Parliamentary Committees

Sustainable Planning and Other Legislation Amendment Bill 2012

Report No. 13

State Development, Infrastructure and Industry Committee

November 2012

State Development, Infrastructure and Industry Committee

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Acknowledgements

The committee thanks those who briefed the committee, gave evidence and participated in its inquiry. In particular, the committee acknowledges the assistance provided by the Department of State Development, Infrastructure and Planning.

Contents

Abbreviations

ADR	Alternative Dispute Resolution
IDAS	Integrated Development Assessment System
IPA	Integrated Planning Act 1997
LGAQ	Local Government Association of Queensland
PEC	Planning and Environment Court
RE	Resource Entitlement
SPA	Sustainable Planning Act 2009
SPR	Sustainable Planning Regulation 2009
QLS	Queensland Law Society
QPP	Queensland Planning Provisions

Chair's foreword

This report presents a summary of the committee's examination of the *Sustainable Planning and Other Legislation Amendment Bill 2012*.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles to the legislation, including whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who lodged written submissions on this bill and others who have informed the committee's deliberations, the committee's secretariat and the Technical Scrutiny of Legislation Secretariat.

I commend the report to the House.

Ted Malone MP
Chair

November, 2012

Recommendations

The committee recommends that the Sustainable Planning and Other Legislation Amendment Bill 2012 be passed.

The committee recommends that when the legislation is implemented, the Deputy Premier and Minister for State Development, Infrastructure and Planning ensures protocols and/or guidelines are developed to promote a consistent approach to clarifying what is required for development applications to be deemed adequate for assessment.

The committee is pleased to note that further work will be undertaken to clarify a range of issues associated with the matter of costs and recommends that this work directly address many of the legitimate concerns raised by numerous stakeholders during the committee's inquiry on the bill.

The committee recommends that Clause 61 should be amended to remove the words 'but follow the event, unless the court orders otherwise'.

The committee recommends that s.491B(4)(b) is omitted in order to avoid unintended consequences in the exercise of power by the Alternative Dispute Resolution Registrar.

The committee recommends that the Deputy Premier and Minister for State Development, Infrastructure and Planning consult with the Attorney General to ensure that the Registrar of the Planning and Environment Court is provided with the necessary additional resources to fulfil its proposed expanded functions.

1 Introduction

1.1 Role of the committee

The State Development, Infrastructure and Industry Committee (the committee) was established by resolution of the Legislative Assembly on 18 May 2012, consisting of government and non-government members.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

The *Sustainable Planning and Other Legislation Amendment Bill 2012* was referred to the committee on 13 September 2012 and the committee was required to report to the Legislative Assembly by 6 November 2012.

1.2 Process

The committee was briefed by the Department of State Development, Infrastructure and Planning and received 124 submissions from stakeholders (see Appendix A). The committee held a public hearing on 25 October 2012 at Parliament House and heard from witnesses representing 29 organisations (see Appendix B). Transcripts of briefings by the Department of State Development, Infrastructure and Planning, submissions received and accepted by the committee and oral evidence heard at the public hearing are published on the committee's webpage at www.parliament.qld.gov.au/committees.

1.3 Policy objectives of the Sustainable Planning and Other Legislation Amendment Bill 2012

The bill seeks to:

- improve the coordination and responsiveness of state government in dealing with particular development applications (proposing development within or partially within state jurisdiction)
- remove ineffective master planning and structure planning arrangements
- reduce regulatory 'red tape' for development applications involving a state resource
- provide some flexibility in the requirements for supporting information accompanying a development application
- provide that certain provisions within the Queensland Planning Provisions also apply to local government planning schemes made under the *Integrated Planning Act 1997* (repealed)
- give the Planning and Environment Court general discretion in relation to costs
- introduce an alternative dispute resolution process in the Planning and Environment Court for minor disputes.

Recommendation 1

The committee recommends that the Sustainable Planning and Other Legislation Amendment Bill 2012 be passed.

2 Examination of the Sustainable Planning and Other Legislation Amendment Bill 2012

2.1 Policy issues

2.1.1 Improve state government coordination and responsiveness with regard to particular development applications (proposing development within or partially within state jurisdiction)

1. Under the current *Sustainable Planning Act 2009* (SPA), multiple state agencies have referral or assessment powers for a development application. The assessment manager decides the application, including the approval, refusal or the imposition of conditions on the development. There a number of state agencies with jurisdiction as assessment managers for particular types of development applications.[1]
2. The current process, known as the Integrated Development Assessment System (IDAS), seeks to integrate state, regional and local considerations and requirements in the assessment of development applications.
3. The Department of State Development, Infrastructure and Planning indicated that, due to the large number of state referrals prescribed for applications, the IDAS has become overly complicated for applicants in recent years, and key industry stakeholders have advised that this contributes negatively to development outcomes.[2]
4. To streamline this process, the bill proposes a new Chapter 6, Part 1, Division 4, Subdivision 2A of the SPA, which allows the chief executive to coordinate all state responses regarding particular development applications and to resolve any inconsistencies that may arise from the different requirements of jurisdictions within the state. That is, it enables the chief executive to be the single state assessment manager and referral agency.
5. The bill also provides that the *Sustainable Planning Regulation 2009* will be amended to prescribe the matters that the chief executive may have regard to in assessing the application.
6. The explanatory notes state that the proposed single state assessment manager and referral agency will not receive development applications relating to building matters or replace the responsibilities of the local government either as assessment manager or referral agency for relevant development applications.[3]

In general, there was strong support from the majority of stakeholders for this proposal. Witnesses at the committee's public hearing commenting on this matter indicated that it would be potentially beneficial, ensuring that, in the future, development applications are more efficiently coordinated with more streamlined processes. A number of stakeholders from industry and planning entities qualified their strong support for the proposal by suggesting that it is important that the new arrangements must 'maintain the technical skills and specialist knowledge within the agency best equipped to address specific issues.'[4]

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1 *Sustainable Planning and Other Legislation Amendment Bill 2012,* Explanatory Notes, p. 2.
2 Department of State Development, Planning and Infrastructure, Briefing, 28 September 2012, p. 1.
3 *Sustainable Planning and Other Legislation Amendment Bill 2012,* Explanatory Notes, p. 3.
4 RPS Submission to Inquiry, p. 2; Planning Institute of Australia submission, p. 2.

The department has sought to assure stakeholders that the new model of a single state assessment manager and referral agency does not reduce the expertise required in considering a development application and that the current expertise applied will continue. The new model empowers the chief executive to make a final decision and is not bound by the regulation as state agencies previously were giving the chief executive the power to reconcile conflicting state issues where there is conflicting advice or conditions of approval among state agencies.[5]

The Urban Development Institute of Australia expressed some doubt about the prospects of the proposed reform achieving its stated objective when it observed:

> 'If the new process will still rely on identifying triggers from a schedule, then simply coordinating these triggers through a single referral agency while beneficial, will not deal with the wider issues raised in the past by the Institute in relation to the referral triggers and the duplication of referral triggers, including their complexity and ambiguity, but also importantly the number of triggers and the duplication of referral triggers over staged application processes. If triggers are still to be relied on, then ongoing and thorough review of the triggers remains critical.'[6]

The department has responded to this concern by indicating that there will be an ongoing reduction of referral triggers to ensure that few development applications are affected.[7]

The Property Council of Australia also cautioned that it was essential that the department was adequately staffed to cope with the increased workload.[8] The department has indicated that options to minimise costs are being examined, since human resources and budget potentially already exist for some components of implementation.[9]

At the public hearing Ergon's spokesperson indicated it would like to see a protocol put in place where Ergon retains its status as a referral agency and the concurrence agency is required to put a protocol in place with Ergon and other electricity entities so that they are involved in development assessments early on. Ergon indicated that this is important because the rectification of issues associated with development in proximity to electricity infrastructure can be costly afterwards and it can also create safety concerns.[10]

In its response to the evidence heard during the inquiry, the Department of State Development, Infrastructure and Planning suggests that the Ergon representative may have misunderstood the proposal and sought to offer reassurance that non-government entities such as Ergon will continue

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5 Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the public hearing on 25 October 2012, p. 22.

6 Urban Development Institute of Australia, Submission to inquiry, p. 3.

7 Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the public hearing on 25 October 2012, p. 21.

8 K MacDermott, Queensland Executive Director, Property Council of Australia, Public Hearing Transcript Brisbane, 25 October 2012, p. 25.

