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Planning and Environment

Queensland's Regulatory Quagmire: The Dark Side of Planning

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Introduction

Urban planning has been described as "*a technical and political process concerned with the control of the use of land and design of the urban environment, including transportation networks, to guide and ensure the orderly development of settlements and communities. It concerns itself with research and analysis, strategic thinking, urban design, public consultation, policy recommendations, implementation and management*."[1] The purpose of urban planning is to provide a well functioning urban environment which meets the communities' needs. Does Queensland's regulatory system satisfy that purpose?

Until the enactment of the *Integrated Planning Act 1997* (IPA), planning legislation in Queensland did not attempt to identify the purpose of land use regulation. While the IPA used the term "planning" extensively, and the *Sustainable Planning Act 2009* (SPA) continues to do so, it did not attempt to define the concept. It is necessary to delve into the provisions of the IPA and the SPA concerning the content of planning schemes to appreciate what, in the statutory context, "planning" seeks to achieve and thus its meaning. The IPA introduced as part of the Act's purpose, a primary goal of ecological protection.[2] This formally introduced a new dimension into the concept of planning. While planning has traditionally in one way or another promoted nature conservation where appropriate[3], that objective mainly fell to other State legislation.[4] The IPA, and subsequently the SPA, incorporated objectives of economic development and ecological protection which in a pure sense are mutually exclusive. This inconsistency is sought to be resolved through a balancing exercise whereby one will give way to the other in appropriate circumstances.[5] The balancing of these competing concepts has come to be seen as achieving "sustainable" planning outcomes.

The third element of the statutory purpose, under both IPA and the SPA, is "*maintenance of the cultural, economic, physical and social well being of people and communities*".[6] That is, in substance, the original purpose of "planning". The first two objectives can be seen as potential outcomes of the third.

The reason for raising the general concept of planning and the purpose of planning regulation is that the performance of regulation should be tested against the purpose it is intended to serve. If regulation fails the purpose test then it merely creates pointless process.

Taylor's formulation of urban planning identifies that it is a technical and political process. The question at the heart of this paper is whether the regulatory process has reached the point where it is no longer properly aligned with the purpose of urban planning, and works against achievement of sustainable planning outcomes. This question will be examined with respect to the following:

- Regional plans;
- State planning policies; and
- Standard Planning Scheme Provisions.

The observations resulting from that examination will be further considered in relation to discretionary decision making and performance based planning.

Regional plans

The following principles should be kept in mind when considering regional plans.

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[1] Taylor, Nigel 2007 *Urban Planning Theory since 1945*, London, Sage
[2] Sections 1.2.1 and 1.3.3
[3] eg Through the provision of parks and open space
[4] eg *Nature Conservation Act 1992; Vegetation Management Act 1999; Brisbane Forrest Park Act 1977; Marine Parks Act 2004; Environmental Protection Act 1994; Coastal Protection and Management Act 1995; Fisheries Act 1994*
[5] *Sustainable Planning Act 2009*, Section 8(a) and (b),;*Integrated Planning Act 1997*, Section 1.3.3(a) and (b)
[6] Ibid, Section 8(c) and Section 1.3.3(c)

1. A regional plan is a statutory instrument and has the force of law.[7]

2. A regional plan is taken to be a state interest.[8]

3. Unless the relevant Minister issues a dispensation, local governments must amend their planning schemes to reflect a regional plan.[9] The relevant Minister may himself amend the local government's planning scheme if it has not within 90 business days of the day notice of the making of a regional plan was gazetted made the relevant amendment or complied with the guidelines in that regard.[10]

4. An entity responsible for amending any plan, policy or code under an Act must take the relevant regional plan into account.[11]

5. If there is an inconsistency between a 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 prevails.[12]

6. The regulatory provisions under a regional plan, which are also a statutory instrument and have the force of law,[13] regulate development where they apply by, in combination with the SPA, precluding the making of certain development applications, changing the assessment criteria so as to reduce the prospects of approval or giving the relevant department administering the regional plan a concurrence role.[14]

7. To the extent that a regional plan has not been reflected in a planning scheme, the regional plan must be considered when assessing both code and impact assessable development applications.[15]

8. An assessment manager's decision on a development application must not be contrary to a regional plan's regulatory provisions (if applicable to the application).[16] Accordingly, approval in the event of such an inconsistency is not permitted.

