COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

Trusted Partners, Strategic Thinkers, Legal and Policy Designers and Tacticians

COLIN BIGGERS & PAISLEY LAWYERS

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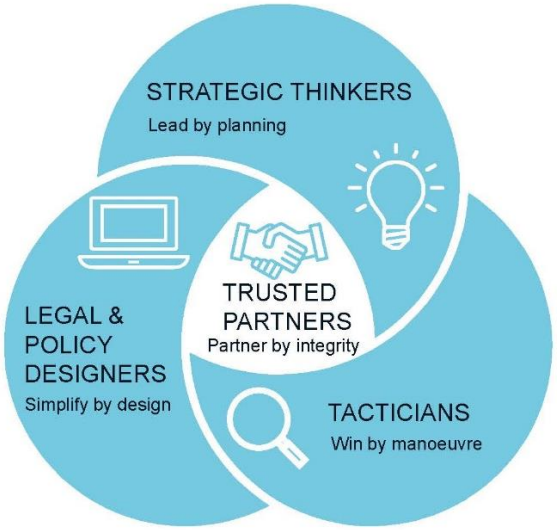

Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

Our group practices collectively as an *East Coast Team of Teams*, which is known for its *Trusted Partners*, *Strategic Thinkers*, *Legal and Policy Designers* and *Tacticians*.

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Drafting IDAS Documents

Ian Wright

This article discusses the practical directions on how to ensure effective written communications when drafting the Integrated Development Assessment System (IDAS) documents

September 2006

Introduction

Purpose

Effective written communication is essential to the work of persons involved in the Integrated Development Assessment System ("IDAS") process, whether it be the drafting of application documents, the drafting of decision notices or the drafting of the myriad of other documents necessitated by the development approvals process.

The purpose of this presentation is to give practical directions on how to ensure that written communications are more effective. It sets out rules and principles that should be followed in relation to the structure, context, language and presentation of documents produced as part of IDAS, in particular refusal decision notices and conditions of development approvals.

Achieving effective written communication

Effective written communication can be achieved through the use of four techniques:

- Structure of a document – a document should have a logical, coherent structure.
- Content of a document – the content and context of a document should be clear, concise and consistent.
- Language of document – a document should adopt plain language.
- Presentation of document – a document should be presented or laid out to provide effective communication.

Each of these four techniques needs to be applied when drafting IDAS documents, especially decisive notices involving approach and the imposition of conditions of approvals.

Before the techniques of effective written communication can be considered in more detail it is important to understand the legislative and common law decision-making powers of assessment managers.

Assessment powers

Levels of assessment for development

Exempt development

Development is exempt development unless it is self-assessable development or assessable development (section 3.1.2(1)). Exempt development does not require a development permit (section 3.1.4(2)). However, exempt development must comply with the regulatory provisions of the SEQ regional plan (sections 3.1.4(3)(b)).

Self-assessable development

Development can be declared to be self-assessable development in schedule 8, part 2 of the *Integrated Planning Act 1997* (**IPA**) or a planning scheme.

Self-assessable development must comply with the codes applicable to the development specified in the planning scheme or a regulation (see sections 3.1.4(3)(a) and 4.3.2(1) and the definition of "planning instrument" in schedule 10).

Like exempt development, self-assessable development can be carried out without a development permit (section 3.1.4(2)).

Assessable development

Development is assessable development where the development is (see the definition of "assessable development" in schedule 10):

- specified in schedule 8, part 1 of IPA; or
- declared assessable development under the planning scheme for the area.

Assessable development requires a development permit to lawfully carry out the development (sections 3.1.4(1) and 4.3.1(1)).

Assessable development can be either code assessable or impact assessable. A regulation, planning scheme or temporary local planning instrument may determine whether relevant assessable development requires impact or code assessment or both impact and code assessment (section 3.1.3(1)).

Relevant assessment documents for assessable development

Code assessable development

A code assessable development must only be assessed against (section 3.5.4(2)):

- the applicable codes in the planning scheme;
- the common material;
- State planning policies where not appropriately reflected in the planning scheme; and
- the SEQ regional plan where not appropriately reflected in the planning scheme.

The applicable codes specified in the planning scheme may be affected by a preliminary approval which has approved development and identified codes for the development (sections 3.1.5 and 3.1.6).

Impact assessable development

Impact assessable development must be assessed having regard to (section 3.5.5(2)):

- the common material;
- the planning scheme;
- other relevant local planning instruments;
- State planning policies;
- the SEQ regional plan;
- any development approval current for the premises or adjacent premises; and
- matters prescribed under a regulation.

The planning scheme may also be affected by a preliminary approval which has approved development and either stated a level of assessment for development or identified codes for that development (sections 3.1.5 and 3.1.6).

The assessment manager must also take into account any submissions made as a result of public notification of an application which is subject to impact assessment (section 3.4.1(a)).

Development approvals

Types of development approvals

IPA provides an assessment manager with the power to decide a development application for assessable development. The assessment manager can issue a preliminary approval or a development permit for assessable development (sections 3.5.14A(1) and 3.5.11(1)).

Preliminary approval

A development application can seek a preliminary approval for assessable development, although this is not required (section 3.1.5(1).

A preliminary approval approves development (section 3.1.5(1)):

- to the extent stated in the approval; and
- subject to the conditions in the approval.

However a preliminary approval does not authorise assessable development to occur (section 3.1.5(1). Whilst a preliminary approval does not authorise development to occur, the conditions of a later development permit that relate to a preliminary approval still in effect cannot be inconsistent with the conditions of the preliminary approval (sections 3.1.5(3)(b)(ii) and 3.5.32(1)(a)).

A preliminary approval can seek to vary the effect of a local planning instrument in 2 ways:

- First by stating that development relating to the preliminary approval is assessable, self-assessable or exempt development (section 3.1.6(3)(a) and 3.1.6(5)(a)); and
- Secondly by identifying codes for the development that is stated to be self-assessable or assessable (section 3.1.6(3)(b) and 3.1.6(5)(b)).

An application for a preliminary approval that seeks to vary the effect of a local planning instrument will generally require public notification (section 3.4.2(1)(b) and 3.4.2(3)).

Development permit

A development permit authorises assessable development to occur to the extent stated in the permit and subject to the conditions attached to the permit (section 3.1.5(3)). The development permit is also subject to any preliminary approval and the conditions of the preliminary approval (section 3.1.5(3)(b)(ii)). A condition of a development permit must not be inconsistent with the conditions of the preliminary approval for the same development (section 3.5.32(1)(a)).

Decision making powers

General powers

When deciding whether to grant a development application for assessable development, the assessment manager must (section 3.5.11(1)):

- approve all or part of the development application and include in the approval any concurrence agency conditions; or
- approve all or part of the development application subject to conditions and include in the approval any concurrence agency conditions; or
- refuse the development application.

The development approval is deemed to include the conditions imposed by the assessment manager and any concurrence agency (section 3.5.11(6)(a)).

The assessment manager may give a preliminary approval even though the applicant applied for a development permit (section 3.5.11(6)(b)).

Application for a section 3.1.6 preliminary approval

An assessment manager must (section 3.5.14A(1)):

- approve all or some of the variations sought; or
- approve different variations from the variations sought; or
- refuse the variations sought.

The assessment manager's decision must not compromise the achievement of desired environmental outcomes for the planning scheme area unless compromising the achievement of desired environmental outcomes is necessary to further State planning policies or the SEQ regional plan where they are not appropriately reflected in the planning scheme(section 3.5.14A(2)).

Although a preliminary approval can vary the effect of a local planning instrument by stating the level of assessment for development as exempt, self-assessable or assessable development), the preliminary approval is of no effect if the stated levels of assessment are inconsistent with the assessment levels for development specified in schedules 8 and 9 of IPA (section 3.1.6(8)).

Application for code assessable development

If an application for a code assessable development is made under a transitional planning scheme, the assessment manager must assess the application in accordance with specified provisions of the *Local Government (Planning and Environment) Act 1990* (**PEA**) (section 6.1.30(3) of IPA).

If the application is made under an IPA planning scheme, the following limitations apply:

- the assessment manager must approve the application if the assessment manager is satisfied that it complies with all applicable codes (section 3.5.13(2));
- the assessment manager may approve the application subject to conditions that ensure compliance with all applicable codes (section 3.5.13(2));
- the assessment manager may approve an application that conflicts with an applicable code where:
  - there are sufficient grounds to justify the decision having regard to (sections 3.5.13(3) and 3.5.13(4)):
    - the purpose of the code; and
    - State planning policies and the SEQ regional plan where they are not appropriately reflected in the planning scheme; and
  - the approval does not compromise the achievement of the desired environmental outcomes of the relevant planning scheme area;
- the assessment manager must refuse the application where:
  - required by a concurrence agency (section 3.5.12); and

- the application would compromise the desired environmental outcomes for the planning scheme area (section 3.5.13(4)).

Application for impact assessable development

If an application for impact assessable development is made under a transitional planning scheme, the assessment manager must assess the application in accordance with specified provisions of the PEA (section 6.1.30(3) of the IPA).

If the application is made under an IPA planning scheme, the assessment manager's decision must not (section 3.5.14):

- conflict with the planning scheme unless there are sufficient grounds to justify the decision despite the conflict; or
- compromise the achievement of the desired environmental outcomes of the planning scheme area unless this is necessary to further a State planning policy or the SEQ regional plan if they are not appropriately reflected in the planning scheme.

Sufficient grounds

Statement of reasons and sufficient grounds

If an assessment manager approves an application that conflicts with the planning scheme and other relevant planning instruments, the assessment manager must set out the reasons for the decision including a statement of sufficient grounds (section 3.5.15(2)).

Sufficient grounds

Prior to the amendment of IPA by the *Integrated Planning and Other Legislation Amendment Act 2006* (**IPOLA 2006**) that commenced on 30 March 2006:

- a code assessable application which conflicted with a code could be approved if there were "enough grounds to justify the decision"; and
- an impact assessable application which conflicted with the planning scheme could be approved if there were "sufficient planning grounds to justify the decision" having regard to the purpose of the code.

Sections 3.5.13(3) and 3.5.14(2)(b) of IPA have now been amended so that the relevant test is whether there are "sufficient grounds to justify the decision despite the conflict".

These amendments were made to enhance consistency, with a new meaning for "grounds" also inserted into IPA ("grounds" mean matters of public interest that do not include the personal circumstances of an applicant, owner or interested party).

The term "sufficient" also implies that the grounds are to be determined on a qualitative basis rather than a quantitative basis (see the Explanatory Notes to IPOLA 2006 and the definition of "grounds" in schedule 10 of IPA).

Sufficient grounds for code assessable development

The steps for determining whether there are sufficient grounds to justify conflict with a code were summarised in *Westfield Management Ltd v Brisbane City Council and Anor* [2003] QPEC 010. Incorporating the amendments contained in IPOLA 2006 (section 3.5.13(3) of IPA), the 4 part test is as follows:

- Identification of conflict – examine the nature and extent to which the development conflicts with the code.
- Identification of grounds – firstly, determine whether there are any grounds which support that part of the development which is in conflict with the code having regard to the purpose of the code and any State planning policies and the SEQ regional plan (where if they are not appropriately reflected in the planning scheme) and secondly, determine whether the conflict can be justified on those grounds.
- Determination of sufficiency of grounds – determine whether the grounds in favour of the application as a whole are, balanced, sufficient to justify approving the application notwithstanding the conflict.
- Assessment against desired environmental outcomes and *Building Act 1975* – in any case, the decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area or in the case of building work conflict with the *Building Act 1975*.

Determining whether there are sufficient grounds is limited to issues raised by the purpose of the code (*Westfield Management Ltd v Brisbane City Council and Anor* [2003] QPEC 010 at paragraph 27) and issues raised in State planning policies or the SEQ regional plan if they are not appropriately reflected in the planning scheme. General planning grounds or grounds identified in other documents are irrelevant considerations (see *Westfield Management Ltd v Brisbane City Council and Anor* [2003] QPEC 010 at paragraphs 50-51).

Sufficient grounds for impact assessable development

A conflict with the planning scheme for an impact assessable development can only be justified by sufficient grounds. Unlike in section 3.5.13 for code assessable development, section 3.5.14 does not restrict the documents that may be used to identify sufficient grounds. Rather, grounds must be matters of public interest that do not include the personal circumstances of an applicant, owner or interested party (see Schedule 10 for definition of grounds).

An impact assessable development that conflicts with the planning scheme but is generally appropriate for the planning scheme area will often satisfy the "sufficient grounds" test where the conflict does not compromise the achievement of desired environmental outcomes (see *Crane v Brisbane City Council and Anor* [2004] QPELR 1).

In *Crane*, the desired environmental outcomes of the relevant planning scheme raised planning grounds that were dealt with in a positive way by the application. In that case, the application did not compromise the achievement of the desired environmental outcomes but rather furthered their achievement. Issues such as amenity, diversity of accommodation, preservation of a "character" house and proximity to public transport were dealt with in a positive way by the application and provided sufficient planning grounds to justify the conflict. The remaining conflict with a landscape code was able to be solved through an appropriate condition requiring a landscape plan to be lodged by the applicant.

Matters that are relevant grounds

Relevant planning grounds

In our view the planning grounds previously recognised under the PEA and under IPA in respect of the assessment of development applications against transitional planning schemes will fall within the scope of "grounds" for the purpose of determining whether there are sufficient grounds to approve an application which is inconsistent with a code or planning instrument.

Furthermore, other grounds may be relevant such as those set out in *Beck v Atherton Shire Council & Anor* [1991] QPCR 56 and 59:

- new information available since the scheme was made, for example, planning strategies being overtaken by events or some other reason that clearly no longer have any application; or
- incorrect information included in the scheme; or
- a factual error in the scheme itself.

Amenity

The absence of an adverse impact on the amenity of nearby residents is a relevant ground which may be used to justify conflict with the planning scheme (see *Queensland Adult Deaf and Dumb Society (Inc) v Brisbane City Council* [1972] 26 LGRA 380).

The impact of development on amenity should be considered in light of the following relevant factors:

- Amenity is to be judged on an objective standard rather than a subjective standard such that an impact on amenity is required to be determined according to the standards of comfort and enjoyment which are to be expected by ordinary people of plain, sober and simple notions not affected by some special sensitivity or eccentricity. However, it is necessary to take into account individuals' perceptions when determining whether the impact of a development would adversely impact on the amenity of the neighbourhood.
- Regard must be had to the planning scheme including development of the land which is self-assessable or code assessable (see *Everson v Beaudesert Shire Council* [1992] QPLR 129; *Van Amstel v Albert Shire Council* [1986] QPLR 404; *D P Thoroughbred Pty Ltd v Albert Shire Council* [1986] QPLR 273).
- Amenity is not a static concept and it is unreasonable to expect that the amenity of an area will continue unaltered in perpetuity.
- Amenity is also required to be looked at in context. For example, if a person lives on a busy road, that person has to expect a lower standard of amenity then if they lived in a cul-de-sac. However, if that amenity is poor this is not a justification for worsening that amenity.

Relevant cases include *Hamilton v Livingstone Shire Council* [1991] QPLR 95 and *John Albert Pty Ltd v Brisbane City Council* [1990] QPLR 244.

Need

Need is a relevant ground which may be used to justify conflict with the planning scheme. It is often an important consideration in reaching a balanced judgment as to whether there are grounds sufficient to justify a conflict with the planning scheme. The absence of a need for land to be developed for a proposed development coupled with evidence that the land may not become sterile if the proposed development is not approved would provide support for refusal of an application which conflicts with the planning scheme (c.f. *Tunbridge Industries Pty Ltd v Gold Coast City Council* [1976] QPLR 190).

An absence of need is established if existing facilities which are presently enjoyed by the community or planned for the community in the future are put in jeopardy by a proposed development and that detriment would not be made good by the proposed development itself then that is a relevant factor supporting refusal of a development application (see *Kentucky Fried Chicken v Gantidis* [1979] 140 CLR 675; *Jadmont Pty Ltd v Miriam Vale Shire Council and Arameen Pty Ltd* [1998] QPELR 351).

Environmental impact

The absence of an impact on the environment is a relevant ground which may be used to justify a conflict with the planning scheme.

The environment is defined to include (schedule 10):

- ecosystems and their constituent parts including people and communities;
- all natural and physical resources;
- those qualities and characteristics of locations, places and areas however large or small which contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- the social, economic, aesthetic and cultural conditions which affect the matters referred to above or which are affected by those matters.

See *Hilcorp Pty Ltd v Logan City Council* [1993] QPLR 199 for a consideration of the definition of "environment".

Unlawful development

If a development application involves what would be an illegal activity this is a relevant factor for an assessment manager to conclude that there is not sufficient grounds to justify a conflict with the planning scheme. This has occurred for example where brothels have been disguised as other uses (see *Dennis v Parramatta City Council* (1981) 43 LGRA 71; *Sydney City Council v Hurzelen* [1981] QPLR 165).

Future control

The absence of an opportunity for relevant future control through subsequent development applications to the assessment manager is a relevant factor for the assessment manager to conclude that there is not sufficient grounds to justify a conflict with the planning scheme (see *Gunning v Bristol City Council* [1985] QPLR 165, c.f. *Tulle v Toowoomba City Council* [1986] QPLR 199).

Existing development approvals

The existence of development approvals on other lands may be a relevant factor in concluding that there are not sufficient grounds to justify a conflict with the planning scheme. For example, the existence of development approvals that have not been taken up is highly relevant to the question of economic need. It will also be relevant for the assessment manager to conclude that there is not sufficient grounds to justify a conflict with the planning scheme if asked to grant a development approval which is contradictory to existing development approvals (see *Gold Coast Carlton Pty Ltd v Beaudesert Shire Council* [1985] QPLR 343).

However, the potential impact of a development application should be assessed against the impact of any current lawful uses on the site (see *Carbone v Esk Shire Council* [2006] QPEC 016).

Non-derogation or Coty principle

In essence, this principle states that where a planning scheme or an amendment to a planning scheme is in the process of approval and an assessment manager is required to decide a development application, the assessment manager should avoid as far as possible giving a judgment or establishing any principle that would render more difficult the ultimate decision as to the form the planning scheme should take. That is a development application should not be approved if the development approval would cut across the intent of the new planning scheme (see *Coty (England) Pty Ltd v Sydney City Council* [1957] 2 LGRA 117; *Colonial Sugar Refining Co Ltd v Sydney City Council* [1959] 4 LGRA 1).

There are cases, however, where the Coty principle may have no application:

- if the planning scheme is impossible to implement (see *Samuel Wood v Sydney City Council* (1961) 6 LGRA 288); or
- where the proposed development application would render the land sterile; or
- where the assessment manager has previously permitted substantial encroachments onto the policy that is set out in the proposed scheme; or
- where the proposed planning scheme has not progressed very far towards approval (ie public notice has not been given of the planning scheme).

In relation to an assessment manager, this principle only applies to those planning instruments that come into effect after the application was made but before the application enters the decision stage of IDAS (section 3.5.6).

Proposed compulsory acquisition

The service of a notice of intention to resume may be a relevant ground in determining whether there are sufficient grounds to approve an application despite the conflict with the planning scheme (see *Chalk v Brisbane City Council* [1966] 13 LGRA 228). However, where the Council has not yet resolved an intention to compulsorily acquire land nor served a notice of intention to resume on the landowner, the possibility of a compulsory acquisition in the future will not be a relevant consideration (see *Kabale Holdings Pty Ltd v Albert Shire Council* [1993] QPLR 252). In *Kabale*, it was suggested that where a Council has resolved an intention to resume land but has not served a notice of intention to resume the land, the resolution may be a relevant consideration depending on whether there is, on the balance of probabilities, sufficient certainty of resumption.

Sterilisation

It is a relevant consideration in determining whether there are sufficient grounds to approve an application despite a conflict with the planning scheme if the development of one parcel of land would sterilise another parcel of land (see *Proctor v Brisbane City Council* [1993] QPLR 329).

Factors that are not relevant grounds

The courts have also identified a number of factors that are not relevant planning grounds for the purpose of determining a development application:

- The financial circumstances of an applicant is not a relevant ground as is the effect of reasonable or relevant conditions on the profitability of a development (see *Gosford Shire Council v Anthony George Pty Ltd (No. 2)* [1968] 16 LGRA 165; *Ponton v Brisbane City Council* [1970] 25 LGRA 73). This is also supported by the statutory definition of "grounds" in schedule 10 of IPA.
- Social and moral issues are not a relevant ground (see *Venus Enterprises Pty Ltd v Sydney City Council* [1974] 3 LGRA 152). However, where an activity which the community might find objectionable for social or moral reasons might have an amenity impact such as unlawful or offensive behaviour, it is a relevant ground (see *Kelly v Toowoomba City Council* [1995] QPLR 3).
- Concern that the approval of a development would create a precedent such that the assessment manager is unable to resist pressure for similar developments in the same area is not a relevant ground (see *Georgeson and Cotton v Caboolture Shire Council* [1996] QPELR 12; *Gore v Brisbane City Council* [1996] QPELR 276).
- The fact that an existing development may be unlawful is not a relevant planning ground to support a refusal as it is the assessment manager's role to determine whether the development application should be approved. That is, the local government is required to look forwards not backwards (see *Trewellar v Gold Coast City Council* [1981] QPLR 17; *Sci-Fleet Motors Pty Ltd v Brisbane City Council* [1982] QPLR 5; *John Gimpell v Brisbane City Council* [1988] QPLR 5; *Jenner v Maroochy Shire Council* [1993] QPLR 285).
- The requirement to obtain subsequent development approvals from other public sector agencies is not a relevant ground. Each development application is required to be considered on its merits (see *Walker v Noosa Shire Council* [1983] 2 Qd R 86).
- A reduction in property values is not a relevant ground (see *West Coast Developments Pty Ltd v Caboolture Shire Council* [1990] QPLR 404). Again, the personal circumstances of an interested party are excluded from the definition of "grounds" in schedule 10 of IPA.
- The cost of affordable housing is not a relevant ground (see *Cobar Investments Pty Ltd v Douglas Shire Council* [1989] QPLR 152).
- The cost burden of contributions to administrative and sinking funds in a group housing development is not a relevant ground (see *Cobar Investments Pty Ltd v Douglas Shire Council* [1989] QPLR 152).
- The fact that land is listed on the Register of the National Estates is not a relevant ground as it does not of itself prejudice any lawful use that may be made of the land that has been listed (see *Leisuremark (Aust) Pty Ltd v Noosa Shire Council* [1988] QPLR 132).
- The political implications of having to sanction an unpopular use is not a relevant ground (cf. *First Steps Childrens Centre v Gold Coast City Council* [1992] QPLR 4 where the political implications of having to undertake enforcement action against a popular community use was not a ground for approving a development application).
- The existence of petitions and standard form letters is not a relevant ground (see *Aldred v Beaudesert Shire Council* [1978] 37 LGERA 404; *Allen v Atherton Shire Council* [1977] 4 QL 266; *Wilson v Logan City Council* [1990] QPLR 197).
- Overly emotive objections by submitters are not a relevant ground (see *Mackay Port Authority v Mackay City Council* [1992] QPLR 125). Neither are objections by submitters who have not inspected the development application (see *Good Mix Concrete Pty Ltd v Brisbane City Council* [1985] QPLR 38).
- The sheer volume of objections is also not a conclusive ground (see *Indooroopilly Golf Club v Brisbane City Council* [1981] 7 QL 287; *Baglow v Livingstone Shire Council* [1983] QPLR 352).

- Grounds of refusal directed to notions of philosophy rather than the terms of the local government's planning scheme are not a relevant ground (see *Anderson v Mareeba Shire Council* [1998] QPELR 355).

Role of assessment manager

The local government as assessment manager and not its officers or consultants has the responsibility to make a decision in respect of a development application.

If an assessment manager rejects the unanimous advice of its technical officers or consultants without giving good planning reasons it is in breach of its public duty (see *Nagy v Cairns City Council* [1981] QLPR 148; *Ingram v Maroochy Shire Council* [1983] QPLR 139; *Duncanson & Brittain (Quarries) Pty Ltd v Brisbane City Council* [1986] QPLR 330; *Robinson v Brisbane City Council* [1987] QPLR 71). In such cases the assessment manager should give reasons for its decision to act contrary to the advice of its technical officers or consultants in fairness to both the applicant and its own officers and consultants (see *Duncanson & Brittain (Quarries) Pty Ltd v Brisbane City Council* [1986] QPLR 330).

An assessment manager's decision which is not supported by the assessment manager's technical officers or consultants is unlikely to be upheld on appeal, unless it can be demonstrated that the advice of the technical officers or consultants is manifestly wrong.

Conditions powers

Conditions power under IPA

Limits on conditions

The assessment manager must not include a condition which:

- is not relevant to the development, or is relevant to but is an unreasonable imposition on the development, or is not reasonably required in respect of the development (section 3.5.30(1)); or
- is inconsistent with a condition of an earlier development approval that is still in effect for the development (section 3.5.32(1)(a)); or
- requires a monetary payment for the establishment, operating and maintenance costs of, or works to be carried out for, development infrastructure (section 3.5.32(1)(b)) unless the Council has a local planning policy or a planning scheme policy about infrastructure that will apply for the development (section 6.1.31); or
- requires a condition pursuant to a local planning policy or a planning scheme policy about infrastructure that is inconsistent with an infrastructure agreement for supplying the infrastructure (section 6.1.31(3)(a)); or
- requires an entity other than the applicant to carry out works for development (section 3.5.32(1)(c)); or
- requires an access restriction strip (section 3.5.32(1)(d)); or
- limits the time a development approval has effect for a use or work forming part of a network of community infrastructure, other than State owned or State controlled transport infrastructure (section 3.5.32(1)(e)).

Permissible conditions

The assessment manager may include a condition which:

- provides that the relevant period for the approval (previously known as the currency period and now known as the relevant period) is longer or shorter than the default period in section 3.5.21 (see sections 3.5.21(1)(b), 3.5.21(2)(c) and 3.5.21(3)(b)) although it is best that this is included in the approval itself rather than the conditions;
- limits how long a lawful use may continue or works may remain in place (section 3.5.31(1)(a));
- limits the start of a development to the giving of other development permits or the starting or completion of other development on the site (section 3.5.31(1)(b));
- requires a monetary payment or works to be carried out to protect or maintain the safety or efficiency of:
  - existing or proposed State owned or State controlled transport infrastructure (section 3.5.32(2)(a)(i));
  - railways under the *Transport Infrastructure Act 1994* (section 3.5.32(2)(a)(ii));
- requires a monetary payment or works to be carried out to ensure the efficiency of public passenger transport infrastructure within the meaning of the *Transport Planning and Coordination Act 1994* (section 3.5.32(2)(b));
- requires land, work or a contribution towards the cost of supplying infrastructure including parks under a local planning policy or a planning scheme policy about infrastructure (section 6.1.31(2)(c));
- in respect of applications for particular types of operational work, requires a document or work to be subject to compliance assessment (section 3.5.31A and section 14 and schedule 12 of *Integrated Planning Regulation 1998*).

Conditions power under the PEA

In the case of applications lodged under the PEA the local government had power to approve the application subject to conditions.

A condition of an approval granted under the PEA attached to the land and bound successors in title to the land unless amended or superseded by a subsequent application or until the approval became void, lapsed or was revoked.

Where an application was made to a local government the local government was not to (section 6.1 of PEA):

- Subject its approval of the application to a condition that was not relevant or reasonably required in respect of the proposal to which the application related, notwithstanding the provisions of the planning scheme.
- Restrict the duration of the approval to less than the period prescribed by Part 5 of the PEA (except where town planning considerations warranted a lesser period) or require that works to be commenced in a lesser period than that which was specified by Part 5 of the PEA.

Common law tests

Application of the common law tests

The PEA and IPA do not define terms such as "relevant" or "unreasonable". Accordingly the common law tests of validity continue to apply under IPA as they did under the PEA.

In summary, in order to be valid at common law, conditions must:

- be for a planning purpose (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578);
- fairly and reasonably relate to the application (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578);
- not be so unreasonable that no reasonable planning authority could have imposed them (known as Wednesbury reasonableness) (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Provincial Picturebuses Ltd v Wednesbury Corporation* [1948] 1KB 223).

Condition has a planning purpose

A condition should be referable to IPA, the planning scheme or a planning scheme policy or a State planning policy or the SEQ regional plan where they are not appropriately reflected in the planning scheme.

A condition could not be imposed for the purpose of fulfilling another purpose which may be socially or morally acceptable but unconnected with the purpose of town planning.

Condition fairly and reasonably relates to the development

This is the most important test of validity of a condition. The test is whether the proposed condition is reasonably required by the proposed development.

A condition is reasonably required if there is some nexus, identification or relationship between the proposed development and the purpose for which the condition is imposed. A nexus between the condition and the proposed development is likely to be established if the following criteria are satisfied:

- the proposed development will result in a change in circumstances from that which existed prior to the proposed development;
- the relationship between the proposed development and the alteration in existing circumstances is not too remote; and
- the condition seeks to address the impact or effects of the alteration in existing circumstances.

Therefore, to determine whether a condition fairly and reasonably relates to the development, it is necessary to consider the changes that are likely to emerge from the development, and whether the conditions are related to those changes. It is also necessary to consider the relevant planning scheme provisions and sections of IPA which relate to the development.

Changed circumstances

The proposed development must have a tangible impact. In order to prove that there would be a change in circumstances it is necessary to have knowledge of the state of affairs prior to the proposed development, the potential changes caused by the proposed development and the impact of the changes on the existing circumstances.

Remoteness

The easiest requirements to justify are those which relate directly on the site or the proposed development. The greater the separation between the requirements of a condition and the site or the proposed development the more difficult it is to prove that there is a nexus between the proposed development and the requirements.

Proportionality

The easiest requirements to justify are those which are proportional to the impact or effect arising from the alteration in existing circumstances. The greater the proportionality between the requirements of a condition and the impacts or effects the greater the prospect of a condition being lawful.

For example, if proposed roadworks would benefit the public at large, it might be that the applicant should not make any contribution to the roadworks or that the costs should be shared by the local government and the applicant.

In *Neilson v Gold Coast City Council and Anor* [2004] QPEC 089, the development of a shopping centre would bring forward the upgrading of a State-controlled roundabout from 2013 to 2010. Expert studies showed that the development would create between 9-12% of the demand necessitating the upgrade. A condition of the development permit was that the applicant pay 100% of the costs of the upgrade. The Council held that the condition was relevant to the development, but that the amount of the contribution was an unreasonable imposition on the development pursuant to section 3.5.30(1) of IPA. The court found that it was unreasonable for a minor user to be made to pay for the whole of the works. The court struck out the condition and substituted the contribution with a 'bring forward' amount that represented the extra costs of performing the upgrade 3 years ahead of schedule. This equated to approximately 11.3% of the total upgrade cost.

In *Trehy and Ingold v Gosford City Council*, an unreported judgment of the Land and Environment Court of New South Wales delivered on 12 July 1995, a condition requiring part of the land to be improved by the applicant, including removing weeds and debris from the site, so that the part of the land could then be dedicated to the Council was held to be an unreasonable imposition. The court held that although the applicant was not required to improve the land, the poor state of the land subject to the future dedication could be taken into account to determine appropriate compensation for the dedication. The court also noted that if the Council held a genuine belief that the weeds and debris required removal on environmental grounds, the Council should have issued an appropriate notice to the landowner rather than using conditions of a development approval to solve the matter.

Reasonableness of condition

The question of whether a condition is so unreasonable that it could not be imposed by any reasonable local government is sometimes seen as a "catch all" or safety net requirement. The following types of conditions have not been considered to be reasonable:

- conditions that are manifestly arbitrary, unjust or exhibit partiality;
- a condition that is uncertain (see *Shilling v Cairns City Council* [1988] QPLR 243);
- a condition that is not final in that the proposed development is dependent upon the making of further discretionary decisions by the local government (*McBain v Clifton Shire Council* (1995) 89 LGERA 372); although a condition to the satisfaction of an individual or entity will be valid so long as clear objective standards are included in the condition (see *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council and Anor* (1994) 85 LGERA 408 and *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184);
- a condition that requires constant supervision by the assessment manager (see *Mery McKeown Carpets Pty Ltd v Brisbane City Council* [1977] QPLR 20).

Infrastructure contributions under the PEA

Infrastructure planning and funding framework under PEA

The PEA was repealed by the IPA on 31 March 1998. However the infrastructure planning and funding framework established by the PEA still remains relevant to a development approval granted under the PEA (s 6.1.23 of. IPA) and a development approval granted under IPA in respect of a development application lodged before the commencement of IPA and which is required to be assessed and determined as if the PEA had not been repealed (s 6.1.25 of IPA).

Infrastructure planning framework under PEA

Under the PEA, a local government is empowered to prepare a local planning policy that is not inconsistent with the PEA (s 1A.4 of PEA).

The PEA also specifically authorised a local government to prepare a local planning policy that specified the monetary contribution to be paid to a local government for water supply and sewerage headworks (s 6.2(2) of PEA) and parkland in lieu of the supply of an area of land for use as a park (s 5.6(4) of PEA).

The Court of Appeal has held that the specific provisions contained in sections 6.2 and 5.6(4) of the PEA to prepare local planning policies in respect of water supply and sewerage headworks and parkland do not constrain the power of a local government to make a local planning policy in respect of other items of infrastructure such as roadworks or community infrastructure. In *Maroochy Shire Council v PF Wise and DM Wise* Appeal 349 of 1998 unreported decision of 3 November 1998, the Court of Appeal stated:

> *Speaking generally, the effect of s.6.2 is to define the powers of a local government to require contributions towards water supply and sewerage works as a condition of granting approval to, among other things, a rezoning application. Reliance was placed on the details which s.6.2*

> *contains, but it does not appear to us that anything material can be derived from them, so far as this appeal is concerned, other than that they make elaborate provision for the subject with which they deal. That subject is the power to require of developers contributions towards water supply and sewerage works; this is regulated in some detail, leaving the Council's power (if any exists) to require contributions towards works of another kind — for example roadworks — quite unregulated.*

Accordingly a local government has the power under the PEA to make a local planning policy in respect of all items of infrastructure and not just sewerage and water supply headworks and parkland as specifically provided for in sections 6.2 and 5.6(4) of PEA.

Infrastructure funding framework under PEA

Under the PEA, a local government is empowered to impose a condition on a development approval requiring a monetary contribution in respect of infrastructure provided the condition satisfies the requirements of section 6.1(1)(c) of the PEA of being relevant or reasonably required in respect of the proposal to which it relates.

Section 6.1(1)(c) of the PEA has been the subject of much judicial consideration and the tests enunciated by the courts in relation to the validity of a condition have been considered above.

Application of statutory test to sewerage and water supply headworks

Section 6.2 of PEA does not establish a separate and independent head of power for charging contributions in relation to sewerage and water supply headworks. Rather section 6.2 of PEA complements the general power contained in the PEA to impose a condition provided it is within the requirements of section 6.1(1)(c) of the PEA.

The effect of section 6.2 of the PEA is that a condition which imposes a contribution for water supply and sewerage headworks that is calculated in accordance with a lawful local planning policy in respect of sewerage and water supply headworks, is generally considered to be a lawful condition for the purposes of section 6.1(1)(c) of the PEA (*Grey Boulevarde v Maroochy Shire Council* (2000) QPELR 167).

Conversely, a condition that imposes a monetary contribution that is not in accordance with a lawful local planning policy is generally considered to be an unlawful condition (*Hervey Bay Industrial Estate Pty Ltd v Hervey Bay City Council* (1996) QPELR 1). Furthermore a condition that imposes a contribution that is in accordance with an invalid local planning policy would also be considered to be an unlawful condition (cf. *Hollis v Atherton Shire Council* (2003) QSC 147).

In short, the effect of sections 6.2 and 6.1(1)(c) of the PEA is that whilst there is a strong presumption that a condition requiring a contribution for sewerage and water supply that is calculated in accordance with a lawful local planning policy in respect of sewerage and water supply headworks is lawful, such conditions will be unlawful where the local planning policy gives rise to a contribution that does not meet the "relevant to or reasonably required by" test in section 6.1(1)(c) of the PEA (*Grey Boulevarde v Maroochy Shire Council* (2000) QPELR 167).

Application of statutory test to parkland

The position in respect of parkland contributions under the PEA was similar to that in respect of sewerage and water supply headworks contributions.

Section 5.6 of the PEA empowered a local government to make a local planning policy specifying the amount of land not exceeding 10% of the site that could be required to be dedicated and the basis for calculating a monetary contribution to be made in lieu of the provision of that land. Section 5.6 of the PEA also empowered a local government to require such contributions as a condition of a subdivision approval.

Under the PEA there was uncertainty whether a condition requiring a contribution for parkland could be imposed on a planning application other than for the subdivision of land. In *Hervey Lex No. 64 Pty Ltd v Mulgrave Shire Council* (1995) QPELR 266, Daly DCJ rejected an attempt to impose parkland contributions on a rezoning application. However 2 weeks earlier to this decision in *Crengate Pty Ltd v Caloundra City Council* (1995) QPLR 247, Skoien SJDCJ relying on earlier obiter observations of the Court of Appeal in *Hervey Bay Developments v Hervey Bay City Council* (1994) 83 L6ERA 216 of 222, held that a parkland contribution could be imposed as a condition of a rezoning approval.

In my opinion, the decision in *Crengate Pty Ltd v Caloundra City Council* (1995) QPLR 247 is to be preferred in that circumstances can arise where the imposition of a parkland contribution could meet the "relevant to or reasonably required" test such as where the rezoning approval represents the end of the development approvals process for a development and there will not be a subsequent subdivision approval. In such circumstances it would be an extraordinary result if a parkland contribution could not be imposed at the rezoning stage.

Accordingly whilst the matter was not beyond doubt, section 5.6 of the PEA operated similar to section 6.2 of the PEA in respect of sewerage and water supply headworks, in that a condition imposing a contribution for parkland in accordance with a lawful local planning policy in respect of parkland was presumed to be a lawful condition, although the condition will be unlawful where the local planning policy gives rise to a contribution that does not meet the "relevant or reasonably required" test in section 6.1(1)(c) of the PEA.

Application of statutory test to other items of infrastructure

Unlike sewerage and water supply headworks and parkland, the PEA did not contain a specific power for the making of a local planning policy in respect of other items of infrastructure. Accordingly a condition requiring a contribution for other items of infrastructure is required to meet the general requirements of section 6.1(1)(c) of the PEA.

The application of section 6.1(1)(c) of the PEA to a condition requiring a contribution in respect of items of infrastructure, other than sewerage and water supply headworks and parkland, has generated significant litigation. Relevant cases include *Bargara Park Pty Ltd v Burnett Shire Council* (1996) QPELR 133 and *Wise v Maroochy Shire Council*.

Bargara Park Pty Ltd v Burnett Shire Council

The case of *Bargara Park Pty Ltd v Burnett Shire Council* (1996) QPELR 133 related to the imposition of a condition requiring a contribution for the upgrading of the Shire road network on a subdivision approval for 39 residential lots.

In the appeal, the local government provided detailed evidence on how a charge on a shire wide basis was calculated. The Planning and Environment Court described it as follows:

> *In approaching this task, it was assumed that the population in the relevant area will grow to approximately 25,000 persons from the present level of around 7,000. The costs of the works identified by the study were assessed and, by relating population growth to the corresponding number of new residential allotments in the area, a "per allotment" contribution was arrived at.*

However, the court found the condition unlawful under the requirements of section 6.1(1)(c) of the PEA. The court stated:

> *The difficulty for the Respondent's case in this appeal is that while, in the Local Government (Planning and Environment) Act specific and detailed provision is made for "contributions towards water supply and sewerage works" (s6.2) no comparable provisions in respect of "roadworks headworks charges" are included in the Act. Conditions of the kind under consideration are governed by s6.1 which is of general application ...*

The court found that a contribution for roadworks could only be required in respect of the impact of the development on specific roads which could be identified as enduring some measurable impact and could not be required in respect of the upgrading of roads on a Shire wide basis.

Wise v Maroochy Shire Council

The case of *Wise v Maroochy Shire Council* (1998) QPELR 416 related to the imposition of a condition requiring a contribution for roadworks on the proposed rezoning of land from the Drainage Problem zone to the Commercial zone in the vicinity of Sunshine Plaza at Maroochydore.

The proposed contribution for roadworks was calculated in accordance with the local government's policy for the Maroochydore CBD road upgrading. The Planning and Environment Court described the method of calculating a contribution under the policy as follows:

1. *An area described as the "catchment area" was identified as an area where the benefits of the improved infrastructure would be most felt. Under the policy any development within that area would be required to make contribution to the relevant roadworks on the basis that such development would be likely to generate traffic on the roadworks. The identification of the catchment area is explained in Attachment No 1 to the policy.*
2. *An assessment was made of the cost of the necessary infrastructure works these costs being converted "into present day costs based on the accepted Treasury time preference discount rate which is currently 6 per cent."*
3. *Using a technique based on computer modelling of a likely 2011 scenario, the prediction was made as to the likely impact of all development within the catchment area upon the road system which will benefit from the relevant roadworks. The proportion of that impact which is attributable to a particular proposal is used to assess the contribution in any given case.*

The evidence in the appeal did not show that the rezoning or future development consistent with the rezoning would cause there to be a need to do any of the works contemplated by the policy. The need for the works was caused by growth in the area that had occurred over time and would occur in the future.

In finding that the condition proposed by the local government was unlawful, and that a smaller token contribution was all that could be required, the Planning and Environment Court stated:

> *The difficulty in linking the desirability of making adequate provision for infrastructure and the imposition of conditions upon development approvals was recognised in this Court as long ago as 1981 when in Marsh v Logan City Council (1981) QPLR 91, Carter J, then constituting this Court, refused to uphold a condition which sought to impose water supply headworks charges upon a*

> *rezoning approval. His Honour held that such a condition was beyond the general power to impose conditions on such approvals.*
>
> *Following that decision, amendments were made to the Local Government Act to provide (as far as rezonings were concerned) in s33(18E) a specific power to obtain "contributions towards and payment of costs to water supply and sewerage works by an applicant for rezoning or consent". In substance those provisions are carried over in s6.2 of the present legislation. A perusal of those provisions indicates the careful control that is imposed upon the manner in which contributions are fixed and the circumstances in which they may be required. In my view this indicates that the legislature accepts that it is not appropriate that conditions in respect of infrastructure items which are not directly necessitated by a particular proposal be sought under the general conditions power (s4.4(5) governed as it is by s6.1). I believe that there is substance in the submission (made on the Appellants' behalf) that the "plan or policy" of the Act is that, where contributions in respect of infrastructure works are to be required, specific legislative provision in respect of the matter is called for.*

The local government appealed to the Court of Appeal against the decision of the Planning and Environment Court in *Wise v Maroochy Shire Council* (1999) 2 Qd R 566. In particular, it appealed against the following statement in the judgment:

> *... the legislature accepts that it is not appropriate that contributions in respect of infrastructure items which are not directly necessitated by a particular proposal be sought under the general conditions power (s4.4(5) governed as it is by s6.1).*

The Court of Appeal allowed the appeal and remitted the matter to the Planning and Environment Court to be reconsidered in light of its decision. In making the decision, the Court of Appeal noted its earlier decision in *Proctor v Brisbane City Council* (1993) 81 LGERA 398 where in obiter it stated that a condition could be imposed if it was either relevant or reasonably required.

When the matter was remitted to the Planning and Environment Court in *Wise v Maroochy Shire Council* (1999) QPELR 353, the Planning and Environment Court reaffirmed the token contribution that had earlier been imposed but expanded on the reasons for its decision.

Having regard to a planning authority's discretion to impose the conditions, the Planning and Environment Court set out the following test for the validity of a condition:

1. *The condition must fairly and reasonably relate to the provisions of the development plan and to planning considerations affecting the land;*
2. *It must fairly and reasonably relate to the permitted development; and*
3. *It must be such as a reasonably planning authority duly appreciating its statutory duties could have properly imposed.*

Accordingly, in relation to infrastructure contributions other than for sewerage and water supply headworks and parkland, the legal position under the PEA was that a condition was lawful if it could be demonstrated that there was a nexus between the contributions and the development in that the contributions would be expended on specified works of direct benefit to the particular development.

One final point of historical significance under PEA

Under the PEA (and its predecessor the *Local Government Act 1936*) sewerage and water supply headworks in respect of the subdivision of land rezoned before 1 September 1985 were payable at the rates applicable when the land was rezoned. This benefit has now been restricted in that it will only exist in respect of those development applications to which the PEA framework is applicable.

Infrastructure contributions under IPA

Infrastructure planning and funding framework under IPA

Infrastructure planning and funding are key components of the integrated planning system established by IPA. Infrastructure planning is integrated into the planning system in three main ways:

- First, a local government is required to prepare a planning scheme under IPA (referred to as an IPA planning scheme) in order to replace its planning scheme made prior to IPA (referred to as a transitional planning scheme) which is to lapse within specific dates that have been nominated by the Minister in respect of each local government (s 6.1.11 of IPA). As part of the preparation of an IPA planning scheme, a local government must prepare a statement of proposals which is required to include a statement as to how infrastructure is to be addressed (section 3(2)(b) of schedule 1 and section 2.1.3A(1)(b) of IPA).
- Second, an IPA planning scheme must coordinate and integrate infrastructure including its State and regional dimensions (section 2.1.3(1)(a) and section 2.1.3A(1)(b) of IPA) and must include a priority infrastructure plan (section 2.1.3(1)(d) of IPA). A priority infrastructure plan establishes an infrastructure planning benchmark as a basis for the infrastructure funding framework and is discussed in more detail below.

