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

Our Planning Government Infrastructure and Environment group

Colin Biggers & Paisley's Planning Government Infrastructure and Environment group is the trusted partner of public and private sector entities, for whom we are the legal and policy designers of strategic and tactical solutions to exceptionally challenging problems, in our chosen fields of planning, government, infrastructure and environment.

Our group has developed a longstanding reputation for continual and exceptional performance in the planning, designing and execution of legal and policy solutions for large development and infrastructure projects in Australia, including new cities, towns and communities.

We are passionate about planning, government, infrastructure and environment issues, and we pride ourselves on acting for both the private and public sectors, including private development corporations, listed development corporations, other non-public sector entities and a wide range of State and local government entities.

The solutions we design extend beyond legal and policy advice, and represent sensible, commercially focused outcomes which accommodate private interests in the context of established public interests.

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Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

Planning – Strategic and tactical planning of development issues and processes for projects, in particular major residential communities, retail, commercial and industrial developments.

Government – In-depth understanding of government legislation, policy and processes.

Infrastructure – Specialist expertise and experience in infrastructure planning, funding and delivery.

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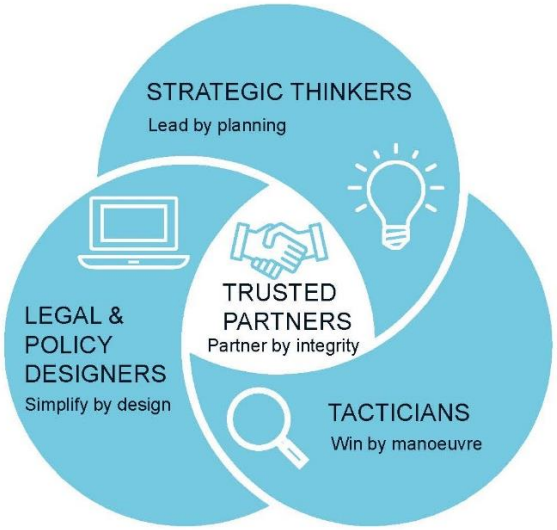

Lead, Simplify and Win with Integrity

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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We believe that continual and exceptional performance is the foundation of success, and we apply our integrity and character, critical reasoning and technical process of strategy to ensure an unparalleled level of planning, design and manoeuvre to achieve that success.

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The role of council in relation to Planning Schemes under the Integrated Planning Act

Ian Wright

This article discusses the impact of the *Integrated Planning Act 1997* (IPA) upon how the council determines development applications under IPA and how they enforce provisions of its Planning Scheme. The article considers the changes made by IPA

January 1999

Introduction

The purpose of this presentation is to consider the role of the council in relation to the application of its Planning Scheme. This will be considered in the context of council:

- determining development applications under the Integrated Planning Act (**IPA**); and
- enforcing the provisions of its Planning Scheme under IPA.

Planning Schemes under IPA

Shift in government policy

The IPA has significantly changed the role of council's Planning Scheme.

Prior to IPA, council's Planning Scheme could:

- regulate as well as prohibit development; and
- specify procedural matters in respect of development applications and the enforcement of the Planning Scheme to the extent they were not inconsistent with the then *Local Government (Planning and Environment) Act 1990*.

Following IPA:

- all procedural matters in respect of development applications and enforcement are specified in the IPA, not the Planning Scheme; and
- the council's Planning Scheme can regulate but not prohibit development.

Legal principles

The policy shift effected by IPA has been achieved through the implementation of five legal principles:

- *Council's Planning Scheme has the force of law* – it is a statutory instrument which has the force of law (section 2.1.23(1)).
- *Council's Planning Scheme is a valid law* – those provisions of the Planning Scheme that are inconsistent with the Integrated Development Assessment System (**IDAS**) specified in IPA are invalid (section 6.1.3).
- *Council's Planning Scheme cannot prohibit* – the development on or use of premises cannot be prohibited (section 2.1.23(2)).
- *Council's Planning Scheme can regulate* – the use of premises can be regulated by the council's Planning Scheme by applying a code identified in the Planning Scheme to the use (section 2.1.23(3)).
- *A prohibited use in council's Planning Scheme is contrary to policy* – a prohibited use in the council's Planning Scheme is taken to be an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited (section 6.1.9(3A)).

Role of Planning Schemes under IPA

The policy shift effected by IPA means that council's Planning Scheme has changed from being a law that sets out both legal requirements and policy requirements to a law which sets out only policy requirements.

This change has important consequences for how council:

- determines development applications; and
- enforces its Planning Scheme.

Assessment of development applications

Prior to IPA

Prior to IPA council was required to refuse a development application if it did not comply with:

- The legal requirements specified in the Planning Scheme provisions – such as non-relaxable setbacks, building heights or subdivision controls.
- The policy provisions specified in the Strategic Plan or Development Control Plans unless there were good planning grounds to justify the non-compliance.

After IPA

After IPA the test previously applied to council's Strategic Plan and Development Control Plans has been extended to all provisions of the Planning Scheme.

Accordingly, council is required to refuse a development application if it does not comply with a provision of the Planning Scheme unless there are good planning grounds to justify the non-compliance.

Furthermore, under IPA, if the council gives a development approval which is inconsistent with the Planning Scheme, it must note the approval on the Planning Scheme (section 3.5.27).

Legal principles

Whilst there have been no decided cases on the interpretation of IPA's provisions, a review of existing case law indicates that the following matters should be addressed by council:

- The provision of the Planning Scheme being examined or being relied upon must be lawful under IPA. That is, it must be a policy requirement (as opposed to a mandatory legal requirement) related to proper planning considerations. If council's Planning Scheme is properly drafted, this can be taken as a given.
- If the policy requirement relates to the subject development, then the council must give regard to the policy requirement.
- The council must correctly interpret and understand the nature and content of the policy requirement.
- The council is not required to slavishly follow the policy requirement however.
- The council must in each case assess the relevance and weight to be accorded to the policy requirement as against the relevance and weight to be attached to other material considerations.
- If the council departs from the policy requirement in the Planning Scheme in a particular case, the council must set out its reasons for so doing and such reasons must be sound, clear cut and intelligible planning reasons.

  The importance of identifying reasons for a departure or making exceptions in a particular case has been emphasised on the basis that the recipient of the decision should know why the decision is being made as an exception to the policy and the grounds upon which the decision was taken. Applicants, objectors and the council are entitled to know where they stand in relation a particular decision.
- Nevertheless, the planning reasons can be briefly stated.
- There can be no challenge to the reasons for departing from a policy requirement in the Planning Scheme or treating a particular case as an exception to the policy requirement unless, in that particular case, the reasons are substantially wrong or irrelevant.
- Whilst it is the duty of the council's technical officers to report and make recommendations on applications that come before the council and the obligation of the council to decide such applications, the council must not of necessity adopt the views expressed by the council's technical officers.
- If the council departs from the advice of its technical officers, especially in circumstances where the council is departing from a policy requirement in its Planning Scheme, then the council must refer to the reasons in its decision, otherwise serious doubts will be cast by a court on appeal as to the propriety of the decision-making process.

  This principle was stated by Row DCJ in *Duncanson and Brittain (Quarries) Pty Ltd v Brisbane City Council* (1986) QPLR 330 at 347:

  > "*The abovementioned matters which I have set out in detail demonstrate that in the circumstances in relation to this application, the conduct of the Respondent as a responsible planning authority is most reprehensible.*
  >
  > *Accepting that it is the obligation of technical officers of a local authority to report and make recommendations on applications that come before the local authority, and that the obligation on the local authority is to decide such applications, the absence in any of the material which was before any political arm of the Respondent when it considered the application whereby it arrived at a decision contrary to the overwhelming views favourable to the application put forward by a*

> *relatively large number of its technical staff and the view of the Assessment Committee, is a matter of considerable concern. Nagy & Anor v Council of the City of Cairns* (1981) 23 QPLR 143*, Ingram & Ors v Maroochy Shire Council* (1983) QPLR at 140*.*
>
> *The conduct of a responsible local planning authority which employs competent technical staff but does not accept such advices given to it by technical staff on technical matters and where no reason is advanced in any of the documentation as to why such advice was rejected or, where on the same basis a decision contrary to such recommendation is made, casts serious doubts as to the propriety of the decision-making process. I regard it as proper in the exercise of the town planning functions of a local planning authority that it ought in such circumstances to- refer to matters which led to the rejection of the recommendation, in fairness to an applicant who is then able to ascertain on what facts and circumstances the recommendations tendered by technical officers to the local planning authority was rejected. It is also fair to the technical officers that the local planning authority which rejects the recommendations tendered should set out the- facts and circumstances which led to the rejection of such recommendations."*

- If the council departs from a policy requirement in the Planning Scheme in circumstances where it has no reason to do so, then any ensuing development approval will be invalid. A council which negligently gives an invalid development approval can be liable in damages for that negligence. There also can be liability for abuse of public office if the council or one of its officers knowingly gives an invalid development approval. For example, a council which purported to amend a condition of a development approval without going through the statutory procedure of calling for objections was held liable in damages to persons whose land was depreciated in value by the construction of a building in reliance upon the development approval rendered invalid by the purported amendment (see *Freeman v Shoalhaven Shire Council* (1980) 2 NSWLR 826).

Effect of legal principles

The combined effect of these legal principles and IPA is as follows:

- The council should not depart from policy requirements in its Planning Scheme or the advice of its technical officers unless there are good reasons for doing so.
- If the council wishes to depart from a policy requirement in its Planning Scheme or the advice of its technical officers, then these reasons must be stated in council's decision, otherwise serious doubt will be cast on the propriety of the decision-making process by the court on appeal.
- If the council decides to depart from a policy requirement in its Planning Scheme, then it must note the departure in its Planning Scheme.

Enforcement of Planning Schemes

IPA

Under IPA, the policy requirements specified in the Planning Scheme form part of what is called "*an applicable code*" (section 6.1.1).

Self-assessable development under council's Planning Scheme (ie as of right development) must comply with the applicable codes (section 6.1.35). Failure to comply with an applicable code is a development offence punishable by 165 penalty units (section 4.3.2).

Accordingly, under IPA, a self-assessable development is unlawful if it does not comply with all those policy requirements of the Planning Scheme that are applicable to the self-assessable development.

Common law duty

The council, as an assessing authority for the purposes of IPA, has a duty to administer and enforce its Planning Scheme.

Failure to carry out this duty can result in the council being held liable in negligence for damages.

The three questions that the council must address are:

- Does any person in the council know that there is a breach of legislation occurring?
- Does the council know that the breach of legislation is injuring or is likely to injure some other person?
- Does the council have the power to act to ensure that the breach no longer occurs?

If the answer is "*yes*" to each of these questions, then a failure to act will be a breach of the duty of care owed by the council and it will be liable in negligence for any damages caused by the breach of the duty of care.

A very recent example of a council being held liable for a failure to enforce its own laws is provided by the decision of *Ryan v Great Lakes Council* (1999) FCA 177 (5th March 1999).

Review of developments in planning and environment law in Australia including the impact of recent court decisions

Ian Wright

This article discusses the changes to planning and environment law in Australia. The article specifically focuses upon updates and amendments of Queensland, New South Wales and Western Australian planning and environment legislative changes. It further discusses recent Queensland and New South Wales planning and environment / land and environment court decisions and explains their impact

February 1999

Central Marine Authority

The Senate Environment Recreation Communication and the Arts Reference Committees Inquiry into Marine and Coastal Pollution has recommended a central authority be established by the Federal government to co-ordinate coastal and marine affairs. The authority would co-ordinate the development of river catchment, coastal and marine policies as well as the sustainable management and use of marine resources, including an adequately funded program of marine research. The committee highlighted that despite legal obligations placed on Australia by the 1994 United Nations Convention on the Law of the Sea, there was no Commonwealth legislation dealing specifically with land based sources of marine pollution. Recommendations of the committee included:

- increased funding for research to establish benchmarks from which restoration of marine ecosystems could be measured;
- the development of guidelines for the quality of discharge in marine environments through sewerage systems or direct to water; and
- the establishment of uniform target dates for the elimination of discharges of untreated sewerage to sea and exploration of land based treatment strategies.

Fees and charges for planning services

The Western Australian Planning Commission has issued a planning bulletin in relation to the introduction of a uniform system of fees and charges for local government planning services. In Western Australia the planning fees that are charged by local governments vary considerably across the State. This has led industry groups to express concern about the level of fees, the disparity of fees charged and the value of the service provided by some local governments. In 1994 the Minister for Planning requested the Western Australian Municipal Association (**WAMA**) to submit a proposal for the introduction of a State wide system of fees and charges. The WAMA produced three reports:

- Local Government Planning and Development Service Fees in Western Australia (November 1995).
- Planning Fees Discussion Paper (March 1997).
- Local Government Planning and Development Service Fees (August 1997).

After considering these reports the Western Australia Planning Commission identified seven principles for a system of local government planning fees and charges:

- regulations should adequately cover a legitimate fee structure for the extent and quality of service provided;
- the fee structure should be clear and simple to administer;
- fees for administration and fees for processing development applications should represent the average cost in providing these services;
- there should be reasonable equity between the benefits gained by the service used (applicant) and the service provided (local government);
- the regulations should provide for a maximum fee structure, enabling local governments to charge less, or not at all;
- the regulation should enable justification for a higher fee than the specified maximum when and where there are exceptional circumstances beyond what is normally undertaken by most local governments. This would deal with applications which require:

- specific assessment such as environmental assessment studies;
- extensive consultation procedures such as for exceptionally large or unusually complicated proposals;
- technical resources and equipment such as computer modelling; and
- specialist skill such as heritage conservation.

- If at the commencement of the processing of an application it is recognised that additional costs will be incurred an additional charge will be applied commensurate with the level of service to be provided.

Based on these principles the following fees have been developed:

Subdivision clearances	A flat fee of $50 per lot up to a maximum of $5,000.
Change of use	A flat fee of $200 for change of use applications.
Home occupations	A flat fee of $150 for home occupations.
Development applications	Fees for development applications are based on the value of the development. The recommended rate is .25% of the estimated development cost plus advertising costs and specialist reports when applicable. A minimum fee of $100 is recommended to cover basic administrative and processing costs for developments up to $40,000. A maximum fee of $25,000 is recommended for developments worth more than $10,000,000. The recommended rate was based on the estimated direct costs associated with assessing and determining development applications as determined by a survey of local governments.
Rezoning proposals	A separate fee should be calculated for each rezoning application based on estimated salary costs, direct costs, specialist report costs and document preparation costs and should be calculated by the local government in accordance with the fee calculation table attached to the bulletin which sets out various estimated costs in respect of various tasks. To ensure that the system of levying fees in respect of rezoning applications is fair and equitable the following guidelines are also specified: ▪ fees are to relate only to scheme amendments that are initiated at the request of an applicant; ▪ fees are payable by the applicant at the time of lodgement of the application; ▪ fees are to be calculated in accordance with the fee calculation table set out in the bulletin; ▪ only those activities to be paid for or carried out by the local government subject to the proposal are to be included in the fee calculation; ▪ the cost of specialist services or reports required by the local government to adequately assess a scheme amendment proposal is payable by the applicant and the scope of such work may be undertaken directly by the applicant or by the local government at the applicant's expense but not both; ▪ details of the calculation used to arrive at a fee are to be made available to the applicant on request; ▪ fees are not payable for a scheme amendment where the sole purpose of that amendment is to achieve consistency between a regional scheme and a local or district town planning scheme; ▪ fees may be waived by local government at their discretion in other circumstances; ▪ any fees not expended are to be refunded if a proposal is not approved for advertising; ▪ if an applicant is not satisfied that the fees so calculated are a reasonable estimate of the cost of the service to be provided by the relevant local government, then the matter may be referred to and resolved by an arbitration panel appointed by the Minister for Planning comprising nominees from the WAMA, the Planning Commission and a planning consultant nominated by the Royal Australian Planning Institute.

In a significant warning to local governments in Queensland, the Western Australian Planning Commission makes the point that the proposed system of planning fees is necessary to ensure a system of local government accountability and quality control is introduced and to ensure that fees charged for planning services are reasonable, bear an identifiable relationship to the actual cost of providing a service, and do not constitute a tax. Local governments are also required to keep records of planning fees as part of their financial reporting and this information is required to be made available in its annual reports.

Liveable neighbourhoods

The Western Australian Planning Commission has released a document entitled "*Liveable Neighbourhoods – A Community Design Code*". Liveable Neighbourhoods is available to developers as an alternative to current subdivision policies to trial and test the community design code through the liberty of projects. Western Australian proponents can elect to have their subdivision application assessed under Liveable Neighbourhoods. The Planning Commission will need to be satisfied that the principles of the community design code are incorporated otherwise the provisions of the current commission policies will prevail.

Planning and Environment Court costs

In the recent decision of *Re: Crouch and Lyndon's Bill of Costs* White J. has determined that the District Court Scale of Costs is the relevant scale of costs for determining solicitor and own client costs for legal work undertaken in a Planning and Environment Court in Queensland. The court found that a proper construction of section 7.6 of the *Local Government (Planning and Environment) Act 1990* requires that the District Court scale be applied in all circumstances.

Changes in negligence law

On 23 January 1998 the High Court, constituted by Chief Justice Brennan and Justices Toohey, McHugh, Gummow and Kirby, handed down its decision in the case of *Pyrenees Shire Council v Day* (1998) 192 CLR 330, signalling a significant change in direction as to the circumstances in which local governments and other statutory bodies will be liable in negligence in the exercise of their statutory powers.

Background

In brief, the case began with a small fire in a chimney in the Victorian country town of Beaufort, in a building used partly as a shop and partly as a residence. An inspector from the Pyrenees Shire Council subsequently inspected the chimney and found defects in its construction. The council warned the then tenant of the property (**First Tenant**) and the owners of the property (**Owners**) not to light any fires in the fireplace but did nothing further, notwithstanding that the Shire had substantial powers to ensure the defects were remedied under the then *Local Government Act 1958* (Vic).

The First Tenant later transferred the lease of the property to Eskimo Amber Pty Ltd, the family company of the Stamatopoulos family (**Second Tenants**), but said nothing about the defective chimney. The Second Tenants later lit a fire in the fireplace, which burned down the property and a neighbouring property owned by Mr & Mrs Day (**Neighbours**).

In the legal proceedings which followed the Shire was found liable in negligence to the Neighbours but not to either the Owners or the Second Tenants. Other actions amongst the parties are not relevant. The Second Tenants appealed against the decision in favour of the Shire and the Shire appealed against the decision in favour of the Neighbours.

"General reliance"

The basis of the initial findings that the Shire was liable in negligence to the Neighbours, but not to the Second Tenants, was the concept of "*general reliance*". This concept, first suggested by Mason J. in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, was said to give rise to a duty of care on the part of the Shire to the Neighbours on the basis that the mere existence of the Shire's statutory powers in this case led to a general reliance or expectation by the Neighbours that those powers would be exercised, notwithstanding that the Neighbours in fact did not rely on the Shire at all and did not even know the powers existed.

The Shire was held not to owe a duty of care to the Owners or the Second Tenants because each of these had the ability to have inspected the chimney and protected themselves against any risk either by not lighting a fire or remedying the defects in the chimney. This was said to preclude any "*general reliance*" by the Owners or Second tenants that the Shire would exercise its powers.

The concept of general reliance has faced criticism since it was first suggested and was the subject of sustained argument in this case. Kirby J. summed up the position by saying that these appeals provided the court "*with an opportunity to reconsider its decision in Sutherland Shire Council v Heyman*" and "*an opportunity to afford a more principled approach (to the liability of a Local Government or statutory body for failure to exercise its powers), which is at once more realistic about the law's objectives and operation, more straightforward in application and, to the extent possible, more predictable in outcomes*".

The High Court

A 3/2 majority of the High Court (Brennan CJ., Gummow and. Kirby JJ.) rejected the concept of general reliance as a basis for imposing a duty of care.

Brennan CJ. emphasised that the court was dealing with a statutory power and stated that "*if community expectation that a statutory power will be exercised were to be adopted as a criterion of a duty to exercise that power it would displace the criterion of legislative intention*". Gummow and Kirby JJ. simply acknowledged that the concept was merely a "*legal fiction*", in that the plaintiff need not have actually relied on the power at all, or even known that it existed.

The majority rejected the creation of a "*fictional*" reliance in order to give rise to a duty of care where no reliance in fact exists, but rather than a win for the Shire, the majority found that reliance was not necessary at all in order to give rise to a duty of care. As a result, the majority found that the Shire remained liable in negligence to the Neighbours and, of even more importance for local governments and statutory bodies, that the Shire also owed a duty of care and was liable in negligence to the Second Tenants.

The majority decisions took somewhat different approaches to the formulation of a duty of care and liability in the absence of general reliance (or any reliance at all), but each applied those approaches in the same way.

Brennan CJ. held that a duty of care to exercise the statutory power in question arose quite simply on existing general principles from the particular circumstances of the case, including the purpose for which the power was conferred, the extent of the risk if the power was not exercised and the reasons given for not exercising the power. Gummow J. also found a duty of care arising simply from the circumstances of the case but emphasised that the statutory powers of the Shire gave rise to a "*measure of control of the situation, including its knowledge, not shared by the Second Tenants or the Neighbours, that if the situation was not remedied, the possibility of fire was great and damage to the whole row of shops might ensue*".

Kirby J. was the only Judge to reach his conclusion based on a restatement or fine-tuning of the general principles of negligence. Even his judgement however, is in the end based on a finding that it was reasonably foreseeable by the Shire that its failure to exercise its statutory powers to ensure the defects of the chimney were remedied would be likely to cause harm to the Neighbours and the Second Tenants. Kirby J. found that "*given the undoubted statutory powers of the Shire, the high risk to which it had found the offending fireplace and chimney exposed the shops and dwellings and those who owned and occupied them, it is not at all unreasonable to suggest that prima facie more should have been done than to write the rather inconsequential letter which the Shire considered to be the discharge to its responsibilities*".

As set out above, each of the majority Judges applied these principles to find the Shire liable not just to the Neighbours but also to the Second Tenants, notwithstanding that the Second Tenants could have inspected the fireplace and chimney themselves and discovered the defects. The court found that this did not sufficiently distinguish the position of the Second Tenants from the position of the Neighbours.

Implications for local government and other statutory bodies

The High Court's decision will apply to local governments and any other body exercising statutory powers. Those bodies may now be found liable for failures to exercise their statutory powers in circumstances where previously they may not have been liable.

The High Court rejected the concept of "*general reliance*", but rather than insisting on some form of actual reliance and narrowing the potential liability of local governments and statutory bodies, instead found that an obligation to exercise statutory powers may arise notwithstanding an acknowledgment that there is no reliance at all on the local government or statutory body to do so.