9. For both code and impact assessable applications, the assessment manager's decision must not conflict with a regional plan unless necessary to ensure the decision complies with a State planning regulatory provision, or unless there are sufficient grounds to justify the decision, despite the conflict.[17]

10. Where conflict with the provisions of a planning scheme is an issue, weight may be given to a regional plan as a later law or policy, and may thus be a sufficient ground for overcoming conflict with the planning scheme.[18]

These statutory rules are quite complex when applied for the purpose of testing whether development conflicts with a planning scheme and a regional plan.

Using the SEQ Regional Plan 2009-2031 as an example, its purpose is to manage growth in the region in the most sustainable way to protect and enhance quality of life in the region.[19] The emerging regional growth issues are said to be population growth, housing affordability, transport congestion, climate change and employment generation.[20] The current SEQ Regional Plan continues the themes of the previous regional plan of promoting compact urban forms and

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[7] SPA, section 24
[8] SPA, section 25
[9] SPA, section 26(2) and section 29(2)
[10] SPA, section 29(3)(b)
[11] SPA, section 26(2)
[12] SPA, section 26(3)
[13] SPA, section 17(1)
[14] SPA, section 21 and, for example, the South East Queensland Regional Plan 2009-2031 State Planning Regulatory Provisions
[15] SPA, section 313(2)(b) and 314(2)(b)
[16] SPA, section 324(3)
[17] SPA, section 326(1)
[18] SPA, section 317(1) and 326(1)(b) operating in combination with sections 26 and 29
[19] *South East Queensland Regional Plan 2009-2031*, Part A – Introduction, page 4
[20] *South East Queensland Regional Plan 2009-2031*, Part A – Introduction, page 4

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 planning the provision of infrastructure by State and local governments ahead of urban expansion. In some respects the current SEQ Regional Plan now contains more detail and expands the influence of the State over matters of general planning and design.

A regional plan is said to enhance the purposes of the SPA by providing an "integrated policy" for the relevant region[21] and identifies desired regional outcomes and the policies and actions to achieve those outcomes.[22] It is intended to identify the future spatial structure in terms of future regional land use patterns and infrastructure provision[23] and the key environmental, economic and cultural resources to be preserved, maintained or developed.[24]

Turning again to the SEQ Regional Plan, it has been in force since October 2004 in various iterations, including the original draft SEQ Regional Plan. Yet it has not been fully reflected in the region's planning schemes. The former State government did not actively require planning schemes to be amended to reflect regional plans and, generally speaking, only those SEQ local governments that adopted new planning schemes after the regional plan commenced attempted to reflect the regional plan in their planning schemes. The focus of the SEQ Regional Plan, at least in the early versions, was to set the urban footprint boundary, by largely following existing zonings, and otherwise to replicate existing planning scheme zonings at a coarser scale through two zones.

As mentioned above, a planning scheme cannot be inconsistent with a regional plan, regardless of how it states the way in which the scheme has attempted to reflect the regional plan. To the extent that there is any inconsistency between a regional plan and a planning scheme, the former prevails to the extent of the inconsistency.[25] In theory there are two basic inverse consequences of such inconsistency. On the one hand, development that is contrary to a regional plan but consistent with a planning scheme should not be supported. Conversely, development that is contrary to a planning scheme but consistent with a regional plan should be supported. However, it is not as simple as that in practice. In the first place regional plans, through their associated regulatory provisions, are very specific in proscribing urban land uses outside of the urban footprint boundary, but on the other hand are very general in encouraging the establishment of urban uses within the urban footprint boundary. The broad categorisation of "urban footprint" covers a multitude of urban land uses including public open space. Regardless of what the highest and best "urban" land use might be, designation of land within the urban footprint can be satisfied by a lower order urban zoning in a planning scheme, even one which precludes development or proposes a land use that is unlikely to ever be economically feasible or practical. Experience with the regional plan suggests that the inclusion of land in the urban footprint for the obvious purpose of promoting greenfield residential expansion, does not necessarily provide any certainty that such development can in fact be achieved.

Accepting that part of a regional plan's role is to manage growth, there is also a responsibility on the part of the State government to drive changes to constituent planning schemes in accordance with the very clear intent of the SPA. Unless this role is taken seriously, regional plans will operate as an impediment to, rather than as a facilitator of, economic growth and the associated physical cultural and social benefits.

