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SEQ Regional Plan 2009-2031

The New Regulatory Provisions

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INGRAINED INTELLIGENCE

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The New Regulatory Provisions

The State government's recent release of the South East Queensland Regional Plan 2009-2031 has also involved the release of new regulatory provisions. The new regulatory provisions replace the regulatory provisions formerly contained in the South East Queensland Regional Plan 2005–2026, Amendment 1 and, most recently, the draft regulatory provisions contained in the draft version of the new Regional Plan.

The new regulatory provisions "give teeth" to the new Regional Plan by, among other things, changing the level of assessment in respect of particular development, identifying circumstances where the Department of Infrastructure and Planning will be a referral agency for a development application, and identifying assessment criteria against which a development application would be assessed. The new regulatory provisions appear, in summary, to be more streamlined and simpler to deal with than some earlier regulatory provisions. Given the detail of the new regulatory provisions, it is the purpose of this paper to highlight some of the provisions rather than deal with all the new regulatory provisions.

When the new regulatory provisions do *not* apply

Section 1.5 identifies development to which the new regulatory provisions do not apply.

Sections 2.1 and 3.1 of the new regulatory provisions do not apply to development in the Regional Landscape and Rural Production Area (RLRP) or Rural Living Area (RL) if the premises are in an urban area under a planning scheme[1] or a biodiversity development offset area approved under a State planning Instrument.

The new regulatory provisions also do not apply to:

- development in a rural precinct if it is consistent with the rural precinct;
- development exempt from assessment against a planning scheme under Schedule 9 of the *Integrated Planning Act 1997*;
- development carried out under a development approval which has not lapsed for a development application that was properly made before the new regulatory provisions commenced or to which Division 2 of the new regulatory provisions applied[2];
- development that is consistent with a preliminary approval under Section 3.1.6 of the Integrated Planning Act[3] which has not lapsed where the development application for the preliminary approval was properly made before the new regulatory provisions commenced or assessed against Division 2 of the new regulatory provisions;
- development that is generally in accordance with a rezoning approval[4] where the development entitlements from the rezoning approval are conferred by:
    - the resulting zone in a transitional planning scheme;
    - a development permit or acknowledgement notice mentioned in Section 3.2.5(1)(a) of the Integrated Planning Act[5] for a development application (superseded planning scheme) for the resulting zone in a transitional planning scheme which is a superseded planning scheme; or
    - a planning scheme (other than a transitional planning scheme).

[1] Other than a transitional planning scheme
[2] Division 2 applies to material change of use outside the Urban Footprint and material change of use in development area
[3] That is, a preliminary approval that states the way in which the effect of a local planning instrument is varied
[4] Which is defined in Schedule 2 of the new regulatory provisions
[5] That is, where an application is a development application (superseded planning scheme) advises that the applicant proposes to carry out development under a superseded planning scheme, the acknowledgement notice states that the applicant may proceed as proposed as if the development were to be carried out under the superseded planning scheme

- development that is declared to be a significant project under Section 26(1)(a) of the *State Development and Public Works Organisation Act 1971* in a State development area under that Act.

This paper deals with some of the exclusions in more detail.

Development in the RLRP or RL if the premises are in an urban area under a planning scheme

Section 1.5(1) of the new regulatory provisions provides that Sections 2.1 and 3.1 of the new regulatory provisions do not apply to development in the RLRP and RL if the premises are in an urban area under a planning scheme. Sections 2.1 and 3.1 concern material change of use outside the Urban Footprint and subdivision in the RLRP and RL.

The Integrated Planning Act requires that a local government must amend its planning scheme to reflect a regional plan (e.g. the new regulatory provisions) as made, amended or replaced[6]. Furthermore, to the extent there is an inconsistency between a regional plan and any other plan, policy or code under an Act of a planning nature, including any other planning instrument, the regional plan prevails[7]. The *Sustainable Planning Bill 2009* contains similar provisions[8]. Accordingly, the new Regional Plan is the pre-eminent planning document in Queensland and planning schemes must be amended to reflect it. If land is in an urban area under a planning scheme, but is designated RLRP or RL under the new Regional Plan, the planning scheme must be amended to put the land into a rural zone or like zone. It is therefore unclear why this exemption has been included in the new regulatory provisions. Perhaps the rationale is that it is fair to allow development to be undertaken, or development applications to be made, based on the current zoning, pending the planning scheme having changed to align with the RLRP or RL designation. Such an application would still face difficulties due to the evident change in policy because of the designation of the land under the new Regional Plan, but at least there would be no outright prohibition on the making of applications, or preclusion of approval.

