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26 September 2014

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Hon Jeff Seeney MP
Deputy Premier
Minister for State Development, Infrastructure and Planning
PO Box 15009
City East Qld 4002

Dear Deputy Premier Jeff

Draft Planning and Development Bill 2014

Thank you for the opportunity to provide feedback on the draft *Planning and Development Bill 2014* (the Bill).

The Property Council appreciates the time taken by the Department of State Development, Infrastructure and Planning (the Department) to involve the industry in discussions leading to the development of the Bill.

Through stakeholder working groups, presentations to our committees and one-on-one meetings, the Department has ensured the Property Council's involvement through all stages of the Bill's development.

The format of the Bill is logical and streamlined, and much simpler to read than the current *Sustainable Planning Act 2009* (SPA).

As a significant amount of the content of the Bill will be located in the yet-to-be-finalised regulations and DA rules, it is difficult to provide a full commentary on the impact the new legislation will have on improving Queensland's planning and development assessment system. The Property Council is keen to be involved in the development and road testing of the draft regulations and DA rules.

From the information contained in the Bill, it is clear that the Government has taken significant steps to reduce the complexity within the system, and provide greater certainty for all stakeholders.

The following sections of this submission cover the Property Council's headline concerns and queries with the Bill. A table has also been attached, which contains further detail.

The Property Council was pleased to meet with representatives of the Department in early September to discuss our broader concerns and propose alternative solutions for consideration. This is indicative of the consultative approach taken by the Department since the announcement of the new legislation in June last year.

Positive changes

There are many positive changes proposed through the Bill. A few of these have been highlighted below:

- Affording discretion to assessment managers in matters such as determining when an application is properly made or when considering extension requests, will have a positive impact on both applicants and assessment managers.
- The introduction of a presumption in favour of approval for standard assessment will have a catalytic impact on the culture of development assessment within local governments. It will profoundly change the way in which assessment managers approach standard applications and send a positive signal regarding the importance of development in achieving planning outcomes.
- Decoupling public notification from merit assessment recognises that a 'one size fits all' approach to development assessment does not work. It empowers local governments to make decisions on behalf of their constituents and acknowledges that not all complex applications require community input.
- The Property Council is particularly pleased to see the retention of deemed approvals. While used infrequently, deemed approvals provide a mechanism to ensure that statutory timeframes are met.
- The conflict and sufficient grounds tests in SPA were often the subject of protracted litigation. Their removal will have a positive impact on the broader operation of the development assessment system.
- Introducing standard currency periods and abolishing the confusing roll forward provisions of the SPA will provide greater clarity to both assessment managers and development proponents.

Removal of limitations in calling up external documents

The SPA included limitations on the external documents local governments could call up in their planning schemes and planning scheme policies. The Bill no longer contains these limitations.

The concern for our members is twofold. First, our members are concerned by the types of documents that will be called up. Second, our members are concerned about what will happen if the documents called up later change. Such a change could lead to an adverse planning change, yet the current superseded scheme and compensation provisions of the Bill do not deal with this situation.

Retrospective TLPIs

Section 20(6)(c) allows for Temporary Local Planning Instruments (TLPIs) to have effect retrospectively from the day a local government resolved to give the TLPI to the Minister for approval.

The Property Council has significant concerns with the unintended consequences of this provision.

As there is no public notice required when a local government resolves to give a TLPI or amendment to a Minister, a proponent cannot be expected to know when this has occurred.

There is therefore the very real potential for a development offence to be committed where an action in breach of the TLPI occurs between when the local government resolves to send it to the Minister, and when it is publicly notified by the Minister as being made.

A person would have had no way of knowing they were committing an offence at the time of their action.

Proposed alternative for adverse planning change

At section 25(4)(e), an alternative has been proposed for determining an adverse planning change.

The Property Council does not support the proposed alternative.

The current provisions in the SPA are well understood, and as such, we see no reason to change them.

The wording of the proposed alternative introduces significant uncertainty and subjectivity through language such as 'good faith' and 'best available information'. The interpretation of these terms is likely to lead to litigation.

Exemption certificates

The introduction of exemption certificates at section 40 is a positive move, and is supported by the Property Council.

There is however, significant uncertainty as to how these exemption certificates will operate.

A number of questions arise, including:

- Are they personal to the owner, or will they run with the land?
- Can they be withdrawn at any time? What type of notice (if any) will be given before withdrawal?
- Will there be limits on the number of times they can be issued/reinstated?
- Will copies of exemption certificates be provided as part of a standard or full planning and development certificate? This information will be extremely important during due diligence.

- The terms 'started', 'completed' and 'use' do not work well for material change of use (MCU) and reconfiguration of a lot (RoL) development categories. Are there more appropriate ways to state the intent?

