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LAWYERS

SEQ Regional Plan 2009-2031

Infrastructure Issues

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INGRAINED INTELLIGENCE

Infrastructure Issues

Introduction

This paper is part of a set of papers prepared by HopgoodGanim's Planning and Development Group on the *South East Queensland Regional Plan 2009-2031*. The focus of this paper is section 10 of the Regional Plan, which contains the region's policies relating to infrastructure.

The aim of this paper is to explain the effects of the Regional Plan on proposed development in the context of infrastructure provision. This can be relevant to proposed development in the following ways:

- Proposed development that may be otherwise consistent with a planning scheme may be affected by a proposed infrastructure project, which can result in a requirement for part of the development site to be dedicated, imposition of setbacks from the site's boundary, and other implications for the development.
- A development project may give rise to the need for additional infrastructure that is within the jurisdiction of the State Government. The Regional Plan may indicate if and when such infrastructure is to be supplied, which could have either positive or negative implications for a project.
- There may be a requirement for a development proponent to enter into a State Infrastructure Agreement in order for a project to proceed.
- Planning schemes are expected to align with the Regional Plan in all respects, including with respect to infrastructure, and if there is any inconsistency, the Regional Plan prevails.

Statutory context

The following principles should be kept in mind when considering the Regional Plan.

1. The Regional Plan is a statutory instrument and has the force of law¹.
2. The Regional Plan is taken to be a State interest².
3. Unless the Minister for Infrastructure and Planning issues a dispensation, local governments must amend their planning schemes to reflect the Regional Plan³.
4. An entity responsible for amending any plan, policy or code under an Act must take the Regional Plan into account⁴.
5. If there is an inconsistency between the Regional Plan and a planning scheme or planning instrument, or any plan, policy or code of a planning nature under any Act, the Regional Plan prevails⁵.
6. The regulatory provisions under the Regional Plan, which are also a statutory instrument and have the force of law, regulate development where they apply by, in combination with the Integrated Planning Act, preventing certain development applications from being made, changing the assessment criteria so as to reduce the prospects of approval, or giving the Department of Infrastructure and Planning a concurrence role⁶.

¹ Integrated Planning Act, section 2.5A.10(2)

² Integrated Planning Act, section 2.5A.19

³ Integrated Planning Act, 2.5A.20(2)

⁴ Integrated Planning Act, 2.5A.21(2)

⁵ Integrated Planning Act, 2.5A.21(3)

⁶ Integrated Planning Act, section 2.5C.3 and SEQ Regional Plan 2009-2031 State planning regulatory provisions

7. To the extent that the Regional Plan has not been reflected in a planning scheme, the Regional Plan must be considered when assessing both code and impact assessable development applications⁷.
8. Development applications that are contrary to the Regional Plan's regulatory provisions (if applicable to the application) must be refused⁸.
9. Code assessable development applications which conflict with an applicable code may be approved on sufficient grounds, including a ground based upon a provision of the Regional Plan not identified as reflected in the planning scheme⁹.
10. In respect of impact assessable development applications, a desired environmental outcome may be compromised (if that is necessary to further the outcomes of the Regional Plan) if it is not identified as reflected in the relevant planning scheme¹⁰.
11. Where conflict with a provision of a planning scheme is in issue, weight may be given to the Regional Plan as a later law or policy, and may therefore be a sufficient ground for overcoming the conflict¹¹. On the other hand, weight given to the Regional Plan may influence the refusal of an application.

These principles will change in some respects if the *Sustainable Planning Bill 2009* commences in its current form.

Structure of the Regional Plan

The Regional Plan's purpose is to manage growth in the region in the most sustainable way, to protect and enhance quality of life. The emerging regional growth issues are identified as population growth, housing affordability, transport congestion, climate change and employment generation.

The Regional Plan continues the themes of the previous regional plan of promoting compact urban form and controlling urban expansion through the urban footprint, allocating land to accommodate future urban growth in a targeted way, supporting growth in the Western Corridor, and providing for the planned provision of infrastructure by the State and local governments ahead of urban expansion. However, the Regional Plan now contains more detail and expands the influence of the State into matters of general planning and design.

The plan is divided into six parts. Part A contains an introduction; part B contains the Regional Vision and strategic directions; part C contains the regional land use pattern which sets growth boundaries, land use categories, and contains sub-regional narratives which apply as policy; part D contains the regional policies; part E deals with implementation and monitoring; and part F contains the Plan's State planning regulatory provisions, which implement the Plan's land use boundaries.