Against the above background the SPA promotes regional plans as the highest order planning instrument and makes the consequence of conflict with a regional plan, obligatory refusal on the development application, unless there are sufficient reasons in the public interest to warrant approval. This is the test which operates through the SPA's decision rules for development applications in respect of land within the urban footprint. Outside the urban footprint, for those applications that are able to achieve "properly made" status, the test for overcoming conflict with the regional plan is more onerous.[26]

Focusing then on land within an urban boundary under a regional plan, does the regional plan serve any useful planning purpose, or does it merely mirror the planning which has already been undertaken by local governments? Single State interest issues are supposed to be driven forward into local planning instruments through the State Planning Policies (SPPs). The former Department of Infrastructure and Planning stated that *"regional plans reflect and balance SPPs as*

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[21] SPA, section 23(b)
[22] SPA, section 28(a)
[23] SPA, section 28(b)
[24] SPA, section 28(b)(iii)
[25] SPA section 26(3)
[26] SEQ Regional Plan 2009-2031 regulatory provisions schedule 3

they provide an agreed spatial expression of the state interests addressed by those SPPs at the regional level".[27] To date the State interests promoted through SPPs have mainly been concerned with environmental or natural resource conservation. There has not been a single SPP concerned with promoting particular forms of development in any part of the State, save for the extractive industry SPP.

Greater Brisbane has the largest local government planning area in Australia. The Brisbane City Council is well resourced with strategic planners and has a sophisticated program of ongoing local planning reform within its urban areas. Does the regional plan assist in planning for greater Brisbane? Do the SPA's decision rules relating to conflict with the regional plan assist Brisbane City Council in dealing with development applications?

If regional plans are intended to drive top down planning to ensure that State's interests are properly coordinated and applied in local planning instruments, that outcome will not be assisted by the SPA's decision rules. The outcome can only be achieved by vigorous practical action at the State level. Regional plans are drawn at a large scale and, for the most part, employ language that is usually aspirational. Looking to a regional plan for assistance in supporting a development application within the urban footprint usually results in disappointment. Conflict with the regional plan is more often used as a reason for refusing an application than the reverse.

Development of land outside the urban footprint boundary is strongly controlled through state planning regulatory provisions. The regulation of development within the urban footprint through a regional plan is unlikely to serve a useful purpose unless the regional plan adopts a finer grained approach with respect to urban land uses. That has not however been the political intent of regional planning which defers to local government for the allocation of land uses within the urban footprint.

In summary, regional plans have been successful in immediately preventing the development of land outside the urban footprint, through those plans' regulatory provisions. However they have not had the same impact in reverse in promoting the development of land within the urban footprint. Regional plans are strongly anti-growth outside the urban footprint but growth neutral or only weakly pro-growth within the urban footprint. If providing housing at affordable prices or rents to people on average incomes is seen as a key element of sustainable planning regional plans are not necessarily achieving that outcome.

State planning policies

As already noted, at a policy level, SPPs are taken into account when making regional plans. Local governments are required to reflect both regional plans and SPPs in their planning schemes.[28]

An assessment manager must assess code and impact assessable development applications against SPPs to the extent the SPP is not identified in a regional plan as being appropriately reflected in the regional plan.[29] One would expect to find a clear, prominent statement within regional plans indicating the SPPs which are appropriately reflected in the plan. An examination of the recent Wide Bay Burnett Regional Plan, for example, failed to identify such a statement.

Under the SPA, an SPP is a statutory instrument with the force of law that advances the purposes of the SPA by stating the State's policy about a matter of State interest.[30] SPPs prevail, to the extent of any inconsistency, over local planning instruments but, in the hierarchy of State planning instruments, are subservient to regulatory provisions and regional plans.31 Three new SPPs commenced in the last six months.[32]

The position under the SPA in respect of SPPs differs from that under its predecessor, the IPA, which identified SPPs as one of a range of instruments taken into account for assessment, but did not mandate refusal of a development

[27] Department of Infrastructure and Planning, "State Planning Instruments Programme – Policy Paper" page 4
[28] SPA, sections 88 and 90
[29] SPA, section 313(2)(b) and 314(2)(d)
[30] SPA, sections 40 and 41
[31] SPA, section 43
[32] SPP 4/11 – Protecting wetlands of high ecological significance in Great Barrier Reef Catchments (25 November 2011); SPP 1/12 – Protection of Queensland's Strategic Cropping Land (30 January 2012); and SPP 3/11 – Coastal Protection (3 February 2012)

application in the event of conflict with an SPP.33 Therefore SPPs now have an elevated role in the SPA's assessment and decision process.

