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Planning and Environment

Unlocking the Power of Positive Planning Policy: Returning flexibility to Queensland's planning system

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At the core of Queensland's planning system under the *Sustainable Planning Act 2009* (SPA) is a set of legally binding rules that regulate development decisions by assessment managers and the Planning and Environment Court (**Court**)[1]. These rules, referred to in this paper as 'the decision rules', have increased in rigour over time to the point where, under the SPA today, they unduly constrain the exercise of discretion by assessment managers and, in the case of appeals, by the Court.

The legal framework within which discretion is to be exercised can be designed to be either flexible or constrained. The decision rules, as they now stand, are at the constraining end of the spectrum. This is not conducive to a well performing planning system[2].

The exercise of discretion inherently involves weighing up competing considerations. In the sphere of town planning, the goal of the assessment manager, and the Court, should be to achieve planning outcomes that are in the public interest when measured against all relevant planning instruments, by weighing up the competing considerations and exercising discretion accordingly. The decision rules contain a series of legal tests that are complex to apply within a two-tiered planning system, and do not adequately provide for the discretionary application of State level planning policy. Further, the decision rules are not conducive to the development of a performance oriented planning system.

This paper, which is a sequel to the author's paper presented in May 2012[3], argues for the reform of the decision rules.

A historical perspective

Before 1998, the regulatory framework involved planning schemes which could legally prohibit development. The harshness of prohibition was counteracted by providing for applicant-initiated rezoning, which, if approved, would remove the prohibition. There were originally no statutory restrictions on decisions about applications for rezoning and development consent. Such decisions were guided by the intent of the planning scheme, especially the strategic aspects and express statements of intent of the various zones. Planning schemes usually specified the relevant criteria for consideration for both types of applications. Relevant considerations were also gleaned from the overall policies expressed by the planning scheme. Assessment of such applications usually involved balancing competing issues in order to arrive at a decision.

The *Local Government (Planning and Environment) Act 1990* (Repealed) (PEA) contained decision rules for applications for rezoning, town planning consent and subdivision in this form:" *The local government must refuse to approve the application if –*

(a) The application conflicts with any relevant strategic plan or development control plan; and

(b) There are not sufficient planning grounds to justify approving the application despite the conflict."

Strategic plans set out the higher order policies of planning schemes and were treated by the Court as particularly important when considering the consistency of a development proposal with a planning scheme. Development control plans were likewise considered important because of their intensive focus on the planning of particular areas within a planning scheme. The reference to 'sufficient planning grounds' in the PEA recognised the previous approach of the Court in balancing planning considerations, such as community need, against the provisions of the planning scheme.

The *Integrated Planning Act 1997* (Repealed) (IPA) expanded the scope of the decision rules for impact assessable applications to encompass the whole of the planning scheme, rather than just the strategic component. The IPA also excluded the opportunity to balance competing considerations by applying 'sufficient planning grounds' if a development proposal would 'compromise' the achievement of a planning scheme's Desired Environmental Outcomes (which in effect replaced strategic plans under the new generation of IPA-compliant planning schemes). Desired Environmental Outcomes (**DEOs**) were routinely drafted as broadly-based expressions of purpose, and there were very few decisions of

[1] The current decision rules are found in Chapter 6, Part 5, Division 3, Subdivision 2 of the SPA.
[2] Nicholls, DL. *Queensland's Regulatory Quagmire: The Dark Side of Planning*. Paper presented at the Queensland Environmental Law Association 2012 conference, May 2012.
[3] Op cit

the Court where such provisions were found to preclude development[4]. More specific DEOs could be given greater weight[5].

The SPA removed the reference to DEOs and combined the decision rules for impact assessable and code assessable development applications. The SPA called up all State planning instruments against which a development application must be assessed for the purpose of testing for conflict, other than State Planning Regulatory Provisions. This was a quantum leap in potential legal complexity for decision making which has not yet been fully explored in planning appeals.