Once a local government or statutory body has knowledge of a situation which may cause damage or injury and it commences to exercise statutory powers to effect a remedy of the situation, the High Court's decision is such that it almost certainly will come under a duty of care to ensure that its powers are exercised to the fullest extent necessary in order to in fact bring about a remedy of the situation. That duty will be owed to anyone who might foreseeably suffer damage from the situation, whether or not they rely on the local government or statutory body to act or even know of the existence of the statutory power to act.

Neither is it necessarily the case that a local government or statutory body can avoid the implications of the High Court's decision by not acting at all. Apart from the fact that "*not acting*" will often be inconceivable for responsible local governments and statutory bodies, if a local government or statutory body has knowledge of a situation likely to cause damage or injury and has statutory powers which enable it to effect a remedy, then it is but a short step from the High Court's statements above to find a positive duty to exercise those statutory powers.

It remains to be seen what limits or control mechanisms the courts will place on this new duty of care. The nature of the statutory power will still be relevant and some distinction between operational and policy decisions appears to still apply, but the High Court's statements will apply to many, and possibly the majority, of significant statutory powers. For local government the scope of statutory powers to which the High Court's statements will apply is likely to be even more indeterminate following the replacement of the previous specific powers in the *Local Government Act 1936* by the general powers set out in the *Local Government Act 1993*.

Finally, practically speaking, local governments and statutory bodies should realise that, not having the benefits of hindsight they may often infringe this new duty of care. It will not be practicable or possible for local governments or statutory bodies to fully exercise their statutory powers, including (in the case of local governments) notices, prosecution, or even the undertaking of works by the local government, in every situation which might now give rise to liability. Local governments and statutory bodies should however look closely at their practices and policies as to how, when and to what extent they exercise their statutory powers and seek legal advice to refine those practices in light of the High Court's decision.

Coastal wetlands

State Environmental Planning Policy No 14 Coastal Wetlands was gazetted on 12 December 1985. The aim of the policy is to ensure that coastal wetlands are preserved and protected in the environmental and economic interests of the State of New South Wales. Developments that have the potential to damage or destroy wetlands are permitted provided there are no feasible alternatives, and they are located and designed so as not to significantly reduce the value of the wetland. The Policy requires that developments involving the clearing of land, the construction of a levy, the draining of land or the filling of land requires an environmental impact statement and public notice under the Environmental Planning and Assessment Act. Under the policy, a number of matters must be taken into consideration when a development proposal is considered including:

- the environmental effects of the proposed development including the effects on plant and wildlife communities;
- safeguards and rehabilitation measures which have been and will be made;
- consistency with the objectives and major goals of the National Conservation Strategy for Australia;
- whether any feasible alternative exists or has been considered; and
- any proposal to preserve or enhance wetlands surrounding the land to which the development application relates.

Resolving development disputes without litigation

The New South Wales Department of Urban Affairs and Planning has released a circular designed to encourage New South Wales councils to resolve disputes without court action. The circular aims to encourage alternatives to litigation by suggesting some ways to prevent disputes, outlining some of the advantages or alternatives for dispute resolution and outlining some principles for effective dispute resolution. This circular provides some support to the alternative dispute resolution provisions which have been included in the Integrated Planning Act.

Canal estate development

The New South Wales Department of Urban Affairs and Planning has released State Environmental Planning Policy No 50 – Canal Estate Development. The object of the State Environmental Planning Policy (**SEPP**) is to prohibit canal estate developments. Canal estate development involves a wholly or partly constructed canal or other waterway or body with a residential component as defined in the SEPP and the use of fill to raise the service level of the land to a suitable height for residential use. The SEPP does not prevent necessary works for drainage water supply or treatment. It also does not prevent the completion of development consistent with an existing approval or development for which a development application has been lodged and which is permitted by another environmental planning instrument immediately before the SEPP comes into effect, provided any outstanding approval is obtained.

Acid sulfate planning instruments

The New South Wales local government of Hastings has prepared a local environmental plan and a development control plan based on acid sulfate soils. The documents require development consent for work on land, particularly non-urban land, affected by acid sulfate soils even where that did not previously require approval.

Moreton Bay Marine Park

The Queensland Government has released the Moreton Bay Marine Park zoning plan. This Plan covers that part of Moreton Bay from Caloundra to the Gold Coast Seaway and includes Pumicestone Passage and Bribie and Stradbroke Islands. Sections of the Park have been designated as conservation zones where dredging will not be permitted in order to conserve the zone's natural features as far as possible and ensure only ecologically sustainable uses. Under the Plan a Special Management Area has been introduced for the conservation of sea turtle and dugong populations to primarily reduce the incidence of injury and death caused by boats and other craft such as jet skis. The Plan also addresses conservation of shorebirds such as the Eastern Curlew and Little Tern with provisions designed to prevent undue disturbance of the birds and their habitat. Conflict with recreational and commercial fishing interests is to be addressed through Management Advisory Committees established under the Fisheries Act. The Plan does not allow .for trawling in the conservation zone. Those areas zoned Protection cannot be used for fishing, collecting and particularly for recreational lines and spear fishing.

Access for disabled persons

The Building Code of Australia 1996 has been amended to significantly increase the obligations on designers and builders in relation to the provision of access for people with disabilities. The amendments apply to new buildings and classes 3, 5, 6, 7, 8, 9 and 10A.

As a general principle, access must be provided through the principal public entrance to premises. In residential buildings such as hotels and boarding houses, access must be provided to all public areas on the public entrance level, at least one of each type of public facility provided on each floor and every floor containing accommodation. Public areas include reception areas, TV rooms, common lounges, common kitchen and dining areas and common recreation areas. if the building contains sole occupancy units, one in every twenty units must provide disabled access. If the building does not contain sole occupancy units:

- if there are 49 beds or less in the building, two must have disabled access;
- if there are between 49 and 99 beds, four must have the required access; and
- if there are more than 99 beds in the building, six beds must have access for disabled persons.

In classes 5-8 buildings, access must be provided to and within the entrance floor. Access to class 9B buildings must be provided to and within every auditorium but not to every tier or platform, the main entrance to the auditorium and all other areas normally used by the occupants. Where fixed seating is provided, one wheelchair space is required for every 100 seats, up to 200 seats with the additional space for every 200 seats thereafter. In schools, access must be provided to every floor to which vertical access is available by way of lift or ramp. In early childhood centres, access must be provided to all areas used by staff, visitors and children. Buildings that are within a school or early childhood centre with built-in amplifying systems must have a hearing augmentation listening system complying with AS1428.1.

Signs incorporating the international access symbol must identify each accessible entrance, lift and sanitary facility (in accordance with AS1428.1). All passenger lifts must now comply with the amended and more stringent requirements of clause E3.6 of the Code. If there are no lifts in a building of more than one storey, at least one stairway or ramp must have handrails complying with AS1428.1.

Environmental Protection Regulation 1998

The Queensland Department of Environment has released its Regulatory Impact Statement on the *Environmental Protection Regulation 1998* (**1998 Regulation**).

The 1998 Regulation will replace the *Environmental Protection (Interim) Regulation 1995* (the **1995 Regulation**) which expires on 1 March 1998. The 1995 Regulation as it currently stands, contains much of the regulatory detail under the *Environmental Protection Act 1994* (**EPA**) including a list of Environmentally Relevant Activities (**ERAs**) which require either a licence or approval under the EPA.

Risk assessment approach

As part of the development of the 1998 Regulation, a report was commissioned to analyse the licensing process provided for under the 1995 Regulation. The report prepared by Rust PPK entitled "*The application of risk management principles to environmental licensing in Queensland*" sought to determine the "*environmental risk*" each ERA posed to the environment.

The purpose of the risk assessment approach was to provide a mechanism for, assessing and comparing the relative risks of environmentally relevant activities. Existing ERAs were ranked according to the relative risk each activity posed to a series of environmental indicators. In determining an acceptable risk threshold, the comparative ranking of individual ERAs has been undertaken against a benchmark, namely, whether the release of a contaminant will or may cause environmental harm.

Activities with a potential to cause serious or material environmental harm or an environmental nuisance are level 1 activities which require a licence. Those activities with a potential to cause insignificant environmental harm require an approval.

The proposed model has been developed to focus solely on the potential technical hazard proposed by a particular ERA. No weight has been given to account for the potential public and economic sensitivity of the respective activity. However, the proposed model may be adapted to incorporate such factors.

The Department of Environment says that the report will form a sound basis to determine the need for licensing in the future. In essence, the risk assessment approach has sought to introduce information into licensing issues concerning the risk an ERA poses to the environment.

ERAs now require approval

The risk assessment approach has shown that the current regime of regulation may be inappropriate for certain activities.

Activities once requiring licences will now require an approval. Those ERAs now requiring an approval include:

- ERA1(b) – Agriculture;
- ERA23 – Boilermaking or Engineering;
- ERA25 – Metal Forming;
- ERA45 – Crushing, Milling and Grinding;
- ERA57 – Asphalt Manufacture ERAs requiring a licence.

Those ERAs previously requiring an approval, but now requiring a licence as a result of the risk assessment review include:

- ERA20 – Mineral Exploration or Mining;
- ERA39(b) – Construction of Premises – Roads;
- ERA63 – Motor Racing;
- ERA69 – Port Facilities.

The risk assessment review shows that the initial licensing regime in certain circumstances created unwarranted imposts on certain business operations. The risk assessment shows that certain industries do not present a serious environmental risk and as a result will no longer require a licence.

Further, the 1998 Regulation allows the administrative authority, if it considers that environmental risks are low, to decide that a person who has held a licence or a provisional licence for at least two years and has a history of compliance with licence conditions, need only apply for an approval to carry out the activity in the future.

Furthermore, the risk assessment approach has provided the basis for establishing an equitable fee structure based on environmental risks as well as providing for the introduction of pollution charges that reflect the environmental risk associated with the risk of contaminants.

Further amendments

Further amendments are also sought to be introduced in the 1998 Regulations. In general, the amendments when compared to the current regulation can be summarised as follows:

- the incorporation of amendments to definitions for various environmentally relevant activities, so as to better define the types of activities which require a licence or an approval;
- a re-assessment of the risk proposed by an activity to the environment;
- the re-assessment of licence fees in accordance with the risk an activity poses to the environment;
- the introduction of information about the environmental hazard profile for each ERA category relevant to licence fees and pollution charges;
- a process to be provided to allow for alternative dispute resolution procedures when dealing with minor matters of environmental nuisance;
- jurisdiction will be provided to local governments to deal with "*home based*" operators who would otherwise require a licence for operating an ERA.

Amendments to the Environmental Protection Act are also being developed in conjunction with 1998 Regulations to allow the administrative authority to decide whether a person carrying out a Level 1 ERA must hold a licence or an approval.

Recent EPA prosecutions

Facts

A Gold Coast man was recently convicted in the Southport Magistrates Court under the *Environmental Protection Act 1994* (**EPA**) for dumping tyres and 400 drums of paint waste.

The defendant pleaded guilty to the charges of:

- placing a contaminant where environmental harm or nuisance may be caused; and
- failure to comply with an Environmental Protection Order.

The defendant had been issued with an Environmental Protection Order in August 1996 to clean up and dispose of waste left on a property rented by the defendant. The defendant had been evicted from the property in June of 1996 and failed to comply with the terms of the Order.

Decision

In recording a conviction, the Magistrate imposed a fine of $10,000 or 6 months imprisonment on default of payment. The defendant was also ordered to pay $80,000 compensation to the Department of Environment.

In assessing the penalty, the Magistrate took into account various issues. Firstly, the defendant had shown little or no remorse for his actions. Secondly, the defendant stood to profit by $30,000 in dumping the waste. The $10,000 fine was seen to be necessary to act as a deterrent in this case. In considering a penalty, the Magistrate was also referred to the prosecution of Golden Circle Limited in 1996 for the same offence of placing a contaminant where environmental harm or environmental nuisance may be caused. The Magistrate said that the Golden Circle case can be distinguished from the facts of this matter as Golden Circle had taken some steps in alleviating the problem. In this case the defendant had not taken steps to address the problem.

Implications of decision

The decision again shows that the taking of positive steps towards rectifying or alleviating the impact an activity may have on the environment is given a significant degree of weight by the courts.

Wolfe case

A similar prosecution was recently successful in the Rockhampton Magistrates Court. The defendant, Mr Wolfe, was convicted for:

- failing to comply with an Environmental Protection Order (fined $5,000);
- operating an environmentally relevant activity without a licence; and
- causing unlawful environmental nuisance (fined $5,000).

The offences related to the transport and storage of regulated waste. Mr Wolfe was also ordered to pay the costs of the Department of Environment amounting to nearly $16,000.

Polluter imprisoned

Facts

A caravan park owner who pumped millions of litres of sewage into a New South Wales river became the second person in Australia to be jailed for committing an environmental offence.

Decision

The New South Wales Land and Environment Court has imposed a 12 month jail term on the polluter. The Land and Environment Court also imposed a maximum fine of $250,000 and ordered the defendant to pay the costs of the prosecution amounting to $170,000.

Findings

The defendant was found to have wilfully disposed of waste in a manner likely to harm the environment between October 1993 and April 1996. Through an elaborate secret system of bypass pipes constructed by the defendant, an average of 128,710 litres of effluent a week was discharged into the Karuah River which contained oyster leases.

The deliberate act was repeated a number of times a week for the 128 weeks of the offence period. The defendant's motive to pollute had been for financial gain. The defendant saved himself around $138,000 in effluent removal costs during the period he used the bypass pipes.

Implications of decision

The Judge in this case said that the actions had the most serious consequences of environmental harm and likely environmental harm imaginable. It appears that the Judge in this case gave considerable weight to the fact that the defendant was deliberately causing the pollution and did little to rectify the situation.

Overview of the Draft City Plan for Brisbane City

Ian Wright | Damian McDonnell

This article discusses the Draft City Plan for Brisbane City. The article considers in depth, the main development implications, the effect of IPA on the Plan and key features and relevant changes

April 1999

Introduction

The Draft City Plan 1999 is intended to replace the current Brisbane Town Plan prepared in 1987. The new State Planning legislation, the *Integrated Planning Act 1997* (**IPA**) requires local governments to review their current town plans and draft new plans that incorporate the requirements of the IPA.

The Draft City Plan 1999 is currently on public display until early June 1999. During this period submissions can be made to the council. It is envisaged by the council that following the consideration of public submissions, the Plan will come into effect in early 2000.

The Draft City Plan is one of the first Planning Schemes to be prepared under the IPA and represents a significant change in form and content to the existing Brisbane Town Plan. In particular, the new City Plan adopts a performance based approach to development assessment which places greater emphasis on achieving desired environmental outcomes rather than merely regulating land use.

This overview briefly discusses some of the main development implications before outlining the key features of the Draft City Plan 1999. These features include:

- the Strategic Plan;
- areas and assessment processes;
- local plans;
- codes and related provisions;
- planning scheme policies;
- contribution policies;
- designations of community infrastructure.

Refer Attachment 1 for a summary of the key features of the Draft City Plan.

Development implications

Introduction

The Draft City Plan 1999 will have the following main implications for development within the Brisbane City Area:

- reduce use rights;
- increase the length and costs of the development approval process;
- enhance the council's ability to impose conditions on development.

Reduction in use rights

Under the Draft City Plan, there is significant potential for a reduction in existing use rights. In particular, the "*As of Right*" nature of uses within the Residential B, Commercial and Business zones of the current Town Plan.

Also, the minimum subdivisional lot sizes have also been reduced in some cases. For example, in the current Rural Residential zone, the minimum lot size was one (1) hectare. However, under the Draft City Plan the equivalent "*Area*" designation (Rural or Environmental Protection) increases the minimum lot size to ten (10) hectares and requires any subdivision application proposing lots below 10 hectares to be subjected to Impact Assessment.

This reduction in use rights is a result of the new City Plan categorising many uses as being subject to Code Assessment against the new Codes prepared as part of the Draft City Plan. If the particular development proposal is unable to comply with the specific performance criteria outlined in the relevant Codes, regardless of whether it was formerly an As of Right or Permitted Development under the existing Town Plan, the proposal would be either refused, or where relevant, subjected to Impact Assessment and thereby attracting subsequent objection and appeal rights.

The difficulty with the introduction of a performance-based regulatory framework such as that contained in the new City Plan is that in order to establish whether a particular development proposal is able to comply with the relevant Codes, detailed planning and design work would need to be undertaken prior to the lodgement of any development application.

Under the current Town Plan, a prospective applicant first looks to the relevant Zone and its accompanying Table of Development in order to establish the category of assessment for a particular use, ie whether it is As of Right, Consent or Prohibited development. However, in most circumstances, under the proposed performance based City Plan, a prospective applicant would need to first review the relevant Codes to determine the proposal's ability to comply or otherwise and then look to the particular "*Area*" ("*Zone*" under the existing Town Plan) to ascertain the level of assessment as being either Self-Assessment, Code Assessment or Impact Assessment.

The following examples illustrate the point. For the purposes of these examples, the scenarios only involve building work (as defined in section 1.3.5 of the Integrated Planning Act) and no Development Control Plans (**DCP**) or Local Plans are applicable.

Scenario 1 Duplex development in a residential area

	CURRENT TOWN PLAN	NEW CITY PLAN
USE	Duplex	Not specifically defined ▪ Included in "*Multi-Use Dwelling*" definition
ZONE/AREA	Residential B – **RDA 3**	Low-Medium Density Residential
USE RIGHT/ASSESSMENT LEVEL	Permitted subject to Conditions. The application cannot be refused by the council.	Code Assessment The application is approved only if the development complies with the following Codes: ▪ Residential Design – Low-Medium Density; ▪ Residential Character Code; ▪ Green Space & Residential Areas Impact Assessment. Otherwise, if it fails to comply with the Performance Criteria in the Codes or the Desired Environmental Outcomes (**DEOs**) for the Area, the development would be *refused*

Scenario 2 Shopping centre development in a commercial area (gross floor area: 201- 4999m^2)

	CURRENT TOWN PLAN	NEW CITY PLAN
USE	Shopping Centre	Shop (includes activities supermarket, department store, showroom, retail warehouse)
ZONE/AREA	Commercial	Multi-purpose Centre ▪ Convenience Centre (as the development is under 5000m^2)
USE RIGHT/ASSESSMENT LEVEL	Permitted Development. The application cannot be refused by the council.	Code Assessment The application is approved only if the development complies with the following Codes: ▪ Centre Concept Planning Code; ▪ Centre Design Code; ▪ Centre Amenity and Performance Code. ["*Shop*" is included in the definition of "*Centre Activities*"] Otherwise, if it fails to comply with the Performance Criteria in the Codes or the DEOs for the Area, the development would be *refused*

Increase the length and costs of the development approval process

Information requests – code and impact assessment

In addition to the "*up front*" planning and design work required by prospective applicants, the information request ability given to local government under the IPA as part of the Integrated Development Assessment System (**IDAS**) enables the council to request information on a range of matters prior to making a decision on an application.

This ability, when coupled with the myriad of codes, planning scheme policies, local plans, desired environmental outcomes etc incorporated in the Draft City Plan, has the prospect of greatly increasing the breadth and detail of such information requests as part of the code or impact assessment processes, thereby increasing the cost and time of the development approval process.

IPA knowledge

Adding to the increase in costs of obtaining a development approval is the need for applicants to develop an understanding and obtain accurate advice in respect of the IPA. This legislation is still new and applicants, the council and State government departments will take time to fully come to terms with the workings of IPA. In particular, as IPA not only sets out the framework for the form and content of local government Planning Schemes, the IDAS also defines the various types of development and the level of assessment category applicable to a proposed development application, being either self, code or impact assessment.

Enhance the council's ability to impose conditions on development

The IPA has retained the tests of "*reasonableness*" or "*relevance*" to ascertain the lawfulness of conditions imposed on development approvals.

The Draft City Plan with its codes, planning scheme policies, local plans, desired environmental outcomes and in particular the ability to require centre concept plans for proposals within centre areas has enhanced the council's ability to impose conditions on development approvals.

These planning instruments and concept plans establish a hierarchical framework of performance criteria which due to the detail provided in these instruments will assist the council in successfully satisfying the tests of reasonableness and/or relevance for an expanded range of issues such as urban design, character and amenity.

Key features of City Plan 1999

Strategic plan

Content

The Brisbane Strategic Plan addresses a time horizon to the year 2111. It sets out the broad policy of the City Plan and is a reference point for general development policy.

The main components of the Strategic Plan are identified in the Strategic Plan Map A – City Structure and include:

- Desired Environmental Outcomes (**DEOs**);
- performance indicators;
- elements.

DEOs

The DEOs set out broad policy at a city wide level. The IPA provides that DEOs are key elements of planning schemes and requires DEOs to be identified and achieved through the development assessment process.

The DEOs are provided through the hierarchy of the City Plan's planning instruments at an increasing level of specificity and detail. The DEO commences with the broad Strategic Plan, the "*Elements of the City*", the "*Area*" designations and then descend to detail with local plans, codes and planning scheme policies.

Performance indicators

Performance indicators through the Plan provide the measures to allow the Brisbane City Council to review the performance of the City Plan in achieving the DEOs. For example, in respect of performance indicators for community life, health and safety, the council will assess the hectares of parkland dedicated to council and the proximity of new residential dwellings to parkland as a performance indicator in achieving community facilities.

On the other hand, in respect of centre area designations and employment, the council will assess the proportion of commercial approvals in-Centre compared with out-of-Centre as performance indicators to measure DEOs for land use and built environment.

Elements of the City

The Elements of the City express the DEOs in a spatial context for the City. The designations have a great deal of significance in the assessment of development applications. In particular, the Elements provide a broad expression of how the City structure should develop to achieve the DEOs. There is a close relationship between the Elements of the City, the underlying Area Designations and local plans.

The Elements of the City include:

- Green Space System;
- residential neighbourhood;
- industrial areas;
- centres;
- movement system;
- Native Title; and
- heritage.

Brisbane Green Space System

This System is a range of natural, semi-natural and modified environments in public and private ownership. These lands are broadly categorised as follows:

- *Investigation Areas* – Comprises land currently under investigation to determine the best long-term use.
- *Conservation and Recreation Areas* – Comprises assets that must be preserved such as Brisbane Forest Park, the Boondall and Pine River wetlands, Karawatha Forest Park, Moreton Bay's islands and the City's forested foothills and ridgelines.
- Includes the more formal recreational and open space areas such as golf courses, major sporting fields and complexes, major natural areas such as Mt Coot-tha and private lands with publicly accessible recreational and sporting facilities.
- *Environmental Protection Areas* – Includes land that will be retained and enhanced for habitat conservation and landscape protection. It may accommodate a range of private development only if environmental impacts are minimised and green space values are retained.
- *Rural Areas* – Includes land that defines the City's edges, acts as a buffer between incompatible land uses and can provide pleasant vistas along Movement Networks. It will be retained for the ongoing operation of rural and semi-rural activities.
- *Green Space Corridors* – Includes land intended to serve as physical breaks and buffers in the urban area, to increase the sense of identity for local communities and to serve floodway and drainage functions.