Under the SPA, regulatory provisions and regional plans are pre-eminent, followed by SPPs, and then by planning schemes. The lower order instruments in theory reflect the higher order instruments. This hierarchy however does not contemplate that SPPs influence higher order instruments such as regional plans nor that SPPs would become prescriptive regulatory instruments.

The Department of Infrastructure and Planning issued a guideline relating to the State planning instruments program.[34] This guideline provides information in relation to the making of State planning instruments. In respect of regional plans and SPPs it states as follows:

> *"Regional plans allow the State to translate its issue-specific policies into actual policies and requirements for a region, thereby cancelling any conflicts between state policies when these are applied to a particular geographic area. It is for this reason that regional plans override SPPs to the extent of an inconsistency; the regional plan becomes the 'vehicle' for those SPPs it has reflected in its regional policies and provisions. Statutory regional plans, supported as necessary by SPRPs, can override any other planning instruments and are capable of ensuring the effective delivery of the State's desired planning and development outcomes. If a State interest is only relevant for a specific region, the statutory regional plan for the region is more likely to be the appropriate instrument than a SPP."*[35]

Thus an SPP can override a planning scheme but will cease to do so if and when it is "neutralised" by a regional plan.

SPP 3/11: Coastal Protection includes a requirement that is presumably meant to strongly influence, if not bind, the State when the State is making a regional plan. It states:

> *"Making or amending a planning instrument*
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> *E.1 When making or amending a regional plan, the SPP overall policy outcome will be achieved when:*
>
> *(a) regional outcomes, future regional land-use patterns and key regional environmental, economic and cultural resources to be preserved, maintained or developed reflect the overall policy outcome of this SPP; and*
>
> *(b) the regional plan policies that are relevant to coastal protection and management are aligned with the specific policy outcomes of this SPP.*
>
> *Note: a regional plan need not fully reflect a policy outcome of this SPP due to the necessary balancing of relevant state and regional issues in the region. Section 26(3) of the Sustainable Planning Act 2009 states:*
>
> *'If there is any inconsistency between a regional plan and another planning instrument or any other plan, policy or code under an Act, the regional plan prevails to the extent of the inconsistency.'"*[36]

SPP 3/11 also states that it is intended to:

> *"Inform future regional plans as well as local government planning schemes and decisions on development applications ..."*[37]

And also:

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[33] IPA, section 3.5.13 and 3.5.14
[34] Department of Infrastructure and Planning, *State Planning Instruments Program Guideline*, undated
[35] Department of Infrastructure and Planning, *State Planning Instruments Program Guideline*, undated, page 7
[36] SPP 3/11, part E.1
[37] SPP 3/11, part A – Implementing the State planning policy

> *"... inform the preparation of any amendments to existing, or the preparation of future regional plans under the SPA to align regional plan policies with the outcomes of this SPP."*[38]

SPP 4/11: Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchment and SPP 1/12: Protection of Queensland's Strategic Cropping Land each contain provisions about achieving their respective policy outcomes through regional plans.[39] These SPPs envisage that they will be implemented by regional planning instruments and that the SPP will inform the preparation of any amendments to existing or preparation of future regional plans under the SPA to align the regional plan policies with the outcomes sought by the SPP.[40] However, like SPP 3/11 these SPPs acknowledge that the regional plans need not fully reflect the policy outcome of the SPP in consequence of section 26(3) of the SPA.

These recent SPPs clearly purport to strongly influence, if not control, the content of regional plans but at the same time acknowledge that the regional plans prevail.

These provisions concerning the influence of SPPs on regional plans need to be considered in the context of the prescriptive nature of the new generation of SPPs. They are no longer broad policy instruments but instead are very detailed and quite prescriptive to the point of proscribing development in defined localities.

