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The New Queensland Coastal Plan: A Regulatory Tsunami

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Enabling Legislation

The *Environmental Protection and Other Legislation Amendment Act 2011* (Amending Act) effects substantial amendments to *the Coastal Protection and Management Act 1995* (the Coastal Act). The Explanatory Notes to the Amending Act state that the relevant amendments:

> *". . . are essential to support the implementation of ... the proposed Queensland Coastal Plan (QCP). The QCP addresses sustainable development of the Queensland coast and includes provisions for* ***managing the social and economic risks of climate change and coastal hazards****, for planning coastal-dependent development, and for the preservation of social and ecological values."*

One of the amendments is the inclusion of a new object in section 3 of the Coastal Act as follows:

> *"(c) ensure decisions about land use and development, safeguard life and property from the threat of coastal hazards"*

A definition of "coastal hazard" has been inserted which provides as follows:

> *"Coastal hazard means erosion of the foreshore or tidal inundation"*

The Queensland Coastal Plan (Coastal Plan) is intended to operate with respect to decision making at a number of levels across government involving the coastal zone. To achieve this it is split into two parts. The first is the *State Policy for Coastal Management* (SPCM). Through the SPCM the Coastal Plan operates as a policy instrument affecting decisions about the use or development of land which is not governed by the *Sustainable Planning Act 2009* (SPA). The latter is regulated through the other component of the Coastal Plan which is the *State Planning Policy for Coastal Protection* (SPPCP).

One of the ways in which the objects of the Coastal Act are to be achieved is contained in section 4(e) which follows:

> *"**Use of other legislation***
>
> - *Using other relevant legislation wherever practicable to achieve the object of this Act"*

The introduction to the SPCM lists the legislation through which it is intended to operate.[1]

An example of legislation affecting land use where the SPCM would be applied rather than the SPPCP arises where the Coordinator General is required to make a decision about a material change of use of land under a development scheme for a State development area. Such development is not regulated under the SPA, which in part explains the reference to the *State Development and Public Works Organisation Act 1971* in the SPCM.

*This is a revised and updated version of a paper by the author dated 27 July 2011 published on HopgoodGanim's website - www.hopgoodganim.com.au/publications.aspx

[1] *Environmental Protection Act 1994; Forestry Act 1959; Land Act 1994; Local Government 2009; Marine Parks Act 2004; Nature Conversation Act 1992; Recreation Areas Management Act 2006; State Development and Public Works Organisation Act 1971; Transport Infrastructure Act 1994; Vegetation Management Act 1999; Water Act 2000.*

The Coastal Zone

The Amending Act inserts a new section 18A which defines the term "Coastal Zone Map", as a map certified by the Chief Executive showing the coastal zone. Section 18A(2) states that the coastal zone may include only:

> *"(a) coastal waters; and*
>
> *(b) land and Queensland waters landward of coastal waters and seaward of the* ***coastal zone inner limit****."*

Therefore the "coastal zone inner limit" is the critical boundary for determining the extent of land affected by the amendments. Section 18A provides as follows:

> *"(3) for subsection (2), the* ***coastal zone inner limit*** *is, subject to subsection (4), an imaginary line every point of which represents* ***the most landward*** *of the following points –*
>
> *(a) the point that is* ***5 km landward of the high water mark****;*
>
> *(b) the point nearest the high water mark* ***where the land reaches the height of 10 m Australian Height Datum;***
>
> *(4) if the imaginary line mentioned in subsection (3) intersects a lot, the line may follow either the seaward or landward boundary of the lot instead of following the imaginary line."*

It can be seen that this is potentially a very broad area. This is significant because the overall policy preference for non-residential development and regulatory controls in relation to climate change induced sea level rise potentially apply to this area. They are not restricted to coastal management districts.

The package of statutory amendments which accompanied the Coastal Plan includes the replacement of section 15 of the Coastal Act which defines the "coastal zone". Prior to the Amending Act the definition read as follows:

> *"15 Meaning of Coastal Zone*
>
> *The coastal zone means –*
>
> *(a) Coastal waters; or*
>
> *(b) All areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities* ***that affect or potentially affect, the coast or coastal resources****."*

The definition now states:

> *"15 Meaning of Coastal Zone*
>
> *The coastal zone means the part of the State comprising the following:*
>
> *(a) Queensland waters and land within the area shown as the coastal zone on the coastal zone map;*
>
> *(b) The airspace above the surface of the area mentioned in paragraph (a);*
>
> *(c) The subsoil below the surface of the area mentioned in paragraph (a)."*

Consequently, it is no longer the case that the Coastal Act is only concerned with the protection, conservation and management of the areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect or potentially affect the coast or coastal resources.[2]

The current position is that the coastal zone is simply the land depicted by the regulatory mapping which is spatially limited in accordance with section 18A of the Act.