Regional infrastructure policy

Although infrastructure is dealt with specifically in part D section 10 of the Regional Plan, other provisions of the plan may also be relevant. For example, part C of the Regional Plan contains the sub-regional narratives, each of which contains a description of the infrastructure that is to be provided in a sub-region to support the regional land use pattern proposed. A key change in the Regional Plan is that the sub-regional narratives have the status of policy under the Regional Plan. This is expressly stated in respect of, among other things, the identification of "key infrastructure priorities that will support expected growth". Section 8.2.3, for example, requires that physical and social infrastructure must be capable of being adequately funded and delivered before permitting development of development areas. Therefore, the Plan's infrastructure planning requirements need to be factored into the design and feasibility of projects.

⁷ Integrated Planning Act, sections 3.5.4(2)(c)(iii), 3.5.5(2)(c)(iii) and 3.5.5A(2)(e)(iii)

⁸ Integrated Planning Act, section 3.5.11(4A)

⁹ Integrated Planning Act, section 3.5.13

¹⁰ Integrated Planning Act, section 3.5.14(4)(c)

¹¹ Integrated Planning Act, sections 3.5.6(2) and 4.1.52(2)(a)

Other regional policies may deal with aspects of infrastructure in addition to section 10. For example, section 8.9 deals with integrated land use and transport planning, while section 11 deals with water management and section 12 deals with integrated transport. So, in terms of the impact of the Regional Plan with respect to infrastructure, the plan needs to be read as a whole, with particular emphasis on the aspects which operate as policy.

Part D section 10 contains the following Desired Regional Outcome:

"Plan, coordinate and deliver regional infrastructure and services in a timely manner to support the regional settlement pattern and desired community outcomes."

The sub-regional narratives referred to above, which also operate as policy, will give local context to this Desired Regional Outcome.

The policy contained in the Desired Regional Outcome is given effect by a set of principles, sub-policies and programs. All of these in combination are stated to be the Plan's regional policies. As the Regional Plan is a statutory instrument, these policies have the force of law as policy, and are potentially relevant to the assessment of development applications.

The narrative supporting Desired Regional Outcome 10 references the South-East Queensland Infrastructure Plan and Program (SEQIPP), which is said to outline the Queensland Government's infrastructure priorities to support the Regional Plan. The SEQIPP is not a statutory instrument. It was written before the Regional Plan was finalised and came into effect, and references the draft Regional Plan rather than the final. The SEQIPP appears to have been prepared well before its release, which happened a week or so before the final Regional Plan. It is odd that it was released at that time, when it obviously was not going to align with the final Regional Plan. For example, the final Regional Plan excluded land that was within the urban footprint in both the draft Regional Plan, and the 2005 Regional Plan, and added other land to the urban footprint. In Redland, for example, population targets were significantly reduced and 900 hectares of land was taken out of the urban footprint, yet the sub-regional narrative under the heading "Infrastructure" identifies the same key projects for Redland to support delivery of the Regional Plan as the draft. These infrastructure projects are as follows:

- 4.17 *Redland sub-arterial road upgrade - Mt Gravatt-Capalaba Road to Tingalpa Creek - \$190 million*
- 4.18 *Cleveland-Redland Bay Road upgrade - South Street to Boundary Road - \$70 million*
- 4.19 *Redland Bay Road upgrade - Tingalpa Creek to Cleveland - Redland Bay Road - \$80 million*
- 4.20 *Eastern Busway - Buranda to Capalaba - \$3.264 billion*
- 4.21 *Cleveland Rail Corridor upgrades - \$375 million*

Given the substantial reductions in the urban footprint in Redland, which were based upon the local government's desire to limit growth, and koala conservation concerns, the planned infrastructure is likely to be under-utilised. There are probably other examples of such mis-alignment, particularly where additional land has been included in the urban footprint.

Protection of key sites, corridors and buffers

Regional Policy 10.4 addresses the protection of key sites and corridors. The stated principle is "identify, protect and manage key infrastructure sites and corridors". The Policy is stated as:

10.4.1 Identify, preserve and protect key sites, corridors and buffer areas for current and future regional infrastructure and services."

The relevant programs are stated to be as follows:

- 10.4.2 *Identify opportunities for co-location of joint infrastructure services, sites and corridors.*
- 10.4.3 *Minimise impacts from essential economic infrastructure by providing offsets in accordance with the principles of the Queensland Government Environmental Offsets Policy and relevant specific issue offset policies."*

The notes to the above regional policy state that:

"To achieve the strategic intent of the SEQ Regional Plan, sites and corridors for infrastructure such as transport and freight networks, pipelines, dams, transmission lines, outdoor recreation trails and biodiversity networks must be identified and preserved well ahead of time. The SEQIPP identifies a number of investigations where, dependent on the circumstances, it would be prudent to preserve potential corridors and sites at an early stage."