- Third, IPA requires infrastructure to be supplied in a coordinated, efficient and orderly way and requires urban development to be encouraged in areas where adequate infrastructure exists or can be provided efficiently (s 1.2.3(1)(d) of IPA). IPA empowers State and local governments to designate land for community infrastructure (s 2.6.1 of IPA) the effect of which is that development carried out in accordance with a community infrastructure designation is exempt development (that is it can be carried out without a development approval and is not subject to an IPA planning scheme) (s 2.6.5 of IPA).

In addition to the infrastructure planning framework, IPA also provides for an infrastructure funding framework involving the following mechanisms:

- contributions imposed on applicants for development approvals by State and local governments; and
- infrastructure charges imposed on landowners or applicants for development approvals by local governments; and
- infrastructure agreements entered into by developers or landowners with State and local governments.

These infrastructure planning and funding mechanisms are subject to various transitional arrangements depending on whether or not a local government has prepared an IPA planning scheme which includes a priority infrastructure plan. A priority infrastructure plan for the council is currently being drafted. Until the priority infrastructure plan for the council finalised, the transitional framework under IPA will continue to apply.

Transitional infrastructure planning and funding framework under IPA

Under the transitional infrastructure planning framework, a local government was empowered to make a planning scheme policy about infrastructure under a transitional planning scheme or an IPA planning scheme until 30 June 2007 (s 6.1.19 and s 6.1.20 of IPA).

After 30 June 2007, a local government is not empowered to make a planning scheme policy about infrastructure as it is required to prepare a priority infrastructure plan for inclusion into its IPA planning scheme.

IPA does not provide any specific guidance as to the extent of the legislative power to make a planning scheme policy about infrastructure. However, the planning scheme policy must state (section 6.1.20(2) of IPA):

- a contribution for each development infrastructure network identified in the policy;
- the estimated proportion of the establishment cost of each network to be funded by the contribution;
- when it is anticipated the infrastructure forming part of the network will be provided;
- the estimated establishment cost of the infrastructure;
- each area in which the contribution applies and how the contribution must be calculated for each area; and
- each type of lot or use for which the contribution applies and how the contribution must be calculated for each type of lot or use.

The infrastructure contribution can be calculated in the way specified in the PEA or as an infrastructure charge under IPA (section 6.1.20(2C) of IPA). An infrastructure contribution calculated in the way specified in the PEA must be decided by reference to, in the case of:

- water supply and sewerage headworks, the matters specified in section 6.2(6)(b)(i) and (ii) of the PEA; and
- parkland, the amount of the monetary contribution to be paid instead of supplying an area of land for use as a park.

Transitional infrastructure funding framework under IPA

Under the transitional infrastructure funding framework, a local government is empowered to impose a condition requiring a monetary payment for the establishment, operating and maintenance costs of infrastructure and the works to be carried out for infrastructure (section 6.1.31(2)(b) and section 6.1.32(1)(b) of IPA).

However the condition must satisfy the general conditions power in section 3.5.30(1) of IPA of being:

- relevant to but not an unreasonable imposition on the development or use of premises as a consequence of the development; or
- reasonably required in respect of the development or the use of premises as a consequence of the development.

It is important to note that the test in respect of the lawfulness of a condition in section 3.5.30(1) of IPA is a higher test than that specified in section 6.1(1)(c) of the PEA which requires that a local government not subject its approval to a condition that is not relevant or reasonably required in respect of the proposal to which the application relates. The test in section 3.5.30(1) of IPA extends the "relevance test" to require that a condition be relevant to, but not an unreasonable imposition on the development or the use of premises as a consequence of the development.

In *Hammond and Anor v Albert Shire Council* [1997] QPELR 314, it was held that a condition of a subdivision approval requiring the dedication for a future major road corridor was neither relevant nor reasonable. In Hammond, the future road was likely to proceed but the Department of Main Roads was unable to determine a possible time frame for its construction and had not included the road in its forward planning documents. In these circumstances, the court held that there was no relevant nexus between the proposed road and the subdivision and that the subdivision did not create a change in affairs that would allow the condition to be a reasonable response to the subdivision.

Application of statutory test to infrastructure contributions

The common law

The application of the statutory test in section 3.5.30(1) of IPA to a condition imposed by a local government in respect of a planning scheme policy made pursuant to section 6.1.20 of IPA has recently been considered in the case of *Hickey Lawyers and Ors v Gold Coast City Council* (2005) QPEC 022.

This case concerned the lawfulness of conditions requiring monetary contributions in respect of transport infrastructure and parkland in accordance with planning scheme policies made pursuant to section 6.1.20 of IPA. The planning scheme policies had been prepared on a similar basis to which local planning policies were prepared under the PEA in respect of sewerage and water supply headworks.

The planning scheme policy for parkland was based on the following methodology:

- the catchments within the local government area to be serviced by particular networks of park or recreation infrastructure were identified;
- the anticipated ultimate population within each catchment at a nominated date being 2012 was identified;
- the existing and future infrastructure network required to service the ultimate population within each catchment was identified based on desired standards of service;
- the estimated cost based on present day values of providing the existing and future infrastructure networks within each catchment was identified; and
- the total estimated cost was then divided by the ultimate population to give a present day cost per person to provide the required infrastructure in each catchment.

The planning scheme policy for road infrastructure was based on the following methodology:

- the whole of the local government area was identified as being serviced by a network of local government roads;
- the anticipated ultimate population that will use the road network was identified;
- the existing and future infrastructure network required to service the ultimate population within the local government area was identified based on desired standards of service;
- the local government area was divided into sectors and the extent to which each sector consumed the capacity of the road network was identified having regard to factors such as population density and distance from transport nodes such as activity centres;
- the use and costs of the network was then apportioned to each sector based on the level of vehicle trip generation from each sector;
- the cost of the road network apportioned to each sector was then divided by the number of vehicle trips apportioned to each sector to produce a dollar figure per vehicle trip within each sector;
- a contribution could then be calculated by multiplying the cost per vehicle trip end by the number of trip ends generated by the particular development.

Significantly, the appellant in Hickey Lawyers did not seek to challenge the lawfulness of either planning scheme policy.

Rather, it was alleged that the contributions produced by each planning scheme policy offended the general test for the lawfulness of conditions in section 3.5.30 of IPA. In particular 2 contentions were made:

- First, that the contributions did not have a sufficient nexus with the development in that they required contributions in respect of infrastructure which was remote from the development and which was needed to satisfy the requirements of a population that may or may not eventuate.
- Second, that the contributions were otherwise unreasonable as being too imprecise particularly taking into account the uncertainties of future development and contributions that may or may not be obtained from that future development.

The court did not accept these contentions. The court held that a condition which is imposed in respect of a lawful planning scheme policy will ordinarily satisfy the test for a lawful condition under section 3.5.30 of IPA. The court accordingly upheld the contributions as lawful.

In essence, the court adopted the position that applied under the PEA in respect of contributions for sewerage and water supply headworks under local planning policies. In *Hervey Bay Industrial Estate Pty Ltd v Hervey Bay City Council* (1996) QPELR 1 and *Grey Boulevarde v Maroochy Shire Council* (2000) QPELR 167, the court held that there is a strong presumption that a condition requiring a contribution for sewerage and water supply headworks that is calculated in accordance with a lawful local planning policy in respect of sewerage and water supply headworks is lawful, although a condition may be unlawful if a lawful local planning policy gives rise to a contribution which does not meet the "relevant to or reasonably required by" test under the PEA.

The questions to be answered

Accordingly 2 questions must be asked when considering a contribution imposed pursuant to a planning scheme policy prepared pursuant to section 6.1.20 of IPA:

- First, is the planning scheme policy under which the contribution is imposed a lawful planning scheme policy?
- Second, does the contribution which arises from a lawful planning scheme policy meet the statutory test for a condition specified in section 3.5.30 of IPA?

If the answer to the first question is in the affirmative then it is extremely likely that the second question will be answered in the affirmative.

The real question therefore is what makes a planning scheme policy lawful. This question was not determined in the Hickey Lawyers case.

Lawfulness of a planning scheme policy

Whilst there is no judicial authority on this point, it appears to me that a planning scheme policy which adopts a methodology based on the following principles is likely to be upheld as lawful by the court:

- First, the methodology produces a monetary contribution which is directly proportional to a development's contribution to the need for additional infrastructure.
- Second, the methodology produces a monetary contribution which is calculated on the same basis for all comparable development.
- Third, the methodology produces a monetary contribution which bears the same proportion to the cost of the ultimate infrastructure network as the impact generated by the development (whether it be people or vehicle trips for example) bears to the impact generated by all other development.

These principles underpinned the preparation under the PEA of local planning policies in respect of sewerage and water supply headworks and parkland and underpin the basis for infrastructure charges schedules under IPA.

In short, a planning scheme policy prepared in accordance with these principles is likely to be lawful as is any contribution calculated in accordance with such a planning scheme policy that is imposed as a condition.

Priority infrastructure plans

From July 2007 onwards, infrastructure conditions can only be imposed pursuant to a priority infrastructure plan contained within a planning scheme (sections 2.1.3(1)(d) and 6.1.20(4)(a)).

The priority infrastructure plan will identify future infrastructure needs and include an infrastructure charges schedule to be applied to developments requiring infrastructure contributions (see schedule 10 definition of "priority infrastructure plan").

Although the priority infrastructure plan further refines the calculations for infrastructure contributions, it is likely that the plan will still have to fulfil the tests required for a planning scheme policy's lawfulness in order for conditions to be reasonable.

Other issues with conditions

Conditions that relate to outdated policies

In *Keenbill Pty Ltd v Redland Shire Council* [2001] QPE 004, the appellant sought the refund of infrastructure contributions paid to the council as the council had revised its planning strategy for the area from residential development to uses of a non-residential type. The appellant contended that the revision of the planning strategy effectively removed the basis upon which the conditions were imposed. The appellant argued that, as council held the contributions in trust to expend them for the purpose in which they were paid, the contributions would no longer be required and the conditions should be cancelled under section 3.5.33 of IPA. The court rejected the appellant's arguments as the council could still spend the contributions for the original purposes despite the revision of the planning strategy.

The Keenbill case makes clear that conditions relating to outdated policies can still be relevant and reasonable so long as previously planned infrastructure may still be required in the future. However, new planning strategies that remove the need for infrastructure may require the council to refund contributions previously paid for infrastructure that will no longer be built.

Request to change a condition or a development approval or a new application

Section 3.5.24 allows development approvals to be changed, while section 3.5.33 allows conditions to be changed. As a condition forms part of a development approval (section 3.5.11(6)), there has been some confusion over the application of these sections and how they interrelate.

Any request to change or cancel a condition of a development approval should be made under section 3.5.33 of IPA. This would include a request to change a plan of development that is approved in a condition (*Jewry v Maroochy Shire Council and Anor* [2005] QPEC 030).

However, the request should be made under section 3.5.24 of IPA where the request to change a condition would lead to any assessable development (such as building work, operational work or a material change in the intensity or scale of use of the premises) as the assessment manager does not have the power to authorise the change under section 3.5.33 (see section 3.5.33(1)(b) and *Hayday Pty Ltd v Brisbane City Council* [2005] QPEC 050).

Although section 3.5.24(5) is stated to exclude a change which involves a change to a condition, this provision only operates to exclude a request that could be made under section 3.5.33 to change a condition. Where assessable development would arise in a request to change a condition (and is therefore excluded by the operation of section 3.5.33), it is effectively treated as a change to the development approval that can be considered under section 3.5.24 notwithstanding section 3.5.24(5).

Where assessable development arises from a change that is not considered a minor change under section 3.5.24, a new development application will need to be lodged.

Construction of IPA planning schemes

IPA Planning Schemes

Structure of IPA Planning Schemes

Under the IPA (section 2.1.3(a)) planning schemes are required to:

- coordinate and integrate the matters including the core matters dealt with by the planning scheme, including any state and regional dimensions of the matters;
- identify the desired environmental outcomes for the planning scheme area;
- include measures that facilitate the desired environmental outcomes to be achieved; and
- include a priority infrastructure plan (currently this is not required until 30 June 2007, after which local governments can no longer impose conditions in respect of infrastructure contributions pursuant to planning scheme policies).

Strategic framework

The manner in which the matters including core matters are coordinated and integrated by the planning scheme is demonstrated in what is called the strategic framework. This part of the IPA Planning Scheme is not intended to play a role in the assessment of development and as such its role is somewhat analogous to a planning study supporting a transitional planning scheme.

Desired environmental outcomes

The desired environmental outcomes for the planning scheme area are intended to be based on the broad outcomes of ecological sustainability identified in the IPA. The desired environmental outcomes interpret these broad outcomes in the more localised context of the local government area and in turn provide the context for the measures that facilitate the achievement of the environmental outcomes.

Planning scheme measures

The measures that facilitate the achievement of the desired environmental outcomes will inevitably include planning scheme maps that delineate particular areas within the local government area and planning scheme provisions that apply to particular development within particular areas in the local government area. In general terms, planning scheme provisions include provisions that specify:

- the level of assessment being exempt, self-assessable, code assessable and impact assessment of particular development in particular areas which are usually contained in tables called assessment tables; and
- the consistency or otherwise of particular development in particular areas which are usually contained in codes or tables that are referenced to codes; and
- the outcomes to be achieved for particular areas and particular development which are contained in codes which codify what are:
  - statements of desired outcomes which are the purpose of the code and which are usually referred to as overall outcomes; and
  - statements of desired outcomes that contribute to the achievement of the overall outcomes and which are usually referred to as specific outcomes; and

- assessment criterion that self-assessable development must comply with and which are usually referred to as acceptable solutions; and
- assessment criterion that provide for assessable development, a guide for achieving specific outcomes in whole or part but does not necessarily establish compliance with the specific outcomes and which are usually referred to as probable solutions.

IPA planning schemes are strategic in focus

Under IPA planning schemes the desired environmental outcomes and the measures to facilitate their achievement specify the outcomes that are sought to be achieved for the local government areas. As such the IPA Planning Scheme is intended to be a strategic forward looking document.

In IPA planning schemes, the desired environmental outcomes and the measures that are intended to facilitate their achievement are expressed as outcomes to be achieved in a similar manner to the forward looking statements contained in the strategic plan and some development control plans of Transitional Planning Schemes. Furthermore the zonal structure of IPA planning schemes is intended to be forward looking setting out the outcomes to be achieved similar to the forward looking designations in the strategic plan and some development control plans of transitional planning schemes, rather than the existing land use patterns that were generally typical of zoning maps under transitional planning schemes.

IPA planning schemes are therefore a local expression of what ecological sustainability means in the context of the local government area and how it is to be achieved. As such planning schemes under IPA are outcome oriented and are intended to be forward looking documents.

Considerations relevant to interpretation

When interpreting planning schemes the courts have had regard to the following considerations:

- planning schemes are intended to ensure orderly development for the general convenience and benefit of the public. In *Brown v Idofill Pty Ltd* [1987] 64 LGRA 218 Muirhead J said:

  > *It must be remembered I am considering planning legislation, a purpose of which is to ensure orderly development for the general convenience and benefit of the public and the words "service station" and "sale by retail" have work to do. It is but an exercise in commonsense, without ignoring the words of the plan.*

- planning schemes are drafted largely by non-lawyers;
- planning schemes are administered largely by non-lawyers. As Marks J said in *Pacific Seven Pty Ltd v City of Sandringham* [1982] VR 157 at 162:

  > *All this leads me to say that it is desirable to recall that the definition appears in the context of a planning scheme to be administered largely by laymen entrusted to interpret occupational and trade designations in the light of what is understood by common parlance and practices in the fields, trades or areas concerned.*

- planning schemes are intended to be put into the hands of the ordinary citizen to be acted on by him at least in the first instance without technical assistance. As Hutley JA said in *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* [1981] 46 LGRA 29 at 31:

  > *The Leichhardt Draft Planning Scheme ordinance is not something which is drafted for the benefit of the technical experts in the Department of Environment and Planning. Where it uses terms of common parlance it presumably uses them in the way they are ordinarily understood, except where especially defined. It would be strange if the eloquent pleas which are daily pouring from the lips of reformers that the law should be expressed in plain language had not been heard by the draftsmen of environmental plans which are to be put into the hands of the ordinary citizen to be acted on by him at least in the first instance without technical assistance. This is one field of law in which verbal technicality has no part.*

- planning schemes are intended to be practical in their application and it is intended that they should work. In the *Shire of Perth v O'Keefe* [1964] 110 CLR 529, Kitto J at 535 recognised that practical considerations may be taken into account when interpreting town planning by-laws:

  > *The application by the By-law in a particular case is therefore not to be approached through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date.*

- the interpretation of a planning scheme is a matter of law to be determined by a court and is not a matter of fact in respect of which evidence can be given by an expert witness (see *Osterley Pty Ltd v Council of the Shire of Caboolture and HA Bachrach* Appeal No 165 of 1994 Court of Appeal dated 22 June 1994, *Yu Feng Pty Ltd v Maroochy Shire Council & Ors* (1996) 92 LGERA 41).

These principles are discussed in a paper by D R Gore QC titled "A Practical Guide to Statutory Interpretation" which was presented at the Queensland Environmental Law Association Annual Conference, Airlie Beach — 22 April 1989.

Judicial rules of interpretation

Language to be construed according to current meaning

It has been held in New South Wales that a planning scheme should be interpreted having regard to the meaning which the language bore when the ordinance was enacted (see Samuels JA in *Ku-Ring-Gai Municipal Council v Geoffrey Twibble & Associates* [1979] 39 LGRA 154 to 162).

In making this determination Samuels JA referred to the High Court decision in *Rathborne v Abel* [1964-65] 38 ALJR 293 where Barwick CJ stated at 294:

> *The matter is one of deciding what the language of the Act meant at the time it was enacted, ie, in 1948; for whilst the Act has been considerably amended since that date, I find no amendment which requires that the meaning of a section which is relevant to the questions in the stated case should be determined as at any later date than its enactment in 1948, and in so saying I am not unmindful of the substitution in 1961 of a new paragraph for s.21(1)(e).*

More recently, the High Court has confined the application of that principle to the construction of ambiguous language used in very old statutes where the language itself may have had a different meaning. This approach was propounded by the High Court in *Barbaniaris v Lutony Fashions Pty Ltd* [1987] 163 CLR where Wilson J and Dawson J stated at 23-24 that:

> *The principle — Contemporanea Exposito Est Optima Et Fortissima In Lege — has a use confined to the construction of ambiguous language and statutes which are sufficiently old for the words to have had a previous different meaning: Campbell College, Belfast (Governors) v Northern Ireland Valuation Commissioner [1964] 1WLR 912 at P941 per Lord Upjohn. This origin of the wider doctrine serves to demonstrate its limits. Some ambiguity or doubt must attend the construction of a statute before the doctrine can have any application.*

The decision of Samuels JA in *Ku-Ring-Gai Municipal Council v Geoffrey Twibble & Associates* [1973] 9 LGRA 154 therefore no longer reflects the current approach of the courts to the interpretation of planning schemes, the language of which is to be interpreted in accordance with its meaning as at the date at which the interpretation exercise is taking place. (See for example *Arpedoc Pty Ltd v Beaudesert Shire Council and Rowling Downs Pty Ltd* [1980] Qd R 88 at 94 where Dunn J defined a service station as at date of the decision rather than when the plan was generated).

Definitions in other planning schemes are irrelevant

A planning scheme being administered by one local government cannot be interpreted by reference to planning schemes administered by other local governments. Accordingly the definitions contained in other planning schemes cannot be used to establish the meaning of definitions in the planning scheme that is being interpreted.

This principle was set out by Reynolds JA in *South Sydney Municipal Council v James* [1977] 35 LGRA 432 at 438:

> *Our attention has been drawn to the circumstance that some planning schemes define dwelling house as "a building intended for use as a dwelling for a single family", eg. Dubbo and Talbragar, Kiama, Gosford and Strathfield. Others have the same definition as in this case eg. Illawarra and Monaro, whilst a third formula is used in others where the words mean "a building designed, constructed or adapted for use as a dwelling for a single family", eg. Bathurst, Blacktown and Holroyd. I have difficulty in seeing how this material can give assistance with the construction of any ordinance such as that under consideration.*

Also see *Kaducall Pty Ltd v Coffs Harbour Shire Council* (1980) 49 LGRA 14.

Planning schemes are to be read as a whole

The New South Wales Land and Valuation Court has stated in *S Wallace Pty Ltd v Sydney City Council* [1952] 18 LGR (NSW) 130 that:

> *For the purposes of the interpretation of a scheme, consideration should be given to the general framework, character and purpose of the scheme, construing the scheme as a whole with each portion throwing light if need be on the rest.*

There is no reason to suppose that any different principle applies in Queensland. (See *Comiskey & Pine Rivers Shire Council* [1996] QPLR 158).

The provisions of a planning scheme in respect of any particular zone are to be read in the light of the planning scheme as a whole. The New Zealand Court of Appeal has stated in *Raffia (J) & Sons Limited v Christchurch City* [1984] 1 ONZTPA 53 at 51:

> *The ordinance is applicable to a particular zone as simply one segment of what must be regarded as a living and coherent social document. It is certainly true that the particular ordinances will have been designed to meet particular planning objectives for the varied zones, but in a practical sense their successful operation will depend on their interaction with the intended scope and application of kindred ordinances designed to meet the purposes and objectives associated with other zones.*

Words in a planning scheme are not used in a technical sense

It is well established that a planning scheme is a document in which words are not used in a technical or special sense unless the contrary plainly appears. Accordingly words should generally be given their ordinary meaning except to the extent that they are otherwise defined in the scheme itself.

In *Arpedco Pty Limited v Beaudesert Shire Council and Rowling Downs Pty Ltd* [1980] QDR88, Dunn J stated at 94:

> *That the argument was incorrect I have no doubt at all. Its fundamental error was that it ignored the fact that this town planning scheme is a document in which words are not used in a technical or special sense; therefore, words and expressions must be given their ordinary meaning. The ordinary meaning of the expression "fuel depot" in Queensland in 1979 is, in my opinion, "a place at which an operator engages in the industry of distributing liquid fuels". The conduct of that industry involves the receipt of fuels, their storage and their dispatch. But it is the industry as an entity with which the town planning scheme is concerned.*

(Also see *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* [1981] 46 LGRA 29 at 31; *Pacific Seven Pty Ltd v City of Sandringham* [1982] VR 157 at 162, *Brown v ldofill Pty Ltd* [1987] 64 LGRA 218 and *Helicopter Services Pty Ltd v Pine Rivers Shire Council* [1988] 49 LGRA 14).

Structure of a document

Plan before you draft

Before an assessment manager commences to draft an IDAS document the whole design of the document should be conceived and planned.

When planning the structure of a document regard should be had to:

- the reader of the document (ie the audience); and
- the purpose of the document.

The structure of a document can be tested by asking whether it is easy to find things in the content and move from one thing to another.

Who is the reader of the document?

One of the fundamental guidelines of good drafting is to consider the reader of the document. It is not enough for a document to be technically correct. The document must also be able to be understood by all its likely readers, including the applicant, owners (existing and future) and most importantly the courts.

Whilst the applicant is the most important and immediate audience, a document should be drafted for the least sophisticated audience, that is, an ordinary person in the community.

What is the purpose of the document?

Similarly to considering the reader, thinking about the purpose of a document will also help an assessment manager to determine the content, layout and tone. Readers do not want irrelevant information. It hides the most important information. Once the purpose of the document is identified, this should be made clear to the reader, either in the title of the document, the introduction of the document, or by some other form, as part of the document.

Consequences of poor drafting

If the material has been drafted poorly it is more likely that the document will be misinterpreted or misunderstood by the reader. Documents or conditions that are poorly drafted are also more difficult to comply with.

A large percentage of litigation results from poorly drafted conditions or documents.

While drafting good conditions and documents may take more time, it is more likely that well-drafted conditions will not be misinterpreted and will withstand legal scrutiny.

Useful guidelines

When planning the structure of a document the following guidelines should be adopted:

- Put the most important information first and the less important information later.
- The most important information is determined by the audience and the purpose of the document.

- Place the broadly applicable before the narrowly applicable.
- Place the general before the specific.
- Place rules before exceptions.
- Place principles before procedural detail.
- Group similar items or related material together and arrange ideas for different subject matter in a parallel order.
- Follow the chronological order of events.

Sentence structure

The following guidelines should also be followed in relation to the structure of sentences.

- A sentence should deal with only one idea.
- An approval condition should not contain more than one sentence.
- An ideal average sentence length is between 20 and 25 words.
- An approval condition which is noticeably long should be broken up into separate approval conditions.
- A paragraph which continues for more than 5 lines of unbroken text should be broken up into separate sentences or breaks in the text such as sub-paragraphs should be introduced.

Short sentences

Writing in short sentences is more direct and clear, and should make it easier for the reader to understand the message.

One way to simplify sentences is to replace wordy phrases with simple words. For example:

Instead of using:	*Use*
Adequate number of	enough
At the present time	now
Notwithstanding the fact that	although

Source: Macris (2000) "Planning in Plain English", page 22 - 26.

Paragraphing an aid to avoiding ambiguity

Paragraphing is a significant aid to avoiding ambiguity. It allows the case and the conditions to be separated. At a glance a reader can see the case and the conditions that limit the legal action.

There are several rules of paragraphing that should be followed:

- The document must be capable of being divided into two or more parts.
- The paragraphs must be introduced by and be grammatically connected by introductory words. For example "where/when/if".
- The introductory word or words must be a natural expression of substances. For example:

Unacceptable	**Acceptable**
"The – (a) owner; (b) applicant; and (c) developer; may"	"Where: (a) the owner; (b) the applicant; and (c) the developer may"

  The word "the" is not a word of substance. But "where/when/if" may be appropriate.

- Where there are words after the paragraphs (ie resuming) the resuming words must be capable of being read with each preceding paragraph.
- Where there are paragraphs after the resuming words, the paragraphs must be responsive to the resuming words.
- Paragraphing should not be taken below the level of sub-sub-paragraphs. See the example below.

- Paragraphs are distinguished by letters in the alphabet in the lower case; subparagraphs by roman numerals and sub-sub-paragraphs by letters of the alphabet. For example:

> "The owner must construct:
>
> (a) on the land:
>
> (i) the sewerage works; and
>
> (ii) the roadworks:
>
> (A) to the specified standard; and
>
> (B) in the manner specified; and
>
> (b) outside the land ...."

- Where there is further paragraphing after the resuming words, the paragraph, sub-paragraphs and sub-sub-paragraphs notation is continued not restarted:

> "An owner who is:
>
> (a) over 70 years; and
>
> (b) a resident of the local government area;
>
> must contribute:
>
> (c) $20,000.00 to the council; or
>
> (d) $10,000.00 to the RAPI."

- The penultimate paragraph should be concluded with the word "and" or "or" to show whether the paragraphs are cumulative or alternative. In no circumstances must both "and" and "or" be used between paragraphs of the same level of division. See the above examples.
- Unless the first word of a paragraph is a proper noun, it should not be capitalised but rather written in the lower case on the grounds that the first word of the paragraph is the middle of the sentence. See the above examples.
- Paragraphs should be indented, sub-paragraphs and sub-sub-paragraphs progressively indented. See the above examples.
- Paragraphing must not be used other than with punctuation. See the above examples.

Numbering

When numbering a document use this system:

> 1
>
> 1.1
>
> 1.1(a)
>
> 1.1(a)(i)

For example:

> **6 INFRASTRUCTURE CONTRIBUTIONS**
>
> **6.1 Sewerage headworks**
>
> The applicant must pay to the council:
>
> (a) a monetary contribution relating to:
>
> (i) sewerage works internal; and
>
> (ii) sewerage works external...;
>
> (b) the council's costs and expenses relating to:
>
> (i) the amendment of its infrastructure charges plan relating to sewerage headworks …

Avoid further subdivisions, if possible. If they are unavoidable, continue with:

1.1(a)(i)(A)
1.1(a)(i)(A)(1)
1.1(a)(i)(A)(2) and so on.

Headings

Most documents such as development approvals deal with a number of distinct issues or matters. A development approval should be drafted or structured to deal intelligently and logically with the issues to facilitate understanding of the documents.

Headings help a reader to quickly grasp what a development approval is about by using "keywords" to identify the substance of the documents that follow.

Development approvals should use main headings and document headings.

Documents which deal with clearly distinct issues or topics should be grouped into separate main headings to aid structure and ease of understanding.

The main headings should be in upper case and bold. Do not put a full stop after the main heading number. For example:

1	**INFRASTRUCTURE CONTRIBUTIONS**

Where several distinct documents are grouped into a main heading, each approval must have its own document heading and number, such as 2.1, 2.2, 2.3 and so on.

Document headings should be in lowercase and bold. For example:

1.1	**Sewerage Headworks**

Do not capitalise each word in a clause heading unless the word is a defined term. For example:

3	**INFRASTRUCTURE CONTRIBUTIONS**
3.1	**Sewerage headworks**
	…
3.2	**Water supply headworks**
	…
3.3	**Parks**
	…

Internal cross references

When referring to a document elsewhere in the development approval:

- refer to the document simply by use of the word condition followed by the specific reference number in **bold** type. For example, **condition 1.1(a)(i)**; and
- the first letter of the word **condition** should **not** be capitalised unless it begins a sentence. For example:

(a)	Subject to **condition 4.2**, the applicant must ...

Note that both the word condition and the specific reference number (eg 4.2) are in bold. This bolding assists in ensuring that all cross-references to other conditions in a development approval are correct, particularly when it may be necessary to amend condition references after moving conditions around. References to sections of other documents should also be in bold type. For example:

... pursuant to **section 8.2** of the Planning Scheme

Capitalisation

Initial capitals should **only be used** where:

- a defined term is being used; or
- a capital would be used in ordinary English usage.

Do not capitalise the first letter of "condition" or "section" unless they begin a sentence.

Initial capitals should not be used for legal terms like applicant or owner unless they begin a sentence.

Likewise, do not capitalise the first letter of "section" (as in section 24 of the IPA) or "regulation" (as in regulation 3 of the *Integrated Planning Regulation 1998*) unless it begins a sentence. For example:

(a)	Subject to section 32 of the *Integrated Planning Act 1997* ...

Numbers

Numbers can be expressed in figures or words. Numbers from zero to ten should be expressed in words. Numbers above ten should be expressed in figures. For example:

(a)	The applicant must plant six trees ...
(b)	The applicant must contribute more than 250 widgets ...

Numbers should not be expressed in both figures and words.

Other than as above, there are no absolute rules and the chief guide is always context, common sense and consistency.

Figures should be used to express numbers when they accompany a symbol and in tables. For example, $1,000,000, 10.30am, 50% and 25km.

Judgment should be used in deciding whether to include a decimal point in monetary sums. For example, do not include a decimal point when referring to large sums such as $1,000,000. However, a decimal point can be used when referring to smaller sums, such as $10.00. When using a decimal point, it must be preceded by the $ symbol and a figure and followed by at least two figures. For example- $100.00.

In numbers greater than 999, a comma must be placed before each group of three figures. For example- $100,250.75.

Do not capitalise the first letter of a number unless it begins a sentence.

Hyphens are used when fractions are expressed in words (such as one-third). In expressing fractions in figures an oblique or slash can be used (such as 1/3).

Bullet points

Bullet points can be used to set out related information more clearly. It is important when using bullet points to:

- check that the items are in "parallel construction" (see below);
- ensure that each item forms a complete sentence with the "lead in";
- ensure that the "lead in" contains all ideas common to all items;
- use consistent punctuation; and
- if the list contains alternatives use the word "or" after the item and if the list is inclusive use the word "and" after the item.

If the list is describing steps in a procedure or process, bullet points should not be used. Rather, a more appropriate way to set out this information is to number the steps.

Source: Macris (2000) "Planning in Plain English", page 72.

Parallel construction

Lists should be in parallel construction, as non-parallel construction may confuse the reader. Parallel construction should be used to ensure that statements of policy or advice are distinguished from statements that require action to be taken.

Example of Non-parallel construction:

1 Demolish all buildings on the property

2 All vegetation shall be protected

Example of Parallel construction:

1 Demolish all buildings on the property

2 Protect all vegetation

Bolding/underlining

Do not underline words or headings. Use bolding instead.

Page endings

Avoid ending a page with headings, lead-ins or short sentences which carry over to the next page.

References to legislation

A statute or other legislation should be referred to by its full and correct short title. For example refer to IPA as the *Integrated Planning Act 1997*.

The name of legislation should be italicised but the word "section" or "regulation" should not be bolded or italicised.

Language of a document

Plain language

Plain language is commonly considered to be the best technique of effective written communication in legal documents. It is the technique used for the drafting of Acts of the Queensland Parliament.

Plain language involves the deliberate use of simplicity to achieve clear, effective communication.

A document should be as simple as possible. The ordinary person in the community should be regarded as the ultimate user of a document. A document that is easy to understand is less likely to result in dispute.

The plain language technique does not involve the simplification of a document to the point it becomes legally uncertain. In particular, care needs to be taken that legal uncertainty is not created when dispensing with terms having established meanings for users of a document.

In drafting a document, the objective should be to produce a document that is both:

- easily read and understood; and
- legally effective to achieve the desired policy objectives.

In fact, a document may involve a balancing of the outcomes of simplicity and legal uncertainty.

Use the present tense

Sometimes assessment managers use the future tense when they draft a document. Unnecessarily using the future tense makes the language complicated and difficult to understand.

> **For example:**
>
> *Instead of:*
>
> "Council" shall mean Logan City Council.
>
> *Write:*
>
> "Council" means Logan City Council.

There is no need to write in the future tense merely because a document such as a development approval will have continuing application in the future. A document will be treated as if it is "continually speaking". The present tense applies to the present – when the words are being read and each time they are read. If there is doubt about whether a statement will be interpreted in the present tense, a phrase such as "if at any time" can be used.

Of course you may use the future tense for expressing a consequence that flows from a stated legal case or legal condition. The present tense can also be used.

For example:

Instead of:

If the applicant shall fail to pay the contribution when it is due, the council may refuse to seal a plan of subdivision.

Write:

If the applicant fails to pay the contribution when it is due, the council may refuse to seal a plan of subdivision.

Use the active not passive voice

The next two sentences show the difference between the active and the passive voice.

For example:

Active voice:	The applicant must pay the money to the council.
Passive voice:	The money must be paid to the council.

The structure is simple.

- Active voice: Subject (the actor), active verb, object (the thing being acted upon).
- Passive voice: Object, complex verb, subject.

Writing in the active voice is livelier, more personal and it is generally easier to understand. The passive voice usually takes more words and is less direct.

There is another disadvantage of the passive voice. Often the passive voice is used in a reduced form and does not identify the actor.

For example:

Passive voice:	Written notice must be given to the owner.
Active voice:	The local government must give the owner written notice.

This can lead to uncertainty. By writing in the active voice the writer is forced to identify the person responsible for the action. The writer can often forget this when writing in the passive voice.

However there are circumstances when it might be preferable to use the passive voice.

- When the actor is unknown or it is necessary to hide the actor.

For example:

Unfortunately, the action was taken without the approval of the senior planner.

- When it is necessary to emphasise something other than the actor.

For example:

Even though it was late, the notice was served.

- To avoid clumsy repetition.

For example:	
Instead of	
Active voice:	The applicant must apply to the council for consent to the extended hours of operation. The applicant must include in the application the applicant's address and references. The applicant must make the application within 28 days of the proposed event.
Write in the	
Passive voice:	The applicant must apply to the council for consent to the extended hours of operation. The application must include the applicant's address and references. It must be made within 28 days of the proposed event.

Uncover hidden verbs

Verbs are often hidden as nouns. This makes sentences more wordy and harder to read. It tends to rob a sentence of its sense of action and to introduce a sense of detachment.

Instead of:	**Write:**
If they make a decision ...	If they decide ...
They will make an application ...	They will apply ...
He made an argument that ...	He argued that ...
Please give your response ...	Please respond ...
Please make payment to ...	Please pay ...
She entered an appearance ...	She appeared ...
The condition makes provision for...	He knows ...

Avoid false, double and layered negatives

Where an idea can be expressed either positively or negatively, it is preferable to express it positively. Negative statements force the reader to work out what they can do. Generally positive statements are easier to understand. Avoid multiple negatives.

For example:	
Instead of:	Not only the applicant, but also the owner must sign the infrastructure agreement.
Write:	The applicant and the owner must both sign the deed.
Instead of:	You must not omit the certificate.
Write:	You must include the certificate.
Instead of:	It is not easy to read something that is not written in a positive way.
Write:	It is easy to read something written in a positive way.

The constructions may only...if, or may only...when, are easier to understand than a negative and "unless".

For example:

Instead of:

The applicant cannot assign its obligations under the infrastructure agreement to another person unless the council has consented to the assignment.

Write:

The applicant may only assign its obligations under the infrastructure agreement to another person if they have the council's consent.

"Provided that" and provisos

It is still common to find halfway through a long clause the words "provided that". These words have many meanings. They can mean and, or, but, except that, if. To discover the history of these words and why they have been used in legislation for more than 600 years, see: Centre for Plain Legal Language "Provided that" 1993 31 NSWLSJ, p28.

The correct use of "provided that" is to qualify what has gone before. It marks a legal condition and could be replaced with if.

> **For example:**
>
> *Instead of:*
>
> The applicant may pay the lower contribution provided that they pay on or before 1 January 2001.
>
> *Write:*
>
> The applicant may pay the lower contribution if they pay on or before 1 January 2001.

The words should not be used to introduce a new idea or as a long-winded way of saying "and".

> **For example:**
>
> *Instead of:*
>
> The applicant must repaint the premises provided that if there has been an earthquake the applicant must repair any structural damage.
>
> *Write:*
>
> The applicant must repaint the premises. If there has been an earthquake the applicant must repair any structural damage.

Definitions

Almost all the documents and even many letters that local government officers write have a definitions section. Definitions can be extremely useful. They can:

- provide a shorthand label for complicated concepts, for example, "**IPA**" means *Integrated Planning Act 1997*;
- give more detail of the meaning of a word, for example, "**Assets**" means the assets of the council as at the date of this document;
- select one meaning when a word has various senses that can be confused, for example, "**Business Day**" means a day other than a Saturday, Sunday, a bank or a public holiday; or
- enlarge the natural meaning of a word, for example, "**Advertising Device**" includes a sign exhibited on a trailer or a vehicle.

Definitions are often used for the local government officer's convenience rather than for the reader's. It allows the local government officer to use a form of shorthand, but means the reader must keep flipping from the definition section to the body of the document and back again. This is seen as an advantage as it means the main clauses and the whole document is shorter. But from the reader's perspective, the document can be a struggle. Use definitions sensibly.

Here are some guidelines:

- Never define a word that is only used once or twice in the document.
- Once a label is chosen, stick to it. Use the same term to describe the same concept throughout the document. Documents are not the place for elegant variations of terminology.
- Choose a label that is consistent with the usual meaning, otherwise the writer and the reader might become confused, for example, "fire" includes flood.
- Choose a label that the reader will easily identify. For example, avoid "subject land" and instead use "site".
- Do not include substantive material in the definition, for example, "fill" means the fill material placed upon the site and compacted in accordance with the council's prescribed inspection and testing plan.
- Avoid useless definitions, for example, "Agreement" means this agreement.
- Understand the use of "means" and "includes". Using "means" limits the meaning to only what is specified. An inclusive definition leaves the meaning open. The word has the meaning that is specified and its ordinary meaning. Never use "means and includes".

Use everyday words

Use words that the reader will understand. The following guidelines should be followed:

- Technical words – Words that are genuine terms of art or technical terms must be used appropriately. These words have precise meanings and there is often no convenient substitute. They are words that have an irreducible core of legal meaning.
- Technical words should be used when the word:
  - is the only correct term, for example, plan of subdivision.
  - is a useful shorthand for a complex idea, for example, perjury.
  - is one that the reader will come across later and you want to explain.
- If a technical word must be used:
  - highlight the term by using inverted commas.
  - explain the term when it is first used in as simple language as possible.
- Acronyms – Avoid acronyms, unless the acronym is in everyday use.
- Out-dated words – Use everyday words rather than out-dated words. For example, use 'the' rather than 'aforementioned'.

> **For example:**
>
> '(1) If a person applies for a licence and intends to use the licence for a purpose to which section 10 applies, the person must keep a copy of the licence at any premises where the person is using the licence for the purpose.'

- Jargon – Avoid industry jargon and don't create new jargon.
- Non-English words – Avoid using Latin or French words unless they have become part of the English language.

Omit unnecessary words

- Doublets and triplets – Doublets and triplets often occur in documents. Often these couplings are historic caused by the mingling of English with other languages, such as French or Latin. For example, in Norman times French was the language spoken in court and used in statutes. English words were added with the same meanings as the French if they wanted to preserve the French words or help the reader understand them. These unnecessary synonyms confuse the modern reader who strains to see the difference between the words.

> **For example:**
>
> | *Instead of:* | *Write:* |
> |---|---|
> | housing and keeping dogs | keeping |
> | fit and proper | fit or proper or suitable |

- Overlapping words – You should also avoid using overlapping words, that is, strings of words where the subsequent word often presupposes the first.

> **For example:**
>
> authorise and direct, due and payable, obtain and consider, read and construed as

- Use a simple form rather than a compound construction. For example, use 'if' rather than 'in the event that'.
- Use a specific word rather than a string of synonyms. For example, use 'allow' rather than 'suffer or permit'.
- Do not overuse nominalisations (verbs made into nouns). For example, use 'act' rather than 'take action'.

Gender neutral language

Documents should be drafted in gender neutral language. Words that are, or could be taken to be gender specific, should not be used unless the document is intended only to refer to a specific gender.

However, writing gender neutral English can be difficult. One way to do this is to always use he or she, his or her. Never use s/he or he/she. However this can be very clumsy. There are some other ways.

- Repeat the noun.

> **For example:**
>
> If the applicant wants to develop the site, the applicant must ...

- Drop the pronoun.

> **For example:**
>
> *Instead of:*
>
> Upon obtaining her consent …
>
> *Write:*
>
> Upon obtaining the consent …

- Use titles or descriptions of occupations that apply equally to men and women.

> **For example:**
>
councillor	alderman
spokesperson	spokesman
police officer	policeman
worker	workman
supervisor	foreman
firefighter	fireman
bartender	barman
chairperson/chair	chairman

- Use strong verbs.

> **For example:**
>
> *Instead of:*
>
> If the applicant makes his payments by ...
>
> *Write:*
>
> If the applicant pays by ...

- Use the plural. It is now common to use "they" with a singular noun. This usage is recognised by the Oxford English Dictionary that quotes its usage dating from the 14th century. Fowler's "Modern English Usage" acknowledges its use, but comments that "grammarians" do not like it.

> **For example:**
>
> An applicant may renew the licence if they give the council notice.

Alternatively, it may sometimes be appropriate to draft the document in the plural.

"Shall", "may", "will" and "must"

Use "must" for the imperative. It is a common word that imposes an obligation with certainty. Using "shall" to express an obligation is becoming obsolete. It is very confusing when you use "shall" as an imperative and also write in the future tense.

Use "may" to indicate a privilege, power or right. It is construed as permissive not obligatory.

Use "will" only when writing in the future tense. Writing in the present tense can easily eliminate it.

Deemed

"Deemed" is commonly used to create a legal fiction or to create the presumption of fact irrespective of reality. However it is obsolete and unfamiliar to many readers. Use instead "treated as", "taken as", "considered" or "regarded".

> **For example:**
>
> *Instead of:*
>
> If a communication is served after 5.00p.m. in the place of receipt, it is deemed to be served on the next business day.
>
> *Write:*
>
> If a communication is served after 5.00p.m. in the place of receipt, it is taken to be served on the next business day.

Duty

Use "must" instead of "it is the duty of ..." to create an obligation.

"Money", "monies" and "moneys"

Do not use "moneys" and "monies". They are merely archaic forms of "money".

"Pursuant to"

Avoid "pursuant to", "in pursuance of", "by virtue of", "in exercise of the powers conferred by". To the reader these are hallmarks of legalese. Try instead "under".

"The same", "the said" and "such"

These words are also hallmarks of legalese. Replace them with a pronoun, a definition or leave them out.

Alternative or cumulative lists

Make it clear whether a list of things is to be read in the alternative or cumulatively. Do this by using the disjunctive 'or' or the conjunctive 'and' which is repeated between each item. For example, see the *Local Government Act 1993*, section 1061.

An exception is where the introductory words to the list make it clear whether the list is to be read in the alternative or cumulatively and include the word 'following'. See, for example, the *Local Government Act 1993*, section 1044(2)(b) and section 1099(3).

The expression 'and/or' should never be used.

Internal consistency

Internal consistency in the use of language is important, in particular, different words and expressions should not be used for the same thing. A dictionary of commonly used terms is included in Schedule 1 to assist local government officers to use consistent language in documents.

Definitions

There are certain logical rules for drafting definitions that should be followed:

- Define only as many terms as are necessary to carry out the intent of the planning scheme.
- Do not define terms that are not used in the planning scheme.
- Definitions of related terms should be consistent.

- Definitions should not contain extraneous standards, measurements and other regulations. Avoid a definition as follows:

  > "Buffer" means a planted strip at least 2 metres in width composed of living trees spaced not more than 3 metres apart and not less than one row of dense living evergreen shrubs spaced not more than 2 metres apart which shall be maintained in perpetuity by the owner of the property."