In determining the preferred functions of any green space corridor, appropriate weight will be given to relative measures and plans including the Waterway Code, local plans, drainage master plans and management plans.

Residential neighbourhoods

Residential neighbourhoods are the most extensive of the City structure elements. They contain the residential areas and related amenities and facilities such as convenience shopping, local parkland, schools, churches, pubs and clubs.

Industrial areas

The City has some 3,400 hectares of vacant industrial land in two major locations:

- the Gateway ports adjacent to the Brisbane Airport and the Port of Brisbane; and
- in the Brisbane-Ipswich corridor in the south west.

Northgate and Virginia/Geebung are substantially developed but have some capacity for light and general industries.

Heathwood and Parkinson on the southern edge of the City are undeveloped areas, suitable for light general and transport related industries because of their proximity to the interstate rail line and Logan Motorway.

Industrial Areas will accommodate a range of retail and personal services and recreational facilities to meet the daily needs of the local workforce.

Centres

A broad range of development will be focussed into a network of Multi-Purpose Centres complemented by a range of Special Purpose Centres. The larger Centres are shown on Map A – City Structure and all Centres are identified on the Planning Scheme maps. All centres are either Multi-Purpose or Special Purpose Centres.

The broad categories of Multi-Purpose Centres are the City Centre, Major Centres, Suburban Centres and Convenience Centres.

Special Purpose Centres include hospitals, centres for education, sport, entertainment, airport, institutions, markets, sales and service centres, office park, craft/cottage industry areas and mixed industry/business areas.

Movement system

The Brisbane City Council has adopted the Brisbane Transport Plan designed to develop a modern, integrated transport system that benefits the city and meets the needs of the community. It builds on recent transport planning initiatives throughout the region and is fully integrated with land use planning and council's Corporate Plans.

The major elements of the movement system are identified on Map D – Movement System of the Strategic Plan.

Native Title

The Brisbane City Council acknowledges that:

- Aboriginal people have a traditional association with the land in the city.
- Under the *Native Title Act 1998* Freehold Title extinguishes Native Title.
- Native Title may exist in Brisbane on Crown Land and on the waterways of the city.
- Under the IPA, Aboriginal people's traditional heritage and historical links to land may be based on association only.

In view of these acknowledgements, development decisions will respect the wishes of indigenous people on land and waterways over which Native Title may exist, by assessing development proposals for potential impacts on such places in terms of:

- clearing of vegetation;
- public access;
- altering natural topography and drainage patterns;
- constructing roads;
- erecting/locating buildings and structures;
- extractive industry; and
- impacts on watercourses.

Heritage

Heritage places will be conserved to retain their significance for the benefit of present and future communities. The key measures to achieve this objective are:

- a Heritage Register; and
- a Heritage Place Code.

Both documents will be considered in assessing any development proposal for places of heritage value.

Areas – a new term for Zones

Areas

A key difference in the new City Plan is the change from "*Zones*" to "*Areas*". Refer Attachment 2 for a comparative table of the current "*Zones*" and the new "*Areas*". There are seven new "Areas" of classification which in most cases are further categorised:

- Green Space Areas;
- emerging Community Areas;
- residential Areas;
- industrial Areas;
- centres;
- community Use Areas; and
- road Areas.

The "*Area*" designations:

- Identify the level of assessment required under the Integrated Planning Act (eg Self-Assessable, Code Assessment or Impact Assessment) and the relevant Code/s that are applicable to particular uses and development. Refer to the following table for an extracted Medium Density Residential Areas Table setting out the Levels of Assessment.
- Set out the DEOs for each Area that development proposals must assist in achieving.

The "*Areas*" and "*Level of Assessment Tables*" replace the current "*Zones*" and "*Tables of Development*".

The following is the Table of Development for the Medium Density Residential Area extracted from the Draft City Plan:

MEDIUM DENSITY RESIDENTIAL

LEVEL OF ASSESSMENT

Chapter 3 Areas and Assessment Processes	
Level of Assessment ▪ If the site is in a Local Plan, the Local Plan may change the level of assessment identified in this table. ▪ A preliminary approval may change the level of assessment identified in this table.	
DEVELOPMENT	**RELEVANT CODES**
The trigger for assessment is material change of use unless otherwise specified	
Self-assessment:	
1. **House** where complying with the acceptable solutions in the House Code:	**House Code**
2. **Park** where complying with the acceptable solutions in the Park Code:	**Park Code**
3. **Home Business** where complying with the acceptable solutions in the Home Business Code:	**Home Business Code**
Code assessment	
1. Centre activities where in a Commercial Character Building Code:	**Commercial Character Building**
2. Operational work for Filling or Excavation:	**Filling and Excavation Code**
3. Building work, operational work or subdivision on land adjoining a Heritage Place:	**Heritage Place Code** for exact details of when development is code assessable
4. House where not complying with the acceptable solutions in the House Code:	**House Code**
5. Building work for a Landing:	**Landing Code**
6. Subdivision where all resulting lots are 400m^2 or greater:	**Subdivision Code**
Impact assessment	
1. Building work, operational work or subdivision on the site of a **Heritage Place**:	**Heritage Place Code** for exact details of when development is impact assessable
2. **Home Business** where not complying with the acceptable solutions in the **Home Business Code**:	**Home Business Code**
3. **Park** where not complying with the acceptable solutions in the **Park Code**:	Assessment will include consideration of the **Park Code**
4. **Subdivision** where any resulting lot is less than **400m^2**:	**Subdivision Code** and **Structure Planning Code**

5. **Volumetric subdivision** where not associated with an existing or approved development:	**Subdivision Code**
6. **Any other material change of use**:	Assessment will include consideration of the **Green Space and Residential Areas Impact Assessment Code**

Green Space Areas

The Green Space Areas are intended to protect natural habitats in Brisbane by providing a network of privately and publicly owned land known as the Brisbane Green Space System. This System is designated as Green Space Areas and these Areas are further classified as follows:

- *Conservation Area* – These areas protect particular habitats and native flora/fauna communities. These are generally located in the City's bushlands, wetlands and waterways, on the mainland and the Moreton Bay Islands.
- *Parkland Areas* – These areas are for informal open air recreation and outdoor cultural and educational activities and may provide opportunities for informal sports. Land is publicly owned or intended to be brought into public ownership.
- *Sport and Recreation Area* – Green spaces used for organised recreation and sporting activities.
- *Environmental Protection Area* – These areas are privately owned and accommodate residential and rural uses that are to be preserved provided the DEOs are met. Includes water supply catchment areas.
- *Rural Area* – These areas are privately owned and accommodate residential and rural uses that are to be preserved provided the DEOs are met including the protection of good quality agricultural land.

Emerging Community Areas

The Emerging Community Areas are generally suitable for urban purposes at some future time. These areas have not been fully investigated and many contain pockets of land unsuitable for development because of scenic or environmental constraints.

All land in these Areas require the preparation of a Neighbourhood Structure Plan before development can occur.

Residential Areas

The Residential Areas are further classified into the following Areas:

- *Low Density Residential Area* – Predominantly single houses with no more than two storeys. Multi-unit, low density development is limited to sites over 2500m$^{2.}$
- *Character Housing Area* – Housing of architectural significance. Predominantly single houses with no more than two storeys, strongly reflecting the City's "*timber and tin*" character. These areas are intended to protect high quality, intact traditional character housing and accommodate a limited amount of new houses and multi-unit dwellings that complement traditional housing forms.
- *Low-Medium Density Residential Area* – Comprises houses, among multi-unit development at a house-compatible scale, and predominantly no more than two storeys. Higher residential densities and three storey buildings, railway station and on land within 100 m of an arterial road.
- *Medium Density Residential Area* – Buildings no more than five storeys. High accessibility to Centres with a wide range of shops and services. High accessibility to public transport, bikeways and pedestrian ways.
- *High Density Residential Area* – Buildings up to 10 storeys. Very high accessibility to Centres with a range of shops and services. Very high accessibility to public transport, bikeways and pedestrian ways.

Industrial Areas

The Industrial Areas are further classified into the following Areas:

- *Light Industry Area* – Accommodates businesses selling heavy machinery, motor vehicles, boats, timber or other building materials that are unsuitable for location in multi-purpose Centres. Office activities serve only an administrative function directly connected with a specific manufacturing or distribution activity on the same site. Industries which comply with a set of environmental standards which ensure they are of low impact (eg Industrial Amenity and Performance Code, Industrial Design Code).
- *General Industry Area* – Accommodates a wide range of industrial uses. Industries must comply with specific environmental performance standards including State standards and relevant City Plan Codes (eg Industrial Amenity and Performance Code, Industrial Design Code).
- *Heavy Industry Area* – Accommodates higher impacting industries in locations well separated from residential and community uses. High level of environmental performance and compliance with all relevant environmental legislative requirements, standards and City Plan Codes.

- *Extractive Industry Area* – Extraction of rock, gravel, sand and clay in locations well removed from land uses and activities that would be sensitive to or could prejudice the economic operations of extractive industries. Accommodates activities directly related to extractive industry operations (eg landings, concrete batching plants). Haulage to and from these Areas is on appropriate routes identified in the Movement System (The Strategic Plan Map D – Movement System). Greater requirement for ongoing site rehabilitation.
- *Future Industry Area* – Land set aside for future industrial use. Land is generally unserviced and requires considerable investment in transport and other utilities before development can occur. Development in this Area must be preceded by an industrial structure plan.

Centres

The three Codes controlling development in Multi-purpose and Special Purpose Centres are Centre Amenity and Performance Code, Centre Concept Planning Code and Centre Design Code.

All new retail, commercial, community and cultural developments are required to be located "*in-Centre*" Areas. "*Out-of-Centre*" Area developments will be refused unless an overwhelming public need can be demonstrated. In such a case, a Commercial Development Impact Assessment Report would need to be prepared, pursuant to the Commercial Impact Assessment Planning Scheme Policy, in order to establish such a public need [refer Section 7.2].

- *Multi-purpose Centres* – City Plan identifies four types of Multi-purpose Centre:
  - City Centre;
  - Major Centres being Fortitude Valley, Toowong, Indooroopilly, Upper Mt Gravatt, Carindale, Toombul-Nundah, Chermside, Brookside-Mitchelton;
  - Suburban Centres being all other multi-purpose centres that exceed 5,000m^2 gross floor area;
  - Convenience Centres being all other multi-purpose centres of 5,000m^2 gross floor area or less.
- *Special Purpose Centres* – Includes major hospitals, educational, defence, sporting, airport and port facilities
- *Commercial Character Buildings* – Deals with the reuse of old commercial buildings. Council strongly favours the retention and reuse of these buildings for a range of non-industrial uses. Development in Commercial Character Buildings will be assessed against the Commercial Character Building Code.

Community use areas

Includes the following types of community uses – cemetery, community facilities, health care purposes, education purposes, road and rail activities and utility services.

Road areas

The level of assessment for any development in a roadway is the same as for the land immediately adjoining either side of the middle of the road.

Local Plans, Development Control Plans and Local Area Outline Plans

Local Plans

These operate in conjunction with the Area designations by providing detailed guidance on the preferred development outcomes in particular localities, suburbs or neighbourhoods.

A Local Plan may modify the level of assessment identified in the "*Areas and Assessment Processes*" section of the new City Plan. In addition a Local Plan may provide additional or alternative acceptable solutions to the relevant Codes.

The following is a list of the Local Plans prepared for Draft City Plan 1999:

- Algester/Calamvale/Parkinson/Stretton;
- Ashgrove District;
- Bellbowrie;
- Bowen Hills;
- Brookside – Mitchelton Major Centre;
- Bulimba District;
- Cannon Hill District;
- Capalaba West;
- Carina/Carindale;

- Carindale Major Centre;
- Chermside Major Centre;
- City Centre;
- Clayfield/Wooloowin;
- East Brisbane/Coorparoo;
- Enoggera District;
- Ferny Grove/Upper Kedron and Mitchelton (South West);
- Fitzgibbon;
- Forest Lake;
- Fortitude Valley;
- Grange District;
- Kangaroo Point Peninsula;
- Kuraby District;
- Latrobe and Given Terraces;
- McDowall/Bridgeman Downs;
- Milton;
- Moorooka District;
- Moreton Island Settlements;
- Mt Coot-tha;
- Mt Gravatt Central;
- New Farm and Teneriffe Hill;
- Newstead and Teneriffe Waterfront;
- Racecourse Road;
- Sandgate District;
- South Brisbane;
- Spring Hill and Petrie Terrace;
- Stephens District;
- Toombul – Nundah Major Centre;
- Upper Mt Gravatt Major Centre;
- Walter Taylor South District;
- Western Gateway;
- Willawong;
- Wynnum/Wakerley.

Development Control Plans (DCPs)

DCPs continue to have a statutory role under this City Plan as Local Plans.

The land within DCP boundaries has been allocated to the Area that is most closely aligned with its precinct intent and development requirements.

Local Area Outline Plans (LAOPs)

The LAOPs are a statutory component of the existing Town Plan prepared for potential development areas. The LAOPs do not replace the existing zoning of properties but put forward the council's position on the most desirable land use for that area. The Emerging Community Area provides DEOs and level of assessment guidance for most land covered by LAOPs.

Under the Draft City Plan, the LAOPs continue to have a statutory role as Local Plans for outer suburbs.

Codes – A new word for development requirements

Codes provide regulatory criteria against which development proposals are assessed. They contain performance criteria and the "*acceptable solutions*" to satisfy these criteria, or if no quantifiable "*acceptable solution*" is provided, the Codes outline the nature of the investigations or process necessary to determine whether performance criteria are satisfied.

The following is a list of the Codes prepared for Draft City Plan 1999:

- Acid Sulfate Soil;
- Aircraft Noise;
- Airport Operational Safety;
- Amusement Arcade;
- Awning Lighting;
- Bicycle and Cyclist On-Site Facilities;
- Biodiversity;
- Caravan Parks and Relocatable Home Park;
- Centre Amenity and Performance;
- Centre Concept Planning;
- Centre Design;
- Child Care Facility;
- Commercial Character Building;
- Community Use;
- Construction and Demolition Activities;
- Demolition;
- Energy Efficiency;
- Extractive Industry;
- Farm;
- Filling and Excavation;
- Gas Pipeline;
- Green Space and Residential Areas Impact Assessment;
- Heritage Place;
- Home Business;
- House;
- Industrial Amenity and Performance;
- Industrial Areas – Adjacent Development;
- Industrial Design;
- Landing;
- Landscaping;
- Light Nuisance;
- Non-discriminatory Access and Use;
- Outdoor Sport and Recreation;
- Park;
- Residential Character;
- Residential Design – Small Lot;
- Residential Design – Low-Medium Density;
- Residential Design – Medium Density;

- Residential Design – High Density;
- Residential Design – Special Needs;
- Satellite Dish;
- Service Station;
- Services, Works and Infrastructure;
- Short Term Accommodation;
- Stable;
- Stormwater Management;
- Structure Planning;
- Telecommunication Tower;
- Transport, Access, Parking and Servicing;
- Wastewater Management;
- Waterway;
- Wetland.

Subdivision Codes and related provisions

Provisions	Area Provision
Overview of the Subdivision Design Code	Subdivision Design Code
Operational Works Code	

Planning Scheme Policies

Intent

The Integrated Planning Act allows the council to request additional information to assist in assessing development proposals and to establish an infrastructure charges framework comprising a benchmark development sequence and infrastructure charges. To assist in this regard the council has prepared Planning Scheme Policies and Infrastructure Contribution Policies.

The Planning Scheme Policies outline the material required to be submitted with development proposals and support the Codes contained in the Plan.

The Infrastructure Contribution Policies provide a mechanism for the council to levy infrastructure charges whereas a benchmark development sequence (as required under IPA) will be prepared later as an amendment once the new City Plan is in place.

Planning Scheme Policies

The Draft City Plan contains the following Planning Scheme Policies:

- Acid Sulfate Soil Scheme Policy;
- Commercial Impact Assessment Planning Scheme Policy;
- Community Impact Assessment Planning Scheme Policy;
- Consultation Planning Scheme Policy;
- Energy Efficiency Planning Scheme Policy;
- Environmental Impact Assessment Planning Scheme Policy;
- Hazard and Risk Assessment Planning Scheme Policy;
- Heritage Register Planning Scheme Policy;
- Landscaping Planning Scheme Policy;
- Management of Urban Stormwater Quality Planning Scheme Policy;
- Natural Assets Planning Scheme Policy;
- Noise Impact Assessment Planning Scheme Policy;

- Planting Species Planning Scheme Policy;
- Telecommunication Towers Planning Scheme Policy;
- Transport, Access, Parking and Servicing Planning Scheme Policy;
- Transport and Traffic Facilities Planning Scheme Policy.

Apart from specific development requirements, these Policies could also affect the assessment of development applications in other ways, for example:

- Under the Commercial Impact Assessment Planning Scheme Policy a report could be requested for Commercial Developments (eg shops or office developments) outside of identified Centre Areas or commercial expansion proposals in Centre Areas that are inconsistent with the City Plan provisions for that Centre. The report could be required to include:
  - economic impact assessment;
  - public transport impact and adequacy;
  - traffic impact;
  - urban character and design;
  - amenity impacts;
  - environmental impacts;
  - infrastructure report.
- The Community Impact Assessment Planning Scheme Policy sets out the circumstances and particular uses which may require such a report. Examples:
  - when the development is not clearly envisaged or whether there is some doubt as to whether the development is clearly envisaged by the Plan; or
  - when a development is likely to have a high level of controversy or political sensitivity.

Contribution Policies

These Policies outline the circumstances when and the specific localities or catchment areas where contributions are required for:

- Parks & Recreation;
- Water Supply & Sewerage Headworks.

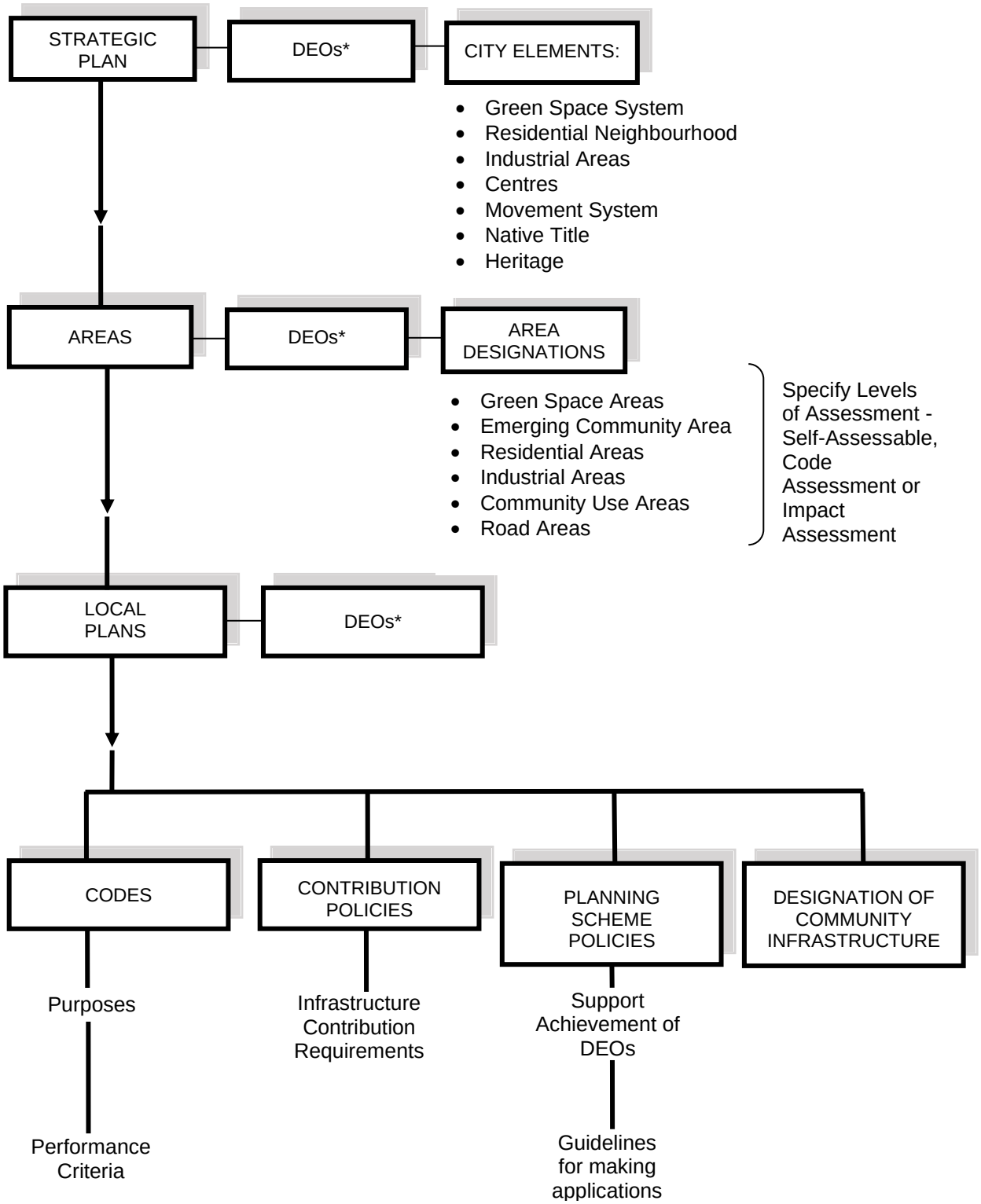
Designations – community infrastructure

IPA provides local government and the State government with the power to designate land for community infrastructure. Development under a designation is to the extent development would be self-assessable development or assessable development under the City Plan – exempt development.

Designations will be shown on the Planning Scheme maps. The underlying Area may not always reflect the current use or the use proposed by the designation.

As of December 1998 there were no designations recorded in the Brisbane City.