Third party assessment

The concept of third party assessment (section 42) is supported by the Property Council, however, further consideration is required as to how this process will work in practice.

By way of example:

- does a third party assessment manager (chosen assessment manager) become a respondent to an appeal?
- will it be necessary for subsequent applications (e.g. change applications, extension applications, cancellation applications) to be made to the chosen assessment manager?
- what happens if a third party assessment manager dies, is declared bankrupt or goes into receivership or liquidation?
- who will maintain records and how will these records be searchable (for planning and development certificate purposes and Right to Information purposes)?

The current 'RiskSmart' process utilised by a number of local governments would appear to provide the most appropriate model for third party assessment. This process ensures that the local government is still responsible for decisions and record management, and ultimately ensures it is involved in further stages of the process, such as appeals, extension applications, declarations etc.

Reasonable and relevant conditions

Section 68 of the Bill '... is the ***reasonable or relevant requirement*** for development conditions.'

The equivalent section of the SPA is section 345, which states, in part:

> (2) Subsection (1) applies despite the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency.

Subsection (1) is the reasonable or relevant requirement.

The effect of this section is to the make the reasonable or relevant requirement paramount *despite* the laws administered and policies applied by an assessment manager or concurrence agency.

This section provides an important safeguard, particularly where a local government is able to introduce its own laws and policies, and impose conditions based on those laws and policies where those laws and policies are not required under planning legislation to be reasonable or relevant.

Section 345(2) gives comfort that where unreasonable or irrelevant laws and policies are in place, the conditions placed on a development approval are still required to satisfy the reasonable or relevant requirement.

Inconsistent conditions

The Property Council supports the intent of sections 70(1) and 70(2) to allow inconsistent conditions to be imposed for a *development* in certain circumstances.

To maximise the utility of these sections, there needs to be an ability to impose inconsistent conditions for different development on the same premises. This will avoid the need to apply to change a former approval where a subsequent approval changes a component of an earlier approval (e.g. car parking requirements, landscaping requirements etc.)

Changes other than for a minor change

The introduction of a process to change applications, other than for a minor change, is supported by the Property Council.

There is, however, some concern that these provisions will not operate as intended, as it is unclear when a change becomes so significant it will require a new application, rather than a change application. This may lead to litigation.

The current scope of the minor change provisions provides adequate leeway for applicants to have their proposed changes assessed without triggering a new development application.

It may be simpler to consider expanding the minor change provisions, rather than to introduce a new category.

Further comments on the Bill are provided in the table attached.

The Property Council appreciates the time the Department has taken to involve our members in the development of the Bill, and we look forward to continuing to work with Department officers in finalising it.

If you have any questions regarding the Property Council or this submission, please do not hesitate to contact Jen Williams on jwilliams@propertyoz.com.au or 07 3225 3000.

Yours sincerely

Chris Mountford
Acting Executive Director

Enc. Table- Feedback on Planning and Development Bill

PROPERTY COUNCIL of Australia

Feedback on Planning and Development Bill

September 2014

Section	Issue/ Description	Resolution/ Further comments
6(2) and (3)	Mentions 'making, amending, suspending or repealing State planning instruments', however there is no mention of suspending in section 8(2) or 14	Amend this section, or introduce 'suspending' in 8(2) and 14
7(4)	Hierarchy does not include the relationship between a TLPI and a planning scheme	Include relationship between planning scheme and TLPI in the hierarchy
Chapter 2, Part 2	No timeframes for when amendments can/should happen	Consider introducing annual (or six monthly) amendments- creates certainty, ensures updates are made as needed
13	Subsections 2-4 are not needed in the legislation	Remove 13 (2)- (4) and place in a guideline
13	Does not outline what should be in a regional plan	In abovementioned guideline, include what should be in a regional plan e.g. infrastructure
15(1)	Regulations may prescribe the required contents for local planning schemes, but what about TLPIs and local planning policies?	Clarify whether or not there will be prescribed contents for TLPIs and local planning policies, or only for planning schemes
15(2)	'required contents apply instead of the local planning instrument'- requires users to know what the required contents are	Minister has power to direct local governments to amend their schemes, so this should happen as the required contents are updated, rather than relying on users to review both documents
17	Limitations on calling up external documents have been removed	Transparency is needed on what an external document means when applied through the scheme; if external documents change, this could lead to an adverse planning change. The superseded scheme and compensation provisions do not address this situation.