9 Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 22.

10 T Stork, Legal Counsel, Property, Planning and Environment, Ergon Energy, Public Hearing Transcript Brisbane, 25 October 2012, p 22.

to receive development applications as referral agencies and will retain their current ability to assess and comment on the current proposal.[11]

Committee comment

The committee supports this policy proposal concerning the single state assessment and referral agency.

2.1.2 Remove master planning and structure planning arrangements

1. The explanatory notes state that the existing master planning and structure planning arrangements in the *SPA* are inefficient and have not added value to planning partnerships arrangements.[12]
2. The bill proposes to remove chapter 4 (Planning Partnerships), the master planning and structure planning provisions of the *SPA,* and make consequential amendments reflecting these components.
3. The explanatory notes indicate that planning partnerships arrangements can be addressed through alternative ways such as regional planning processes, integrated strategic land use and infrastructure planning, and the use of section 242 preliminary approval may affect a local planning instrument to give effect to streamlined development assessment in key growth areas.[13]
4. The bill provides transitional provisions to require existing structure plans to be incorporated into SPA planning schemes within three years.
5. The explanatory notes indicate that these transitional provisions include a requirement that applications, which are inconsistent with the structure plan, will require notification and that the regulatory provisions of the *Sustainable Planning Act 2009* will apply.

Peak planning entities, such as the Planning Institute of Australia and the Urban Development Institute of Australia, strongly support the removal of the current statutory arrangements for master and structure planning, arguing that these arrangements are inefficient.[14]

The Local Government Association of Queensland (LGAQ) and the Council of Mayors (SEQ) also do not oppose the removal of the master and structure planning provisions, recognising the challenges raised by the current arrangements. The LGAQ and Council of Mayors (SEQ) therefore offered their conditional support provided, that in parallel, the State Government implements a streamlined plan making process.[15]

However, some local governments opposed the removal of these provisions, suggesting that it will have an impact on the council's future planning for the area.[16] This issue was also raised by the Sippy

[11] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 20.

[12] Ibid.

[13] Department of State Development, Infrastructure and Industry, Transcript of briefing of 28 September 2012, p.2.

[14] Planning Institute of Australia Submission, p. 2 and Urban Development Institute of Australia Submission, p. 4.

[15] LGAQ and QLD Council of Mayors (SEQ) Submission. p. 5.

[16] Moreton Bay Regional Council Submission, p. 1.

Downs and District Community Association in its submission and the evidence presented at the public hearing. The association support the approved Structure Plan being implemented as currently approved. [17] However, the association does not support the removal of the existing statutory requirements for master and structure planning.[18]

The department has responded by indicating that although the bill removes the ability to 'declare' master planned areas and the associated structure planning and master planning arrangements from the *Sustainable Planning Act 2009* (SPA), it does not impact on other forms of structure planning and master planning activities undertaken by local government and private industry. The department states that it is the government's intention to ensure that structure plans continue in force from commencement until such time as they have been incorporated into the new SPA planning schemes. The department acknowledges that a number of the existing structure plans around the state rely on master plan approvals being obtained prior to development applications being able to proceed in declared master planned areas and that the state government intends to remove the master plan areas but in doing so will also preserve the use rights established by existing master plan approvals. Furthermore, the department notes that the s.242 preliminary approvals provide an alternative process and will be allowed to be made within the declared master planned areas to provide proponents with an alternative application process to master plans.[19]

The department has commented that the decision to alter the current model was made because it was found to be overly process-driven and there are other ways of achieving integrated planning outcomes, including community consultation.[20] The department notes that the bill preserves the use and development rights established by existing structure plans, draft structure plans and master plans for declared master planned areas through the transitional provisions.

The department has indicated that local governments will be required to make or amend their SPA planning schemes within three years to incorporate existing or draft structure plans and that this will ensure that community aspirations contained within existing structure plans are carried through to the new planning schemes. For a master plan development application which has been made before commencement of the new legislation, it may continue to be assessed and decided against the provisions of the former Chapter 4.[21]

A particular concern was expressed by the Sunshine Coast Regional Council who noted that the s.242 proposal will enable a preliminary approval application to vary and override the integrated land use and infrastructure outcomes for Maroochydore and Palmview. The Sunshine Coast Regional Council also noted that it had been its experience that preliminary approval applications under s.242 are lodged in a tactical manner to avoid the integrated infrastructure and land use outcomes that the Council is seeking for these critical growth areas.[22] The Sunshine Coast Regional Council is therefore seeking an amendment to the bill so that it is consistent with the government's stated intention of

[17] Sippy Downs and District Community Association Inc. submission, p.2.
[18] Ibid, p. 2.
[19] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 10.
[20] Ibid, p. 8.
[21] Ibid, p.8.
[22] Submission from Sunshine Coast Regional Council, p. 3.

empowering local government. The department has responded by indicating that in circumstances where a section 242 application is not consistent with the transitioned structure plan and/or transitioned master plan and seeks to vary certain levels of assessment, the development application will require notification and the normal regulatory provisions of the Sustainable Planning Regulation 2009 will apply.

The Sunshine Coast Regional Council has argued that local governments ought to be allowed to 'opt in' or 'opt out' of maintaining the current structure planning and master planning arrangements.[23] The department rejects this proposal by stating that:

> "It is the state government's intention to remove inefficient structure planning and master planning arrangements from the SPA to remove unnecessary regulation and to unlock development opportunities in critical growth areas".[24]

The department rejects the 'opt in' or 'opt out' proposal by some local governments on the grounds that such an arrangement is unnecessary because transitional arrangements have been provided to ensure that the existing structure plans and master plans are preserved. Local governments will have three years to prepare or make amendments to their SPA planning schemes to incorporate each structure plan. In the interim, local governments may seek to make a temporary local planning instrument to put provisions in place to adequately assess development in these areas. Furthermore, the department argues that the alternative application process available via s.242 preliminary approvals has also been activated to provide greater flexibility to proponents delivering land to the market.[25]

In its submission to the inquiry, Coomera Resort Development raised a number of concerns about the potential operation of s.242. In particular, the resort developers sought assurances about the transitional arrangements with respect to the implementation of s.242 for the use and development rights established under existing structure plans and master plans. The developers expressed reservations that, despite reassurances in the Explanatory Notes, the proposed development at Coomera will be disadvantaged by the bill. The developers therefore sought to clarify that if a s.242 preliminary approval application needs to be made to effectively achieve the types of things that have been achieved previously with a master plan application then, provided the application is consistent with the intent and outcomes of the Structure Plan, the application should not be subject to third party appeals.[26]

The committee sought a response from the Department of State Development, Infrastructure and Planning who acknowledges that there is currently an inconsistency between the bill and the Explanatory Notes with regard to notification requirements for a section 242 preliminary approval application in declared master planned areas.

The department indicated that it intends that the public notification requirement is waived where an application for a s.242 preliminary approval:

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[23] Ibid. p. 3.

[24] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 9.

[25] Ibid, p. 9

[26] Coomera Resort Development, p.6.

- is substantially consistent with the structure plan area code; and
- substantially consistent with the master plan area code (if relevant); and
- does not seek to vary the levels of assessment for development, or if it does, it seeks to change it in a way mentioned in section 295(3)(b).

The department acknowledged the Coomera Resort Development concerns and indicated that the relevant part of the bill is being refined to accurately reflect the above intention.[27]

Committee comment

The committee supports the proposal to remove the current statutory arrangements for master and structure planning and also acknowledges the State Government's recognition of the issues raised by Coomera Resort Development and supports the proposal to refine the associated transitional provisions.