Accordingly, as the law now stands, a decision about a development application must be tested for conflict against all applicable provisions of the local planning instrument, as well as all applicable State planning instruments, with the only exception being State Planning Regulatory Provisions. The latter are dealt with separately under the decision rules. The assessment manager's decision cannot be inconsistent with a State Planning Regulatory Provision[6]. Under the SPA, decisions must be tested for conflict with State planning instruments only to the extent that the relevant State instrument has not been appropriately reflected in the planning scheme[7].

The expanded scope of the conflict rules under the SPA coincided with an upsurge in the creation of new Regional Plans and State Planning Policies. The newly-created State Planning Policies took a more prescriptive approach, inevitably giving rise to more instances of conflict with decisions to approve development. There appears to be a link between the expanded decision rules under the SPA and the more assertive position of the State under the new generation of State Planning Policies. There is also evidence of more specificity being employed in regional plans.

Recent and proposed reforms

Since mid-2012, the LNP government has set in motion a number of reforms to the planning system, which are intended to improve its performance and promote growth and prosperity. *Temporary State Planning Policy 2/12 – Planning for Prosperity* commenced in August 2012, and will remain in place for 12 months while the existing suite of 13 State Planning Policies is being reformed as a Single State Planning Policy (SSPP) comprising all relevant State interests. Temporary SPP 2/12 is intended to influence the making or amending of local planning instruments, regional plans and designation of land for community infrastructure. It is not intended to apply to the assessment of development applications. However, the proposed SSPP, when it commences, will apply to the assessment of development applications to the extent that the SPP has not been reflected in a relevant planning scheme. The consultation draft for the SSPP makes clear that it will seek to facilitate employment opportunities and an adequate supply of suitably zoned land for both residential and industrial purposes.

The actual content of the SSPP is presently unknown, as is the likely effect of the economic growth aspects of the policy on new planning schemes. At the time when the SSPP comes into effect, it will not be reflected in any planning schemes in Queensland, including the major planning schemes for South East Queensland. History tells us that bringing planning schemes into conformity with State planning instruments, particularly regional plans, does not happen easily or quickly, and is likely to be delayed pending an overall review and replacement of an entire planning scheme. This could take several years in the case of recently adopted planning schemes and those that are likely to commence over the next year.

South East Queensland's most recent planning scheme, the Toowoomba Regional Council's scheme, has commenced without being subject to the influence of Temporary SPP 2/12.

The Sunshine Coast Regional Council's planning scheme is now on public exhibition and is likely to be approved by the State Government for adoption on the basis that it reflects current State Planning Policies, rather than Temporary SPP 2/12.

The Brisbane City Council has completed the drafting of its planning scheme, again without reference to the State Government's recent change in emphasis regarding economic growth and prosperity. The Brisbane City Council's

[4] Koerner v Maroochy Shire Council [2004] QPELR 211 at [25]
[5] Stappen Pty Ltd v Brisbane City Council [2005] QPELR 466 at [30]
[6] Section 324(3) of the SPA.
[7] Sections 313(2)(b) and (d), 314(2)(b) and (d) and 326(2)

scheme is now available to the public, although it has not yet been through the State interest checking process before being placed on public exhibition. It seems likely that the new planning scheme for Brisbane will be publicly exhibited or adopted based on the current State Planning Policies.

It is understood that the Gold Coast City Council's draft planning scheme was not accepted by the State and has been returned to the Council for reconsideration. It is unclear whether the Gold Coast City Council will be required to delay finalising the scheme so that it can achieve compliance with the SSPP, or whether it will be allowed to proceed on the basis of the current State Planning Policies.

Regional plans are largely in place across most of Queensland, and many of them are of recent origin, reflecting the existing recent State Planning Policies.

The *SEQ Regional Plan 2009* obviously does not reflect Temporary SPP 2/12, nor will it reflect the proposed SSPP. The Queensland Government has indicated that it will review the SEQ Regional Plan during the life of the current government. It is likely this review will be based on the SSPP.