17(8)(a)	'appropriately integrates State, regional and local...' this has been changed from 'reflects'	More active requirement on local governments, so there needs to be State oversight that integration is happening
20(6)(c)	TLPIs can be given retrospective effect	This is problematic and could cause people to be charged with unintentional development offences. Example of this would be BCC's pre-1911 TLPI. If a house was demolished and the TLPI was retrospectively applied, there would be a development offence.
24(2)(b)	Refers to a planning scheme policy being 'replaced'	Further clarification is required on what is meant by 'replaced'
24(3)	Planning scheme policies should also be referred to in this section	Add planning scheme policies
24(4)(b)	The defined term is 'superseded planning scheme'	Replace 'superseded scheme' with defined term
24(9)(b)	There is currently no right to make an extension request under sections 90 and 91 for decisions made under this section	Introduce new provision which states that a decision to grant a request under section 24(4)(b) constitutes a development approval for the purposes of sections 90 and 91
25	Refers to a planning scheme being 'replaced'	Further clarification is required on what is meant by 'replaced'
25	No definition of what a public purpose is	Add definition
25(4)	A possible alternative has been provided	Keep this provision as is. It is important that the word 'significant' is used to describe the risk. The proposed alternative introduces too much subjectivity with terms such as 'in good faith'
25 (6)	Definition of GFA is different to QPP	Consistency required.
26	It is unclear whether or not an affected owner must hold an interest in the premises at the time of the adverse planning change or public purpose change	Clarify if an affected owner must hold an interest in the premises at the time of the change

28	The amount of compensation payable is identified for an adverse planning change, but not for a public purpose change	Add compensation payable for public purpose change
Chapter 2, Part 6	Removal of the right to request a hardship acquisition is not supported	Reintroduce hardship acquisition provisions
35(2)(d)	Noting new designations on planning schemes will often be impractical	New designations will include a lot more information than in the past. Ensure Councils add designations to web, but locate further information (e.g. conditions) via a link on website
37(7)	Designations are considered accepted development (other than building work)	Not an issue- this is a great addition
40	Exemptions are a great idea, but further work is required to make them workable	Rules are needed to clarify matters such as: • Are they personal to the owner, or do they run with the land? • Can they be withdrawn at any time? What impact will this have on valuations? • Will there be limits on the number of times they can be issued/reissued? • The terms 'started' and 'completed' do not work for MCU and RoL, also consider the term 'use' It is essential that exemption certificates be included in standard and full planning and development certificates, so they can be identified during due diligence.
42	There are no rules around how third party assessment will work	This is a good concept, however rules need to be developed in order to provide certainty and confidence for local governments particularly around matters such as: • Does the third party become a respondent to an appeal? • What about access to files for searching?

43(7)	A preliminary approval has never overridden a development permit, they have always existed side-by-side	Remove this section and keep the current situation whereby inconsistencies are rectified through change applications
45	Assessment managers are afforded discretion in determining whether or not an application is considered properly made	No issues. It is great that assessment managers are being afforded this discretion
46	The term 'chosen assessment manager' is introduced	This definition needs to be located at 42 where third party assessment is introduced
47(2)	The description of who the applicant is for a change application is confusing and unnecessarily complicated	If there is a new applicant they are either replacing the original applicant or being added- the wording needs to be revised to clarify this
51(2)(c)	The reference here to 42(3) is incorrect	Change the reference to 42 (b) (ii)
52(1)	The reference to 42(3) is incorrect	Change the reference to 42 (b) (ii)
52(4)	States referral advice must give weight to instruments in effect 'before the application is decided'	This should be before the referral period has ended, not before the application has been decided
53	Drafting errors regarding power for referral agencies to direct assessment managers to approve applications	Amend to reflect power of referral agencies
61	The definition of a variation request is to 'vary the application of a local planning instrument'	Clarify whether or not it is intended that a variation request is intended to extend to TLPIs and planning scheme policies
61	Sections 61 and 62 cover assessment and decisions for variation requests, however there is no description of what a variation request is meant to do	Add in a description of what a variation request is intended to do
65(1)(c)	States assessment manager is required to give notice to the principal submitter at the same time as the applicant etc.	This will not work in application, as submitters should not be informed until after the applicant's appeal period has ended, and they have made a decision re: NDN, appeal, waive etc.
66(1)(a)	The term 'accompanied' implies consent was given at the time	Change wording to better reflect the intent that consent has

	the application was lodged	been provided prior to issuing the decision notice
66(1)(b)	If an assessment managers does not give an approval but an approval is given on appeal, what happens to owner's consent	Reconsider this situation; perhaps the Court needs to impose a condition about owner's consent being available before the use commences
66(3)	Where owner's consent is required but not provided, if the decision is to give a development approval, then the approval should include a condition requiring conditions under 66(1)(c)	The assessment manager should be required to impose a condition under section 66(1)(c)
67	Great to see deemed approvals retained.	
67(2)(b)	Referral agencies cannot direct assessment managers to approve an application	Revise to reflect powers of referral agencies
67(2)(c)	There is no definition for building development application	Introduce definition for building development application
67(6)	10 days is not enough time to issue the deemed approval notice, particularly during Christmas/Easter periods	Revise to 10 business days
68	The SPA requirement for conditions to be reasonable or relevant **despite** the laws and policies in force at the time has been removed. This opens the door for councils to introduce policies and laws that would allow them to impose conditions that are neither reasonable nor relevant	Return the SPA requirement for conditions to be reasonable or relevant **despite** laws and policies in force at the time
69(2)	This provision is not considered necessary	Remove 69 (2)
70(1) and (2)	This is a welcome introduction, but referring to 'the development' does not go far enough to assist for most matters where conditions related to a different development on the same premises	Change 'the development' to something along the lines of 'for the land or the premises'
72(2)(c)	Referencing is incorrect- there is not Part 6, division 4-6	Amend to reflect the correct reference