Development in a rural precinct if it is consistent with the rural precinct

This exclusion was not contained in some earlier regulatory provisions. Rural precinct is defined in the new regulatory provisions to mean land endorsed by the regional Planning Minister in a gazette notice as a rural precinct for the purposes of the new regulatory provisions[9].

Excluding development which is "consistent with" the rural precinct from the operation of the new regulatory provisions appears to be a logical approach, as it seems unnecessary to require assessment against the new regulatory provisions where development would be anticipated in the rural precinct.

It seems likely that there will be some debate in respect of whether development is "consistent with" the rural precinct. The phrase "consistent with" is not defined in the new regulatory provisions and it is not clear whether the Court would take a narrow or broad reading of the phrase in the context of the new regulatory provisions. However, the Court of Appeal has held that "*planning instruments should be construed broadly with a sensible practical approach to best achieve their apparent purpose*" and it is improbable that it is intended that regulatory provisions should "*...dispossess an owner of unrealised but tangible use rights suddenly and arbitrarily and without the prospect of compensation in the absence of a plain and unequivocal legislative intent*"[10]. In cases where it is necessary to construe ambiguous regulatory provisions, an applicant may be given the benefit of the ambiguity[11].

It is a question which would largely be determined on the facts, for example, by considering, among other things, the type, nature and scale of the proposed development and the planning policy evident in the scheme with respect to the rural precinct.

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[6] Section 2.5A.20 of the *Integrated Planning Act 1997*
[7] Section 2.5A.21 of the *Integrated Planning Act 1997*
[8] Clauses 26 and 29 of the *Sustainable Planning Bill 2009*
[9] Section 2.2 of the new regulatory provisions
[10] *Tolocorp Pty Ltd v Noosa Shire Council* [2007] QCA 33 at [7]
[11] *Tolocorp Pty Ltd v Noosa Shire Council* [2007] QCA 33 at [8]

Development carried out under a development approval

Some earlier regulatory provisions did not apply to development carried out under a development approval where the application was made before 27 October 2004[12].

The new regulatory provisions contain a similar exclusion, but provide that the new regulatory provisions do not apply to development carried out under a development approval which has not lapsed for a development application that was properly made before the new regulatory provisions commenced or to which Division 2 of the new regulatory provisions applied[13].

A development approval is not defined in the new regulatory provisions, but the definition of a development approval in the Integrated Planning Act encompasses a preliminary approval, a development permit, or both; and these definitions apply to the new regulatory provisions[14]. Therefore, the new regulatory provisions will not apply to a preliminary approval or development permit which has not lapsed for a development application:

- that was properly made before the new regulatory provisions commenced; or
- to which Division 2 of the new regulatory provisions applied.

This exclusion appears to raise a question about whether subsequent development applications for development permits would be considered development "carried out under" a preliminary approval. There are two possible interpretations available.

A narrow interpretation would be that development carried out under a development approval is limited to the particular type or aspect of development approved by the development approval. Although the new regulatory provisions no longer contain clarification that some exclusions apply even if further development permits are required, arguably this must be implied, at least in the case of a preliminary approval, as a preliminary approval does not approve development to be carried out, which means that further development permits are likely to be necessary in order to implement the preliminary approval. An example of the narrow construction may be where a development application for a development permit for material change of use is required and contemplated by an earlier preliminary approval for material change of use.

On the other hand, a broader construction would be that development carried out under a development approval extends to all types or aspects of development which is contemplated by the development approval (e.g. reconfiguration of a lot (ROL) which was contemplated by a development application for a development approval for material change of use).