The concept of "State interest" is very wide.[41] The State, as maker of regional plans, considers all State interests, but importantly the overarching purpose of making the regional plans is the cultural, economic, physical and social wellbeing to the people of Queensland. The three most recent SPPs, which emanated from the same State department, evince a strident desire for recognition, even supremacy. This is at odds with the "balance" required under purpose of the SPA and the true nature of urban planning which is not concerned with the promotion of single environmental or social issues, but rather with balancing a wide range of issues in the overall public interest.

From that perspective, the idea that an assessment manager's decision on a development application cannot conflict with an SPP without sufficient grounds, where the SPP is one dimensional and proscriptive in its policy approach, must be questioned. In looking for public interest grounds to overcome conflict with single issue SPPs, are economic factors even relevant? In this regard it should be noted that the three SPPs discussed above, have incorporated their own conflict rules which are much tougher than those contained in the SPA. They expressly spell out what amounts to conflict and how it can be overcome and thus purport to displace the standard test in SPA for overcoming conflict with a relevant instrument. The validity of this approach is obviously open to question. It is a reflection of the single minded stridency of the new generation of SPPs.

The idea that conflict between an SPP and a local plan will be resolved by the State through regional planning is fine in theory but in practice it creates a legal minefield.

Standard Planning Scheme Provisions

The SPA introduced a new category of State planning instrument, called the standard planning scheme provisions.[42] This creature was conceived during the review of the IPA following the then Minister for Local Government and Planning's announcement in February 2006 of a general review of the legislation. Extensive consultation revealed a concern about inconsistencies in the structure, language and application of planning schemes and a desire for a more uniform approach to their drafting. This occurred in the context of a broader general concern on the part of stakeholders that the IDAS system was very heavy on process and light on producing good planning outcomes.

Chapter 2 part 5 of the SPA contains six sections dealing with the standard planning scheme provisions (SPSPs) which are summarised below:

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[38] SPP 3/11, part A – Reflecting regional plans in designated region
[39] SPP 4/11 part 3.1, SPP 1/12 part 3.1
[40] SPP 4/11 explanatory statement
[41] "State Interest means – (a) an interest that the Minister considers affects an economic or environmental interest of the State or a part of the State, including sustainable development; or – Example of an interest the Minister might consider for paragraph (a) – 'a tourism development involving broad economic benefits for the State or a part of the State; (b) an interest that the Minister considers affects the interest of ensuring there is an efficient, effective and accountable planning and development assessment system. SPA, schedule 3
[42] SPA, chapter 2, part 5

1. SPSPs are said to advance the purpose of the SPA by providing for a consistent structure for planning schemes and standard provisions for implementing integrated planning at the local level.[43]

2. SPSPs have the status of a statutory instrument and have the force of law in the manner provided for under the SPA.[44]

3. SPSPs have no effect in regulating or affecting development until they have effect in a planning scheme area.[45]

4. Where a local planning instrument for a planning scheme area is inconsistent with the SPSPs, the latter prevails to the extent of the inconsistency and will have effect in the place of the local planning instrument to the extent of the inconsistency.

5. The Minister is empowered to make SPSPs for the whole of the State.[46]

6. Local governments must ensure that their local planning instruments are consistent with the SPSPs.[47]

7. If the SPSPs are amended local governments must amend their planning schemes to reflect the SPSPs as amended.[48]

8. The relevant Minister may amend a planning scheme where a local government has not amended its planning scheme within 90 days of gazettal of SPSPs or amended SPSPs.

The SPSPs are not a "relevant instrument" for the purposes of the decision rules in section 326 of the SPA, other than by implication. A "relevant instrument" for the purposes of the decision rules is a matter or thing mentioned in section 313(2) or 314(2) of the SPA. Neither of those provisions mentions the SPSPs. For code assessment, an applicable code in a planning scheme is a relevant instrument, and for impact assessment, a planning scheme is a relevant instrument. Assuming that there is an inconsistency between a local planning instrument and the SPSPs, the relevant provision of the SPSPs will prevail and have effect in place of the local planning instrument and therefore, by implication, that provision of the SPSPs becomes a relevant instrument for the purposes of testing the assessment manager's decision to identify conflict. There is, however, an alternative view based upon the literal reading of section 326 of SPA because the SPSPs are simply not "a matter or thing mentioned in section 313(2) or 314(2) against which code assessment or impact assessment is to be carried out." There would appear to be an argument that compliance with the relevant provision of the SPSP provides a ground to overcome conflict with the inconsistent provision of the planning instrument sufficient to justify a decision to approve an application despite the conflict.