The overall position, then, is that in the short to medium term, the State level planning instruments will not have been reflected in any local planning instruments. In particular, for SEQ the SSPP and the regional plan will not have been absorbed into the planning schemes for the region. So how will the State's new approach regarding economic growth and prosperity be applied in practice? How should local governments respond to those State level policy changes when making decisions on development applications? What position will the State adopt to local governments' decisions that are contrary to State level policy?

While the State has a broad array of powers it may use to further the State's interests, the LNP government's clearly stated policy is to leave development decisions in the hands of local government. A political 'line in the sand' has been clearly drawn, which potentially weakens the effect of the policy changes at the State level because of the long lead time in implementing State level policies through planning schemes.

Key systemic failures

A key failure of the planning system under the IPA and the SPA has been poor implementation of performance-based planning within local planning instruments. That, in combination with the SPA's complex decision framework, has removed discretion from assessment managers and increased the potential for planning disputes. Decision making can only become more difficult in circumstances where State and local planning instruments are not aligned and, unfortunately, that is likely to be the case in key economic regions of the State, such as South East Queensland, for some time to come.

The IPA gave primacy to regional plans and other State level instruments by stating that they prevail over local planning instruments to the extent of any inconsistency, and the SPA has continued this requirement[8]. As mentioned elsewhere[9], there are, in theory, two basic opposing consequences of inconsistency between a regional plan and a planning scheme. Development that is contrary to a regional plan but consistent with a planning scheme should not be supported, while development that is contrary to a planning scheme but consistent with a regional plan should be supported. This is effective in respect of the aspects of regional plans which seek to preclude development outside the urban footprint, but is not particularly helpful in promoting growth within the urban footprint because of the way in which regional plans have dealt with development within urban footprints.

In attempting to predict how the proposed SSPP will work in assessing and deciding development applications, it is helpful to consider a hypothetical example. To do so, it will be necessary to make some assumptions about the content of the proposed SSPP. The SSPP is intended to contain provisions that enable economic growth, reflecting the intent of the current Temporary SPP 2/12. Under the consultation draft for part 1 of the SSPP, a proposed State interest statement is as follows:

"The proposed State interest statement:

[8] IPA, Section 2.5A.21(3); SPA, Section 26(3)
[9] Nicholls, DL. *Queensland's Regulatory Quagmire: The Dark Side of Planning* op cit.

Planning instruments contribute to the State's prosperity, economic growth and employment needs by:

- supporting efficient use of existing infrastructure and planning for future infrastructure needs;
- supplying an adequate amount and appropriate balance of suitably zoned land;
- facilitating development of a diverse range of employment opportunities and appropriate services for communities;
- enabling processes and decision-making that are:
  - efficient;
  - effective;
  - transparent and accountable;
  - responsive and equitable;
  - innovative."

Assuming that a similar but more detailed provision comes into effect under the proposed SSPP, how would it be applied in the factual scenario below?

Assumed factual scenario:

- An application is made for residential development of a parcel of land that is zoned rural under a planning scheme which pre-dates the SSPP.
- The relevant regional plan pre-dates the SSPP.
- The land is outside of, but near to the edge of, the urban footprint under the regional plan.
- The proposed development is able to connect to existing infrastructure (with upgrades) and has good access to an all weather regional road.
- The land is not agriculturally productive and is used for grazing.
- The regional plan says that land identified as rural outside the urban footprint is to be conserved for rural and scenic purposes.
- The planning scheme says that land zoned rural is to be preserved for rural pursuits, and to maintain the undeveloped rural and vegetated character of the area.
- The land does not contain any significant mapped vegetation, and any environmental impacts as a result of a development can be adequately managed through development conditions.
- Environmental enhancements through design of the subdivision are available.
- Existing developed, and approved but not yet developed, lots in the planning scheme area equate to three to five years supply at current rates of population growth.