2.1.3 Reduce regulatory 'red tape' for development applications involving a state resource

1. The current legislation requires a development application to include evidence of an allocation or an entitlement to the state resource when lodged for it to be considered as properly made.
2. The feedback the department received from industry indicated that the process for obtaining evidence of the allocation or entitlement from the relevant state agency can be very lengthy and causes delays to the development application process. The bill seeks to decouple the allocation or entitlement application from the development application process by removing section 264 (Development involving a State resource) of the SPA.
3. The requirement for an allocation or entitlement to a state resource to be given prior to any use of a resource is retained under various other Acts.
4. Essentially, the bill enables an applicant to apply for a state resource allocation or entitlement prior to, concurrent with, or following the development application and assessment process.[28]

The Urban Development Institute of Australia welcomes the move towards reducing red tape with development involving a state resource, suggesting that the current requirement to furbish evidence of an allocation or an entitlement to the resource (RE) prior to lodging a development application can be costly, time consuming and unnecessary if the development does not proceed. Particular objections were raised about the current requirements to apply for (and in some instances to obtain) a lease before an RE is issued, or where prior approval is required from another agency, before an RE is issued. The Institute notes and accepts that there are certain circumstances where it is legitimate that the consent of the state should be obtained prior to obtaining an RE; however, the Institute encourages the state to ensure that consent is issued efficiently and not unnecessarily delayed.[29]

Similar views were expressed by the Planning Institute of Australia who supported the proposed changes noting that:

[27] Email communication from Natalie Wilde, Director Policy and Legislation, Planning Group, Department of State Development, Infrastructure and Planning, 24 October 2012.
[28] Explanatory Notes, p. 5.
[29] Urban Development Institute of Australia Submission, p. 3

> "The proposed change does not absolve the applicant from obtaining or holding the resource entitlement, but removing the requirement to provide it as part of the application allows the commencement of the assessment of the application while the resource entitlement is obtained. " [30]

The department has emphasised in its correspondence to the committee that the policy intent of these provisions is only to separate the resource entitlement process from the development assessment processes. The department also notes that the current process is not 'coordinated' – it merely imposes a process requirement where evidence of an allocation or an entitlement is required before submitting a development application. However, the proposed new arrangements will enable concurrent rather than sequential assessments resulting in overall efficiency.[31]

In its summary on this issue, the Sunshine Coast Regional Council indicated it was broadly supportive of allowing limited development applications to be lodged without a state RE in those situations where the State Government routinely grants a state RE. However, the council considers that the bill should provide for these situations to be stated in the *Sustainable Planning Regulation 2009* and that the bill should also state that the giving of the development approval is not a sufficient basis to obtain a state resource entitlement. [32]

However, the department does not see the necessity for this approach because the intent of this change is to streamline the development assessment process while also retaining the need for the resource entitlement. In this way, although the development application process is "de-coupled" from the development application process, resource entitlements under the jurisdiction of other agencies would be retained. The policy intent is to retain the need for the resource entitlement. Each case would need to be assessed on its own merits.[33]

The current process for obtaining a state resource allocation or entitlement can be lengthy and as a result can delay development. The department suggests that the separation of resource entitlement and development assessment processes will allow concurrent rather than sequential assessments, which should result in overall efficiency. The provisions do not remove requirements for allocations or entitlements for state resources which exist under other legislation.[34]

Ergon Energy, while being supportive of the proposal, has expressed doubts that the form in which the bill seeks to achieve this (via the omission of s.263(2)(b)), which provides that an owner's consent is not required where resource entitlement has been obtained is likely to simply replace the requirement to obtain a state RE with a requirement to obtain owner's consent. Ergon then goes on to argue that if the bill is passed in its current form then the prospect of obtaining the owner's consent has the prospect of being more difficult than the current requirements for obtaining a state RE. Ergon highlights that this is very likely to be an issue because, currently, entitlement to many state resources is covered by general authorities. These general authorities do not and cannot

[30] Planning Institute of Australia, Submission, p. 3.
[31] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 18.
[32] Sunshine Coast Regional Council Submission, p. 7.
[33] Ibid, p.19.
[34] Ibid, p.20.

constitute owner's consent. [35] Ergon goes on to suggest that this problem could be avoided by including an amendment to allow the state to create general owner's consents, which can be used to satisfy the requirements for owner's consent.

The department does not agree with Ergon's assessment of the impact of omitting s. 263(2)(b) and maintains that the provisions do not change the requirements for owner's consent. The department argues that the Integrated Development Assessment System requires the applicant to provide evidence that the owner of land subject to a proposed development has consented to the application being made. Where the state government is considered to be the owner of land subject to a proposed development, consent will still be required for the development application to be made. The provisions do not affect the statutory requirements for public notification of development applications involving a state resource. [36]

The department notes that the provisions enable a development application to be lodged and assessed, without evidence of an allocation or an entitlement to the state resource, and the applicant may seek a resource allocation or entitlement prior to, during or after the development assessment process. It is not limited to instances where the state government is the land owner, for example.

The department acknowledges that it is possible that a development application could be approved for development requiring a resource allocation or entitlement under other legislation, before the allocation or entitlement is obtained. However, a development approval alone does not authorise a person to carry out development. In these instances, the applicant is still required to obtain the allocation or entitlement for the state resource before they can proceed with development. If the applicant is not granted the resource allocation or entitlement, they cannot proceed with the development.[37]

It is appropriate that where the state is the owner of the land, the state provides written consent prior to the making of an application. This is an existing requirement under the *Sustainable Planning Act 2009* and is not amended by the bill. The department argues that processes for providing the state's consent are internal, operational matters and do not require legislative amendments. It is reasonable that the state takes a period of time before responding to such a request, to enable full consideration of whether consent is appropriate and in the interests of the state. [38]

It is noted that the Urban Development Institute of Australia has not raised any concerns or examples of instances where the state has been inefficient in this matter.

Decoupling the process for obtaining a state resource allocation from development assessment does not remove requirements for allocations or entitlements for state resources which exist under other legislation, nor do the provisions change the requirements for owner's consent.

[35] Ergon Energy, Submission, p. 3.

[36] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 18.

[37] Ibid, p. 19

[38] Ibid, p.20

Committee comment

The committee supports the policy recommendation to de-couple the State Resource entitlement from development assessment processes.

2.1.4 Provide some flexibility in the requirements for supporting information accompanying a development application

1. Under the current legislation, mandatory supporting information is to accompany all development applications for it to be considered properly made. The explanatory notes state that this provision was introduced in the SPA to address the low quality of development applications being made at the time.[39]
2. Due to improved practices and the greater clarity of what is required for adequate applications, the provisions are considered a barrier to the efficiency of the development assessment process.[40]
3. The bill provides the assessment manager the discretion to accept those development applications which have sufficient information for assessments being properly made.

Of the stakeholders who commented on this provision (predominantly local government organisations) all were supportive of the proposal. [41] There were also two industry stakeholders who indicated support for this proposal, RPS and Cement, Concrete and Aggregates Australia, the latter making the point that its support for this proposal was contingent upon the development of protocols which applied across all local governments in order to provide some degree of consistency and certainty to developers.

In its response to the evidence presented to the committee, the department notes that development applicants are required to submit a large amount of supporting documentation with a development application, some of which is unnecessary. The department gives the example of requirements to provide mapping for the location of rubbish bins for single dwellings. Applications which do not include all of this information are presently deemed to be 'not properly made' and cannot be accepted by the assessment manager. The new provisions give assessment managers, including local governments, the discretion to determine which pieces of 'supporting' information are required for the development application to be accepted. The department asserts that the proposed changes will not retract from the quality of the development applications as the mandatory requirements for a development application, such as the consent of a land owner, must still be included in every application. Assessment managers, including local governments, will only have discretion to accept an application, where the mandatory supporting information does not add value to the assessment of the development application.

The department therefore maintains that the amendments will not affect the public's ability to take an informed view of a proposed development because they will continue to have access to all of the supporting information which adds value to the development application. The department also notes that these do not affect an assessment manager's ability to seek any other supporting information they require to assess or believes adds value to a development application at the

[39] *Sustainable Planning and Other Legislation Amendment Bill 2012, Explanatory Notes, p.5.*

[40] Explanatory Notes, at 5.

[41] Logan City Council Submission to Inquiry, p. 1; Sunshine Coast Regional Council Submission to Inquiry, p. 2; and Brisbane City Council Submission to Inquiry, p. 1.

information request stage.

Committee comment

The committee supports the proposal to give the assessment manager discretion to accept development applications.

Recommendation 2

The committee recommends that when the legislation is implemented, the Deputy Premier and Minister for State Development, Infrastructure and Planning ensures protocols and/or guidelines are developed to promote a consistent approach to clarifying what is required for development applications to be deemed adequate for assessment.