Development that is consistent with a preliminary approval under Section 3.1.6 of the Integrated Planning Act

This exclusion requires that development is "consistent with" a preliminary approval under Section 3.1.6 of Integrated Planning Act which has not lapsed where the development application for the preliminary approval was properly made before the new regulatory provisions commenced or assessed against Division 2 of the new regulatory provisions.

Arguments may arise as to whether development is "consistent with" a preliminary approval. As discussed, the phrase "consistent with" is not defined in the new regulatory provisions and the Court's reading of the phrase in the context of the new regulatory provisions is not clear. For example, it may be contended that a development application is not consistent with a preliminary approval under Section 3.1.6 of the Integrated Planning Act where development remains impact assessable under such an approval - that is, the preliminary approval does not lower the level of assessment. It is likely to be a grey area as some preliminary approvals may, by way of example, approve a master plan under which some aspects of development (e.g. a shopping centre) are contemplated but remain impact assessable.

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[12] Section 1.4(1)(a) of the *South East Queensland Regional Plan 2005-2026*
[13] Division 2 applies to material change of use outside the Urban Footprint and material change of use in development area
[14] Page 8 of the *South East Queensland Regional Plan 2009-2031*

However, this exclusion appears to be broader than the requirement that development be "carried out under" a development approval, as it would seem to encompass making development applications for various types or aspects of development (e.g. material change of use, ROL, operational work) provided that such development would be "consistent with" the preliminary approval.

Interpretation of exclusions in some earlier regulatory provisions

Some earlier regulatory provisions contained provisions which assisted with interpretation of the exclusions. For example, earlier regulatory provisions provided that the exclusions applied even where further development permits were needed to facilitate an approval for development carried out under a development approval for a development application that was made before 27 October 2004.

While such provisions assisted with certainty of interpretation of the exclusions, it appears the new regulatory provisions are capable of interpretation in the absence of these provisions.

Division 2 – material change of use

Division 2 of the new regulatory provisions provide for material change of use outside the Urban Footprint and in a development area.

Material change of use outside the Urban Footprint

Section 2.1 identifies material change of use in the RLRP and RL which does and does not require assessment by the referral agency for the new regulatory provisions (i.e. the Department of Infrastructure and Planning).

In the RLRP and RL, material change of use for community activity, sport and recreation, tourist activity, indoor recreation, residential development, rural residential development and other urban activities (e.g. material change of use for an industrial and commercial purpose or service station)[15] does not require assessment by the Department of Infrastructure and Planning against the new regulatory provisions, where it complies with the requirements set out in Section 2.1 (e.g. gross floor area, incidental or associated activities).

Material change of use for community activity, sport and recreation, and tourist activity which does not fall within the scope of development that does not require assessment against the new regulatory provisions must, therefore, be assessed by the Department of Infrastructure and Planning. It must also be impact assessable and comply with the site, use and strategic intent requirements under Schedule 4 of the new regulatory provisions which, among other things, requires the proposed site to be directly accessible to appropriate existing or proposed transport infrastructure, be able to be serviced with efficient provision of physical infrastructure and have timely access to a suitable workforce. Development on the proposed site must exclude areas of significant biodiversity values, koala habitat and unacceptable risk from natural hazards including predicted impacts of climate change; use of the premises must not include residential development; and the strategic intent of the new regulatory provisions, including all Desired Regional Outcomes, must be met.

Material change of use for indoor recreation, residential development, rural residential development and other urban activities which do not fall within the scope of development that does not require assessment against the new regulatory provisions must, therefore, be assessed by the Department of Infrastructure and Planning, be impact assessable[16] and comply with the following assessment criteria:

- the locational requirements or environmental impacts of the development necessitate its location outside the Urban Footprint; and

[15] Each of these terms is defined in Schedule 2 of the new regulatory provisions
[16] This is not clearly stated in Section 2.1 of the new regulatory provisions but is inferred from tables 2B, 2C, 2D and 2E of the new regulatory provisions

- there is an overriding need for the development in the public interest.