Attachment 1 Key features of Draft City Plan



Attachment 2 Comparative table – Zones/Areas

1999 City Plan – Areas		1987 Town Plan Zones
Green Space	Parkland	Open Space
	Sport and Recreation	Sport and Recreation
	Rural or Environmental Protection	Rural Residential and Non-Urban
	Conservation	Conservation
Emerging Community		Future Urban
Residential	Low Density Residential	Residential A
	Commercial Character Buildings	
	Character Residential	Residential A+
	Character Residential	Inner Residential
	Low-Medium Density Residential	Residential B – R3
	Medium Density Residential	Residential B – R5
	High Density Residential	Residential B – R6/R7
Industrial	Light Industry	Light Industry and Service Trades
	General Industry	General Industry
	Light or General Industry	Warehouse and Transport
	Light, General or Heavy Industry	Waterfront Activities
	Heavy Industry	Noxious, Offensive and Hazardous Industry
	Future Industry	Future Industry
	Extractive Industry	Extractive Industry
Centres	Multi-Purpose Centres	Business Zone and Commercial Zone
	Special Purpose Centres	Special Use
Community Use		Special Use

Drafting IPA Planning Schemes: The challenges facing land use planners

Ian Wright

This article discusses the challenges which land use planners face when drafting planning schemes in respect of IPA. The article considers the implications of IPA and its impacts upon planning schemes, policies and the planning profession

May 1999

Introduction

The dream

The *Integrated Planning Act 1997* (**IPA**) has been heralded by its architects as a new beginning in the history of Queensland planning. As the Minister said when introducing the legislation:

> "*The Integrated Planning Bill delivers to Queensland's state-of-the-art planning legislation. It will provide our State with the best performing development assessment system of any State in Australia – best performing in terms of its efficiency and the quality of the decisions it delivers*". (Hansard 1997:4086)

The reality

Unfortunately legislation, and planning legislation in particular, cannot of itself deliver efficiencies or quality decisions. If it was otherwise we would not need land use planners, local governments or indeed the public. All that we would need would be lawyers to draft planning legislation.

Fortunately IPA is not the brainchild of lawyers. IPA was conceived, structured, negotiated and drafted by land use planners. It will also be implemented by land use planners. Therefore land use planners will be able to claim the credit for IPA's successes. On the other hand they will also be held responsible for its failures.

The challenge for land use planners

However in creating IPA land use planners have created a piece of legislation which will challenge their profession. In the coming years, land use planners will have to significantly improve the standard of land use planning practice in this State if they are to meet the expectations of IPA. If they do not IPA will not achieve its stated objectives of delivering efficiencies and quality decisions. As a result land use planners may be slowly marginalised in the plan making process in favour of other environmental health and science professionals who also have a legitimate claim to the achievement of the ecological sustainability.

Themes of the paper

In this paper I will explore three themes.

- First, I will seek to define some key concepts which IPA has left undefined. In doing so I will seek to identify the legal and planning basis on which IPA planning schemes should be prepared.
- Second, I will identify the legal and planning challenges that will face land use planners in the preparation of IPA planning schemes. I will also review the current state of planning practice in relation to the preparation of IPA planning schemes to see how land use planners have responded to those challenges.
- Finally, I will make some predictions about the future state of planning practice and land use planners in general in relation to the plan making process.

Preparation of Planning Schemes

Ecological sustainability

IPA is intended to achieve ecological sustainability (s1.2.1). This term is defined as an end state where ecological processes and systems, economic development and human settlement are in balance (s1.3.1).

Under IPA, ecological sustainability is to be achieved partly through the implementation of IPA planning schemes and partly through the integrated development approvals system which has been designed to ensure that the integrity of IPA planning schemes is protected.

IPA planning schemes

Under IPA, an IPA planning scheme is intended to be a blueprint for the achievement of ecological sustainability within a local government area. Whilst not being as prescriptive as the previous legislation IPA does prescribe what is to be contained within an IPA planning scheme. In essence an IPA planning scheme is only required to contain three elements:

- First, a set of desired environmental outcomes.
- Second, a set of measures that will facilitate the achievement of the desired environmental outcomes.
- Third, a set of performance indicators by which the achievement of the desired environmental outcomes can be assessed.

Importance of planning schemes

It is important to note that desired environmental outcomes, facilitation measures and performance indicators are mandatory requirements of an IPA Planning Scheme. They are not discretionary. Apart from being a necessary component of an IPA planning scheme, desired environmental outcomes, facilitation – measures and performance indicators are also significant in a number of other important respects under IPA:

- Firstly, under the integrated development approvals system a development approval cannot be granted if it would compromise a desired environmental outcome (s3.5.13 and 3.5.14).
- Secondly, local governments are empowered to compulsorily acquire land in order to achieve a desired environmental outcome (s5.5.1).
- Thirdly, the performance indicators must be assessed each six years to determine whether the desired environmental outcomes have been achieved (s2.2.1).

It is clear that the desired environmental outcomes, facilitation measures and performance indicators have important policy and legal implications under IPA. Accordingly, one would expect that these terms would be defined by IPA. Unfortunately, these key concepts are not defined in IPA.

Definition of key concepts

In the absence of any definition in IPA it is necessary to turn to planning theory and practice for guidance as to the intent and possible meaning of these concepts. A review of the relevant literature (set out in the reference section) indicates that these terms can be defined in the following manner:

- Desired environmental outcomes – these are the future or target benchmarks which are to be achieved in respect of the environment.
- Facilitation measures – these are the actions identified to achieve the desired environmental outcomes (ie the future or target benchmarks).
- Performance indicators – these are the characteristics of the environment which can be measured to monitor progress towards the achievement of the desired environmental outcomes (ie the future or target benchmarks).

Examples of each of these key concepts are set out in Table 1.

Table 1 Illustration of key concepts

Goal	Substantial improvement of river/marine habitat and water quality and reduction in river/harbour discharges as sewerage upgrades come on line.
Performance Indicator	River/harbour discharges. Other indicators may be applied including biological oxygen demand (BOD) or diversity of fish species.
Baseline benchmarks	The level of river/harbour discharge at time t. The quality of water at time t. The variety of fish species at time t.
Comparative benchmarks	For an ideal river/harbour environment, the comparative levels of discharges, BOD and diversity of fish species.
Desired environmental outcome (Target or future benchmarks)	The reduction in discharge levels by x, over y period of time, the reduction of BOD levels by z, over y period of time, increase in fish species by a over y period of time.
Facilitation measures	Upgrade sewerage system by y time period. Actions are similar to an output measure (ie the achievement of x task by y time for c cost).

These examples clearly illustrate that the drafting of desired environmental outcomes is dependent on the identification of two matters:

- First, the future or target benchmarks (ie the desired environmental outcomes) which are to be achieved.
- Second, the performance indicators which will be measured to determine whether the future or target benchmarks (ie the desired environmental outcomes) have been achieved.

The identification of desired environmental outcomes is an iterative process in which the identification of performance indicators will influence the target benchmark (or desired environmental outcome) that is chosen.

Benchmarks and desired environmental outcomes

Benchmarks are the key environmental conditions which exist for the planning scheme area at a specified time. Benchmarks are of two types.

The first category of benchmarks is baseline benchmarks. These are the existing environmental conditions within the planning scheme area. These baseline benchmarks are established from baseline information relating to a specific time or defined area.

Baseline benchmarks may be a snapshot of actual conditions or they may be an envisaged representation of conditions intended to take account of natural climatic variability (ie they are modelled).

The second category of benchmarks is target benchmarks. These are the future environmental conditions within the planning scheme area. In my opinion when IPA refers to desired environmental outcomes it is referring to target benchmarks. These target benchmarks are generally established by reference to comparative benchmarks derived from other similar areas or systems. However, as one would expect, the applicability of comparative benchmarks is always subject to the data being comparable and compatible.

When selecting benchmarks for the purposes of a planning scheme, regard should be had to two factors:

- Firstly, benchmarks must be flexible – that is there must be the ability to add or delete benchmarks as they arise or lose importance according to the context.
- Secondly, benchmarks must be comprehensible – that is they must be capable of being measured by a set of performance indicators which are synthetic enough to make the information presented immediately comprehensible.

Turning then to the concept of performance indicators.

Performance indicators

Performance indicators are not themselves statistics, standards or criteria, rather they are a way of marshalling quantified information so as to give a synoptic view of a situation or a component of a situation which can then be assessed by reference to standards and other criteria. Therefore a performance indicator must be distinguished from the actual measure of the performance indicator.

The actual measure of a performance indicator may be based on objective or subjective data. Objective data includes data derived from physical measures and "*factual*" questions in surveys (eg rented or owner occupied dwellings). Subjective data is derived from survey data or individual perception attitude or opinions in a specific situation.

Objective and subjective measures of performance indicators can be used as complements to each other such as where a change in an objective measure can be compared with a subjective response. For example an improvement of ambient air quality (measured in physical terms) can be compared with the general public's perception of the change in air pollution.

Performance indicators can be either absolute or relative (see Table 2). Absolute performance indicators are designed with respect to a fixed measurement scale. Relative performance indicators on the other hand are designed in connection with a second measurement.

Each type of performance indicator is useful but a combination of indicators is often necessary to give a balanced perspective on performance. For example while total energy usage (an absolute measurement) conveys which industry consumes the most energy, energy per unit of production (a relative measurement) indicates whether the energy was used efficiently (either over time or compared to other industries).

Table 2 Type of performance indicators

Type of indicators	Definition	Typical non-financial characteristic
Absolute	Designed with respect to a fixed measurement scale	Physical indicators of mass and volume
Relative	Designed in connection with a second measurement	Production based efficiency indicators. Time based trend indicators

Performance indicators can be divided into three categories in accordance with the definition of ecological sustainability under IPA:

- Environmental performance indicators – these measure the quality of environmental resources such as air, water, soil.
- Economic performance indicators – these measure the effect of human activity on environmental resources. Examples of economic performance indicators include:
  - the consumption of water and energy resources;
  - the production and management of waste;
  - travel patterns and transport usage; and
  - urban form including infrastructure, open space and economic activity.
- Social performance indicators – these measure the effect of environmental resources on human activities. Examples of social performance indicators include:
  - access to amenities to meet socio-cultural and personal needs;
  - security from environmental hazards;
  - the risk of violence;
  - the risk of physical and mental health; and
  - conflicts between the quality of life and the quality of environment.

For those who may think that the identification of performance indicators and measurement criteria is too difficult a task I have set out in Appendix 1 the performance indicators and measurement criteria that have been used by the OECD in studying human settlements. I have also set out in Appendix 2 some indicative performance indicators for an urban local government.

Review of planning practice

Implications of IPA

The preceding analysis has been required because some key concepts have been left undefined by IPA. My analysis of these concepts has been based on a number of fundamental assumptions:

- Firstly, desired environmental outcomes under IPA must be more than the mere statements of objectives that were contained in strategic plans and development control plans under the old Local Government (Planning and Environment) Act. They must be target or future benchmarks that can be measured by the assessment of performance indicators.
- Secondly, desired environmental outcomes must be defined by reference to a baseline benchmark which may or may not be determined by reference to a comparative benchmark.
- Thirdly, a performance indicator is intended to measure the extent to which there has been departure from the baseline benchmark in the process of achieving the desired environmental outcome (or target benchmark).
- If the assumptions underpinning my analysis of these key concepts are correct, then the implications for local government and land use planners are significant:
- First there will have to be significant commitment by local government to the collection of data particularly in relation to:
  - the identification of baseline benchmarks; and
  - the identification of comparative benchmarks.

- Secondly, expert advice will be required from environmental science and health professionals in relation to:
  - the identification of baseline and comparative benchmarks;
  - the setting of target or future benchmarks (ie desired environmental outcomes); and
  - the identification of appropriate performance indicators.

Whether land use planners and local governments are up to the challenges presented by IPA is yet to be seen. However, based on the evidence to date the prospects for both local governments and land use planners is not encouraging.

State of the Art Planning Schemes

To date no IPA planning scheme has been adopted by a local government. However, IPA planning schemes have been prepared by Warwick Shire Council, Maroochy Shire Council and Brisbane City Council. These planning schemes are all currently the subject of the statutory public consultation process or soon will be. The most recent of these IPA planning schemes is the Brisbane City Council's City Plan: The desired environmental outcomes and performance indicators for the City Plan are set out in Appendix 3.

Unfortunately, an analysis of each desired environmental outcome and performance indicator for the City Plan is beyond the scope of this paper. That will have to await the outcome of the many court cases that will undoubtedly arise in respect of these provisions.

However, for the purposes of this exercise, I have set out the desired environmental outcome and associated performance indicators in respect of community life, health and safety. This is a typical example of the way in which these matters have been approached in the City Plan.

> "***Community Life, Health And Safety***
>
> ***Desired Environmental Outcome***
>
> *Brisbane is a safe, healthy, interesting, diverse and relaxed place to live. Its communities are relatively self-contained, with local facilities and services and recreational opportunities provided, and each has a clear sense of its distinct identity. The City's people have equitable access to a wide range of services, facilities and activities.*
>
> ***Performance Indicators***
>
> ***Liveability***
>
> - *Community satisfaction with council's planning performance.*
> - *Community satisfaction with planning and development decision making (participation opportunities).*
> - *Integration of non-traditional uses as Multi-purpose centres.*
>
> ***Housing diversity and choice***
>
> *Number, type, density and location of residential development approvals, eg proportion of medium density in emerging communities areas, including densities within 400m of major bus routes and 800m of busways and rail stations, and within walking distance of the city centre and major centres.*
>
> ***Community facilities***
>
> - *Number, location and accessibility of new facilities such as libraries, halls and child care facilities.*
> - *Hectares of parkland dedicated to council.*
> - *Hectares of parkland per head of population.*
> - *Proximity of new residential dwellings to parkland.*
> - *Landscape features/breathing spaces.*
> - *Level of fragmentation of land in Green Space Areas.*
> - *Cultural heritage.*
> - *Number of heritage places listed.*"

The following observations can be made about the desired environmental outcome and performance indicators extracted from the City Plan:

- Firstly, the desired environmental outcome involves multiple objectives rather than just one objective. As a result, the achievement of one objective may mitigate against the achievement of another objective thereby raising the question of whether the desired environmental outcome as a whole is supported or compromised. For example, in relation to the location of retailing facilities, the requirement for a community to be

self-contained may be inconsistent with the requirement for equitable access to those facilities. The latter objective might dictate that retailing services are located within a development whilst the latter objective may require that it be located outside the community in a locality that is more convenient to all residents.

- Secondly, the desired environmental outcome does not set a target or future benchmark. That is it does not set any end state or quantifiable target that is to be achieved by the end of the life of the planning scheme.
- Thirdly, the desired environmental outcome has not been set by reference to any comparative benchmark or indeed baseline benchmark.
- Fourthly, the performance indicators do not provide any basis for assessing the council's progress towards the achievement of the desired environmental outcome. For example, how can the number of heritage places listed be a measure of anything that is specified in the desired environmental outcome.

Legal and policy Implications

In my opinion, the desired environmental outcomes and performance indicators specified in the City Plan are not in accordance with the words or the intent of IPA. I would like to raise a number of matters which support this view.

- First, there is no difference between the desired environmental outcomes that are stated in the City Plan produced under IPA and the statements of objectives that are currently contained in the council's Strategic Plan which was produced under the Local Government (Planning and Environment) Act. For example, the current Strategic Plan states:

  > "*It is intended that development should retain and enhance access to basic services and facilities and the strong sense of community spirit that contribute to the liveability of Brisbane. New communities should be relatively self-contained and capable of developing a strong sense of local identity and community networks. It is desirable that the community has access to a wide range of housing. (s.3.2.3 of the Town Plan)*."

  This should be compared against the desired environmental outcome quoted earlier. The following statement of objective from the Strategic Plan should also be compared:

  > "*It is intended that development will maintain and enhance the unique character and culture of Brisbane, including traditional buildings and the landscape features of the City as with the catering for the diversity of residents and their cultural associations. (s.3.2.40 of the Town Plan).*"

- Secondly, unlike the provisions of the Local Government (Planning and Environment) Act, IPA provides that development which compromises a desired environmental outcome cannot be approved even if there are good planning grounds to justify the development. That is, under IPA the consequences of non-compliance with a desired environmental outcome are fatal for a development application. Despite this the legal test (ie the written words) against which a development must be assessed under IPA is even more rubbery than that which was specified under Strategic Plans and Development Control Plans produced under the Local Government (Planning and Environment) Act.
- Thirdly, at the end of the six year period when the council is required to review its planning scheme, one would have to seriously question whether the council will be in a position to know whether it has achieved the desired environmental outcome or not. It is difficult to see how any assessment of the performance indicators will demonstrate that the desired environmental outcome has been achieved.
- Finally, it cannot be seriously argued that the council could compulsorily acquire land under IPA on the basis that the land is necessary to achieve a "*safe, healthy, interesting, diverse and relaxed place to live*". The power to compulsorily acquire the property of a citizen must be more objectively based than this. If the law were otherwise, a local government could effectively acquire land for any purpose.

For these reasons I do not believe that the desired environmental outcomes and performance indicators set out in the City Plan satisfy the legal requirements of IPA. Also in my opinion they do not represent "*best practice*" planning and will not in my opinion assist in the achievement of IPA's purpose of ecological sustainability.

It should not be interpreted from this analysis that I consider the draft planning schemes for Warwick Shire Council to be any better or worse. In my opinion it suffers from the same criticisms.

It is also significant to note that Brisbane City is the biggest and most well resourced local government in Australia. If this is the best that can be done then one would have to seriously question the future of IPA and those land use planners who have stacked their careers on it.

The future

In closing, the land use planning profession is at a cross roads. Having well and truly tied their horse to the IPA bandwagon the land use planners must deliver the "*efficiencies and quality decisions*" that were professed to come from IPA. If not, then an uncertain future lays before them.

If land use planners are unable to deliver the state-of-the-art planning that is required by IPA than I make the following predictions:

- Firstly, it will be the land use planners and not the environmental planners, environmental health professionals, lawyers and other miscellaneous hanger-ons who will be held accountable for IPA's failings.
- Secondly, with the removal of the statutory monopoly of land use planners over the plan making process, other environmental health and science professionals who are equally committed to the achievement of ecological sustainability will enter the domain of the land use planner. These professionals have the technical skills to measure, plan and implement ecological sustainability. With these skills already in hand it is not such a great step to commence the preparation of a planning scheme that will achieve IPA's purpose.
- Thirdly, land use planners will become marginalised from the plan making process as their role becomes limited to that of a project manager of the integrated development approvals system.

In summary, IPA provides land use planners with the opportunity to secure their professional future. It also provides the seeds for the marginalisation of land use planners from the plan making process. Only time will tell whether land use planners are up to the challenge or whether they are overtaken by environmental planners, scientists and other health professionals. May the force be with them. At least one thing is for certain, they will not be overtaken by planning lawyers.

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APPENDIX 1

EXAMPLES OF PERFORMANCE INDICATIONS AND MEASUREMENTS

CRITERIA USED BY THE OECD

Benchmark	Purpose	Performance Indicator	Measurement of Performance Indicator
1.1 Housing – Indoor Spaces	This benchmark is intended to reflect the level of crowding.	Percentage of dwelling units with less than X persons per room.	Definition: For each dwelling unit, divide the number of persons by the number of rooms. Calculate the percentage of all dwellings where the number of persons per room is less than "X". Population: all residents, including children. Rooms: all rooms in dwelling units, including kitchen over $6m^2$. X: for example 0.5, 1.0, 1.5.
1.2 Housing – Outdoor Space	This benchmark is intended to reflect two concepts. First, the space available to the household outside the dwelling (as a contrast to the crowding inside). Second, the intensity of use of the resident land area.	Percentage of population living in an area with net density of more than X persons per km^2.	Definition: First, define the predominantly residential areas of the city (as opposed to industrial, commercial areas, etc). Then, within each of these residential areas define sub-areas which are bounded by major transportation routes (eg roads, railways, canal) or major physical features (eg rivers). For each sub-area calculate the resident population (P) and the area (A) in km^2. Net density = P/A persons per km^2. Population: all residents, including children.
1.3 Housing – Amenities and Sanitation	This benchmark is intended to reflect the level of provision of facilities which are available to the dwelling occupants within the dwelling and which are part of the dwelling fixtures.	Percentage of dwellings with a private bath or shower.	Definition: Calculate number of dwellings with at least one amenity and express as a percentage of all dwellings. Private bath or shower: should be permanently fixed inside the dwelling unit for the exclusive use of the dwelling occupants.
1.4 Housing – Security of Tenure	This benchmark relates to the advantages and disadvantages of dwelling ownership in contrast to dwelling occupation. It reflects freedom from the threat of eviction, but it is intended to do more than that. It is a housing concern which should also reflect housing choice.	Percentage of owner–occupying households (including owners of long leases).	Definition: Calculate number of dwellings with owner-occupation tenure arrangements and express as a percentage of all dwellings in the urban area. Owner-occupiers: Occupiers of the dwelling unit who possess the freehold interest in the dwelling, including those cases where a mortgage is being paid off either directly or through co-operative arrangement, and also including holders of long leases with ten or more years to run.

Benchmark	Purpose	Performance Indicator	Measurement of Performance Indicator
1.5 Housing – Costs and Access to Housing	This benchmark covers the ease with which households may acquire accommodation. Ideally this would be in both financial and in non-pecuniary terms although the latter are the more difficult to measure.	Percentage of households spending less than X percent of their income on a specified type of housing.	For owner occupiers (including long term leaseholders) the calculation of cost is more difficult to make because of the household's "equity" or wealth locked into the dwelling. The required measure is: Percentage (B) = $\frac{t.p \times 100}{y + (t.P-M)}$ Where: P = Market value of the dwelling y = Gross household income M = Household's annual mortgage repayments after any tax relief t = Mortgage interest rate Then calculate the weighted average of renters' and owner-occupiers' expenditure on housing as a percentage of household income, thus: Weighted average = a.A + b.B for indicator Where: a = proportion of rented dwellings in the urban area. b = proportion of owner occupied dwellings in the urban area (a + b) = 1 X : for example below 20%, 20-30%, over 30%
2.1 Accessibility and Quality of Commercial Services	This benchmark focuses on the physical attributes of commercial services, ie their level of provision for a given population.	Percentage of population with access to food store within "X" metres.	Definition: Food store is a permanent shop which offers the most important groceries (eg milk, bread, butter, eggs, meat, fruit and vegetables). X : for example 400, 800, 1200, 2400 metres
2.2 Accessibility and Quality of Educational Services	This benchmark focuses on the physical attributes of health services (particularly non-emergency services).	Percentage of population with access to a medical doctor within "X" metres.	Definition: for example 800, 1600, 2400 metres.

