Sustainable Planning and Other Legislation Amendment Bill 2012

EXPLANATORY NOTES

FOR

AMENDMENTS TO BE MOVED DURING CONSIDERATION IN DETAIL BY THE HONOURABLE JEFF SEENEY MP

Title of the Bill

Sustainable Planning and Other Legislation Amendment Bill 2012

Objectives of the Amendments

Amendments to the Sustainable Planning and Other Legislation Amendment Bill 2012 are required to:

- provide and clarify certain powers of the chief executive as the single State assessment and referral agency to ensure the efficient operation of the single State assessment and referral agency model;
- clarify the notification requirements for applications for section 242 preliminary approvals in relation to declared master planned areas;
- provide and clarify that the definition of structure plan applies to a 'declared' master planned area and not other types of master planned communities;
- amend the definition of a structure plan in the transitional provisions;
- provide and clarify the intent that a local government has three years to amend its *Sustainable Planning Act 2009* (SPA) planning scheme or make a new SPA planning scheme, where there is no existing structure plan in effect for a declared master planned area;
- give effect in a modified form to the State Development, Infrastructure and Industry Committee's recommendation to amend the provisions which give the Planning and Environment Court general discretion to award costs; and

- give effect to the State Development, Infrastructure and Industry Committee's recommendation to amend the provisions relating to alternative dispute resolution processes to avoid unintended consequences in the exercise of power by the Alternative Dispute Resolution registrar.

Achievement of the Objectives

Single State assessment and referral agency

Two additional provisions are proposed to support the efficiency of the single State assessment and referral agency.

Firstly, powers are provided to the chief executive to nominate an entity (the *assessing authority*) to have jurisdiction for the administration and enforcement matters relating to a condition of a development for which the development approval relates.

This provision allows the chief executive to delegate the chief executive's administrative and enforcement functions, when the chief executive is the assessment manager or referral agency for a development application. It is intended that this will reduce the administrative burden and cost of the single State assessment and referral agency by allowing State agencies with existing technical expertise to be the nominated entity to oversee compliance of a development approval. This already occurs under the current system, in which multiple State agencies have assessment manager or concurrence agency responsibilities, depending on the development application.

The second new provision clarifies that if an Act other than the *Sustainable Planning Act 2009*, requires that certain matters may or must be regarded or applied by a State agency as the assessment manager or referral agency, these requirements do not apply to the chief executive as the single State assessment manager and referral agency.

Under the current model, when considering referred development applications, State agencies only consider matters within their own jurisdiction and are bound to apply the laws, codes and policies under that jurisdiction. This raises the potential for conflicting State agency responses.

It is intended that under the single State assessment and referral agency model, the chief executive will consider development applications from a State perspective. It may not be possible for the chief executive to resolve internal State conflicts between laws, codes and policies if the chief executive is bound to apply each of those laws, codes and policies.

The amendment enables the chief executive to provide a single, cohesive State response to a development application, and gives the chief executive discretion to resolve inconsistencies or conflicts between laws, codes and

policies. This helps to achieve the intent of introducing the single State assessment and referral agency.

Amending Clause 61 Planning and Environment Court costs

The Bill amends clause 61 to remove the words 'but follow the event, unless the court orders otherwise' for proceedings generally. The purpose of the amendment is to give the Planning and Environment (P&E) Court general discretion to award costs.

The amendment provides for this outcome for the majority of proceedings, the exception being for enforcement proceedings, which are generally brought forward by local government under section 601 of the SPA. In these instances, costs of enforcement proceedings, including investigation costs, will follow the event unless determined otherwise by the P&E Court.

The amendment provides a non exhaustive list of matters the P&E Court may take into consideration in making a decision to award costs. This will ensure greater certainty and transparency for the community, industry and local governments when bringing forward proceedings.

This change has been made to give effect to the recommendation of the State Development, Infrastructure and Industry Committee to amend clause 61.

Amending section 491B to avoid unintended consequences in the exercise of power by the Alternative Dispute Resolution Registrar

The Bill amends section 491B to remove the provision which gives the Alternative Dispute Resolution (ADR) registrar power to inform himself or herself in the way he or she considers appropriate to ensure there are no unintended consequences in the exercise of power by the ADR registrar.

This change has been made to give effect to the recommendation of the State Development, Infrastructure and Industry Committee to omit section 491B(4)(b).

Clarifying section 899 transitional provisions for declared master planned areas

An amendment is proposed for section 899 of the Bill to clarify that where an application for a section 242 preliminary approval meets certain technical requirements, public notification requirements are waived.