As to the first requirement, it is conceivable that there may be activities which require location outside the Urban Footprint (e.g. possibly activities such as mining or quarrying).

As to the latter requirement, Schedule 3 of the new regulatory provisions contains a similar test to that under the earlier regulatory provisions and provides that:

To determine an overriding need for the development in the public interest an application must establish:

(a) The overall social, economic and environmental benefits of the material change of use weighed against:

i. any detrimental impact upon the natural values of the site; and

ii. conflicts with the desired regional outcomes of the SEQ Regional Plan, especially in relation to promoting the consolidation of development within the Urban Footprint and preventing land fragmentation in the Regional Landscape and Rural Production Area; and

(b) That the community would experience significant adverse economic, social or environmental impacts if the material change of use proposal were not to proceed.

(c) This may require an assessment to determine if the material change of use could reasonably be located in the Urban Footprint.

This appears to be a difficult test to satisfy, particularly the requirement to establish that the community would experience significant adverse economic, social or environmental impacts if the material change of use proposal were not to proceed. It is likely that there will be very few, if any, material change of use proposals which would satisfy such requirements.

In contrast to earlier regulatory provisions, the new regulatory provisions do not provide for changes to existing urban activities in RLRP and RL. The Integrated Planning Act provides that material change of use of premises means, among other things, a material change in the intensity or scale of the use of the premises[17] and the Sustainable Planning Bill provides that a material change of use of premises means, among other things, a material increase in the intensity or scale of the use of the premises. It may therefore be the case that changes to existing urban activities in RLRP and RL will amount to a material change of use as defined by Integrated Planning Act, or subsequently the Sustainable Planning Bill, and then require assessment under the new regulatory provisions. If this is the case, it appears that changes to existing urban activities under earlier regulatory provisions were afforded more flexibility in assessment (i.e. the circumstances where material change of use required assessment against earlier regulatory provisions, level of assessment and assessment criteria) than changes which will be made under the new regulatory provisions, as there is no specific accommodation for changes to existing urban activities, which means that changes will be assessed on the same basis as a new material change of use (e.g. gross floor area).

Material change of use in a development area

A development area means land designated by the regional Planning Minister in a gazette notice as a local development area or regional development area for the purposes of the new regulatory provisions. Development areas are dealt with in detail in Section 8.10 of the new Regional Plan.

A material change of use does not require assessment by the Department of Infrastructure and Planning where it involves exempt, self and code assessable development under the planning scheme where the gross floor area on the premises is no more than 10,000m² and the premises is no more than 10,000m².

Other material change of use must be assessed by the Department of Infrastructure and Planning against the identified assessment criteria, that is, that development be "consistent with" the future planning intent for the area. Difficulties in respect of interpreting the phrase "consistent with" have been discussed above. As to identifying the future planning

[17] Section 1.3.5 of the *Integrated Planning Act 1997*

intent for an area, it may seem a relatively simple task but, in practice, it is often difficult, as there may be inconsistencies within a planning scheme, multiple changes to the designation of land, differences between Council's stated and documented intentions for development of land, difficulty in identifying "the area" and failure to regularly update planning schemes to reflect current developments and needs. It therefore seems likely that there will be debate about whether proposed development would be "consistent with" the future planning intent for an area.

Division 3 – subdivision

Division 3 of the new regulatory provisions provide for subdivision in the RLRP and in a development area.

Subdivision in the RLRP

Subdivision[18] of land (i.e. ROL) in the RLRP identified in column one of table 3A does not require assessment by the Department of Infrastructure and Planning. However, subdivision of land in the RLRP is contrary to the new regulatory provisions and may not occur if identified in column two of table 3A (i.e. development which is not identified in column one of table 3A).

