that the proposed amendments are consistent with the principles of natural justice, in particular, the principle of the right to be heard and the principle of procedural fairness. This raises some concerns given that the Explanatory Note expressly identifies that the principles of

natural justice are the basis for the proposed amendments to the Ministerial call in powers in section 424 (When a development application may be called in) of the SPA to afford individuals the right to be heard and procedural fairness.

(b) Second, the Explanatory Note does not justify the departure from fundamental legislative principles on the basis of sound reasoning for the following reasons:

(i) The common law requires administrative power to be exercised consistent with the principles of natural justice.

(ii) If the Parliament intended to limit or exclude the principles of natural justice in an Act it would have to do so expressly.

(iii) The IPA and the SPA do not expressly exclude the principles of natural justice.

(iv) The explanatory notes to the IPA and the SPA do not identify that the principles of natural justice were to be excluded and as such did not identify a fundamental legislative principle issue with the relevant provisions of the IPA and the SPA.

(v) The Planning and Environment Court in *Landel Pty Ltd v Hinchcliffe & Anor* [2009] QSC 408 held that the principles of natural justice were not expressly or impliedly excluded in respect of the exercise of the Ministerial call in powers.

(vi) To suggest as the Explanatory Note does that there was a legislative intention in the IPA and the SPA to exclude the principles of natural justice and that the proposed amendments to the Bill "will clarify the situation" is factually incorrect, legally incorrect and not consistent with the basic democratic values that are fundamental to high quality laws.

(c) Third, the Explanatory Note to the Bill therefore does not accord with section 23(f) (Content of explanatory note for Bill) of the LSA.

10. Queensland's system for assessment of legislation was established in response to the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (The Fitzgerald Report) to ensure that fundamental legislative principles underlie Queensland's legislation and that departure from the principles is explained and justified.

11. In this case the proposed amendments to the Bill undermine fundamental legislative principles, the reasons for the departure from the principles are not properly identified and the justification for the departure from the principles is not based on sound reasoning.

Amend to accord with fundamental legislative principles

12. Accordingly, it is submitted that the Bill be amended as follows:

(a) First, to remove the proposed amendments to the SPA set out in clauses 65, 67, 68 and 74 of the Bill which provide that the Minister is not required to consult with anyone prior to making decisions to take actions or give directions.

(b) Second, in the event that the proposed amendments are to proceed that they be amended to accord with the fundamental legislative principles namely that the exercise of the administrative power:

(i) is sufficiently defined;

(ii) is subject to appropriate review;

(iii) is consistent with the principles of natural justice in particular the principles of the right to be heard and procedural fairness.

Adopted infrastructure charges

Clause of Bill

13. Clause 88 of the Bill provides for the amendment of section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provision) of

the SPA to enable a local government to increase an adopted infrastructure charge from the date the charge is levied to the date it is paid.

14. It is proposed to amend section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provision) of the SPA to insert a new sub-section (10) to provide as follows:

"If the resolution provides for increasing an adopted infrastructure charge—

(a) the resolution must state how the increase is worked out; and

(b) any increase for the particular development must not be more than the lesser of the following amounts—

(i) the amount that is the difference between the amount of the adopted infrastructure charge levied for the development and the amount of the maximum adopted charge the local government could have levied for the development at the time the charge is paid;

(ii) an amount representing the increase in the consumer price index for the period starting on the day the charge is levied and ending on the day the charge is paid."

Effect of proposed amendment

15. The proposed amendment to section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provision) of the SPA in respect of increasing an adopted infrastructure charge provides for a local government to increase an adopted infrastructure charge from the date it is levied to the date it is paid by the consumer price index, provided the increased charge does not exceed the maximum adopted charge specified in the State planning regulatory provision (adopted charges) at the time the charge is paid.

16. By limiting the amount of an increase to an adopted infrastructure charge to the maximum adopted charge at the time the charge is paid, the value of an adopted infrastructure charge levied by a local government is not preserved from the date it is levied to the date it is paid.

17. This limits a local government's ability to collect the real value of an adopted infrastructure charge levied by the local government at the time the charge is paid.

Protection of revenue base

18. Accordingly, it is submitted that the Bill be amended to provide for a local government to increase an adopted infrastructure charge from the date it is levied to the date it is paid by the consumer price index, without being limited by the amount of the maximum adopted charge the local government could have levied for the development at the time the charge is paid.

Urban encroachment

Clause of Bill

19. Clause 94 of the Bill inserts a new chapter 8A (Provisions about urban encroachment) in the SPA.

20. The proposed section 680D (Applications of pt 2) of the SPA provides that part 2 (Restrictions on legal proceedings) applies to relevant development applications.

21. The proposed section 680B (What is a *relevant development application*) of the SPA defines a "relevant development application" by reference to certain types of development applications made under the SPA or the repealed *Integrated Planning Act 1997*.

Effect of Bill

22. The Bill does not provide for the urban encroachment provisions in respect of restrictions on legal proceedings to apply to UDA development applications made under the ULDA Act.

23. The intent of the urban encroachment provisions in the Bill is to ensure that existing lawfully operating uses subject to encroaching development, and the encroaching development, are able to coexist.

24. The Council is of the view that the urban encroachment provisions should apply to UDA development applications made under the ULDA Act, given that new development that is located in an affected area may also be in an urban development area.

25. This is of particular relevance to the Council's local government area given that the Urban Land Development Authority has granted approvals in respect of UDA development applications made for the Caloundra South urban development area adjoining the Caloundra Aerodrome which have the real potential to encroach on the operations of the Caloundra Aerodrome.