This is, as can be seen, a terribly convoluted legal outcome. It begs the question, why can't the process of achieving an appropriate level of consistency of terminology and uniformity of structure for planning schemes be achieved through the State's role in the local scheme making process? Instead we have another added level of complexity which is not justified by the end sought to be achieved.

Systemic failures

The Productivity Commission's draft report dated March 2012 "Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator"[49], records that the regulatory framework, including legislative

[43] SPA, section 50
[44] SPA, section 51
[45] SPA, section 52
[46] SPA, section 54
[47] SPA, section 55(1)
[48] SPA, section 55(2)
[49] Australian Government Productivity Commission, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*, Productivity Commission Research Report, March 2012

complexity and conflicting State objectives, was reported by local governments as an important constraint in Queensland but less so for local governments in other states.[50]

The housing affordability crisis in Queensland saw the creation in 2007 of the Urban Land Development Authority (ULDA) with its own unique development assessment process as provided for in The Urban Land Development Authority Act 2007 (ULDA Act). The ULDA Act provides that for development applications within an urban development area (UDA), the application will be assessed against the ULDA Act and initially an interim land use plan until a development scheme becomes effective for the area.[51]

The development assessment process stated in the ULDA Act differs from the current provisions and timeframes specified in the Integrated Development Assessment System (IDAS) under the SPA. Under the ULDA Act the assessment process has been streamlined to enable a development application to be assessed and decided within 40 business days of lodgement. The express purpose of the then government in creating the ULDA Act and providing for it to operate under a different development assessment system was stated by the then premier, the Honourable Anna Bligh, as follows:

"The ULDA will plan, manage and deliver the strategic sites to the market, cutting red tape and reducing the cost to industry of delivering housing. "[52]

While the ULDA Act mechanisms were indeed able to fast track coordinated and efficient development of major greenfield and brownfield development areas, this happened against growing unrest on the part of local governments about being stripped of their planning powers in these areas and also from the community at large about the uncertainties associated with the ULDA Act process.[53] Since the election of the current government, announcements have been made that a number of UDAs are to be handed back to the relevant local governments in combination with powers to oversee the development of those areas similar to the powers exercised by the ULDA. This will require legislative reform. It involves a tacit acknowledgement by the new government that the current development assessment system under the SPA is deeply flawed and that a different route will have to be followed in order to achieve timely, cost efficient and orderly development outcomes which will provide affordable housing for the public.

The ULDA Act is not the only example of a parallel planning process in Queensland. Following the floods of January 2011, the Queensland government established the Reconstruction Authority under the Queensland Reconstruction Authority Act (QRA Act). The QRA Act gave the QRA powers to make development schemes and to intervene in the development assessment system in order to coordinate and manage the recovery of disaster–affected communities. The then Premier's second reading speech advised Parliament that the new Bill: *"will establish an authority to scope and coordinate the state-wide rebuilding program and to cut through red tape and any other barriers that would stand in the way of swift recovery and rebuilding"*.[54] That was another reference by the then Premier to the regulatory system involving "red tape".

Although local governments retain primary responsibility for assessing and deciding development applications and requests, the QRA development schemes prevail over other planning instruments to the extent of any inconsistency.[55] Further, the QRA has the ability to override local government development decisions and, unlike the ULDA, has the ability to compulsory acquire land.[56]

QRA development schemes are given status as the pre-eminent planning instrument for declared areas.[57] This, coupled with an ability to amend existing development approvals, indicates that in order to "fast track" the rebuilding area, the usual SPA process needs to be short-circuited.