Accordingly, column one of table 3A identifies subdivision which does not require assessment by the Department of Infrastructure and Planning and includes:

- subdivision "consistent with" a rural subdivision precinct, that is, an area designated by the regional Planning Minister in a gazette notice as a rural subdivision precinct for the purposes of the new regulatory provisions;
- subdivision results in lots of 100 hectares or greater;
- subdivision results in no additional lots (e.g. amalgamation);
- subdivision is in an area designated by the Minister in a gazette notice as having a rural residential purpose and subject to a development application that is properly made on or before 6 December 2010;
- subdivision is limited to one additional lot created to accommodate identified facilities or infrastructure (e.g. emergency services facilities and electricity infrastructure);
- subdivision divides one lot into two where the existing lot is severed by a road gazetted before 2 March 2006 and the resulting lot boundaries use the road as the boundary of subdivision;
- subdivision is consistent with a development approval for material change of use that has not lapsed where the application for the development approval was properly made before 31 October 2006 or the material change of use was assessed by a referral agency against Division 2 of the applicable State planning regulatory provisions.

It appears clear that the above provisions are intended to preclude subdivision of land which would lead to land fragmentation or urban development in the RLRP. Mr Gary White of the Department of Infrastructure and Planning recently indicated that the Department made no apologies for the subdivision provisions including, in particular, retaining the prohibition against subdivision of land in the RLRP into lots less than 100 hectares[19].

Interpretation of the phrase "consistent with" would again seem likely to be the subject of debate in the context of subdivision and would seem to be a matter largely to be determined on the facts.

Any other subdivision in the RLRP is contrary to the new regulatory provisions and may not occur.

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[18] Meaning creating a lot by subdividing another lot or dividing land into parts by agreement, rendering different parts of a lot immediately available for separate disposition or occupation, but not a lease for a term not exceeding 10 years (Schedule 2 of new regulatory provisions)

[19] Mr White gave a presentation at a seminar for the Planning Institute of Australia on 10 August 2009

Subdivision in a development area

Subdivision in a development area does not require assessment by the Department of Infrastructure and Planning where it is identified in column one of table 3B. Subdivision in a development area identified in column two of table 3B requires assessment by the Department and impact assessment against the identified assessment criteria.

Column one of table 3B identifies subdivision which does not require assessment by the Department of Infrastructure and Planning and includes:

- subdivision which complies with a master plan for a declared master planned area;
- subdivision resulting in no additional lots (e.g. amalgamation of lots);
- subdivision limited to one additional lot created to accommodate identified facilities or infrastructure (e.g. emergency services facilities and electricity infrastructure);
- subdivision which divides one lot into two where the existing lot is severed by a road gazetted before 2 March 2006 and the resulting boundaries use the road as the boundary of subdivision;
- subdivision consistent with a development approval for material change of use that has not lapsed where the application for the development approval was properly made before 31 October 2006 or the material change of use was assessed by a referral agency against Division 2 of the applicable State planning regulatory provisions.

Subdivision which is not identified above must be "consistent with" the future planning intent for the area. This criterion has been discussed above in the context of material change of use and, again, it seems likely that there will be debate in respect of identification of the "future planning intent for an area" and whether development would be "consistent with" that future planning intent.

Division 4 – assessment criteria for development applications

Division 4 provides that the assessment manager for a development application involving material change of use for an extension of more than 10,000m² of retail floor space must assess the application against the assessment criteria, which provides the development must have regard to the provision of sufficient land with street frontage for non-retail business premises. This is also dealt with in James Ireland's paper in respect of the new Regional Plan.

Division 4 appears to apply to all designations of land unless the new regulatory provisions have been excluded.

Division 6 – contrary and inconsistent development

Development is only contrary to or inconsistent with the new regulatory provisions to the extent the development is identified in column two of table 3A, which identifies subdivision of land in the RLRP which may not occur.

This reflects the new regulatory provisions, as development which is not identified in column two of table 3A is assessable by the Department of Infrastructure and Planning and impact assessable and assessed against particular criteria, rather than prohibited by the new regulatory provisions. This approach appears to be directed towards assessment of development applications on merits rather than outright prohibitions. It therefore seems that the Department of Infrastructure and Planning will expand its role in assessment of development applications.

Conclusion

The new regulatory provisions appear to be are more streamlined than earlier regulatory provisions. However, it seems likely that there will be some debate in respect of the interpretation of some phrases in the new regulatory provisions, as some of the provisions lack clarity and may be open to different interpretations.