Benchmark	Purpose	Performance Indicator	Measurement of Performance Indicator
2.3 Accessibility and Quality of Educational Services	This benchmark focuses on the physical attributes of educational services.	Percentage of pupils with access to a primary school within "X" minutes or metres.	Definition: Primary schools include public and private schools. Children are presumed to walk to the nearest school unless they are assigned to "*specific schools*". Time distance should correspond to their actual mode of transport (walk, bus…). The percentage of pupils must be computed out of the number of registered pupils in primary schools. X : for example 15 minutes (on foot or by bus), 800 metres.
2.4 Accessibility and Quality of Recreational Services	This benchmark focuses on the physical attributes of recreational services.	Percentage of population with access to public open space within "X" metres.	Definition: Public open space is defined as an area: ▪ without residential, commercial or industrial use; ▪ accessible to all residents; ▪ with a minimum size of 5000m^2; and ▪ which serves in a broad sense for active and passive recreational purposes. X : for example 800, 1600, 2400 metres.
2.5 Accessibility and Quality of Transport Services	This benchmark is divided into the service and accessibility aspects.	Ratio of the number of persons killed or injured in a road accident to the total population over one year.	Definition: Persons considered in this case are drivers, passengers, motorcyclists, cyclists and pedestrians. Only road accidents reported by the police are taken into account. They may involve both private and public transport vehicles.
		Percentage of population with access to an urban public transport stop within X metres (eg X - 400, 800 metres).	Definition: Identify public transport stops, identify catchment areas of these stops (respectively 400m, 800m), calculate population living in catchment area and its ratio to total urban population.
2.6 Accessibility and Quality of Protective Services	This benchmark focuses on the physical attributes of protective services.	Percentage of dwelling units totally destroyed by fire over one year.	
2.7 Accessibility to and safety of employment	This benchmark focuses on the physical attributes of employment.	Percentage of all employed persons living X minutes from their place of work (using usual mode of transport at usual time).	Definition: Travel time is the average of morning and evening travel times and is door-to-door. X : for example 10, 20 30 minutes

Benchmark	Purpose	Performance Indicator	Measurement of Performance Indicator
2.8 Natural Environment – Air Quality	This benchmark focuses on the exposure of man to air pollution.	Percentage of residential population living in areas with outdoor concentrations: ▪ of sulphur dioxide in excess of 60µg/m^3 (annual average); and/or 2 per cent of the observations being above 200µg/m^3 (24 hourly value); ▪ and/or of particulate matter in excess of 40µg/m^3 (annual average) and/or 2 percent of the observations being above 120µg/m^3 (24 hourly value).	Definition: No standard technique of measurement is here recommended, but the technique used should be indicated. The recommended procedure of calculation is as follows: ▪ choose sampling sites in the urban areas; ▪ identify areas where one of the above levels or both of them are exceeded; ▪ evaluate the residential population living in these areas as a percentage of the total urban population. As far as possible, measurement should be on a continuous basis throughout the year. Where this is not possible, the measurement period should be stated. The levels specified above are for illustrative purposes.
3.2 Water Quality	This benchmark is subdivided in two subconcerns: quality of potable water supply and quality of recreational or amenity water.	Percentage of population concerned multiplied by the number of days when water supplied is below the following standards: ▪ when water contains E.Coli in a 100ml sample; ▪ when water has an objectionable taste or colour. Percentage of area (short length) of recreational waters within urbanised area (or within a zone of diameter twice that of urbanised area) per 1,000 inhabitants where water quality allows: ▪ swimming; ▪ other water sports: fishing, boating; ▪ visual amenity.	Definition: Calculation could be done yearly on the basis of the current samples and with a corrective factor of 365/number of days with sample. Definition: Recreational waters includes natural lakes, rivers, sea and man-made expanses of water such as canals, artificial lakes and some reservoirs where quality of water is not under special control. Disregard small rivers and ponds (eg less than 10 metres average width, less than 2ha in area). Target area: urbanised area and its environs, the latter being a zone drawn around the basic target area of width equivalent to the average "*radius*" of the basic target area. "*Allows*" assumes criteria which might be taken as the WHO standards for recreational water, or as a proxy transparency (measured by Secchi disc), 1m and 2m deep.
3.3 Natural Environment – Exposure to Noise	This benchmark is subdivided in two sub-concerns: effect on daytime activities and effect on night time activities.	Percentage of residential population in areas with levels of outdoor noise expressed in terms of Leq (i) in excess of (I) 75 dBA, (ii) 65 dBA (iii) 55 dBA and (iv) 45 dBA over the period 6-22h.	The recommended procedure is as follows: ▪ identify, on the basis of existing information and particularly noise maps, the areas and dwellings where the above levels are exceeded; ▪ evaluate the residential population living in these areas and dwellings as a percentage

Benchmark	Purpose	Performance Indicator	Measurement of Performance Indicator
			of the total urban population. The sample characteristics (over space and time) should be provided. A sample of weekdays is recommended. Mention should be made whether the Leq was measured directly or computed using appropriate models. The levels specified above are for illustrative purposes.
		Percentage of residential population in areas with levels of outdoor noise expressed in terms of L eq in excess of: ▪ 55 dBA, ▪ 45 dBA, and ▪ 35 dBA over the period 22-6h.	Definition: Same as for indicator above. Information available for L1 (noise level attained during 1 per cent of the time). The levels specified above are for illustrative purposes.
3.5 Natural Environment – Exposure to Natural Hazards	This benchmark focuses upon the consequences of such phenomena rather than the phenomena themselves.	Annual average percentage of dwellings made permanently uninhabitable due to natural disasters such as landslides, subsidence, floods, high wind, or earthquakes during the past 50 years.	The annual average percentage of dwellings is the sum of the annual percentage of dwellings for each of the past 50 years divided by 50.
3.6 Weather conditions	This concern influences human perception of the quality of life, and covers temperature, precipitations and sunshine.	Number of heating degree days (and cooling days) per year. Average monthly amount of precipitation: ▪ for six summer months; ▪ for six winter months, over a five year period. Average number of hours of sunshine: ▪ over six summer months; ▪ over six winter months, over a five year period.	Sum over a year of the daily positive (and negative) differences between a specific temperature level (such as 18° C) and the mean daily temperatures above (and below) the reference level.
3.7 Natural Environment – Land Quality	This concern relates to the aesthetic quality of urban land.	Percentage of urban area vacant or abandoned.	Definition: "*Vacant land*" is land allocated for development or redevelopment. "*Abandoned land*" is land which has been developed, but which is no longer being used.

APPENDIX 2

INDICATIVE PERFORMANCE INDICATIONS

FOR AN URBAN LOCAL GOVERNMENT

Performance Indicators	Type	Measurement of Performance Indicator
1. Leisure Qualities	Social	Playgrounds, sportsgrounds, bathing establishments/resident (m^2) Parks, grounds/resident (m^2) Vegetated areas/resident (m^2) in x minute zone Cinemas and places of amusement/resident (m^2) Restaurants, hotels, boarding houses/resident (m^2)
2. Housing Qualities	Social	Gross floor areas for housing/resident (m^2) Households with more/less rooms than people (%) Empty dwelling units/all dwelling units (%) Dwelling units with A/c or heating / all dwelling units (%) Average noise level (dBA) Average air pollution (SOT content ppm) Average rent level/household income (%) Price index ratio for dwelling units in the planning area/adjoining areas (%)
3. Educational Qualities	Social	Preschools and kindergarten spaces/children under preschool age (%) Children/kindergarten Primary school children/class Secondary school children/class University students/class Theatre and civic centre space/resident (m^2) Museum and libraries space/resident (m^2)
4. Sensational Qualities	Social	Density of gross floor areas Density of population Old - Age coefficient Proportion of immigrants (%)
5. Consumer Qualities	Social	Short term sales space/resident (m^2) Long term sales space/resident (m^2) CPI for planning scheme area/CPI for Qld Other services space/resident (m^2) Shopping areas free of private traffic/total shopping areas (%) Time free of overlap between shopping and work (h)
6. Qualities of Employment	Social	Personal income/resident/Qld residents Tax rate of the planning scheme area/Tax rate for other Qld local governments Density of employment

Performance Indicators	Type	Measurement of Performance Indicator
7. Health Qualities	Social	Medical consulting space/resident (m^2) Hospital space/resident (m^2) Welfare space/resident(m^2)
8. Traffic Qualities	Economic	Proportion of housing space accessible by public transport in X min (%) Proportion of housing space accessible by private transport in X min (%) Proportion of sales space accessible by public transport in X min (%) Proportion of sales space accessible by private transport in X min (%) Proportion of office space accessible by public transport in X min (%) Proportion of office space accessible by private transport in X min (%) Proportion of product space accessible by public transport in X min (%) Proportion of production space accessible by private transport in X min (%) Price ratio of public transport to private transport
9. Space Market Qualities	Economic	Tertiary space/employees (m^2) Secondary space/employees (m^2) Empty tertiary space/total space (%) Empty secondary space/total space (%) Index rents for business specific for planning scheme area/surrounding local governments
10. Context Qualities	Economic	Telephones/resident Number of faxes/resident Number of computers/resident
11. Resources Extracted, Harvested and Renewed	Economic	Volume of actual harvest/fish/catches Proportion of feed stock from sustainable sources Size of spawning stocks Expenditures for renewal of resources (reforestation, fish stock monitoring)
12. Pollution Prevention	Economic	Expenditure on improved technologies Number of facilities converted to new technologies Percentage of recycled materials used in operations Level of employee training to handle hazardous substances
13. Solid Waste Management	Economic	Total volume of solid waste Percentage waste classified by method of disposal (incineration, land fill, reuse, recycle) Total waste handling costs
14. Hazardous Waste Management	Economic	Volume of hazardous waste generated Toxicity and persistence rating of wastes Reduction in the volume of hazardous substances used in operations total waste handling cost

Performance Indicators	Type	Measurement of Performance Indicator
15. Energy Conservation	Economic	Energy efficiency index (industry/resident benchmarks, per unit of production) Emissions of CO2/SO2 related to energy consumption Total energy used Expenditures on energy efficiency, alternative energies
16. Environmental Monitoring	Economic	Number of audits performed and coverage of facilities (by type of audit)
17. Environmentally Responsible Products/ Services	Economic	Percentage of product content that is recyclable Volume of recycled material used in products/packaging
18. Protecting Habitat and Wildlife	Environment	Numbers of wildlife habitats/migration disturbed or plants damaged within the planning scheme area. Percentage of habitats in planning scheme area
19. Land Disturbed and Restored	Environment	Erosion risk factor Degree of top soil losses Area of land lost to production Restored/reclaimed area/total land distributed (%)
20. Air Pollution	Environment	Volume of emissions of pollutants eg: ▪ Greenhouse gases – CO2 CH4 N20; ▪ Acidification – SOx, N; ▪ Consumption of ozone depleting substances – CFC, halons; ▪ Particulate.
21. Water Pollution	Environment	Volume of discharges: ▪ Nitrogen; ▪ Phosphate; ▪ Heavy metals; ▪ Organic compounds. BOD/COD/TSS of discharges in water Weighted index of effluents (eg toxicity and persistence rating of pollutants) Concentration of heavy metals and organic compounds in environmental media and living species Total water treatment costs

APPENDIX 3

ENVIRONMENTAL OUTCOMES AND PERFORMANCE INDICATIONS

OF THE BRISBANE CITY COUNCIL CITY PLAN

Community life, health and safety

Desired environmental outcome

Brisbane is a safe, healthy, interesting, diverse and relaxed place to live. Its communities are relatively self-contained, with local facilities and services and recreational opportunities provided, and each has a clear sense of its distinct identity. The City's people have equitable access to a wide range of services, facilities and activities.

Performance indicators

Liveability

- Community satisfaction with council's planning performance.
- Community satisfaction with planning and development decision making (participation opportunities).
- Integration of non-traditional uses as Multi-purpose centres.

Housing diversity and choice

Number, type, density and location of residential development approvals, eg proportion of medium density in emerging communities areas, including densities within 400m of major bus routes and 800m of busways and rail stations, and within walking distance of the City Centre and major centres.

Community facilities

- Number, location and accessibility of new facilities such as libraries, halls and child care facilities.
- Hectares of parkland dedicated to council.
- Hectares of parkland per head of population.
- Proximity of new residential dwellings to parkland.

Landscape features/breathing spaces

- Level of fragmentation of land in Green Space Areas.

Cultural heritage

- Number of heritage places listed.

Land use and built environment

Desired environmental outcome

Brisbane's land use pattern and built environment promote its unique character and encourage a sustainable network of Residential Areas, Centres, employment and transport links.

Performance indicators

Character dwelling protection

The rate of character dwelling removal, including:

- Number removed by locality.
- Number of refusals for removal.
- Number of successful appeals that uphold policy.

Centres and employment

- The proportion of commercial approvals in-Centre compared with out-of-Centre (see also performance indicators for Economic development).

Access and mobility

Desired environmental outcome

Brisbane has a sustainable transport system that promotes a more compact and efficient urban structure and accommodates commercial and industrial traffic effectively. It enables residents, visitors and people doing business to travel safely, economically, equitably, comfortably and conveniently while minimising impacts on the environment through less reliance on private vehicles.

Performance indicators

Containment of sprawl

- Dwelling starts/completions by density and area.
- Rate of change of developed land compared with population growth.

Public transport accessibility

- Proportion of people living within 400m of a stop on a major bus route or 800m of a busway or rail station.

Road hierarchy

- Number of access points onto major routes.

Natural environment and waterways

Desired environmental outcome

The City's environmental quality and natural assets are protected so that they contribute effectively to ecological sustainability and biodiversity.

Performance indicators

Bushland and wetland protection

- Proportion of wetland protected in accordance with the Wetland Code.
- Rate of clearing and reforestation in the Environmental Protection Area and public Green Space Areas.

Air quality

- Pressures on air quality composite index.
- Annual median highset 1 hour ozone concentrations for all ozone conducive days.
- Number of air pollutants complaints to Brisbane City Council.

Waterway protection

- Proportion of waterways protected in accordance with the Waterway Code.

Waterway quality

- Measurement of improvement of water quality against water quality objectives for the Brisbane River and Moreton Bay.

River front access

- Kilometres of River front access/pedestrian ways.

Economic development

Desired environmental outcome

A vibrant, dynamic and sustainable economic base consolidates and promotes the City's central role in South East Queensland the State and the Asia Pacific Region.

Performance indicators

Business and industry growth

- Number of businesses and number of new businesses established per annum, categorised by:
  - industry;
  - turnover;
  - value added (latest year).
- Expansion and diversification of existing businesses.

- Number/proportion of approved business/industries using principles of best practice environmental management.

Employment growth

- The number of jobs categorised by full time/part time, occupation, age and industry in:
  - the entire City;
  - the City Centre;
  - inner ring;
  - outer ring;
  - other specified major centres.

Infrastructure

Desired environmental outcome

Transport, power, water, wastewater treatment and stormwater management infrastructure are provided equitably, within the community's resources.

Performance indicators

Expenditure

- Spending across all infrastructure on per capita basis in different areas.
- State contribution to infrastructure per capita.

Contributions

- Water and sewerage infrastructure provision.
- Expenditure annually on new infrastructure and cost per person of this provision.
- Timely delivery of benchmark development sequence plans and infrastructure charges plans.

This paper was presented at the Queensland Environmental Law Association conference, May 1999.

Review of recent developments in planning and environment law in Australia and internationally

Ian Wright

This article discusses the recent changes to planning and environment law in Australia and internationally. The article particularly considers changes to Western Australian planning policies, Native Title, Canadian planning and environment observations along with Queensland and New South Wales legislative and policy updates

June 1999

Farm Forestry Policy

The Western Australian Planning Commission has released a draft Farm Forestry Policy. The policy outlines key planning issues associated with farm forestry and specifies provisions that can be included in planning schemes for dealing with farm forestry proposals. The policy is intended to apply throughout Western Australia and has as its objectives the facilitation of a more consistent planning process for farm forestry and the establishment, management and harvesting of plantations consistent with the "*Code of Practice for Timber Plantations in Western Australia (1997)*". The policy sets out the following recommendations in relation to planning schemes:

- Local planning schemes should provide for plantations and agroforestry as a permitted use in the rural, general fanning or similar zones so that the use does not require planning approval.
- In other rural zones plantations and agroforestry may be listed as discretionary uses and, in certain circumstances, may be listed as not permitted in zones where it can be demonstrated that farm forestry would be contrary to the purpose and intent of the zone (for example, in prime horticultural areas).
- Local planning schemes should provide for plantations or agroforestry as permitted development where the development:
  - complies with the Code of Practice for Timber Plantations Western Australia (1997);
  - complies with the Guidelines for Plantation Fire Protection (1998); and
  - complies with any district road transport strategy or fire management strategy.
- Planning schemes should be amended to provide that where planning approval is required, the responsible authority should before determining any application to use or develop the land for farm forestry, consider as appropriate:
  - the provisions of the Code of Practice for Timber Plantations in Western Australia (1997);
  - the need to encourage farm forestry in locations where it is significant to the State, regional or local economies;
  - the benefits of farm forestry in addressing land degradation including soil erosion and salinity;
  - the role of farm forestry in protecting water quality and preventing adverse effects on ground water recharge;
  - the impact on the natural environment and on visual amenity;
  - the compatibility of farm forestry with adjacent land uses; and
  - the objectives of the zone.

Native Title extended to Australian oceans

The Federal Court has ruled that Native Title can exist over Australia's seas, paving the way for more than 100 claims by coastal and island Aboriginal communities. The judgment however conflicts with the Native Title Amendment Act which denies indigenous people the right to negotiate the grant of future commercial fishing licences. The case involved Australia's first Native Title claim over areas of sea involving some 10 main islands off Darwin owned by several hundred indigenous people. Justice Howard Olney ruled that Native Title rights could exist over areas of sea in the sea bed but that those rights did not override the interests of other parties. The Judge stated that Aborigines who proved Native Title rights over the sea could fish and hunt for non-commercial purposes and visit places of cultural and heritage importance. However, those rights do not allow Aborigines exclusive use of the water. The case means Aborigines have the right to their traditional use of the seas without permits. However, they cannot stop others from carrying out fishing or commercial activities.

Some observations from Canada

In a recent article in the Canadian Environmental Law Association, Theresa McClenaghan makes some interesting observations about recent land use planning trends and their impacts in Canada. In the article, she identifies 10 recent trends in land use planning. It is important to note that the same observations could be made about Queensland.

1 More decisions than ever are being moved to municipalities (ie local governments) from the provincial level of government (ie State governments). In the article, the author points out that examples of this trend include official plan approvals, subdivisional approvals, septic system approvals and contaminated land redevelopment. It is pointed that this trend has the benefit of local decision making. On the other hand, a disadvantage of this approach is that many decisions are being made only at the local level with no party particularly looking for the big picture. It is also observed that many local decision makers are not prepared for their new responsibilities and that there is an immediate need for more resources and training at the local level. This sounds very familiar.

2 Almost all land use laws and regulations have undergone significant changes in the last 2 – 4 years.

The author quotes various changes to Canadian Planning Statutes and Canadian Environmental Statutes. The author quotes some 25 – 30 pieces of legislation that have been amended in the last 2 – 4 years in Canada. The author makes the observation but the ground rules have shifted significantly and very quickly thereby making accurate prediction of outcomes of particular applications and disputes very difficult. Interestingly, the author also states that even predicting the criteria that will be used in particular decisions, is very problematical. No doubt most lawyers and statutory planners would agree with this observation.

3 Local decision making and local participation is more critical than ever to environmental protection.

In relation to this point, the author notes that there is increased industry based decision making (such as decisions involving contaminated lands). The author also notes that the timeframes for making decisions are increasingly short and there are significant notice issues and procedural uncertainties.

4 Many opportunities for citizen input are being eroded.

In relation to this matter the author notes that there has been a trend in recent times towards process matters. In particular, who decides something and based on what, are the critical issues. The author therefore notes that decision makers particularly at the local level must be pressed for good process and local residents must take advantage of the available processes.

5 Many decisions that appear simply financial or structural have important environmental impacts.

In this respect, the author refers to various changes to infrastructure planning legislation and local government statutes which have placed constraints on local governments to fund infrastructure. The author notes that changes in these statutes have significant implications for the environment.

6 The roles of provincial (ie State) and Federal agencies involved in the role of protection are being drastically altered.

In this respect the author refers to the Harmonisation Accord on the Environment (and its sub-agreements) signed in January 1998 which alters the traditional role the Federal government played in protecting the environment. This agreement is similar to the inter-governmental agreement on the environment signed in the early 1990s by governments of all levels together with the recently passed Federal Environment Legislation. The author notes that in Canada the governments are often withdrawing from regulatory oversight and that many roles are being given over to industry or to industry associations. Furthermore, the author notes that many public resources are being turned into commodities, such that governments are now more often concerned about their liability than about what is the right decision from a public protection perspective. Undoubtedly these comments would also sound familiar to Queensland planners.

7 There is a very significant link between land use and health that is often overlooked in planning decisions.

In this regard, the author refers to decisions in respect of roads and their impact on air quality and the impact on water quality as a result of land use decisions. The author points out that land use affects the physical health, psychological, social health and cultural health of communities and notes that the impacts of land use planning trends on the human wellbeing has often been underestimated. This is a critical point that must be addressed by human land use planners in the production of relevant planning schemes.

8 It is becoming apparent that infrastructure decisions are critical to the future shape of the landscape and of the quality of life.

In this regard the author refers to critical decisions including the loss of use of ground water, the location of roads, the location of sewer easements and the placement of bore water pipelines. The author notes that these infrastructure decisions are often completely divorced from the question of the shape of all future communities and as such are made often piecemeal and incrementally. As such, unconstrained road building and construction of water pipelines remove some of the environmental constraints that previously kept development out of important natural heritage function areas.

9 Many agencies and organisations are attempting to move decisions to the "*front end*" of the planning process.

The author notes that there is a such a thing called "*good front end planning*" which looks at impacts before making a decision, which incorporates environmental concerns on an eco-system basis and which plans to a goal or a vision. On the other hand, the author also notes that terrible front end planning involves land use decisions without a context, the removal of public notice and appeal provisions, or the altering of ground rules with public involvement.

10 Planning decisions have a very long life. Communities must think about what they want to look like in 20 or 50 years. The decisions we make today will shape the landscape for our children and grandchildren.

Statement of Planning Policy No. 8 – State Planning Framework Policy

In 1997 the Western Australian Planning Commission adopted the planning strategy which sets out the key principles relating to environment, community, economy, infrastructure and regional development and which is intended to guide the way in which future planning decisions are made in Western Australia.

To support the State Planning Strategy, a Statement of Planning Policy – State Planning Framework Policy has been introduced to bring together existing State and Regional Policies and Plans which apply to land use and development in Western Australia. The State Planning Framework Policy unites existing State and Regional Policy Strategies and Guidelines within a central framework which provides a context for decision making and land use in Western Australia.

The Statement of Planning Policy made under Section 5AA of the Town Planning and Development Act was endorsed by the Minister for Planning in December 1998. The policy is to be applied by the Western Australian Planning Commissioner in determining planning matters throughout the State. Local governments and the Town Planning Appeal Tribunal are also required to have due regard to the Statement in preparing town planning schemes and amendments and determining appeal decisions respectfully.

Integrated catchment management

The Department of Natural Resources has produced four reports in relation to planning for integrated catchment management. The reports summarise the key findings of Stage 1 of the National Heritage Trust Project which provides for the incorporation of integrated catchment management into local government planning schemes. The Stage 1 Evaluation Report identifies the lessons and recommendations from Stage 1 and is intended to be incorporated into the documentation for Stages 2 and 3.