The Amending Act repeals and replaces Chapter 2, Parts 1 and 2 with a new Part 1. The old Part 1, which dealt with advisory bodies including the Coastal Protection Advisory Council, has been omitted.

The Expanded Scope of Coastal Planning

Section 32 of the Coastal Act now states that the Coastal Plan takes effect on the day a notice about the making of the plan is gazetted, or if a later day is stated in the notice or the plan, the later day. The date was 3 February 2012.

Unless replaced, the Coastal Plan will have effect for 10 years after its commencement. This is intended to align with the life of a State Planning Policy under the SPA.

The Coastal Plan is a statutory instrument under the *Statutory Instruments Act 1992*.

Section 21(2) now states that in preparing the Coastal Plan **the Minister must consider**:

> *"(a) public access to the foreshore; and*
>
> *(b) **the effect of climate change on coastal management**."*

Section 21 also states that the Coastal Plan may contain:

> *"(a) a coastal State planning instrument"*

Section 21(4) provides that a "Coastal State Planning Instrument" is a State planning instrument under the SPA made jointly by the Ministers administering the Coastal Act and the SPA that provides for:

> *"(b)(i) the protection, conservation and ecologically sustainable development of the coastal zone; and*
>
> *(ii) the making of decisions about land use and development that safeguard life and property from the threat of coastal hazards."*

The Explanatory Notes to section 21 suggests that the section "requires" that decisions about land use and development **have regard to** the protection of life and property from the impacts of hazards such as coastal erosion and tidal inundation. However, the section is in fact more prescriptive than the Explanatory Notes suggest in that section 21(4) prescribes what must be provided for in the Coastal Plan.

The Minister's deliberative obligation in section 21(2) involves two separate considerations. However, subsections 4(b)(i) and 4(b)(ii) appear to state requirements as to the content of the plan. Notably protection and conservation of the coastal zone are independent of the ESD requirement. The ESD requirement is not the same as ESD under the SPA. Rather it is defined by reference to the National Strategy for Ecologically Sustainable Development. That definition does not contain the balancing principle to be found in the SPA's definition of ESD. There is accordingly no requirement for the balancing of economic factors in the performance of statutory functions under, or in the making of, the Coastal Plan.

The SPPCP is authorised as a "Coastal State Planning Instrument" and has been made under the above provisions.

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[2] See *Reef Cove Resort Pty Ltd v Cairns City Council and Ors* [2007] QPEC 077 at [26].

Coastal Management Districts

Section 15 of the Amending Act omits section 55 of the Coastal Act dealing with where a coastal management district (CMD) may be declared. The omission of section 55 removed all restrictions on the declaration of CMDs. Section 54(1) has been amended to provide for the declaration of CMDs by a regulation. The repeal of section 55 is explained in the following terms, in the Explanatory Notes:

> *"Improvements in mapping capability and the removal of regional coastal management plans (that were previously used to identify coastal wetland and dune systems and key coastal sites) has resulted in these references becoming outdated.* ***In addition, the coastal management district may need to extend further inland than the prescribed distances to manage development in areas that will become at risk of coastal erosion from projected sea level rise as a result of climate change****. Coastal management districts are to be declared for areas of the coastal zone that require specific management or planning responses. In future, the matters listed for section 56 will be used to direct the location of a coastal management district."*

Additionally section 56(d) of the Coastal Act was amended when section 15 of the Amending Act commenced to replace the term "natural hazards" with the term "coastal hazards", which is defined as mentioned above. An additional consideration was added:

> *"(h) the need to conserve, protect or rehabilitate coastal ecological systems or geomorphic features of the area."*

The declaration of CMDs is significant for development under the SPA. Certain development in a CMD is a referral trigger under the SPA, namely building work completely or partly seaward of the coastal building line in a CMD, as well as certain operational work, reconfiguration and material change of use applications for land within the CMD.[3] Also, certain operational work within a CMD is made assessable development under the SPA.[4]

No new referral triggers have been introduced as a result of the SPP's commencement. The existing triggers mainly relate to development within the CMD. The CMD has not been extended to mirror the newly created hazard areas, nor the extended erosion prone area. Examination of the mapping suggests that in most instances, the CMD has for the most part avoided privately owned land. Therefore the main influence of the SPP will be on assessment of development applications by local governments, which will, because of the SPP, be required to amend their planning schemes to deal with erosion prone and hazard areas, as well as areas mapped as general and high ecological significance.