The Regional Plan promotes the protection of key sites, corridors and buffer areas and relies upon the SEQIPP and related government processes to define and map the sites' corridors. This would then be transferred to planning schemes which are required to be aligned with the Regional Plan. This approach recognises and relies upon the legal protection afforded to such corridors against incompatible development under planning law. A recent judicial statement in connection with these principles, following an exhaustive examination of previous case law, is as follows:

[39] *This is not the first time the court has been asked to consider whether to grant approval to a proposal which might be inconsistent with a possible future road. It is not for this court to decide, in the context of an appeal such as this, whether a prospective road proposal should proceed or what form it should take. Those are decisions for the relevant road authorities. The power of the appropriate authority to decide such matters, acquire land as necessary and construct a future road would not be taken away by any development approval granted to the appellant by this court. A development approval for a proposal which conflicts with a future road proposal might however, complicate the decision of the relevant authority and increase the impacts of a road project, particularly if the approval is acted upon prior to any resumption. The likely implementation of an infrastructure project may also reflect adversely on the suitability of a site for a form of development which is inconsistent with the project. The weight to be attributed to a particular future road proposal will vary according to the circumstances."¹²*

[67] *While I appreciate the concern of Mr Derbyshire and the Council to resist a development approval for a retirement village on land the subject of Mr Derbyshire's preferred route, I am not persuaded that there is sufficient certainty about that preference coming to fruition and I am not prepared to attach decisive weight to it, particularly in light of the stage that it is at and its lack of status at this time. Subject to one qualification, I am satisfied that the appellant has discharged its onus, the appeal should be allowed and the application approved subject to conditions."¹³*

Obviously the elevation of these principles to a statement of regional planning policy adds emphasis, though I expect it would still be necessary for a relevant corridor or key site to properly identify and plan for development within a reasonable timeframe in order for the protection to be effective. It will be a matter of fact and degree as to the protection afforded to each project mentioned in the SEQIPP. As stated in the notes to the regional policy, the SEQIPP identifies investigations where "dependent on the circumstances" it would be prudent to preserve potential corridors and sites at an early stage. This suggests that the SEQIPP does not of itself sufficiently identify sites and corridors for the purposes of achieving protection. However, it can be expected that in some instances there will be momentum towards those steps being taken at an early stage.

¹² *Australian Retirement Homes Ltd v. Pine Rivers Shire Council* [2007] QPEC 085, per Rackemann DCJ

¹³ *Australian Retirement Homes Ltd v. Pine Rivers Shire Council* [2007] QPEC 085, per Rackemann DCJ

Recovering infrastructure costs

The supporting narrative to Desired Regional Outcome 10 states:

“Development proposed without existing or planned infrastructure will have to demonstrate how infrastructure can be provided and funded prior to the development being approved.”

Principle 10.2 refers to the co-ordination and integrated planning and delivery of infrastructure services at regional, sub-regional and local levels. Further, part D section 10 deals with infrastructure in the context of:

- economic infrastructure – transport, water and energy;
- social infrastructure – education, health, emergency services and corrective services; and
- environmental – natural areas, open space and recreational.

The statutory basis for imposing conditions on development approvals, and for requiring an infrastructure agreement, is relevant to the provisions of the Regional Plan discussed above. The Regional Plan incorporates the definitions used in the Integrated Planning Act, unless otherwise specified in the plan. The Integrated Planning Act’s definition of “infrastructure”¹⁴ is wide enough to fit comfortably with the broad approach to what constitutes “infrastructure” taken at the beginning of section 10 of the Regional Plan¹⁵, mentioned above. The Integrated Planning Act also defines “State infrastructure”¹⁶ and “State Infrastructure Provider”. State Infrastructure Providers are either concurrence agencies which supply “State infrastructure” or a concurrence agency that administers a Regional Plan for a designated region. In some instances the Department of Infrastructure and Planning, as administrator of the Regional Plan, will be a concurrence agency (for example, for a section 3.1.6 preliminary approval) and therefore will be a State Infrastructure Provider. State Infrastructure Providers have specific conditioning powers under the Integrated Planning Act¹⁷. These powers are applied to “infrastructure”, while the powers relating to infrastructure funding in master planned areas relate to “State infrastructure”. As mentioned, these two terms are defined differently.

The above powers may be contrasted with the more limited scope of infrastructure charging at the local government level, which is constrained by the definition of “development infrastructure” under the Integrated Planning Act.