Stage 2 is the preparation of good practice planning guidelines which are intended to be published by the Department of Communication and Information, Local Government Planning, in September 1999. Stage 3 involves the undertaking of a training education package which is to be undertaken in November 1999.

Review of State planning policies

The State government is undertaking a review of a number of existing State planning policies as well as commencing the production of new State planning policies. The existing State Planning Policy for the Development and Conservation of Agricultural Land and the Guidelines for the Identification of Good Quality Agricultural Land are being reviewed. The State Planning Policy for Planning for Aerodromes and other Aeronautical Facilities is also being reviewed. A number of other new State planning policies are also being considered. These include:

- a State Planning Policy for intensive animal industries;
- a State Planning Policy for acid sulfate soils – this will require local government to put in place measures to ensure that acid sulfate soils are considered in the development of new planning schemes and in the assessment of development applications – this is expected to be released in 1999; and
- a State Planning Policy for natural disaster mitigation – this will require councils to take account of the need to incorporate measures to mitigate the impact of natural disasters when developing planning schemes and when assessing development applications.

Water reform

In accordance with the Council of Australian Governments (**COAG**) reform agenda, the Queensland State government has been implementing a water management planning system across the State. The water management planning regime has involved the preparation of Water Allocation and Management Plans (**WAMP**) and Water Management Plans (**WMP**).

WAMPs are being prepared for all key river basins. It is intended that these WAMPs will specify the flows necessary to maintain the health of river and ground water systems and determine water resources that can be allocated for existing and future consumption. It is also anticipated they will form the basis for the specification of defined entitlements which may be transferable within river basins. It is anticipated that new legislation will have to

be drafted in order to implement WAMPs and also to provide for the granting of entitlements and the transfer of water entitlements. The legislation will also have to make provision for the regulation of the construction of works such as pump stations, dams and weirs to ensure that they are consistent with the WAMPs.

It is also intended that WMPs will be produced in other river basins of catchments where it may become necessary to limit the extent to which additional licensing occurs. It is intended that WMPs will not specify entitlements as explicitly as WAMPs. Therefore there will be limited scope for transfers of entitlements. It is also anticipated that licences granted will continue to attach to the land rather than land owners. It is anticipated that no new legislation will be required to implement WMPs as these are currently provided for under the Water Resources Act.

As indicated above, the Water Resources Act currently does not provide sufficient machinery for the determination of water entitlements and the same transfer of such entitlements. Indeed the current Act only provides for a system of water licences that is issued in respect of water from unregulated and regulated water courses and ground water sources. Accordingly it is intended that new legislation will be introduced to allow for the allocation of water entitlements based on WAMPs. It is anticipated that WAMPs will define resource management conditions for the use of storage works or works to enhance underground supplies. Once a plan for a regulated area is approved the operator will be granted a resource operating licence. This licence will define conditions for the use of water supply works from a resource management perspective, including the maximum water allocations for the works and the management arrangements to share the resource amongst holders of water allocations from the storage. In relation to unregulated areas, resource operations plans will be prepared which will manage flow events and the rate at which water can be diverted and bore extraction requirements. It is intended that existing entitlements within regulated and unregulated areas will not translate until a resource operating licence for regulated areas and resource operation plans in respect of unregulated areas has taken effect. Once translated these entitlements would then be transferable.

It is intended that the legislation will also provide for a water entitlement to deal with the requirements of a water user, that is, the taking of supply and the use of the water. Accordingly, a water entitlement will have two parts:

- a diversion approval to take water from unregulated sources which would by example state the off take rate and the pumping thresholds; and
- a water allocation which would be expressed as a volumetric share of the water resource such as a maximum volume.

It is intended that approval for works required by users such as the construction of weirs or pumps would be approved by the Department of Natural Resources through the IDAS process under the Integrated Planning Act. It is anticipated that as conditions of these development approvals a land and water management plan may have to be prepared to address the use of water on a particular property.

Planning and Environment Court Rules

On 1 July 1999, new Planning and Environment Court Rules and Forms commenced operation. Whilst generally in accordance with the existing procedures the rules do provide for some significant changes.

- An applicant who has commenced proceedings for a declaration will be required to name as respondents those persons who will be directly affected by the relief sought. This is a change from the current practice where either only local governments are named as a respondent or alternatively disputes between land owners are commenced without the relevant local government being named as a respondent.
- The rules provide for the provision of email addresses as part of the contact details for appellants or applicants. As a result of this notification the service of court documents may be effected by email as is provided for under the new Uniform Civil Procedure Rules.
- An entry of appearance is required to be filed within 10 days of the service of an originating process. Accordingly parties such as local governments which are named as a respondent or co-respondent in proceedings, whether they be applications or notices of appeal will be required to serve an entry of appearance within 10 days of the service of those documents if they intend to be heard in respect of the appeal. Any party which has filed an entry of appearance may file and serve a notice of preliminary steps which specifies procedural matters such as the notification of issues, discovery and the conduct of without prejudice conferences between experts. Provision is also made for the filing and serving of a notice of agreement if agreement is reached in relation to an issue. Provision is also made for the filing and service of a notice of unresolved issues.
- Apart from the filing of notices of preliminary steps, notices of agreement and notices of unresolved issues, the court still has the power to make directions for the conduct of the matter following the filing of an entry of appeal.

Review of Planning Schemes

The May and June editions of Zoning News of the American Planning Association contains a two part article entitled "*So You Gonna Revise the Zoning Ordinance?".* The article sets out a number of interesting check lists in relation to review of planning schemes. It is suggested that the zoning revision process follow a basic five step process:

- put someone in charge;
- identify what is wrong with the ordinance;
- agree upon the scope of necessary changes;
- redraft the ordinance; and
- review and adopt the ordinance.

Who is in charge?

In determining who should be put in charge of an ordinance review the following factors are to be considered:

- the zoning revision is essentially a policy process and the group charged with the revision should have a policy orientation;
- a revision cuts across many areas of expertise including law, planning, architecture and urban design, real estate and construction amounting to more than just an adjustment of regulatory provisions; and
- a revision will involve various constituencies with different issues and concerns and as a result the group should be skilled and comfortable.

It is also pointed out that the assignment of staff to the revision group is critical in that the process is too demanding and too important to be assigned to an individual who is overloaded with other duties.

What is wrong with the present ordinance?

It is noted that in order to fix a zoning ordinance it is necessary to agree on what is broken. Accordingly, it is important that a careful and complete listing of problems and issues is undertaken and that this list is best developed through a program of community input that reaches out to key members of the zoning constituencies including staff of the local council, the real estate community, sales construction design and finance sectors and the community including representatives of community based organisations.

It is also pointed out that three key analyses should be performed in order to complement the issues addressed by the various constituencies. These include a review of the relationship of the zoning ordinance to the overall planning scheme provisions, a technical review of the structure and consistency of the zoning ordinance in light of current best practices and an analysis of zoning change actions over the past five years to gain a sense of key problems. It is also suggested the following issues should be addressed or investigated:

- *The utility of the current ordinance organisation* – Does the ordinance clearly specify who is responsible for various application reviews and approvals? Is that responsibility assigned to the most appropriate person or position?
- *The relationship of individual areas to the overall structure of the plan* – Do the purpose and standards of each zoning district relate to applicable policies of the whole planning scheme?
- *The adequacy of the current administrative structure* – Can applicants easily identify who to see or what to apply for when they have a zoning problem or need? Do the reviews and approvals happen in a timely manner?
- *The utility of current development standards* – Are current parking, landscape, environment or similar requirements easily applied and do they have the desired results?
- *The currency and/or lack of definitions* – Are terms defined in a contemporary manner and are all major terms used in the ordinance clearly defined?
- *The scope of ordinance interpretation* – Does the ordinance clearly specify district requirements in the related approval process or do applicants often depend on staff interpretation of such requirements?
- *The relationship of zoning bulk standards to the development being constructed* – Do the height and yard regulations encourage or discourage a desired type of development? Does it result in buildings of desirable scale and design?

What changes are necessary?

It is suggested that the scope of new changes be thought of as a proposed zoning policy. The document makes the important point that comprehensive planning or structure planning is often thought of as a policy exercise whilst zoning is often viewed as a regulatory exercise. However the point is well made that there is much or more policy development inherent in the zoning process as within the overall structure planning process. The document also points out that zoning is not a general regulatory measure but a highly specific approach towards addressing details such as the placement of buildings, specifying the type of land uses that can be located on specific sites and addressing a myriad of small but significant requirements for parking spaces, sign location and design and tolerable noise vibration and dust levels throughout site users. The guidelines and policies required to provide such direction are extensive and their development is very demanding.

Drafting the Ordinance

The article explores various current approaches and techniques for drafting of ordinances. In particular, it provides guidance in relation to the drafting of administrative provisions, district structures, development standards and definitions. The comments in relation to administrative provisions are of limited application in Queensland because of the provisions of IPA. However some interesting comments are made about district structure, development standards and definitions.

In relation to district structure, it is pointed out that typical zoning district sections contain a purpose statement, use regulations, bulk regulations and site development standards. In relation to purpose statements, it is pointed out that the purpose statement should set forth the intent of the district, the objectives to be achieved by the district and its linkage to the comprehensive structure planning. The purpose statement is intended to be a key tool in establishing the link between the comprehensive structure plan and the zoning ordinance and as such is important in turning the zoning ordinance into an implementation mechanism for the plan. This is particularly important when the zoning is challenged as part of a development application as it can be used to show that the district is arranged in a fashion that carries out the intent of the comprehensive structure plan.

In relation to use regulations the article points out that the traditional form of zoning control provides for a specified list of land uses to be allowed in particular zoning districts. It also points out however that some performance zoning approaches have been adopted to bypass land uses as a surrogate and establish district controls permitting any use if adhering to certain performance characteristics. However it is noted that such ordinances have met with some disfavour as a result of community difficulty in understanding the kinds of uses that might be located in a particular area, the complexity of applying such procedures, and a lack of predictability regarding possible development patterns.

It is pointed out that current trends in use regulation include conditioning the character and location attributes of uses by establishing more permitted uses and standards and focussing the conditional use process on those uses that tend to create the greatest land use friction in the community. The departure from the extensive listing of uses in favour of more general terms that are precisely defined in a performance manner has also resulted from the significant array of new commercial activities that are occurring, the mixing of uses and the wide variety of building types. It is also pointed out that the mixed use phenomena is growing and that this may be culminated either through the district use list or through a broadening of accessory uses where the use is considered to be accessory to a principle building.

In relation to bulk controls it is pointed out that contemporary trends include the use of sliding scale height standards where maximum height is held back at a considerable distance from the front building line to prevent over building. Another trend is the adoption of "*build to lines*" which help to establish design character. This technique differs from setbacks by establishing a line that buildings must adhere to rather than be set back from. The purpose of "build to lines" is to encourage the development of a unified street wall that brings buildings closer to the street. In relation to development standards some interesting observations are made about parking and loading, landscaping and sign control provisions.

Town planning consultants be aware

In *Urban Regeneration Agency and English Partnerships (Medway) Ltd v Mott McDonald* (High Court Case) 1996 NJ 736 October 1998, the United Kingdom High Court has held an engineering consultancy liable to an amount of $45 million for negligence in respect of professional advice provided in respect of the clean up of the former royal dockyards site in Chatham, London. It was claimed in the case by the plaintiff, the Urban Regeneration Agency (**URA**), that the consultants failed to provide proper estimates of the contamination and clean up costs at the beginning of the project. During the remediation process it was found that the amount of contaminated material had been underestimated by more than 700,000m^3 and that this had imposed considerable cost overruns on the project such that the URA argued that it would never have started the project if it had known the eventual costs. It is apparent that the URA, its engineering consultants and occupiers and future occupiers of the land and their financiers had very different perceptions of what contamination and clean up suitable for residential end use actually meant. The URA considered any contamination which was either harmful or perceived to be harmful by a potential purchaser or financier to be unacceptable. The engineering consultants on the other hand adopted a more scientific approach arguing it was only necessary to remove contaminated material which was considered to pose a danger to the public health or the environment regardless of public perception. The High Court found that the engineering consultants had failed to exercise reasonable care at various stages of the project. Delivering the judgment the court made the following observations:

- consultancy teams must have the proper expertise – in this case the court found that the consultancy team had been set a task which was beyond their collective or individual expertise;
- good communication between the client and consultant was critical throughout the project;
- there is a continual need throughout the project to clarify the basis of professional judgment and scientific advice and to make explicit the assumptions made; and
- to ensure during contract negotiation that standards are agreed on the definition of clean or level of acceptable contamination and that the methods to be used to derive those standards (such as human health risk assessment) are agreed.

Acid sulfate mapping

The Department of Natural Resources, the Natural Heritage Trust and various local governments have completed a three year mapping program identifying soils in South East Queensland where acid sulfate soils could cause environmental problems if they were disturbed by excavation or development. The map has revealed that there are 60,000 hectares of acid sulfate soils between the New South Wales border and Noosa and that of these already 15,000 hectares has been developed upon for urban purposes and sugar cane is grown on some 9,000 hectares.

Plan making in New South Wales

The New South Wales Department of Urban Affairs and Planning has released a discussion paper on plan making in New South Wales. The New South Wales *Environmental Planning and Assessment Act 1997* (**EPA Act**) provides for the making of State Environmental Planning Policies (**SEPPs**), Regional Environmental Plans (**REPs**), Local Environmental Plans (**LEPs**), Development Control Plans (**DCPs**) and Section 94 Contribution Plans. These plans are often preceded by a regional or local environmental study or strategy. As well as these formal instruments the Minister for Urban Affairs and Planning makes directions and determinations under the Act to formally guide local governments on the format, structure and subject matter of LEPs.

Plan making under the EPA Act has traditionally had an urban or built environment bias and has largely been concerned with the allocation and regulation of land use. As a result there are a growing number of plans and strategies being prepared outside the EPA Act especially in the area of natural resource management. The links between these plans and the EPA Act are often unclear to the detriment of their effect and implementation. A number of weaknesses and limitations have been identified in the existing plan making system:

- the complexity of the system;
- a perceived weakness in the setting of State direction and strategic regional planning;
- the static, inflexible nature of plans and their limited guidance on how to manage change or better manage existing uses; and
- the general low level of public input in the early stages of developing a plan.

The discussion paper sets out three possible planning framework models for reform.

Example 1 – Minimal legislative change

This reform achieves the most from the current system through a combination of operational changes and minor amendments to the EPA Act. Changes under this model would include:

- preparing formal agreements between agencies and local governments to improve the integration of State and local policies;
- consolidating the number of plans at each level (state, regional and local) so that there is only one plan at each level applying to land;
- using guidelines and model local plans;
- delegating the making of some plans to local councils to speed up the process;
- compulsory periodic review of plans to keep them up to date;
- supplementing consultation requirements in the EPA Act by preparing council consultation plans;
- allowing a review of rezoning decisions by an independent enquiry; and
- introducing standard zones and retaining prohibitive development in reservations and environment protection zones only.

Example 2 – State and local partnerships

This model promotes co-ordination between and within State and local government through the use of multidisciplinary project teams at the State and regional level. Changes under this model would include:

- using project teams comprising State and local government to develop State and regional policy directions;
- significantly reducing the number of plans and strategies especially at the State and regional level through the focussed efforts of project teams;
- inserting a common set of planning and resource management objectives into the EPA Act and related legislation to create better linkages between land use and resource policy;
- eliminating spot rezonings by replacing prohibited development with non-conforming development and a merits based assessment system; and
- requiring public hearings for comprehensive plans to increase opportunities for participation.

Example 3 – Regional solution

This model achieves the highest level of coordination through new integrated planning and resource management legislation. The establishment of regional planning units under the direction of regional ministers would support this legislative integration. Changes under this model would include:

- introducing new integrated planning and resource management legislation that combines plan making and licensing and other approvals in the one piece of legislation;
- improving outcomes for an area by facilitating a system of regional place management, reforming the current sectoral nature of government and establishing regional ministers;
- using a single plan at the regional and local levels to make the rules easier to find;
- eliminating the need for plans and strategies to be prepared outside the new planning system;
- allowing councils to make all local plans subject to consistency with the regional plan to speed up local plan making;
- facilitating community driven local plans so people have greater opportunity to participate;
- replacing traditional zoning with locality character statements allowing the merit assessment of proposals;
- introducing compulsory public hearings on draft local plans; and
- having plans lapse after five years.

Preparation of IPA Planning Schemes: The challenge

Ian Wright

This article discusses the challenges local governments face when preparing a planning scheme with reference to IPA

July 1999

The environment of Beaudesert Shire

Built Environment	That part of the natural environment in which people live and work.
Economic Environment	The manner in which the natural environment is utilised to allow people to live and work.
Social Environment	The manner in which people live and work.

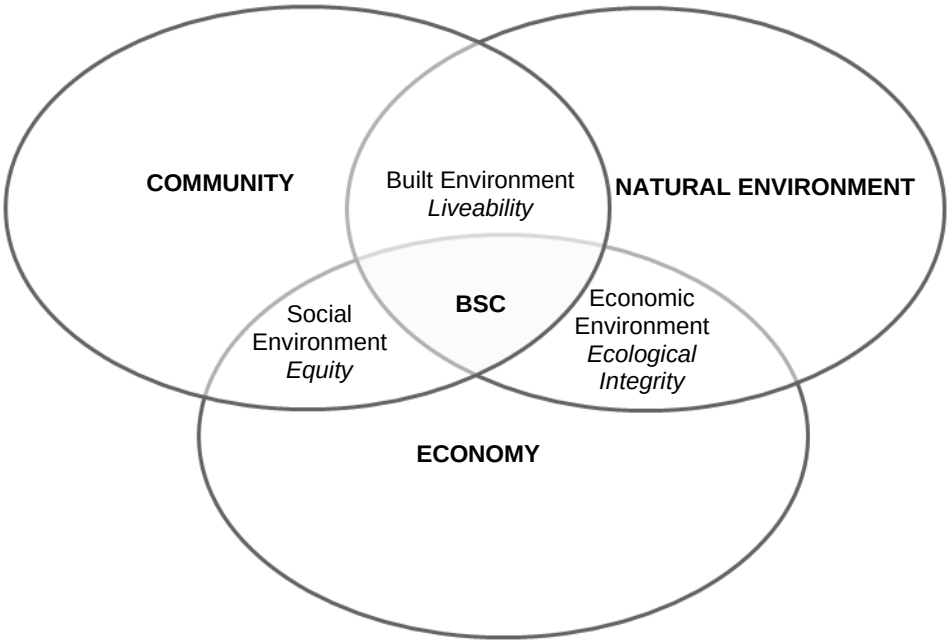
Conflicts in Beaudesert Shire

Built Environment	Conflict between the community and the natural environment.
Economic Environment	Conflict between the economy and the natural environment.
Social Environment	Conflict between the community and the economy.

Council's goals

Environment	Conflict	Goal
Built	Community v/s Natural Environment	Liveability
Economic	Economy v/s Natural Environment	Sustainability
Social	Community v/s Economy	Equity

Council's mission: To achieve liveability, equity and sustainability



How to achieve the mission

- **Step 1**: Design the process
- **Step 2**: Strategic overview
- **Step 3**: Formulation of strategies
- **Step 4**: Implementation
- **Step 5**: Review

Design the process

- Agree the scope of the process:
  - the timing;
  - the objectives.
- Agree the extent of the consultation:
  - the community;
  - the State;
  - local governments.
- Agree the resources to be used:
  - financial;
  - expertise.
- Agree the management of the process
  - the management structure;
  - the reporting.

Strategic overview

- Identify significant issues and the performance indicators that can be measured to evaluate the issues.
- Measure the performance indicators to ascertain baseline benchmarks – use scientific tests or attitudinal surveys.
- Identify the future benchmarks by reference to the baseline benchmarks and comparative benchmarks (from other places).
- Undertake a SWOT analysis to identify what is needed to achieve the future benchmarks.

Formulate strategies

- Identify the actions that are required to achieve the future benchmarks.
- For each action identify:
  - the timeframe;
  - the proposed expenditure;
  - the performance indicators;
  - the expected roles and responsibilities of various programs, departments, organisations.
- Prepare specialised plans:
  - economic development strategy;
  - community health strategy;
  - natural environment strategy;
  - expenditure programs;
  - legislative/policy reform strategy.

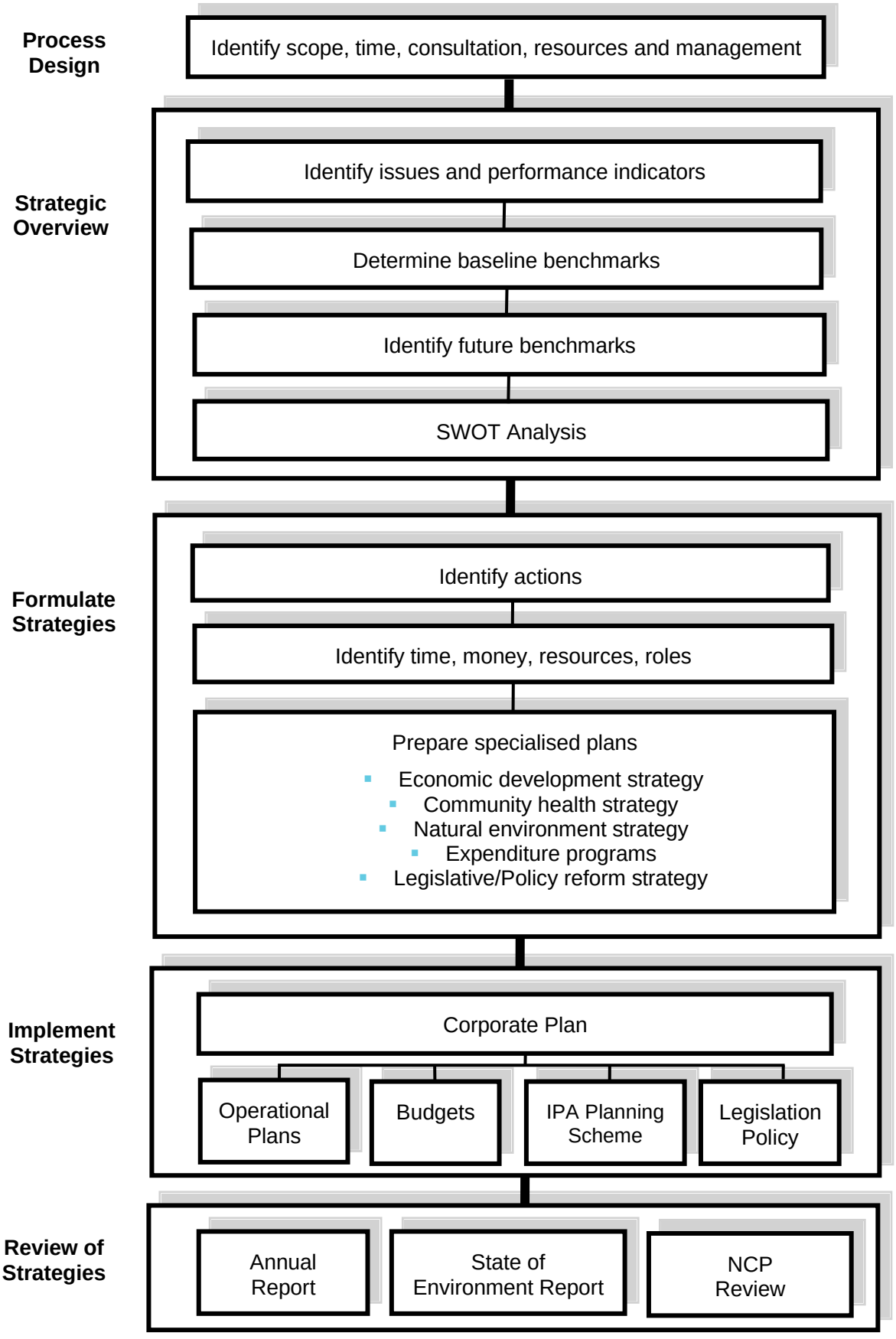
Implement strategies

- Prepare corporate plan.
- Prepare operational plan.
- Prepare budget.
- Prepare IPA planning scheme.
- Prepare legislative/policy framework.