Development Assessment under SPPCP

The significance of State planning instruments such as the SPPCP has increased since December 2009 because of the changes made to the decision rules for development applications, which were introduced by the SPA. The effect of section 326 of the SPA is that an assessment manager's decision cannot conflict with the SPPCP, subject to certain limited exceptions mainly aimed at resolving conflict between different State instruments. Otherwise, the usual "sufficient grounds" exception applies, the term "grounds" meaning matters of public interest. The ground which is usually sufficient to overcome conflict with a planning instrument is "planning need" meaning circumstances which show there is an unsatisfied need for a proposed development which the community would be better off having than being denied. The sufficient grounds must address the relevant points of conflict between the development proposed and the planning instrument. However, the SPA's departure rules regarding conflict with planning instruments are altered under Part D of the SPPCP. Section D1 states:

> *"D.1 Despite the specific principles and policies outlined in Part C, the acceptable circumstances for not fully achieving in the overall policy outcome are where the proposed development:*

[3] See Integrated Planning Regulation schedule 8, Table 1 Item 11 and Table 2 Items 13, 14 and 15 and Table 3 Item 5

[4] See schedule 3, Part 1 Table 4 Item 5

(a) provides an overriding need in the public interest in accordance with the factors outlined at annex 5; or

(b) is a development commitment; or

(c) is for public benefit asset".

Therefore planning need is elevated to a test of "overriding need in the public interest" which requires an applicant to jump through a number of hoops. Essentially the proponent must establish that the overall social, economic and environmental benefits of the development outweigh any detrimental effect on the natural values of the site and adjacent areas and any conflicts with the policy outcome. In addition the proponent must establish that the development cannot be located elsewhere so as to avoid conflicting with the policy outcome of the SPPCP. Further, it is expressly stated that uses requiring relatively few locational requirements to function do not establish an overriding need in the public interest. The consequences of these provisions are that the usual tests regarding planning need are replaced by a more specific and much more onerous test. The test is similar to that introduced by the SEQ Regional Plan's regulatory provisions. It will be very difficult for residential development to pass this test.

Where the Chief Executive administering the Coastal Act exercises concurrence jurisdiction, section 282 of the SPA requires the Chief Executive to assess the application against State planning policies applied by the Chief Executive as a referral agency to the extent that the policies are not identified in any relevant regional plan a planning scheme as being appropriately reflected in either of those instruments. The Chief Executive must also assess the application against the laws that are administered by and the policies that are reasonably identifiable as policies applied by the referral agency. This requires assessment against the relevant provisions of the Coastal Act and the SPPCP. If the Chief Executive, as concurrence agency, requires the development application to be refused the assessment manager must refuse it.[5]

The SPPCP applies to the whole coastal zone, the spatial dimensions of which are expanded as referred to earlier in this paper. The extent of this zone is shown on the digital maps prepared by the Department.

In considering the application of the SPPCP to development, the distinction between the coastal zone and coastal management districts needs to be kept in mind. Coastal management districts are a regulatory mechanism which engage the assessment and referral mechanisms of the SPA and are generally applied to erosion prone areas and areas of high ecological significance adjacent to the coast. The coastal zone is a much more extensive area which has been mapped to identify areas of high and general ecological significance and high and medium coastal hazard areas. This includes land that is projected to be permanently inundated due to sea level rise as well as the part of the storm tide inundation area that will be temporarily inundated to a depth of one metre or more during a defined storm tide event. Maritime development areas are also mapped. Development within these areas does not currently trigger referral unless the land is in a coastal management district as well. However, development in these areas will call up the application of the SPPCP by the assessment manager and the SPA's conflict and departure rules, as amended by the SPPCP. Where assessment of a development application is triggered, section 104 of the Coastal Act sets out the Chief Executive's deliberative obligations in some detail.

How does the SPPCP apply?

Certain development is **not** caught by the SPPCP at all. Section B.9 states that the SPPCP does not apply to:

- building work that is assessable only against the *Building Act* 1975; or
- a material change of use for a domestic housing activity, unless the development involves building work completely or partly seaward of a coastal building line; or
- a material change of use for a domestic housing activity to the extent that the development will result in necessary clearing of an area of general or high ecological significance; or

[5] SPA section 325(4)

- operational work – that is clearing an area of general or high ecological significance to the extent necessary for a domestic housing activity.

The glossary defines the term "domestic housing activity" by referencing the *Sustainable Planning Regulation 2009*, which defines the term to mean "the construction or use of a single residence on a lot and any reasonably associated building or structure".