The definition of “infrastructure” under the Integrated Planning Act is open ended, and this appears to be recognised by the language at the start of section 10 of the Regional Plan. The point to be made here is that at the State level, the concept of “infrastructure” may well expand beyond traditional usage as understood by the development industry. The references to health services and corrective services at the start of section 10 are examples, as is the broad approach to State infrastructure evident in the SEQIPP. While the conditioning power for State Infrastructure Providers uses transport infrastructure as an example, the relevant sections are not so limited.

¹⁴ Integrated Planning Act, schedule 10 “Infrastructure” includes land, facilities, services and works used for supporting economic activity and meeting environmental needs

¹⁵ At page 124, column 1

¹⁶ Integrated Planning Act, schedule 10 “State infrastructure” means any of the following:

- (a) State schools infrastructure;
- (b) public transport infrastructure;
- (c) State-controlled roads infrastructure;
- (d) emergency services infrastructure;
- (e) health infrastructure, including hospitals and associated institutions infrastructure;
- (f) freight rail infrastructure;
- (g) State urban and rural residential water cycle management infrastructure, including infrastructure for water supply, sewerage, collecting water, treating water, stream managing, disposing of water and flood mitigation;
- (h) justice administration facilities, including court or police facilities.

¹⁷ Integrated Planning Act, sections 5.1.28 – 5.1.32

As mentioned, the Integrated Planning Act contains specific funding powers for infrastructure in master planned areas¹⁸. These powers are referable to "State infrastructure" and allow for a regulated infrastructure charges schedule to be made for such areas, and for infrastructure agreements to be made in relation to such State infrastructure. This is recognised in section 10.2 of the Regional Plan, which refers to funding mechanisms for infrastructure projects. Section 10.2.6 refers to:

"Development mechanisms such as State infrastructure agreements for Development Areas where appropriate."

The notes to this policy program state:

"Where the Queensland Government is providing new infrastructure to lead development ahead of anticipated demand, landowners and developers of new areas who stand to benefit significantly will be required to contribute to capital works infrastructure provision through mechanisms such as a State Infrastructure Agreement, or contribute works or land in lieu. In some instances, mechanisms such as State Infrastructure Agreements can support the timely delivery of infrastructure programs ahead of anticipated demand."

Accordingly there are options for the State to recover the cost of "infrastructure" through the Integrated Planning Act's conditioning powers, or to recover the costs of "State infrastructure" through the declaration of land as a master planned area, allowing the imposition of a regulated State infrastructure charges schedule. However, there are differences between the two definitions. The latter definition appears to be more limited in relation to certain aspects of social infrastructure.

Social infrastructure

Regional Policy 10.8 deals with social infrastructure, the relevant principle being "plan and coordinate the effective and timely provision of social infrastructure". The relevant policies require identification and planning for social infrastructure in sequence with residential development, and that social infrastructure is well located and accessible in relation to residential development, public transport services, employment and educational opportunities. Policy 10.8.3 refers to the identification and securing of sites for social infrastructure "particularly in broad hectare developments located in outlying areas with high service and transport needs, and in development in activity centres in established urban areas identified to accommodate further growth". One of the programs is to update and implement the SEQ Regional Plan 2005-2026 Implementation Guideline No. 5 for Social Infrastructure Planning to inform planning for new development. Reference to this guideline is made in the notes to the section, which underscores the scope of the concept of social infrastructure, namely:

- *universal facilities and services such as education, training, health, open space, recreation and sport, safety and emergency services, religious, arts and cultural facilities, and community meeting places*
- *lifecycle-targeted facilities and services, such as those for children, young people and older people*
- *targeted facilities and services for groups with special needs, such as families, people with a disability, Aboriginal and Torres Strait Islander peoples and culturally diverse people.*

The extent to which the private sector, in undertaking development, will be required to fund or contribute to the funding of all of these categories of social infrastructure remains to be seen. The differences between "infrastructure" and "State infrastructure" may influence those outcomes. However, it is clear that sites for the provision of such infrastructure are intended to be secured within greenfield residential development, and will no doubt be targeted in master planned areas.

¹⁸ Integrated Planning Act, sections 5.3.1 to 5.3.9



Concluding comments

Regional planning in Queensland will usher in a new era in developer funding of State infrastructure. The provisions of the Regional Plan relating to infrastructure, when read in conjunction with the Integrated Planning Act, suggest that there is great scope for expanded use of the powers in relation to State level infrastructure. There will inevitably be arguments between developers and State agencies as to whether infrastructure is within the scope of the State's conditioning powers under the legislation. This aspect of regional planning is clearly one factor that will influence land use and master planning in new development areas.

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