73(2)(a)	Typographical error 'by, on'	Correct the error
76(3)(b)	The wording of this section is confusing	Rewrite so it is understandable to the reader
77(2)(a)	Reinforces need to clarify 70 (1)	
77(2)(b)	This section is not necessary	Remove this section
80(3)	The language in this section is inconsistent with 65 (1)(c) If the assessment manager is a third party (chosen assessment manager), the notice needs to be given to the prescribed assessment manager	Amend to ensure consistency
80(4)(b)	The references need to be clarified It is unclear why a negotiated decision notice must comply with section 107	Reference to section 65 should be a reference to 65(2) and 65(3).
82(1)(a)	This section is not needed	The limitation to 'only a person' should be sufficient
83(1)(b)(ii)	Owner's consent should not be required if the original application did not require owner's consent	Amend to reflect
83(2)(d)(ii)	This subsection ends on ';and'	This subsection needs to be completed
84(2)	Need to clarify to ensure it is not *a change* that would not, but rather is a change that *because of the minor change* would not...	Reword this section to reflect its intent
86	The type of change that would be considered as 'other than a minor change' is unclear. While it is potentially positive for our members, in its current form it is likely to lead to litigation	Provide clarification of what is intended, or review the scope of the minor change provisions to achieve intended outcomes
88(2)(b)	Owner's consent should only be required for cancellation if it was required for the development application	Amend to reflect

89	Support changes to currency- will provide more clarity	
89(1)(ii)	This section does not refer to the first plan for reconfiguration	Insert reference to first plan of reconfiguration
90(3)(b)	This section only refers to some of the exceptions for when owner's consent is required	Amend to include all exceptions
93(1)(a)	This section does not need to be here	Remove this section
104(1)	A notice should be given to the Court if the application is the subject of an appeal	Amend to include the Court
108	The Minister needs to make decisions for whole applications, not just for part of them	Revise this section to ensure the Minister is not able to decide parts of applications and then hand them back to the assessment manager
111(2)	The reference to part 6, division 4 appears to be incorrect It also does not deal with the situation where approvals are cancelled	Amend to include correct reference Include possibility of cancelled approvals
115(4)	Section 115 (3) (a) refers to amending and giving infrastructure notices, however 115 (4) only refers to amending them	Amend to include giving an infrastructure charges notice
133(2)	Applicants should only be required to provide either the identified infrastructure **or** different infrastructure delivering the same standard or service, but not both	The reference to 'either or both' needs to be removed.
167(1)	Typographical error	The last word should be plural- offences
170(2)	The reference to 92 (3) is incorrect	Amend to reflect correct reference
178(2)	The reference to174 (4) (a) is incorrect	Amend to reflect correct reference
194(2)(c)	The section only deals with deemed refusals of development	Revise to include deemed refusals of other applications under

	applications	the legislation
237(2)	The list of the work to be done by the regulation is incomplete	Complete the list
Chapter 8, Part 2	The drafting of this Part is difficult to understand	Documents/instruments/applications to be individually transitioned, rather than by descriptive class
246	Reference to the *Acts Interpretation Act* adds complication	Where there is an intention that the identified provision will continue, make this explicit
256(1)(c)	The words 'adopted or' are unnecessary	Remove 'adopted or'
262	This section makes rezoning approvals under the LGP&E Act development approvals. It is unclear if this is intentional	Clarify whether or not this is the intended outcome
Schedule 1, Part 1, Table 1, Item 18	The rights of appeal with respect to infrastructure appear to have been altered, and reduced This section also needs to refer to the decision to amend an infrastructure charges notice Typographical error in 18(b) 'relating to the application of the application of the'	Reinstate all rights of appeal with respect to infrastructure charges notices Amend to include reference to amending an infrastructure charges notice Revise to remove error
Schedule 2	The definition of 'material change of use' has been changed. Note the terms 'intensity' and 'scale' are not interchangeable The definition of 'operational work' has changed. The definition of 'use' has been changed. This will make it easier for secondary uses to be undertaken as part of the primary use	Clarify/provide explanation as to why definitions have changed