- The term defined must be exactly equivalent to the definition. No matter the context, it must be possible to replace each with the other.
- The term defined should not appear in the definition.
- A term cannot be defined by a synonym as whatever ambiguity exists in one term necessarily exists in its synonym. If the term to be defined is perfectly clear there is no need for a definition.
- Definitions in positive terms are preferable to definitions in negative terms.
- Terms should not be defined by other indefinite or ambiguous terms. Since the object of defining a term is to eliminate ambiguity nothing is accomplished if there are equally vague terms in the definition.

Presentation of a document

Format and printing style

Format is about how each particular type of provision or part of a provision is presented on the page, for example, where a heading is located, or how a document paragraph and subparagraph is set out.

Printing style is about how each character of a provision is printed, for example, what size, what style.

Together format and printing style control how text is presented on a page.

Furthermore the format and printing style of all documents such as development approvals made by a single assessment manager should be the same.

Presentation

The format and printing style of a document should be used to promote effective written communication.

The format and printing style of all documents such as development approvals should, as far as practicable, be the same as the format and printing style of Acts of the Queensland Parliament.

Content of a document

Parts of a legal obligation

There are potentially four parts to a legal obligation, namely:

- **The legal subject:** The legal person on whom the legal obligation is imposed.
- **The legal action:** The action which expresses the legal obligation.
- **The legal case:** The circumstances where the legal obligation applies.
- **The legal condition:** The action which causes the legal obligation to apply.

A document must include the first and second parts. The third and fourth parts are not always present.

For example:	
Legal subject:	An applicant
Legal action:	must pay all fees, rates, interest and other charges levied on the land
Legal case:	where an application has been made to the local government
Legal condition:	the fees, rates, interest and other charges levied on the land have not been paid

Often all four parts are found in one sentence. This can make the sentence long and complex, particularly where there are many legal conditions.

Traditionally legal conditions are placed first in a sentence. This is the ***if...then*** structure. This is fine if there is only one condition. However if there are many conditions then this creates a problem for the reader. They must keep all these conditions in mind before they reach the core of the provision, what the provision is really about. This can be avoided by placing the legal conditions after the legal action.

For example:

Instead of:

If fees, rates, interest and other charges levied on the land remain unpaid and the applicant makes an application for the release of a plan of subdivision the applicant must pay the fees, rates, interest and other charges levied on the land.

Write:

The applicant must pay the fees, rates, interest and other charges levied on the land if:

(a) the applicant makes an application for the release of a plan of subdivision; and

(b) the fees, rates, interest and other charges remain unpaid.

Legal subject

The subject of a legal obligation must be a legal person. This is to ensure that the identity of the person who is to take the legal action is never in doubt.

A draft condition states as follows:

> "All fees, rates, interest and other charges levied on the land must be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision".

No legal subject is specified in the draft condition. It is unclear which person is to take the legal action (that is pay the money):

- the applicant;
- the developer;
- the owner.

Development approvals are binding on the applicant as well as the owner of the land for the reasons that:

- a development approval attaches to the land and binds the owner and the owners successors in title (section 3.5.28); and
- applicant is defined for the purposes of the development offences under IPA as including the person in whom the benefit of an application vests which would include the owner (see schedule 10).

Accordingly, the legal subject should, as a general rule, be the applicant for the development approval.

The draft condition could be redrafted as follows:

> "All fees, rates, interest and other charges levied on the land must be paid by the applicant in accordance with the rate at the time of payment prior to release of the plan of subdivision".

Legal action

The legal obligation must specify what the legal subject is enabled or commanded to do. A legal obligation must contain a predicate.

A legal obligation should contain a predicate that satisfies as many of the following guidelines as possible:

- It contains a verb — that is the action to be taken.
- The verb is finite — that is the action is limited in time.
- The verb is expressed in the active voice as opposed to the passive voice so as not to obscure the legal subject who is identified to take the legal action. For example:

> "The money must be paid by the applicant" (passive).
>
> "The applicant must pay the money" (active).

- It should, as often as possible, contain an object. For example, money is the object used in the active/passive voice examples used above.

- It must distinguish whether the legal action is mandatory or discretionary. For example:

> If mandatory the word "must" should be used.
>
> If discretionary the words "may at the applicant's discretion" should be used.

The draft condition could therefore be redrafted as follows:

> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land".

The elements of the draft condition as redrafted are as follows:

- A mandatory legal action – "must".
- Legal subject – "The applicant".
- Legal action – "must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land".

The legal action in the draft condition as redrafted comprises:

- A verb – "pay".
- A finite verb – "prior to the release of the plan of subdivision".
- An active verb – "the applicant must".
- An object – "fees, rates, interest and other charges levied on the land".

The legal case

A legal obligation should specify the circumstances in respect of which or the occasion on which the legal obligation is to take effect. This is generally known as the legal case.

The legal case is generally introduced by the word "where" for those circumstances which may be repeated and the word "when" for those circumstances which will happen only once.

The draft condition does not specify the when or where. In this example the draft condition only takes effect where an application has been made to the local government for the release of the plan of subdivision. However this has not been stated although it is implied.

As the draft condition is currently drafted a person could one day after receiving the development approval pay the fees, rates, interest and other charges that were outstanding on that day and they would have satisfied the draft condition even if other fees, rates, interest and other charges became payable after the date of the payment.

The draft condition could therefore be redrafted as follows to include the legal case:

> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land when an application has been made to the local government for the release of the plan of subdivision".

The legal condition

A legal obligation must specify, if appropriate, what is to be done for the legal obligation to become operative.

This is generally known as the legal condition. A legal condition is normally introduced by the word "if". Where there is both a case and a condition limiting the application of the legal action the words "where/when" or "if" may be used interchangeably.

The draft condition does not specify the legal condition that must be satisfied before it operates. In this example the draft condition will operate where at the date of an application to the local government for the release of a plan of subdivision there are outstanding fees, rates, interest and other charges levied on the land.

As the draft condition is currently drafted the local government could call on a person to pay the fees, rates, interest and other charges levied on the land notwithstanding that they have already been paid or have been levied but not yet delivered to the person.

The draft condition could therefore be redrafted as follows to include the legal condition:

> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest and other charges levied on the land have not been paid."

Order of parts

There is no set rule as to how the parts should be ordered. However it is recommended that a legal obligation should wherever possible be structured as follows:

- Legal subject.
- Legal action.
- Legal case.
- Legal condition.

The outcome of the drafting process

If the draft condition is structured in accordance with the suggested order it would be drafted as follows:

> "The applicant must pay all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest or other charges have not been paid."

The parts of the draft condition would be structured as follows:

- Legal subject – "The applicant".
- Legal action – "must pay all fees, rates, interest and other charges levied on the land".

It should be noted that the legal action:

- Is in the active voice and is mandatory – "must".
- Comprises a verb – "pay".
- Comprises an object – "all fees, rates, interest and other charges levied on the land".
- Legal case – "an application has been made to the local government for the release of the plan of subdivision".
- Legal condition – "the fees, rates, interest or charges have not been paid".

It should be noted that the word "where" was chosen to introduce the legal case and the condition as more than one plan of subdivision may be lodged with the local government especially where the local government may require changes to the plan of subdivision as submitted.

Further reading

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This paper was presented at the Logan City Council seminar on IDAS Training, 20 September 2006.

Drafting Exercise No. 1

Condition

All fees, rates and other charges levied on the property shall be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision.

Legal subject

All fees, rates, interest and other charges levied on the property shall be paid by the applicant in accordance with the rate at the time of payment prior to release of the plan of subdivision.

Legal action

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the property.

The case

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the property when an application has been made to the local government for the release of the plan of subdivision.

The conditions

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and charges levied on the property where:

- an application has been made to the local government for the release of the plan of subdivision; and
- the fees, rates, interest and other charges levied on the property have not been paid.

The outcome of the drafting process

The applicant must pay all fees, rates, interest and other charges levied on the property where:

- an application has been made to the local government for the release of the plan of subdivision; and
- the fees, rates, interest or other charges have not been paid.

Drafting Exercise No. 2

Condition

The Property Records will be noted that a geotechnical investigation is required on each lot before a building application is made to council and that such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Structure of condition

Legal subject

Legal action:

- Verb
- Finite verb
- Object
- Mandatory directory

The case

The condition

Redrafted condition

Drafting Exercise No. 3

Condition

To ensure compliance with the conditions of this approval, council will require that you enter into a bank bond to guarantee performance. The value of such bond would be determined and would need to be lodged prior to the issue of a building permit, and any costs incidental thereto will be the applicant's responsibility.

Structure of condition

Legal subject	
Legal action: • Verb • Finite verb • Object • Mandatory directory	
The case	
The condition	

Redrafted condition

Drafting Exercise No. 4

Acceptable Measure A2.2 Acid Sulphates Code

Development must be carried out in accordance with the approved Environmental Management Plan such that:

- all pollutants are contained and managed within the site boundaries; or
- treated to levels acceptable for discharge from the site such that natural limits are not exceeded and no environmental harm is caused.

Structure of condition

Legal subject	
Legal action: • Verb • Finite verb • Object • Mandatory directory	
The case	
The condition	

Redrafted condition

Suggested Answer – Drafting Exercise No. 2

Condition

The Property Records will be noted that a geotechnical investigation is required on each lot before a building application is made to council and that such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Structure of condition

Legal subject	There is no legal subject specified in the condition. The obligation is on the applicant of the land to arrange for the geotechnical investigation, therefore the legal subject would be the applicant: A geotechnical investigation is to be conducted *by the applicant* of each lot before a building application is made to council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.
Legal action: • Verb • Finite verb • Object • Mandatory directory	The legal action should be expressed in the active voice: *The applicant must conduct a geotechnical investigation* of each lot before a building application is made to council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.
The case	In this example, the condition takes effect prior to a development application for building work being lodged: The applicant must conduct a geotechnical investigation of each lot *prior to a development application for building work* being made to council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.
The condition	The condition requires a geotechnical investigation be submitted to the council prior to a development application for building work being made, however, the intent of the condition is for the council to have received the report prior to a building approval being issued: The applicant must conduct a geotechnical investigation of each lot prior to the grant of a development permit for building work by the council and *such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant*.

Redrafted condition

The applicant must prior to the grant of a development permit for building works in respect of a lot submit to the council a geotechnical investigation of the lot which is undertaken by a suitably qualified consultant.

Suggested Answer – Drafting Exercise No. 3

Condition

To ensure compliance with the conditions of this approval, council will require that you enter into a bank bond to guarantee performance. The value of such bond would be determined and would need to be lodged prior to the issue of a building permit, and any costs incidental thereto will be the applicant's responsibility.

Structure of condition

Legal subject	The legal subject specified in the condition is "you". It is unclear as to who the person is to take the legal action. Accordingly the legal subject should be the applicant for the development approval: To ensure compliance with the conditions of this approval, council will require that the applicant enters into a bank bond to guarantee performance. The value of such bond would be determined and would need to be lodged prior to the issue of a building permit, and any costs incidental thereto will be the applicant's responsibility.
Legal action: • Verb • Finite verb • Object • Mandatory directory	The legal action should be expressed in the active voice: The applicant must enter into a bank bond to guarantee performance of and compliance with the conditions of this approval. The value of such bond will be determined and will need to be lodged prior to the issue of a building permit, and any costs incidental thereto will be the applicant's responsibility.
The case	The circumstances in respect of which or the occasion on which the legal obligation is to take effect: The applicant must enter into a bank bond to guarantee performance of and compliance with the conditions of this approval. The value of such bond will be determined and must be lodged prior to the issue of a building permit, and the applicant will be responsible for any incidental costs.
The condition	What is to be done for the legal condition to become operative. Before this condition becomes operative, a development approval must have been granted by the council. The applicant must enter into a bank bond to guarantee performance of and compliance with the conditions of this development approval. The value of such bond will be determined and must be lodged prior to the issue of a building permit, and the applicant will be responsible for any incidental costs.

Redrafted condition

The applicant must prior to the grant of a development permit for building work lodge with the council a performance security for an amount to be determined by the council acting reasonably as to the cost to the council to perform the work to ensure compliance with the conditions of this development approval.

Suggested Answer – Drafting Exercise No. 4

Acceptable Measure A2.2 Acid Sulphates Code

Development must be carried out in accordance with the approved Environmental Management Plan such that:

- all pollutants are contained and managed within the site boundaries; or
- treated to levels acceptable for discharge from the site such that natural limits are not exceeded and no environmental harm is caused.

Structure of condition

Legal subject	There is no legal subject in the condition: The *applicant* must carry out development in accordance with the approved Environmental Management Plan such that: ▪ all pollutants are contained and managed within the site boundaries; or ▪ treated to levels acceptable for discharge from the site such that natural limits are not exceeded and no environmental harm is caused.
Legal action: • Verb • Finite verb • Object • Mandatory directory	The legal action is to carry out the development in accordance with the Environmental Management Plan and not to cause off site pollution: The applicant must *carry out the development*: ▪ in accordance with the approved Environmental Management Plan; and ▪ such that all pollutants are: - contained and managed within the site; or - treated to levels acceptable for discharge from the site such that natural limits are not exceeded and no environmental harm is caused.
The case	The ability to discharge off the site is dependent on the pollutants being treated: The applicant must carry out the development: ▪ *in accordance with the approved Environmental Management Plan*; and ▪ *such that all pollutants are*: - *contained and managed within the site*; or - *discharged from the site* where the pollutants are treated to levels acceptable for discharge from the site such that the natural limits are not exceeded and no environmental harm is caused.
The condition	The pollutants must be treated to a satisfactory level before they are discharged off the site: The applicant must carry out the development: ▪ in accordance with the approved Environmental Management Plan; and ▪ such that all pollutants are: - contained and managed within the site; or - discharged from the site if the pollutants are treated to levels *where*: > *natural limits are not exceeded; and* > *no environmental harm is caused*.

Redrafted condition

The applicant must carry out the development:

- in accordance with the approved Environmental Management Plan; and
- such that all pollutants are:
  - contained and managed within the site; or
  - discharged from the site if the pollutants are treated to levels where:
    - natural limits are not exceeded; and
    - no environmental harm is caused.

COLIN BIGGERS & PAISLEY LAWYERS

Master planning of master planned areas – State government's legislative response to housing affordability

Ian Wright

This article discusses how master planning of master planned areas can positively impact housing affordability in response to the Queensland Housing Affordability Strategy 2007

November 2007

Introduction

Queensland Housing Affordability Strategy 2007

Strategy goals

In July 2007 the State government announced the Queensland Housing Affordability Strategy (**Housing Affordability Strategy**). The Housing Affordability Strategy is intended to "ensure that the State's land and housing is on the market quickly and at the lowest cost".[1]

Strategy actions

The Housing Affordability Strategy provides that the State government will take the following actions:[2]

- First establish an Urban Land Development Authority.
- Second make changes to the *Integrated Planning Act 1997* (**IPA**) to improve the planning and development assessment process.
- Third increase the supply of land ready for development in South East Queensland (**SEQ**) by identifying greenfield land in the Urban Footprint which can be developed earlier than provided for in the South East Queensland Regional Plan (**SEQ regional plan**).
- Fourth designate land for housing in regional areas of high demand such as Cairns, Townsville, Thuringowa and Mackay.
- Fifth identify and develop underutilised State land for urban purposes.
- Finally allow local governments to facilitate private sector funding of infrastructure.

Proposed IPA amendments

The Housing Affordability Strategy envisages that IPA will be amended in the following ways:[3]

- First to improve the efficiency and timeliness of the development assessment system particularly for high growth areas.
- Second to enable the Minister to resolve conflicts between agencies early in the assessment process including a power to direct a decision to be made.
- Third to require structure planning for major development areas.
- Finally to enable local government to deal with low risk approvals through a simplified process.

Urban Land Development Authority Act 2007

Scope of UDLA

The State government's legislative response to the Housing Affordability Strategy is the *Urban Land Development Authority Act 2007* (**UDLA Act**) which was introduced into the Queensland Parliament in August 2007 and commenced on 11 September 2007.

The UDLA Act establishes the Urban Land Development Authority and amends various other Acts to provide for the implementation of the legislative scheme specified in the UDLA Act.

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1 Queensland Government Department of Infrastructure (2007) Queensland Housing Affordability Strategy p1.

2 Ibid p1.

3 Ibid p4.

Scope of IPA amendments

The UDLA Act also amends the IPA to specifically implement the Housing Affordability Strategy in particular the following matters:

- First to extend regional planning throughout Queensland.
- Second to provide for master planning of major development areas (now called master planned areas) throughout Queensland.
- Third to provide for the making of a new State planning instrument called a State planning regulatory provision.
- Fourth to extend the directions power of the Minister in relation to IDAS and the master planning process.
- Fifth in relation to local government infrastructure charges:
  - provide for the Queensland Competition Authority to review the methodology of local government priority infrastructure plans; and
  - enable the Building and Development Tribunal to decide disputes relating to an error of calculation of an infrastructure charge but not its methodology.
- Sixth in relation to State government infrastructure charges provide for a regulated State infrastructure charges schedule for master planned areas.

Themes of presentation

This presentation is focussed on only one part of the Housing Affordability Strategy reform package namely the implementation of a master planning process for master planned areas. In this presentation I will explore 6 themes:

- First, I will summarise the major policy processes and key stakeholders included in the master planning process for master planned areas under IPA.
- Second, I will discuss the types of master planned communities that may be identified as a master planned area and consider the policy criteria that may be considered relevant to the identification of a master planned area and the making of a declaration for a master planned area.
- Third, I will consider the process for making a structure plan amendment to a local government planning scheme for a declared master planned area.
- Fourth, I will consider the process for approving master plans required by a structure plan for a declared master planned area.
- Fifthly, I will compare the new master planning process for a master planned area with the previous structure and master planning process in respect of major development areas in SEQ in order to highlight how the planning and development system has been made more efficient in accordance with the Housing Affordability Strategy.
- Finally, I will consider the transitional provisions that are intended to apply in respect of the ongoing preparation of structure plans for major development areas under the SEQ regional plan.

Master planning process for master planned areas under IPA

Policy processes

The master planning process for master planned areas under IPA involves 4 distinct policy processes:

- First, the identification of a proposed master planned community as a master planned area.[4]
- Second, the making of a declaration for the identified master planned area.[5]
- Third, the making of a structure plan amendment to the local government's planning scheme for the declared master planned area.[6]
- Finally, the approval of master plans required by the structure plan for the declared master planned area.[7]

Each of these policy processes involves a number of stakeholders being the Minister, local governments, the coordinating agency, participating agencies, developers and the public. Each of these stakeholders have defined roles in respect of each policy process.

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4 Section 2.5B.2 of the *Integrated Planning Act 1997*.

5 Section 2.5B.3 of the *Integrated Planning Act 1997*.

6 Section 2.5B.10 and Schedule 1A of the *Integrated Planning Act 1997*.

7 Section 2.5B.21 to 2.5B.57 of the *Integrated Planning Act 1997*.

Minister's role

The Minister responsible for administering IPA has 4 distinct roles:

- First, to approve the identification of a master planned area.[8]
- Second, to make a declaration for an identified master planned area.[9]
- Third, to approve a structure plan amendment for a declared master planned area.[10]
- Finally, to resolve conflicts between coordinating agencies, participating agencies and local governments in respect of the making of a structure plan amendment including State and local government infrastructure agreements[11] and the approval of master plans for a declared master planned area.[12]

Local government's role

Local governments have 3 distinct roles:

- First, to identify in their planning schemes and other documents prepared under a regional plan such as a local growth management strategy the master planned communities in their local government area that may be approved by the Minister.[13]
- Second, to prepare a structure plan amendment and any associated local government infrastructure agreements for a declared master planned area.[14]
- Third, to approve the master plans for a declared master planned area required by an approved structure plan or master plan.[15]

Coordinating agency role

The coordinating agency has 2 distinct roles:

- First, to coordinate participating agencies in relation to the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area.[16] The coordinating agency in this context is the entity specified in the Minister's declaration for a master planned area.[17]
- Second, to coordinate participating agencies in relation to the assessment of the master plans required by a structure plan or master plan for a declared master planned area.[18] The coordinating agency in this context is the entity specified in the approved structure plan for a declared master planned area.[19]

Participating agencies' role

A participating agency has 2 distinct roles:

- First, to participate in the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area.[20] The participating agencies in this context are the entities specified in the Minister's declaration for a master planned area.[21]
- Second, to participate in the assessment of the master plans required by a structure plan or a master plan for a declared master planned area.[22] The participating agencies in this context are the entities specified in the approved structure plan for a declared master planned area.[23]

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8 Section 2.5B.2 of the *Integrated Planning Act 1997*.

9 Section 2.5B.3 of the *Integrated Planning Act 1997*.

10 Section 14 of Schedule 1A of the *Integrated Planning Act 1997*.

11 Sections 1(5) and 5 of Schedule 1A of the *Integrated Planning Act 1997*.

12 Section 2.5B.38 of the *Integrated Planning Act 1997*.

13 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

14 Section 2.5B.7 and sections 1 and 4 of Schedule 1A of the *Integrated Planning Act 1997*.

15 Sections 2.5B.40 to 2.5B.48 of the *Integrated Planning Act 1997*.

16 Section 1(3) of Schedule 1 A of the *Integrated Planning Act 1997*.

17 Section 2.5B.3(2) of Schedule 1 A of the *Integrated Planning Act 1997*.

18 Sections 2.5B.24(3), 2.5B.34(3) and 2.5B.37 of the *Integrated Planning Act 1997*.

19 Section 2.5B.8(2)(b)(iii) of the *Integrated Planning Act 1997*.

20 Section 1(2) of Schedule 1A of the *Integrated Planning Act 1997*.

21 Section 2.5B.3(2) of the *Integrated Planning Act 1997*.

22 Sections 2.5B.24(2) and 2.5B.34 to 2.5B.36 of the *Integrated Planning Act 1997*.

23 Section 2.5B.8(2)(b)(iii) of the *Integrated Planning Act 1997*.

Developer's role

Developers have 2 distinct roles:

- First, to participate in the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area.[24]
- Second, to lodge master plan applications required by an approved structure plan or master plan for a declared master planned area.[25]

Public's role

The public has 2 distinct roles:

- First, to lodge submissions in respect of the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area.[26]
- Second, to lodge submissions in respect of master plan applications that are required to be publicly notified by an approved structure plan for the declared master plan area.[27]

Identification and declaration of master planned areas

Identification by local government and Minister

Having discussed the respective roles of each of the relevant stakeholders under the master planning process for master planned areas it is appropriate to consider each of the distinct policy processes involved in the master planning process under IPA. The first policy process is the identification of a proposed master planned community as a master planned area.

A master planned area can be identified in 2 ways:

- First, by a local government in a planning scheme or a document prepared by a local government under a regional plan.[28] In all such cases the Minister is the ultimate approving authority in respect of the planning scheme or the document and as such must approve the local government's identification.
- Second, by the Minister in a regional plan, a State planning regulatory provision or a declaration for a master planned area.[29]

Before discussing the policy criteria that may be considered relevant by a local government or the Minister in identifying a master planned area, it is appropriate to consider the types of master planned communities that may be the subject of an identification.

What is a master planned community?

The term master planned community is generally used to refer to a large scale development which has the following characteristics:[30]

- It is carried out under single or unified management.
- It is carried out in accordance with an overall plan.
- It includes different types of residential, commercial and community facilities and services sufficient to serve the residents of the community.
- It may provide land for industry or is accessible to industry, offers other types of employment opportunities and may eventually achieve a measure of self sufficiency.

Types of master planned communities

Master planned communities can be divided into 4 categories.[31]

Self contained communities

The first category of master planned communities is self contained communities. These are new communities which are designed to be as self sufficient as possible in terms of providing adequate jobs, shopping, leisure and

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24 Section 4(a) of Schedule 1A of the *Integrated Planning Act 1997*.

25 Section 2.5B.21 of the *Integrated Planning Act 1997*.

26 Sections 8 to 12 of Schedule 1 A of the *Integrated Planning Act 1997*.

27 Sections 2.5B.27 to 2.5B.33 of the *Integrated Planning Act 1997*.

28 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

29 Sections 2.5B.2(2) and (3) of the *Integrated Planning Act 1997*.

30 Advisory Commission on Intergovernmental Relations (1968) *Urban and Rural America*, Washington, D.C. US Government Printing Office p64.

31 AC Nelson and JB Duncan *Growth Management Principles and Practices* (1995) Planners Press, Washington D.C. p91.

housing opportunities for all residents. These communities are situated within urban areas and are more effective when linked to urban centres by transportation links. There is currently no example of a self contained community in SEQ. However the proposed communities of Yarrabilba and Flagstone in northern Beaudesert and Ripley Valley in Ipswich do offer the opportunity for the development of self contained communities.

Urban nodal communities

The second category of master planned communities is urban nodal communities. These communities are primarily residential and shopping areas with relatively little employment although offices and business services may be sought. These communities are generally situated at the edge of the urban area and have relatively good accessibility to transportation links. Examples of existing urban nodal communities include Forest Lake and Springfield Lakes in south western Brisbane, North Lakes in northern Brisbane, Sippy Downs, Bundilla Lakes and Kawana Waters on the Sunshine Coast and Robina and Pacific Pines on the Gold Coast. Examples of future urban nodal communities include Caloundra South and Palmview in Caloundra, the Coomera Town Centre in Gold Coast and Park Ridge in Logan.

Urban infill communities

The third category of master planned communities is urban infill communities. These communities are high intensity mixed use developments that are located near activity centres such as the CBD, inner city areas, subregional and district centres and high employment centres and as a result are not vehicle dependent. These communities may occupy land spaces of different sizes. Examples of existing urban infill communities include the urban renewal projects in New Farm, Teneriffe and West End in Brisbane, residential development associated with the Roma Street Parklands and South Bank in Brisbane and Varsity Lakes at Bond University. Examples of future urban infill communities include the Caloundra Transit Oriented Community on the Caloundra Airport and the Horton Park Golf Course site in the Maroochydore CBD.

Resort communities

The final category of master planned communities is resort communities. These communities are intended to be places for tourism and ancillary residential uses rather than residential communities. They are situated in isolated locations outside of the urban area. However where the resort community is located close to an urban area residential uses are likely to predominate. Examples of existing resort communities include Sanctuary Cove, Hope Island and Royal Pines on the Gold Coast whilst Couran Cove, Kooralbyn Valley, Laguna Whitsundays and Hamilton Island are classic examples of isolated resort communities.

Policy context for identifying a master planned area

It is conceivable that, in an appropriate policy context, master planned communities of every type may be identified as a master planned area. It is therefore necessary to consider the policy context in which a proposed master planned community may be identified as a master planned area.

Master planned communities unlike other forms of development have the potential to both implement as well as impact on the urban development patterns of individual local governments and whole regions.

Therefore prior to being identified as a master planned area under IPA, a master planned community should be evaluated for its consistency with 2 categories of principles:

- Firstly, the urban growth management principles of individual local governments and regions.
- Secondly, development planning principles.

Urban growth management principles for assessing a master planned area

The following urban growth management principles may be relevant to the determination of whether a proposed master planned community should be identified as a master planned area.

Planning need

The first growth management principle is planning need.

A master planned community must be consistent with the population, housing, employment and land use needs that underpin the planning instruments of State and local planning authorities.

If a developer seeks to rely on different projections, the State and local planning authorities should reassess the capacity of existing land uses, land designated for urban development and infrastructure and services to accommodate the revised projections and if found necessary or desirable revise their planning instruments to take into account the implications of the different projections.

Only after the revised projections have been fully considered and State and local planning instruments revised, should State and local planning authorities consider identifying a master planned community as a master planned area.

Impact on ultimate development pattern

The second growth management principle to be considered is whether a master planned community impacts on the ultimate development pattern envisaged by State and local planning instruments.

A master planned community should not attract development away from areas that are in sequence or where new investment is encouraged such as locations in the vicinity of transit nodes, activity centres and employment centres and blighted communities such as inner city industrial areas.

Furthermore a master planned community should not introduce development that negatively impacts on the integrity of nearby land uses such as environmentally sensitive areas, rural production areas and open space and landscape areas.

Impact on infrastructure services and facilities within the urban area

The third growth management principle to be considered is whether a proposed master planned community impacts on the existing or planned capacity of infrastructure, services and facilities to accommodate development that may otherwise be built in a more accessible location.

Impact on land supply within the urban area

The fourth growth management principle to be considered is whether a proposed master planned community has the effect of increasing the supply of land which is allocated for that community beyond that which is provided for in State and local planning instruments. This should only be considered where State and local planning authorities having considered a developer's proposal, determine that the additional supply is necessary at the location of and within the time frame of the master planned community.

Footprint of self contained and resort communities must be limited

The final growth management principle is that self contained communities and resort communities should be contained within identified development limits and must be connected to urban areas by good transport links.

If these communities are not contained, urban sprawl may result and the values of environmentally sensitive areas, rural production areas and open space and landscape areas between these communities and the urban area may be adversely affected.

Development planning principles for assessing a master planned area

In addition to these broad urban growth management principles, a proposal to identify a master planned community as a master planned area under IPA may also be considered in the context of a number of development planning principles.

Comprehensive master plan

The first development planning principle is whether a master planned community can be planned and developed under a comprehensive master plan that controls the following matters:

- the timing of the development;
- the scale of the development; and
- the design of the development.

The fragmentation of land within a proposed master planned community may mitigate against its identification as a master planned area.

Urban design

The second development principle is whether a master planned community is intended to follow urban design principles including balanced land uses, specified population densities and non-residential intensities.

Infrastructure, services and facilities

The third development principle is whether a master planned community would offer economies of scale and fiscal viabilities for the community and the local government especially in relation to the provision of infrastructure, services and facilities.

Identity

The fourth development principle is whether a master planned community has or would achieve a geographic and social identity. For example, the existing developments of Varsity Lakes and Sanctuary Cove on the Gold Coast have a clear identity. The same could not be said for other so called existing and proposed master planned communities in SEQ.

Community needs

The fifth development principle is whether a master planned community would provide a mix of housing, a primary employment and commercial base and a range of community facilities.

Policy context for making a declared master planned area

The broad urban growth management principles and the more particular development planning principles are likely to be relevant in identifying a master planned community as a master planned area.

Consequences of identified master planned area

However the identification of a master planned area does not of itself trigger the master planning process. Rather the identification of a master planned area is important in 2 respects:

- First, a development application under section 3.1.6 of IPA for a preliminary approval to vary the effect of a local planning instrument cannot be made in an identified master planned area unless a structure plan for a declared master planned area provides that such an application can be made.[32]
- Second, a State planning regulatory provision can be made in respect of a master planned area to protect the future master planning of the master planned area.[33]

Consequences of a declared master planned area

It is the making of a declaration by the Minister in respect of a master planned area that gives rise to the obligations of local governments, the coordinating agency and participating agencies to participate in the preparation of a structure plan amendment for a declared master plan area and the subsequent master plan approvals process for master plans required by an approved structure plan or master plan for the declared master plan area.

The Minister's decision to make a master plan area declaration is likely to be influenced by the broad urban growth management principles discussed above as well as the capacity of local governments, the coordinating agency and participating agencies to adequately resource the master planning process.

Cost recovery by local government

Local governments can recover their costs of the master planning process from developers in two ways:

- First, for a structure plan, local governments can enter into a cost recovery agreement with landowners and other interested stakeholders,[34] levy a special charge under the *Local Government Act 1993*[35] or recover its costs through an infrastructure agreement.[36]
- Second, for a master plan application, local governments can impose a regulatory charge under the *Local Government Act 1993*.[37]

State government perspective

State government coordinating and participating agencies will be required to fund their involvement in the master planning process other than for master plan application fees prescribed by a regulation.[38] Whilst the master planning process does involve a significant commitment of resources in the upfront planning process it is anticipated that the involvement of coordinating and participating agencies in the assessment of development applications under IDAS will be reduced. This will be achieved in 2 ways:

- First, the incorporation of coordinating and participating agency requirements in the structure plan and master plans is likely to resolve policy issues that are currently deferred for resolution under IDAS. IDAS is as its name suggests a development assessment system and not a policy resolution process.
- Second, coordinating and participating agencies are declared not to be a referral agency for a development application in a declared master planned area to the extent that they have exercised a coordinating and participating agency's jurisdiction for a structure plan or master plan.[39] In short coordinating and participating agencies lose their referral agency status under IDAS.

Therefore insofar as declared master plan areas are concerned it is considered that the resources of coordinating and participating agencies will over time be redeployed from administering IDAS to participating in the master planning process.

It is therefore opportune to consider the master planning process for declared master planned areas. I will consider the structure plan amendment process first before discussing the master plan approvals process.

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32 Section 2.5B.4 of the *Integrated Planning Act 1997*.

33 Sections 2.5C.1 and 2.5C.2 of the *Integrated Planning Act 1997*.

34 Section 2.5B.74 of the *Integrated Planning Act 1997*.

35 Section 2.5B.75 of the *Integrated Planning Act 1997*.

36 Section 5.2.3(2) of the *Integrated Planning Act 1997*.

37 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

38 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

39 Sections 2.5B.63 and 2.5B.64 of the *Integrated Planning Act 1997*.

Structure plan amendment

Structure plan amendment process

The process for making a structure plan amendment to the local government's planning scheme is summarised in Flowchart 1. In short the process involves the following steps:[40]

- The local government and the coordinating agency must agree on the proposed structure plan amendment. The coordinating agency is to coordinate the involvement of participating agencies and the Minister is to decide any disagreements.
- The local government must propose a structure plan amendment to its planning scheme.
- The Minister considers the State interests of the structure plan amendment.
- Local government and the coordinating agency must consult with significant landowners and stakeholders and negotiate relevant State and local government infrastructure agreements. The Minister may resolve any conflicts.
- The Minister must reconsider the State interests of the structure plan amendment and State and local government infrastructure agreements.
- The local government must give public notice of the structure plan amendment and any State and local government infrastructure agreements.
- The local government and the coordinating agency must consider any submissions and decide whether to proceed with the proposed structure plan amendment.
- The Minister must reconsider the State interests of the structure plan amendment and infrastructure agreements.
- The local government must adopt the structure plan amendment and give public notice of its adoption.

Content of structure plan

A structure plan is intended to be an integrated land use plan setting out broad environmental, land use, infrastructure and development intended to guide detailed planning for a declared master planned area.[41]

The structure plan must contain the following elements:

- First, a structure plan code that states the development entitlements and development obligations for the declared master planned area and includes a structure plan map that gives a spatial dimension to the matters the subject of the code.[42]
- Second, master planning requirements for all or part of the declared master planned area.[43]
- Finally, a statement as to the levels of assessment and codes for development in the declared master planned area.[44]

The master planning requirements that may be identified in a structure plan include the following:

- First, whether any master plans are required to be made for the master planned area.[45]
- Second, any requirements with which master plans must comply.[46]
- Third, the coordinating agency and participating agencies for the master plan application and their jurisdictions in respect of the application.[47]
- Fourth, any requirements for public notification or master plans.[48]
- Finally, the specification of any period in respect of the master planning process which IPA advises to be specified in the structure plan.[49]

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40 Schedule 1A of the *Integrated Planning Act 1997*.

41 Section 2.5B.8(1) of the *Integrated Planning Act 1997*.

42 Section 2.5B.8(2)(a) of the *Integrated Planning Act 1997*.

43 Section 2.5B.8(2)(b) of the *Integrated Planning Act 1997*.

44 Section 2.5B.8(2)(c) of the *Integrated Planning Act 1997*.

45 Section 2.5B.8(2)(b)(i) of the *Integrated Planning Act 1997*.

46 Section 2.5B.8(2)(b)(ii) of the *Integrated Planning Act 1997*.

47 Section 2.5B.8(2)(b)(iii) of the *Integrated Planning Act 1997*.

48 Section 2.5B.8(2)(b)(iv) of the *Integrated Planning Act 1997*.

49 Section 2.5B.8(2)(v) of the *Integrated Planning Act 1997*.

The structure plan may also include the following elements:

- First, a statement of desired environmental outcomes for the master planned area.[50]
- Second, a statement of the impact assessable development that may be made self-assessable or code assessable in a master plan.[51]
- Third, a statement of the development that cannot be carried out in the declared master planned area unless there is a master plan for the area.[52]
- Fourth, a statement of where applications to which section 3.1.6 of IPA applies can be made for development in the area.[53]
- Finally, a regulated State infrastructure charges schedule may be included for the declared master planned area.[54]

Having discussed the content of a structure plan and the process for making a structure plan amendment of a local government planning scheme it is appropriate to consider the master plan approvals process.

Master plan approvals

Master plan approvals process

The master plan approvals process is summarised in Flowchart 2. In short the process involves five stages:[55]

1 Application stage.

2 Information request and response stage.

3 Consultation stage where required by a structure plan.

4 State government decision stage.

5 Local government decision stage.

It is important to note that the time estimates provides in Flowchart 1 of 10, 6 and 4 months respectively do not take account of the time taken by an applicant to respond to an information request (which could reasonably be assumed to be an average of 20 business days) and the applicants appeal period (which is a further 20 business days although this could be waived).

Content of master plan

A master plan must include the following elements:

- First, a master plan area code that states the development entitlements and development obligations for the relevant master planning unit and includes a master plan map that gives a spatial dimension to the matters the subject of the code.[56]
- Second, a master plan must state the levels of assessment and codes for development in the master planning unit.[57]
- Third, a master plan must state when the development in the master planning unit must be completed.[58]

A master plan may vary the levels of assessment for development stated in a structure plan in the following ways:

- Firstly, it may make impact assessable development in a structure plan self-assessable or code assessable if this is provided for in a structure plan.[59]
- Second, it may make code assessable development in a structure plan self-assessable.[60]
- Third, it may increase the level of assessment stated in a structure plan.[61]

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50 Section 2.5B.8(3)(a) of the *Integrated Planning Act 1997*.
51 Section 2.5B.8(3)(b) of the *Integrated Planning Act 1997*.
52 Section 2.5B.8(3)(c) of the *Integrated Planning Act 1997*.
53 Section 2.5B.8(3)(d) of the *Integrated Planning Act 1997*.
54 Section 2.5B.8(3)(e) of the *Integrated Planning Act 1997*.
55 Division 5 of Chapter 5B of the *Integrated Planning Act 1997*.
56 Section 2.5B.15(1)(a) of the *Integrated Planning Act 1997*.
57 Section 2.5B.15(1)(b) of the *Integrated Planning Act 1997*.
58 Section 2.5B.15(1)(b)(iii) of the *Integrated Planning Act 1997*.
59 Section 2.5B.15(2)(a) of the *Integrated Planning Act 1997*.
60 Section 2.5B.15(2)(b) of the *Integrated Planning Act 1997*.
61 Section 2.5B.15(2)(c) of the *Integrated Planning Act 1997*.

A master plan may also vary a code in the local government's planning scheme included in a structure plan (other than the structure plan area code) provided it remains substantially consistent with the code that it varies the effect of.[62]

A master plan may also require later master plans for the master planning unit and may state requirements with which a later master plan must comply.[63]

Structuring of master planning process

Having discussed the structure plan amendment process and the master plan approvals process, I propose to consider how these master planning processes could be used to deliver a master planned community.

I will use the Kawana Waters master planned community in Caloundra as an example. Kawana Waters is intended to comprise some 23,000 persons, a town centre, employment areas, a regional hospital, an open space network based on a public recreation lake comprising an international rowing course and conservation areas based on the Mooloola River floodplain.

The master planning process for Kawana Waters under the existing Development Control Plan 1 (Kawana Waters) and associated Development Agreement is shown in Flowchart 3.

This existing process could be used to demonstrate how the Kawana Waters master planned community could be master planned as a master planned area under IPA. The proposed master planning process is illustrative only in that the master planning process could be implemented in other ways. With that said the master planning for Kawana Waters could involve 4 stages.

Structure plan amendment

The first stage would involve the making of a structure plan amendment to the planning scheme. The plans titled Development Control Plan and Structure Plan in Flowchart 3 are examples of structure plan maps that could be included in a structure plan area code.

If a more generalised structure plan is adopted such as that shown for the Development Control Plan in Flowchart 3 then it may be necessary to require that a more detailed master plan be proposed across the whole of the master planned area. In such a case a more detailed master plan such as that shown as a Structure Plan in Flowchart 3 may be required to be approved.

District master plan

The second stage of the master planning process could involve the approval of a district master plan required to be prepared by a structure plan for a district forming part of the master planned area such as a suburb comprising residential neighbourhoods, employment areas, centres and open space.

The plans titled Neighbourhood Plan and Detailed Planning Area Plan in Flowchart 3 are examples of district master plans that could be required by a structure plan.

Precinct master plan

The third stage of the master planning process could involve the approval of a precinct master plan in respect of a precinct forming part of a district master plan such as a residential neighbourhood, an employment area, a town centre or parts of a transit oriented community.

The plan titled Precinct Estate Plan in Flowchart 3 is an example of a precinct master plan that could be required by a structure plan or a district master plan.

Site development plan

The fourth stage of the master planning process could involve the approval of a site development plan in respect of an identified site within a precinct such as a multi unit development site, a main street, a neighbourhood or district centre, a mixed use development, a transit oriented development or a site within a transit oriented community, a town centre or an employment area.

The plan titled Site Development Plan in Flowchart 3 is an example of a site development plan that could be required by a precinct master plan or district master plan.

Development applications under IDAS

Following the completion of the master planning process it will inevitably be the case that development applications will be required to be submitted under IDAS in respect of any material change of use that remains assessable development under the structure plan or master plans, the reconfiguring of lots and any operational work and building work that is required to be carried out. The relationship between the master planning process described above and IDAS is specified in Figure 1.

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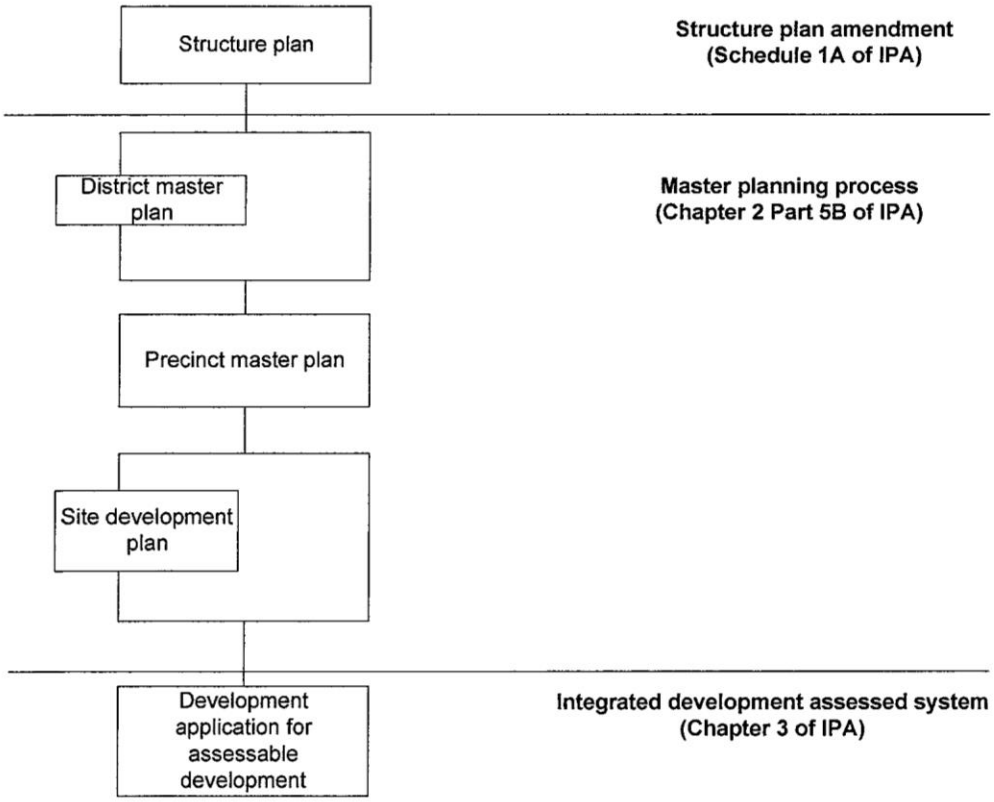
62 Section 2.5B.15(3) and (4) of the *Integrated Planning Act 1997*.

63 Section 2.5B.15(5) of the *Integrated Planning Act 1997*.

Figure 1 - Relationship of planning scheme, master plans and IDAS



The development applications submitted in respect of a master planned area are subject to modified assessment and decision making rules under IDAS which require the refusal of a development application which would do one or more of the following:

- First, compromise the achievement of the desired environmental outcomes including those for a master planned area.[64]
- Second, conflict with the purpose of a structure plan area code or a master plan area code.[65]
- Third, conflict with the provision of another applicable code where there are not sufficient grounds to justify the decision despite the conflict.[66]

It is also important to note that any restrictions contained in other Acts in respect of the making of a properly made development application are declared not to apply in a master planned area.[67] Examples include the provisions specified in section 22A of the *Vegetation Management Act 1999* and section 967 of the *Water Act 2000*.

These provisions are appropriate considering that the relevant State government agencies administering such Acts would have participated in the structure plan making and master plan approvals process as a coordinating or participating agency and as a result the relevant policy issues would have been resolved as part of that master planning process thereby removing the need for such restrictions.

Efficiency of master planning process

Comparative analysis of master planning processes

Having discussed the master planning process for master planned areas provided for in the IPA it is appropriate to consider whether the master planning process achieves the Housing Affordability Strategy's goal of making the planning and development assessment systems more efficient.

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64 Sections 2.5B.69(3)(a) and 2.5B.70(4) of the *Integrated Planning Act 1997*.