So what development is **not** exempted from the operation of the SPPCP? Within developed urban areas, planning schemes may encourage increased density in order to take advantage of existing infrastructure and services by allowing lots to be split into smaller ones, or for single residences to be replaced with duplexes. All rights afforded by planning schemes to undertake such development are affected by the SPPCP. Also, intensification of commercial uses in areas such as coastal shopping centres, including by incorporating mixed uses in those centres, remains affected by the SPPCP, even though it may be encouraged by planning schemes,. It is therefore necessary to read the relevant provisions of the SPPCP to see whether, and how, development of that type is regulated.

Policy B.6 deals with development within the CMD and B.7 deals with development within the coastal zone, but outside the CMD. Each provision explains the development, in those areas, to which the SPPCP applies. The overall exemptions referred to in the preceding paragraph apply despite these two provisions.

It is important to appreciate that the new extended erosion prone area (EPA) based upon projected sea level rise has not necessarily been included in the CMD. In many instances where the new EPA currently extends past property boundaries in developed beach side suburbs, the CMD has not been correspondingly extended. A consequence of the statutory amendments referred to earlier, is that it will now be much easier to declare such areas as within the CMD. Only a regulation is required. The preliminary actions/considerations that were previously imposed on the Minister have been repealed.

When reading the SPPCP, it is very important to have a good grasp on the defined terms relating to "coastal hazards" because they govern whether particular development is regulated. In this regard, it should be remembered that:

- the term "Coastal Hazard Area" means an "erosion prone area" or a "storm tide inundation area";
- the term "erosion prone area" is defined under the Coastal Act and is created by being declared through the regulatory mapping;
- the "Storm Tide Inundation Area" (STIA) is an area determined to be inundated by defined "Storm Tide Event" by applying the methodology in Annex 3 to the policy. The regulatory mapping identifies these areas; and
- there is a third category of coastal hazard defined by the Coastal Act. It is "the permanent inundation of land due to a sea level rise of 0.8 metres by 2100 (relative to 1990)".

These three defined coastal hazard areas often overlap on the regulatory maps, but sometimes they are separated. Whether they coincide will depend on the relevant topography. In coastal areas where the height of the dunal system increases to the west of the coast, there may not be any storm tide inundation or permanent inundation effects on private property or infrastructure, but the EPA may have been extended well into and beyond the frontal dunes. In flatter coastal areas and flood plains, the permanent and storm tide inundation areas will usually overlap with and extend beyond the EPA.

Material changes of use (MCU) within a coastal management district to which the SPPCP will be applied by the Chief Executive as a concurrence agency are those which will result in certain operational work or building work, namely:

- *"a material change of use that will result in:*
    - *Operational works other than conducting a forest practice, placing an advertising device on premises; or works assessable against the Water Act 2000; or*
    - *Building work that is:*

- *The construction of new premises with a gross floor area of greater than 1000 square metres; or*
- *The enlargement of the gross floor area of an existing premises by more than 1000 square metres, or to be greater than 1000 square metres in total."*

Outside the coastal management district, but within the coastal zone the SPPCP applies to the following development:

- *"MCU that would require clearing an area of high ecological significance;*
- *MCU that would require new permanent structures for accommodation purposes within the coastal hazard area;*
- *MCU that would require more than 1,000 sq m to be filled within the coastal hazard area;*
- *reconfiguration of a lot (ROL) within the coastal hazard area that would result in an increase in the number of lots and an increase in the number of residential dwellings or premises;*
- *ROL in connection with the construction of a canal;*
- *operational work that involves:*
  - *filling an area greater than 1,000 sq m within the coastal hazard area;*
  - *clearing vegetation in area of high ecological significance."*

The SPPCP also applies to MCU resulting in building work within 500 metres of the coastline for the purposes only of applying the scenic amenity provision Part C Section 4. There are exceptions to this, however. The trigger does not apply to development in ports, airports, maritime development areas, where there are already structures seaward of the proposed development or where extensions to a building do not increase the building's height.

Main Policy Outcomes Sought by the SPPCP

The overarching policy outcomes sought by the SPPCP are:

"(a) *avoid the social, financial and environmental costs arising from the impacts of coastal hazards, taking into account the projected effects of climate change;*

(b) *manage the coast to protect, conserve and rehabilitate coastal resources and biological diversity;*

(c) *preferentially allocate land on the coast for coastal-dependent development."*

The first part of the overall policy outcome assumes that climate change induced coastal hazard will result in social, financial and environmental costs. This element of the overall policy requires that these costs be "avoided". The second outcome concerns the conservation and rehabilitation of coastal resources, while the third is land use related. It expresses a clear preference against residential development on the coast.