In this scenario, a decision to approve the development application would conflict with the planning scheme in a number of respects, as well as with the regional plan. However (hypothetically), a decision to approve the application would not conflict with any relevant aspect of the SSPP and would be consistent with those of its provisions, which seek to promote economic growth and enhance residential land supply.

Section 326 of the SPA provides as follows:

*"326 **Other decision rules***

(1) The assessment manager's decision must not conflict with a relevant instrument unless –

(a) the conflict is necessary to ensure the decision complies with a State planning regulatory provision; or

(b) there are sufficient grounds to justify the decision, despite the conflict; or

(c) the conflict arises because of a conflict between –

(i) 2 or more relevant instruments of the same type, and the decision best achieves the purposes of the instruments; or

Example of a conflict between relevant instruments –

– a conflict between 2 State planning policies

(ii) 2 or more aspects of any 1 relevant instrument, and the decision best achieves the purposes of the instrument.

Example of a conflict between aspects of a relevant instrument –

– a conflict between 2 codes in a planning scheme

(1) In this section –

***relevant instrument** means a matter or thing mentioned in section 313(2) or 314(2), other than a State planning regulatory provision, against which code assessment or impact assessment is carried out."*

If we apply those decision rules to the scenario above, the following results emerge:

- A decision to approve the application is not required to ensure the decision complies with a State Planning Regulatory Provision – section 326(1)a is not applicable.
- Conflict does not arise because of a conflict between two instruments of the same type. The local plan and the regional plan are respectively different types of instruments to the proposed SSPP – section 326(1)(c)(i) is not applicable.
- There is no conflict between different aspects of the same instrument – section 326(1)(c)(ii) is not applicable.
- Excusing the conflict depends on applying section 326(1)(b). To do so would involve demonstrating that there is sufficient community need or other 'grounds' to justify a decision to approve.

In these circumstances, what is the consequence of a decision to refuse the application that is contrary to the SSPP in relation to economic development? Does such a decision 'conflict' with the SSPP? If it does, could the assessment manager argue that consistency with the SSPP provides sufficient public interest grounds to approve the application notwithstanding conflict with the local plan? While such an argument might be available in theory, the answer is far from clear. As can be seen, the decision rules fail to appropriately deal with the aspects of a decision that are consistent with the SSPP. The same reasoning may be applied to consistency with a regional plan that conforms with the SSPP.

Court's approach to interpreting Planning Schemes

Both the Court and Supreme Court at appellate level have consistently maintained that planning schemes are not drafted as statutes. They are the work of town planners and should be construed in a common sense way focused on their

planning intent.[10] Why are the decision rules not drafted in a way which adopts this plainly sensible approach? On the contrary the decision rules seem intent on sending the reader on an expedition to look at every potentially applicable provision of the planning instrument to see if there would be any conflict with a decision to approve development. In the appeal context vast amounts of time is wasted on arguable conflict with diverse provisions of planning schemes. This is costly to the parties and absorbs considerable judicial time in the hearing of appeals and writing judgments. Does this produce better planning outcomes? The real focus ought to be on the merits of the development viewed in the context of the policy intent of planning schemes. That is the way it used to be under earlier legislation and it has much to recommend it.

Unlocking positive planning policy

The decision rules seem to have been drafted with a view to requiring the refusal of development applications which conflict with State level policy that is directed at constraining development rather than promoting it. If the future SSPP eschews prescription in favour of broad planning policy, then the decision rules should revert to the form they were in when State Planning Policies were not prescriptive, by removing the references to conflict with State level instruments. Further, in order to secure development that conforms with positive economic imperatives under the SSPP and regional plans, such as facilitating employment opportunities and providing adequate land supplies, the 'grounds' for a decision which conflicts with a local planning instrument ought to be revised - for example, as follows:

*"**Grounds**, for sections 326(1)(b) and 329(1)(b) –*

(1) "grounds" means matters of public interest.

(2) "grounds" does not include the personal circumstances of an applicant, owner or interested party.