65 Section 2.5B.69(3)(b) and 2.5B.70(4)(b) of the *Integrated Planning Act 1997*.

66 Section 2.5B.69(3)(c) and (5) and 2.5B.70(4)(c) and (6) of the *Integrated Planning Act 1997*.

67 Section 2.5B.65 of the *Integrated Planning Act 1997*.

In order to determine this it is necessary to carry out a comparative analysis of the previous structure and master planning processes for major development areas in SEQ under the SEQ regional plan against the master planning process for master planned areas provided for in IPA. This analysis is summarised in Table 1.

Table 1 Assessment of master planning processes

Master planning processes	Low range (months)	High range (months)
1. Existing structure plan making process involving concurrent scheme amendments and subsequent s3.1.6 preliminary approvals	42	78
2. Existing structure plan making process involving subsequent scheme amendments and subsequent s3.1.6 preliminary approvals	51	96
3. Proposed structure plan making process with subsequent master plan approvals	28	56
Time savings (3 versus 1)	**14**	**22**
Time savings (3 versus 2)	**23**	**40**

Notes

1. *The time estimates are based on the assumption that a local growth management strategy has been prepared for the local government area which provides a strategic framework for the master planned area.*
2. *The low range estimates assume relatively minor complexity in relation to the master planning processes in terms of the predominant land use mix, infrastructure planning and amendments to the planning scheme.*
3. *The high range estimates assume significant complexity in relation to the master planning processes in terms of the predominant land use mix, infrastructure planning and amendments to the planning scheme.*

Previous structure and master planning processes for major development areas

The previous structure and master planning process which was provided for in IPA and the SEQ regional plan in respect of major development areas involved five processes:

- First, the approval of a local government prepared structure plan by the Regional Planning Minister.
- Second, the approval of a local government prepared planning scheme amendment by the Planning Minister.
- Third, the approval of a section 3.1.6 application for preliminary approval by State and local governments to approve development and establish a master planning process.
- Fourth, the approval of a subsequent section 3.1.6 application for preliminary approval by State and local governments to approve master plans for development.
- Fifthly, the approval of subsequent applications for development permits to carry out development.

The processes for making a structure plan and making planning scheme amendments could have been carried out concurrently although no local government availed itself of this opportunity. If the processes were carried out concurrently they may take between 18 and 36 months to complete. If they were carried out subsequently to each other they may take between 27 and 53 months to complete.

The IPA did not previously provide a process for master plan approvals. Rather, it made provision for a section 3.1.6 application for a preliminary approval which may specify levels of assessment and codes. This type of application which was publicly notifiable and subject to third party submission and appeal rights was used in practice to establish master planning processes. This approvals process could take between 14 and 26 months to complete.

Having established a master planning process by means of a section 3.1.6 preliminary approval, subsequent applications for section 3.1.6 preliminary approvals were required to be made to seek approval for master plans. These subsequent section 3.1.6 applications were not subject to public notification, but could reduce the levels of assessment and specify codes. This approvals process could take between 10 and 17 months to complete.

Having sought approval for master plans, development applications were then lodged for development permits to carry out development in accordance with the approved master plans. These development applications were generally only subject to code assessment and could take between 10 and 17 months to complete.

In summary, the previous structure and master planning approvals processes are estimated to have taken between 42 and 78 months if the structure plan and planning scheme amendment processes were run concurrently and 51 to 96 months if they were run subsequently.

Master planning process for master planned area

The master planning process for master planned areas under IPA involves three processes:

- First, the approval of a local government prepared structure plan amendment by the Minister.
- Second, the approval by local government of master plan applications or a section 3.1.6 application for preliminary approval where provided for in a structure plan.
- Third, the approval of subsequent applications for development permits to carry out development.

The structure plan amendment process rationalises the previous structure plan making process, planning scheme amendment process and section 3.1.6 application for preliminary approval into one process. This process is estimated to take between 18 and 36 months as compared with 32 to 62 months where the structure plan and scheme amendment processes were run concurrently or 41 to 79 months where the structure plan and scheme amendment processes were run subsequently. This represents a respective saving of 14 to 26 months where the processes were run concurrently and a saving of 23 to 43 months where the processes were run subsequently.

The master planning process replaces the current section 3.1.6 applications for preliminary approvals which are lodged subsequently to a section 3.1 application for preliminary approval which is publicly notifiable. This process is estimated to take between 10 and 20 months as compared with 10 to 17 months for a section 3.1.6 application for preliminary approval. The high range estimates will generally relate to higher order master plans whilst the low range estimates will apply to lower order master plans. Furthermore, higher order and lower master plans can be lodged concurrently with each other as opposed to section 3.1.6 applications for preliminary approval which must be lodged subsequently to each other.

The IPA also enables development applications for development permits to be lodged concurrently with master plan applications. This represents a further improvement on the previous system whereby development applications for development permits were required to be lodged subsequently to a section 3.1.6 application for preliminary approval.

In summary, the master planning approvals processes for master planned areas are estimated to take between 28 to 56 months (see Table 1) above.

Comparative analysis of master planning processes for major development areas and master planned areas

The master planning process for master planned areas is estimated to reduce the development approval process by 14 to 22 months in comparison to the previous process where the structure plan and scheme amendment processes were run concurrently and up to 23 to 40 months where the structure plan and scheme amendment processes were run subsequently.

The master planning process for master planned areas is also estimated to significantly reduce IDAS timeframes for subsequent applications for development permits in a master planned area given that:

- applications for development permits can be lodged concurrently with master plan applications; and
- State government agencies will be removed as referral agencies in the IDAS process given their involvement as a coordinating agency or a participating agency in the structure plan amendment or master plan approvals processes.

The master planning process for master planned areas also provides more flexibility and certainty than the current section 3.1.6 applications for preliminary approvals in that:

- the development identified as impact assessable in the structure plan can be reduced to code or self-assessable development in a master plan; and
- the master plan application is not subject to public notification and third party submitter and appeal rights as is the case with the initial section 3.1.6 application for preliminary approval under the previous situation.

Public notification processes are also substantially improved in that:

- all relevant documents including the structure plan, planning scheme amendments and State and local government infrastructure agreements are subject to public notification; and
- the current separate public notification processes in respect of the structure plan, planning scheme amendments and the initial section 3.1.6 application for preliminary approval are combined into one public notification process.

Transitional arrangements for structure plans under SEQ regional plan

Having discussed the improved efficiency of the master planning process for master planned areas in comparison to the previous structure and master planning processes for major development areas under the SEQ regional plan it is appropriate to consider the transitional arrangements that are provided for in respect of these previous structure planning processes in SEQ.

Under the transitional provisions a major development area under the SEQ regional plan is to be an identified master planned area but not a declared master planned area.[68] This has several consequences:

- First, an application for a preliminary approval to which section 3.1.6 applies can not be in a major development area unless specified in a structure plan.[69]
- Second, a State planning regulatory provision can be made in respect of the master planned area.[70] In this regard it is noted that the current regulatory provisions included in the SEQ Regional Plan are taken to be State planning regulatory provisions for the SEQ region.[71]

The transitional provisions also provide that where a structure plan for a major development area has been prepared by the local government and approved by the Minister, the structure plan may be adopted as an amendment to the local government's planning scheme.[72] In essence the previous structure plan making process can be continued subject to the structure plan being included in the local government's planning scheme rather than the SEQ regional plan.

The transitional provisions also provide that a local growth management strategy prepared under the SEQ regional plan may be included in the regional plan for the SEQ region.[73]

Conclusions

In conclusion then, master planned communities have played and will continue to play an important role in accommodating urban growth in high growth areas especially in South East Queensland and in the major regional centres.

Master planned communities that meet appropriate urban growth management and development planning principles are more likely to be identified as master planned areas under IPA.

An identified master plan area is likely to be made a declared master plan area where the relevant urban growth management principles are satisfied and where the relevant local government and coordinating and participating agencies are adequately resourced to participate in the master planning process for the master planned area.

The master planning process for master planned areas is more efficient than the previous structure and master planning processes for major development areas under the SEQ regional plan. Indeed the master planning process for master planned areas is estimated to reduce the development approvals process by between 18 and 27 months.

As such the master planning process for master planned areas is expected to have a positive impact on housing affordability consistent with the State government's Housing Affordability Strategy. The State government is therefore to be congratulated for implementing what can only be described as a significant reform to Queensland's planning and development system.

This paper was presented on Urban Land Development Authority Act 2007 to Queensland Government Department of Infrastructure seminars to State government agencies and industry groups on 16 November 2007 and to the SEQ Regional Planners Forum on 23 November 2007.

68 Section 6.8.8 of the *Integrated Planning Act 1997*.

69 Section 2.5B.4 of the *Integrated Planning Act 1997*.

70 Section 2.5C.2 of the *Integrated Planning Act 1997*.

71 Section 6.8.4 of the *Integrated Planning Act 1997*.

72 Section 6.8.7 of the *Integrated Planning Act 1997*.

73 Section 6.8.6 of the *Integrated Planning Act 1997*.

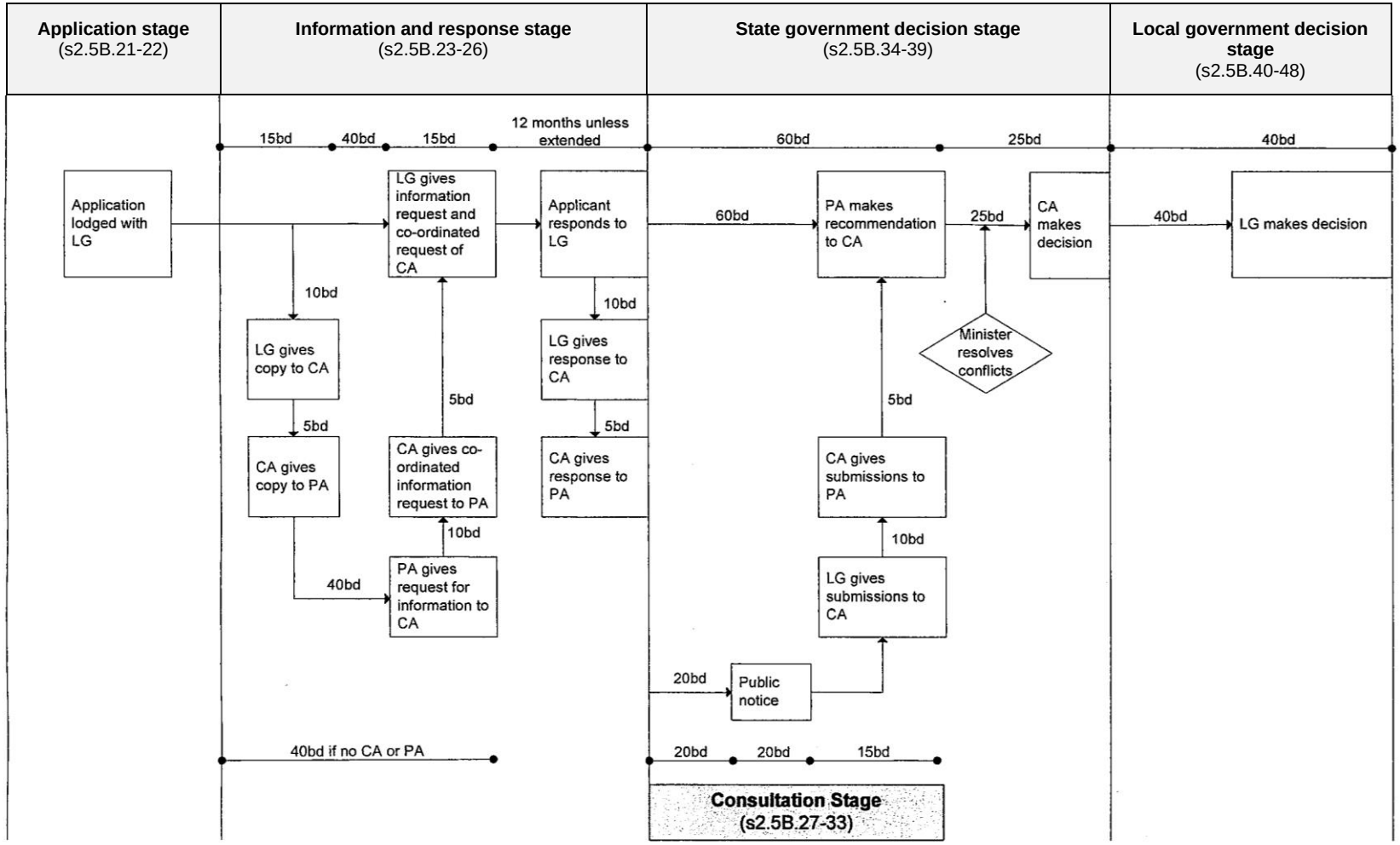
Flowchart 1 Making a Structure Plan

Step	Comments	Relevant sections
1- Identification of Master Planning Area	By the State or local government.	2.5B.2
2- Declaration of Master Planning Area	By the State only. The declaration identifies participating agencies, coordinating agencies and timeframes for the steps for making the structure plan.	2.5b.3
3- Local government must prepare structure plan	The structure plan must be prepared in accordance with Schedule 1A and any guidelines prescribed under regulation.	2.5B.6 and 2.5B.7
4- Local government and coordinating agency must agree on the proposed structure plan	The coordinating agency must coordinate the involvement of participating agencies and the Minister must decide disagreements.	Section 1 of Schedule 1A
5- Local government proposes amendment to planning scheme to include structure plan	Local government must give a copy of the proposed amendment, including the proposed structure plan, to the Minister.	Section 2 of Schedule 1A
6- Minister considers State interests	Local government must comply with any conditions imposed by the Minister.	Section 3 of Schedule 1A
7- Consultation on the proposed structure plan	Local government and the coordinating agency must consult with significant landowners and stakeholders and may enter State and local government infrastructure agreements. The Minister may resolve conflicts. Following consultation the local government and coordinating agency must decide whether to proceed with the proposed amendment. If they decide to proceed then they must give a copy of the proposed amendment and any infrastructure agreements to the Minister.	Sections 4, 5 and 6 of Schedule 1A
8- Minister reconsiders State interest	Minister may impose conditions on the notification of the proposed amendment.	Section 7 of Schedule 1A
9- Public notification of proposed amendment to any infrastructure agreements	Minimum of 30 business days.	Sections 8 and 9 of Schedule 1A
10- Consideration of submissions	Following public notification and consideration of submissions the local government and coordinating agency must decide whether to proceed with the proposed amendment. If the local government and coordinating agency decide to proceed with the proposed amendment then the local government must report on how submissions were dealt with and give report to submitters and the Minister.	Sections 10, 12 and 13 of Schedule 1A
11- Minister reconsiders State interest	Minister may impose conditions on the adoption of the proposed amendment.	Section 14 of Schedule 1A
12- Adoption and public notice of adoption	If the local government decides to proceed with the proposed amendment it must publicly notify the decision and give a copy of the notice and proposed structure plan to the chief executive.	Sections 15, 16 and 17 of Schedule 1A

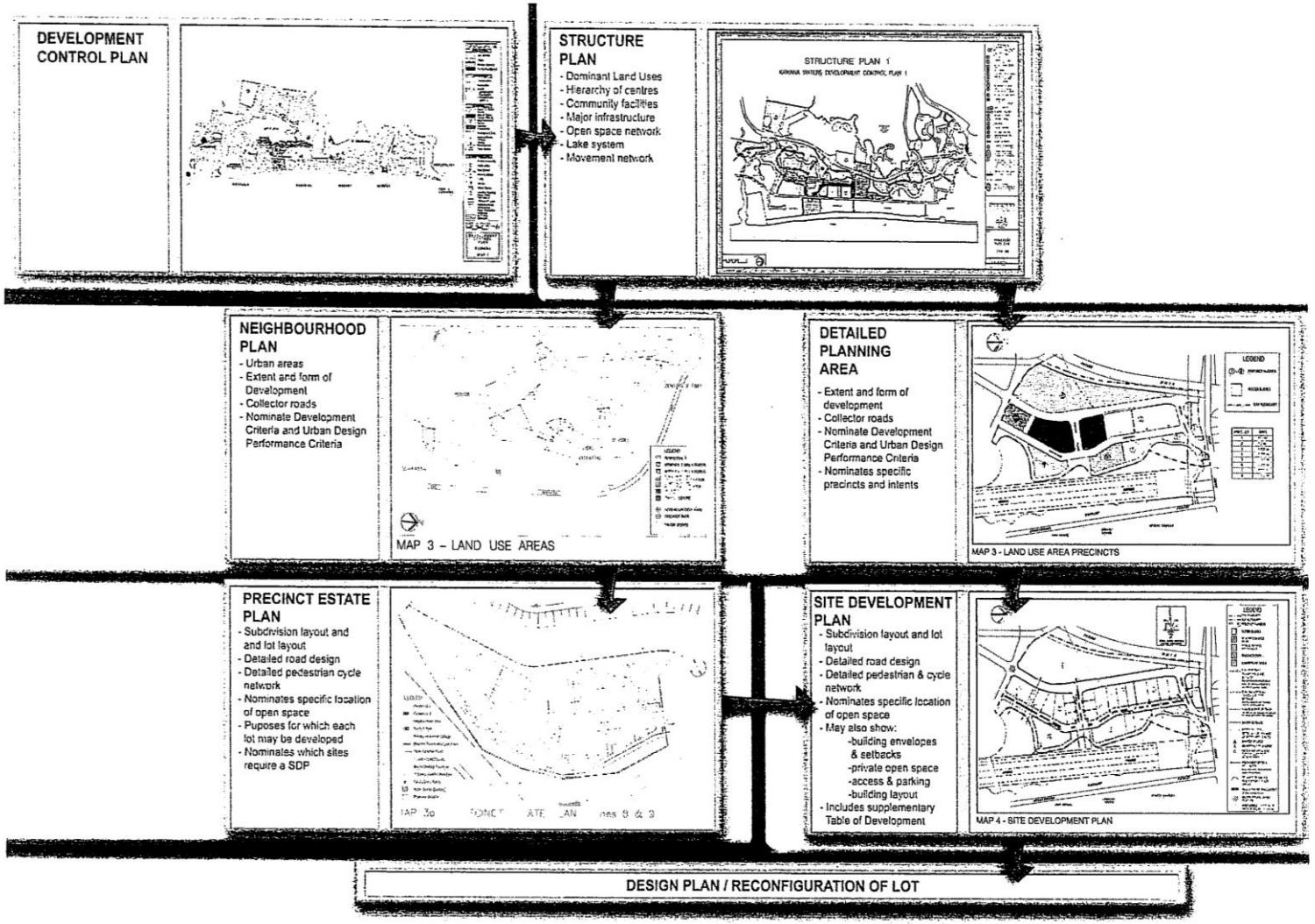
Flowchart 2 Master Plan Approval Process

For application involving -

- Coordinating agency (CA), participating agency (PA) and information requests - 10 months
- Only local government (LG), information request and consultation - 6 months
- Only local government and information request - 4 months



Flowchart 3 Kawana Waters Master Planning Process



The reform of the Queensland planning and development system to implement master planning

Ian Wright

This article discusses the Housing Affordability Strategy reform package, specifically the major policy processes and key stakeholders, the types of master planned communities, the process of making a structure plan amendment, the approval process, a comparison of the new system with the previous structure and process and the transitional provisions of structure plans for major development areas

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Introduction

Queensland Housing Affordability Strategy 2007

In July 2007 the State government announced the Queensland Housing Affordability Strategy (**Housing Affordability Strategy**). The Housing Affordability Strategy is intended to "ensure that the State's land and housing is on the market quickly and at the lowest cost".[74]

The Housing Affordability Strategy provides that the State government will:[75]

- establish an Urban Land Development Authority;
- make changes to the *Integrated Planning Act 1997* (**IPA**) to improve the planning and development assessment process;
- increase the supply of land ready for development in South East Queensland (**SEQ**) by identifying greenfield land in the Urban Footprint which can be developed earlier than provided for in the South East Queensland Regional Plan (**SEQ regional plan**);
- designate land for housing in regional areas of high demand such as Cairns, Townsville, Thuringowa and Mackay;
- identify and develop underutilised State land for urban purposes; and
- allow local governments to facilitate private sector funding of infrastructure.

The Housing Affordability Strategy envisages that IPA will be amended to:[76]

- improve the efficiency and timeliness of the development assessment system particularly for high growth areas;
- enable the Minister to resolve conflicts between agencies early in the assessment process including a power to direct a decision to be made;
- require structure planning for major development areas; and
- enable local governments to deal with low risk development approvals through a simplified process.

Urban Land Development Authority Act 2007

The State government's legislative response to the Housing Affordability Strategy is the *Urban Land Development Authority Act 2007* (**UDLA Act**) which was introduced into the Queensland Parliament in August 2007. The majority of provisions commenced on 21 September 2007.

The UDLA Act establishes the Urban Land Development Authority and amends various other Acts to provide for the implementation of the legislative scheme specified in the UDLA Act.

The UDLA Act also amends the IPA to specifically implement the Housing Affordability Strategy in particular:

- to extend regional planning throughout Queensland;
- to provide for master planning of major development areas (now called master planned areas) throughout Queensland;

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74 Queensland Government Department of Infrastructure (2007) Queensland Housing Affordability Strategy p1.

75 Ibid p1.

76 Ibid p4.

- to provide for the making of a new State planning instrument called a State planning regulatory provision;
- to extend the directions power of the Minister in relation to IDAS and the master planning process;
- in relation to local government infrastructure charges, to:
  - provide for the Queensland Competition Authority to review the methodology of local government priority infrastructure plans; and
  - enable the Building and Development Tribunal to decide disputes relating to an error of calculation of an infrastructure charge but not its methodology; and
- in relation to State government infrastructure charges provide for a regulated State infrastructure charges schedule for master planned areas.

Themes of presentation

This paper is focussed on only one part of the Housing Affordability Strategy reform package namely the implementation of a master planning process for master planned areas. This paper will explore the following themes:

- The major policy processes and key stakeholders included in the master planning process for master planned areas under IPA.
- The types of master planned communities that may be identified as a master planned area and the policy criteria that may be considered relevant to the identification of a master planned area and the making of a declaration for a master planned area.
- The process for making a structure plan amendment to a local government planning scheme for a declared master planned area.
- The process for approving master plans required by a structure plan for a declared master planned area.
- A comparison of the new master planning process for master planned areas with the previous structure and master planning process in respect of major development areas in SEQ in order to highlight how the planning and development system has been made more efficient in accordance with the Housing Affordability Strategy.
- The transitional provisions that are intended to apply in respect of the ongoing preparation of structure plans for major development areas under the SEQ regional plan.

Master planning process for master planned areas under IPA

The master planning process for master planned areas under IPA involves four distinct policy processes:

- the identification of a proposed master planned community as a master planned area;[77]
- the making of a declaration for the identified master planned area;[78]
- the making of a structure plan amendment to the local government's planning scheme for the declared master planned area;[79] and
- the approval of master plans required by the structure plan for the declared master planned area.[80]

Each of these policy processes involves a number of stakeholders being the Minister, State agencies, local governments, developers and the public. A State government agency can be identified in a master planned area declaration or a structure plan as having a particular role as a coordinating agency or participating agency.[81]

Each of these stakeholders have defined roles in respect of the master planning process.

The role of the Minister responsible for administering IPA in the master planning process is to:

- identify or approve the identification of a master planned area;[82]
- make a declaration for an identified master planned area;[83]

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77 Section 2.5B.2 of the *Integrated Planning Act 1997*.

78 Section 2.5B.3 of the *Integrated Planning Act 1997*.

79 Section 2.5B.10 and Schedule 1A of the *Integrated Planning Act 1997*.

80 Section 2.5B.21 to 2.5B.57 of the *Integrated Planning Act 1997*.

81 Sections 2.5B.3(2) and 2.5B.8(2)(b)(iii) and the definition of "participating agency" and "coordinating agency" in Schedule 10 of the *Integrated Planning Act 1997*.

82 Section 2.5B.2 of the *Integrated Planning Act 1997*.

83 Section 2.5B.3 of the *Integrated Planning Act 1997*.

- approve a structure plan amendment for a declared master planned area;[84] and
- resolve conflicts between coordinating agencies, participating agencies and local governments in respect of the making of a structure plan amendment including State and local government infrastructure agreements[85] and the approval of master plans for a declared master planned area.[86]

The role of a local government in the master planning process is to:

- identify in their planning schemes and documents prepared under a regional plan, such as a local growth management strategy, the master planned areas in their local government area (subject to approval of those instruments by the Minister);[87]
- prepare a structure plan amendment and any associated local government infrastructure agreements for a declared master planned area;[88] and
- approve the master plans for a declared master planned area required by an approved structure plan or master plan.[89]

The role of a coordinating agency in the master planning process is to:

- coordinate participating agencies in relation to the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area;[90] and
- coordinate participating agencies in relation to the assessment of the master plans required by a structure plan or master plan for a declared master planned area.[91]

The role of a participating agency in the master planning process is to:

- participate in the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area;[92] and
- participate in the assessment of the master plans required by a structure plan or a master plan for a declared master planned area.[93]

The role of developers seeking to develop land in a master planned area is to:

- participate in the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area;[94] and
- lodge master plan applications where required by an approved structure plan or master plan for a declared master planned area prior to commencing development.[95]

The public has the opportunity to make submissions in the master planning process:

- in respect of the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area;[96] and
- in respect of master plan applications that are required to be publicly notified by an approved structure plan for the declared master plan area.[97]

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84 Section 14 of Schedule 1A of the *Integrated Planning Act 1997*.

85 Sections 1(5) and 5 of Schedule 1A of the *Integrated Planning Act 1997*.

86 Section 2.5B.38 of the *Integrated Planning Act 1997*.

87 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

88 Section 2.5B.7 and sections 1 and 4 of Schedule 1A of the *Integrated Planning Act 1997*. See also section 5.1.33 and part 2 of chapter 5 of the *Integrated Planning Act 1997*.

89 Sections 2.5B.40 to 2.5B.48 of the *Integrated Planning Act 1997*.

90 Section 1(3) of Schedule 1A of the *Integrated Planning Act 1997*. The coordinating agency in this context is the entity specified in the Minister's declaration for a master planned area pursuant to section 2.5B.3(2) and Schedule 10 of the *Integrated Planning Act 1997*.

91 Sections 2.5B.24(3) and 2.56.37 of the *Integrated Planning Act 1997*. The coordinating agency in this context is the entity specified in the approved structure plan for a declared master planned area pursuant to section 2.5B.8(2)(b)(iii) and Schedule 10 of the *Integrated Planning Act 1997*.

92 Section 1(2) of Schedule 1A of the *Integrated Planning Act 1997*. The participating agencies in this context are the entities specified in the Minister's declaration for a master planned area pursuant to section 2.5B.3(2) and Schedule 10 of the *Integrated Planning Act 1997*.

93 Sections 2.5B.24(2) and 2.5B.34 to 2.5B.36 of the *Integrated Planning Act 1997*. The participating agencies in this context are the entities specified in the approved structure plan for a declared master planned area pursuant to section 2.5B.8(2)(b)(iii) and schedule 10 of the *Integrated Planning Act 1997*.

94 Section 4(a) of Schedule 1A of the *Integrated Planning Act 1997*.

95 Section 2.5B.21 of the *Integrated Planning Act 1997*.

96 Sections 8 to 12 of Schedule 1A of the *Integrated Planning Act 1997*.

97 Sections 2.5B.27 to 2.5B.33 of the *Integrated Planning Act 1997*.

Identification and declaration of master planned areas

Identification by local government and Minister

Having discussed the respective roles of each of the relevant stakeholders under the master planning process for master planned areas it is appropriate to consider each of the distinct policy processes involved in the master planning process under IPA. The first policy process is the identification of a proposed master planned community as a master planned area.

A master planned area can be identified in two ways:

- By a local government in a planning scheme or a document prepared by a local government under a regional plan.[98] In all such cases the Minister is the ultimate approving authority in respect of the planning scheme or the document and as such must approve the local government's identification.
- By the Minister in a regional plan, a State planning regulatory provision or a declaration for a master planned area.[99]

Before discussing the policy criteria that may be considered relevant by a local government or the Minister in identifying a master planned area, it is appropriate to consider the types of master planned communities that may be the subject of an identification.

What is a master planned community?

The term master planned community is generally used to refer to a large scale development which:[100]

- is carried out under single or unified management;
- is carried out in accordance with an overall plan;
- includes different types of residential, commercial and community facilities and services sufficient to serve the residents of the community;
- may provide land for industry or is accessible to industry, offers other types of employment opportunities and may eventually achieve a measure of self sufficiency.

Types of master planned communities

Master planned communities can be divided into the following four categories.[101]

Self contained communities

Self contained communities are new communities which are designed to be as self sufficient as possible in terms of providing adequate jobs, shopping, leisure and housing opportunities for all residents. These communities are situated within urban areas and are more effective when linked to urban centres by transportation links. There is currently no example of a self contained community in SEQ. However the proposed communities of Yarrabilba and Flagstone in northern Beaudesert[102] and Ripley Valley in Ipswich do offer the opportunity for the development of self contained communities.

Urban nodal communities

Urban nodal communities are primarily residential and shopping areas with relatively little employment although offices and business services may be sought. These communities are generally situated at the edge of the urban area and have relatively good accessibility to transportation links. Examples of existing urban nodal communities include Forest Lake and Springfield Lakes in south western Brisbane, North Lakes in northern Brisbane, Sippy Downs, Bundilla Lakes and Kawana Waters on the Sunshine Coast and Robina and Pacific Pines on the Gold Coast. Examples of future urban nodal communities include Caloundra South and Palmview in Caloundra, the Coomera Town Centre in Gold Coast and Park Ridge in Logan.

Urban infill communities

Urban infill communities are high intensity mixed use developments that are located near activity centres such as the CBD, inner city areas, subregional and district centres and high employment centres and as a result are not vehicle dependent. These communities may occupy land spaces of different sizes. Examples of existing urban infill communities include the urban renewal projects in New Farm, Teneriffe and West End in Brisbane, residential development associated with the Roma Street Parklands and South Bank in Brisbane and Varsity

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98 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

99 Sections 2.5B.2(2) and (3) of the *Integrated Planning Act 1997*.

100 Advisory Commission on Intergovernmental Relations (1968) *Urban and Rural America*, Washington, D.C. US Government Printing Office p64.

101 AC Nelson and JB Duncan *Growth Management Principles and Practices* (1995) Planners Press, Washington D.C. p91.

102 Both Flagstone and Yarrabilba are expected become part of Logan City Council once the Council amalgamations are complete in 2008.

Lakes at Bond University. Examples of future urban infill communities include the Caloundra Transit Oriented Community on the Caloundra Airport site and the Horton Park Golf Course site in the Maroochydore CBD.

Resort communities

Resort communities are intended to be places for tourism and ancillary residential uses rather than residential communities. They are situated in isolated locations outside of the urban area. However where the resort community is located close to an urban area residential uses are likely to predominate. Examples of existing resort communities include Sanctuary Cove, Hope Island and Royal Pines on the Gold Coast whilst Couran Cove, Kooralbyn Valley, Laguna Whitsundays and Hamilton Island are classic examples of isolated resort communities.

Policy context for identifying a master planned area

It is conceivable that, in an appropriate policy context, master planned communities of every type may be identified as a master planned area. It is therefore necessary to consider the policy context in which a proposed master planned community may be identified as a master planned area.

Whilst the IPA does not specify any criteria for the Minister's identification of a master planned area, it is important to recognise that master planned communities, unlike other forms of development, have the potential to both implement as well as impact on the urban development patterns of individual local governments and whole regions.

Accordingly from a policy perspective it will be necessary to carry out some form of evaluation of community prior to its consideration for identification as a master planned community. There are at least 2 categories of policy principles that would be relevant to the master planned community:

- The urban growth management principles of State and local government planning criteria.
- Growth planning principles applicable to development.

Urban growth management principles for assessing a master planned area

The following urban growth management principles may be relevant to the determination of whether a proposed master planned community should be identified as a master planned area.

Planning need

A proposed master planned community should be consistent with the population, housing, employment and land use needs that underpin the planning instruments of State and local planning authorities.

If a developer seeks to rely on different projections, the State and local planning authorities should reassess the capacity of existing land uses, land designated for urban development and infrastructure and services to accommodate the revised projections and if found necessary or desirable revise their planning instruments to take into account the implications of the different projections.

Only after the revised projections have been fully considered and State and local planning instruments revised, should State and local planning authorities consider identifying a master planned community as a master planned area.

Impact on ultimate development pattern

The identification of a proposed master planned community should consider whether the master planned community impacts on the ultimate development pattern envisaged by State and local planning instruments.

A master planned community should not attract development away from an area that is in sequence or where new investment is encouraged such as an area in the vicinity of a transit node, an activity centre and an employment centre or a blighted community such an as inner city industrial area.

Furthermore a master planned community should not introduce development that negatively impacts on the integrity of a nearby land use such as on environmentally sensitive area, a rural production area, open space or a landscape area.

Impact on infrastructure services and facilities within the urban area

The identification of a proposed master planned community should also consider whether the master planned community impacts on the existing or planned capacity of infrastructure, services and facilities to accommodate development that may otherwise be built in a more accessible location.

Impact on land supply within the urban area

The identification of a proposed master planned community should also consider whether the master planned community has the effect of increasing the supply of land which is allocated for that community beyond that which is provided for in State and local planning instruments. This should only be considered where, State and local planning authorities, having considered a developer's proposal, determine that the additional supply is necessary at the location of and within the time frame of the proposed master planned community.

Footprint of self contained and resort communities must be limited

Self contained communities and resort communities should be contained within identified development limits and must be connected to urban areas by good transport links.

If these communities are not contained, urban sprawl may result and the values of an environmentally sensitive area, rural production area, open space or a landscape area between these communities and the urban area may be adversely affected.

Development planning principles for assessing a master planned area

In addition to these broad urban growth management principles, the following development planning principles may be relevant to the determination of whether a proposed master planned community should be identified as a master planned community.

Comprehensive master plan

A relevant development planning principle is whether a master planned community can be planned and developed under a comprehensive master plan that controls:

- the timing of the development;
- the scale of the development; and
- the design of the development.

The fragmentation of land within a proposed master planned community may mitigate against its identification as a master planned area.

Urban design

Another relevant development planning principle is whether a proposed master planned community is intended to follow urban design principles including balanced land uses, specified population densities and non-residential intensities.

Infrastructure, services and facilities

A further relevant development planning principle is whether a proposed master planned community would offer economies of scale and fiscal benefits to the community and the local government especially in relation to the provision of infrastructure, services and facilities.

Identity

Another relevant development planning principle is whether a proposed master planned community has or would achieve a geographic and social identity. For example, the existing developments of Varsity Lakes and Sanctuary Cove on the Gold Coast have a clear identity.

Community needs

A final relevant development planning principle is whether a proposed master planned community would provide a mix of housing, a primary employment and commercial base and a range of community facilities.

Policy context for making a declared master planned area

The broad urban growth management principles and the more particular development planning principles are likely to be relevant in identifying a master planned community as a master planned area.

Consequences of an identified master planned area

However the identification of a master planned area does not of itself trigger the master planning process. Rather the identification of a master planned area is important in at least two respects:

- A development application under section 3.1.6 of IPA for a preliminary approval to vary the effect of a local planning instrument cannot be made in an identified master planned area unless a structure plan for a declared master planned area provides that such an application can be made.[103]
- A State planning regulatory provision can be made in respect of a master planned area to protect the future master planning of the master planned area.[104]

Consequences of a declared master planned area

It is the making of a declaration by the Minister in respect of a master planned area that gives rise to the obligation on a local government and the identified coordinating agency and participating agencies to participate in the preparation of a structure plan amendment for a declared master plan area and the subsequent master plan

[103] Section 2.5B.4 of the *Integrated Planning Act 1997*.

[104] Sections 2.5C.1 and 2.5C.2 of the *Integrated Planning Act 1997*.

approvals process for master plans required by an approved structure plan or master plan for the declared master plan area.

The Minister's decision to make a master plan area declaration is likely to be influenced by the broad urban growth management principles discussed above as well as the capacity of the relevant local governments and the identified coordinating agency and participating agencies to adequately resource the master planning process.

Cost recovery by local government

A local government can recover its costs of the master planning process from a developer in two ways:

- For a structure plan, a local government can enter into a cost recovery agreement with landowners and other interested stakeholders,[105] levy a special charge under the *Local Government Act 1993*[106] or recover its costs through an infrastructure agreement.[107]
- For a master plan application, a local government can impose a regulatory charge under the *Local Government Act 1993*.[108]

State government perspective

State government coordinating and participating agencies will generally be required to fund their involvement in the master planning process but can prescribe a fee in respect of a master plan application through a regulation.[109] Whilst the master planning process does involve a significant commitment of resources in the upfront planning process it is anticipated that the involvement of coordinating and participating agencies in the assessment of development applications under IDAS will be reduced. This will be achieved in two ways:

- The incorporation of coordinating and participating agency requirements in a structure plan and master plans is likely to resolve policy issues that are currently being deferred for resolution under IDAS. IDAS is as its name suggests a development assessment system and not a policy resolution process.
- Coordinating and participating agencies are declared not to be a referral agency for a development application in a declared master planned area to the extent that they have exercised a coordinating and participating agency's jurisdiction for a structure plan or master plan.[110] In short coordinating and participating agencies lose their referral agency status under IDAS.

Therefore insofar as a declared master plan area is concerned it is considered that the resources of coordinating and participating agencies will over time be redeployed from administering IDAS to participating in the master planning process.

It is therefore opportune to consider the master planning process for a declared master planned area.

Structure plan amendment

Structure plan amendment process

The process for making a structure plan amendment to the local government's planning scheme is summarised in Flowchart 1. In short the process involves the following steps:[111]

- The local government and the coordinating agency must agree on the proposed structure plan amendment. The coordinating agency is to coordinate the involvement of participating agencies and the Minister is to decide any disagreements.
- The local government must propose a structure plan amendment to its planning scheme.
- The Minister considers the State interests of the structure plan amendment.
- Local government and the coordinating agency must consult with significant landowners and stakeholders and negotiate any associated State and local government infrastructure agreements. The Minister may resolve any conflicts.
- The Minister must reconsider the State interests of the structure plan amendment and any associated State and local government infrastructure agreements.
- The local government must give public notice of the structure plan amendment and any associated State and local government infrastructure agreements.

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105 Section 2.5B.74 of the *Integrated Planning Act 1997*.

106 Section 2.5B.75 of the *Integrated Planning Act 1997*.

107 Section 5.2.3(2) of the *Integrated Planning Act 1997*.

108 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

109 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

110 Sections 2.5B.63 and 2.5B.64 of the *Integrated Planning Act 1997*.

111 Schedule 1A of the *Integrated Planning Act 1997*.

- The local government and the coordinating agency must consider any submissions and decide whether to proceed with the proposed structure plan amendment.
- The Minister must reconsider the State interests of the structure plan amendment and infrastructure agreements.
- The local government must adopt the structure plan amendment and give public notice of its adoption.

Content of structure plan

A structure plan is intended to be an integrated land use plan setting out broad environmental, land use, infrastructure and development intended to guide detailed planning for a declared master planned area.[112]

A structure plan must contain the following elements:

- a structure plan area code that states the development entitlements and development obligations for the declared master planned area and includes a structure plan map that gives a spatial dimension to the matters the subject of the code;[113]
- master planning requirements for all or part of the declared master planned area;[114] and
- a statement as to the levels of assessment and codes for development in the declared master planned area.[115]

The master planning requirements that may be identified in a structure plan include:

- whether an application for a master plan is required to be made for the master planned area;[116]
- any requirements with which master plans must comply;[117]
- the coordinating agency and participating agencies for the master plan application and their jurisdictions in respect of the application;[118]
- any requirements for public notification of a master plan;[119] and
- the specification of any period in respect of the master planning process which IPA specifically provides may be nominated in a structure plan.[120]

The structure plan may also include the following elements:

- a statement of the desired environmental outcomes for the master planned area;[121]
- a statement of the impact assessable development that may be made self-assessable or code assessable in a subsequent master plan;[122]
- a statement of the development that cannot be carried out in the declared master planned area unless there is a master plan for the area;[123]
- a statement of whether a development application for a preliminary approval to which section 3.1.6 of IPA applies can be made for development in all or part of the master planned area;[124] and
- a regulated State infrastructure charges schedule may be included for the declared master planned area.[125]

Having discussed the content of a structure plan and the process for making a structure plan amendment of a local government planning scheme it is appropriate to consider approvals process for a master plan application.

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112 Section 2.5B.8(1) of the *Integrated Planning Act 1997*.
113 Section 2.5B.8(2)(a) of the *Integrated Planning Act 1997*.
114 Section 2.5B.8(2)(b) of the *Integrated Planning Act 1997*.
115 Section 2.5B.8(2)(c) of the *Integrated Planning Act 1997*.
116 Section 2.5B.8(2)(b)(i) of the *Integrated Planning Act 1997*.
117 Section 2.5B.8(2)(b)(ii) of the *Integrated Planning Act 1997*.
118 Section 2.5B.8(2)(b)(iii) of the *Integrated Planning Act 1997*.
119 Section 2.5B.8(2)(b)(iv) of the *Integrated Planning Act 1997*.
120 Section 2.5B.8(2)(v) of the *Integrated Planning Act 1997*.
121 Section 2.5B.8(3)(a) of the *Integrated Planning Act 1997*.
122 Section 2.5B.8(3)(b) of the *Integrated Planning Act 1997*.
123 Section 2.5B.8(3)(c) of the *Integrated Planning Act 1997*.
124 Section 2.5B.8(3)(d) of the *Integrated Planning Act 1997*.
125 Section 2.5B.8(3)(e) of the *Integrated Planning Act 1997*.

Master plan approvals

Master plan approvals process

The master plan approvals process is summarised in Flowchart 2. In short the process involves five stages:[126]

1 the application stage;

2 the information request and response stage;

3 the consultation stage where required by a structure plan.

4 the State government decision stage; and

5 the local government decision stage.

It is important to note that the time estimates provided in Flowchart 2 of 10, 6 and 4 months respectively do not take account of the time taken by an applicant to respond to an information request (which could reasonably be assumed to be an average of 20 business days) and the applicants appeal period (which is a further 20 business days although this could be waived).

Content of master plan

A master plan must include the following elements:

- a master plan area code that states the development entitlements and development obligations for the relevant master planning unit and includes a master plan map that gives a spatial dimension to the matters the subject of the code;[127]
- a statement of the levels of assessment and codes for development in the master planning unit;[128] and
- a statement of when the development in the master planning unit must be completed.[129]

A master plan may vary the levels of assessment for development stated in a structure plan by:

- making impact assessable development in a structure plan self-assessable or code assessable if this is provided for in a structure plan;[130]
- making code assessable development in a structure plan self-assessable;[131] and
- increasing the level of assessment stated in a structure plan.[132]

A master plan may also vary a code in the local government's planning scheme included in a structure plan (other than the structure plan area code) provided it remains substantially consistent with the code that it varies the effect of.[133]

A master plan may also require later master plans for the master planning unit and may state requirements with which a later master plan must comply.[134]

Structuring of master planning process

Having discussed the structure plan amendment process and the master plan approvals process, it is relevant to consider how these master planning processes could be used to deliver a master planned community.

The Kawana Waters master planned community in Caloundra is a useful example. Kawana Waters is intended to comprise some 23,000 persons, a town centre, employment areas, a regional hospital, an open space network based on a public recreation lake comprising an international rowing course and conservation areas based on the Mooloola River floodplain.

The master planning process for Kawana Waters under the existing Development Control Plan 1 (Kawana Waters) and associated Development Agreement is shown in Flowchart 3.

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126 Division 5 of Chapter 5B of the *Integrated Planning Act 1997*.

127 Section 2.5B.15(1)(a) of the *Integrated Planning Act 1997*.

128 Section 2.5B.15(1)(b) of the *Integrated Planning Act 1997*.

129 Section 2.5B.15(1)(b)(iii) of the *Integrated Planning Act 1997*.

130 Section 2.5B.15(2)(a) of the *Integrated Planning Act 1997*.

131 Section 2.5B.15(2)(b) of the *Integrated Planning Act 1997*.

132 Section 2.5B.15(2)(c) of the *Integrated Planning Act 1997*.

133 Section 2.5B.15(3) and (4) of the *Integrated Planning Act 1997*.

134 Section 2.5B.15(5) of the *Integrated Planning Act 1997*.

This existing process could be used to demonstrate how the Kawana Waters master planned community could be master planned as a master planned area under IPA. The proposed master planning process is illustrative only in that the master planning process could be implemented in other ways. With that said the master planning of Kawana Waters as a master planned area under IPA could involve four stages.

Structure plan amendment

The first stage could involve the making of a structure plan amendment to the planning scheme. The plans titled Development Control Plan and Structure Plan in Flowchart 3 are examples of structure plan maps that could be included in a structure plan area code.

If a more generalised structure plan is adopted such as that shown for the Development Control Plan in Flowchart 3 then it may be necessary to require that an application be made for a more detailed master plan for the whole of the master planned area. In such a case a more detailed master plan such as that shown as a Structure Plan in Flowchart 3 may be required to be approved.

District master plan

The second stage of the master planning process could involve the approval of a district master plan if this was required to be prepared by the structure plan. The district master plan would relate to a district forming part of the master planned area such as a suburb comprising residential neighbourhoods, employment areas, centres and open space.

The plans titled Neighbourhood Plan and Detailed Planning Area Plan in Flowchart 3 are examples of district master plans that could be required by a structure plan.

Precinct master plan

The third stage of the master planning process could involve the approval of a precinct master plan in respect of a precinct forming part of a district master plan such as a residential neighbourhood, an employment area, a town centre or parts of a transit oriented community.