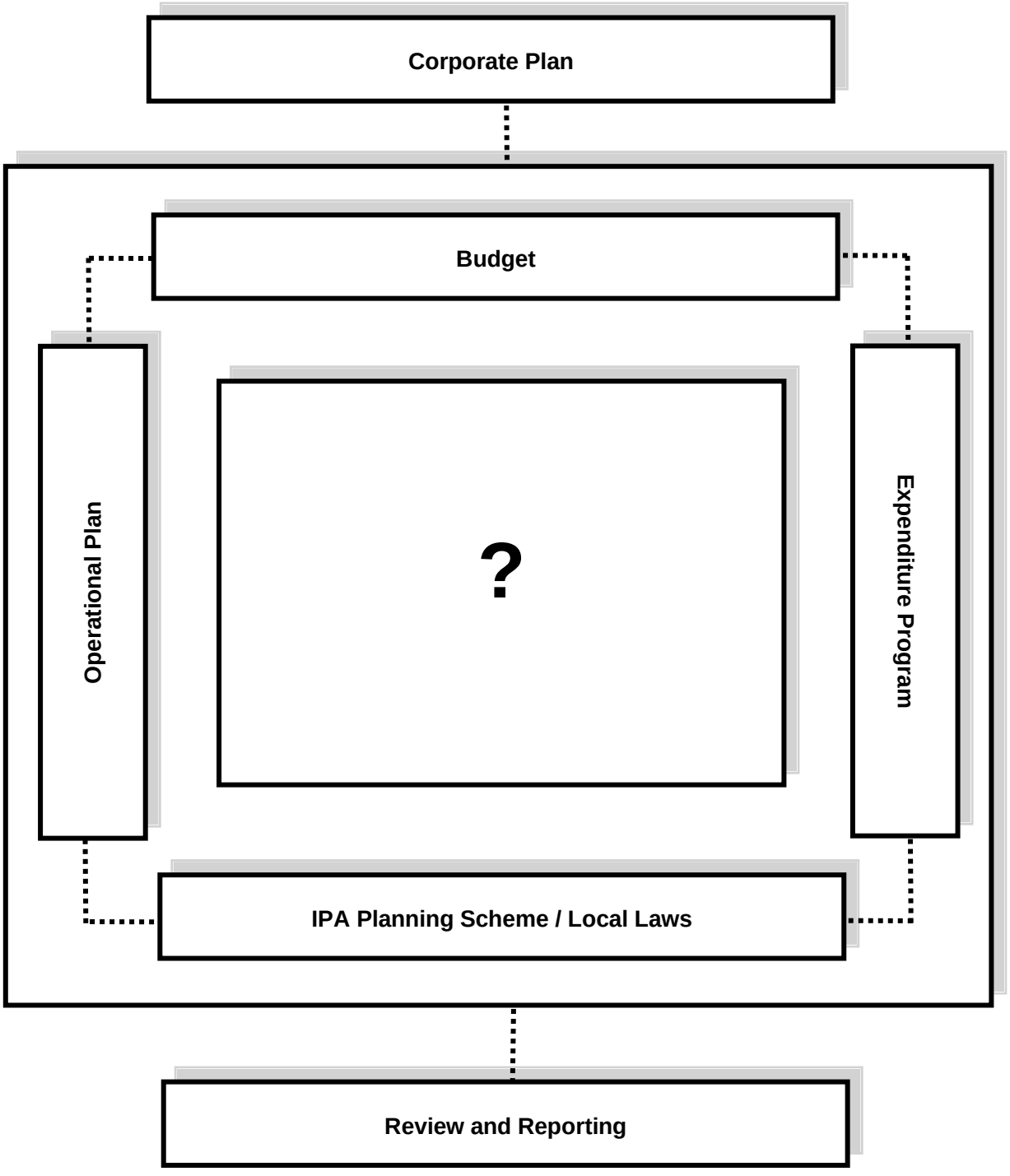
Review of plans

- Prepare annual report:
  - corporate plan;
  - operational plan.
- Prepare state of the environment report:
  - annual reporting of IPA Planning Scheme;
  - seven year review of IPA Planning Scheme.
- Prepare NCP reviews:
  - business enterprises;
  - legislative/policy framework.

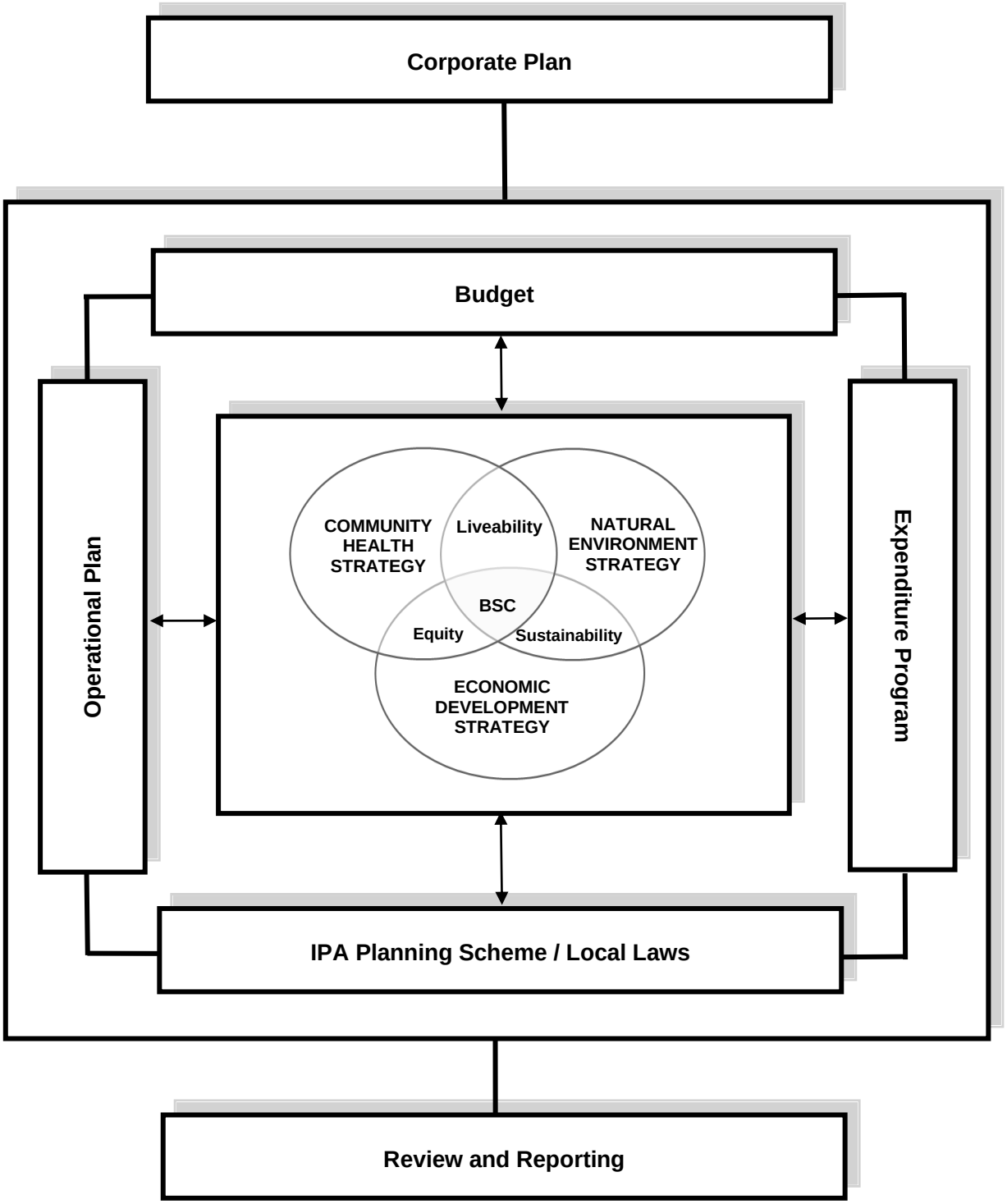
Integrated planning framework



Where we are today



Where council should be



This paper was presented to the Beaudesert Shire Council, July 1999.

COLIN BIGGERS & PAISLEY LAWYERS

Funding local government infrastructure in Queensland (Part 1)

Ian Wright | Deborah Weekes

This article discusses the funding of local government infrastructure in Queensland. The article gives a historical recount of Queensland legislation in respect of funding of local government infrastructure and discusses current funding mechanisms along with their impacts

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> "*Australian cities share the problem of accommodating expanding populations and requirements for adequate public services and infrastructure, with limited revenues.*"[1]

Introduction

Local governments are faced with the onerous responsibility of satisfying the private and community infrastructure needs of society. Funding is critical in the provision of this infrastructure. It determines the financial independence of local governments as well as the rate and type of development within local government areas.

In the last decade, the sources and methods of funding infrastructure have been placed under increasing pressure. The powers provided for funding infrastructure have been found to be too limited to satisfy the needs of local governments. Increasing demands have been imposed on local governments in relation to the adoption of higher standards of infrastructure provision and greater levels of accountability. These requirements, however, until recently, have not been able to be met. Instead the limited availability of funding has resulted in poor infrastructure services and inhibited the ability of local governments to participate in forward planning.[2]

Due to the problems confronted with funding infrastructure, legislative changes have recently been made to the powers of local governments in relation to the provision of infrastructure. The adoption of infrastructure charges under IPA and the expansion of the power of local governments to levy rates have now provided the potential to create a dynamic improvement in the provision of infrastructure services in both private and community domains.

This paper considers existing mechanisms for funding infrastructure, the application of these mechanisms and the recent changes made to the funding powers of local government.

Infrastructure

Infrastructure consists of the land, facilities, services and works used for supporting economic activity and meeting environmental needs.[3] Infrastructure can be divided into two categories:

- *Private Benefit Infrastructure* – infrastructure which supports the physical functioning of a community, including water supply, sewerage, roads, flood mitigation works etc; and
- *Social Infrastructure* – infrastructure which supports community activity or is available for community use, including public open space, community centres, libraries, schools etc.

Private benefit infrastructure is funded on a user pays basis where the users of the infrastructure are responsible for the costs, whilst social infrastructure is funded by government through general rates or taxes where the infrastructure is believed to benefit the community as a whole.

In practice infrastructure items are not always easily classified into one of these categories.[4] Often infrastructure which is provided on a user pays basis also provides a community benefit. Where this occurs the local government must decide what proportion of the costs for the infrastructure should be recovered from the

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1 Collington, F., "*Where's the Money Coming From? Any Lessons for Australia from the California Experience?*" (1991)29(3) Australian Planner 114.

2 Gutteridge Haskins and Davey Pty Ltd BBC Consulting Planners, *Indicative Planning Council Infrastructure Program Wesroc Case Study*, 1995, s6.3.

3 Schedule 10 of IPA.

4 Spiller, M, " *Strategies for Funding Urban Infrastructure –A Response to the Industry Commission Agenda*", 3(2) Urban Futures Journal, 1.

developer. This complicates what is already a difficult task for the local government – the manner and source of funding infrastructure.

Reliance upon pre-existing funding mechanisms

Traditionally infrastructure has been funded by local government through a variety of mechanisms including:

- rates;
- fees & charges;
- grants;
- borrowing and loans;
- securities;
- trading; and
- developer contributions.[5]
- In recent times these sources have been found to be inadequate. These sources are insufficient to provide the level of funding which is necessary for the current rates of development found within Queensland. Restrictions on public sector debt and borrowing for community infrastructure, the increasing costs of infrastructure and higher levels of community expectation have all contributed to an urgent need to identify other means for funding infrastructure.[6]

Reliance upon existing funding mechanisms has resulted in a number of problems:

- Infrastructure provision has often been subsidised where existing mechanisms have prevented local governments from recovering the full costs of the infrastructure from the users of the infrastructure. In these circumstances the balance of the costs has often been made up by levying rates on non-users.[7]
- The subsidisation of developers is appropriate where a particular type of development is to be encouraged or the contributions required would be otherwise excessive. However, there must be a logical rationale for offering a subsidy. The subsidies provided and the reasons behind them must be made explicit.[8] This does not always occur.
- Residents have often been charged twice for infrastructure. This is known as double dipping and occurs most often where rates are levied on residents for infrastructure for which they paid an infrastructure contribution at the time of development.[9] This has resulted in inequitable distribution of costs between generations of users.
- Forward planning has often been constrained due to uncertainty regarding the acquisition of funds required for supplementing developer contributions.[10]
- Excessive reliance upon developer contributions for funding infrastructure has increased the cost of housing and created a windfall gain for existing landowners.[11]
- Insufficient funding, as a result of limited funding mechanisms, has meant that the community expectations of infrastructure have not always been met. Many areas have been developed with minimal facilities or poor quality infrastructure. Delays have often occurred between the occupation of an area and the provision of basic infrastructure services such as sewerage and water supply services.
- Insufficient funding has also meant that although infrastructure may initially be provided, insufficient resources then remain for the maintenance and replacement of that infrastructure.[12]
- Funding has not been able to be acquired to address existing backlogs where infrastructure has already been provided.[13] Until IPA commenced, most infrastructure funding mechanisms were aimed at providing funding for infrastructure being or going to be provided, as opposed to pre-existing infrastructure.

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5 Office of Local Government, *Commonwealth Department of Human Services and Health, Strategic Local Government Approaches to Infrastructure*, January 1994, 11.

6 Ibid.

7 Kirwan, R., "*Financing Urban Infrastructure: Equity and Efficiency Considerations*", (1990) 8(4) Urban Policy and Research, 2.

8 Barnes, N., Dollery, B, "*Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*", (1996) 21 Urban Futures Journal, 23.

9 Id at 25.

10 Office of Local Government, *Commonwealth Department of Human Services and Health*, Strategic Local Government Approaches to Infrastructure, January 1994, 17.

11 Kirwan, R., "*Financing Urban Infrastructure: Equity and Efficiency Considerations*", (1990) 8(4) Urban Policy and Research, 1.

12 Kirwan, R., "*Financing Urban Infrastructure: Equity and Efficiency Considerations*", (1990) 8(4) Urban Policy and Research, 1.

- Development conditions requiring an infrastructure contribution have often been challenged. The *Local Government (Planning and Environment) Act 1990* provided little guidance as to which infrastructure items could attract contributions.[14] Conditions were consequently often imposed where an insufficient nexus existed between the infrastructure to be provided and the developments from which contributions were sought.

In order to provide an appreciation of these issues it is necessary to consider the instruments which have created the mechanisms for funding infrastructure.

Legislative instruments for funding infrastructure

Local Government (Planning and Environment) Act 1990 (PEA)

Until 1998 the *PEA* was relied upon as the most appropriate mechanism for obtaining infrastructure funding. Section 6.1 of the *PEA* provided local governments with power to seek contributions from developers through the imposition of conditions on development approvals. Such conditions could be imposed providing the contributions were relevant or reasonably required for the proposal.[15]

Courts interpreted "*relevant or reasonably required*" as meaning that:

- the proposed development must result in a change in the circumstances as they existed prior to the development application;
- the relationship between the proposed development and the alteration in existing circumstances must not be too remote; and
- the proposed development must be benefited by the condition (ie the infrastructure to be provided).[16]

The powers provided pursuant to section 6.1 of the *PEA* were expressly complemented by specific provisions in relation to seeking contributions for sewerage and water supply infrastructure and for acquiring land for the purposes of parkland.[17] However, these additional provisions created some confusion for local governments in respect of whether infrastructure contributions could be sought for other types of infrastructure. For some time local governments were not certain whether contributions could also be sought for infrastructure such as community centres, bike paths, landscaping etc.

The ability to seek contributions for these types of infrastructure was addressed in *Maroochy Shire Council v P F Wise and D M Wise* (Appeal No. 349 of 1998). In this case the Court of Appeal held that the effect of section 6.2 of the *PEA* was merely to further define the imposition of conditions in respect of sewerage and water supply infrastructure and to complement the powers provided under section 6.1 of the *PEA*. Section 6.2 was not intended to restrict the power to require developer contributions under section 6.1 of the *PEA* to sewerage and water supply infrastructure.

In March 1998, the *PEA* was repealed by the *Integrated Planning Act 1997*. The above provisions, however, will still be relied upon in certain circumstances until the expiry of the transitional provisions in March 2003.

Integrated Planning Act 1997 (IPA)

IPA has introduced a number of new mechanisms with the objective of overcoming the problems identified above with funding infrastructure. The mechanisms that can be used for co-ordinating the provision and funding of infrastructure include:

- infrastructure charges;
- development contributions;
- infrastructure agreements;
- dedication of land for infrastructure for local community purposes; and
- community infrastructure designations.

Table 1 sets out the types of infrastructure which are funded by these mechanisms.

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13 Office of Local Government, *Commonwealth Department of Human Services and Health, Strategic Local Government Approaches to Infrastructure*, January 1994, 17.

14 Hansard, *Second Reading Speech*, 20 November 1997, 4544.

15 Section 6.1 of the *PEA*.

16 *Buderim Projects Pry Ltd v Maroochy Shire Council* (1981) QPLR 60.

17 Sections 6.2 and 5.6 of the PEA.

Table 1 Types of infrastructure

Category of infrastructure	Type of infrastructure (I)	Charging mechanisms					
		Infrastructure agreement (IPA)	Community infrastructure designations (IPA)	Infrastructure charges plan (IPA)	Development conditions (IPA)	Dedication notice (IPA)	Special charges (LGA)
Social Infrastructure	State schools infrastructure (s3.5.35(1)(b))	✓	✓	X	✓	X	X
	Public transport infrastructure (s3.5.35(1)(b))	✓	✓	X	✓	X	X
	State controlled roads infrastructure (s3.5.32(3), 3.5.35(1)(b))	✓	✓	X	✓	X	X
	Police or emergency road infrastructure (s3.5.3t(1)(b))	✓	✓	X	✓	X	X
	Other State social infrastructure (see Schedule 5 – community infrastructure)	✓	✓	X	X	X	X
	Local social infrastructure (see Schedule 5 – community infrastructure)	✓	✓	X	X	X	✓
Private Benefit Infrastructure	Urban water cycle management infrastructure (s5.1.1(1)	✓	✓	✓	✓	X	✓
	Local transport infrastructure (s5.1.1(1))	✓	✓	✓	✓	X	✓
	Infrastructure for local community purposes (s5.1.1(1))	✓	X	✓	✓	✓	✓
	Other private benefit infrastructure (eg gas, electricity, telecommunications)	✓	X	X	X	X	✓

Infrastructure charges

Infrastructure charges are a new concept based on the user-pays approach. IPA allows charges to be levied on residents in the form of special charges for pre-existing and planned infrastructure.

A local government may levy an infrastructure charge where:

- the infrastructure charge relates to a development infrastructure item which:
  - is being used for urban water cycle management, local transport infrastructure or local community purpose[18];
  - is not being developed by the State government under a community infrastructure designation[19]; and
  - is not servicing works or a use authorised under the *Mineral Resources Act 1989*;[20] or
- the development infrastructure item is not in the infrastructure charges plan and the charge:
  - is payable by the applicant;
  - is in respect of a development which is inconsistent with the planning scheme or is not consistent with a benchmark development sequence; and
  - is based on the minimum life cycle costs to achieve the desired standard of service for a similar item in the infrastructure charges plan and any guidelines approved by the Department of Communication, Information, Local Government and Planning.[21]

Infrastructure charges must be fixed in accordance with an infrastructure charges plan and must not be more than the proportion of the cost of the item that can reasonably be apportioned to the premises for which the charge is fixed.[22] The charge levied must also take into account the money already spent on supplying any existing development infrastructure item to the premises. This redresses the problem of double dipping frequently experienced with the *PEA*.

For the purpose of levying infrastructure charges an infrastructure charges plan must be adopted by all local governments by March 2003. Infrastructure charges plans are to be adopted as part of the planning scheme and must:

- identify development infrastructure items making up a network of development infrastructure items;
- state the desired standard of service for the network having regard to user benefits and environmental effects of the network; and
- evaluate the alternative ways of funding the items. [23]

Development conditions

Under IPA, development conditions which require an infrastructure contribution for funding the capital and recurrent costs of infrastructure can be imposed on the same basis as the *PEA* up and until the local government prepares a Planning Scheme under IPA.[24] It is anticipated that the IPA Planning Scheme will contain an infrastructure charges plan which will provide the basis for infrastructure charges. Furthermore, the IPA Planning Schemes of the larger urban local governments is also required to contain benchmark development sequences which set out the sequence or timing of development for a local government area for a 15 year period. Although development is not restricted to land which is within the benchmark development sequence, the cost impacts of out of sequence development can be recovered under IPA in the form of a development condition pursuant to section 3.5.35 of IPA or an infrastructure agreement created pursuant to section 5.2.2 of IPA. This section allows local governments to impose a development condition seeking a monetary payment to lessen the cost impacts of infrastructure for development which is out of sequence or otherwise inconsistent with the Planning Scheme.

Infrastructure agreements

Section 5.2.2 of IPA enables a person to enter into a written agreement with a local government for:

- funding a development infrastructure item in an infrastructure charges plan other than by an infrastructure charge; or
- supplying a development infrastructure item not identified in an infrastructure charges plan; or
- supplying a development infrastructure item identified in an infrastructure charges plan to a different standard than that which is identified.[25]

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18 Section 5.1.5 of IPA.