2.1.5 Provide that certain provisions within the Queensland Planning Provisions also apply to local government planning schemes made under the Integrated Planning Act 1997 (repealed)

1. The bill provides powers to make certain provisions within the Queensland Planning Provisions (QPP) also apply to local government planning schemes made under the repealed *Integrated Planning Act 1997* (IPA) and the SPA. This will allow for aspects like specific maximum levels of assessment and statewide codes under the QPP to apply to all local government planning schemes.
2. The explanatory notes state that the level of assessment required for development applications involving low-risk operational works is unnecessarily high creating an unnecessary burden for local governments and development applicants.[42]
3. It is considered that greater use of compliance assessment would simplify processes for development applications for certain low-risk operational works (e.g. car parking, sediment and erosion control).[43]
4. The QPP will provide the maximum level of assessment for certain low risk operational works, which will apply in all local government areas. Local government will still have flexibility to adopt a lower level of assessment, such as self-assessments or to create exemptions in their planning instruments.[44]

Some local governments have questioned the need to apply certain provisions within the Queensland Planning Provisions to the local government planning schemes made under the *Integrated Planning Act 1997*. [45] The Brisbane City Council has also suggested that this proposal requires further consideration in order to clarify and determine those operational works considered to be low risk and is particularly concerned about the breadth of s.55A as currently drafted. The council is concerned that the provisions may unintentionally create increased use of compliance assessments and suggest that the current process needs to be significantly simplified.[46]

The Planning Institute of Australia also supports maximum levels of assessment for certain

[42] *Sustainable Planning and Other Legislation Amendment Bill 2012, Explanatory Notes, p. 5.*
[43] *Sustainable Planning and Other Legislation Amendment Bill 2012, Explanatory Notes, pp. 5-6.*
[44] *Sustainable Planning and Other Legislation Amendment Bill 2012,* Explanatory Notes, p.6.
[45] Moreton Bay Regional Council Submission to the Inquiry p. 3.
[46] Lord Mayor, Brisbane City Council, Submission to the Inquiry. p. 3

operational works and see it as an important dimension of red tape reduction.[47]

The Sunshine Coast Regional Council suggests that this policy objective would be better implemented through the *Sustainable Planning Regulation 2009* rather than having to introduce IPA standard planning provisions as an amendment to an existing IPA scheme at the same time that local governments are preparing new planning schemes under the *Sustainable Planning Act 2009*.[48]

The department does not favour this position, highlighting that an amendment to the *Sustainable Planning Regulation 2009* must also be accompanied by an amendment to the State Planning Policy 3/10: Acceleration of Compliance Assessment and amendment of the QPP. The department states that these amendments would be required (to enable compliance assessment) to have immediate effect and until all local governments have QPP compliant schemes, since some local governments are still operating under planning schemes made under the repealed *Integrated Planning Act 1997*.

The department did consider the option proposed by the Sunshine Coast Regional Council. However, it was rejected because it would fix the level of assessment for all local governments, rather than provide a maximum level of assessment, therein not allowing any flexibility for local governments to adapt a level of assessment to suit local conditions. This would have particularly adverse consequences for many of the high growth local governments that currently prescribe lower levels of assessment which would then be required to increase the level of assessment for prescribed operational works if the SPR was amended.

Instead, the bill provides a head of power for part of the QPP to apply to planning schemes made under the SPA and the repealed IPA. This allows the QPP to provide a maximum level of assessment for certain operational works which applies to all local governments, regardless of their planning scheme. The intention of the amendments is to prescribe a maximum level of assessment for certain low-risk operational works which would then apply in all local government areas, regardless of the council's planning scheme. The provision does not prevent local governments from choosing a lower level of assessment if they so wish.[49]

Consultation has commenced through a series of workshops with the development industry and local government; however, in order to ensure that local governments have a greater opportunity to outline their views on this matter, the department has stated that it plans to consult on QPP 3.0 during 2013.

Committee comment

The committee supports the stated policy objective of this provision to reduce the level of assessment required for development applications involving low-risk operational works and commends the department for its commitment to undertaking further consultation with local government prior to finalising this aspect of the legislation.

2.1.6 Give the Planning and Environment Court general discretion in relation to costs

1. The bill proposes to amend the SPA in relation to the rules of the Planning and Environment Court and the costs of court proceedings.

[47] Planning Institute of Australia Submission to the Inquiry p.3.

[48] Sunshine Coast Regional Council Submission to the Inquiry p. 2

[49] Departmental Correspondence to Committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October, p. 13-15

2. Currently, s.445(2) provides that the rules of the court may provide for the procedures of the court, including matters that may be dealt with by a court officer.
3. Currently, s.457(1) provides that each party to a proceeding in the court must bear the party's own costs for the proceeding. Section 457(2) provides that the court may order costs for a proceeding as it considers appropriate in a number of circumstances, for example, if the court considers the proceeding to have been frivolous or vexatious.
4. Clause 59 of the bill seeks to amend s.445(2) to provide that the rules of the court may contain how the court exercises a discretion as to costs under s.457.
5. Clause 61 of the bill seeks to amend s.457(1) to provide that costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
6. The bill also proposes that the court may order each party to bear its own costs if early in the proceeding the parties participate in a dispute resolution process; if the proceeding is resolved during or soon after the dispute resolution process; and if the parties participate in a dispute resolution process and the proceeding is not resolved, the costs of the proceeding include the costs of the dispute resolution process. The bill also proposes that costs of a proceeding may include investigation costs reasonably incurred by a party to the proceeding.
7. The current Planning and Environment Court Rules do not provide for how a court may exercise its discretion in relation to costs.
8. The provisions in the bill are to commence by proclamation, and if passed, will enable the Planning and Environment Court Rules (subordinate legislation) to be amended to provide for how the court may exercise its discretion.
9. The current rules for awarding costs in the Planning and Environment Court deviates from the rules applied in the Supreme and District Courts – where the losing party pays the winning party's costs.
10. The department has indicated that this arrangement has proved to be a deterrent to some applicant appellants due to the costs of challenging a development decision or the conditions on a development approval. Also, for commercial competitors lodging submitter appeals, the cost of the appeal may not deter an appeal being made if the desired outcome is primarily to delay the development.[50]
11. Ultimately, appeals that have little chance of success are being made, resulting in substantial time and cost impacts for the court and all parties involved.[51]

The proposed changes to the arrangements with respect to costs were the most contentious aspect of the entire bill. Of the 124 submissions the committee received, all but two submissions suggested that the provision should be amended. Similarly at the public hearing, it was this issue that witnesses were most concerned about and again there was agreement across all stakeholder groups that the policy position should be revisited. The concerns expressed were far reaching and firmly expressed.

Owing to the extent of public engagement on this policy issue, in the interests of brevity it is necessary to summarise the key objections and concerns about the costs proposal presented by various stakeholders:

[50] Department of State Development, Infrastructure and Planning, Transcript of Briefing, 28 September 2012, p. 4.
[51] Ibid.

1. The general view is that the current discretion of court to award costs where proceedings are deemed by the court to be vexatious or frivolous is sufficient and that the status quo should remain.
2. It will mostly disadvantage smaller scale applicants, local governments, residents and community interest groups, while failing to achieve the issues it aims to overcome.
3. The crippling impact of costs on parties who have no direct commercial or private benefit associated with the outcome of proceedings, only the protection of the public interest. This creates a strong disincentive to parties who have proper and legitimate concerns about proposed development is counter-productive efficient planning and administration in Queensland, and mean that the Planning and Environment Court (PEC) is no longer a 'public interest' court.
4. The own costs principle provides parity and a degree of certainty to use in risk assessment for all parties in a PEC proceeding.
5. The proposed amendment is perceived to be 'heavy handed', unfair and intimidating, creating a 'David and Goliath' scenario between wealthy developers and small community organisations or individuals.
6. It will also be a disincentive to local governments to exercise discretion to refuse development applications because of the risk of having to bear the applicant's costs in any successful appeal against their decision. This focuses local government decision making on costs, rather than the public interest and sound town planning they are there to represent. Their decisions should be based on the *Sustainable Planning Act*.
7. The suggestion in the explanatory notes that the proposed changes will bring the PEC into line with the District and Supreme Courts is flawed: The PEC deals with matters of broader public importance, unlike the private interest matters dealt by the District and Supreme Courts.
8. The amendments will not address what the explanatory notes say they are aiming to address. The amendments make no reference to those matters and will actually have the opposite effect. For example, they will actually further discourage applicants from challenging conditions placed on developments, the result being that unreasonable conditions will render a development unviable or drive up housing costs.
9. Commercial developers using the court process to delay have usually budgeted for cost contingencies. The costs they would incur are offset against the liabilities they are hoping to avoid by the delay.
10. Reducing the number of developments approved by council being litigated by third parties on weak town planning grounds can be achieved through other means (such as a broader discretion to award costs) without creating the powerful disincentives the proposed amendments create.
11. There are other reasons than 'town planning grounds' for a successful appeal – for example, legal or environmental grounds.
12. It would make more sense to incrementally change current rules, including having a general discretion available for the court to use in determining when to award costs. To prevent 'frivolous and vexatious' matters, the court could award costs based on a consideration that a party has behaved unreasonably rather than the current 'frivolous and vexatious' measure or the Act could list other relevant matters that the court should have regard to in determining costs. The Act could specify that costs must be awarded against a commercial competitor if they lose an appeal.