The plan titled Precinct Estate Plan in Flowchart 3 is an example of a precinct master plan that could be required by a structure plan or a district master plan.

Site development plan

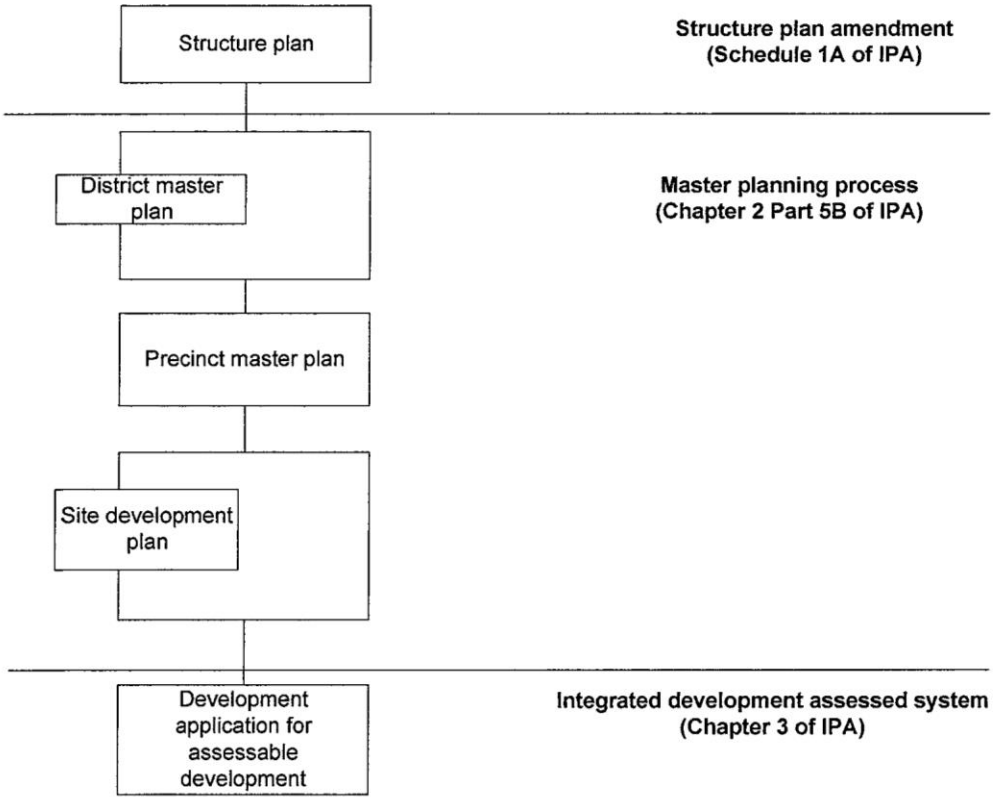
The fourth stage of the master planning process could involve the approval of a site development plan in respect of an identified site within a precinct such as a multi unit development site, a main street, a neighbourhood or district centre, a mixed use development, a transit oriented development or a site within a transit oriented community, a town centre or an employment area.

The plan titled Site Development Plan in Flowchart 3 is an example of a site development plan that could be required by a precinct master plan or district master plan.

Development applications under IDAS

Following the completion of the master planning process it will inevitably be the case that development applications will be required to be submitted under IDAS in respect of any material change of use that remains assessable development under the structure plan or master plans, the reconfiguring of lots and any operational work and building work that is required to be carried out. The relationship between the master planning process described above and IDAS is specified in Figure 1.

Figure 1 - Relationship of planning scheme, master plans and IDAS



Whilst Figure 1 conceptually shows development applications being submitted at the conclusion of the master planning process, the IPA allows development applications to be lodged concurrently with master plan applications albeit that the development applications cannot be approved until the master plan applications are approved.

It is also relevant to note that whilst Figure 1 shows master plans as being lodged subsequently to each other, the IPA allows master plan applications to be lodged concurrently with each other albeit that a lower order master plan cannot be approved until a higher order master plan is approved.

As will be noted later the process of allowing concurrent master plan applications to be lodged and allowing concurrent master plan and development applications to be lodged significantly improves the efficiency of the master planning process.

The development applications submitted in respect of a master planned area are subject to modified assessment and decision making rules under IDAS which require the refusal of a development application which would:

- compromise the achievement of the desired environmental outcomes including those for a master planned area;[135]
- conflict with the purpose of a structure plan area code or a master plan area code;[136]
- conflict with the provision of another applicable code where there are not sufficient grounds to justify the decision despite the conflict.[137]

It is also important to note that any restrictions contained in other Acts in respect of the making of a properly made development application are declared not to apply in a master planned area.[138] Examples of such provisions include section 22A of the *Vegetation Management Act 1999* and section 967 of the *Water Act 2000*.

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135 Sections 2.5B.69(3)(a) and 2.5B.70(4) of the *Integrated Planning Act 1997*.

136 Section 2.5B.69(3)(b) and 2.5B.70(4)(b) of the *Integrated Planning Act 1997*.

137 Section 2.5B.69(3)(c) and (5) and 2.5B.70(4)(c) and (6) of the *Integrated Planning Act 1997*.

138 Section 2.5B.65 of the *Integrated Planning Act 1997*.

These provisions are appropriate considering that the relevant State government agencies administering such Acts would have participated in the structure plan making and master plan approvals process as a coordinating or participating agency and as a result the relevant policy issues would have been resolved as part of that master planning process thereby removing the need for such restrictions.

Efficiency of master planning process

Comparative analysis of master planning processes

Having discussed the master planning process for master planned areas provided for in the IPA it is appropriate to consider whether the master planning process achieves the Housing Affordability Strategy's goal of making the planning and development assessment system more efficient.

In order to determine this it is necessary to carry out a comparative analysis of the previous structure and master planning processes for major development areas in SEQ under the SEQ regional plan against the master planning process for master planned areas provided for in the IPA. A summary of this analysis is provided in Table 1.

Table 1 Assessment of master planning processes

Master planning processes	Time estimates (months)[1]		
	Low range[2]	High range[3]	Average
1. Previous structure plan making process involving concurrent planning scheme amendments and subsequent section 3.1.6 preliminary approvals (but not including subsequent development permits)	42	79	60
2. Previous structure plan making process involving subsequent planning scheme amendments and subsequent section 3.1.6 preliminary approvals (but not including subsequent development permits)	51	96	73
3. New structure plan making process with subsequent master plan approvals (but not including subsequent development permits)	28	56	42
Time savings (1 versus 3)	**14**	**23**	**18**
Time savings (2 versus 3)	**23**	**40**	**31**

Notes

1. *The time estimates are based on the assumption that a local growth management strategy has been prepared for the local government area which provides a strategic framework for the master planned area.*
2. *The low range estimates assume relatively minor complexity in relation to the master planning processes in terms of the predominant land use mix, infrastructure planning and amendments to the planning scheme.*
3. *The high range estimates assume significant complexity in relation to the master planning processes in terms of the predominant land use mix, infrastructure planning and amendments to the planning scheme.*

Previous structure and master planning processes for major development areas

The structure and master planning process which was previously provided for in the IPA and the SEQ regional plan in respect of major development areas involved the following statutory processes:

- the approval of a local government prepared structure plan by the Regional Planning Minister;
- the approval of a local government prepared planning scheme amendment by the Planning Minister;
- the approval of a section 3.1.6 application for preliminary approval by State and local governments to approve development and establish a master planning process;
- the approval of a subsequent section 3.1.6 application for a preliminary approval by State and local governments to approve master plans for development; and
- the approval of subsequent development applications for development permits to carry out development.

The processes for making a structure plan and making planning scheme amendments could have been carried out concurrently although no local government availed itself of this opportunity. If the processes were carried out concurrently they were likely to take between 18 and 36 months to complete. If they were carried out subsequently to each other they were likely to take between 27 and 53 months to complete.

The IPA did not previously provide a process for master plan approvals. Rather, it made provision for a section 3.1.6 application for a preliminary approval which may specify levels of assessment and codes. This type of application which was publicly notifiable and subject to public submissions and submitter appeal rights was used in practice to establish master planning processes. This approvals process could take between 14 and 26 months to complete.

Having established a master planning process by means of a section 3.1.6 preliminary approval, subsequent applications for section 3.1.6 preliminary approvals were required to be made to seek approval of master plans for the development. These subsequent section 3.1.6 applications were not subject to public notification, but could reduce the levels of assessment specified in the earlier preliminary approval and could specify codes. This approvals process could take between 10 and 17 months to complete.

Having sought approval for master plans, development applications were then lodged for development permits to carry out development such as a material change of use, reconfiguring a lot and operational work in accordance with the approved master plans. These development applications were generally only subject to code assessment and could take between 10 and 17 months to complete. Given that these applications do not form part of the master planning process per se these time estimates have not been included in the analysis specified in Table 1.

In summary therefore, the previous structure and master planning approvals processes under the IPA are estimated to have taken between 42 and 78 months if the structure plan and planning scheme amendment processes were run concurrently, and 51 to 96 months if they were run subsequently (see Table 1 above).

Master planning process for master planned area

The new master planning process for master planned areas under IPA involves the following statutory processes:

- the approval of a local government prepared structure plan amendment by the Minister;
- the approval by a local government of master plan applications or section 3.1.6 applications for a preliminary approval where provided for in a structure plan; and
- the approval of subsequent development applications for development permits to carry out development.

The structure plan amendment process rationalises the previous structure plan making process, planning scheme amendment process and section 3.1.6 application for preliminary approval into one process. This process is estimated to take between 18 and 36 months as compared with 32 to 62 months where the structure plan and scheme amendment processes were run concurrently or 41 to 79 months where the structure plan and scheme amendment processes were run subsequently. This represents a respective saving of 14 to 26 months where the processes were run concurrently and a saving of 23 to 43 months where the processes were run subsequently.

The master planning process replaces the current section 3.1.6 applications for a preliminary approval which are lodged subsequently to a section 3.1.6 application for a preliminary approval which is publicly notifiable. This process is estimated to take between 10 and 20 months as compared with 10 to 17 months for a section 3.1.6 application for a preliminary approval. The high range estimates will generally relate to higher order master plans whilst the low range estimates will apply to lower order master plans. Furthermore, higher order and lower master plans can be lodged concurrently with each other as opposed to section 3.1.6 applications for a preliminary approval which must be lodged subsequently to each other.

The IPA also enables development applications for development permits to be lodged concurrently with master plan applications. This represents a further improvement on the previous system whereby development applications for development permits were required to be lodged subsequently to a section 3.1.6 application for a preliminary approval.

In summary, the master planning approvals process for a master planned area is estimated to take between 28 to 56 months (see Table 1 above).

Comparative analysis of master planning processes for major development areas and master planned areas

The master planning process for a master planned area is estimated to reduce the development approvals process by 14 to 23 months in comparison to the previous process where the structure plan and scheme amendment processes were run concurrently and up to 23 to 40 months where the structure plan and scheme amendment processes were run subsequently. Taking an average of these figures it can be estimated that the master planning process for master planned areas may reduce the approvals process by between 18 and 31 months (see Table 1 above).

The master planning process for a master planned area is also expected to reduce IDAS timeframes for subsequent applications for development permits in a master planned area given that:

- development applications for development permits can be lodged concurrently with master plan applications; and

- certain State government agencies will be removed as referral agencies in the IDAS process given their involvement as a coordinating agency or a participating agency in the structure plan amendment or master plan approvals processes.

The master planning process for a master planned area also provides more flexibility and certainty than the current section 3.1.6 applications for a preliminary approval in that:

- the development identified as impact assessable in the structure plan can be reduced to code or self-assessable development in a master plan; and
- the master plan application is not subject to public notification and third party submitter and appeal rights as is the case with the initial section 3.1.6 application for preliminary approval under the previous structure plan and master planning process.

Public notification processes are also substantially improved in that:

- all relevant documents including the structure plan, planning scheme amendments and any associated State and local government infrastructure agreements are subject to public notification; and
- the current separate public notification processes in respect of the structure plan, planning scheme amendments and the initial section 3.1.6 application for a preliminary approval are combined into one public notification process.

Transitional arrangements for structure plans under SEQ regional plan

Having discussed the improved efficiency of the master planning process for a master planned area in comparison to the previous structure and master planning process for a major development area under the SEQ regional plan it is appropriate to consider the transitional arrangements that are provided for in respect of these previous structure planning processes in SEQ.

Under the transitional provisions a major development area under the SEQ regional plan is taken to be an identified master planned area but not a declared master planned area.[139] This has several consequences:

- A development application for a preliminary approval to which section 3.1.6 applies cannot be lodged in a major development area unless specified in a structure plan.[140]
- A State planning regulatory provision can be made in respect of the master planned area.[141] In this regard it is noted that the current regulatory provisions included in the SEQ regional plan are taken to be State planning regulatory provisions for the SEQ region.[142]

The transitional provisions also provide that where a structure plan for a major development area has been prepared by a local government and approved by the Minister, the structure plan may be adopted as an amendment to the local government's planning scheme.[143] In essence the previous structure plan making process can be continued subject to the structure plan being included in the local government's planning scheme rather than the SEQ regional plan.

The transitional provisions also provide that a local growth management strategy prepared under the SEQ regional plan may be included in the regional plan for the SEQ region.[144]

Conclusion

In conclusion then, master planned communities have played and will continue to play an important role in accommodating urban growth in high growth areas especially in South East Queensland and in the major regional centres.

Master planned communities that meet appropriate urban growth management and development planning principles are more likely to be identified as master planned areas under IPA.

An identified master plan area is likely to be made a declared master plan area where the relevant urban growth management principles are satisfied and where the relevant local government and coordinating and participating agencies are adequately resourced to participate in the master planning process for the master planned area.

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139 Section 6.8.8 of the *Integrated Planning Act 1997*.

140 Section 2.5B.4 of the *Integrated Planning Act 1997*.

141 Section 2.5C.2 of the *Integrated Planning Act 1997*.

142 Section 6.8.4 of the *Integrated Planning Act 1997*.

143 Section 6.8.7 of the *Integrated Planning Act 1997*.

144 Section 6.8.6 of the *Integrated Planning Act 1997*.

The master planning process for master planned areas is expected to be more efficient than the previous structure and master planning process for major development areas under the SEQ regional plan. Indeed the master planning process for master planned areas is on average estimated to reduce the development approvals process by between 18 and 31 months.

As such the master planning process for master planned areas is expected to have a positive impact on housing affordability in the medium to long term consistent with the State government's Housing Affordability Strategy.

This paper was presented at the Queensland Environmental Law Association seminar, November 2007.

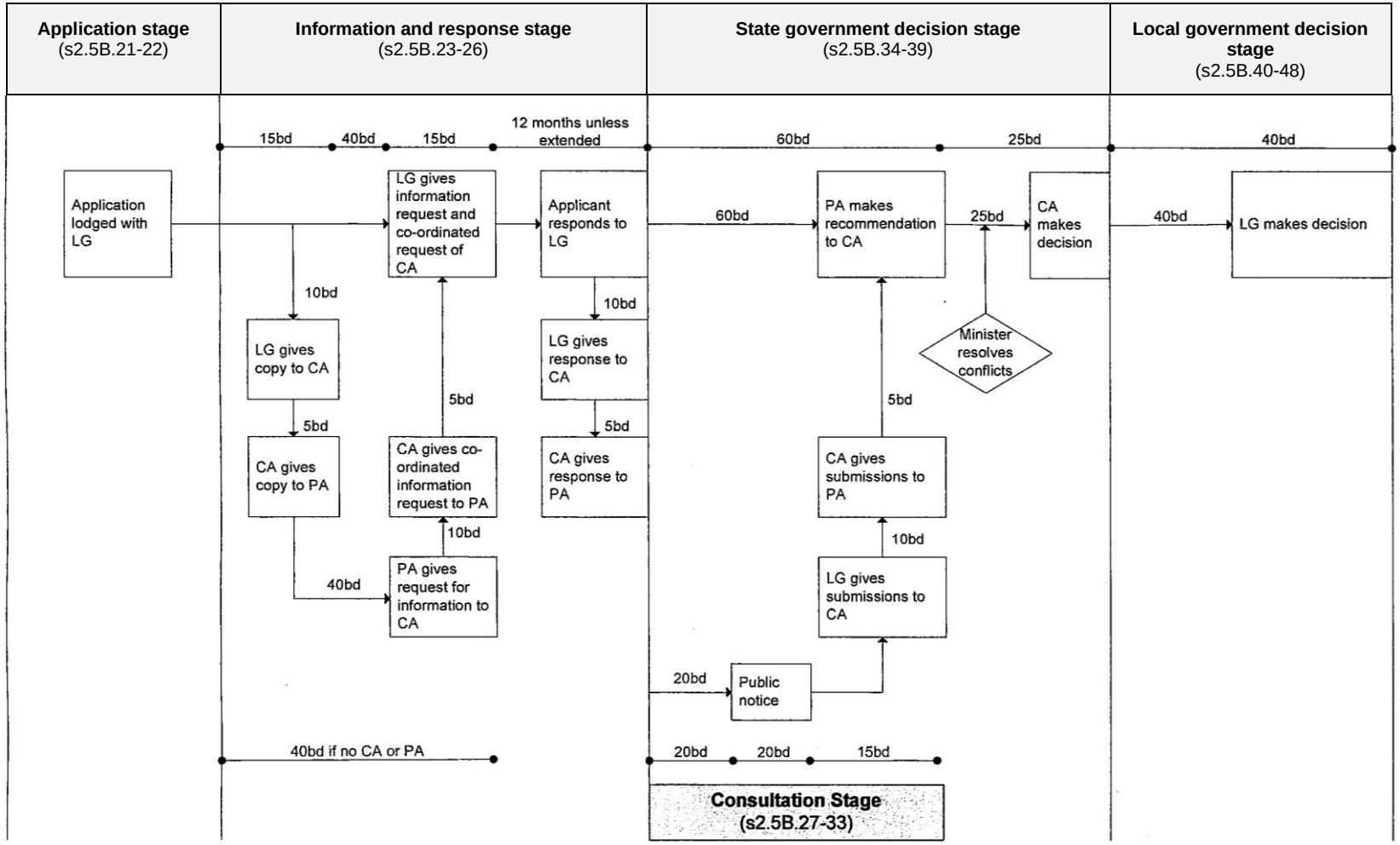
Flowchart 1 Making a Structure Plan

Step	Comments	Relevant sections
1- Identification of Master Planning Area	By the State or local government.	2.5B.2
2- Declaration of Master Planning Area	By the State only. The declaration identifies participating agencies, coordinating agencies and timeframes for the steps for making the structure plan.	2.5b.3
3- Local government must prepare structure plan	The structure plan must be prepared in accordance with Schedule 1A and any guidelines prescribed under regulation.	2.5B.6 and 2.5B.7
4- Local government and coordinating agency must agree on the proposed structure plan	The coordinating agency must coordinate the involvement of participating agencies and the Minister must decide disagreements.	Section 1 of Schedule 1A
5- Local government proposes amendment to planning scheme to include structure plan	Local government must give a copy of the proposed amendment, including the proposed structure plan, to the Minister.	Section 2 of Schedule 1A
6- Minister considers State interests	Local government must comply with any conditions imposed by the Minister.	Section 3 of Schedule 1A
7- Consultation on the proposed structure plan	Local government and the coordinating agency must consult with significant landowners and stakeholders and may enter State and local government infrastructure agreements. The Minister may resolve conflicts. Following consultation the local government and coordinating agency must decide whether to proceed with the proposed amendment. If they decide to proceed then they must give a copy of the proposed amendment and any infrastructure agreements to the Minister.	Sections 4, 5 and 6 of Schedule 1A
8- Minister reconsiders State interest	Minister may impose conditions on the notification of the proposed amendment.	Section 7 of Schedule 1A
9- Public notification of proposed amendment to any infrastructure agreements	Minimum of 30 business days.	Sections 8 and 9 of Schedule 1A
10- Consideration of submissions	Following public notification and consideration of submissions the local government and coordinating agency must decide whether to proceed with the proposed amendment. If the local government and coordinating agency decide to proceed with the proposed amendment then the local government must report on how submissions were dealt with and give report to submitters and the Minister.	Sections 10, 12 and 13 of Schedule 1A
11- Minister reconsiders State interest	Minister may impose conditions on the adoption of the proposed amendment.	Section 14 of Schedule 1A
12- Adoption and public notice of adoption	If the local government decides to proceed with the proposed amendment it must publicly notify the decision and give a copy of the notice and proposed structure plan to the chief executive.	Sections 15, 16 and 17 of Schedule 1A

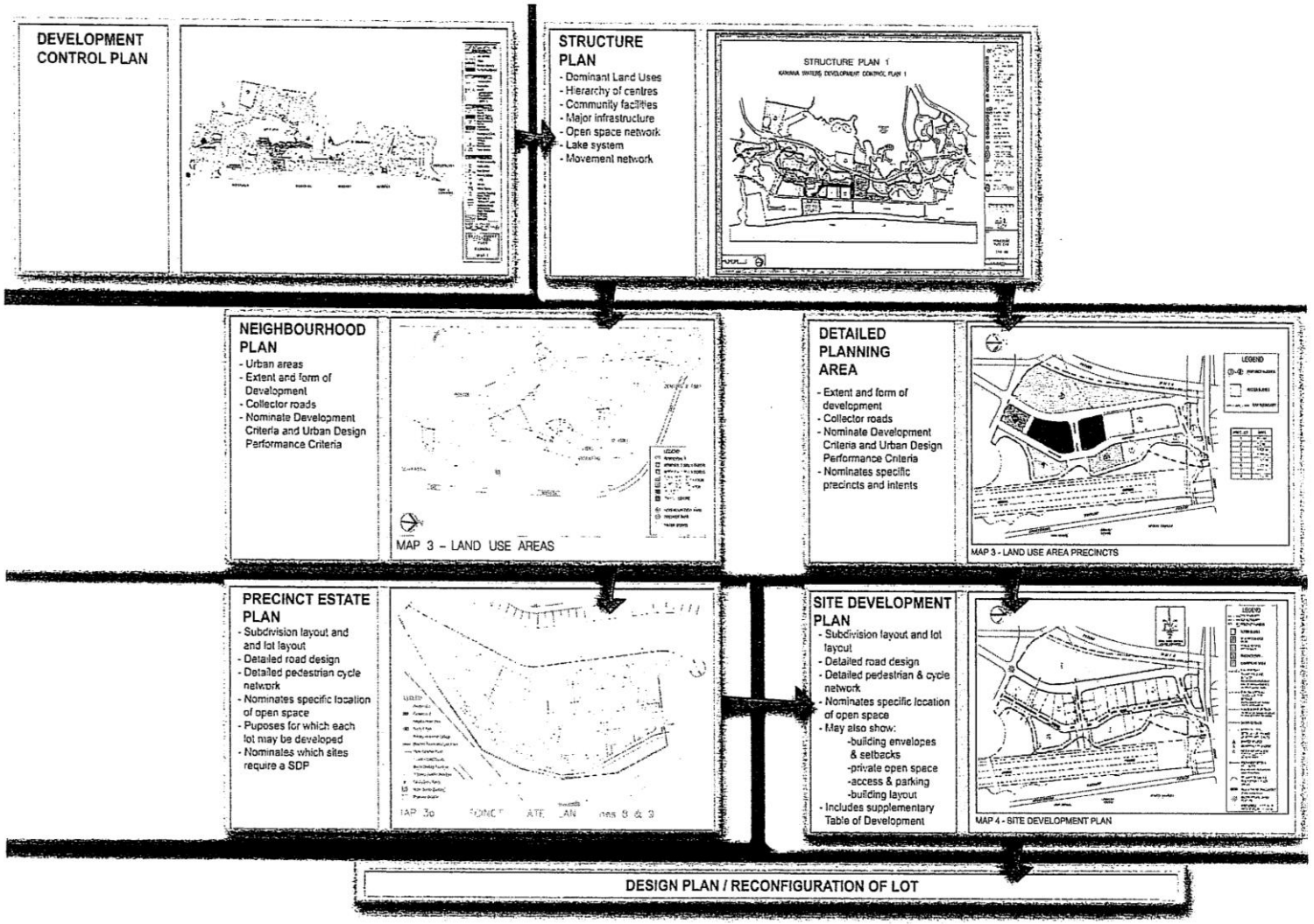
Flowchart 2 Master Plan Approval Process

For application involving -

- Coordinating agency (CA), participating agency (PA) and information requests - 10 months
- Only local government (LG), information request and consultation - 6 months
- Only local government and information request - 4 months



Flowchart 3 Kawana Waters Master Planning Process



Master planning under the Integrated Planning Act 1997

Ian Wright

This article discusses master planning under the Integrated Planning Act 1997

May 2008

Introduction

Queensland Housing Affordability Strategy 2007

In July 2007 the State government announced the Queensland Housing Affordability Strategy (**Housing Affordability Strategy**). The Housing Affordability Strategy is intended to "ensure that the State's land and housing is on the market quickly and at the lowest cost".[145]

The Housing Affordability Strategy envisages that IPA will be amended to:[146]

- improve the efficiency and timeliness of the development assessment system particularly for high growth areas;
- enable the Minister to resolve conflicts between agencies early in the assessment process including a power to direct a decision to be made;
- require structure planning for major development areas; and
- enable local governments to deal with low risk development approvals through a simplified process.

Urban Land Development Authority Act 2007

The State government's legislative response to the Housing Affordability Strategy is the *Urban Land Development Authority Act 2007* (**ULDA Act**) which was introduced into the Queensland Parliament in August 2007. The majority of provisions commenced on 21 September 2007.

Relevantly the ULDA Act amends the IPA to provide for master planning of major development areas (now called master planned areas) throughout Queensland.

Themes of this paper

This paper is focussed on the implementation of the master planning process for master planned areas. This paper will explore 4 themes:

- The major policy processes and key stakeholders involved in the master planning process for master planned areas under IPA.
- The process for making a structure plan amendment to a local government planning scheme for a declared master planned area.
- The process for approving master plans required by a structure plan for a declared master planned area.
- The transitional provisions that are intended to apply in respect of the ongoing preparation of structure plans for major development areas under the SEQ Regional Plan.

Master planning process for master planned areas under IPA

Policy processes

The master planning process for master planned areas under IPA involves four distinct policy processes:

- the identification of a proposed master planned community as a master planned area;[147]
- the making of a declaration for the identified master planned area;[148]

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145 Queensland Government Department of Infrastructure (2007) Queensland Housing Affordability Strategy p1.

146 Ibid p4.

147 Section 2.5B.2 of the *Integrated Planning Act 1997*.

148 Section 2.5B.3 of the *Integrated Planning Act 1997*.

- the making of a structure plan amendment to the local government's planning scheme for the declared master planned area;[149] and
- the approval of master plans required by the structure plan for the declared master planned area.[150]

Each of these policy processes involves a number of stakeholders being the Minister, State agencies, local governments, developers and the public. A State government agency can be identified in a master planned area declaration or a structure plan as having a particular role as a coordinating agency or participating agency.[151]

Each of these stakeholders have defined roles in respect of the master planning process.

Planning Minister

The role of the Minister responsible for administering IPA in the master planning process is to:

- identify or approve the identification of a master planned area;[152]
- make a declaration for an identified master planned area;[153]
- approve a structure plan amendment for a declared master planned area;[154] and
- resolve conflicts between coordinating agencies, participating agencies and local governments in respect of the making of a structure plan amendment including State and local government infrastructure agreements[155] and the approval of master plans for a declared master planned area.[156]

Local government

The role of a local government in the master planning process is to:

- identify in their planning schemes and documents prepared under a regional plan, such as a local growth management strategy, the master planned areas in their local government area (subject to approval of those instruments by the Minister);[157]
- prepare a structure plan amendment and any associated local government infrastructure agreements for a declared master planned area;[158] and
- approve the master plans for a declared master planned area required by an approved structure plan or master plan.[159]

State coordinating agency

The role of a coordinating agency in the master planning process is to:

- coordinate participating agencies in relation to the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area;[160] and
- coordinate participating agencies in relation to the assessment of the master plans required by a structure plan or master plan for a declared master planned area.[161]

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149 Section 2.5B.10 and Schedule 1A of the *Integrated Planning Act 1997*.

150 Section 2.5B.21 to 2.5B.57 of the *Integrated Planning Act 1997*.

151 Sections 2.5B.3(2) and 2.5B.8(2)(b)(iii) and the definition of "participating agency" and "coordinating agency" in Schedule 10 of the *Integrated Planning Act 1997*.

152 Section 2.5B.2 of the *Integrated Planning Act 1997*.

153 Section 2.5B.3 of the *Integrated Planning Act 1997*.

154 Section 14 of Schedule 1A of the *Integrated Planning Act 1997*.

155 Sections 1(5) and 5 of Schedule 1A of the *Integrated Planning Act 1997*.

156 Section 2.5B.38 of the *Integrated Planning Act 1997*.

157 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

158 Section 2.5B.7 and sections 1 and 4 of Schedule 1A of the *Integrated Planning Act 1997*. See also section 5.1.33 and part 2 of chapter 5 of the *Integrated Planning Act 1997*.

159 Sections 2.5B.40 to 2.5B.48 of the *Integrated Planning Act 1997*.

160 Section 1(3) of Schedule 1A of the *Integrated Planning Act 1997*. The coordinating agency in this context is the entity specified in the Minister's declaration for a master planned area pursuant to section 2.5B.3(2) and Schedule 10 of the *Integrated Planning Act 1997*.

161 Sections 2.5B.24(3) and 2.5B.37 of the *Integrated Planning Act 1997*. The coordinating agency in this context is the entity specified in the approved structure plan for a declared master planned area pursuant to section 2.5B.8(2)(b)(iii) and Schedule 10 of the *Integrated Planning Act 1997*.

State participating agencies

The role of a participating agency in the master planning process is to:

- participate in the preparation of a structure plan amendment including any associated State infrastructure agreement for a declared master planned area;[162] and
- participate in the assessment of the master plans required by a structure plan or a master plan for a declared master planned area.[163]

Developers

The role of developers seeking to develop land in a master planned area is to:

- participate in the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area;[164] and
- lodge master plan applications where required by an approved structure plan or master plan for a declared master planned area prior to commencing development.[165]

Public

The public has the opportunity to make submissions in the master planning process:

- in respect of the preparation of a structure plan amendment and any associated State and local government infrastructure agreements for a declared master planned area;[166] and
- in respect of master plan applications that are required to be publicly notified by an approved structure plan for the declared master plan area.[167]

Identification and declaration of master planned areas

Identification by local government and Minister

Having discussed the respective roles of each of the relevant stakeholders under the master planning process for master planned areas it is appropriate to consider each of the distinct policy processes involved in the master planning process under IPA. The first policy process is the identification of a proposed master planned community as a master planned area.

A master planned area can be identified in two ways:

- By a local government in a planning scheme or a document prepared by a local government under a regional plan.[168] In all such cases the Minister is the ultimate approving authority in respect of the planning scheme or the document and as such must approve the local government's identification.
- By the Minister in a regional plan, a State planning regulatory provision or a declaration for a master planned area.[169]

Consequences of an identified master planned area

However the identification of a master planned area does not of itself trigger the master planning process. Rather the identification of a master planned area is important in at least two respects:

- A development application under section 3.1.6 of IPA for a preliminary approval to vary the effect of a local planning instrument cannot be made in an identified master planned area unless a structure plan for a declared master planned area provides that such an application can be made.[170]
- A State planning regulatory provision can be made in respect of a master planned area to protect the future master planning of the master planned area.[171]

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162 Section 1(2) of Schedule 1A of the *Integrated Planning Act 1997*. The participating agencies in this context are the entities specified in the Minister's declaration for a master planned area pursuant to section 2.5B.3(2) and Schedule 10 of the *Integrated Planning Act 1997*.

163 Sections 2.5B.24(2) and 2.5B.34 to 2.5B.36 of the *Integrated Planning Act 1997*. The participating agencies in this context are the entities specified in the approved structure plan for a declared master planned area pursuant to section 2.5B.8(2)(b)(iii) and schedule 10 of the *Integrated Planning Act 1997*.

164 Section 4(a) of Schedule 1A of the *Integrated Planning Act 1997*.

165 Section 2.5B.21 of the *Integrated Planning Act 1997*.

166 Sections 8 to 12 of Schedule 1 A of the *Integrated Planning Act 1997*.

167 Sections 2.5B.27 to 2.5B.33 of the *Integrated Planning Act 1997*.

168 Section 2.5B.2(1) of the *Integrated Planning Act 1997*.

169 Sections 2.5B.2(2) and (3) of the *Integrated Planning Act 1997*.

170 Section 2.5B.4 of the *Integrated Planning Act 1997*.

Consequences of a declared master planned area

It is the making of a declaration by the Minister in respect of a master planned area that gives rise to the obligation on a local government and the identified coordinating agency and participating agencies to participate in the preparation of a structure plan amendment for a declared master plan area and the subsequent master plan approvals process for master plans required by an approved structure plan or master plan for the declared master plan area.

The Minister's decision to make a master plan area declaration is likely to be influenced by the broad urban growth management principles discussed above as well as the capacity of the relevant local governments and the identified coordinating agency and participating agencies to adequately resource the master planning process.

Cost recovery by local government

A local government can recover its costs of the master planning process from a developer in two ways:

- For a structure plan, a local government can enter into a cost recovery agreement with landowners and other interested stakeholders,[172] levy a special charge under the *Local Government Act 1993*[173] or recover its costs through an infrastructure agreement.[174]
- For a master plan application, a local government can impose a regulatory charge under the *Local Government Act 1993*.[175]

State government perspective

State government coordinating and participating agencies will generally be required to fund their involvement in the master planning process but can prescribe a fee in respect of a master plan application through a regulation.[176] Whilst the master planning process does involve a significant commitment of resources in the upfront planning process it is anticipated that the involvement of coordinating and participating agencies in the assessment of development applications under IDAS will be reduced. This will be achieved in two ways.

- The incorporation of coordinating and participating agency requirements in a structure plan and master plan is likely to resolve policy issues that are currently being deferred for resolution under IDAS. IDAS is as its name suggests a development assessment system and not a policy resolution process.
- Coordinating and participating agencies are declared not to be a referral agency for a development application in a declared master planned area to the extent that they have exercised a coordinating and participating agency's jurisdiction for a structure plan or master plan.[177] In short, coordinating and participating agencies lose their referral agency status under IDAS.

Therefore insofar as a declared master plan area is concerned it is considered that the resources of coordinating and participating agencies will over time be redeployed from administering IDAS to participating in the master planning process.

It is therefore opportune to consider the master planning process for a declared master planned area.

Structure plan amendment

Structure plan amendment process

The process for making a structure plan amendment to a local government's planning scheme is summarised in Flowchart 1. In short the process involves the following steps:[178]

- The local government and the coordinating agency must agree on the proposed structure plan amendment. The coordinating agency is to coordinate the involvement of participating agencies and the Minister is to decide any disagreements.
- The local government must propose a structure plan amendment to its planning scheme.
- The Minister must consider the State interests of the structure plan amendment.
- The local government and the coordinating agency must consult with significant landowners and stakeholders and negotiate any associated State and local government infrastructure agreements. The Minister may resolve any conflicts.

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171 Sections 2.5C.1 and 2.5C.2 of the *Integrated Planning Act 1997*.

172 Section 2.5B.74 of the *Integrated Planning Act 1997*.

173 Section 2.5B.75 of the *Integrated Planning Act 1997*.

174 Section 5.2.3(2) of the *Integrated Planning Act 1997*.

175 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

176 Section 2.5B.22(1)(f) of the *Integrated Planning Act 1997*.

177 Sections 2.5B.63 and 2.5B.64 of the *Integrated Planning Act 1997*.

178 Schedule 1A of the *Integrated Planning Act 1997*.

- The Minister must reconsider the State interests of the structure plan amendment and any associated State and local government infrastructure agreements.
- The local government must give public notice of the structure plan amendment and any associated State and local government any associated State and local government infrastructure agreements.
- The local government and the coordinating agency must consider any submissions and decide whether to proceed with the proposed structure plan amendment.
- The Minister must reconsider the State interests of the structure plan amendment and infrastructure agreements.
- The local government must adopt the structure plan amendment and give public notice of its adoption.

Content of structure plan

A structure plan is intended to be an integrated land use plan setting out broad environmental, land use, infrastructure and development intended to guide detailed planning for a declared master planned area.[179]

A structure plan must contain the following elements:

- a structure plan area code that states the development entitlements and development obligations for the declared master planned area and includes a structure plan map that gives a spatial dimension to the matters the subject of the code;[180]
- master planning requirements for all or part of the declared master planned area;[181] and
- a statement as to the levels of assessment and codes for development in the declared master planned area.[182]

The master planning requirements that may be identified in a structure plan include:

- whether an application for a master plan is required to be made for the master planned area;[183]
- any requirements with which the master plan must comply;[184]
- the coordinating agency and participating agencies for the master plan application and their jurisdictions in respect of the application;[185]
- any requirements for public notification of a master plan;[186] and
- the specification of any period in respect of the master planning process which IPA specifically provides may be nominated in a structure plan.[187]

The structure plan may also include the following elements:

- a statement of the desired environmental outcomes for master planned area;[188]
- a statement of the impact assessable development that may be made self-assessable or code assessable in a subsequent master plan;[189]
- a statement of the development that cannot be carried out in the declared master planned area unless there is a master plan for the area;[190]
- a statement of whether a development application for a preliminary approval to which section 3.1.6 of IPA applies can be made for development in all or part of the master planned area;[191] and
- a regulated State infrastructure charges schedule for the declared master planned area.[192]

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179 Section 2.5B.8(1) of the *Integrated Planning Act 1997*.
180 Section 2.5B.8(2)(a) of the *Integrated Planning Act 1997*.
181 Section 2.5B.8(2)(b) of the *Integrated Planning Act 1997*.
182 Section 2.5B.8(2)(c) of the *Integrated Planning Act 1997*.
183 Section 2.5B.8(2)(b)(i) of the *Integrated Planning Act 1997*.
184 Section 2.5B.8(2)(b)(ii) of the *Integrated Planning Act 1997*.
185 Section 2.5B.8(2)(b)(iii) of the *Integrated Planning Act 1997*.
186 Section 2.5B.8(2)(b)(iv) of the *Integrated Planning Act 1997*.
187 Section 2.5B.8(2)(v) of the *Integrated Planning Act 1997*.
188 Section 2.5B.8(3)(a) of the *Integrated Planning Act 1997*.
189 Section 2.5B.8(3)(b) of the *Integrated Planning Act 1997*.
190 Section 2.5B.8(3)(c) of the *Integrated Planning Act 1997*.
191 Section 2.5B.8(3)(d) of the *Integrated Planning Act 1997*.
192 Section 2.5B.8(3)(e) of the *Integrated Planning Act 1997*.

Having discussed the content of a structure plan and the process for making a structure plan amendment of a local government planning scheme it is appropriate to consider the approvals process for a master plan application.

Master plan approvals

Master plan approvals process

The master plan approvals process is summarised in Flowchart 2. In short the process involves five stages:[193]

- the application stage;
- the information request and response stage;
- the consultation stage where required by a structure plan;
- the State government decision stage; and
- the local government decision stage.

It is important to note that the time estimates provided in Flowchart 2 of 10, 6 and 4 months respectively do not take account of the time taken by an applicant to respond to an information request (which could reasonably be assumed to be an average of 20 business days) and the applicants appeal period (which is a further 20 business days although this could be waived).

Content of master plan

A master plan must include the following elements:

- a master plan area code that states the development entitlements and development obligations for the relevant master planning unit and includes a master plan map that gives a spatial dimension to the matters the subject of the code;[194]
- a statement of the levels of assessment and codes for development in the master planning unit;[195] and
- a statement of when the development in the master planning unit must be completed.[196]

A master plan may vary the levels of assessment for development stated in a structure plan by:

- making impact assessable development in a structure plan self-assessable or code assessable if this is provided for in a structure plan;[197]
- making code assessable development in a structure plan self-assessable;[198] and
- increasing the level of assessment stated in a structure plan.[199]

A master plan may also vary a code in the local government's planning scheme included in a structure plan (other than the structure plan area code) provided it remains substantially consistent with the code that it varies the effect of.[200]

A master plan may also require later master plans for the master planning unit and may state requirements with which a later master plan must comply.[201]

Structuring of master planning process

Having discussed the structure plan amendment process and the master plan approvals process, it is relevant to consider how these master planning processes could be used to deliver a master planned community.

The Kawana Waters master planned community in Caloundra is a useful example. Kawana Waters is intended to comprise some 23,000 persons, a town centre, employment areas, a regional hospital, an open space network based on a public recreation lake comprising an international rowing course and conservation areas based on the Mooloola River floodplain.

The master planning process for Kawana Waters under the existing Development Control Plan 1 (Kawana Waters) and associated Development Agreement is shown in Flowchart 3.

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193 Division 5 of Chapter 5B of the *Integrated Planning Act 1997*.

194 Section 2.5B.15(1)(a) of the *Integrated Planning Act 1997*.

195 Section 2.5B.15(1)(b) of the *Integrated Planning Act 1997*.

196 Section 2.5B.15(1)(b)(iii) of the *Integrated Planning Act 1997*.

197 Section 2.5B.15(2)(a) of the *Integrated Planning Act 1997*.

198 Section 2.5B.15(2)(b) of the *Integrated Planning Act 1997*.

199 Section 2.5B.15(2)(c) of the *Integrated Planning Act 1997*.

200 Section 2.5B.15(3) and (4) of the *Integrated Planning Act 1997*.

201 Section 2.5B.15(5) of the *Integrated Planning Act 1997*.

This existing process could be used to demonstrate how the Kawana Waters master planned community could be master planned as a master planned area under IPA. The proposed master planning process is illustrative only in that the master planning process could be implemented in other ways. With that said the master planning of Kawana Waters as a master planned area under IPA could involve four stages.

Structure plan amendment

The first stage could involve the making of a structure plan amendment to the planning scheme. The plans titled Development Control Plan and Structure Plan in Flowchart 3 are examples of structure plan maps that could be included in a structure plan area code.

If a more generalised structure plan is adopted such as that shown for the Development Control Plan in Flowchart 3 then it may be necessary to require that an application be made for a more detailed master plan for the whole of the master planned area. In such a case a more detailed master plan such as that shown as a Structure Plan in Flowchart 3 may be required to be approved.

District master plan

The second stage of the master planning process could involve the approval of a district master plan if this was required to be prepared by the structure plan. The district master plan would relate to a district forming part of the master planned area such as a suburb comprising residential neighbourhoods, employment areas, centres and open space.

The plans titled Neighbourhood Plan and Detailed Planning Area Plan in Flowchart 3 are examples of district master plans that could be required by a structure plan.

Precinct master plan

The third stage of the master planning process could involve the approval of a precinct master plan in respect of a precinct forming part of a district master plan such as a residential neighbourhood, an employment area, a town centre or parts of a transit oriented community.

The plan titled Precinct Estate Plan in Flowchart 3 is an example of a precinct master plan that could be required by a structure plan or a district master plan.

Site development plan

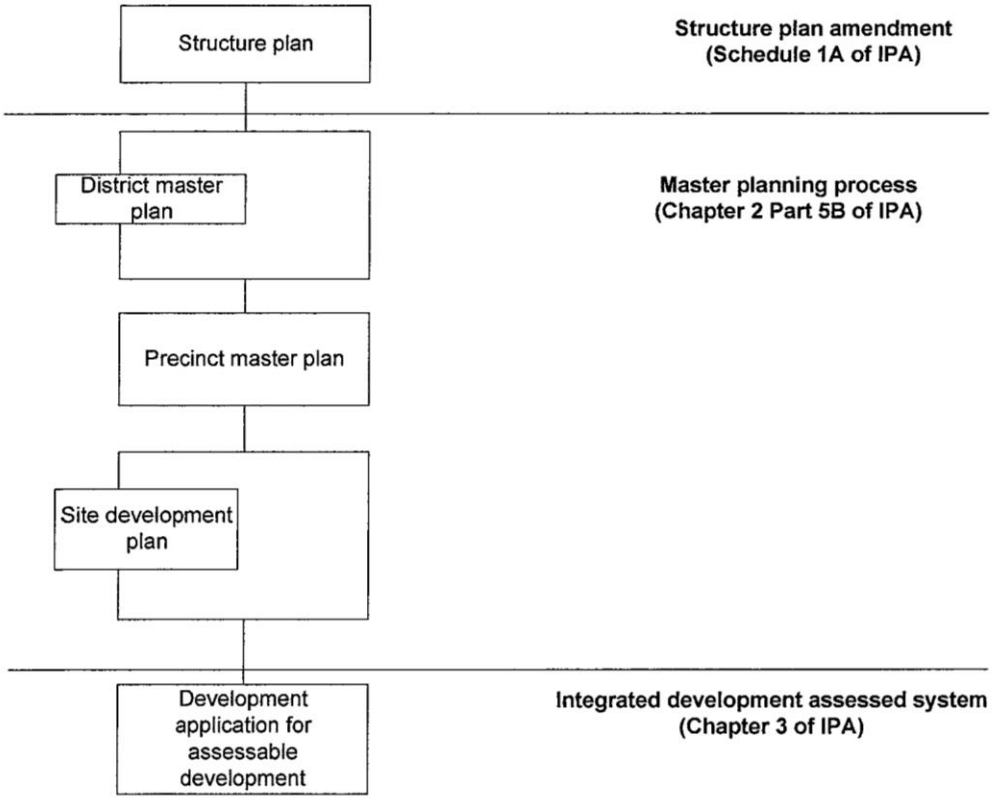
The fourth stage of the master planning process could involve the approval of a site development plan in respect of an identified site within a precinct such as a multi unit development site, a main street, a neighbourhood or district centre, a mixed use development, a transit oriented development or a site within a transit oriented community, a town centre or an employment area.