Urban encroachment provisions to apply to UDA development applications

26. Accordingly, it is submitted that the Bill be amended to provide for the urban encroachment provisions in respect of restrictions on legal proceedings to apply to UDA development applications made under the ULDA Act.

Infrastructure agreements

Clause of Bill

27. Clause 129 of the Bill provides for the insertion of a new part 6A (Infrastructure agreements) in the ULDA Act.

28. The proposed section 136D (Infrastructure agreement continues beyond cessation of urban development area) of the ULDA Act provides that where an infrastructure agreement applies to land in an urban development area and the land ceases to be in an urban development area:

    (a) the superseding public sector entity for the land is taken to be a party to the agreement in place of the Urban Land Development Authority (**ULDA**); and

    (b) the rights and responsibilities of the ULDA under the agreement become the rights and responsibilities of the public sector entity.

Effect of Bill

29. Whilst the Council acknowledges that an applicant for a development approval seeks to achieve certainty in entering into an infrastructure agreement, the proposed amendments to the ULDA Act which would result in the Council assuming the rights and responsibilities of the ULDA under an infrastructure agreement may lead to a significant financial burden on the Council and existing and future ratepayers.

30. In relation to the Caloundra South urban development area, the Development Scheme bestows significant development entitlements on the Caloundra South urban development area including the following:

    (a) 20,000 dwellings;

    (b) 650,000m^2 of gross floor area of industry and business uses;

    (c) 168,500m^2 of gross floor area of retail and commercial uses.

31. It has been foreshadowed that the cost of sub-regional and local infrastructure to service the significant development entitlements bestowed under the Development Scheme will be in the order of billions of dollars.

32. The Council is aware that the ULDA and the landowner are engaged in discussions in respect of the negotiation and preparation of an infrastructure agreement for the land within the Caloundra South urban development area.

33. The Council has previously written to the ULDA requesting clarification in respect of its intentions for the provision of infrastructure in the Caloundra South urban development area, however, to date, the Council has not been included in discussions in respect of the proposed infrastructure arrangements to be specified in the infrastructure agreement.

34. An infrastructure agreement typically addresses the following matters:

    (a) specifications of infrastructure contributions to be provided, including land, work and financial contributions for trunk and non-trunk infrastructure;

    (b) requirements for local, sub-regional and regional infrastructure;

    (c) timing for the delivery of infrastructure;

    (d) the party responsible for the delivery of infrastructure.

35. If the Council were to take over the rights and responsibilities of the ULDA under an infrastructure agreement for the land within the Caloundra South urban development area, the Council would be obliged to meet the following:

    (a) the ULDA's obligations in respect of infrastructure set out in the infrastructure agreement;

    (b) those infrastructure requirements not otherwise imposed on the landowner that are necessary for the development.

36. The Council would become liable for those development obligations in circumstances where those obligations are not funded in the Council's infrastructure charging instruments, budget or long term financial plan.

37. Given the scale of the infrastructure required to service the development of the Caloundra South urban development area, the assumption by the Council of the rights and liabilities of the ULDA under an infrastructure agreement is not in the public interest as it has the potential to materially affect the financial position of the Council and otherwise impose a significant financial burden on existing and future ratepayers.

ULDA infrastructure agreements not to be binding on local governments

38. Accordingly, it is submitted that the Bill be amended to remove the proposed amendment to the ULDA Act which provides for a superseding public authority for land that is no longer in an urban development area to assume the rights and responsibilities of the ULDA under an infrastructure agreement entered into for the land.

Submissions

39. It is therefore submitted that the Bill be amended as follows:

    (a) to ensure the observation of the fundamental legislative principles the proposed amendments to the SPA set out in clauses 65, 67, 68 and 74 of the Bill which provide that the Minister is not required to consult with anyone prior to making decisions to take actions or give direction should be removed or if they are to be retained be amended to ensure that the exercise of the administrative power:

        (i) is sufficiently defined;

        (ii) is subject to appropriate review;

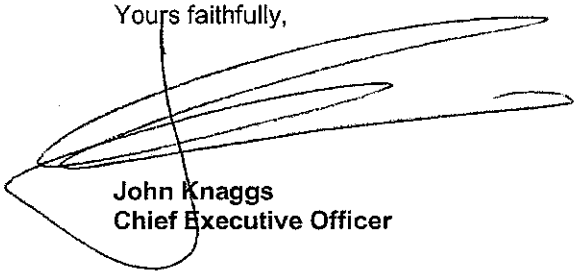
(iii) is consistent with the principles of natural justice in particular the principles of the right to be heard and procedural fairness;

(b) to protect local governments' revenue base section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provision) of the SPA should be amended to provide that a local government may increase an adopted infrastructure charge from the date it is levied to the date it is paid by the consumer price index without being limited by the amount of the maximum adopted charge the local government could have levied for the development at the time the charge is paid;

(c) to protect against urban encroachment the SPA should be amended to provide for the urban encroachment provisions in respect of restrictions on legal proceedings to apply to UDA development applications made under the ULDA Act;

(d) to protect the financial position of local governments and the financial burden on existing and future ratepayers the proposed amendment to the ULDA Act which provides for a superseding public authority for land that is no longer in an urban development area to assume the rights and responsibilities of the ULDA under an infrastructure agreement entered into for the land should be removed.

Yours faithfully,



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