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[50] Page 453
[51] Section 57 of the ULDA Act
[52] "*Bligh declares Queensland first urban development authority areas*." Ministerial media statement, joint statement of Premier Bligh and Deputy Premier and Minister for Infrastructure and Planning Paul Lucas, 31 March 2008
[53] For example, the absence of particular rights of appeal which are contained in the SPA
[54] Second Reading Speech, Queensland Reconstruction Authority Bill 2011, (QLD) 16 February 2011, (Hon PM Bligh)
[55] QRA Act, section 78
[56] QRA Act, section 11
[57] Section 78(1) of the QRA Act

Essentially, the QRA Act gives the QRA the ability to make decisions that may not be made because another level of government or authority drags its feet. For example, part of the reconstruction of the Grantham area included the creation of a development scheme that effectively turned off assessment and referral triggers under the SPA. This development scheme was written in the space of four months, enabled subdivision in the area to be exempt development and also enabled roads to be closed within days rather than months.[58]

If mechanisms such as the ULDA and QRA are considered necessary to circumvent "red tape", surely the same applies to land outside of a UDA or reconstruction area. It is wrong in principle and contrary to the goals of sustainable planning for parts of the State to be unshackled from this "red tape" while other parts of the State, perhaps equally deserving economic progression, are left languishing under the burden.

Performance based planning outcomes

Although the IPA, and now the SPA, were intended to promote a performance approach to planning, that goal has largely been thwarted through overbearingly prescriptive drafting of planning schemes which retaliated against the IPA's proscription of prohibition in planning schemes. One of the many ways this was attempted was to provide that a particular type of use is an "inconsistent use" on an identified parcel of land and to define the term "inconsistent use" as a use which is strongly inappropriate in the zone because of incompatibility with other uses in the zone. Then the code would effectively provide in a performance criteria that particular development could not happen on that land, and there would be no stated acceptable solution for that performance criteria. This is the complete antithesis of performance or outcome based planning. It attempts to facilitate de facto prohibition without any consideration of ameliorating impacts or positive benefits. It is an inappropriate way in which to state the objectives or intent of a zone. I have seen this device used, for example, to make the use of identical buildings on adjoining land consistent on one parcel and inconsistent on the other unless used for short term accommodation. Sadly it is an approach which is also evident throughout the new generation of State planning instruments such as SPPs and regulatory provisions which eschew flexibility in favour of prohibition. These instruments have to some extent side-swiped and derailed performance based planning at the local level.

Planning discretion – a case of slow desiccation

In the paper I presented to the annual QELA conference in 2010, I surveyed the statutory purpose clauses of Queensland legislation and statutory instruments falling within the SPA's decisional framework and commented that:

> *"When one drills down into the relevant operative provisions of the legislation and statutory instruments, varying degrees of prescription and prohibition are revealed which are inconsistent with the concept of balance enshrined in the principles of ESD.*
>
> *The conclusion to be drawn from this is that while the SPA, and its predecessor the IPA, intended that a balance be sought between environmental protection, economic development and social enhancement when making planning instruments, that strategy is easily fractured through the intervention of single purpose ecologically driven regulation. This has become most obvious in recent years in various codes, regulatory provisions and prohibitions under the SPA, which have effectively precluded any discretionary balancing exercise by decision makers."*[59]

Prohibition or absolute preclusion of particular forms of development is the antithesis of a performance based planning system. The IPA removed prohibition in local planning instruments but not in other statutory instruments.[60] The State has been able to regulate through prohibitory instruments and has done so regularly throughout the life of the IPA and more vigorously under the SPA. Under the SPA, with respect to local planning instruments, the door has been left ajar to prohibit development where this is provided for in the SPSPs. None of this bodes well for a system which depends upon flexibility in order to produce sustainable planning outcomes that are in the public interest.

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[58] Presentation by Brendan Nelson, 2011 Planning Institute of Australia Queensland State Planning Conference, 22 September 2011
[59] ESD and the Sustainable Planning Act 2009 – where is the balance? QELA Conference Papers – May 2010
[60] IPA, section 2.1.23

Rapid societal, demographic, economic and technological changes over the past decade have exposed the planning system's inability to quickly respond. The housing affordability crisis is a good example. In order to respond to this problem effectively and in a timely way, the State chose to completely bypass the system and create a new one. This clearly demonstrated that at both local and State levels the planning system is not capable of appropriately delivering either greenfield or brownfield housing development quickly and cost effectively. It is not delivering on a key component of sustainability.

In summary, the planning system appears to have interfered with or removed discretion in planning decisions at a number of levels, for example through:

- prohibition of particular development under State instruments; or
- removal, or severely limiting, discretion in the drafting of local planning instruments;
- the operation of SPA's decisional framework;
- unwillingness to exercise, or recommend the exercise of, discretion at a technical level;
- unwillingness to exercise discretion at a political level in local government.