The plan titled Site Development Plan in Flowchart 3 is an example of a site development plan that could be required by a precinct master plan or district master plan.

Development applications under IDAS

Following the completion of the master planning process it will inevitably be the case that development applications will be required to be submitted under IDAS in respect of any material change of use that remains assessable development under the structure plan or master plans, the reconfiguring of lots and any operational work and building work that is required to be carried out. The relationship between the master planning process described above and IDAS is specified in Figure 1.

Figure 1 - Relationship of planning scheme, master plans and IDAS



Whilst Figure 1 conceptually shows development applications being submitted at the conclusion of the master planning process, the IPA allows development applications to be lodged concurrently with master plan applications albeit that the development applications cannot be approved until the master plan applications are approved.

It is also relevant to note that whilst Figure 1 shows master plans as being lodged subsequently to each other, the IPA allows master plan applications to be lodged concurrently with each other albeit that a lower order master plan cannot be approved until a higher order master plan is approved.

The process of allowing concurrent master plan applications to be lodged and allowing concurrent master plan and development applications to be lodged significantly improves the efficiency of the master planning process.

The development applications submitted in respect of a master planned area are subject to modified assessment and decision making rules under IDAS which require the refusal of a development application which would:

- compromise the achievement of the desired environmental outcomes including those for a master planned area;[202]
- conflict with the purpose of a structure plan area code or a master plan area code;[203] or
- conflict with the provisions of another applicable code where there are not sufficient grounds to justify the decision despite the conflict.[204]

It is also important to note that any restrictions contained in other Acts in respect of the making of a properly made development application are declared not to apply in a master planned area.[205] Examples of such provisions include section 22A of the *Vegetation Management Act 1999* and section 967 of the *Water Act 2000*.

These provisions are appropriate considering that the relevant State government agencies administering such Acts would have participated in the structure plan making and master plan approvals process as a coordinating or

[202] Sections 2.5B.69(3)(a) and 2.5B.70(4) of the *Integrated Planning Act 1997*.

[203] Section 2.5B.69(3)(b) and 2.5B.70(4)(b) of the *Integrated Planning Act 1997*.

[204] Section 2.5B.69(3)(c) and (5) and 2.5B.70(4)(c) and (6) of the *Integrated Planning Act 1997*.

[205] Section 2.5B.65 of the *Integrated Planning Act 1997*.

participating agency and as a result the relevant policy issues would have been resolved as part of that master planning process thereby removing the need for such restrictions.

Transitional arrangements for structure plans under SEQ Regional Plan

It is now appropriate to consider the transitional arrangements that are provided for in respect of these previous structure planning processes in SEQ.

Under the transitional provisions a major development area under the SEQ Regional Plan is taken to be an identified master planned area but not a declared master planned area.[206] This has several consequences:

- A development application for a preliminary approval to which section 3.1.6 applies cannot be lodged in a major development area unless specified in a structure plan.[207]
- A State planning regulatory provision can be made in respect of the master planned area.[208] In this regard it is noted that the current regulatory provisions included in the SEQ regional plan are taken to be State planning regulatory provisions for the SEQ region.[209]

The transitional provisions also provide that where a structure plan for a major development area has been prepared by a local government and approved by the Minister, the structure plan may be adopted as an amendment to the local government's planning scheme.[210] In essence the previous structure plan making process can be continued subject to the structure plan being included in the local government's planning scheme rather than the SEQ Regional Plan.

The transitional provisions also provide that a local growth management strategy prepared under the SEQ Regional Plan may be included in the regional plan for the SEQ region.[211]

Conclusion

In conclusion then, master planned communities have played and will continue to play an important role in accommodating urban growth in high growth areas especially in South East Queensland and in the major regional centres.

The IPA now provides specified processes for the preparation of a structure plan amendment to an IPA planning scheme and for the approval of master plans required by a structure plan.

The master planning amendments will present challenges as well as opportunities to State and local governments, the development sector as well as planning and legal professionals.

Warren Bunker will now focus on the challenges and opportunities presented to local government in the carrying out of master planning processes.

Greg Vann will then consider the challenges and opportunities presented to the development sector and professional planners by the master planning amendments to IPA.

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206 Section 6.8.8 of the *Integrated Planning Act 1997*.

207 Section 2.5B.4 of the *Integrated Planning Act 1997*.

208 Section 2.5C.2 of the *Integrated Planning Act 1997*.

209 Section 6.8.4 of the *Integrated Planning Act 1997*.

210 Section 6.8.7 of the *Integrated Planning Act 1997*.

211 Section 6.8.6 of the *Integrated Planning Act 1997*.

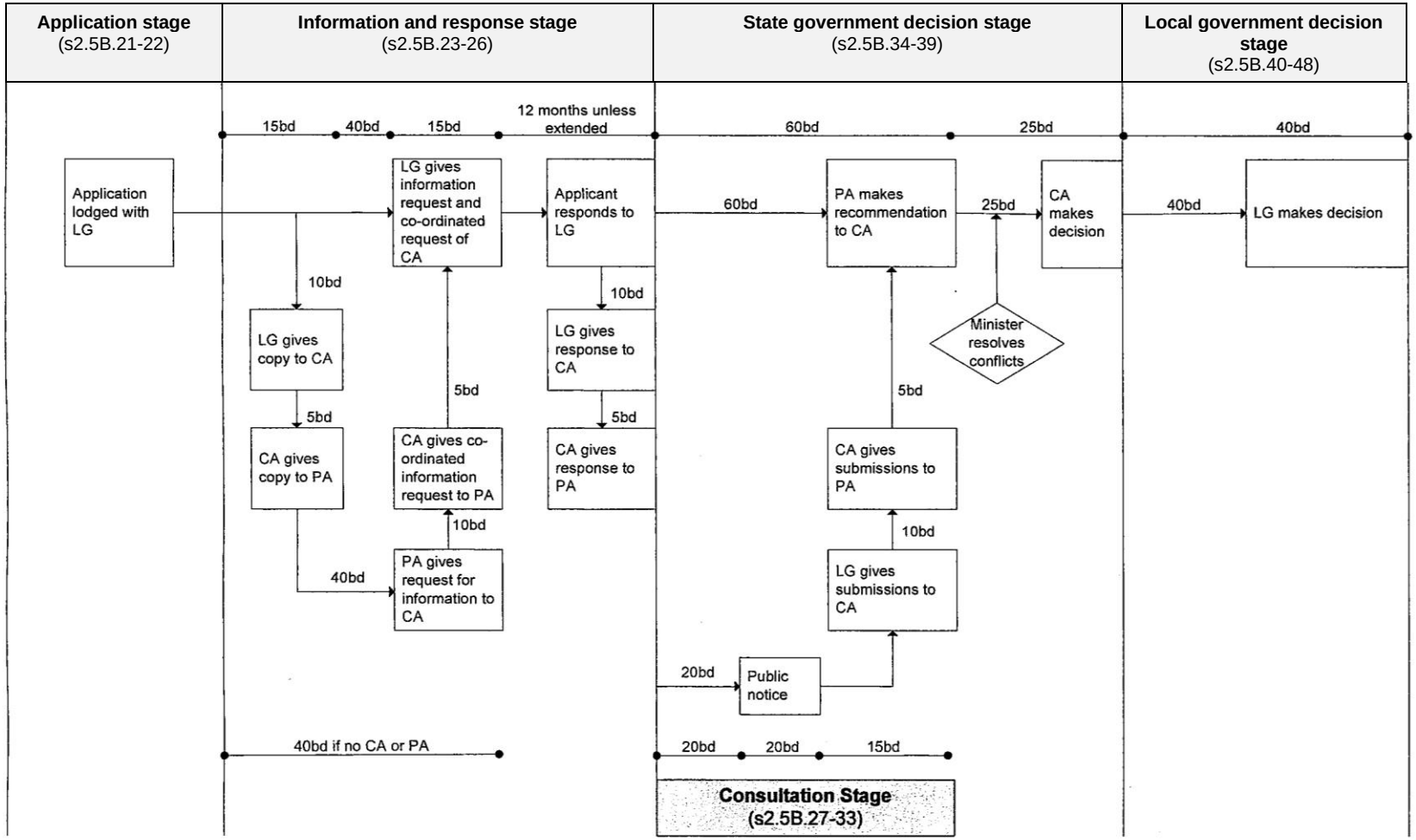
Flowchart 1 Making a Structure Plan

Step	Comments	Relevant sections
1- Identification of Master Planning Area	By the State or local government.	2.5B.2
2- Declaration of Master Planning Area	By the State only. The declaration identifies participating agencies, coordinating agencies and timeframes for the steps for making the structure plan.	2.5b.3
3- Local government must prepare structure plan	The structure plan must be prepared in accordance with Schedule 1A and any guidelines prescribed under regulation.	2.5B.6 and 2.5B.7
4- Local government and coordinating agency must agree on the proposed structure plan	The coordinating agency must coordinate the involvement of participating agencies and the Minister must decide disagreements.	Section 1 of Schedule 1A
5- Local government proposes amendment to planning scheme to include structure plan	Local government must give a copy of the proposed amendment, including the proposed structure plan, to the Minister.	Section 2 of Schedule 1A
6- Minister considers State interests	Local government must comply with any conditions imposed by the Minister.	Section 3 of Schedule 1A
7- Consultation on the proposed structure plan	Local government and the coordinating agency must consult with significant landowners and stakeholders and may enter State and local government infrastructure agreements. The Minister may resolve conflicts. Following consultation the local government and coordinating agency must decide whether to proceed with the proposed amendment. If they decide to proceed then they must give a copy of the proposed amendment and any infrastructure agreements to the Minister.	Sections 4, 5 and 6 of Schedule 1A
8- Minister reconsiders State interest	Minister may impose conditions on the notification of the proposed amendment.	Section 7 of Schedule 1A
9- Public notification of proposed amendment to any infrastructure agreements	Minimum of 30 business days.	Sections 8 and 9 of Schedule 1A
10- Consideration of submissions	Following public notification and consideration of submissions the local government and coordinating agency must decide whether to proceed with the proposed amendment. If the local government and coordinating agency decide to proceed with the proposed amendment then the local government must report on how submissions were dealt with and give report to submitters and the Minister.	Sections 10, 12 and 13 of Schedule 1A
11- Minister reconsiders State interest	Minister may impose conditions on the adoption of the proposed amendment.	Section 14 of Schedule 1A
12- Adoption and public notice of adoption	If the local government decides to proceed with the proposed amendment it must publicly notify the decision and give a copy of the notice and proposed structure plan to the chief executive.	Sections 15, 16 and 17 of Schedule 1A

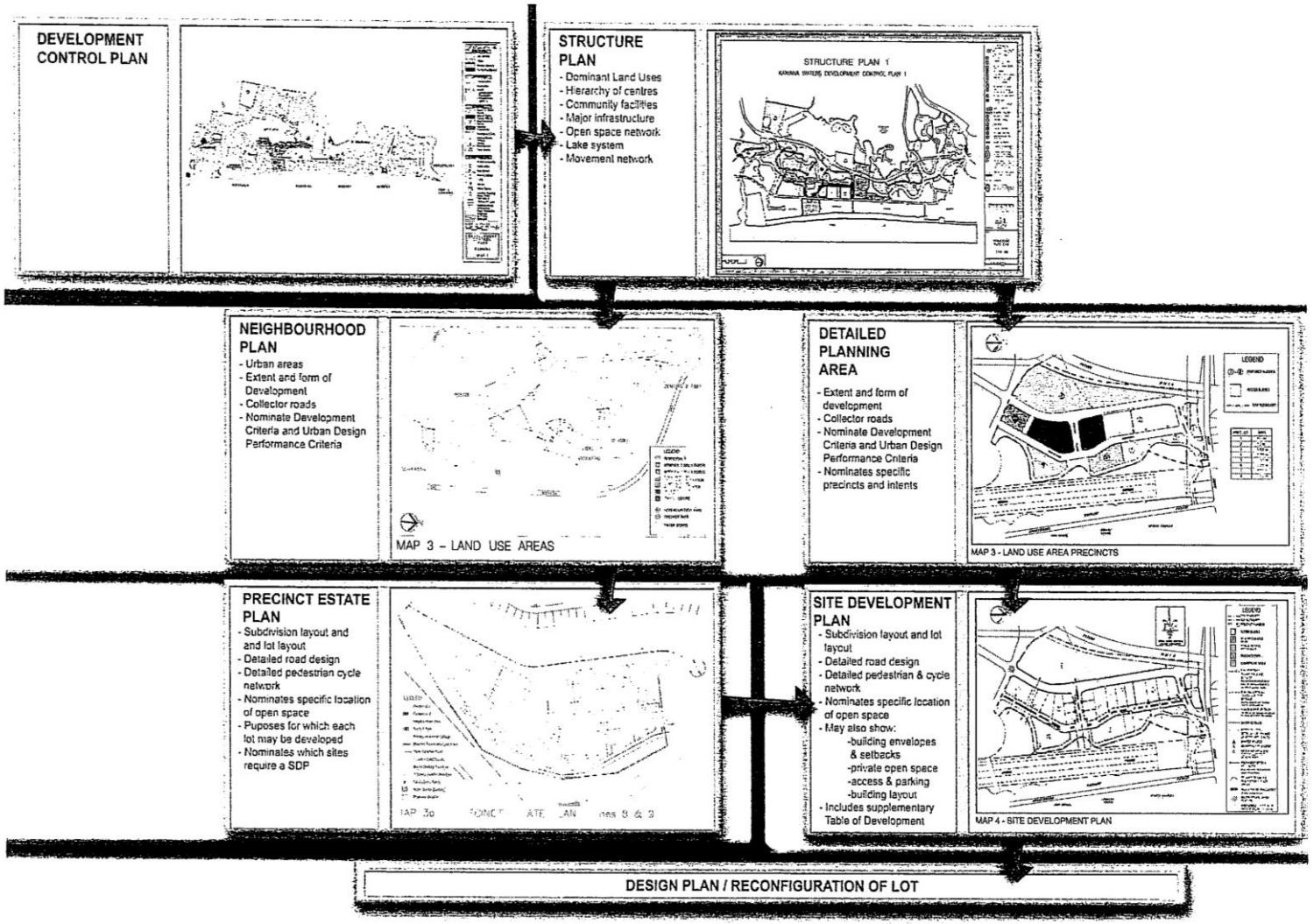
Flowchart 2 Master Plan Approval Process

For application involving -

- Coordinating agency (CA), participating agency (PA) and information requests - 10 months
- Only local government (LG), information request and consultation - 6 months
- Only local government and information request - 4 months



Flowchart 3 Kawana Waters Master Planning Process



Master planning under the Integrated Planning Act 1997 – A planning authority's perspective

Ian Wright | Warren Bunker

This article discusses master planning under the Integrated Planning Act 1997 from a planning authority's perspective

May 2008

Purpose of master planning

The purpose of this paper is to focus on master planning under the *Integrated Planning Act 1997* from the perspective of a planning authority principally a local government.

Master planning techniques have been used for some time by the development industry to design and market developments. However the use of master planning techniques by planning authorities is more recent.

From a planning authority's perspective master planning has been adopted in response to growth management issues in particular those which are associated with urban sprawl.

Urban sprawl generally describes an urban form which is unplanned, uncontrolled and uncoordinated. This type of urban form typically comprises single use developments that do not provide for an attractive and functional mix of uses or are not functionally related to surrounding land uses. Development which is typically characterised as urban sprawl includes low density, ribbon or strip, scattered, leapfrog or isolated development.

This type of urban form has had significant adverse effects:

- First, urban sprawl has significantly increased the capital costs of providing public infrastructure in particular transport, water, sewerage and community infrastructure.
- Second, urban sprawl has resulted in the loss of land which is required for its agricultural production, environmental or open space values.
- Third, the development of conflicting land uses especially on the periphery of urban areas has resulted in the loss of value and amenity of urban real estate. This is illustrated by the declining house prices in the western suburbs of Sydney.
- Fourth, urban sprawl has increased energy consumption and greenhouse gas emissions.
- Fifth, urban sprawl has been destructive of city centres.
- Sixth, urban sprawl has lead to an intensification of residential segregation by race and social class.
- Finally, urban sprawl has lead to fragmented and overlapping governmental units and has directly contributed to the regional planning, local government amalgamation and water reforms initiated by the State government.

Master planning can assist in addressing the adverse effects of urban sprawl by promoting the achievement of a more efficient urban form.

A more efficient urban form has the following goals:

- Achieving a jobs — housing balance, whereby dwellings are located closer to workplaces.
- Integrating socio-economic classes as both low and high income works generally work in the same locations.
- Reducing the need for the expansion of transport infrastructure.
- Enhancing the redevelopment of existing areas.
- Minimising environmental impacts.
- Preventing conflicting land use patterns.
- Minimising public infrastructure costs.

Therefore in its simplest terms the broad policy purpose of master planning is the achievement of a more efficient urban form.

Master planning seeks to achieve a more efficient urban form in a number of ways.

- First, it delivers a land use structure that provides for the following significant elements:
  - Sizeable areas of moderately high density development especially of dwellings and workplaces.

  - The location of dwellings closer to workplaces.
- Second, it delivers an infrastructure structure that provides for the following significant elements:
  - Adequate public infrastructure to accommodate development.
  - The use of stable and predictable funding mechanisms to finance public infrastructure.
- Third, it delivers a governance structure that provides for the following significant elements:
  - Substantial control by local government of the master planning process.
  - A framework that requires local governments to carry out master planning to meet regional needs.

Master planning process

However before considering the elements of effective master planning it is important to appreciate the nature of the master planning process when contrasted to more traditional planning processes.

Master planning is a strategic planning process that involves the planning of new communities, towns and cities. It is to be contrasted with the development assessment process that tends to predominate traditional subdivisional and estate planning.

These are conceptually different processes:

- Master planning emphasises partnerships between the public and private sectors. Development assessment on the other hand encourages an adversarial approach between the public and private sectors.
- Master planning emphasises linkages between development where development is seen as part of a bigger jigsaw puzzle. Development assessment on the other hand emphasises only the development which is the subject of a development application where development is seen in isolation or as an island.
- Master planning emphasises the longer term whereas development assessment focuses on the short to medium term.
- Master planning emphasises flexibility over certainty whereas development assessment emphasises certainty over flexibility.
- Master planning is initiated by a relevant public planning authority whereas development assessment is initiated by a private applicant.
- Master planning is unconstrained by very broad legal notions of reasonableness whilst development assessment is constrained by strict legal notions that require a nexus to be demonstrated between the planning authority's requirements and the particular development.

It is therefore important for all stakeholders whether they be State and local government planning authorities, the community or the private sector to appreciate the important differences between the master planning process and the traditional development assessment process.

Stakeholders who seek to participate in a master planning process from a purely development assessment perspective will inevitably be disappointed with the outcomes of the master planning process when viewed from just a development assessment perspective. For example, the development entitlements and obligations that are delivered from a master planning process cannot be assessed from the traditional development assessment perspective of what is reasonable or relevant. Such requirements have a more limited role in a master planning process.

Neither should the development assessment process be seen as an alternative to the master planning process. The planning for a new community, town or city has rarely been delivered through development assessment processes. Rather the development assessment process initiated by a private applicant is the means by which the outcomes of the master planning process initiated by a public planning authority are delivered.

Critical elements of effective master planning

There are a number of elements that are critical to effective master planning.

Consensus for growth management

There must be a public consensus for growth management. This has 2 parts. First, there must be a desire to accommodate some development. Secondly, and more importantly, there must be a recognition of the need to manage development to avoid the adverse effects of growth.

Leadership

Once consensus has been achieved for growth management, leadership is required from elected representatives and the officers of planning authorities to convert that consensus into action through the preparation of a structure plan and more importantly the implementation of that structure plan.

Elected representatives must be engaged throughout the master planning process rather than just at the end. Elected representatives must be informed about the methodologies to be utilised, the application of the methodologies and the results that are produced by the application of those methodologies. There will be an increased likelihood of commitment by elected representatives to the outcomes of the master planning process if there is an understanding of the methodologies and techniques that are employed in the master planning process rather than an explanation of the outcomes of those methodologies.

Finally, it is also critical to achieve the commitment of elected representatives beyond individual political cycles given the extended timeframes associated with the development of master planned areas which may extend over many decades. This requires the broad planning principles that underpin the master planning process to be sound, clearly articulated and agreed.

In seeking consensus from elected representatives it is critical to appreciate that most elected representatives will generally have some experience with town planning related matters especially at the local level and it is important to build on that experience to ensure that elected representatives are informed of the broader policy issues associated with the master planning process.

Setting of the vision, goals and objectives

Once executive leadership has resulted in a commitment to prepare a structure plan, it is necessary to implement a goal setting process that leads to a shared vision and specific planning goals and objectives.

Consensus on the intended urban form and structure

Once a shared vision has been established it is important to articulate the intended urban form and structure for the planning area in general and the master planned area in particular in order to focus the preparation of the structure plan and its implementation.

The local growth management strategies that are required by the SEQ Regional Plan to be prepared by SEQ local governments has provided a basis for local governments as planning authorities to set out the desired urban form for their local government areas as a whole and for master planned areas in particular. For example the Local Growth Management Strategy for Caloundra City articulates the desired urban form for Caloundra South and Palmview which are 2 major development areas in respect of which a structure plan is required to be prepared under the SEQ Regional Plan.

It is essential that the broad planning principles are agreed so that they can form the basis of drafting instructions for the preparation of the structure plan.

The planning principles must also ensure that the master planned area is fully integrated into existing development. The master planned area must not be treated as an island. It must be treated as one piece of a much larger jigsaw that should be integrated together to form a complete picture.

The broad planning principles must also relate to both land use and infrastructure matters and must be fully integrated. It is critical to ensure that infrastructure is not just bolted onto the land use planning outcomes.

The planning principles must ensure that the resulting community, town or city is not set in a time warp and that a homogenous urban form is not achieved. Paraphrasing the old good luck saying master planning should involve "something old, something new, something borrowed, something blue".

The planning principles also need to ensure that a limited number of growth fronts are identified in order to minimise the infrastructure requirements and resulting financial obligations.

Community engagement

A critical element of master planning is engagement with the community.

Whilst formal public notice of structure plan amendments to a planning scheme are mandated by IPA, community engagement should be initiated much earlier in the master planning process and should attempt to build community consensus for growth management, the desired vision for a master planned area and the desired urban form and structure of the master planned area.

However the form of the community engagement will vary depending on the type of master planning exercise that is being undertaken but could include the following:

- Community goal setting sessions at which problems and opportunities are identified and community planning goals are set.
- Community information sessions at which drafts of structure plan elements addressing community planning goals are openly shared with the community.
- Community advisory committees that represent community interest groups, and which are tasked with providing advice to the planning authority.

It is important to ensure that the structure plan outcomes determined from community involvement are not inconsistent with State or regional planning goals. For example, some communities have expressed a desire to limit growth in circumstances where the SEQ Regional Plan is mandating higher growth rates. Other communities

have sought to exclude or restrict certain types of development such as low income housing, extractive industries and intensive animal husbandry industries contrary to State planning policies.

Accordingly the community must be actively engaged about the relevant State and regional planning goals that provide the context within which the master planning process must be carried out.

Financial and technical support

Master planning can only be successfully carried out with considerable financial and technical support. The failure to properly resource master planning can cause significant time delays with resulting increases in cost and uncertainty for the development sector that can undermine their confidence in the master planning process.

Accordingly if master planning is to be adopted it must be carried out expeditiously and professionally in a way that respects the rights of the public as well as individual landowners and developers.

The preparation of a structure plan will cost hundreds of thousands of dollars and in some cases may cost millions of dollars. These costs may appear at first glance to be high but if proper master planning leads to even a small percentage reduction in public infrastructure costs or a more efficient land use pattern the cost savings will well and truly outweigh the costs of the structure plan.

In any event there are mechanisms under IPA by which the costs of the preparation of a structure plan can be recovered including the imposition of a special charge by a local government or a negotiated outcome as part of an infrastructure agreement or a cost recovery agreement prepared in accordance with a local government policy.

In particular proper master planning can only be carried out where the planning authority has made appropriate investments in the following tools:

- A population forecasting model.
- A traffic and transport model.
- A flood model.
- Constraints based mapping in particular hard constraints such as steep slopes, good quality agricultural land, vegetation and open space.
- Geographical information systems and associated mapping tools.

It is important to appreciate that these tools and the resultant data will also be needed for the assessment of subsequent master plan applications and development applications submitted in respect of the structure plan. Accordingly the investment of financial and technical resources in their development as part of the preparation of the structure plan would streamline the subsequent review processes.

It is also important to adopt an appropriate planning horizon for the planning studies supporting the structure plan. This is especially the case with public infrastructure such as transport corridors, community land and services corridors which will be required to support development for many decades and in some cases even hundreds of years.

The need to allocate and preserve land to meet future community infrastructure needs cannot be overemphasised. Town commons, green belts, community parks, esplanades and the like were the tools used by the original town surveyors to preserve options for future generations. The temptation to fully plan out master plan areas must be resisted. It is vitally important to preserve flexibility, options and allow for adaptability. The master planner of this century is no different to the town surveyor of the last century.

State and local government coordination

It is also very important to ensure the coordination of State and local government plans and in the case of matters such as National Highways, interstate railways, tertiary institutions and hospitals the plans of the Commonwealth government. This is especially the case with public infrastructure such as transport infrastructure and water and sewerage infrastructure given the water reform process in South East Queensland.

It is also critical to coordinate service providers such as gas, electricity and telecommunications whose facilities and corridors are often neglected and are not integrated with planned development from the early stages of master planning. Witness the failure of planning when powerlines and electricity sub stations have to be retrofitted into existing development areas because they were not planned for as part of the master planning process.

Effective coordination also involves the sharing of information and reaching consensus on broad planning principles. Local government as a planning authority has an important role to play in ensuring coordination with and between State government agencies especially given that it generally possesses greater information and resources at the local level.

The experience of the then Caloundra City Council as part of the preparation of its Local Growth Management Strategy was that if local government can provide good leadership in terms of coordinating State government agencies then those State government agencies will reciprocate by giving priority to the projects of that local government.

Proper coordination is also a major focus of the recent amendments to IPA. A State government coordinating agency is required to be appointed to coordinate State government participating agencies in the structure plan preparation process.

Importantly the IPA also establishes procedures for the Planning Minister to resolve conflicts between State and local governments and between State government agencies which is a major omission of the existing planning scheme amendment processes.

Streamlined assessment processes

The investment in up front structure planning must also result in more streamlined assessment processes in respect of subsequent master plan applications and development applications.

Importantly the IPA encourages this outcome in a number of ways:

- Structure plans may identify the need to prepare subsequent master plans that are required to be approved.
- Structure plans can identify impact assessable development, the level of assessment of which may be reduced in subsequent master plans.
- Master plans can change the level of assessment specified in a structure plan.
- Structure plans and master plans are required to contain codes that are intended to contain reasonably clear and objective standards which affords developers maximum certainty whilst assuring that development is consistent with the identified planning goals, objectives and policies.
- Development applications where necessary can be lodged concurrently with master plan applications albeit their approval must be delayed until the determination of the master plan applications.
- State government agencies under IDAS that are involved in the structure plan amendment process or master plan applications are excluded from being referral agencies in respect of subsequent development applications.

It is critical that State and local government planning authorities fully use these powers to ensure that subsequent assessment processes are streamlined especially given the additional time that will be incurred in finalising the initial structure plans.

Adequate professional support

The preparation of structure plans and the implementation of structure plans in particular the master planning processes contemplated by structure plans require adequate professional and administrative support. This means larger and more professionally trained planning and engineering staff than some local governments currently have or indeed what the State government may be accustomed to.

The appropriate commitment of resources will ensure well managed master planning processes that will lead to more efficient land use patterns, less costly delivery of public infrastructure and greater fiscal capacity for State and local governments.

This is also important for the private sector as well managed master planning processes are more likely to result in the following:

- Public infrastructure being in place or planned concurrent with the impacts of development.
- Development assessment being more objectively and reasonably based.
- Greater certainty for project feasibility.

Role of the master planners

Having considered the role of master planning in achieving a more efficient urban form, it is perhaps appropriate at a conference of planning and legal professionals to end with a consideration of the role of those professionals involved in the master planning process.

It is suggested that master planning professionals have 2 equally important roles which sometimes may be in conflict. First, they are advocates of the public interest. Second, they are protectors of ratepayers and taxpayers.

As such master planning professionals should seek to influence short term parochial interests to consider long term societal interests so that future generations will enjoy a high quality of life.

Whilst it is not a panacea, master planning does provide the opportunity to make significant gains in achieving a more efficient urban form for the benefit of existing and future residents in our communities, towns and cities.

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COLIN BIGGERS & PAISLEY LAWYERS

Negotiated planning – Infrastructure agreements under the Sustainable Planning Act 2009

Ian Wright

This article discusses the negotiated planning of infrastructure agreements under the *Sustainable Planning Act 2009*

June 2009

Legislative background – Rezoning agreements – Local Government Act 1936

- *Parties* – Local government.
- *Purpose* – Applicant makes infrastructure contributions if local government rezones land.
- *Terms* – No legislative requirements.
- *Operation* – Contract which did not run with the land and bind successors.

Legislative background – Infrastructure agreement – Local Government (Planning and Environment) Act 1990

- *Parties* – State, government owned corporation or local government.
- *Purpose* – Parry makes infrastructure contributions for development of land in a development control plan (DCP).
- *Terms*:
  - Change of development obligations if development entitlements under the DCP are changed without consent.
  - How the development obligations are fulfilled if there is a change of ownership.
  - Can fetter discretion.
- *Operation* – Contract which runs with land and binds successors like a development approval if land owner is a party or consents (administrative law concept).

Legislative background – Infrastructure agreement – Integrated Planning Act 1997 and Sustainable Planning Act 2009

- *Parties* – Public sector entity.
- *Purpose* – Party makes infrastructure contributions and other matters within or outside of the jurisdiction of the public sector entity.
- *Terms*:
  - Change of development obligations if fulfilment of development obligations depends on development entitlements that may be affected by a change of planning instrument.
  - How the development obligations are affected if there is a change of ownership.
  - Can not fetter discretion.
- *Operation*:
  - Contract which runs with the land and binds successors, if land owner is a party or consents.
  - Prevails over a development approval, master plan or infrastructure charges notice.

Key concepts

Infrastructure contributions – contribution to infrastructure in the form of money, work or land.

Infrastructure charge – financial contribution for funding trunk infrastructure levied under an infrastructure planning instrument.

Infrastructure planning instrument – a legal instrument which specifies trunk infrastructure and an infrastructure charge – planning scheme policy, priority infrastructure plan, SEQ infrastructure charges schedule.

Trunk infrastructure – infrastructure which is funded by an infrastructure charge such as higher order or common user infrastructure.

Non-trunk infrastructure – infrastructure which is not funded by an infrastructure charge such as lower order or private user infrastructure.

Offset – value of an infrastructure contribution (money, work or land) which is offset against an infrastructure charge.

Credit – value of an infrastructure contribution previously made (eg lawful existing use, contribution of a development approval).

Key principles – Infrastructure contributions by Infrastructure Authority – Scope of trunk infrastructure

Infrastructure Authority should provide the trunk infrastructure in an infrastructure planning instrument for which an infrastructure charge is being levied but not the following in lieu of the trunk infrastructure:

- non-trunk infrastructure;
- temporary work for trunk infrastructure;
- infrastructure not forming part of the ultimate trunk infrastructure.

Key principles – Infrastructure contributions by Infrastructure Authority – Bring forward of trunk infrastructure

Infrastructure Authority should not bring forward the provision of the trunk infrastructure in an infrastructure planning instrument unless satisfied:

- the earlier provision does not delay the provision of in sequence trunk infrastructure;
- if the trunk infrastructure is to service the development of land, the landowner pays a bring forward cost such as the interest cost of borrowings to finance the trunk infrastructure earlier than the planned date.

Key principles – Infrastructure contributions by Infrastructure Authority – Delaying trunk infrastructure

Infrastructure Authority should not delay the provision of trunk infrastructure in an infrastructure planning instrument unless satisfied the delay will not:

- prevent development from proceeding; and
- result in an overcharging of infrastructure charges.

Key principles – Infrastructure contributions by landowners – Scope of infrastructure

Landowners should provide the trunk infrastructure in an infrastructure planning instrument to service their land rather than non-trunk infrastructure, temporary work for trunk infrastructure or infrastructure not forming part of the ultimate trunk infrastructure, in lieu of the trunk infrastructure to:

- relieve the infrastructure authority of the obligation to provide the trunk infrastructure;
- avoid additional costs on the infrastructure authority.

Key principles – Infrastructure contributions by landowners – Timing of infrastructure

Landowners should only be granted development entitlements for their land if the infrastructure necessary to service the land exists or is legally obliged to be provided by means of a development approval or an infrastructure agreement.

Key principles – Infrastructure contributions by landowners – Bonding of infrastructure

Landowners should provide infrastructure to service their land prior to the sealing of the plan of survey and should not be fully or substantially bonded as this will result in the need for temporary infrastructure (eg pump outs, water carriers).

Key principles – Offsets – Purpose of offsets

Infrastructure charges for an infrastructure network should be offset by an infrastructure contribution for the same infrastructure network and not for other infrastructure networks (ie avoid "cross crediting" or cross offsetting).

Key principles – Offsets – Scope of offsets

Infrastructure charges should be offset by infrastructure contributions for trunk infrastructure but not infrastructure contributions for:

- non-trunk infrastructure;
- temporary work for trunk infrastructure;
- infrastructure not forming part of the ultimate trunk infrastructure.

Key principles – Offsets – Value of offsets

Infrastructure charges should be offset by the value of an infrastructure contribution stated in an infrastructure planning instrument (planned cost) or an infrastructure agreement (estimated cost) but not the cost of provision of the infrastructure contribution (actual cost).

Key principles – Offsets —Unit of offsets

Infrastructure charges should be offset by the value of an infrastructure contribution stated in dollars rather than demand units (such as EP's, ET's, ICU's).

Key principles – Offsets —Indexation of offsets

Infrastructure charges should be offset by the value of an infrastructure contribution which is indexed by:

- *CPI* – if the infrastructure contribution is provided out of sequence; or
- *Road and Bridge Index* – if the infrastructure contribution is provided in sequence.

Limits of local government body's power to acquire land by compulsory process

Samantha Hall | Nikita Tuckett

The High Court handed down a decision on 2 April 2009[212] that sets out relevant principles in relation to the requirement of obtaining owners' consent in the compulsory acquisition of land by a Council under section 7B of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

July 2009

Background

The High Court considered whether a proposal by the Parramatta City Council (**council**) to compulsorily acquire land owned by the appellants was restrained because the council had failed to obtain the owners' approvals.

The council sought to compulsorily acquire the appellant's land as part of a redevelopment scheme, pursuant to section 186(1) of the *Local Government Act 1993* (NSW). The scale of the redevelopment was such that the council could only achieve it with the assistance of private enterprise and thereupon entered into a public-private partnership with two private companies. Under that agreement, the council was, as a condition precedent, to acquire certain lands, which included those of the appellants. As the development progressed, the council was to transfer those lands to its partner, firstly under a trust and then by transfer of legal title in return for money and other valuable consideration.

The appellants sought to resist the acquisition, arguing that the respondent's power under section 186(1) was limited by section 188(1), which prohibited the respondent from acquiring land without the owner's approval where the land was being acquired for the purpose of re-sale.

The primary judge held that the acquisition was for the purpose of re-sale, and so the appellant's land could not be acquired other than with their approval. Conversely, the Court of Appeal considered that as the redevelopment was a function contemplated by section 186(1), and as the council's sole or dominant purpose in making the transfer to its partner was the furtherance of that redevelopment, section 188(1) did not apply to restrain the compulsory acquisition process.

Before the High Court, it was not in issue that the council had the power to make the acquisition in question. The issue was whether the land was restrained from doing so by virtue of section 188(1).

Decision of the High Court

The High Court allowed the appeal and held that the council could only acquire by compulsory process land already vested in it under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s7B, which represented the council's only substantive source of power for such an acquisition. Consequently, section 188(2) of the *Local Government Act 1993* (NSW) was not engaged as the "other land" in question, namely the land which comprised the relevant streets, was not, and could not have been, land acquired at the same time under the *Local Government Act 1993* (NSW).

The court considered the relevance of the purpose of re-sale to the function being exercised by the council and made the following points:

- The term re-sale in the context of a compulsory acquisition presupposes a sale to a local government body such as the council, for which it must pay monetary compensation. In this case, under the agreement between the council and its partner, the land acquired was to be disposed of in return for money and money's worth. That disposition was a re-sale properly so called.
- The term re-sale is used in the context of a compulsory acquisition as the antecedent compulsory acquisition is treated as a forced sale by a land owner to a local government body. The transfer under the public-private partnership of that land is clearly a re-sale as there is nothing in the Act that limits the constraint imposed by section 188(1) to transactions involving only a monetary consideration. To so construe re-sale would be to limit the term to only one aspect of the ordinary meaning of the word sale.

[212] *R&R Fazzolari Pty Limited v Parramatta City Council* (2009) HCA 12.

- To ask which function a council would be exercising in acquiring land under a compulsory acquisition does not assist in deciding whether that acquisition, under section 188(1), was for the purpose of re-sale. That question relates to whether or not a council can exercise its function in a certain way. The purpose in this case was satisfaction of a condition precedent to the public-private partnership. It was no answer to state that the acquisitions were but part of a larger arrangement.
- Where a number of parcels are acquired as a part of a large scale development, it is the use to which each individual parcel is to be put that is in issue, as the constraint operates in relation to a particular parcel of land. It is sufficient if the purpose so found is a substantial, that is non-trivial, purpose. It need not be the sole nor the dominant purpose for section 188(1) to apply.

Practical note

Whilst the case specifically relates to the provisions of the NSW *Land Acquisition (Just Terms Compensation) Act 1991* the decision of the High Court sets out relevant principles for the compulsory acquisition of land by Queensland local governments:

- Importantly, a council may not have the statutory power to compulsorily acquire land for the purposes of "re-sale" even if the development is for a public purpose. Therefore, when interpreting provisions relating to a council's powers regarding compulsory acquisition of land, the construction that least interferes with private property rights is the one to be preferred.
- Also, when considering a legislative restraint that relates to the purpose of an acquisition, focus needs to be placed on the use of the particular land to be acquired and not upon any broader objective in undertaking the development in question.

Postscript for NSW

Since the High Court decision was handed down the NSW *Land Acquisition (Just Terms Compensation) Act 1991* has been amended which will enable councils to compulsorily acquire land for resale that adjoins or is in the vicinity of their own land.

Planning (Urban Encroachment Milton Brewery) Act 2009

Samantha Hall | Nikita Tuckett

This article highlights the commencement of the *Planning (Urban Encroachment-Milton Brewery) Act 2009*. It discusses the Act's intent to prevent criminal and civil proceedings regarding the redevelopment of land in Milton and draws attention to particular obligations under the Act

July 2009

Background

On 23 February 2009 the *Planning (Urban Encroachment-Milton Brewery) Act 2009* (**Act**) commenced. Under the Act, the Milton Brewery in Brisbane, is to be protected from criminal and civil lawsuits relating to air emissions, noise and light pollution from new residents associated with the redevelopment of land in the vicinity of the Milton Railway Station.

The Act will not affect residents already coexisting with the brewery and does not effect the brewery's requirements to comply with its licence under the *Environmental Protection Act 1994* or its liability for any physical or personal damage if there was an incident.

Purpose

The main purpose of the Act is to protect the existing use of the Milton Brewery from encroachment by, and the intensification of, other development.

The purpose is to be achieved mainly by restricting particular civil proceedings and criminal proceedings relating to particular activities of the Milton Brewery. In particular, the Act outlines the restrictions on particular legal proceedings, the particular obligations of an applicant in a development application for the affected area, and the impact of transitional provisions on relevant development applications.

Legal proceedings

The Act restricts particular legal proceedings brought by affected persons where it is claimed that a relevant act at the Milton Brewery is, was or will be an unreasonable interference, or likely interference, with an environmental value and that relevant act was, or was caused by, the emission of aerosols, fumes, light, noise, odour, particles or smoke.

The affected person cannot take a civil proceeding or criminal proceeding against any person in relation to the claim if development conditions or the brewery development approval and any codes of environmental compliance relating to that act have been complied with.

This protection from legal proceedings applies despite the *Environmental Protection Act 1994* or any other Act. This restriction does not apply if under the *Environmental Protection Act 1994* an amended authority or a new authority is in place, or that amended authority or new authority authorises greater emissions of light or noise, or a greater release of contaminants into the atmosphere than is authorised under the brewery development approval, or brewery registration certificate in force at the commencement of the Act.

The registered operator, named in the brewery's registration certificate must publish the brewery registration certificate, the brewery development approval and the development conditions of the approval on the operator's website.

Particular obligations

Notice forms a central element of the particular obligations imposed by the Act. The applicant for a relevant development application must give the registrar notice, enabling the keeping of a record that this Act applies to that relevant development application as an 'affected area notation'.

If that notice asking for affected area notation is not given, as an additional consequence, if the applicant enters into a contract with a buyer for the premises the subject of the application, the buyer may end the contract at any time before the contract is completed by giving the applicant's agent a signed, dated notice, despite anything in the contract itself.

Before a prospective buyer enters into a contract to buy the property, the applicant-seller must give the prospective buyer an affected area notice of the consequent restrictions under the Act. Failure to do so gives the prospective buyer the right to end the contract.

Transitional provisions

If, before the commencement of this Act, a prospective buyer entered into a contract to buy a property to which the particular obligations of notice applies, the prospective buyer does not have the right to end the contract due to the failure to give that prospective buyer an affected areas notice.

Change to development conditions set by court order

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Collard v Brisbane City Council* [2009] QPEC 62 heard before Robin QC DCJ

August 2009

Case

This was an appeal by Mr Collard (**appellant**) in relation to the conditions of an approval imposed by the court in respect of a development permit for a material change of use for a house over 8.5 metres above ground level and a preliminary approval for building work.

The appellant owned a vacant block (under 450m^2) at 127 Denman Street, Greenslopes, on which the previous owner sought approval from the Brisbane City Council (**council**) to build a family home that was to be 9.5 metres above ground level. Nga Vu, an uphill owner to the appellant's property, lodged a submission dated 26 May 2008 objecting to the blocking of views from her house. The submission was the foundation for Nga Vu's appeal to the Planning and Environment Court in BD2222 of 2008 against the council's decision made on 18 July 2008 to approve the proposed development.

Facts

The appellant owned a vacant block (under 450m^2) at 127 Denman Street, Greenslopes, on which the previous owner sought approval from the council to build a family home that was to be 9.5 metres above ground level. Nga Vu, an uphill owner to the appellant's property, lodged a submission dated 26 May 2008 objecting to the blocking of views from her house. The submission was the foundation for Nga Vu's appeal to the Planning and Environment Court in BD2222 of 2008 against the council's decision made on 18 July 2008 to approve the proposed development.

An agreement was reached between the parties in that appeal and an order was made in the Planning and Environment Court (appeal BD2222 of 2008) on 22 January 2009 for a development permit for a material change of use for a house, subject to a condition that the height of the house was to be restricted to 9.2 metres above ground level as opposed to the 9.5 metres originally sought, on the lot being less than 450m^2 and for a preliminary approval for building work.

The appellant purchased the block after the order was made and sought a change to the condition imposed by the court, seeking to increase the height of all vertical elements of the building above the floor at ground level by 300mm. The effect of the change would be to reinstate the plans approved by the council on 18 July 2008, for a building height of 9.5 metres. The proposed change to the height of the house required impact assessment under the *Brisbane City Plan 2000*.

As a result of the earlier proceedings, the court required that Nga Vu become an interested party in the appellant's appeal (1487 of 2009). The court required the appellant to serve Nga Vu with the originating application for the appeal and to invite Nga Vu to become a party to the proceedings. Nga Vu did not join the proceedings.

It became apparent that Nga Vu did not have a development approval for decking areas and other modifications that she had undertaken to the third and fourth levels of her dwelling, in respect of which the council issued a show cause notice dated 21 January 2009.

On 26 June 2009, the appellant raised the possibility that an application based on rule 668 (Matters arising after order) of the *Uniform Civil Procedure Rules 1999* (**UCPR**) might be more appropriate than an application under section 3.5.33 (Request to change or cancel conditions) of the *Integrated Planning Act 1997* (**IPA**). The reason for this was the potential difficulties associated with an application under section 3.5.33 (Request to change or cancel conditions) of the IPA, if the change to the height of the house were one by which assessable development would arise, which, on a strict interpretation, appeared to be the case. Accordingly the appellant filed an application in pending proceeding based on rule 668 (Matters arising after order) of the UCPR.

Decision

His Honour Judge Robin indicated that "some persuasion" would be required to use the UCPR provisions to change development conditions set by a court. His Honour concluded that it was appropriate to comply with the established rules in the IPA that specifically applied to the situation and accordingly decided the appeal pursuant to section 3.5.33 (Request to change or cancel conditions) of the IPA.