This reflects the original intention to transition and preserve the existing use and development rights established by existing structure plans and master plans for declared master planned areas.

Clarifying the definition of a structure plan for declared master planned areas

The Bill includes transitional provisions to clarify that the definition of a structure plan applies to 'declared' master planned areas and not other types of master planned communities.

This change has been made in response to suggestions made in submissions through the State Development, Infrastructure and Industry Committee.

Clarifying the timeframe for structure plans not in effect on the commencement

The Bill includes an additional clause to the transitional provisions to clarify the policy intent that a local government has three years to amend its SPA planning scheme or make a new SPA planning scheme to include the future planning intentions for the declared master planned area.

This change has been made in response to issues raised in submissions through the State Development, Infrastructure and Industry Committee. In particular, clarification was sought on the specific timeframe for local government to undertake these actions.

Alternative Ways of Achieving Policy Objectives

There is no alternative way of providing and clarifying the necessary powers of the chief executive as the single State assessment manager and concurrence agency.

There is also no alternative way of clarifying the notification requirements for applications for section 242 preliminary approvals in relation to declared master planned areas.

Estimated Cost for Government Implementation

The proposed additional provisions are unlikely to add a new administrative cost to government.

Single State assessment and referral agency

The power for the chief executive to delegate administrative and enforcement functions to nominated entities will not result in an operational change. Under the existing 'multiple' State assessment and referral agency model, State agencies already have jurisdiction and technical expertise for certain development approvals and development permit conditions, including enforcement.

Consequently, the ability for the chief executive to have discretion in applying various laws, codes and policies in responding to a development application will not impose a new financial cost.

Correcting section 899 transitional provisions for declared master planned areas

This provision will not impose any actions or costs on government.

Consistency with Fundamental Legislative Principles

There are no fundamental legislative principle issues associated with these proposed amendments.

Consultation

No consultation has been undertaken in relation to the proposed amendments for the single State assessment and referral agency and the clarification of section 899 of the Bill. Both amendments are consistent with the original policy intent to establish and ensure the efficient operation of the single State assessment and referral agency, and the preservation of existing use and development rights for declared master planned areas under transition.

NOTES ON PROVISIONS

Amendment 1 *- Clause 2 (Commencement)*

The amendment removes reference to clauses 59, 61 and 67 from the provision which identifies the sections of the Bill that will commence by proclamation. Clause 59 is omitted under Amendment 4. The amendment ensures that clause 61 which relates to court costs for the Planning and Environment Court, and clause 67 which relates to the Alternative Dispute Resolution registrar, will commence on assent.

Under the Bill, provisions related to court costs and the Alternative Dispute Resolution registrar had been envisaged to commence by proclamation to enable time for the Rules of Court to be amended. Due to the amendments to section 457 this action is no longer required and the clauses which relate to the Planning and Environment Court and the Alternative Dispute Resolution registrar may commence on assent.

Amendment 2 *- Clause 2 (Commencement)*

The amendment removes reference to section 946 (Costs for existing court proceedings) from the provision which identifies the sections of the Bill that will commence by proclamation. The amendment ensures that section 946 which relates to court costs for the Planning and Environment Court will commence on assent.

Under the Bill, commencement by proclamation had been envisaged to enable time for the Rules of Court to be amended. As this action is no longer required due to the amendments to section 457, the clauses which relate to the Planning and Environment Court may commence on assent.

Amendment 3 *- Clause 35 (Insertion of new ch 6, pt 1, div 4, sdiv 2A)*

This amendment provides for new section 255D (Chief executive imposes conditions or recommends conditions be imposed on development approvals) and 255E (Relationship with other Acts).

New section 255D provides that the chief executive, where imposing or recommending conditions on a development approval as either the assessment manager or a referral agency for a development application, may nominate an entity to be the assessing authority for a development for which the development approval relates. This means the entity nominated to be the assessing authority will have jurisdiction for the administration and enforcement of matters relating to a particular condition of the development approval.

The purpose of this provision is to allow for the efficient and cost-effective operation of the single State assessment and referral agency. The chief

executive can manage its workload by nominating assessing authorities with the technical expertise to ensure compliance with the State's decision, while continuing to focus on the core function of responding to referred development applications.

New section 255E clarifies how other Acts apply to the chief executive as the single State assessment and referral agency and how other Acts apply to development applications. This section does not apply where another Act provides for a local government or another entity, which is not a State government agency, to be an assessment manager or referral agency.