The policy outcomes are said to be achieved when development to which the policy applies is consistent with each of the specific policy outcomes and policies contained in Part C sections 1 to 7.

The SPPCP will have a significant effect on land use planning by the State and local governments. The overall principle is stated as follows:

> *"Allocating areas for urban development avoids or minimises the exposure of communities to the risk of adverse coastal hazard impacts, maximises the conservation of coastal resources and preferentially allocates land on the coast for coastal-dependent development."*

Residential development in any form is not coastal-dependent development under the SPPCP.

This policy appears to have the following effects:

- separation of residential uses from coastal-dependent development;
- exclusion of residential development from areas which are at risk of climate change induced hazards;
- increased conservation of coastal resources.

The first two of these affects will represent a fundamental change in the historical pattern of development in Queensland under which residential development has co-located with ports and harbours. Most of Queensland's coastal cities and towns would not be permitted to have a significant proportion of their residential development where it is located today under this policy.

In effect the policy creates an additional "urban footprint" constraint that will affect land use planning including regional plans prepared under the SPA. The new additional urban footprint will coincide with the existing nodes of urban conurbation along the coast. Like the SEQ Regional Plan which identifies rural, scenic and natural areas as the boundaries of the urban footprint, the SPPCP in effect creates a boundary around existing urban areas on the coast.

Until future planning instruments apply and give effect to these policies by changing the zoning of land to bring it into line with the policy, the SPPCP's development assessment provisions will be applied to constrain development in the relevant parts of the coastal zone consistently with the policy.

The Development Code (the Code) expresses the same overall outcomes and policy as the SPPCP. At Section 2.5 of the Code it provides:

> *"This code is to be used where a relevant adopted planning scheme does not explicitly state that it appropriately reflects the policy."*

The Code generally adopts the approach of specifying a prescriptive performance outcome and no specific outcome, or a prescriptive specific outcome which replicates the content of the relevant policy.

Coastal Hazards Policy

The most significant change to coastal planning introduced by the Amending Act in combination with the Coastal Plan concerns coastal hazards which are covered exclusively by the SPPCP component of the plan. The overall planning principle with respect to coastal hazards is:

> *"Communities and development are protected from adverse coastal hazard impacts* ***taking into account the projected affects of climate change, the protective function of the natural environment and the preference for allowing the natural fluctuation of the foreshore*** *and foreshore ecosystems to continue including in response to rising sea levels."*

This policy, reduced to its bare essentials, advocates planned retreat from climate change induced sea level rise in preference to engineered responses to the perceived threat.

The specific policies underneath this principle require coastal hazard areas to be identified in accordance with stated methodology using the following climate change induced impacts by 2100:

- *"a sea level rise factor of 0.8 m;*

- *an increase in the maximum cyclone intensity by 10%."*

The methodology is to be reviewed within six months of release of further assessment by the UN Intergovernmental Panel on Climate Change, or the making of an Australian intergovernmental agreement or policy adopting the sea level rise and storm intensity planning criteria.

Against this background, section 2.2.1 of the Policy states that development may occur in a coastal hazard area if it is one or more of the following:

- *"coastal-dependent development;*
- *temporary, readily relocatable or able to be abandoned;*
- *essential community service infrastructure that cannot reasonably be located elsewhere;*
- *redevelopment that does not increase the risk to people and property from exposure to adverse coastal impacts."*

This is expressed to be subject to policies 2.3 to 2.5. This primary policy position is then relaxed to a limited extent under policies 2.3 to 2.5.

This policy preference is for no new residential development in coastal hazard areas. Redevelopment is allowed provided it does not increase the risk to people and property from coastal hazards. The notes to this policy explain that replacing like for like is not considered to increase the risk, but an increase in development footprint or intensity would increase exposure to the risk. Therefore the policy intent is to preclude new residential development and freeze infill development at existing levels in these areas, subject to the limited relaxations discussed below.

Sections 2.3, 2.4 and 2.5 deal with development in erosion prone areas, coastal protection work and development in high and medium coastal hazard areas respectively. Section 2.5 is the most significant of these provisions because it seeks to override existing urban designations and zoning in coastal hazard areas. For that purpose the term "urban locality" relevantly means an area that is:

- *"urban footprint or rural living area in the Regional Plan;*
- *allocated for an urban or rural residential purpose under the planning scheme."*

A new development in an urban locality that is not of the type described in section 2.2.1 must be located outside a high hazard area unless consistent with an adaption strategy prepared under section 1.6 of the policy.