13. Determining what 'event' the costs would follow is highly problematic and will generate considerable, costly legal argument, none of which is related to planning and development.
14. Proponents of smaller developments face likely opposition from larger commercial competitors. This could affect local government decision-making in the first instance and dissuade the developer from continuing even if it is approved (discussion about the process and how it will disadvantage small developers).
15. The amendments are not consistent with practice in other specialist courts or tribunals within Australia, or with international best practice.
16. Opposed to awarding of costs where a council may find itself responsible for another party's costs purely on the basis of one party's success in a proceeding.
17. Denies all but the wealthiest the ability to take legitimate cases to the PEC through fear of crippling costs.
18. It creates a power imbalance by tipping the scales of negotiation and dispute resolution in favour of large councils and developers who can afford the risk of going to trial and appeals.
19. It will discourage community groups with legitimate concerns about a developer's non-compliance with planning conditions to instigate actions in the PEC, even in situations where such breaches may have serious adverse impacts on the health and amenity of a community, such as noise, vibration, and the improper operation of a quarry.
20. Despite negligible consultation, the bill overturns a 20-year rule that has served the public interest of community involvement in planning decisions which affect large groups of people.
21. The bill won't reduce appeals by commercial competitors who have much to gain by persisting with 'delay and obstruct' tactics and are already exposed to cost orders.
22. It won't reduce appeals that lack reasonable planning grounds as they are already rare and subject to the risk of cost orders.
23. It is unlikely to improve early resolution of appeals which are already resolved 90 percent of the time before trial.
24. It won't meaningfully improve development assessment as less than 0.1 percent of development applications are delayed by third party appeals.
25. The potential adverse impact of the bill on the capacity of individuals to raise legitimate concerns (vis a vis resources) and councils' ability to enforce a developer's compliance with conditions of development approval.
26. This proposal could influence smaller and less wealthy councils from making decisions based solely on the planning merits of a development application to making decisions based on the risks of litigation costs.
27. Court data indicates that 97 percent of development approvals were not the subject of any appeal and that for every 1000 of these only three were the subject of a full appeal hearing by the Court. This, therefore, suggests that there is limited evidence that the proposed amendment will have any impact on 'cutting red tape'.
28. P & E cases can turn on esoteric legal technicalities which do not reflect the real issues underlying communities' concerns. Hence well-reasoned and well supported objections can be extinguished by technicalities with catastrophic financial consequences for community groups.
29. Developers with 'deep pockets' can afford to and do engage expensive experts and legal representatives, which in the long term may have serious financial implications for small organisations or individuals under the proposed cost arrangements.

30. The proposal directly contradicts the objects of the *Sustainable Planning Act 2009* s.5(g), which states that one of key goals of the Act is 'providing opportunities for community involvement in decision making', however, the proposal 'effectively obliterates any such community involvement and is at odds with the intent of the legislation'.
31. The bill fundamentally denies ordinary citizens' access to justice.
32. Existing provisions of the *Sustainable Planning Act* are open to abuse, for example, commercial competitors abusing the processes for commercial or strategic gain but concerns exist that a developer may commence an appeal against conditions and seek a negotiated settlement through an ADR process and/or via 'without prejudice' negotiations with a council. At the moment, this process can cease without being exposed to the risks of adverse cost orders if a matter proceeds to a trial that is not economically justifiable. However, there are concerns that the proposed new costs arrangements may limit this possibility in the future by shackling the courts discretion to achieve a just outcome in relation to the costs of a proceeding.
33. Small developers may find the new proposal a significant deterrent to appealing against council conditions regardless of the merit of their case.
34. It may have adverse financial consequences for local governments which are respondents to all appeals.
35. It will adversely affect access to justice for persons of limited financial means.
36. Many matters heard relate to conditions associated with development applications where a decision may be to reduce or vary the conditions but not remove them entirely and that in such circumstances it would not be appropriate for costs to follow the event.
37. While the proposal addresses circumstances in a proceeding where the behaviour of one party is unreasonable, it has implications that go well beyond such a scenario potentially creating serious unintended consequences. Suggest further analysis is required and urge caution to avoid such unintended consequences of the proposed change prior to its adoption.
38. The legislation would be improved by the inclusion of clear guidance to the court on when and how it should exercise the discretion to award costs (PIA).
39. Planning matters should (and up until now) have been recognised to be different to many other types of legal disputes because the decisions affect the whole community in which a development is located and not just the parties to the appeal. Therefore, it is seen as important to understand that introducing a rule of costs following the event would discourage legitimate appeals due to the intimidation and anxiety members of the community would face about potentially crippling costs orders.
40. Community appeals to the PEC frequently represent an attempt to protect an inter-generational legacy of environmental social and economic well-being with no direct financial benefit derived from initiating proceedings or the outcomes and the persons involved in such proceedings should not be exposed to such unfair financial risks.

In its response to the evidence presented to the committee, the department made the following response:

> 'The Bill includes an amendment to the Sustainable Planning Act 2009 (SPA) to the effect that costs in the Planning and Environment Court (the Court) are in the discretion of the Court, unless the Court orders otherwise. It is important to note that the Court may choose to order that each party bears its own costs, or apportion costs between the parties – that is, it is not a 'foregone conclusion' that the Court will always order the losing party to pay all costs. Planning and Environment Court Rules (the Rules) are yet to

be established for how the Court may exercise its discretion when awarding costs, however work on drafting the Rules is currently underway.

It is intended that the relevant cost provisions will not commence until the Rules are amended, establishing how the Court may exercise its discretion when awarding costs. Any amendment of the Rules requires the Governor in Council with the agreement of the Chief Judge and a District Court Judge to make the change. They will carefully consider the implications of the changes to the Rules for all parties, including community members. The Department understands that the Chief Judge normally consults with key professional bodies and organisations in developing the Rules.

The Bill also provides that the Court may order each party to bear its own costs if the parties participate in the alternative dispute resolution process early in the proceeding and the proceeding is resolved during that process or soon after it has been finalised.

Where proceedings are not resolved at mediation, the change will encourage third party appellants to ensure they have legitimate and well founded grounds for an appeal to be considered by the Court. If successful they will then have the possibility to have their costs paid.

In addition, the Bill also enables the Chief Judge to direct that certain matters be dealt with by the Alternative Dispute Resolution (ADR) Registrar, where each party pays their own costs. This will enable relatively minor matters or disputes to be resolved quickly, cheaply and effectively without the risk of adverse costs orders.

Community groups and individuals are still encouraged to contribute to local government planning schemes during the plan making stage and influence planning and environment matters in their local communities. These groups are also still encouraged to make submissions on impact assessable development which is publicly notified. The local government, in its decision making process, is still required to have regard to all properly made submissions.'

The department indicated that from May to July 2012, a series of six Planning Reform Forums were held with key stakeholder groups:

- Property Council of Australia
- Local Government Association of Queensland and Council of Mayors (South East Queensland)
- Urban Development Institute of Australia
- Planning Institute of Australia
- Construction group (Housing Industry of Australia, Master Builders Association, Australian Institute of Building Surveyors)
- Environmental group (Queensland Conservation Council and Environmental Defenders Office)

In addition, each local government was invited to make a submission. Both the local governments and the forums participants were invited to answer questions such as, what is the planning system needing to deliver, is there a better, more effective way; and what could realistically be achieved over a 6 month to 24 month time period. Four key areas of the planning and development system were the focus of discussions:

- Plan making and planning tools
- Development assessment

- Referrals
- Appeals and third party rights

Submissions received from local governments were consistent with feedback obtained during the forums. The policy proposals the *Sustainable Planning and Other Legislation Amendment Bill 2012* seeks to achieve are based on the discussions at these forums and the subsequent analysis. The government also followed up with stakeholders in August 2012 to discuss the policy proposals which were being pursued through the bill. Consultation on the bill occurred for a four week period from the 13 September 2012 to the 12 October 2012.