In combination these factors have limited discretion in favour of a more prescriptive and less flexible approach to decision making within the planning system. These factors make it easy for State agencies and local governments to say "no" to development. It is still possible to say "yes" where there is strong political will to do so, but where the application is impact assessable there is the ever present spectre of third party submitter appeals, in which the Court's discretion is likely to be similarly constrained. Overall the availability of discretion has tended to wither on the vine due to greater prescription and changes to the IDAS decision rules.

Conclusions

A well performing planning system must have inbuilt flexibility if it is to ensure that opportunities for sustainable development which delivers public benefit are seized rather than stymied. The ability to balance all relevant factors and to exercise discretion in the public interest within a suitable policy framework is essential in achieving the social and economic purposes of good urban planning.

My experience, anecdotally, over the life of the IPA and now under the SPA is that anything other than compliant code assessable "plain vanilla" development proposals are likely to experience difficulty, delay and, often, failure. The system is top heavy with State regulation. 2010 and 2011 in particular saw new regional plans and associated regulatory provisions and new SPPs introduced which added complexity to existing development applications as well as concerns about retrospective effects on approved development. I call this the dark side of planning.

The term "dark side of planning" was coined by an academic planner, Bent Flyvbjerg, and it refers to the real rationality that planners employ in planning practice, as opposed to the ideal rationalities of the theoretical planners that often inhabit planning textbooks. In the conclusion to a paper he wrote entitled "The Dark Side of Planning: Rationality and 'Realrationalität", he wrote:

> *"In 'The Prince', Machiavelli spells out in no uncertain terms the dangers of the normative attitude when he says 'a man who neglects what is actually done for what should be done learns the way to self-destruction'. The focus of modernity and of planning theory is on 'what should be done?' I suggest a reorientation toward the first half of Machiavelli's dictum, 'what is actually done …'. In this way, we may gain a better grasp – less idealistic, more grounded – of what planning is and what the strategy and tactics are that may help change it for the better."* [61]

[61] Flyvberg, Bent, 1996, "*The Dark Side of Planning: Rationality and Realrationalitat*" published in Seymour Mandelbaum, Luigi Mazza, and Robert Burchell eds, Explorations in Planning Theory, page 392

The mysterious process by which State interests are "balanced" in making regional plans is what some academic planners would refer to as the "dark side of planning".

I think that what has happened to the planning system in Queensland is that it has moved from a practical or rational planning approach to one which is more influenced by notions of ideal outcomes. The regulatory system hinders rather than helps planning practitioners. Checklists and compliance minutiae seem to have replaced innovation and creativity. Idealism, ideology and single-issue manipulation by minority interest groups has fractured the system, which now needs to be "re-balanced". There are a multitude of things which need to be considered if the planning system is to be reformed to improve its performance. In the context of the issues canvassed in this paper the following should be considered:

1. The preclusion on making development applications in respect of land outside the urban footprint under regional plans should be removed. Such applications should at least be capable of being assessed and decided against relevant criteria, allowing for appropriate grounds for approval to be weighed against the policy of the regional plan.

2. Remove special conflict rules which are specific to State instruments, for example, the "overriding need" test contained in regulatory provisions under regional plans and recent SPPs. The State can always retain sufficient interest in such applications through its role as a concurrence agency and its call-in powers.

3. Remove the rules that require refusal of a development application when it conflicts with an SPP unless there is sufficient grounds.

4. Alter the drafting of SPPs so that they are policy instruments rather than prescriptive regulatory instruments.

5. Remove potential prohibition of development from the mandate of SPSPs and enforce the adoption of consistent terminology and structure through administrative arrangements rather than hierarchical inconsistency rules.

To these I would also add reinstating the pre-SPA decision rules for compliant, code-assessable applications.

It is suggested that reforms along those lines, amongst others, should make the system more responsive, efficient and capable of producing better more sustainable urban planning outcomes. Hopefully the planning system can be moved away from the dark side towards a more enlightened approach, involving a lighter regulatory hand on the controls. This should allow urban planning as described at the commencement of this paper to be undertaken by the public and private sectors with more emphasis on innovation and creativity than is presently the case. That would be in the public interest.

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