An adaption strategy must be included in local planning instruments for urban localities that are projected to be within a high hazard area by 2100. These are strategies that seek to mitigate the hazard by methods such as planned retreat, avoidance or defence. Such strategies must detail mitigation works or actions, costs, funding arrangements and timelines for commencement and completion of mitigation works or actions.

In the absence of a mitigation strategy, non-compliant development will only comply with the policy if it can be demonstrated that adverse coastal hazard impacts can be mitigated through design, construction, operating standards or through existing defensive structures. This option is available only for five years from the commencement of the SPPCP.

These provisions require local governments to investigate the potential for adaption to climate change induced sea level rise in the coastal hazard areas as a means of allowing for the possibility of development in these areas rather than its preclusion. A five year time frame is set for the amendment of planning schemes in affected areas.

Development within a non-urban locality in both high and medium hazard areas must not be urban development and must be of a type described in section 2.2.1 - ie principally coastal-dependent development.

Non-urban development is development that is not for "urban purposes" for which the glossary adopts the definition in the *Sustainable Planning Regulation 2009*.

Specific exceptions, subject to limitations, are created for development within a Maritime Development Area or for small to medium scale tourist development.

Small scale tourist development is development for nature based tourism with a maximum of 15 habitable rooms for short-term accommodation.

Medium scale tourist development refers to short term accommodation for tourist activity containing no more than 300 persons and which is consistent with any State Planning Regulatory Provision or Regional Plan.

The above provisions seem to be designed to align with the exemptions for development outside an urban footprint under the SEQ Regional Plan.

Development within a maritime development area or for small to medium scale tourist development may be located in a coastal hazard area:

- where it is accommodation it is located outside the high hazard area; or
- it is in accordance with an adaption strategy; or
- it is acceptable in terms of risk assessment based mitigation.

All development, other than development for essential community infrastructure, must be located, designed, constructed and operated to:

- maintain dune crest heights, or where a reduction in crest heights cannot be avoided mitigate risks to development from wave overtopping and storm surge inundation;
- ensure structures can sustain flooding from a defined storm tide event;
- maintain the safety of people living and working on the premises from a defined storm tide event; and
- maintain and enhance coastal ecosystems and natural features.

Areas of High and General Ecological Significance

An important change effected by the Coastal Plan is the increased emphasis upon ecological conservation. Previously the coastal zone's reach was defined by the coastline and riverline catchments, so that there was a connection between land use regulation and the coast. As previously mentioned the nexus between land in the coastal zone and the coast and coastal resources has been removed. The new broader coastal zone provides a wider coastal strip which is able to be regulated under the Coastal Act, and as mentioned earlier there is now potentially increased emphasis on environmental protection and conservation within the coastal zone under section 21 of the Act. Such protection and conservation has been implemented through the new HES and GES mapping layers under the Coastal Plan which will operate to potentially restrict development in those areas.

Section 3 of the SPP deals with nature conservation and contains the following specific policy outcome:

> *"Areas of high ecological significance are protected and areas of general ecological significance on land and other ecological values are conserved."*

Policy 3.1 states that development is to be located outside of, and not impact on, areas of high ecological significance. This is subject to general exemptions the most notable of which is "urban or rural residential purposes within an urban

locality".[6] This exemption is similar to that which applies under the *Vegetation Management Act 1999*. The other general exemptions relate to:

- maritime and aquaculture development areas;
- development associated with ports and airports;
- certain low impact tidal water intakes or discharges and minor public marine facilities; and
- extraction within key resource areas.[7]

Notwithstanding these general exemptions, any development for those purposes is to be located, designed and operated to avoid adverse impacts on areas of HES or where avoidance is not feasible, minimise impacts and provide an environmental offset for any residual impacts. Such offsets are to be provided in accordance with the whole of government environmental offsets policy and any relevant specific issue offsets, policy which can be located on the Department of Environment and Resource Management website.

There is, however, an exemption from those requirements relating to what is referred to as "identified development". This exemption was sought by development industry stakeholders through the Working Group that was formed in late 2011 to review the March 2011 version of the Coastal Plan. The term "identified development" is defined in the glossary as follows:

> *"Identified Development: development of land for urban or rural residential purposes within an urban locality for which there is clear evidence that:*
>
> *(a) a planning instrument or legally binding agreement (between the State or a Local Government Authority and third parties) relevant to the land was in place prior to the commencement of State Planning Policy 3/11: Coastal Protection; and*
>
> *(b) the agreement or planning instrument provided for the development of the land and also substantively dealt with ecological matters for the land, for example by referring to an associated contribution or dedication of land for environmental, conservation, natural or wilderness area purposes."*

The purpose of this additional exemption was to avoid an inequitable outcome which would have arisen where land has been appropriately zoned for urban purposes and is being developed in stages, where the overall master planning has resulted in areas being zoned and dedicated for conservation. The exemption ensures that the development of the areas zoned for urban purposes may proceed without any further requirement for avoidance or minimisation of impacts or environmental offsets.