*(3) **"grounds" may include the consistency of the decision with a relevant State planning instrument, other than a State Planning Regulatory Provision, to the extent the relevant instrument is not identified in the planning scheme as being appropriately reflected in the planning scheme**."*

A reform along those lines would allow the consistency of a decision with positive State Planning Policy to be given proper weight.

Impact assessable development

Under the SPA the decision rules applicable to impact and code assessable development were merged into a single set of rules. The main difference between the decision rules for each type of application is that for code assessment a "relevant instrument" includes any applicable code in a planning scheme, while for impact assessment it includes the whole planning scheme. This carries forward the approach to deciding impact assessable applications under the IPA. While it is correct to assess an impact assessable application against the whole planning scheme there will often need to be objective balancing of different provisions of the scheme.

The PEA focussed on "big picture" conflict with the strategic plan and avoided mandating refusal in respect of lower order provisions other than those contained in Development Control Plans. This approach allowed more flexibility in balancing the minutiae of a planning scheme against the scheme's purpose. Focussing on the policy intent of a planning scheme better facilitates performance based outcomes and avoids "de facto" prohibition that is intended to operate irrespective of the merits of an application.

With the move back to strategic planning under the Queensland Planning Provisions it would be possible to change the decision rules back to the way they operated under the P&E Act. If that were to happen there would have to be transitional arrangements in place to describe the "Strategic" components of IPA compliant planning schemes with which a decision may not conflict without sufficient grounds.

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[10] ZW Pty Ltd v Peter R Hughes & Partners Pty Ltd [1992] 1 Qd R 352 at 360; Des Forges v Brisbane CC [2002] QPELR 402; [2002] QCA 90 at [41]; Bhat v Brisbane CC [2003] QPELR 109 at [31]; Westfield Management Ltd v Pine Rivers SC [2004] QPELR 337 at [18]

Code assessable development

Under section 313 of the SPA, an assessment manager must assess the part of an application requiring code assessment against, among other things, "any applicable code in... a planning scheme". In other words, a code assessable development application is not assessed against the whole of the planning scheme. Under the IPA, the decision rules were stated separately for code and impact assessable development. In the case of code assessable development, there was no requirement that the decision must not conflict with the planning scheme, as was the case for impact assessment. The distinction between code and impact assessable development is based on the premise that code assessment will be indicated where development is anticipated within a particular zone.

The approach that was taken to decisions on code assessable applications under the IPA made sense. The more stringent assessment and decision rules for impact assessable development was reserved for development that was not anticipated in a particular zone, or exceeded significant applicable development parameters. There appears to be a strong case for reverting to the approach taken to decisions related to code assessable development under the IPA, so that refusal is only warranted if an application cannot be conditioned so as to achieve compliance with applicable codes. An alternative approach would be to limit the decision rules in the case of conflict with codes to the purpose of the code, rather than the whole of the code.

An alternative approach

There is another way to "soften" the decision rules if it is thought appropriate to retain the SPA's identification of provisions with which a decision must not conflict. This approach also involves expanding the definition of "grounds". In the case of code assessment the definition could be expanded as follows:

> " 'grounds' may, for code assessment, include the consistency of the decision with the purpose of an applicable code."

For impact assessment the definition of "grounds" could be altered to include:

> " 'grounds' may, for impact assessment, include consistency of the decision with the strategic plan, or equivalent higher order provisions, of the planning scheme."

Conclusions

It will take time for the new generation of State planning instruments to be adequately reflected in local plans. There will inevitably be many development applications that conflict with local plans, but are consistent with applicable State planning instruments. If the State level planning instruments are to have any positive impact on urban development, the SPA's decision rules need to be modified to provide sufficient flexibility to allow that to happen.

Further, consideration should be given to amending the decision rules so that the decision maker is able to balance various provisions of the planning scheme with which a decision may conflict against the higher order provisions which encapsulate the relevant policy intent. The purpose of such reforms is to reverse the present inflexibility that is inherent in the decision rules and promote performance related development decisions.