Referring to the purposive approach adopted in *Dimensions Property Group Pty Ltd v Brisbane City Council* [2009] QPEC 041, the court held that the change sought by Mr Collard was not assessable development for the purposes of section 3.5.33(1) (Request to change or cancel conditions) of the IPA, as the changes sought had already been approved by the council in July 2008. This approach was favoured over an excessively technical approach requiring a new development application and an impact assessment process including public notification where there was little likelihood of a different outcome.

The court was satisfied that "service" on Nga Vu did occur, however, the relevant letter and originating application may not have been received. His Honour Judge Robin held that there was no need to adjourn the matter despite Nga Vu's absence from the hearing. His Honour continued that in relation to Nga Vu's submission she had no right to a view, referring to *Calvisi v Brisbane City Council* [2008] QPEC 45 at [13]. His Honour suggested that if the allegations against her for unlawful development were correct, "*it would be a case of the pot calling the kettle black*".

Held

The court ordered that the conditions of the development approval granted by the order of Judge Searles in appeal BD2222 of 2008 of 22 January 2009 be changed, effectively reinstating the plans approved by the council on 18 July 2008. A copy of the order was to be served on Nga Vu prior to the change being effective.

Consolidation of parallel appeals

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Smits v Moreton Bay Regional Council & Ors*; *Tendiris Pty Ltd v Moreton Bay Regional Council & Ors* [2009] QPEC 63 heard before Robin QC DCJ

August 2009

Case

This case concerned two parallel appeals against the refusal by the Moreton Bay Regional Council (formerly Pine Rivers Shire Council) (**council**) of a development application for a material change of use for a low density residential subdivision. It was thought to be untenable to have a single proceeding as the multiple appellants' interests did not coincide. The parallel proceedings were originally allowed by the court in an attempt to preserve both parties' interests in the matter. The issue before the court was whether the proceedings should be consolidated.

Facts

Two appeals were brought in relation to the development application:

- BD1313 of 2003 lodged on 28 April 2003 by Mr Ogle; and
- BD4569 of 2004 lodged on 15 December 2004 by Tendiris Pty Ltd.

Mr Ogle's site was sold to Tendiris Pty Ltd by a mortgagee exercising a power of sale. Tendiris Pty Ltd applied to be added as an appellant to the former appeal commenced by Mr Ogle. The parties were hostile with each other and Tendiris Pty Ltd did not want its ability to pursue the development application and appeal compromised by Mr Ogle in any way. Therefore, a second appeal was filed by Tendiris Pty Ltd. In each of the appeals, the appellants were separately represented. As the appeals progressed, they began to exhibit differences, in particular Mr Ogle and Tendiris Pty Ltd proposed different forms of development in their respective appeals. The council argued to have the proceedings consolidated so as to have one identified single developer-adversary. Upon application by Tendiris Pty Ltd, Mr Ogle was later removed as appellant to appeal BD1313 of 2003, by the Court of Appeal, who assigned Mr Ogle's rights as mortgagee to Mr Smits, the sole director and shareholder of Tendiris Pty Ltd.

Decision

Judge Robin QC DCJ took the view that the proceedings should be consolidated on the basis of rule 78 of the *Uniform Civil Procedure Rules 1999*. His Honour stated that "*the removal of Mr Ogle from the picture has removed the whole basis on which the court permitted the pursuit of parallel appeals*". By this his Honour was referring to the conflicting interests of the different appellants, being Mr Ogle and Tendiris Pty Ltd. His Honour found no basis for Tendiris Pty Ltd and Mr Smits' interests to so conflict.

His Honour also provided that should any unforeseen unjust consequences result from the consolidation, rule 81 of the *Uniform Civil Procedure Rules 1999* will allow the consolidation order to be varied.

Held

The proceedings be consolidated pursuant to rule 78 of the *Uniform Civil Procedure Rules 1999* and the proceedings be stayed until the appellants have common legal representation.

COLIN BIGGERS & PAISLEY LAWYERS

Putting the SEQ Regional Plan into perspective – The legal perspective

Ian Wright

September 2009

Introduction

Land use and infrastructure planning framework

The *South East Queensland Regional Plan 2009-2031* (**SEQ Regional Plan**) and the accompanying *South East Queensland Regional Plan 2009-2031 State Planning Regulatory Provisions* (**SEQ SPRP**) provide a land use and infrastructure planning framework for the South East Queensland region (**SEQ region**).

This regional land use and infrastructure planning framework is relevant to the following policy decisions for the SEQ region:

- The decisions of the State government, local governments and other entities about land use and infrastructure plans and investments.
- The preparation of a State and local government planning instrument, plan, policy and code.
- The preparation of a structure plan and the determination of a master plan under a structure plan for a declared master plan area.
- The determination of an application for development including an application for preliminary approval to vary the effect of a local planning instrument.

Themes of paper

This paper considers from a legal perspective the general land use and infrastructure planning framework created by the SEQ Regional Plan and the SEQ SPRP. It focuses on 4 matters:

- First, the regional land use and infrastructure planning framework created by the SEQ Regional Plan and the SEQ SPRP.
- Second, the effect of the SEQ Regional Plan and the SEQ SPRP on the preparation of a State and local government planning instrument, plan, policy and code.
- Third, the impact of the SEQ Regional Plan and the SEQ SPRP on the preparation of a structure plan and the determination of a master plan under a structure plan for a declared master planned area.
- Fourth, the impact of the SEQ Regional Plan and the SEQ SPRP on the determination of an application for development, including an application for preliminary approval to vary the effect of a local planning instrument.

Regional land use and infrastructure planning framework

The SEQ Regional Plan and the SEQ SPRP create a regional land use and infrastructure planning framework for the SEQ region which has 3 broad elements:

- First, a regional land use pattern.[213]
- Second, regional policies.[214]
- Third, a process for the planning of future urban development areas.[215]

Regional land use pattern

The SEQ Regional Plan and the SEQ SPRP provide for a regional land use pattern that has 4 broad components:

- First, all land in the SEQ region is allocated to a regional land use category comprising an urban footprint, rural living area and regional landscape and rural production area which are specified on regulatory maps under the SEQ SPRP.[216]

213 SEQ Regional Plan Part C.
214 SEQ Regional Plan Part D.
215 Section 8.10 of the SEQ Regional Plan.
216 See Map 2 of the SEQ Regional Plan and section 1.4(2) and Schedule 1 of the SEQ SPRP.

- Second, future urban development areas in the urban footprint are specified as regionally significant (regional development areas) or locally significant (local development areas).[217]
- Third, future urban development areas in the regional landscape and rural production area are specified as identified growth areas.[218]
- Fourth, some areas in the regional landscape and rural production area are specified as a rural precinct, a rural subdivision precinct and a rural residential purpose area.[219]

Regional policies

The SEQ Regional Plan and the SEQ SPRP specify 3 types of regional policies:

- First, the policies for the regional land use categories that have become provisions of the SEQ SPRP.[220]
- Second, the narratives for each sub-region in the SEQ region which are stated to have the status of policies.[221]
- Third, the regional policies which set out the desired regional outcomes, the principles to achieve the outcomes and the specific policy statements for the principles to have effect.[222]

Planning process for future urban development areas

The SEQ Regional Plan and the SEQ SPRP also provide for the planning of future urban development areas to be initiated by the local government, landowners and the State government.[223]

The planning of an identified growth area in the regional landscape and rural production area can be initiated by submitting information to the Minister demonstrating compliance with the following:

- the urban footprint principles;[224]
- the development area delivery principles;[225]
- the relevant sub-regional narrative policies.[226]

The Minister can adopt the planning by including the identified growth area in the urban footprint through a change to the regulatory maps under the SEQ SPRP.

The planning of a regional development area in the urban footprint can be initiated by submitting a structure plan to the Minister demonstrating compliance with the following:

- the development area delivery principles;[227]
- the sub-regional narrative policies;[228]
- the proposed regional and local development area plan content guidelines.[229]

The structure plan for the regional development area can be adopted by the Minister through the following:

- a structure plan for a master planned area;[230]
- a planning scheme amendment;
- a preliminary approval to vary the effect of a local planning instrument for the regional development area.[231]

The planning of a local development area in the urban footprint can be initiated by submitting a plan to the Minister demonstrating compliance with the following:

- an adopted regional development area plan;
- the proposed regional and local development area plan content guidelines.[232]

The plan for the local development area can be adopted by the Minister through the following:

- a master plan for a master planned area;

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217 See section 8.10 of the SEQ Regional Plan and section 5.1(1)(a) and (b) of the SEQ SPRP.
218 See sub-regional narratives in Part C of the SEQ Regional Plan.
219 Section 5.1(c), (d) and (e) of the SEQ SPRP.
220 SEQ Regional Plan page 152 and pages P15-16.
221 SEQ Regional Plan page 17.
222 SEQ Regional Plan page 38.
223 SEQ Regional Plan page 104.
224 Section 8.2 of the SEQ Regional Plan.
225 Section 8.10 of the SEQ Regional Plan.
226 Part C of the SEQ Regional Plan.
227 Section 8.10 of the SEQ Regional Plan.
228 Part C of the SEQ Regional Plan.
229 Section 8.10 of the SEQ Regional Plan.
230 Part 5B of the *Integrated Planning Act 1997* and chapter 4 of the *Sustainable Planning Bill 2009*.
231 Section 3.1.6 of the *Integrated Planning Act 1997* and section 242 of the *Sustainable Planning Bill 2009*.
232 Section 8.10 of the SEQ Regional Plan.

- a planning scheme amendment;
- a preliminary approval to vary the effect of a local planning instrument for the local development area.

The reference in the SEQ Regional Plan to a master plan as a means of implementing a plan for a local development area appears to be problematical given that the current drafting of the master plan provisions of the *Integrated Planning Act 1997* and the *Sustainable Planning Bill 2009* only apply to a declared master planned area for which a structure plan has been prepared.[233]

It is suggested that the relevant provisions could be amended to enable the master planning provisions to be accessed where a structure plan, planning scheme amendment or preliminary approval which varies the effect of a local planning instrument specify that a subsequent master plan is to be approved. This will ensure that where a master planning process is considered appropriate, there is a uniform master planning process in operation for regional and local development areas.

Preparation of a planning instrument, plan, policy and code

Legal requirements

The *Integrated Planning Act 1997* sets out the following legal requirements for the preparation of a planning instrument, plan, policy and code:

- First, the SEQ Regional Plan is to prevail over a State or local government planning instrument, plan and code to the extent of any inconsistency.[234]
- Second, a State or local government planning instrument, plan, policy and code is to take account of and state how the SEQ Regional Plan is reflected in the document.[235]
- Third, a local government planning scheme in the SEQ region is to deal with the matters reflected in the SEQ Regional Plan as the regional dimension of a planning scheme matter.[236]

The SEQ Regional Plan also specifically identifies that a State and local government planning instrument, plan, policy and code is to be consistent with the following parts of the SEQ Regional Plan:

- the sub-regional narratives in Part C which have the status of policies under the SEQ Regional Plan;[237]
- the desired regional outcomes, principles and policies in Part D in particular sustainability and climate change (DRO1), compact settlement (DRO8) and employment location (DR09);[238]
- any policy of the SEQ Regional Plan which is a provision of the SEQ SPRP to which the assessment manager will have regard to in determining a development application;[239]
- the future planning intent in the SEQ Regional Plan for a development area.[240]

Implications for a drafter

The provisions of the SEQ Regional Plan in the context of the *Integrated Planning Act 1997* and the *Sustainable Planning Bill 2009* therefore have the following legal implications for the drafter of a State or local government planning instrument, plan, policy and code:

- First the drafter is to identify any conflict which may exist between the document and the SEQ Regional Plan and is to amend the document to ensure consistency with the SEQ Regional Plan.
- Second the drafter is to include an express statement in the document as to how the SEQ Regional Plan has been reflected in the document.

Whilst each drafter will employ their own methodology to address these legal requirements, the following is intended to provide some suggestions for those embarking on the journey.

Review of SEQ Regional Plan, SEQ SPRP and supporting documents

As an initial step it is suggested that the drafter review the SEQ Regional Plan, SEQ SPRP and their supporting documents, including the following:[241]

- the South East Queensland Infrastructure Plan and Program (**SEQIPP**);

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233 Section 2.5B.6 of the *Integrated Planning Act 1997* and section 150 of the *Sustainable Planning Bill 2009*.
234 Section 2.5A.21(3) of the *Integrated Planning Act 1997* and section 26(3) of the *Sustainable Planning Bill 2009*.
235 Section 2.5A.21(2) of the *Integrated Planning Act 1997* and section 26(2) of the *Sustainable Planning Bill 2009*.
236 Section 90(3)(b) of the *Sustainable Planning Bill 2009*.
237 SEQ Regional Plan pages 17 and 152.
238 SEQ Regional Plan pages 38 and 152.
239 SEQ Regional Plan page 152.
240 SEQ Regional Plan page 152.
241 SEQ Regional Plan page 70.

- associated guidelines and codes such as the following:
  - the implementation guidelines prepared for the SEQ Regional Plan;
  - the implementation guidelines prepared for the previous regional plan for the SEQ region which are referred to in the SEQ Regional Plan;[242]
  - the proposed guidelines referred to in the SEQ Regional Plan such as the *proposed regional and local development area plan content guidelines* for development areas;
- maps indicating an area to which the SEQ Regional Plan and SEQ SPRP apply such as the following:
  - the regulatory maps which show the regional land use categories;[243]
  - the maps showing development areas;[244]
  - the maps showing a rural precinct, rural subdivision precinct and rural residential purpose area;
  - associated strategies and non-statutory plans.

Each supporting document is to be reviewed in the context of the SEQ Regional Plan and the SEQ SPRP to determine the following matters:

- First, the statutory basis of the supporting document is to be identified to determine the extent to which the supporting document is legally relevant to the SEQ Regional Plan and the SEQ SPRP.
- Second, having determined the extent of the legal relevance of the supporting document, the planning intent stated in the supporting document is to be identified to determine its relevance to the document that is being prepared.

The SEQ Regional Plan contains specific policy statements which indicate that a variety of supporting documents are relevant, albeit to a different extent. For example:

- Some policy statements require a supporting document to be complied with:
  - the *proposed regional and local development area plan content guidelines* are to be complied with for proposed plans for regional and local development areas;[245]
  - the *South East Queensland Regional Plan 2009-2031 Implementation Guidelines No. 7 (Water Sensitive Urban Design)* is to be complied with for the planning and management of urban stormwater;[246]
  - the *Queensland Government Environment Offsets* Policy is to be complied with where an impact on an area of significant biodiversity values cannot be avoided;[247]
  - the *Environmental Protection (Air) Policy 1997*, *Environmental Protection (Noise) Policy 2008* and the *Road Traffic Noise Management Code of Practice* are to be complied with for air, odour and noise emission impacts on sensitive land uses;[248]
  - the *Queensland Coastal Plan* is to be complied with to ensure that development avoids an erosion prone area, storm tide inundation hazard area and the undeveloped section of a tidal waterway.[249]
- Some policy statements require a supporting document to be implemented:
  - the *South East Queensland Outdoor Recreation Strategy* is to be implemented to coordinate outdoor recreation services;[250]
  - the *South East Queensland Natural Resource Management Plan 2009-2031* is to be implemented to coordinate natural resource management.[251]
- Some policy statements require a supporting document to be used. For example, the *Crime Prevention Through Environmental Design (CPTED) Guidelines for Queensland* is to be used for development to optimise community safety.[252]

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242 *South East Queensland Regional Plan 2005-2006 Implementation Guidelines No. 5 (Social Infrastructure)*, *South East Queensland Regional Plan 2005-2006 Implementation Guidelines No. 6 (Rural Precinct Guidelines)*, *South East Queensland Regional Plan 2005-2006 Implementation Guidelines No. 7 (Water Sensitive Urban Design and Design Objectives for Urban Stormwater Management)*, *South East Queensland Regional Plan 2005-2006 Implementation Guidelines No. 8 (Identifying and Protecting Scenic Amenity)*.
243 Section 1.4(2) and Schedule 1 of SEQ SPRP.
244 Section 5.1(1) of SEQ SPRP.
245 Steps 2A and 3A of Figure 3 in section 8.10 of the SEQ Regional Plan.
246 Policy 11.1.2 of section 11.1 of the SEQ Regional Plan.
247 Policy 2.1.4 of section 2.1 of the SEQ Regional Plan.
248 Policy 2.3.2 of section 2.3 of the SEQ Regional Plan.
249 Policy 2.4.2 of section 2.4 of the SEQ Regional Plan.
250 Policy 3.7.2 of section 3.7 of the SEQ Regional Plan.
251 Policy 4.1.1 of section 4.1 of the SEQ Regional Plan.
252 Policy 6.3.47 of section 6.3 of the SEQ Regional Plan.

- Some policy statements specify an outcome which is to be consistent with a supporting document. For example it is a specific policy statement intent to ensure sustainable rural communities which are consistent with the *Rural Futures Strategy for South East Queensland*.[253]

Preparation of a local planning instrument

For those involved in the drafting of a local planning instrument the following suggestions are offered to minimise the extent of any inconsistency with the SEQ Regional Plan and to more easily demonstrate and explain how the SEQ Regional Plan has been taken account of and reflected in the local planning instrument. These suggestions are made in the context of the standard planning scheme provisions under the *Sustainable Planning Bill 2009*.

- Consistency of terminology – The local planning instrument could use the terminology employed in the SEQ Regional Plan to identify relevant land use and infrastructure elements.
- Land use categories – The local planning instrument could identify in the strategic outcomes maps of the strategic framework, the extent of the regional land use categories in the local government area and in particular those parts of the urban footprint and rural living area which are not suitable for an urban purpose and rural residential purpose respectively.
- Development areas and identified growth areas – The strategic outcomes maps could also identify the regional and local development areas in the urban footprint and the identified growth areas in the regional landscape and rural production area.
- Activity centre elements – The strategic outcomes maps could also identify activity centres specified as primary, principal and major in the SEQ Regional Plan as well as other sub-regional and locally significant centres which could be identified as district activity centres and local activity centres.
- Other land use elements – The strategic outcomes maps could also identify land use.
- Opportunity areas incorporating regionally significant designations (as reflected in the SEQ Regional Plan) as well as sub-regional and local designations – The land use opportunity areas could relate to the enterprise, science and technology, health and education and training elements identified in the SEQ Regional Plan.
- Infrastructure elements – The strategic outcomes map could also identify the regionally significant infrastructure and services as reflected in the SEQ Regional Plan as well as sub-regional and locally significant infrastructure and services.

Preparation of a structure plan and master plan for a master planned area

Legal requirements

The *Integrated Planning Act 1997* provides for the identification of a master planned area in a regional plan, a document made under a regional plan, a State planning regulatory provision, a planning scheme or a declaration of a master planned area.[254]

The *Integrated Planning Act 1997* also provides for the making of a declaration of a master planned area.[255] A local government is required to prepare a structure plan for a declared master planned area.[256] A structure plan may require a master plan for all or part of a declared master planned area.[257]

Where a master planned area is identified, an application for a preliminary approval to vary the effect of a local planning instrument for the master planned area cannot be made unless a structure plan has taken effect and the structure plan states that such an application can be made.[258]

Identified master planned areas

The draft SEQ Regional Plan identified the Ripley Valley, Caloundra South, Palmview and Ebenezer as master planned areas as well as other development areas as potential master planned areas.[259]

However the SEQ Regional Plan departs significantly from the draft SEQ Regional Plan and the previous regional plan for the SEQ region in the following respects:

- First, no master planned areas are identified. Rather regional development areas and local development areas are identified.

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253 Policy 5.1.1 of section 5.1 of the SEQ Regional Plan.
254 Section 2.5B.2 of the *Integrated Planning Act 1997* and section 132 of the *Sustainable Planning Bill 2009*.
255 Section 2.5B.3 of the *Integrated Planning Act 1997* and section 133 of the *Sustainable Planning Bill 2009*.
256 Section 2.5B.7 of the *Integrated Planning Act 1997* and section 140 of the *Sustainable Planning Bill 2009*.
257 Sections 2.5B.8(2)(b) and 2.5B.13 of the *Integrated Planning Act 1997* and sections 141(2)(b) and 150 of the *Sustainable Planning Bill 2009*.
258 Section 2.5B.4 of the *Integrated Planning Act 1997* and section 134 of the *Sustainable Planning Bill 2009*.
259 *Draft South East Queensland Regional Plan 2009-2031* page 101.

- Second, landowners and the State government in addition to the local government can initiate the planning for a development area by preparing a structure plan for a regional development area or a plan for a local development area and submitting those documents to the Minister.
- Third, the Minister can adopt a structure plan for a regional development area or a plan for a local development area through the following processes:
  - a structure plan and master plan for a declared master planned area;
  - a planning scheme amendment;
  - an application for a preliminary approval to vary the effect of a local planning instrument.

Declared master planned areas

It is therefore envisaged that a master planned area will only be identified and declared for a limited number of development areas with the remainder being delivered by a planning scheme amendment which is initiated by a local government or by an application for a preliminary approval to vary the effect of a local planning instrument which is initiated by a landowner.

Determination of an application for development

The SEQ Regional Plan and the SEQ SPRP also impact on the determination of an application for development in three ways:

- First, some development is exempted from the operation of the SEQ Regional Plan whilst other development is prohibited under the SEQ Regional Plan.
- Second, some development is identified as requiring impact assessment.
- Third, additional assessment criteria for an application for development are specified.

Exemption from making a development application

The SEQ SPRP exempts the following development from the operation of the SEQ Regional Plan:[260]

- development in an urban area under a planning scheme made under the *Integrated Planning Act 1997* (as opposed to a transitional planning scheme made under an act prior to the *Integrated Planning Act 1997*);
- development in a State biodiversity development offset area;
- development which is consistent with a rural precinct;
- exempt development under the *Integrated Planning Act 1997*;
- development carried out under a development permit;
- development consistent with a preliminary approval which varies the effect of a local planning instrument;
- development which is generally in accordance with a rezoning approval;
- development which is a significant project or in a State development area under the *State Development Public Works Organisation Act 1971*.

Prohibition on making a development application

The SEQ SPRP also prohibits an application being made for a subdivision in the regional landscape and rural production area other than in a limited number of circumstances, which are generally consistent with those specified in the previous regional plan for the SEQ region.[261]

Significantly the SEQ Regional Plan and the SEQ SPRP do not operate to prohibit the making of a preliminary approval to vary the effect of a local planning instrument, as was the case with the major development areas identified under the previous regional plan for the SEQ region and the master planned areas identified in the draft SEQ Regional Plan.

This is a significant policy shift in that it recognises that a landowner can initiate the land use and infrastructure planning for a future urban development area; a role which has traditionally been reserved for local government.

Whilst the integrated development assessment system is unsuited to the carrying out of integrated land use and infrastructure planning for large development areas and can result in development leading infrastructure, it could be argued especially by the property development sector that it is necessary given the fact that the structure planning under the previous regional plan for the SEQ region and the draft SEQ Regional Plan of some urban development areas has not progressed as quickly as was anticipated.

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[260] Sections 1.5(1) and (2) of the SEQ SPRP.
[261] Section 3.1(1) of the SEQ SPRP.

Development requiring impact assessment

The SEQ SPRP requires impact assessment for the following development for a material change of use of premises outside the urban footprint:[262]

- a community, sport and recreation and tourist activity over 5000m^2 GFA;
- indoor recreation over 3000m^2 GFA;
- a residential or rural residential development other than on an existing lot;
- an industrial and commercial development over 750m^2 GFA;
- a service station over 1000m^2 GFA.

The SEQ SPRP also requires impact assessment for the following development in a development area in the urban footprint:[263]

- a material change of use where the GFA of the premises exceeds I0,000m^2;
- a subdivision.

Additional assessment criteria

The SEQ Regional Plan and the SEQ SPRP also specify additional assessment criteria for assessable development.[264]

The SEQ Regional Plan requires assessable development to be assessed against the following:[265]

- the sub-regional narratives in Part C;
- the regional policies in Part D.

The SEQ SPRP also specifies the following additional assessment criteria for development requiring impact assessment under the SEQ SPRP:

- development outside of the urban footprint for a community, sport and recreation and tourist activity must comply with the site, use and strategic intent requirements;[266]
- other development outside of the urban footprint which requires impact assessment must comply with the following assessment criteria:[267]
  - the locational requirements or environmental impacts of the development must necessitate its location outside of the urban footprint;
  - there is an overriding need for the development in the public interest;[268]
  - development in a development area in the urban footprint which requires impact assessment must be consistent with the future planning intent for the area.[269]

Whilst the test of overriding need for the development in the public interest which is applicable to development outside the urban footprint is defined in the SEQ SPRP, the test for development in a development area in the urban footprint being that the development is "consistent" with the future planning intent for the area is not defined in the SEQ SPRP.

A development which would prejudice the values of the regional land use designation or cut across the SEQ Regional Plan in a way which would render it more difficult to implement in the future or require its review would not be consistent with the future planning intent for the area.[270]

However a development which departs from the SEQ Regional Plan but does not otherwise prejudice the values of the regional land use designation or render the SEQ Regional Plan more difficult to implement in the future or require its review may be arguably consistent with the future planning intent for the area.

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262 See Tables 2B, 2C, 2D and 2E of section 2.1(b) of the SEQ SPRP for the details of the development outside of the urban footprint which requires impact assessment.
263 See Table 2F and Table 3B of sections 2.2(b) and 3.2(b) of the SEQ SPRP.
264 See section 3.5.4(2)(c)(ii)(iii) of the *Integrated Planning Act 1997* and section 313(2) of the *Sustainable Planning Bill 2009*, for code assessment and section 3.5.5(2)(ii)(iii) of the *Integrated Planning Act 1997* and section 314(2) of the *Sustainable Planning Bill 2009* for impact assessment.
265 SEQ Regional Plan page 5.
266 See Table 2B of section 2.1(b) of the SEQ SPRP.
267 See Table 2C, 2D and 2E of the SEQ SPRP.
268 Schedule 3 of the SEQ SPRP.
269 See Table 2F of the SEQ SPRP.
270 cf *Chesol Pty Ltd v Logan City Council* [2007] QPELR 285 at paragraph 187.

Conclusions

This is an important question which will undoubtedly arise for consideration by the courts given the new era that is to unfold where the planning for future urban development areas may be initiated by a landowner through an application for a preliminary approval to vary the effect of a local planning instrument.

This is arguably the most significant policy change effected by the SEQ Regional Plan. It was also a policy change that was not reflected in the draft SEQ Regional Plan when it was publicly notified.

Some local governments will undoubtedly be concerned by the prospect of integrated land use and infrastructure planning being achieved through the integrated development assessment system. This is especially the case for large development areas such as new cities or towns which will be developed well beyond the planning horizon of the SEQ Regional Plan and where a preliminary approval granted today may continue to prevail over subsequent planning schemes for decades to come.

However, on the other hand it could be strongly argued especially by the property development sector that this policy change is necessary given the fact that the planning of some future urban development areas under the previous regional plan for the SEQ region and the draft SEQ Regional Plan has not been progressed as quickly as was anticipated.

It is therefore clear that a new era of landowner initiated planning is to commence. I fear that the significant commercial and financial interests that guide State and local governments and landowners may give rise to a new era of contested planning based on the IDAS decisional rules of assessing a development application which override the planning scheme as opposed to the negotiated planning involved in the preparation of a planning scheme amendment.

Whilst the outcome is uncertain and my concerns may prove unfounded, it is certain that the game will be a very interesting one for all participants. May the force be with the good guys whoever they may be.

Navigating the haze: Construing the assessment provisions of the Integrated Planning Act 1997

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *Sevmere Pty Ltd v Cairns Regional Council & Anor* [2009] QCA 232 heard before McMurdo P, Holmes JA and Dutney J

October 2009

Case

This was an appeal by Sevmere Pty Ltd (**developer**) to the Court of Appeal in relation to a decision of the Planning and Environment Court (**P&E Court**) concerning the proper construction of section 3.3.15(1) (Referral agency assesses application) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The developer made a development application (superseded planning scheme) (**DA (SPS)**) to the Cairns Regional Council (**council**). The developer's land was in the Residential 3 Zone under the superseded planning scheme, however a significant proportion of the developer's land was in an area zoned for conservation under the current planning scheme.

At the developer's request, the council resolved to assess the development application under the superseded planning scheme and was required under section 3.5.4(5) (Code assessment) of the IPA to assess the development application under the superseded planning scheme as if the existing planning scheme was not in force. By contrast, the Department of Natural Resources and Water (**DNRW**) a referral agency for the development application under section 3.3.15(1)(b) (Referral agency assesses application) of the IPA, was required to assess the development application having regard to the current planning scheme.

The DNRW directed the council to refuse that part of the development application that related to building in the area zoned for conservation. By virtue of section 3.5.11(4) (Decision generally) the council was obliged to refuse that part of the development application as directed by the DNRW.

The developer appealed to the P&E Court against the council's part refusal of its development application.

P&E Court decision

Everson J declared that the DNRW, by virtue of section 3.3.15(1) (Referral agency assesses application) of the IPA, in assessing the DA (SPS), was required to have regard to the current planning scheme.

The primary judge also considered whether the developer was entitled to compensation for the reduction in value of its interest in the land to which the development application related and concluded that section 5.4.2 (Compensation for reduced value of interest in land) of the IPA did not preclude the developer's right to compensation if the council's decision resulted in a change which reduced the value of the developer's interest in the land the subject of the development application.

Decision

The Court of Appeal agreed with the decision of the Planning and Environment Court at first instance, that a referral agency must assess a development application under the existing planning scheme at the time of the making of the application.

Reading of section 3.3.15 (Referral agency assesses application)

The developer and the council submitted that the provisions of the IPA should be construed to prefer an interpretation which would best achieve the purposes of the IPA, and in particular "coordinating and integrating planning at the local, regional and State levels". Holmes JA rejected this argument in respect of section 3.3.15(1)(b) (Referral agency assesses application) of the IPA, agreeing with the submissions put forward by the DNRW, that the aim of "coordinating and integrating planning" does not require the assessment manager and a referral agency to assess a development application using identical assessment criteria.

The developer and the council, relying on Lord Diplock's formula in *Wentworth Securities Ltd v Jones* [1980] AC 74, put forward two different constructions of the words "any planning scheme in force, when the application was made, for the planning scheme area" in section 3.3.15(1)(b) (Referral agency assesses application) of the IPA.

Holmes JA considered the various Australian authorities applying Lord Diplock's test and concluded that the third limb of the test had not been met in this case, as it was not obvious that the words proposed were those which the legislature would have inserted had it considered the matter.

Holmes JA (Dutney J agreeing) suggested that whilst a "hiatus in the IPA" had been demonstrated in respect of the appeal regime for DA (SPS), it should be left to Parliament to remedy the deficiency.

Compensation under section 5.4.2 (Compensation for reduced value of interest in land)

Holmes JA held that the primary judge had erred in his construction of section 5.4.2 (Compensation for reduced value of interest in land) of the IPA in concluding that the DNRW's assessment of the development application could not produce a "change" as defined in section 5.4.1 (Definition for pt 4) of the IPA, that is, a "change to the planning scheme or any planning scheme policy affecting the land" reducing the value of the interest. As a consequence, the developer had no entitlement to compensation, despite having suffered a loss because of the DNRW's response.

McMurdo P reached a different conclusion, suggesting that insofar as the DNRW's assessment of the application based on the current planning scheme resulted in a reduction in the developer's value of its interest in the land, the developer had an entitlement to compensation.

Appeal process under section 4.1.52 (Appeal by way of hearing anew)

Holmes JA stated that in respect of the operation of the appeal provisions in section 4.1.52 (Appeal by way of hearing anew) of the IPA that section 4.1.52(3)(b) (Appeal by way of hearing anew) unequivocally requires the court to deal with the appeal on the basis that the superseded planning scheme applies and that the existing planning scheme is to be disregarded. By contrast, McMurdo P reached the opposite conclusion, suggesting that the P&E Court, in deciding the appeal insofar as it related to the referral agency’s response, must deal with the appeal on the basis of the existing planning scheme.

Held

The appeal was dismissed, with the developer and the council to pay the DNRW's costs.

COLIN BIGGERS & PAISLEY LAWYERS

Interest on debt under judgment or order

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Court of Appeal in the matter of *Hammercall Pty Ltd v Gold Coast City Council & Anor* [2009] QCA 233 heard before Keane and Muir JJA and Fryberg J

October 2009

Case

The Queensland Court of Appeal made orders that the Gold Coast City Council and State of Queensland (**respondents**), pay a specified part of Hammercall Pty Ltd's (**applicant**) costs of a successful appeal to the Court of Appeal from judgments of the Planning and Environment Court. On 13 May 2009 the applicant applied to the Court of Appeal for an order pursuant to section 48(2)(b) of the *Supreme Court Act 1995* (**Act**) that the respondents pay interest on the amount of costs recoverable.

Facts

On 6 May 2005 the Court of Appeal made orders disposing of the costs of an appeal to the Court of Appeal by the present applicant.

On 25 March 2009, after much delay, due in part to legislative changes in the costs assessment regime in Queensland, the legal costs assessor engaged to determine the amount of the costs recoverable by the applicant indicated to the parties his intention to assess the amount of costs recoverable by the applicant at $58,302.54.

On 15 June 2009, the certificate of assessment contemplated by rule 737 of the *Uniform Civil Procedure Rules 1999* was issued by the assessor. The certificate fixed the amount of costs recoverable by the applicant at $64,790.89 which sum included the costs of the assessment itself.

On 13 May 2009, the applicant applied to the Court of Appeal for an order pursuant to section 48(2)(b) of the Act that the respondents pay interest on the sum of $58,302.54 from 6 May 2005 until the date of payment at the rate of 11% per annum compounding daily.

Central to this application was section 48 of the Act which provided as follows:

> *Interest on debt under judgment or order*
>
> *(1) Where judgment is given or an order is made by a court of record for the payment of money in a cause of action that arose after the commencement of the Common Law Practice Act Amendment Act 1972, interest shall, unless the court otherwise orders, be payable at the rate prescribed under a regulation from the date of the judgment or order on so much of the money as is from time to time unpaid.*
>
> *(2) Notwithstanding anything contained in subsection (1) –*
>
> *...*
>
> *(b) Where the court makes an order for the payment of costs and the costs are unpaid within 21 days after the ascertainment thereof by taxation or otherwise - interest on the costs shall not be payable unless the court otherwise orders.*

Decision

The court found that it was readily apparent from the language of section 48(2)(b) of the Act that, until the lapse of 21 days after the ascertainment of the costs payable under the order of the court and the non-payment of the ascertained amount by the party liable, the occasion for the making of an order for the payment of interest had not arisen. The court held that it was clear beyond any shadow of doubt that this was the effect of the language of section 48(2)(b) of the Act.

Before the court, the applicant expressly accepted that the costs were only ascertained for the purposes of section 48(2)(b) of the Act when the assessor's certificate was issued on 15 June 2009. The court found that there was, therefore, no occasion to consider whether the 21 day period contemplated by section 48(2)(b) of the Act began to run before 15 June 2009. Consequently, the court found that it was clear that the occasion for the exercise of the discretion conferred by section 48(2)(b) of the Act had not yet arisen.

Held

It was held by the court that the application was premature and the application was therefore dismissed.

Deciding on the conflict: A question of fact

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council & Anor* [2009] QCA 237 heard before the Chief Justice, Chesterman JA and Wilson J

October 2009

Case

This was an appeal to the Supreme Court by Gracemere Surveying and Planning Consultants as agent for D & B Carne Investments Pty Ltd trading as Capella Hotel/Motel (**Capella**) against the decision of the Planning and Environment Court (**P&E Court**) to dismiss an appeal against the Peak Downs Shire Council's (**council**) approval of Cuposa Pty Ltd's (**Cuposa**) development application for a material change of use to facilitate development of a hotel/motel facility with a general liquor licence. The appeal was brought pursuant to section 4.1.56 of the *Integrated Planning Act 1997* (**IPA**) on the grounds that the P&E Court had made an error of law in that the P&E Court Judge had misinterpreted the provisions of the council's planning scheme.

Facts

The P&E Court dismissed an appeal against the council's approval of Cuposa's development application. In deciding this case, the P&E Court Judge rejected the submission of Capella that Cuposa's proposal conflicted with the council's planning scheme. The central issue was whether the approval of the development application in the Town-Highway precinct was contrary to the overall outcome for the precinct provided in section 4.3.2(2)(6)(f)(v) which states "The inclusion of ... motels, food premises and hotels is minimised; as they are generally not compatible with the uses in the Precinct".

The uses proposed by the development application were not among those for which land in the Town-Highway Precinct were intended to be "predominantly" used but were expressly included in the list of uses to be "minimised". On that basis, the P&E Court Judge stated that it was open to a proponent to show that, whatever may "generally" be the situation, the particular proposal was compatible with the uses desired in that precinct and held that no persuasive case had been made that the proposed use was not compatible with the defined uses.

Capella appealed on the basis that the P&E Court Judge made an error of law in wrongly interpreting the term 'minimised' in section 4.3.2(2)(6)(f)(v) of the council's planning scheme.

Decision

Chesterman JA, with whom the Chief Justice and Wilson J agreed, held that the relevant consideration as to whether the proposal conflicted with the council's planning scheme was at best, a question of mixed fact and law but was really a question of fact.

His Honour found that the judgment of the P&E Court Judge did not reveal any misunderstanding of the section and that in reality the section was worded in such vague and flexible terms that there was no definitive criteria to determine any conflict between the planning scheme and a proposed development.

His Honour concluded his judgement by stating that "whether such a use is minimal or not is a question of fact and degree depending upon the circumstances. It is not a question of law, given the terms in which section 4.3.2(2)(6)(f)(v) is cast." Therefore, given that the question of conflict between the council's planning scheme and the proposed development was a question of fact and not law, no appeal could be made to the Court of Appeal.

Held

Leave to appeal was refused and Capella was ordered to pay the council's and Cuposa's costs of the application.

COLIN BIGGERS & PAISLEY LAWYERS

Directions for dispute resolution regarding conditions attached to a development approval

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2009] QPEC 77 heard before Dodds DCJ

October 2009

Case

The case concerned two applications made by Acland Pastoral Co Pty Ltd (**appellant**) and Tanya Plant (**third co-respondent**) regarding the conditions that would attach to an approval for a development application for a material change of use, which had been granted previously by the court after a successful appeal by the appellant.

Facts

The applications originated from an appeal against the refusal of a development application for a material change of use for lot feeding of cattle. The refusal of the development application was directed by the Department of Primary Industries and Fisheries, a concurrence agency, as the proposed development did not comply with the *Environmental Protection Act 1994* and the Reference Manual for the Establishment and Operation of Beef Cattle Lots in Queensland (**reference manual**).

That appeal was allowed, but only to the extent of an approval for a 5,000 Single Cattle Unit (**SCU**) feedlot, instead of the original size proposed (11,000 SCU). The approved smaller size complied with the requirements for odour levels and separation distances. The appeal was adjourned to allow the parties to formulate the conditions that would attach to the approval.

Since the original appeal, the matter had returned to the court several times on the request of both the appellant and respondents for a number of different orders regarding the conditions that would attach to the approval, most of which dealt with odour issues arising from the approved development.

The matter returned to court most recently on 14 August 2009. Conditions had been proposed and circulated by the Department of Primary Industries, the Chief Executive under the *Vegetation Management Act 1999* (**second co-respondent**) and the Rosalie Shire Council (**respondent**). In response, the appellant proposed further orders to obtain agreement between the parties including orders for a without prejudice meeting of the parties chaired by the Planning and Environment Court ADR Registrar, directions from the court for exchange of further affidavits and for a hearing in November. Time limits were included in this application.

The third co-respondent opposed these orders, particularly with respect to the without prejudice meeting, in part due to complicating factors regarding the health of the fifth co-respondent and a scheduled holiday booked by the fifth and sixth co-respondents on dates that conflicted with the time limits suggested by the applicant.

Decision

The court found that Part 7 Division 3 of the *District Court Act 1967* and Chapter 9 Part 4 of the *Uniform Civil Procedure Rules 1999* provide for alternative dispute resolution processes.

In addition, Section 4.1.48 of the *Integrated Planning Act 1997* incorporates provisions of the aforementioned acts into the procedures of the Planning and Environment Court.

The *Planning and Environment Courts Rules 2008* provide for without prejudice conferences to be convened and chaired by an ADR Registrar of the court if so directed.

Held

The court held that the further affidavit material be filed and served, each party notified all other parties of any objection to the conditions proposed by the Department of Primary Industries, the second co-respondent and the respondent and if resolution could not be reached with respect to the conditions, all parties were to attend a mediation before the Planning and Environment Court ADR Registrar to narrow or resolve any remaining dispute about conditions. The appeal was adjourned for further review.

Complexities with the removal and transportation of sand tailings

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Queensland Construction Materials Pty Ltd v Redland City Council & Ors* [2009] QPEC 85 heard before Wilson SC DCJ

November 2009

Case

This was an application seeking the determination of the following preliminary points of law before the appeal itself was to be heard:

- whether possible interests in the land to which Queensland Construction Materials Pty Ltd's (**QCM**) application relates were held by persons with rights or a claim under the *Native Title Act 1993* (Cth) (**NTA**);
- whether QCM was obliged to seek approval to stockpile sand on the land; and
- whether there were procedural defects in QCM's development application involving non-compliance with sections 3.2.1(3) and (5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**).

Facts

QCM lodged a development application for a development permit for a material change of use for Extractive Industry (removal and transportation of sand tailings for sand mining operations) (**development application**) with the Redland City Council (**council**) to enable it to remove and transport sand tailings, produced from sand mining operations, near Dunwich on Stradbroke Island. The council refused the development application and QCM appealed the refusal.

The development application related to two mining leases over unallocated State land. The sand the subject of the development application was located within the boundaries of the two mining leases, was the property of the State and was sold to QCM by an agreement dated 31 October 2007.

Possible interests in the land to which QCM's application relates of persons with rights or claim under the NTA

Section 3.2.1(3) (Applying for development approval) of the IPA required QCM's development application to contain or be supported by the written consent of the owner of the land. It was asserted by the council and the co-respondents, that the consent of the native title claimants was necessary pursuant to section 3.2.1 (Applying for development approval) of the IPA.

The co-respondents contended that:

- granting of a development permit would be a 'future act' as that term is defined in section 233(1) (Future act) of the NTA, which was rendered invalid under that Act to the extent it affected native title, if the consent of native title holders had not been obtained;
- in the alternative, the grant of the development permit, if it was a future act, would offend section 24OA (Future acts invalid unless otherwise provided) of the NTA, which provided that unless a provision of the NTA said otherwise, a future act was invalid to the extent that it affected native title;
- none of the specific future act procedures in Division 3 of Part 2 of the NTA applied or were able to be applied to validate the granting of a development permit over land subject to native title, in the absence of consent by the holders of that title.

Whether QCM was obliged to seek approval to stockpile sand on the land

- The co-respondents alleged that the development application was piecemeal, as it excluded from the approval the activity of creating sand stockpiles for the purpose of providing sand for removal and transportation off the site.
- Evidence by QCM established that the creation of stockpiles was already authorised by the mining leases and the Environmental Authority, and those activities were exempt development under IPA.
- Whether there were procedural defects in QCM's application involving non-compliance with section 3.2.1(3) and (5) (Applying for development approval) of the IPA.

The final preliminary issue raised by the co-respondents was that QCM failed:

- to obtain the written consent of the owner of each of the parcels, which would be traversed as part of the transport route, as required under section 3.2.1(3) (Applying for development approval) of the IPA;
- in any event, to identify, or correctly identify, all of the various parcels affected by the development application; and
- to have its development application properly accompanied by the evidence necessary under section 3.2.1(5) (Applying for development approval) of the IPA.

QCM argued that it was not necessary for it to obtain the consent of the owners of the land, and that the development application did satisfy the requirements of section 3.2.1(5) (Applying for development approval) of the IPA and that the exclusion in section 3.2.1(6)(a) (Applying for development approval) of the IPA applied.

Decision

Possible interests in the land to which QCM's application relates of persons with rights or claim under the NTA

Wilson SC, DCJ determined that, "it was not necessary for the development application to contain or be supported by the written consent of the assumed native title holders or registered native title claimants, and it was not necessary for notice to be given to them as adjoining owners".

Furthermore, Wilson SC, DCJ declared:

- a future act must be something which does or would, rather than might, affect native title;
- the evidence available made it impossible to say that a development permit, as a future act, would be invalid to the extent that it was unarguably caught and extinguished by the NTA;
- unless the IPA is read as expressly providing that it affects native title (and, plainly, there is no basis for that construction) the relevant provisions in it do not offend the *Racial Discrimination Act 1975* (Cth);
- the evidence does not establish that, on the required assumptions, native title holders had attained rights of a kind commensurate with those attached to an 'owner' under the IPA; and it is not apparent that a conclusion to that effect necessarily involves offending the provisions of the NTA.

Whether QCM was obliged to seek approval to stockpile sand on the land

His Honour identified that the conditions of the mining leases required the deposit of tailings within the lease area. The Judge went on to note that the mining leases did not however authorise the extraction or removal of sand off-site from the tailings deposits, as was sought by the current development application. Once that was appreciated, it could be said the development application was 'piecemeal'.

Whether there were procedural defects in QCM's development application involving non-compliance with section 3.2.1(3) and (5) (Applying for development approval) of the IPA

Wilson SC, DCJ determined that this issue hinged upon the proper meaning of section 3.2.1(5) (Applying for development approval) of the IPA and found that this was a case which did not involve a requirement for a general authority to an entitlement, nor the production of evidence of an allocation or entitlement.

The evidence which was required was evidence of satisfaction that the development would be consistent with an allocation of, or entitlement to, the relevant resource – here, land and, that land was identified earlier in the IDAS form.