The mapping of areas of HES and GES is inaccurate. It contains, for example, areas which although near the foreshore comprise hardstand parking areas, roads, parks and community infrastructure. The Editor's notes to the SPP guidelines state that:

> *"Development is outside an area of High Ecological Significance (HES) if an ecological assessment demonstrates that the ecological values attributed to the area shown on the map are not present on the site."*

This is consistent with the glossary definitions of areas of HES and GES.

The HES mapping is composite mapping which includes land already mapped for ecological purposes. The Editor's note to the guidelines states:

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[6] Policy 3.1(a).
[7] Policies 3.1(b) to (f).

> *"Mapped areas of HES are the result of comprehensive assessment of biodiversity interests in the coastal zone and include the protected area estate; endangered and of concern regional ecosystems, high value coastal wetlands and core essential habitat for selected threatened species. Other areas of HES may be areas that support a critical life stage ecological process of a threatened species, such as feeding, breeding or roosting sites."*

It is unclear from the mapping and Editor's notes what additional ecological or coastal specific values are intended to be covered by this mapping.

It is evident from the Editor's notes that the mapping is acknowledged as coarse because it is stated that only basic site assessments will be required to demonstrate that HES values are not present where values are readily identifiable.

The approach to protection and conservation appears to be to map broadly and coarsely and place the onus on the land owner to disprove the mapping. The evident intent of the approach is to extend the reach of the State's whole of government environmental offsets policy.

Scenic Amenity

Since the introduction of referral triggers for the Coastal Act under the *Integrated Planning Act 1997*, scenic amenity has been excluded from DERM's (formerly the EPA's) referral jurisdiction. This exclusion persists under the *Sustainable Planning Regulation 2009* and the Coastal Act, sections 104(1)(b) and (3). Consequently scenic amenity policies 4.1 and 4.2 apply to development assessment by local governments until the SPPCP is reflected in the applicable planning scheme, but not to assessment by DERM as a concurrence agency.

Land use planning policy 1.10 requires areas of high and locally important scenic preference values, including scenic coastal landscapes of state significance, to be protected under planning instruments "where these areas or landscapes were previously identified in a relevant planning scheme".

The primary position of the scenic amenity policy is to "maintain and enhance" the "dominance" of the natural character of the coast except within ports, airports, maritime development areas or aquaculture development areas, and other than in respect of minor marine development or private marine access structures.

This policy, as previously mentioned, is triggered for development within 500 metres of the coast.

Assessment of pre-existing development applications

Applications already progressing through IDAS at the time the SPP commenced are not specifically addressed by the instrument. Instead, the statutory and common law rules apply relating to the "weight" to be afforded to the SPP in deciding applications. This is a particularly complex and difficult issue which is likely to engage the Planning and Environment Court over the course of the next few years. Should the SPP, as a matter of "weight", be applied by, in effect, undertaking risk assessment in accordance with the guidelines for pre-existing development applications? Given the long-term policy objective and the period of five years allowed for the development of planning scheme amendments, it does seem unreasonable to inflict the full effects of the SPP on existing applications. However, it should be noted that as long ago as 2006, the Planning and Environment Court gave decisive weight to a local planning instrument which took into account the effects of storm tide surge on the location of coastal development. The engineering evidence that the court accepted referred to the then current version of the Coastal plan and the need to consider the impacts of climate change. The decision was upheld by the Queensland Court of Appeal.[8]

It seems inevitable that issues of the weight to be applied to the SPP will open up questions about the accuracy of the statutory mapping, which in the case of the HES layer is open to review as part of a development application. It is a live question whether weight can be attributed to the instrument in circumstances where development assessment is required to determine the accuracy of the mapping and therefore its applicability.

[8] *Charles Howard Pty Ltd v Redland Shire Council* [2006] QPEC 095; *Charles Howard Pty Ltd v Redland Shire Council* [2007] QCA 200.

Critique and conclusions

The policy of the Coastal Plan is to restrict the development footprint in the coastal zone by limiting development to infill and redevelopment of existing urban areas, and allowing only coastal-dependent development in other areas. Bearing in mind that the coastal zone can extend more than 5 kms inland from the coast where the level of the land is below 10 m AHD, this is a very broad and significant restriction. The restriction is amplified where the land would be inundated by climate induced sea level rise of 0.8 m by 2100. In the latter case there will be an absolute preclusion in respect of residential development unless an adaption strategy can be satisfied or within five years from the commencement coastal hazard risks are satisfactorily mitigated.