The department advised the committee that in awarding costs under the new regime, the Planning and Environment Court will apply the Rules, which are yet to be made. It is expected these will detail appropriate matters to be considered in making an order about costs. Until the Rules are made, it is not appropriate to comment on their substance except to say it is expected they will be directed towards a fair and just outcome. It is possible that the Rules may take into consideration where proceedings are in the 'public interest' or where local governments are unreasonably exposed and consider the assistance of all the parties in the appeal, the behaviour of the parties, the relevance of the matters, and determining 'the event'. The current provisions in SPA relating to frivolous or vexatious actions have been interpreted in such a way that it is rare for cost orders to be made under this provision, even where the opponent is a commercial competitor. The Rules will clarify the way the court's discretion is to be exercised. This is in line with the rules which apply in the Supreme and District courts.

The committee is pleased to note that further work will be undertaken to clarify a range of issues associated with the matter of costs and expects this work to directly address many of the legitimate concerns raised by numerous stakeholders during the committee's inquiry on the bill.

During its deliberations on the bill, the committee considered the issue of costs at some length. These deliberations centred on:

- preserving access to justice for all
- the need to reduce the impact on the court system
- reducing the incidence of frivolous and vexatious litigation
- supporting and strengthening the relationship between ADR processes and the court system.

The committee considered a number of possible options, seeking to identify an approach that would satisfy the objectives of the bill and also address stakeholder concerns. Ultimately the committee resolved not to support Clause 61 of the bill and instead supported the view expressed by the majority of evidence received during the inquiry suggesting the need to remove the phrase 'but follow the event, unless the court orders otherwise'. The committee recognises that omitting these words shifts the default position proposed in the bill but concluded that the proposed change is unnecessary when considered in the combined context of the proposed:

- preservation of the court's existing discretion in the matter of costs
- review of the court rules
- new powers for the ADR Registrar
- increased emphasis on ADR processes.

The committee notes that the department seeks to offer the public some reassurance by noting that public interest groups have the opportunity to have their point of view heard through the mediation process without fear of costs. If it is not resolved at mediation, and they have legitimate and well considered grounds, they will have the choice to have their appeal considered by the court. If successful they will then have the possibility to have their costs paid. However, the department later goes on to note that the cost Rules apply equally to enforcement proceedings and include investigation costs.[52] The committee notes that a number of legal representatives and organisations raised significant concerns about the anticipated practical difficulties in defining 'an event' and advise caution in the use of such an imprecise term as the trigger for the issue of costs determination.[53]

The committee is most appreciative of the detailed and considered response provided by the department to the issues raised in relation to all the concerns and views expressed by the many individuals and organisations who made submissions and presented evidence to the inquiry. However, the committee remains concerned that the department has underestimated the scope, nature and depth of community concern about the question of costs and their desire for meaningful and active engagement on this question of significant public interest.

Recommendation 3

The committee is pleased to note that further work will be undertaken to clarify a range of issues associated with the matter of costs and recommends that this work directly address many of the legitimate concerns raised by numerous stakeholders during the committee's inquiry on the bill.

Recommendation 4

The committee recommends that Clause 61 should be amended to remove the words 'but follow the event, unless the court orders otherwise'.

2.1.7 Introduce an alternative dispute resolution process in the Planning and Environment Court for minor disputes

1. The bill provides that the Chief Judge of the District Court has the discretion to direct the Alternative Dispute Resolution (ADR) registrar to exercise certain powers of the court (i.e. to adjudicate and decide about non-complex, relatively minor matters) on the basis that each party bears its own costs. The purpose of these provisions is to enable relatively simple, straightforward disputes to be resolved quickly, cheaply and efficiently without having an expensive trial.

There was strong support for the use of alternative dispute resolution process among all stakeholder groups in both written submissions and evidence presented at the public hearing.

There was absolute consensus across all stakeholders that the alternative dispute resolution process demonstrated the significant benefits it contributed to the resolution of planning and environment

[52] Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, pp. 2-7.

[53] T Webb, Queensland Environmental Law Association, Submission to the Inquiry, p. 2; M Baker Jones on behalf of S Keim SC, Submission to the Inquiry p. 2; and R Traves SC, Queensland Bar Association, p. 2.

disputes outcomes as reflected in the fact that 90 percent of mediated appeals are resolved by consent. Milne Legal suggested that the alternative dispute resolution system would be greatly enhanced by the registrar's greater use of a case appraisal process.[54]

The Queensland Law Society (QLS) was the only organisation that directly addressed the proposed changes to s. 491 relating to the power of the ADR Registrar. The Law Society indicated that it perceived the proposed changes as a positive step towards increasing the efficiency of the court process, particularly for matters of a minor nature. However, the QLS expressed concern about the proposal in s.491B (4)(b) which allows the ADR Registrar to 'inform himself or herself in the way the ADR registrar considers appropriate'.[55] The QLS has noted that this provision mirrors a similar power in the existing Building Committee but the type of jurisdiction which is proposed to be delegated to the ADR Registrar is different. The QLS expressed concern that such a provision provides an extremely broad power for the ADR Registrar to decide proceedings in their entirety, in circumstances where evidentiary matters may not be tested as they are in a usual hearing. QLS gives the example of proceedings referred to the ADR Registrar for a decision which involves a self-represented party making submissions to the Registrar based on a mix of fact and law, in circumstances where there would be no opportunity for another party to cross-examine or test those submissions. Members of the QLS are aware that similar arrangements currently exist in the Victorian Civil and Administrative Tribunal and that it frequently gives rise to inappropriate and frustrating situations occurring during the hearing.

The QLS therefore suggest that an amendment to the provision to remove this clause and that s.491B(4) would then read 'In exercising a power of the court under this division, the ADR Registrar must act as quickly, and with as little formality and technicality , as is consistent with a fair and appropriate consideration of the issues.'

The QLS notes that the subsection (1) already allows the Chief Judge of the District Court to issue directions about how the ADR registrar may exercise his or her powers under this section. The QLS submits that this provides the most effective way of ensuring that proceedings referred to the ADR Registrar for determination are done so in a bounded manner, following consultation between the Chief Judge of the District Court and the ADR Registrar.[56]

The committee notes that the departmental response to evidence received by the committee on this provision indicates that the broad power is intended to reduce the formality and the length of the proceedings to achieve a cost effective and rapid resolution to a dispute.[57] The committee also notes that the amendment proposed by the QLS is consistent with and supports this policy objective while also avoiding potential unintended consequences.

The Queensland Bar Association described the court as functioning at world class standards and that it is regularly referred to as being one which is at the top of its game worldwide, and that this is something Queensland has to be proud of.

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54 R Milne, Transcript of Public Hearing of Inquiry, 25 October 2012, p. 4

55 J de Groot, Queensland Law Society, Submission to the Inquiry, p. 9.

56 Ibid. p. 9.

57 Department of State Development, Infrastructure and Planning, correspondence to committee of 30 October 2012 containing response to Submissions and Evidence presented at the Public hearing on 25 October 2012, p. 1

The Queensland Bar Association and the Queensland Law Society indicated that the addition of case appraisal to the alternative dispute resolution functions of the court registrar would add to the suite of measures available to the court and would not be seen as inappropriate as an option available to the parties.[58] The Queensland Bar Association and the spokesperson for the Queensland Law Schools did not consider that such case appraisals need be conducted by the Registrar and that they might be just as well conducted by appropriately other qualified practitioners familiar with the planning and environment court.[59]

The Environmental Law Association also expressed reservations about the introduction of case appraisal by an external barrister on the grounds that it has to be paid for and instead expressed a preference for the current ADR system which is free for all participants in the system.[60]

The spokesperson for the various Queensland Law Schools suggested it was problematic to alter the current mediation process where parties can come together without prejudice, exchange views and attempt to find common ground 'off the record' in a non-adversarial environment.[61] Altering this process to give the Registrar the authority to adjudicate, even in non-complex and relatively minor matters, changes the power dynamic and the Queensland Law Schools likened it to having a 'person sitting at the top of the table…. holding a gun and going to shoot one'.[62]

However, all stakeholders when questioned by the committee suggested that in order for the Court Registrar to increase the volume of matters dealt with via alternative dispute resolution processes, the Court would definitely require additional resources in this area, with many witnesses qualifying their observation by also noting that this potentially represented a very cost effective approach.