Section 255E(2) and section 255E(3) clarify that this subdivision overrides provisions of any Act imposing requirements on the assessment manager or referral agency for a referred development application.

Section 255E(4) supports section 255E(2) and section 255E(3) by clarifying that the chief executive does not need to comply with a requirement under another Act stating the matters an assessment manager or referral agency 'may' or 'must' have regard to. Instead, the chief executive may have regard and give weight to the matters the chief executive considers appropriate as provided for in section 255A(2)(b), 255B(2)(b) or 255C(2)(b) in the Bill.

Section 255E(5) and 255E(6) provide for a circumstance where another Act confers a function on a referral agency or assessment manager for a development application. For assessing the matter, the function is conferred on the chief executive and the chief executive has discretion in relation to having regard to the other Act's purpose.

Section 255E(7) clarifies that when imposing conditions on a development approval, the chief executive does not need to comply with a provision under another Act requiring the imposition of particular conditions on a development approval. However any condition the chief executive imposes on a development approval must be in accordance with section 345 of SPA, which requires that conditions must be relevant or reasonable.

Section 255E(8) provides that where another Act states that a particular entity would be, or would be taken to be the assessment manager or referral agency for assessing a matter for the application, the provision is taken to state that the chief executive is, or is taken to be, the assessment manager or the referral agency.

Section 255E(9) and 255E(10) provides that where another Act requires an applicant to provide a document to an assessment manager or referral agency, the applicant must give the document to the chief executive.

Section 255E(11) clarifies the meaning of terms as they are used in the section, including *application*, *assessing*, *function* and *must have regard to*.

Amendment 4 *– Clause 59 (Amendment of s445 (Rules of court))*

The amendment omits clause 59 as changes to the Planning and Environment court rules are no longer required due to the amendments to section 457 under Amendment 5.

Amendment 5 *– Clause 61 (Amendment of s457 (Costs))*

The amendment provides for new section 457(1) and (2) to remove the proposal under clause 61 that Planning and Environment Court costs 'follow the event, unless the court orders otherwise' for proceedings generally.

Section 457(1) gives the Planning and Environment Court general discretion to make an order about costs of a proceeding.

Section 457(2) provides a non exhaustive list of the matters the Planning and Environment Court may have regard to when exercising its discretion in ordering costs.

Section 457(3) clarifies that the matters the Planning and Environment Court may have regard to when exercising its discretion in ordering costs are not limited to the matters listed in section 457(2).

Section 457(4) clarifies that without limiting the general discretion given to the Planning and Environment Court under section 457(1), if the parties to a proceeding elect to participate in the Alternative Dispute Resolution process at an early stage and the proceeding is resolved during or soon after the dispute resolution process has been finalised, each party must bear its own costs unless the Planning and Environment court orders otherwise.

Section 457(5) provides that where parties to a proceeding participate in an Alternative Dispute Resolution process and the proceeding is not resolved, the costs of the proceeding include the costs of the dispute resolution process.

Section 457(6) clarifies that costs of a proceeding include investigation costs for particular proceedings.

Section 457(7) provides that investigation costs under section 457(6) include costs the court decides were incurred by a party to a proceeding for the purposes of investigating or gathering evidence.

Section 457(8) clarifies that sections 457(9) to 457(15) apply to a proceeding despite section 457(1).

Section 457(9) provides that costs for an enforcement proceeding or application in a proceeding under section 601, follow the event, unless the court orders otherwise.

A note is included under section 457(16), as renumbered, which clarifies that information relating to when a party to a proceeding must bear the party's own costs can be found under section 491B(3).

***Amendment 6** – Clause 67 (Insertion of new ch 7, pt 1, div12A)*

The amendment clarifies that section 457(1), section 457(4) in addition to sections 457(9) to 457(14) do not apply to proceedings decided by the Alternative Dispute Resolution registrar, and that parties to the proceeding will pay their own costs.

***Amendment 7** – Clause 67 (Insertion of new ch 7, pt 1, div12A)*

The amendment omits section 491B(4)(b) and renumbers the section, to give effect to the recommendation of the State Development, Infrastructure and Industry Committee to avoid unintended consequences in the exercise of powers of the Alternative Dispute Resolution registrar.

***Amendment 8** - Clause 121 (Insertion of new ss 761A and 761B)*

New section 761A (Special requirement to amend or make planning scheme) is amended to address the circumstances where there is not yet a structure plan in effect for a declared master planned area. Under such circumstances, the local government must amend its SPA planning scheme within three years after the commencement, to address certain matters provided in new section 761A(4) relating to future planning intentions for the area, by following the process stated in the relevant guideline.