The development of adaption strategies will be a matter for local governments under the Coastal Plan. This will not be an easy task given the potentially long time frame involved, the uncertainty surrounding the risks, potential costs and liability issues. Climate change adaption modelling is an emerging discipline. Recently two models were evaluated: the Australian Greenhouse Office model (Australian Government 2006) and the International Council for Local Environmental Initiatives (ICLEI) 2006, which have been recommended by the Federal government and the ICLEI to local governments in this context. The authors of the analysis suggested that the capacity of these models to analyse effective and efficient adaption appears limited as they address only part of a very complex planning scenario.[9] It is unrealistic to expect individual local governments to solve this problem in five years. A statewide modelling strategy seems more likely to be required if any meaning is to be given to the adaption strategy exception to the new development restrictions. So far the State has released a guideline for preparing coastal hazard adaption strategies and is undertaking a pilot adaption strategy jointly with the LGAQ and the Townsville City Council.

The coastal plan mapping takes a simplistic two dimensional approach by adding 0.8 m to existing flood levels across the whole landscape. 0.8 m is at the conservative end of sea level rise projections (the 2070 median projection is 0.35 m), yet as a planning response the Coastal Plan will immediately sterilise significant tracks of developable land in response to a risk which is long-term and uncertain. The Coastal Plan applies the precautionary principle quite strictly although it is but one of a number of principles which ecologically sustainable development policy requires to be considered.

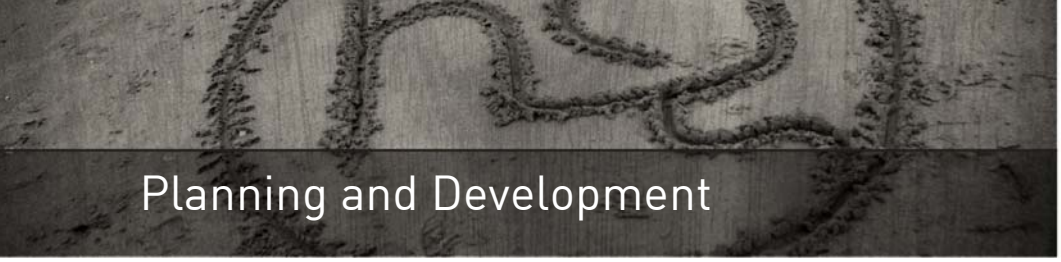
An alternative risk based response could allow for site-specific hydro-dynamic modelling, combined with risk responsive construction and engineering design, to determine development outcomes. This could mean that only the most at risk land is quarantined from development and would arguably be a more proportionate response to the risk of sea level rise, and one that objectively applies proper weighting to economic, social and environmental factors.

It appears that the coastal zone has been expanded to allow for more extensive regulation and policy application with respect to climate change induced coastal hazards. A by-product of this is a more extensive area that is now subject to ecological mapping, but without any requirement that the ecological values be coastal related.

The HES and GES policies combined with the broad extent of the regulatory mapping takes environmental conservation on private land within the coastal zone to new levels. The regulatory provisions within the SPPCP and associated code are designed to either prevent development within the mapped areas or minimise it and require offsets. This will constrain the potential of the urban footprint within the coastal zone in line with the SPPCP's overall policy or will add costs to developing urban zoned land in accordance with its intended purpose by requiring environmental offsets.

The SPPCP will have significant economic and social consequences. Applied in combination with other constraints under State instruments, such as urban footprints in regional plans and vegetation mapping, the potential residential development footprint will shrink, placing further downward pressure on the supply of greenfield residential land in Queensland's major cities and towns. The economic consequence of scarcity is usually price increases. It will also make existing residential land and houses in coastal locations more desirable, but with a fixed or limited stock to satisfy an increasing population. Responding to demand through high density infill development in these locations is likely to become more problematic.

[9] J Scott and C Weston. "The Pitfalls and Promises of Climate Adaption Planning", Australasian Journal of Environmental Management Volume 18 June 2011 pp 73 – 87.



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Overall the SPPCP is the last piece in the extensive constraints based jigsaw puzzle that now comprises planning regulation in Queensland. It is significant for its very clear intent to move residential development away from Queensland's coastline. There is likely to be tension between this policy and the aspirations of Queensland's population as reflected in regional plans and planning schemes into the future.