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Your Ref: Sustainable Planning and Other Legislation Amendment Bill 2011

Quote in reply: PLanning and Environment Law Committee

2 December 2011

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TLGC

Ms Lyndel Bates
Research Director
Transport and Local Government Committee
Parliament House
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Dear Ms Bates

SUSTAINABLE PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2011

I apologise for the lateness of our submission and thank the Committee for allowing a short extension to allow us to lodge a submission on this Bill. Our submission is restricted to Part 7 – Amendment of Sustainable Planning Act 2009. We have not reviewed other Parts of the Bill.

The QLS supports some sections of the Part and has concerns about other sections.

Clause 62 - Section 78A Relationship between local planning instruments and Building Act

The QLS has previously advised the former Department of Infrastructure and Planning that a section along these lines was considered necessary and appropriate and we are pleased that it has at last been introduced.

Clause 67, 68 and 74 No requirement to consult

This is a series of clauses amending provisions which do not currently express a right to consultation, expressly ruling out a right to consultation. The QLS does not have strong views about this, but we do have a general concern that the amendments appear to be heading in the wrong direction. In each case, the planning process would appear more likely to be improved by greater consultation, rather than the reverse.

Clause 76 Section 424A Notice of proposed call in

The QLS strongly supports the introduction of provisions giving notice to applicants, submitters and government agencies about a proposed call in and providing them with an opportunity to lodge submissions.

However, the QLS opposes:

(a) The Minister's wide discretion about the re-starting point - The Minister having an opportunity to re-start the IDAS process at any point, in the Minister's discretion (prior to decision, as explained in the new **Section 425(3)(d)**), in particular if this allows the Minister to re-start the application at a later point than it has reached in IDAS, eg, Section 424A(3)(d). For example, if the application has only just been lodged, the Minister should not be able to skip information and referral and notification and go straight to decision. Also, the QLS opposes the Minister being given an opportunity to 'chop and change' about the re-starting point, under **Section 425(2A).**

(b) Onerously restricted period for submissions to be lodged - The provision of only 5 business days for people to make submissions about the proposed call in (subject to extensions at the absolute discretion of the Minister) – Section 424A(3)(h). Such a limited period would be extremely onerous for anyone whose interests could be affected (including members of the community). In this regard, it is noted that people who are preparing and lodging representations are only given 5 business days to do this, but the Minister is given 20 business days under Section 424C to consider them, which seems a little unfair, to say the least.

(c) Omission of normal decision criteria - The Minister trying to decide any application '*having regard only to the State interest*' (eg Section 424A(3)(d)) and that the normal assessment and decision provisions do not apply (Section 424A(3)(f).

Possibly, the intention of focussing the Minister's attention on the particular State interest which is nominated as the reason for the referral may have been to try to avoid abuse, that is, to avoid the Minister calling in an application on the basis that it 'involves' a specified State interest, but then deciding the application on the basis of purely local political reasons. However, this is not what the drafting achieves.

Consider the example of an application which is called in for State commercial reasons. The Minister could then only take into account the State's commercial interest in deciding the application, without regard to relevant planning or environmental issues in the normal way. Those issues could not even be taken into account in assessing conditions. This would clearly be wrong and absurd. All of the normal requirements should remain relevant to the decision (both whether or not to approve and also the assessment of conditions). The Minister should be required to take into account the nominated State interest, but it should not necessarily be given higher priority than other normal considerations. For example, if the Minister calls in an application for State commercial reasons, this does not necessarily mean that it should be approved if it conflicts with local planning and environmental requirements.

In passing, it is also suggested that advice agencies should be notified of a call in, not only concurrence agencies.

Clause 94 Chapter 8A Urban encroachment

The QLS is not opposed in principle to legislation which tries to protect existing industrial uses from inappropriate urban encroachment, or from unreasonable complaints as a result of people choosing to 'move to a nuisance'. In planning law, there is an existing caselaw principle known as 'reverse amenity' and in tort law, there are existing principles relating to people who choose to 'move to a nuisance'.

However, unfortunately, the drafting of these provisions appears to have been unduly rushed and would have benefitted from normal public consultation about the legal and commercial consequences of the proposed drafting. The provisions are not as flexible and nuanced as existing caselaw dealing with similar issues. Once a statute attempts to 'codify' existing principles of caselaw, if the statute does not take into account the nuances of the existing caselaw, there is a serious risk that those nuances are taken to have been intentionally overridden by the more inflexible statutory drafting.

For example, Section 680B (2) has a definition for 'undeveloped land' which includes some common types of rural land uses but not others; and it picks out abattoirs and tannery land for protection, but not sugar mills and other agricultural processing facilities or extractive industry (which is commonly located on Rural-zoned land).

The normal key problem for existing industrial uses that were built in rural or industrial areas, where their buffers are subsequently eroded by inappropriate urban encroachment, is that the industrial developments are subject to conditions of their development permits for environmentally relevant activities, measured at 'sensitive places'. When they were built, they met these standards, because there were no 'sensitive places' in the vicinity. Section 680E does not protect these industrial developments from proceedings under either the *Sustainable Planning Act 2009* or the *Environmental Protection Act 1994*, relating to the unintentional breach of those conditions due to people having 'moved to the nuisance'. It only protects against the less serious problems of:

(a) Civil proceedings for nuisance; or
(b) Criminal proceedings relating to a local law.

Also, the term 'sensitive places' is defined more broadly in development permits for 'environmentally relevant activities' than just houses and sheds ('relevant development application' in Section 680B).

Accordingly, the Bill appears to be just creating significant additional paperwork for both the existing industrial developments and the residential encroachments, without achieving either the prevention of the residential encroachment or the protection of the existing development from being closed down as a result of people moving to the nuisance.

If the Committee has questions arising from this submission, the QLS would be happy to respond.

Yours faithfully

Bruce Doyle
President

Susan Moran

From: Matthew Dunn [M.Dunn@qls.com.au]
Sent: Friday, 2 December 2011 5:17 PM
To: Transport and Local Government Committee
Cc: Bruce Doyle; leanne.bowie@bowielaw.com.au
Subject: Sustainable Planning and Other Legislation Amendment Bill 2011

Attachments: DOC021211.pdf

DOC021211.pdf
(390 KB)

Dear Transport and Government Committee

Please find attached a submission from the Queensland Law Society to the Inquiry on the Sustainable Planning and Other Legislation Amendment Bill 2011.

The original will follow by post.

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