In its response to the evidence presented in the submissions and at the public hearing, the Department of State Development, Infrastructure and Planning indicated that the question of resourcing the court is not a matter determined by the department.

The committee appreciates this advice but also recognises that the use of ADR processes is at the heart of the proposed changes to the Planning and Environment Court. The committee therefore considers it is critical that the Minister consults with the Attorney General to address the question of resourcing for the ADR Registrar to ensure the successful implementation of the new legislation.

Committee comment

The committee supports the increased use of alternative dispute resolution processes in the Planning and Environment Court.

[58] C McGrath, University of Queensland Law School, Transcript of Public Hearing of Inquiry, 25 October p. 4 and M. Connor, Transcript of Public Hearing of Inquiry 25 October p. 4.
[59] M Lister, Transcript of Public Hearing of Inquiry, 25 October 2012, p. 5.
[60] T Webb, Transcript of Public Hearing of Inquiry, 25 October 2012, p.4.
[61] C McGrath, University of Queensland Law School, Transcript of Public Hearing of Inquiry, 25 October p. 5.
[62] Ibid. p. 5.

Recommendation 5

The committee recommends that s.491B(4)(b) is omitted in order to avoid unintended consequences in the exercise of power by the Alternative Dispute Resolution Registrar.

Recommendation 6

The committee recommends that the Deputy Premier and Minister for State Development, Infrastructure and Planning consult with the Attorney General to ensure that the Registrar of the Planning and Environment Court is provided with the necessary additional resources to fulfil its proposed expanded functions.

2.2 Consultation

The Department of State Development, Infrastructure and Planning indicated that during May to July 2012, a series of six planning reform forums were held with key local governments and industry representatives[63] to identify the main issues and concerns relating to current arrangements for plan-making, development assessment, referrals and appeals under the SPA. Local governments and industry representatives were also invited to make submissions.

The department received 19 submissions from councils and 10 submissions from industry stakeholders. These submissions highlighted several key recommendations and concerns relating to the planning and development framework including the operation of state planning instruments; complexity of state referrals; and the high levels of regulation under local planning instruments.[64]

With the exception of industry and planning peak entities who complimented the Assistant Minister on the level of engagement on the Bill, there was concern and criticism across all other stakeholder groups about the consultation processes undertaken in relation to the preparation of this legislation. Twenty per cent of stakeholders expressed dissatisfaction with the groups consulted and the timeframes available for consultation, particularly in view of the complexity of the legislation and the potential impacts on the wider community. Many of these stakeholders requested further details and more time be given to consider the implications of the proposed changes particularly in relation to the most contentious question of cost liabilities following an event.

2.3 Consequential amendments

The bill proposes consequential amendments to *Airport Assets (Restructuring and Disposal) Act 2008*; *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009;* and the *Transport Infrastructure Act 1994,* as a result of the proposal to remove chapter 4 (Planning Partnerships) from the SPA. The purpose of the amendments is to remove references to structure plans for declared master planned areas and to relevant master plan applications. In addition, transitional arrangements are provided to protect the use and development rights established by existing structure plans and master plans under a new chapter 10, part 6 of the bill.[65]

The bill proposes consequential amendments to *Coastal Protection and Management Act 1995*;

[63] Industry representatives were property and construction sector, environmental groups and peak professional bodies for planning and law.

[64] Department of State Development, Planning and Infrastructure, Briefing, 28 September 2012, pp. 6-8.

[65] Department of State Development, Infrastructure and Planning, Briefing, 28 September 2012, p. 5; and *Sustainable Planning and Other Legislation Amendments Bill*, Explanatory notes, p. 3.

Fisheries Act 1994; *Transport Infrastructure Act 1994*; *Water Act 2000;* and *Water Supply (Safety and Reliability) Act 2008*, as a result of the proposal to de-couple the resource allocation and entitlement process from the development application process under the SPA. The purpose of this amendment is to remove the need for development applications to contain or be accompanied by evidence of an allocation of, or an entitlement to the prescribed state resource.

The bill also proposes consequential amendments to the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012)* to remove master planning and structure planning arrangements (chapter 4 Planning Partnerships) from the SPA. In addition, the bill provides the assessment manager with discretion to accept an application as properly made despite any non-compliance of the application with regard to mandatory supporting information.

The committee received no written submissions on any of the proposed consequential amendments and did not hear any evidence at the public hearing on these issues. The committee therefore has no comment to make on these changes.

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the legislation is sufficiently clear and precise

3.1 Right and liberties of individuals - Section 4(2)(a) *Legislative Standards Act 1992*

Clause 61

Clause 61 amends s.457 of the *Sustainable Planning Act 2009* in relation to litigation costs. Currently, parties to proceedings in the Queensland Planning and Environment Court generally bear their own litigation costs. The changes proposed for s.457 provide that costs of a proceeding, including an application in a proceeding, are in the discretion of the court but 'follow the event' unless the court orders otherwise. This will typically (unless the Court orders otherwise) allow a successful party to recover its legal costs from an unsuccessful party ('costs follow the event'), as usually occurs in the Supreme and District Courts.

The rationale behind having parties (previously) bear their own costs was tied to the fact that the development process is of a public nature and interested stakeholders, including local authorities, local residents and community groups, should have an opportunity to exercise their legal rights without fear of adverse costs sanctions (except where proceedings are 'frivolous or vexatious').

Whilst this is an admirable goal, one downside to allowing parties to each pay their own costs is that it fails to discourage appeals that are without legal merit or that have limited prospects of success, including those brought merely to delay or obstruct development.

The amendments (especially the potential for an adverse costs order) also seek to encourage timely resolution of proceedings by encouraging parties to use Alternative Dispute Resolution (ADR) processes to negotiate a mutually acceptable outcome as early on in the matter as possible. Subsection 457(2) gives the court a discretion to order that the parties bear their own costs if parties have participated in early dispute resolution processes under either the ADR provisions or the *Planning and Environment Court Rules 2010* and the proceeding is resolved during the dispute resolution process or soon after its finalisation. Each party to a proceeding will also bear their own costs where the ADR registrar hears and decides a proceeding at the court's direction (see ss.491B(3)).

It can reasonably be argued that the potential for an adverse costs order against a losing party may adversely affect the rights and liberties of individuals by discouraging people from pursuing (or at the least increasing the actual and/or perceived financial risk of pursuing) litigation related to the development assessment process.

The matter is referred to the Minister for consideration in accordance with recommendation 4.

3.2 Clear and precise – Section 4(3)(k) *Legislative Standards Act 1992*

Clause 122

Clause 122 inserts a new s.893 into the *Sustainable Planning Act 2009* that provides definitions for the purposes of (proposed) new Chapter 10 Part 6 of the Act. Within s.893 the definitions of '*declared master planned area'* and '*structure plan for a master planned area'* both direct the reader to see subsection 761A(3). The correct reference is to ss.761A(4). This is a mere cross-referencing error.

3.3 PROPOSED NEW OFFENCE PROVISIONS

Proposed maximum penalty

Clause 922 (4)

Carrying out development in a declared master planned area contrary to a master plan for the area.

1665 penalty units ($ 183,150)

Clause 922 (5)

Carrying out development in a declared master planned area if the structure plan for the area requires that the development cannot be carried out in the master planned area until there is a master plan for the development.

1665 penalty units ($ 183,150)

Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. Subsection 22(1) states that when introducing a bill in the Legislative Assembly, a member must circulate to members an explanatory note for the bill. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information.