His Honour determined that it was not necessary for owners' consent to be given under section 3.2.1(3) (Applying for development approval) of the IPA, because section 3.2.1(6) (Applying for development approval) of the IPA applied. Evidence provided was sufficient to satisfy the requirements of section 3.2.1(5) (Applying for development approval) of the IPA. Evidence from Forest Products and from the Department of Environment and Resource Management, whose officers signed the development application form lodged with the council, was sufficient for the purposes of sub-section 3.2.1(5)(b) (Applying for development approval) of the IPA in establishing evidence that the chief executive of the department administering the resource is satisfied the development is consistent with an allocation of, or an entitlement to, the resource.

Held

- The question contained in the first preliminary point, concerning native title, was answered in terms that it was not necessary for the development application to contain or be supported by the written consents of native title holders or the registered native title claimants; and neither was it necessary for notice to be given to them.
- The development application was not piecemeal.
- The development application satisfied and was sufficient for the requirements of section 3.2.1(3) and (5) (Applying for development approval) of the IPA.

Reliance on council's records: A risk for developers

Ben Caldwell | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Parolin & Anor v Body Corporate for L'Etage* [2009] QPEC 90 heard before Robin QC DCJ

November 2009

Case

This was a directions hearing brought by the Parolins (**applicants**) to the Planning and Environment Court to seek excusal of the applicants' non-compliance with public notification requirements under section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**) in order to protect a development approval from any future challenge.

Facts

The applicants had previously lodged a development application for a material change of use and a preliminary approval for carrying out building work. This development application was impact assessable under the IPA and therefore required public notification in compliance with Chapter 3, Part 4 of the IPA.

The applicants' agent who had carried out the public notification had sought details from the Brisbane City Council (**second respondent**) of the adjoining owners who were entitled to personal notification of the development application. The council identified Denman Pty Ltd as a relevant owner of 29 Moray Street and supplied an address which was used to give notice to the adjoining owner.

It was later discovered that the council's records were out of date and that a body corporate (**first respondent**) was now the "owner" of 29 Moray Street for notification purposes under section 3.4.4(5) (Public notice of applications to be given) of the IPA.

The applicants had begun preparatory work pursuant to the approval and sought relief under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to obtain protection against future challenges to the development before they expended substantial effort and money on the development.

The body corporate failed to attend the directions hearing after personal service of the documents on the chairman of the body corporate. The failure of the body corporate to attend the court in addition to property searches which incorrectly list the body corporate address as 27 Moray Street, left the judge with some residual concern about the service of the body corporate.

Decision

His Honour Judge Robin QC determined that public notification was undertaken correctly insofar as newspaper advertising and the sign on the site was concerned. The judge also agreed that it was hard to avoid the inference that the body corporate members, or most of them at least, would have been aware of the public notice sign placed on the site.

Following the failure of the body corporate to attend the directions hearing, Judge Robin QC determined that the applicants were to send to the body corporate and to the owner/occupant of each of the five lots at that address, a copy of the directions order which would be amended to include a description of the application which the directions related.

Held

His Honour Judge Robin QC made the applicants' directions order, subject to amendments.

Epilogue

The matter was subsequently heard by his Honour Judge Wilson SC who excused the applicants' non-compliance with section 3.4.4(5) (Public notice of applications to be given) of the IPA and granted relief under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA.

Appeal dismissed: Contrary to planning scheme

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council* [2009] QPEC 87 heard before Robertson DCJ

November 2009

Case

This was an appeal by MC Property Investments Pty Ltd (**MC Property**) against the Sunshine Coast Regional Council's (**council**) refusal of its impact assessable development application for a material change of use of its site at 34-36 Toral Drive Buderim, for 38 multiple dwelling units which involved medium density housing.

The appeal followed two decisions in the Planning and Environment Court in relation to similar development applications in Toral Drive. Of these two decisions, one appeal was allowed (*MLK Newton Pty Ltd v Maroochy Shire Council* (2007) QPELR 259) and the other dismissed (*Hofer v Maroochy Shire Council & Anor* [2008] QPELR 278).

Facts

The council refused the development application, providing numerous reasons for its decision, which included the following:

- the development was contrary to Desired Environmental Outcome No. 2 (Social Equity and Liveability) in the planning scheme;
- the proposal would exacerbate traffic congestion and increase traffic volumes at the intersection of Stringybark Road;
- the development compromised the intent of the Stringybark Road West precinct as the site was not within convenient walking distance to the town or local centres or to public transport so as to warrant the proposed density.

One of the main arguments in this case was that the proposed development conflicted with the intent of Precinct 5 in the planning scheme, which provided for "detached housing on large lots".

Additionally, a critical issue in the case was whether the development was "located close to public transport facilities" pursuant to the intent of precinct 7 in the planning scheme. In this case, the development was approximately 650 metres from the nearest bus stop.

Decision

In determining the question of consistency with the planning scheme and more particularly the intent of precinct 5, his Honour Judge Robertson held as follows:

> *It would follow that a 36 multiple dwelling development on the site approximately 200 meters to the west of where the character of Toral Drive changes will impact on character and on visual amenity in that part of Toral Drive.*

In deciding the issue of closeness to public transport, his Honour accepted Judge Rackemann's comments in Hofer where he stated the following:

> *whether the proposed development is 'close' to those facilities should be judged by reference to the distance between the development and the closest bus-stops, being the point where the bus facilities are accessed.*

In the present case, his Honour further held the following:

> *Whether the proposal is 'close enough to the public transport facilities' is ultimately a question of fact, and being 'located on the cusp of being within an acceptable walking distance of public transport' would not, in my opinion quality as being 'close' in the sense in which the word is used in context in this part of the Planning Scheme.*

His Honour also rejected the argument that such an inconsistency in this part could be overcome by MC Property constructing a bus-stop close to the development. His Honour held that if the assessment manager should have had regard to anticipated future public transport facilities for assessing proposals, the planning scheme would have clearly stated it.

His Honour rejected the grounds for allowing the appeal, stating that "*the grounds are not sufficient to justify approval despite the significant conflict (with the Planning Scheme)*" (emphasis added).

Held

The appeal was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

Submitter appeals – When can a submitter appeal in relation to code assessable aspects of a development application?

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cairns Aquarius Body Corporate Committee & Anor v Cairns City Council & Anor* [2009] QPEC 86 heard before Wilson SC DCJ

November 2009

Case

This was an application for determination of preliminary points in relation to an appeal by submitters against a decision of the Cairns City Council (**council**) to approve a development application for new development at the site of the Cairns RSL.

Facts

The RSL Australia Cairns Sub Branch (**co-respondent**) made a development application to the council for a new development at the site of the Cairns RSL. The development application involved overbuilding of the existing structure, incorporating a tavern and facilities for indoor sport and entertainment and multi-unit housing and holiday accommodation comprised of 69 apartments located in two towers of 10 and 15 storeys.

The first and second appellants (**appellants**) made submissions against the development application and appealed against the council's decision to approve the development application.

Two issues were raised before the court for determination as preliminary points:

- the co-respondent argued that the notice of appeal raised issues that were not appellable as they related to aspects of the development application that were code assessable under the *Integrated Planning Act 1997* (**IPA**);
- the appellants asserted that the co-respondent failed to comply with the requirements for public notification of the development application set out in section 3.4.4 (Public notice of applications to be given) of the IPA.

Decision

Impact and code assessable uses

The court considered the interconnection between the tavern, indoor sport and recreation facilities and the multi-unit housing and holiday accommodation.

The co-respondent's land was in the CBD North Cairns Planning District and the tourist and residential planning area under the council's planning scheme. In that area, tavern and indoor sport and entertainment were impact assessable uses whereas multi-unit housing and holiday accommodation were code assessable.

The court accepted the evidence of the co-respondent's architect, as illustrated in the plans for the development, that the two proposed uses were designed as separate entities with separate entrances, lift access and car parking to enable them to operate separately. Wilson SC DCJ indicated that the uses were largely separate and discreet and did not rely upon each other to function effectively as individual uses.

Section 4.1.28 (Appeals by submitters—general) of the IPA provides that a submitter for a development application may only appeal to the court against that part of the approval relating to the assessment manager's decision in relation to an application requiring impact assessment under section 3.5.14 (Decision if application requires impact assessment) of the IPA.

Wilson SC DCJ considered the various authorities that examined the operation of section 4.1.28 (Appeals by submitters—general) of the IPA to allow a submitter to appeal in relation to both impact and code assessable aspects of a development application.

In *Halfback Pty Ltd v Logan City Council* [2003] QPELR 552, Brabazon QC DCJ suggested that to bring code assessable aspects into an appeal by a submitter required "an inextricable link between the two issues".

Here, the appellants argued that the high rise accommodation building was "inextricably linked with and integrated with the material change of uses of indoor sport and recreation and extension of tavern". It was also argued that the premises were "structurally indivisible" and that the whole building was unavoidably involved in the impact assessable uses, being "incidental to and necessarily associated with the use of the premises".

Wilson SC DCJ concluded that there was no inextricable connecting issue between the code assessable and impact assessable parts of the development application. Whilst he accepted that there was a degree of tangible interconnection between the structures, that did not extend to "any material overlapping of the uses".

In relation to the appellant's reliance on the approach taken by Brabazon QC DCJ, accepted in *Fox v Brisbane City Council* [2002] QPEC 049, Wilson SC DCJ indicated that the IPA clearly distinguishes use on the one hand and building works on the other.

"Use" in relation to premises, is defined in schedule 10 (Dictionary) of the IPA to include any use incidental to and necessarily associated with the use of the premises. "Building work" is defined in section 1.3.5 (Definitions for terms used in development) to include building, underpinning, moving or demolishing a building or other structure.

The code assessable part of the co-respondent's development application related to the demolition of existing structures and the construction of a new building, being building work not use under the IPA.

Referring to *Boral Resources (Qld) Pty Ltd v Cairns City Council* [1997] 2 Qd R 31, his Honour clarified that the question is not whether structures are incidental and necessarily associated with each other, but whether uses have that feature. He indicated that the appellants' submissions appeared to "mistakenly conflate use with other activities including, in particular, building work".

The court concluded that the appellants' inclusion of the code assessable parts of the development application in their notice of appeal offended section 4.1.28 (Appeals by submitters—general) of the IPA and disclosed no reasonable cause of action.

Public notification

The first appellant submitted that by omitting a specific reference to "defence credit union offices" and/or "business facilities" from its public notification, the co-respondent had failed to comply with the requirements of section 3.4.4 (Public notice of applications to be given) of the IPA.

It was accepted by all parties that a reference to "defence credit union offices" was never meant to be included in the application and indeed, a reference to "Defence CU" was only included in two plans. Other plans referred to "office facilities". However, the first appellant asserted that the co-respondent should have changed its application to amend these plans.

The public notice of the development application properly described the material change of use for a tavern, two function rooms, ancillary office facilities and multi-unit housing/holiday accommodation.

Wilson SC DCJ indicated that the purpose of public notification under the IPA is "to give the public the opportunity to make submissions, including objections and later, secure right of appeal about the assessment manager's decision".

His Honour concluded that the notice was adequate to outline the nature of the proposal so that an interested person would be put on notice of the development application and would then search the council file. He went on to state that it was impossible to see how anyone could have been misled by the reference to "Defence CU" in the plans.

Costs

The co-respondent sought costs under section 4.1.23(2)(b) (Costs) of the IPA which allows the court to depart from the usual rule that each party bears its own costs, where proceedings or part of them can be categorised as frivolous or vexatious.

Wilson SC DCJ dismissed the co-respondent's application for costs, concluding that the first appellant's position was not unarguable and could not be described as "frivolous or vexatious in the sense of being obviously untenable, manifestly groundless or utterly hopeless", citing *Oakden Investments Pty Ltd v Pine Rivers Shire Council* [2003] QPELR 333.

Held

The notice of appeal should only relate to those parts of the development application which required impact assessment. Paragraphs 9, 10, 11, 16 and 17 of the notice of appeal were ordered to be struck out.

The co-respondent did not fail, in respect of public notification, to comply with section 3.4.4 (Public notice of applications to be given) of the IPA.

The co-respondent's application for costs was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

The time to act is now

Samantha Hall | Diane Coffin

This article discusses the inquiry report, *Managing our Coastal Zone in a Changing Climate: the Time to Act is Now*, relating to climate change and environmental impacts on coastal communities

November 2009

Background

On 26 October 2009, the House of Representatives Climate Change, Water, Environment and the Arts Committee released its inquiry report into climate change and environmental impacts on coastal communities, *Managing our Coastal Zone in a Changing Climate: the Time to Act is Now*. The report calls for new governance arrangements for Australia's coastal zone and makes recommendations to improve management of climate change and environmental impacts on the coast.

The inquiry generated a high level of interest from the Australian community, with over 100 written submissions and 180 exhibits. The committee heard from over 170 witnesses at 28 public hearings held around Australia and undertook 9 site inspections of coastal areas known to be vulnerable to climate change.

Ms Jennie George MP (Throsby), when she tabled the report in Federal Parliament, noted that the report sums up the key themes and directions that emerged from lengthy consideration following the receipt of the terms of reference and focuses on the three major themes of climate change impacts, environmental impacts and governance arrangements.

Climate change impacts

As the report notes, climate change impacts on the coastal zone will affect a majority of Australians and associated infrastructure because 80% of the Australian population lives in the coastal zone. There are approximately 711,000 addresses within 3km of the coast, which are less than 6m above sea level.[271]

Environmental impacts

Population growth and the resulting intensification of land use are increasing pressures on the environment and on biodiversity. The report states that over 6 million people live in coastal areas outside the capital cities, with the rate of population growth in these areas being consistently higher than the national average.[272]

Governance arrangements

Coastal zone planning and management is largely a state/territory responsibility with day-to-day decision making the responsibility of local governments. Many coastal stakeholders who contributed to the inquiry pointed to these current arrangements noting the fragmentation, overlaps, complexity and lack of coordination in coastal policy and management in Australia.[273]

A further major topic covered by the report is the key emerging issues of insurance, planning and legal matters relating to the coastal zone. In relation to insurance issues, the committee noted that a changing, less predictable climate has the potential to reduce insurers' capacity to assess, price and spread weather-related risk, particularly in the coastal zone, and will have adverse impacts on insurance affordability and availability.[274] In respect of planning, a number of submissions to the inquiry emphasised that there is a pressing need to reconsider planning for coastal development, the criteria applied to approve or refuse development applications and building regulations imposed for new structures to safeguard against risks of sea effects on coastal assets.[275]

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271 *Managing our Coastal Zone in a Changing Climate: the Time to Act is Now*, page 3.
272 Ibid, p6
273 Ibid.
274 Ibid, p122.
275 Ibid, p125.

With respect to coastal legal issues, the report noted that uncertainties about legal matters relating to climate change and the coastal zone was one of the issues most frequently raised in the evidence and documentation provided to the committee. The report concluded that as local governments are at the forefront of day-to-day coastal management, they needed to develop clearly defined policies to deal with the impacts of climate change and make the risks of the impact of climate change an explicit part of their decision-making criteria to assist in limiting their potential exposure to legal action.[276]

Ms George noted that one clear message emerged from the committee's investigations, being the need for national leadership in managing our precious coastal zone in the context of climate change.[277] The report made 47 recommendations which Ms George said go to the heart of how national leadership can be provided in a collaborative framework with both the State and local governments and also include the community. These recommendations included the following:[278]

- establishment of a new Coastal Zone Ministerial Council to develop an intergovernmental agreement on the coastal zone endorsed by COAG;
- a separate funding program for infrastructure enhancement in coastal areas vulnerable to climate change;
- 2012 to be declared as the national Year of the Coast to build community awareness of climate change and other coastal issues;
- an Australian Law Reform Commission inquiry into the liability issues facing public authorities and property owners in respect of climate change;
- a Productivity Commission inquiry into insurance cover for coastal properties;
- further analysis of the impact of tourists in coastal areas to assist in planning and management;
- further research into socioeconomic vulnerability to climate change impacts in coastal communities;
- a focus on biodiversity and the need to increase the number of RAMSAR sites classified as nationally important. It also called for the loss of coastal habitat as a result of population pressures to be addressed, especially the cumulative impacts of coastal development.

However, given the record of successive governments in respect of reports produced by this committee, it is yet to be seen whether the national leadership role that has been identified as being crucial to resolving the issues raised will be provided at the national level, or whether the political climate is still not ready for change.

276 Ibid, p160.
277 Ibid, Forward.
278 Ibid, Forward.

Strategic steps or frivolous and vexatious proceedings?

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fraser Waters Pty Ltd v Fraser Coast Regional Council & Ors* [2009] QPEC 104 heard before Wilson SC DCJ

December 2009

Case

This was an application by the Fraser Coast Regional Council (**council**) seeking costs pursuant to section 4.1.23(2)(b) (Costs) of the *Integrated Planning Act 1997* (**IPA**) from Fraser Waters Pty Ltd (**Fraser Waters**). Section 4.1.23(2)(b) (Costs) of the IPA gives the court discretion to award costs where it considers the proceeding (or part of the proceeding) to be frivolous or vexatious.

Held

On 19 April 2005, Fraser Waters lodged a development application for the reconfiguring of a lot under the council's transitional planning scheme (the original development application). The transitional planning scheme was repealed and replaced with an IPA planning scheme 18 months after the original development application was made.

On 22 April 2008, Fraser Waters commenced an appeal against the council's deemed refusal of the original development application. Additionally, on 11 December 2008, Fraser Waters lodged a development application (superseded planning scheme) (**DA (SPS)**) pursuant to section 3.2.5 (Acknowledgement notices for applications under superseded planning schemes) of the IPA. The land that was the subject of the DA (SPS) was substantially the same as the land the subject of the original development application. Between the commencement of the appeal and the lodgement of the DA (SPS), steps were carried out in respect of the appeal including "the provision of further and better particulars, disclosure, and notification of experts". In January 2009, Fraser Waters filed a notice of discontinuance.

The council filed the application for costs on the basis that the appeal proceedings were frivolous or vexatious. The grounds upon which this assertion was made included an email sent by a director of Fraser Waters which stated that the purpose of the appeal was to discover the council's reasons for refusal of the original development application and to address these reasons in the DA (SPS).

Additional information supplied by an officer of the council demonstrated that a town planning consultant for Fraser Waters had instructed solicitors for Fraser Waters to continue with the appeal with the aim of obtaining further and better particulars about the reasons for the council's refusal in order to use this information in the preparation of the DA (SPS).

It was argued by the council that this evidence demonstrated that the appeal had not been instituted for the purpose of obtaining approval for the original development application, but instead for the purpose of increasing the prospects of success for the DA (SPS). It was suggested by the council that the appeal proceedings were frivolous and vexatious and therefore that section 4.1.23(2)(b) (Costs) of the IPA would apply to allow the court to exercise its discretion to award costs.

Decision

Wilson SC, DCJ observed that the arguments of the council initially appeared to suggest that "strategic or tactical steps underlying or explaining an appeal might themselves qualify as frivolous or vexatious". However, Wilson SC, DCJ stated that it is often the case that there appears to be more than one motive for, or explanation of, appeal proceedings and furthermore, that strategic elements are not uncommon.

In considering the circumstances of this case, Wilson SC, DCJ made reference to *Mudie v Gainriver Pty Ltd & Anor* [2002] QCA 546, in which the Court of Appeal adopted a statement made by Deane J in *Oceanic Sunline Special Shipping Company v Fay* (1988) 165 CLR 197 (at 147) to the effect that vexatious actions are those which are "productive of serious and unjustifiable trouble or harassment". Additionally, Wilson SC considered the submission of the council that at the time the appeal was lodged, Fraser Waters had no intention of pursuing the original development application.

With this in mind, Wilson SC determined that a line exists, on one side of which appeal proceedings with an ulterior or strategic motive will still constitute legitimate proceedings and therefore will not be held to be frivolous or vexatious. On the other side of the line are those proceedings motivated by strategy that do qualify within the ordinary meaning of "frivolous and vexatious". In this case, Wilson SC, DCJ determined that the subject of this application was such a proceeding as demonstrated by the history of the conduct of Fraser Waters. As such, the ordinary rules regarding costs under section 4.1.23(1) (Costs) of the IPA were countermanded by the exception in subsection (2)(b), which allows costs to be awarded at the discretion of the court where proceedings are frivolous or vexatious.

Held

An order was made that Fraser Waters pay the council's costs of and incidental to the appeal.

COLIN BIGGERS & PAISLEY LAWYERS

Finding the meaning in IPA: Interpreting the words of the legislature

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *Stockland Property Management Pty Ltd v Cairns City Council & Ors* [2009] QCA 311 heard before McMurdo P, Keane JA and Wilson J

December 2009

Case

This was an appeal by Stockland Property Management Pty Ltd (**Stockland**) to the Court of Appeal in relation to a decision of the Planning and Environment Court (**P&E Court**) concerning the operation of:

- section 3.2.1(5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) and section 12 (State resources (schedule 10)) of the *Integrated Planning Regulation 1998* (**IPR**); and
- section 3.2.9 (Changing an application) of the IPA.

The developer made a development application (superseded planning scheme) (**DA (SPS)**) to the Cairns City Council (**council**) for a development permit for a material change of use of land at Mt Sheridan Plaza, Cairns for the expansion of a shopping centre. The council issued an acknowledgement notice agreeing to assess the development application under the superseded planning scheme.

The Department of Main Roads (**DMR**) objected to the DA (SPS) on the grounds that the application was inconsistent with the DMR's plans for the Bruce Highway. The developer subsequently amended the DA (SPS) to include another parcel of land (Lot 301) to accommodate the DMR's intentions for the Bruce Highway. Lot 301 was a "State resource" as identified in schedule 10 (State resources) of the IPR. The amended DA (SPS) was then notified to the public.

On 26 November 2007 the council issued a decision notice granting a development permit for a material change of use of land, including Lot 301.

Stockland had made a properly made submission opposing the DA(SPS) and appealed to the P&E Court against the council's decision.

P&E Court

The parties were in dispute as to whether the developer's DA (SPS) required supporting evidence under section 3.2.1(5) (Applying for development approval) of the IPA that the Chief Executive of the DMR was satisfied that the development application was consistent with an allocation of, or entitlement to, Lot 301 as a State resource.

The issue for the court was whether the development proposed in the amended DA (SPS) involved "taking or interfering with" a State resource under section 3.2.1(5) (Applying for development approval) of the IPA and section 12(1) (State resources (schedule 10)) of the IPR.

Brabazon QC DCJ held that the inclusion of Lot 301 did not alter the DA (SPS). Further, his Honour held that the development application remained a "properly made application", applying section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse the developer's failure to provide the evidence required by section 3.2.1(5) (Applying for development approval).

Decision

The Court of Appeal agreed with the decision of the P&E Court at first instance, for reasons materially different from that of the learned primary judge. The reasons for judgment and orders were given by Keane JA, McMurdo P and Wilson J agreeing.

Taking or interfering with a State resource

Keane JA disagreed with the approach taken by Brabazon QC DCJ at first instance to the construction of the phrase "taking or interfering with a resource". Section 3.2.1(5) (Applying for development approval) of the IPA provides it is only to the "extent the development involves" a State resource of a nature which includes the "taking or interfering with a resource" that section 12 (State resources (schedule 10)) of the IPR and section 3.2.1(5) (Applying for development approval) of the IPA are engaged.

Keane JA stated that "taking", being a particular kind of "involvement", is an involvement which is "adverse to the enjoyment by the State of its ownership or stewardship of the State resource". His Honour went on to state that "interference" is a "less absolute kind of adverse involvement than a 'taking', but...(suggests) a concrete effect in the nature of a clash with the State's enjoyment of its ownership or stewardship of the State resource".[279]

His Honour highlighted the language of section 3.2.1(5)(b) (Applying for development approval) of the IPA which refers to the consistency of the development application "with an allocation of, or an entitlement to, the resource", as indicating the legislature's intention that the operation of section 3.2.1(5)(b) (Applying for development approval) of the IPA is triggered by a "clash with, or a hampering or hindering of, the State's enjoyment of ownership or stewardship of the State resource" in question.

Keane JA suggested this view was consistent with any underlying intention that where proposed development is consistent with the State's own purposes, "the concern which informs the legislation does not arise".

Given that Lot 301 was acquired by the State for the purpose of transport, in particular road purposes, the approval of the DA (SPS) could not hamper or hinder the State's enjoyment of its ownership of Lot 301. Consequently, section 3.2.1(5) (Applying for development approval) of the IPA was not engaged.

A changed application

Stockland argued that the provisions of section 3.2.9(1) (Changing an application) of the IPA did not afford an applicant the opportunity to amend a development application so that it may become a "properly made application". Keane JA held that:

> *...there is nothing in the text of these provisions or their context or legislative history which suggests that the legislature intended to deny the possibility that an applicant might cure defects in its initial application by changing it so as to enable it to proceed beyond the application stage of the IDAS process as a properly made application.*[280]

His Honour went on to state that section 3.2.9(1) (Changing an application) of the IPA provides an applicant with the opportunity to remedy deficiencies in a development application so that it might progress beyond the application stage, without the need to lodge a new application.

Keane JA held that there is nothing in section 3.2.9 (Changing an application) of the IPA which denies the possibility of a development application being changed by the addition of a further parcel of land prior to the finalisation of the application stage. Consequently, section 3.2.9 (Changing an application) of the IPA enabled the developer to amend the DA(SPS) to include Lot 301. Further there was no "legitimate interest of any other person which would be adversely affected" by allowing the application to be changed before public notification.

Held

The appeal was dismissed, with Stockland to pay the respondents' costs.

[279] [2009] QCA 311 at [38].
[280] [2009] QCA 311 at [51].

COLIN BIGGERS & PAISLEY LAWYERS

Residential subdivision did not cut across new planning scheme

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *May & Anor v Redland Shire Council* [2009] QPEC 106 heard before Robin QC DCJ

December 2009

Case

In this case Mr and Mrs May (**appellants**) appealed against the Redland Shire Council's (**respondent**) refusal of their 2005 development application for a material change of use of their 6 hectare site at Thornlands to 'residential subdivision' from 'residence'. The development application which was made under the Town Planning Scheme for the Shire of Redland (which commenced in 1988 and includes the Redland Shire Strategic Plan 1998) (**former planning scheme**) was refused principally on the basis of its cutting across the new Redlands Planning Scheme which commenced on 30 March 2006 (**current planning scheme**).

Facts

It was agreed that the development application for a material change of use from a golf driving range and private residence to a use which envisaged 8 residential lots (the indicative configuration of which had undergone change) was generally consistent with the rural/non-urban zoning under the former planning scheme. However, the respondent argued that, amongst other things, the development application would jeopardise the structure plan currently being developed for the area, the development application conflicted with a desired environmental outcome in the current planning scheme and the development application conflicted with the South-East Queensland draft regulatory provisions.

The appellants' development application which proposed covenants that would require the establishment and maintenance of vegetation, sought to satisfy the Respondent's Local Planning Policy Waterways Wetlands and Coastal Zone and Statutory Policy ENDS - 001 Parks and Recreations Contributions (23/11/04). However, the respondent also argued that half of the park dedication required, that is, half of the conventional 10% of the site, should be provided above the 2.4m contour. On that basis, almost half of the site would need to be dedicated to the council as park over and above the dedication of further land which the respondent sought for drainage purposes. The issue of dedication was linked to the issue of title to those parts of the proposed lots to be protected for environmental purposes. The appellants argued that the covenants which they proposed represented a far better outcome from an environmental perspective than the current use of the site which was a golf driving range.

The final issue considered by the court was the insistence by the respondent upon a 6,000m^2 minimum lot size for all lots except for one lot. The consequence of this, combined with the respondent's insistence upon requiring dedication of large tracts of the site, would have been the appreciable reduction of the appellants' lot yield.

Decision

On the issue of whether the development application would jeopardise the structure plan currently being developed, the court noted that the proposal, conditioned as outlined in the judgment, would not 'frustrate a new planning intention'.

On the issue of land dedication, the court found that the dedication required by the respondent was excessive and unreasonable. The court found that it was difficult to discern what advantage the public would gain from such a dedication, particularly as the land dedicated would be abruptly constricted at the southern end where it abutted the adjoining property.

On the issue of title to those parts of the proposed lots to be protected for environmental purposes, the court found that whether the land was dedicated to the respondent as public open space or maintained in private ownership under registered covenants, the practical outcome would be essentially the same due to the Greenspace Management Plan (**GMP**) which had been prepared in respect of the proposed park residential concept. The court found that little, if any, detectable difference depended on whether the area in contest was dedicated to the respondent or remained privately owned and that it was incongruous to have lot yield determined according to who had title to the area within the GMP.

On the issue of minimum lot sizes, the court noted that relaxations in minimum lot sizes were far from unprecedented and found that no persuasive case had been made against the acceptability of additional 'under-size' lots.

Held

The appeal was allowed and the parties were invited to propose an order and conditions package to give effect to the conclusions of the judgment.

Court exercises discretionary power to validate planning scheme

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *ITC Timberlands Pty Ltd v Cassowary Coast Regional Council & Ors* [2009] QPEC 96 heard before Wilson SC DCJ

December 2009

Case

This was an application brought by ITC Timberlands Pty Ltd (**ITC**) seeking orders from the court that in 2007, the then Cardwell Shire Council's (now Cassowary Coast Regional Council) (**council**), amendment to its planning scheme, which changed the assessment level for forestry uses from self assessable to impact assessable, was invalid and of no effect.

Facts

In September 2006, the council resolved to propose amendments to its planning scheme. Later that year, the council submitted the proposed changes to the State government and on 18 January 2007 provided public notice of the proposed scheme in accordance with the requirements of section 12 (Public notice of, and access to, proposed planning scheme) of schedule 1 of the *Integrated Planning Act 1997* (**IPA**). The amendments did not at this stage include the particular amendment the subject of the application, being the change to the assessment level for the use of land for forestry purposes from self assessable to impact assessable. As such, no submissions were made on this point during the public consultation period.

In March 2007, the council resolved to undertake further amendments before submitting the planning scheme again to the State government for a final check. On 12 April 2007, the council resolved to proceed with the proposed amendments, which included the amendment to change the level of assessment for forestry. On 28 June 2007, the council resolved to adopt the amended planning scheme.

Subsequently, ITC acquired land in the rural zone for the purposes of forestry and made relevant development applications for forestry use in compliance with the requirements of the changed planning scheme. ITC later became aware of the circumstances underpinning the amendments to the planning scheme and initiated proceedings seeking relief that the amendment to the level of assessment for forestry was invalid and of no effect. ITC made the following submissions:

- That the council did not, pursuant to section 16(2) (Decision on proceeding with proposed planning scheme) of schedule 1 of the IPA, form an opinion as to whether it was satisfied that the relevant amendment was a modification which did not make the proposed planning scheme significantly different from the planning scheme which had been notified.
- That if the council did form a conclusion relevant to section 16(2) (Decision on proceeding with proposed planning scheme) of schedule 1 of the IPA, that conclusion was wrong in law and so unreasonable that no council, acting reasonably, could have formed the opinion with the result that it is void.
- That the council had failed to meet the requirements of section 2.1.5 (Process for making or amending planning schemes) of the IPA (in respect of the preliminary consultation stage) in making the further amendment to the level of assessment for forestry, because it did not return to section 12 (Public notice of, and access to, proposed planning scheme) of schedule 1 of the IPA and give public notice of and access to the proposed planning scheme including the late changes.
- That the council's non-compliance with section 2.1.5 (Process for making or amending planning schemes) of the IPA had, necessarily, adversely affected public awareness of the further amendment.

The council argued that the process for the amendments to the planning scheme met the IPA's requirements or in any event, that in light of what had since happened (the amount of time that had passed and the reliance on the planning scheme's validity by the council and the public), the court should nevertheless exercise its discretion to refuse the remedies sought by ITC.

Decision

The court rejected the argument that the council did not form an opinion as to whether it was satisfied that the relevant amendment was a modification which did not make the proposed planning scheme significantly different from the planning scheme which had been notified. His Honour Judge Wilson SC DCJ relied on the evidence of town planner, Ms Taylor who was consulted by the council as to whether the council could change the level of assessment at the late stage in the amending process. After consultation with a Departmental Officer from the Department of Local Government, Planning, Sport and Recreation, Ms Taylor concluded that the amendment to the assessment level for forestry did not need to be publicly notified. The council later resolved to adopt the amendments.

In response to ITC's argument that Ms Taylor and the Departmental Officer merely formed an opinion as to the amendments but the council did not, his Honour held that the evidence of Ms Taylor, in combination with the subsequent resolution of the council, carried a powerful implication that the council turned its mind to the matters set out in section 16(2) (Decision on proceeding with proposed planning scheme) of schedule 1 of the IPA and that these circumstances were sufficient for the purposes of the subsection.

ITC's second submission was also rejected by the court. His Honour held at paragraphs 34 35 that:

> *This is not a case in which the modification is of such vital importance to the overall balance of the proposed scheme (the phrase Keane JA used) that it renders the modified scheme significantly different...*
>
> *Its only direct effect is upon those putative applicants. In light of these conclusions, it simply cannot be said that Council's decision in terms of section 16(2) was wrong in law, or unreasonable.*

His Honour observed that ITC's third submission which argued that the council had not complied with section 2.1.5 (Process for making or amending planning schemes) of the IPA, hinged upon a finding that the council had not formed the requisite opinion under section 16(2) (Decision on proceeding with proposed planning scheme) of schedule 1 of the IPA. As mentioned, his Honour held that the council did form the requisite opinion and therefore ITC's third submission was rejected. Additionally, for the same reason, being that the requirements of schedule 1 and section 2.1.5 (Process for making or amending planning schemes) of the IPA had been met by the council, his Honour was unpersuaded by ITC's argument that the council's non-compliance with section 2.1.5 (Process for making or amending planning schemes) of the IPA, necessarily, adversely affected public awareness of the further amendment. His Honour held that:

> *in any event, there has been 'substantial compliance' with the process staged in Schedule 1 (as section 2.1.6 envisages) because non-compliance has not adversely affected the awareness of the existence and nature of the proposed scheme or restricted the opportunity of the public to make properly made submission. The conclusion hinges, of course, that the circumstances here do not offend section 16(2).*
>
> *Even if a contrary view about ITC's primary submission had been reached the relief it seeks should, as a matter of discretion, be refused here...* [281]

In explaining the reasons for refusing relief in any event, his Honour held that the court should refuse the relief sought by ITC because two years had elapsed since the amendment was adopted and took effect. ITC was aware of the amendment immediately and had since acquired land and made applications for forestry use in compliance with the requirements of the changed planning scheme. It was not until much later that ITC become aware of the circumstances underpinning the amendments which led to the application and the council and the public had conducted their affairs since the amendments took effect on the basis that the planning scheme, as amended, was valid.

Held

The relief sought by ITC was refused.

[281] Per Judge Wilson SC DCJ at para 39-40.

Application for leave to appeal: Law vs Fact

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Court of Appeal in the matter of *ALDI Stores (A Limited Partnership) v Redland City Council* [2009] QCA 346 heard before the Chief Justice, Holmes and Muir JJA

December 2009

Case

This case concerned an application by the Redland City Council (**applicant**) for leave to appeal a decision of the Planning and Environment Court which granted ALDI Stores (**respondent**) a development permit for a material change of use to establish a supermarket on land at Alexandra Hills. The applicant contended that the Planning and Environment Court 'erred in law', and that the Court of Appeal should consequently grant leave to appeal, allow the appeal and set aside the primary judgment.

Facts

The original case concerned a development application by the respondent for a development permit for a material change of use to establish a supermarket on land at Alexandra Hills. The supermarket was to be located 250 metres west of the existing Alexandra Hills Shopping Centre, which was a large suburban retail outlet. The applicant refused the development application on the basis that the proposed development would impair the Redlands Planning Scheme's (**RPS**) intent that this sort of development be confined to the existing 'central development'.

The council referred to section 3.2.3(3)k of the RPS contending that this development was 'out-of centre development' arguing that the ALDI supermarket was outside what the RPS identified as the 'Alexandra Hills District Centre'. In this sense the council argued that the 'District Centre' consisted entirely of, and was strictly limited to, the land occupied by the Alexandra Hills Shopping Centre, and did not extend to the ALDI site.

The respondent contended the Alexandra Hills District Centre contemplated by the RPS was larger than the District Centre zone and the Alexandra Hills Shopping Centre which lay within it. The judge of the Planning and Environment Court accepted this contention. This decision was based upon the fact that the RPS did not set clear limits on what it presented as any "central development" plus the RPS lacked a definition of what constituted a 'centre'.

Jurisdiction of the Court of Appeal is confined to 'errors of law' and the court is not permitted to re-hear purely factual evaluations. The applicant's application for leave to appeal to the Court of Appeal challenged the learned judge of the Planning and Environment Court's conclusion that the respondent's development would not impair the objective of centrality discernible from the RPS. The respondent opposed the grant of leave for appeal, denying any error of law and submitting that the applicant only sought to re-agitate issues of fact and merit.

Decision

His Honour the Chief Justice, with Holmes and Muir JJA agreeing, rejected the applicant's application for leave to appeal on the basis that there was no substantially arguable error of law in respect of the primary judge's approach.

On the applicant's argument that the primary judge 'erred in law' in finding that the Alexandra Hills District Centre as contemplated by the RPS was large enough to encompass the respondent's development site, his Honour the Chief Justice concluded that the process for determining this was 'evaluative' rather than a determination of law. His Honour pointed out that the RPS's failure to specify a precise delineation of the District Centre meant that it was for the primary judge to determine, as best he could, allowing for various indications otherwise drawn from the provisions of the RPS, whether the proposed site fell within its bounds. Although not purely factual, this process of determination was evaluative rather than a determination of law. Determining the ordinary meaning of a word in everyday use, such as 'centre' or 'district centre', is not a matter of law.

His Honour also noted that the primary judge's rejection of the applicant's argument that the proposed development would compromise various 'Desired Environmental Outcomes' (**DEOs**), such as 'Community Health and Wellbeing' and 'Access and Mobility', was a purely factual consideration and did not give rise to an arguable error of law.

This was further highlighted by the primary judge's determination of the issue of 'compromise' with the RPS's DEOs. His Honour correctly pointed out that the primary judge did not determine this issue by reference to authorities in his judgment, but rather by reference to his conclusion about the siting of the development within the District Centre (DEOs 3 and 6) and the issue of transport movement (DEO 4). Such determinations were quintessentially factual in nature and did not constitute a ground of appeal.

Held

The application for leave to appeal was refused. The applicant to pay the respondent's costs, to be assessed, as necessary, on the standard basis.

Owner's consent: A common sense approach

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wilhelm v Ipswich City Council and Parmac Investments Pty Ltd (ACN 106 378 205)* [2009] QPEC 127 heard before Robin QC DCJ

December 2009

Case

This was an application brought by Parmac Investments Pty Ltd (**Parmac**) for an order declaring that the owner's consent to the making of the relevant development application had been properly given or alternatively that the court was satisfied that any non-compliance in this regard did not substantially restrict any persons opportunity to exercise rights conferred by the *Integrated Planning Act 1997* (**IPA**) or any other Act.

Facts

Parmac lodged a development application with the Ipswich City Council (**council**) in respect of land that was constituted by three adjoining lots, two of which were owned by Mr and Mrs Jackson, the other was owned by their company, Staljack Pty Ltd. Both Mr and Mrs Jackson were directors, with Mrs Jackson also the secretary of the company.

With respect to the owner's consent for the three lots, the consents were signed by Mr and Mrs Jackson and then also by Mr Jackson for Staljack Pty Ltd. In the appellant's, Wilhelm's, notice of appeal, it was contended that the owner's consent for the development application had not been properly obtained.

Decision

His Honour Judge Robin QC, DCJ provided in his judgment that for the purposes of granting owner's consent, a single director of a company may provide a company consent. Further, his Honour held that the formality required for an agreement or a contract entered into by a company does not apply to the granting of relevant consent for the purposes of a development application under the IPA.

His Honour held that the situation therefore did not warrant an indulgence under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA and that there was no realistic possibility of identifying any impact on rights or opportunities available to any person on any basis.

When public notification goes wrong in more ways than one

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Emerdev Pty Ltd v Central Highlands Regional Council & Anor* [2009] QPEC 132 heard before Robin QC, DCJ

December 2009

Case

This was a hearing seeking directions for the conduct of the proceedings and seeking orders regarding the court's satisfaction that non-compliance, or partial compliance with the provisions of the *Integrated Planning Act 1997* (**IPA**) with respect to the giving of public notice of the developed application had not substantially restricted the opportunity for submissions to be made to the respondent council.

Facts

Emerdev Pty Ltd (**appellant**) lodged a development application with the Central Highlands Regional Council (**council**) for a material change of use (low industry and retail/commercial complex) on land at Gregory Highway and Pilot Farm Road, Emerald (**land**).

The following issues with respect to the public notification arose:

- the development application was incorrectly notified for 15 business days rather than 30 business days;
- a third notice was placed on the Land a week late;
- the notice on the land, the notice published in the newspaper and the notice to owners of all land adjoining the land indicated that submissions were able to be made until 6 November 2009, when in fact submissions were able to be made until 26 November 2009;
- one of the notices along the road frontage of the land was positioned such that the bottom part of the notice was concealed behind high grass.

In response to the issues with the public notice of the development application, the appellant carried out the following:

- the notices on the land were amended on 4 November 2009 to indicate that submissions were able to be made until 26 November 2009;
- a second notice to owners of all land adjoining the land was given notifying that submissions were able to be made until 26 November 2009;
- the notice in the newspaper was re-advertised to advise that submissions were able to be made until 26 November 2009;
- within the first week of notice being placed on the land, the notice which was obstructed by high grass was remounted at a higher level.

The appellant sought relief from the court under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA which provided:

> *(1) Subsection (2) applies if in a proceeding before the court, the court—*
>
> *(a) finds a requirement of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with; but*
>
> *(b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this or the other Act.*
>
> *(2) The court may deal with the matter in the way the court considers appropriate.*

Decision

In exercising the court's discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA, his Honour Judge Robin QC, DCJ took into consideration that:

- the case for relief under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA was strengthened by the fact that two additional submissions were received during the extended notification period over and above one which had already been received;
- in respect of the sign on the third road frontage of the land, which was placed on the land a week late, the road pattern was such that it was not possible to get onto the road, which was a dead end, except from other roads which at all relevant times had public notice signs placed on them; and
- the omission to place a notice on the third road frontage of the land, in his Honour's opinion, had not limited or compromised the opportunities of anyone to exercise rights under the IPA or any other Act.

Held

The court was satisfied that the non-compliance or partial compliance with the provisions of the IPA with respect to the giving of public notification of the developed application had not substantially restricted the opportunity for submissions to be made to the council. Accordingly, relief under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA was granted.

Application for transfer of appeal from Bundaberg to Brisbane

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Conquest & Anor v Bundaberg Regional Council* [2009] QPEC 130 heard before Robin QC DCJ

December 2009

Case

This was an application in which the appellants in a developer appeal against a decision of the Bundaberg Regional Council (**council**), sought the transfer of the appeal to the Planning and Environment Court in Brisbane from the Planning and Environment Court in Bundaberg.

Facts

The council initiated enforcement proceedings against Mr Conquest and Mrs Conquest (**appellants**) in the Magistrates Court in Bundaberg in respect of building work that had been carried out without an appropriate development permit.

The appellants made a development application to the council seeking approval for operational work to regularise the problematic development. The council refused the development application.

The appellants appealed to the Planning and Environment Court in Bundaberg against the council's decision to refuse the development application.

The appellants failed to serve notice of the appeal on the Department of Primary Industries and Fisheries, a concurrence agency for the purposes of the development application, and the Chief Executive of the Department of Infrastructure and Planning.

The appellants sought to transfer the appeal from the Planning and Environment Court in Bundaberg to the Planning and Environment Court in Brisbane, expressing a lack of confidence in the court in Bundaberg.

Decision

Robin QC DCJ made it clear to Mrs Conquest, who represented the appellants, that the judges dealing with matters in the Planning and Environment Court in Bundaberg would be travelling from other centres.

His Honour suggested that it would be more convenient for the appeal to be heard in Bundaberg, if Mrs Conquest could be satisfied of the independence of the judge hearing the appeal.

His Honour went on to state that the venue of the appeal ought not be changed nor anything significant be done in the appeal until the appellants served notice of the appeal on the Department of Primary Industries and Fisheries and the Chief Executive of the Department of Infrastructure and Planning.

Held

The appellants were ordered to serve notice of the appeal on the Department of Primary Industries and Fisheries, as a concurrence agency for the development application, and on the Chief Executive of the Department of Infrastructure and Planning.

OUR LEADERS

Ben Caldwell
Partner
+61 7 3002 8734
0427 553 098
ben.caldwell@cbp.com.au

Todd Neal
Partner
+61 2 8281 4522
0411 267 530
todd.neal@cbp.com.au

David Passarella
Partner
+61 3 8624 2011
0402 029 743
david.passarella@cbp.com.au

Ian Wright
Senior Partner
+61 7 3002 8735
0438 481 683
ian.wright@cbp.com.au

BRISBANE

Level 35, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Australia

law@cbp.com.au
T 61 7 3002 8700
F 61 7 3221 3068

MELBOURNE

Level 23
181 William Street
Melbourne VIC 3000
Australia

law@cbp.com.au
T 61 3 8624 2000
F 61 3 8624 4567

SYDNEY

Level 42
2 Park Street
Sydney NSW 2000
Australia

law@cbp.com.au
T 61 2 8281 4555
F 61 2 8281 2031