***Amendment 9** - Clause 121 (Insertion of new ss 761A and 761B)*

New section 761A (Special requirement to amend or make planning scheme) is amended to address the circumstances where there is not yet a structure plan in effect for a declared master planned area, and the local government planning scheme is an *Integrated Planning Act 1997* (IPA) planning scheme. Under the circumstances, the local government must make a SPA planning scheme within three years after the commencement, to address certain matters provided in new section 761A(4) relating to future planning intentions for the area, by following the process stated in the relevant guideline.

The amendment includes new subsection (4) outlining the matters that must be addressed by the local government in making or amending its SPA planning scheme relating to the future planning intentions for the area.

Previous subsection (4) containing definitions for the section is renumbered subsection (5).

Amendment 10 *– Clause 121 (Insertion of new ss 761A and 761B)*

New section 761A (Special requirement to amend or make planning scheme) is amended to clarify that this section relates to structure plans for declared master planned areas and not other types of master planned communities.

Amendment 11 *– Clause 122 (Insertion of new ch 10, pt 6)*

New section 893 (Definitions for pt 6) definition of *declared master planned area* is amended to correct the reference to renumbered section 761A(5).

Amendment 12 *– Clause 122 (Insertion of new ch 10, pt 6)*

New section 893 (Definitions for pt 6) definition of *structure plan* is amended to clarify that the definition of a structure plan for a declared master planned area has the same meaning as for *structure plan* under new section 761A(5).

Amendment 13 *– Clause 122 (Insertion of new ch 10, pt 6)*

The amendment amends section 898(1)(b) to clarify that an existing structure plan continues in effect until the local government amends its planning scheme or makes a new planning scheme under SPA to incorporate the structure plan.

Amendment 14 *– Clause 122 (Insertion of new ch 10, pt 6)*

The title of new section 899 (Changes to restrictions on particular development applications in master planned area) is amended to more appropriately reflect its intent. The new title is 'Changes to restrictions on, and notification requirements for, particular development applications in master planned area.'

Amendment 15 *– Clause 122 (Insertion of new ch 10, pt 6)*

New section 899 as titled (Changes to restrictions on, and notification requirements for, particular development applications in master planned area) is amended to insert new subsection (3). New section 899(3) provides that for applications for section 242 preliminary approvals, public notification is waived where certain technical requirements have been met, i.e. the proposed development is substantially consistent with the structure plan and any master plan area code applying to the land, and the application does not seek to change the assessment level of the development other than in a way mentioned in section 295(3)(b).

This provision clarifies the notification requirements for some applications for section 242 preliminary approval in declared master planned areas.

Amendment 16 *– Clause 122 (Insertion of new ch 10, pt 6)*

The amendment omits section 901 (Structure plans not in effect on the commencement) which is no longer required as requirements for local governments with declared master planned areas without a structure plan in effect for the area, are now provided for under new section 761A.

Amendment 17 *- Clause 122 (Insertion of new ch 10, pt 6)*

New section 902 (Agreements to fund structure plans) is amended to clarify that a local government must, as required under section 761A, amend its planning scheme or make a planning scheme instead of preparing a structure plan. The planning scheme amended or made under subsection (3) must be consistent with the policy the local government adopted under the former section 143(2).

Amendment 18 *– Clause 123 (Amendment of sch 3 (Dictionary))*

This amendment moves the definitions relating to the Alternative Dispute Resolution registrar from clause 123(4) to clause 123(3). The purpose of this is to ensure that definitions which support the expanded role of the Alternative Dispute Resolution registrar commence on assent, rather than by proclamation.

Amendment 19 *– Clause 123 (Amendment of sch 3 (Dictionary))*

This amendment reorders the definitions under clause 123(4) as a result of the removal of definitions relating to the Alternative Dispute Resolution registrar.

Amendment 20 *– Clause 123 (Amendment of sch 3 (Dictionary))*

The definition of *assessing authority* is amended to insert a new paragraph (k) for the entity nominated by the chief executive for a development under a development approval for which the chief executive is the assessment manager or a referral agency.

This provision supports the efficient operation of the single State assessment and referral agency model, by ensuring the chief executive can nominate state agencies with the appropriate technical expertise to administer and enforce a development approval.

The remaining paragraph is renumbered accordingly.