Explanatory notes were tabled with the introduction of the bill. The notes are fairly detailed and contain the information required by s.23 and a reasonable level of background information and commentary to facilitate understanding of the bill's aims and origins.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
1	Jonathan Peter
2	Moreton Bay Regional Council
3	Noosa Biosphere Association Inc.
4	Organisation Sunshine Coast Association of Residents
5	Wildlife Preservation Society of Queensland
6	Jennifer Peat
7	Residents Association South
8	Kevan and Ivy Robertson
9	Noosa Parks Association Inc.
10	Reg Lawler
11	Robert Mirams
12	Alan Williams
13	Luke and Jean Daglish
14	Ergon Energy
15	Mark Lawler
16	Glenda Ernst
17	Sonya Maley
18	Noosa Waters Residents Association Inc.
19	David Zuric
20	James G. Primrose
21	Alison Dower
22	Rural Environment Planning Association Inc.
23	EDV Residents' Group
24	John Bloomfield
25	Meghan Halverson
26	Murray and Margaret Johnston
27	Peter Gillbank

28	Mackay Conservation Group
29	Des Ritchie
30	Shirley Ruescher
31	Councillor Nicole Johnston
32	Development Watch Inc.
33	Environmental Defenders Office
34	Gary Thomasson
35	Tim Stork
36	Jenna Oakley
37	Dr Keith Trace and Mrs Rosalind Trace
38	Simon Baltais
39	Sunshine Coast Environment Council
40	Rhonda Deans
41	Logan City Council
42	Paul and Adrienne Prentice
43	Ron and Sue Smith
44	Malcolm Chilman
45	Paulette Andrews
46	Noosa Chamber of Commerce and Industry
47	Yandina Creek Progress Association
48	Heidi Andrews
49	Gary Andrews
50	Sunshine Coast Regional Council
51	Koala Action Group Qld Inc.
52	Queensland Murray-Darling Committee Inc.
53	Murray and Sheree Lyons and Prue Lovell
54	IPA Law
55	Lord Mayor of Brisbane – Councillor Graham Quirk
56	National Parks Association of Queensland
57	Property Council of Australia

58	Stan Chandler
59	Eugenie Navarre
60	Kepnock Residents Action Group
61	Councillor Greg Rogerson
62	Tamborine Mountain Progress Association Inc.
63	National Heart Foundation of Australia (Queensland Division)
64	Carol Booth
65	Ian Bates
66	Cement Concrete and Aggregates Australia
67	Noosa Integrated Catchment Association Inc.
68	Norman Creek Catchment Coordinating Committee
69	Roelant Tops
70	Urban Development Institute of Australia
71	Trevor and Merrilyn Coad
72	Greenslopes Branch, Australian Labor Party
73	Noosa Biosphere
74	Bulimba Creek Catchment Coordinating Committee
75	Coomera Resort Pty Ltd
76	Peter Crispin
77	Marilyn Watson
78	Elizabeth Bergland
79	Planning Institute of Australia
80	Gary Watson
81	Anthony Haslam
82	Local Government Association of Queensland and Council of Mayors (SEQ)
83	Professor Poh-Ling Tan, Professor A. J. Brown, Dr Philippa England, Dr Ron Levy, Dr Chris Butler, Dr Rowena Maguire, Dr Chris McGrath and Dr Justine Bell
84	Councillor Paul Bishop
85	Phillip Giffard
86	Jutta Dyrchs-Jansen

87	Noosa Residents and Ratepayers Association Inc.
88	Joe Hallenstein
89	Mary River Catchment Coordinating Committee
90	South-East Queensland Catchments Ltd
91	Friends of Lake Weyba Inc.
92	Margaret Hardy
93	Stephen Keim SC, David Fahl and Mark Baker-Jones
94	Queensland Environmental Law Association Inc.
95	Queensland Law Society
96	Wayne Flello
97	Councillor Helen Abrahams
98	Margie Barram
99	Milne Legal
100	Amanda Anthopoulos
101	RPS Australia East Pty Ltd
102	Lindsay Rex Oakley
103	Take Action for Pumicestone Passage Inc.
104	Koala Action Pine Rivers Incorporated
105	Mara Ellis
106	Councillor Wendy Boglary
107	Sheila and Peter Mason
108	Annie Nolan
109	Koala Diaries
110	Ian and Judi Donald
111	Rodney and Janice Smith
112	Sippy Downs and District Community Association Inc.
113	Dr Jan Aldenhoven
114	Genevieve Gall
115	Capricorn Conservation Council Inc.
116	Community Alliance for Responsible Planning (CARP) Redlands Inc.

117	Peter Andrews
118	Maleny District Green Hills Fund
119	Queensland Regional NRM Groups Collective
120	Katrina Gosschalh
121	Bar Association of Queensland
122	Comiskey Group
123	Australian Lawyers for Human Rights
124	Scenic Rim Rate Payers Association Inc.

Appendix B – Witnesses at public hearing – 25 October 2012

Witnesses
Dr Chris McGrath, University of Queensland
Mr Mark Baker-Jones, Special Counsel
Mr Troy Webb, Queensland Environmental Law Association
Mr Michael Connor, Queensland Law Society
Mr Robert Milne, Milne Legal
Mr Rod Litser, Bar Association of Queensland
Ms Linda Bradby, Moreton Bay Regional Council
Mr Ron Piper, Sunshine Coast Regional Council
Mr Luke Hannan, Local Government Association of Queensland
Mr Anthony Jones, Council of Mayors SEQ
Mr Sean Ryan, Environmental Defenders Office
Mr Geoff Penton, Queensland Murray-Darling Committee
Mr Paul Donatiu, National Parks Association of Queensland
Jill Chamberlain, Wildlife Preservation Society of Queensland
Mr Mike Berwick, Qld Regional NRM Groups Collective
Jill Chamberlain, Take Action for Pumicestone Passage Inc.
Mr Ian Christesen, Organisation Sunshine Coast Association of Residents
Mr Joe Jurisevic, Noosa Residents and Ratepayers Association
Mr Murray Lyons, Sippy Downs and District Community Association Inc.
Ms Johanne Wright, EDV Residents' Group
Mr Dick Patterson, Noosa Waters Residents Association
Mr Tim Stork, Ergon Energy
Mr Aaron Johnstone, Cement Concrete and Aggregates Australia
Wouter Van Der Merwe, Coomera Resort
Désirée Houston-Jones, RPS
Mrs Jennifer Hacker, Rural Environment Planning Association Inc.
Kathy Mac Dermott, Property Council of Australia

Witnesses
Ms Kate Isles, Planning Institute of Australia
Ms Marina Vit, Urban Development Institute of Australia
Ms Lavinia Wood, Community Alliance for Responsible Planning

Statement of Reservation

I write to lodge a statement of reservations on the *Sustainable Planning and Other Legislation Amendment Bill 2012.*

The Committee's report does not consider the feedback from an overwhelming majority of stakeholders that there is no need to change how costs are imposed in the Planning and Environment Court.

When the Department was asked in Committee briefings to provide data or evidence for why changes were needed to the way the Planning and Environment Court imposes costs it was advised that no such data exists.

Without any clear rationale or justification the Government appears to be heading down a path that will remove the ability of local groups and Local Governments to stand up to more financially powerful developers.

Out of the 124 submissions lodged with the Committee 109 submissions outright oppose changes to the way costs are awarded in the Planning and Environment Court.

These stakeholders range from local community and environmental groups to the Queensland Law Society and legal academics, to Councillors and the Local Government Association of Queensland.

The Committee report fails to listen to these stakeholders and states that concerns can be met through the rules for the Planning and Environment Court which are yet to be made. This response is unsatisfactory and disregards the genuine concerns of a broad range of stakeholders.

Community groups and legal stakeholders were asked during Committee Hearings about whether a 'public interest' Court rule would be satisfactory to meet concerns and the overwhelming response from stakeholders was an outright opposition to legislative amendments.

The Committee has clearly decided to ignore the input of stakeholders.

The only submissions supportive of this legislative change in its current form are from the Comiskey Group and RPS Australia.

The Committee report at least acknowledges concerns raised by the Property Council of Australia, the Urban Development Institute of Queensland and the Queensland division of the Planning Institute of Australia who are also generally supportive of changes to awarding costs in the Planning and Environment Court.
With no evidence in relation to frivolous or vexatious commercial appeals, or clear policy justification (other than the support of stakeholders in the property industry), the LNP Government's motivations for changing how costs are awarded in the Planning and Environment Court are questionable.

The Queensland Bar Association indicated to the Committee that the court is functioning at world class standards and this view is supported by the Queensland Law Society.

Many stakeholders have advocated the view of if 'it isn't broke don't fix it' and Government Members of the Committee have wilfully ignored this advice.

The Opposition also has a number of other reservations in relation to this legislation including

that the Committee Report does not adequately respond to the concerns raised by stakeholders including the Coomera Resort and Sunshine Coast Regional Council that the removal of structure and master plans may remove existing development rights.

There has been no consideration provided to the Sunshine Coast Regional Council's position that there should be flexibility to opt in or out of current master and structure plans with considerable work already undertaken.

Not all reservations are detailed here and more will be raised during the debate on this legislation.

Yours sincerely

Hon Tim Mulherin

Deputy Leader of the Opposition