19 Section 2.6.6 of IPA.

20 Section 5.1.5(3) of IPA.

21 Section 5.1.7 of IPA.

22 Section 5.1.6(2) of IPA.

23 Section 5.1.4(1) of IPA

24 Chapter 6– *Transitional Provisions* IPA.

25 Section 5.2.2(1) of IPA.

Infrastructure agreements enable local governments to adopt flexible arrangements in respect of the timing and payment of infrastructure charges whilst still maintaining accountability.

Community infrastructure designation

Section 2.6.1 of IPA allows local governments to designate land for community infrastructure already existing on land or intended to be supplied on the land by the local government. Community infrastructure is defined in Schedule 5 to include infrastructure such as hospitals, cemeteries, railway lines, parks, waste management facilities etc.

A community infrastructure designation has two benefits for a local government:

- It allows development to occur without assessment, as development on land designated for community infrastructure is exempt development and does not need to be assessed under the integrated development assessment system (IDAS).[26]
- Where development is to be undertaken by a local government or State department on land designated for community infrastructure they will not be required to pay infrastructure charges.[27]

The community also benefits from community infrastructure designations because local governments are required to undertake co-ordinated strategic planning in respect of community infrastructure in order to be able to designate land for community infrastructure.

There are, however, a number of requirements which must be satisfied before land can be designated for community infrastructure. Land may only be designated for community infrastructure if the local government (as the designator) is satisfied that:

- the proposed community infrastructure will:
  - facilitate the implementation of environmental legislation and policies; or
  - facilitate the efficient allocation of resources; or
  - satisfy statutory requirements or budgetary commitments of the State or local governments in respect of community infrastructure; or
  - satisfy the community's expectations for the efficient or timely supply of the infrastructure;[28] and
- if the infrastructure is to be provided by a private entity and is likely to have major environmental effects, the environmental impacts of the proposal are assessed as if the proposal were an application under section 29(2) of the *State Development and Public Works Organisation Act 1971* and are found to be satisfactory.[29]

The latter requirement seems ominous, however, this requirement is no greater than that imposed on applicants for development approvals with regard to environmental impact assessments. The only difference is that local government has been made subject to the same process to which applicants for developments approvals are subject to.

Acquisition of land for local community purposes

The power to designate land for community infrastructure is different to the power under section 5.1.15(3) of IPA to acquire land for local community purposes. Section 5.1.15(3) of IPA allows the local government to require a developer to give part of the land which is the subject of a development application to the local government instead of paying infrastructure charges. This power may only be relied upon where the land will be used for "*local community purposes*". "*Local community purposes*" means public recreation predominantly serving a local area, or other purpose prescribed under a regulation.[30]

Section 5.1.15(3) of IPA provides an extension of the powers previously provided under the PEA to acquire land for the purpose of parkland[31] or other community infrastructure.[32] By allowing local governments to acquire the land at the time of development this section ensures that land for local community purposes is allocated at a time and in a manner which is suitably located and integrated with other land uses within the community.[33]

Local Government Act 1993 (LGA)

The LGA provides local governments with power to fund infrastructure through the levying of rates and charges. Section 963(1) of the LGA states that a local government may make and levy:

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26 Section 2.6.5 of IPA.

27 Section 2.6.6 of IPA.

28 Section 2.6.2 of IPA.

29 Section 2.6.3 of IPA.

30 Schedule 10 of the IPA.

31 Section 5.6 of the *PEA*.

32 Section 6.1 of the *PEA*.

33 Explanatory Notes for Section 5.1.1 of IPA.

- general or differential general rates;
- minimum general rate levies;
- separate rates and charges;
- special rates and charges; and
- utility charges.

Local governments also have the power to fix general charges for services and facilities supplied by it. These charges may be in the form of licence fees, road tolls, information service fees, application fees, entrance fees, registration etc.

Rates have traditionally been regarded as the most acceptable mechanism for acquiring funds for infrastructure provision.[34] The most common form of rates is a general rate which is a rate made and levied by the local government equally on the unimproved value of all rateable land in its area.[35] However, increasing attention has recently been paid to the possibility of expanding the powers available to local government to acquire funding through the imposition of special rates and differential general rates.[36]

Section 971 of the LGA allows the local government to levy a rate for infrastructure on land where, in the government's opinion, the land or the occupier of the land will receive special benefit from the infrastructure or has directly contributed to the need for the infrastructure.

Section 976 of the LGA allows the local government to levy a differential general rate on land within the local government area. The levying of a differential general rate involves the application of different rates to different categories of land, where the land within each category shares at least one similar characteristic.

Current funding mechanisms

So far we have identified that a variety of mechanisms exist for funding infrastructure, some of which have only been introduced recently in an attempt to redress the problems created by limited funding and uncertainty in the application of these mechanisms. We will now consider the issues concerning funding in the context of recent developments relating to the following mechanisms:

- infrastructure charges plans;
- special rates and charges; and
- differential general rates.

Infrastructure charges plans

Objectives

One of the main objectives of IPA is to introduce greater certainty in infrastructure funding. Infrastructure funding under the development process has been perceived to inhibit forward planning of growth areas.[37] The introduction of infrastructure charges plans is intended to improve efficiency, clarity, accountability, and coordinated planning in the delivery of infrastructure to communities.[38]

Infrastructure charges, as discussed previously, are based on the user pays principle and may be levied on a landowner either at the time of a development approval or at some other time as determined by the local government.[39] The charges may also be levied on the owners of vacant land who will receive a benefit from the infrastructure upon development of the land.

Infrastructure charges are to be treated in the same manner as a rate and are not to be levied for social infrastructure. They are to be limited to infrastructure where consumer choice is constrained due to reasons of health or safety or where there are compelling savings in long term provision costs.[40] Consideration of all available funding mechanisms prior to adopting infrastructure charges is encouraged by IPA.[41]

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34 Section 963(2) of the LGA.

35 Office of Local Government, *Commonwealth Department of Human Services and Health, Strategic Local Government Approaches to Infrastructure*, January 1994, 11.

36 Section 3 of the LGA.

37 Hansard, *Second Reading Speech*, 20 November 1997, 4544.

38 Ibid.

39 Department of Local Government and Planning and Local Government Association of Queensland, IPA *Implementation Manual,* 31.

40 Department of Local Government & Planning, IPA *Guideline 4/98 – Infrastructure Charging*, 1998, 6.

41 Ibid.

Infrastructure charges encourage forward planning by moving the focus from up-front contributions for infrastructure from developers to charges for infrastructure supplied as part of a long term (ie 15 year) development sequence specified in a Planning Scheme. Until now development has been dictated by the budget of local governments, so that development has been determined by the local government on an ad hoc basis as opposed to being determined by market driven forces.[42]

Provisions

Under section 5.1.5 of IPA infrastructure charges may be levied for development infrastructure items which consist of land or capital works or land and capital works for:

- Urban water cycle management infrastructure – this consists of land, facilities, services and capital works for water supply, sewerage, collecting and treating water, stream managing, disposing of waters and flood mitigation.
- Transport infrastructure – this includes roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities, cycle ways, pathways and ferry terminals.
- Infrastructure for local community purposes – this consists of land, facilities, services and capital works for public recreation for the local area.[43]

Once the development infrastructure items have been identified the plan must state the desired standard of service for the network and evaluate the alternative ways of funding the items.[44] The plan must:

- explain why an infrastructure charge is intended for the items;
- state the estimated proportion of the capital cost of the items to be funded by the charge;
- include a schedule which shows the estimated timing for, and estimated capital cost of the items;
- state the method by which the charge must be calculated;
- state each area in which the charge applies;
- identify each type of lot, work or use in respect of which the charge applies;
- calculate the rate at which the charge applies; and
- state when the charge is payable if the charge is payable by a person other than an applicant for a development approve.[45]

Since an infrastructure charges plan must form part of the planning scheme, local governments must follow the requirements in the Act for making and amending a planning scheme in Schedule 1 of IPA when making the infrastructure charges plan.[46]

Where a development infrastructure item is not in the infrastructure charges plan a charge is payable based on the minimum life cycle costs for achieving the desired standard of service for a similar item in the infrastructure charges plan. Life cycle costs are the amount of capital cost for infrastructure plus the amount representing the value of operating and maintenance costs of the infrastructure over 30 years, or longer if specified in an infrastructure charges plan.[47]

Once an infrastructure charge has been paid for a development infrastructure item not specified in the infrastructure charges plan, the local government must then amend the infrastructure charges plan to account for this infrastructure charge.[48]

Benchmark development sequences

Benchmark development sequences are an important part of the reform of infrastructure funding under IPA. Infrastructure charges plans must specify development infrastructure items which are planned as part of a benchmark development sequence or identified as a network of development infrastructure items.[49] Although local governments are not required to adopt benchmark development sequences unless specified by regulation, their adoption will assist the creation of an infrastructure charges plan.

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42 Hansard, *Second Reading Speech*, 20 November 1997, 4551.

43 Section 5.1.1(1) of IPA.

44 Section 5.1.4(1) of IPA.

45 Section 5.1.5(2) of IPA.

46 Section 5.1.3 of IPA.

47 Section 5.1.7 of IPA.

48 A benchmark development sequence is not compulsory for IPA planning schemes, unless otherwise specified for a local government in a regulation. At present no local governments are required to adopt benchmark development sequences.

49 Hansard, *Second Reading Speech*, 20 November 1997, 4551.

A benchmark development sequence is a development sequence which specifies the preferred development for an area over a 15 year period or 3 five year periods. Under infrastructure charges plans development which occurs in accordance with a benchmark development sequence will be encouraged. Cost incentives will be provided for development in areas where infrastructure already exists or is proposed in the next five years as part of the benchmark development sequence.

Flexibility is still provided under IPA to allow development outside development sequences ie in areas where infrastructure capacities already exist or are proposed in capital works plans.[50] However, a qualification will apply in that the costs of bringing forward the provision of infrastructure as a result of the development will be able to be recovered by local government. Where development occurs outside a benchmark development sequence the cost impacts due to bringing forward the provision of the infrastructure may be recovered pursuant to a development condition imposed under section 3.5.35(1) of IPA. In the past the local government had no power to recover the full costs of these impacts. Infrastructure provision consequently occurred on a fragmented basis in accordance with revenue acquired in the form of up-front development contributions.

Drafting an infrastructure charges plan

IPA does not provide a particular format for infrastructure charges plans.

Infrastructure charge plans need to refer to or take account of:

- the scope of infrastructure financing mechanisms and their interrelationships;
- the nature of the infrastructure to be provided;
- demands generated by development;
- current government policies;
- standards of infrastructure provision;
- the local government's future intentions for the area; and
- community expectations and scope for involvement in policy development.[51]

Guidelines have been prepared by the Department of Local Government and Planning for creating infrastructure charges plans. A suggested layout for infrastructure charges plans is set out in Appendix 1.

Practical implementation

Infrastructure charges plans address many of the problems previously encountered with developer contributions and other funding mechanisms such as accountability, full cost recovery, transparency, double dipping etc. New concerns have arisen, however, in relation to the creation and application of infrastructure charges plans.

The identification of likely areas of development and the infrastructure required for those areas is perceived by local governments to be a difficult political task. Furthermore, once the required infrastructure has been identified the local government must then assign a cost to the infrastructure, taking into account inflation and market value. This requires the making of further assumptions about future market operations.

In New South Wales a concept similar to infrastructure charges plans was adopted in 1992 under the *Environmental Planning and Assessment Act 1979*. Under section 94 of the *Environmental Planning and Assessment Act 1979* local governments must adopt a contributions plan for the purpose of levying contributions charges. A contributions plan is required to show how infrastructure funds are derived and allocated by local governments.[52]

Similarly to infrastructure charges plans, contributions plans must establish a relationship between the development or use being levied and the infrastructure being levied for. This is a task which local governments have found to be particularly difficult. In order to establish whether a sufficient relationship exists for the purpose of levying infrastructure charges local governments need to undertake a comprehensive assessment of their whole area, now and in the future. This requires extensive resources and time.

To assess the relationship between infrastructure and land use or development, local governments must forecast future population growth and demographic composition, the type of infrastructure required for that population, future land use and development characteristics, the demand for commercial or industrial space, environmental

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50 Thompson, S., "*Infrastructure Financing– A Framework for Policy Development*", (1994) 3(4) & 4(1) Urban Futures Journal, 22.

51 Barnes, N, Dollery, B, "*Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*", (1996) 21 Urban Futures Journal, 19.

52 Barnes, N., 20.

constraints, the desirable level of standards and the likely influence of government policy on development and grants.[53]

Such assessment is also required for the preparation of a works schedule. The inclusion of a works schedule is a requirement which applies to both infrastructure charges plan and contribution plans. Contributions plans must show the projected costs and timing for infrastructure. The purpose of the works schedule is to identify the timeframe and demand threshold at which point infrastructure charges will be levied. In order to determine infrastructure demands and costs local governments need to assess population projections, demographics, production rates, occupancy rates, existing infrastructure capacities etc.[54] This involves making assumptions about the characteristics of the incoming population and the infrastructure needs and expectations of this population. This requirement has been criticised in New South Wales on the basis that such predictions are rarely if ever going to be accurate.[55] Immediate needs should not determine future requirements. Where this approach is taken, future requirements will be assessed in terms of the existing population and will not take account of fluctuations in size, technology, demography etc.

Determining the proportion of costs which may reasonably be allocated to a premises will also provide a challenge. The problems faced under the *PEA* in determining what constitutes reasonable standards will again be confronted with infrastructure charges, as the concept of what is reasonable can only be determined from standards already adopted by local government.[56] Furthermore, a decision to raise standards in a new development area is likely to create confusion in terms of whether these standards should also be raised in existing areas of development.

In conclusion, the effort expended in determining these matters will ultimately require a substantial amount of time and funding. Although these costs may be recovered through the infrastructure charges plan, commentators have wondered if such plans should be more procedural.[57] Regardless of this perspective, however, the adoption of infrastructure charges plans in the specified manner will force local governments to participate in forward planning and to provide clear mechanisms for acquiring and distributing infrastructure funds. To adopt an infrastructure charges plan local governments will be required to engage in detailed planning of growth areas in order to meet the accountability and cost apportionment tests for the purposes of IPA.

Special rates

Section 971 of the LGA

Special rates are different to general rates in that traditionally they have financed benefits to specific land through the use of community infrastructure and are proportionate to the benefit the landowner receives.[58] Special rates may be relied upon to fund infrastructure such as bike paths, landscaping, security surveillance etc or to recover operational and maintenance costs from the users of infrastructure.[59]

Under section 971 of the LGA a "*special rate*" was, until recently, a rate or charge for a service, facility or activity which, in the local government's opinion, would specially benefit the land. A special benefit has been defined as an additional or further or particular benefit to be derived by residents from the specified area over and above the general effect of expenditure (*Parramatta City Council v Pestell* (1972) 27 LGRA 72).[60] The application of this definition has resulted in much uncertainty, as little guidance was previously provided in the legislation for ascertaining the existence of special benefits. Section 971(2) did not provide any further guidance by stating that the rate may be made and levied on the basis the local government considers appropriate.

On 16 June 1999, the *Local Government and Other Legislation Amendment Act 1999* expanded section 971 to apply to a rate or charge for a service, facility or activity where, in the local government's opinion:

- the land or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or
- the occupier of the land, or the use made or to be made of the land, has specially contributed, or will, specially contribute, to the need for the service, facility or activity.

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53 Department of Planning, Section 94 Contributions Plans Manual, 1992, 4 in Barnes, N, Dollery, B, "*Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*", (1996) 21 Urban Futures Journal, 20.

54 Barnes, N, Dollery, B, "*Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*", (1996) 21 Urban Futures Journal, 20.

55 Id at 21.

56 Ibid.

57 Witherby, A., Lecturer/Sub-Dean, Geography and Planning, University of New England Armidale, pers. Comm., 10 July 1996 in Barnes, N, Dollery, B, "*Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*", (1996) 21 Urban Futures Journal, 21.

58 Taylor, M, (1998) 15(2) "*Finding Alternatives to Compulsory Developer Contributions under Section 94 of the Environmental planning and Assessment Act 1979*", Environmental Planning and Law Journal, 110.

59 Department of Local Government & Planning, IPA *Guideline 4/98 – Infrastructure Charging*, 1998, 9.

60 Although the expenditure does not need to be exclusively for the residents of the specified area (*Western Stores Ltd v Orange City Council* (1973) 26 LGRA 1).

Expansion of Section 971 of the LGA

The changes to the local governments' powers to levy special rates have resulted in two important variations, both of which involve the user pays principle.

The amendments have extended the application of special rates and charges to circumstances where the occupiers of land receive a benefit. This means that the benefit does not have to be one associated with the value of the land and may instead be related to the use of the land. Previously the most common forms of special rates were imposed where the special benefit was an increase in the value of land. Under the amendments it is no longer necessary for the local government to determine whether the special benefit or special access is received by the land or the occupier of the land.[61] In addition, the occupier of land need not receive a personal benefit from the infrastructure, provided it is reasonable to form the opinion that the land has or will specially benefit or acquire special access eg where ten parcels of land will acquire special access to an ungraded road all parcels will be considered to have received a special benefit even if the occupier of one lot does not own a motor vehicle.[62]

The second variation is that a special benefit does not need to be accrued as a result of the infrastructure or services provided. It will be sufficient for the purposes of levying a special rate or charge if the occupiers of the land or the use of land have directly contributed to the need for the infrastructure. An example of this would be where a shop is part of a strip development and the local government decides to create parallel parking for the strip development. In such circumstances the shop could be reasonably considered to have directly contributed to the need for parking, and consequently the local government would be able to levy a special rate on the shop for the purpose of recovering costs incurred in providing the parking spaces. It would not matter if the occupiers of the shop did not receive increased profits as a result of these parking spaces.

These amendments have provided local governments with greater power to fund infrastructure through levying special rates. A special rate may now be levied where a special benefit is acquired in respect of the use of the property or the use of the property has directly contributed to the need for the special rate, even if the owner/occupier will not receive a special benefit from the infrastructure provided.

However, in order to regulate these expanded powers a further requirement has been imposed on local governments. Under section 971(4A) of the LGA local governments are now required to prepare an overall plan which must be adopted by resolution either before or at the same time the local government makes the special rate or charge. The adoption of an overall plan will ensure that a local government does not arbitrarily levy special rates. Under section 971(4A) of the LGA an overall plan must:

- identify the rateable land to which the rate applies;
- describe the infrastructure; and
- state the estimated cost and time for implementing the plan.

Consequently, although the local government has been given greater power to levy special rates, it is now under a responsibility to justify why, in the local government's opinion, a special benefit has been received from the infrastructure or the use of the land has directly contributed to the need for the infrastructure.

Section 971A has also been inserted as part of the amendments to ensure that local governments are directly accountable for funds acquired through the imposition of a special rate or charge. If a special rate or charge is levied on land to which a special benefit is not received or which does not directly contribute to the need for the infrastructure or services to be provided, the local government must return the funds to the person on whom the rate or charge was levied.[63] [64] If the rate or charge is correctly levied but there are funds remaining after the overall plan is implemented or the local government decides not to fully implement the overall plan, the local government must pay the remaining funds to the current owners of the land in the same proportions in which the rate or charge was levied. [65]

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61 Explanatory Notes for section 971(1)(b) of the *Local Government and Other Legislation Amendment Act* 1999.

62 Explanatory Notes for section 971(1)(b) of the *Local Government and Other Legislation Amendment Act* 1999.

63 Section 971A(3) of the LGA.

64 We note that where a rate or charge is levied on land to which a special benefit is not received or which does not directly contribute to the need for the infrastructure or services to be provided this does not invalidate the rate or charge (section 971A(2) of the LGA).

65 Section 971A(4) of the LGA.

Final observations

The special rates amendments increase local governments' powers to fund infrastructure and improve accountability by ensuring that the local government has considered all relevant materials and formed an opinion based on the application of logical reasoning. [66] Additional guidance has also been provided by the amendments for the purposes of assessing whether a special benefit or special access will be provided, by the inclusion of examples of special benefits in section 971(1) of the LGA.

These changes have removed many of the problems previously associated with levying special rates. A further refinement of the special rates powers is still required, however, for the purpose of defining the relationship between the powers for levying special rates and the power to levy infrastructure charges pursuant to the *Integrated Planning Act 1997*. Infrastructure charges should complement other funding sources and vice versa. This would ensure the adoption of an appropriate funding mix for satisfying infrastructure needs in a local government area. [67]

Differential general rates

Definition

Differential general rates may be levied by the local government on rateable land if:

- there are two or more categories of rateable land for levying the rates;[68]
- the categories of rateable land are defined by set criteria;[69] and
- the categories to which all parcels of rateable land belong to have been identified by application of the criteria.[70]

The levying of a differential general rate involves the application of different rates to different categories of land, where the land within each category shares at least one similar characteristic.[71] These characteristics will be determined by the criteria which is adopted for each category.

The adoption of criteria for the purpose of defining differential rate categories has created some concern for local governments, as no legislative description or guidelines exist for determining such criteria. The importance of adopting an explicit and logical procedure for adopting and applying criteria for the purpose of categorising land for a differential general rate was, however, emphasised in *Arana Hills Property Pty Ltd v Townsville City Council* (unreported, Qld Supreme Ct No. 881 of 1994). In this case the Supreme Court found a differential general rate to be invalid on the basis that the criteria relied upon to levy the rate merely consisted of real property descriptions as opposed to criteria or characteristics shared by the land.[72]

Few cases have considered the types of criteria which may be adopted for the purpose of differential general rates. However, it is considered that such criteria could include:

- land use;
- infrastructure and services available;
- location;
- economic circumstances; and
- environmental issues affecting the land etc.

Regardless of the criteria adopted, local governments must be able to justify the adoption of criteria on the basis of a rational process and the information considered at the time the criteria was considered.

Problems and recommendations

In assessing the power of local governments to fund infrastructure by levying differential general rates a number of concerns have been identified.

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66 Prior to the amendments *Alan E Tucker Pty Ltd v Orange City Council* (1969) 18 LGRA 314 held that a rational basis must exist for identifying a special benefit to land due to infrastructure or services provided. *Parramatta City Council v Pestell* (1972) 27 LGRA 72 also held that a rate levied must not be "so unreasonable that no reasonable Council could have levied". The need to now identify the basis on which a special rate or charge is levied in the overall plan formalises these requirements.

67 Queensland Department of Communication and Information, *Local Government and Planning, Review of Local Government Revenue Raising Powers*, May 1999.

68 Section 966 of the LGA.

69 Section 977 of the LGA.

70 Section 978 of the LGA.

71 *Arana Hills Property Pty Ltd v Townsville City Council* (unreported, Qld Supreme Ct No. 881 of 1994).

72 However it has been held that it is acceptable to define criteria by reference to zoning or land use codes (*Houghton v Brisbane City Council* (1992) 14 QCLR 278).

Firstly, as discussed above, local governments have been uncertain as to the criteria and categories to adopt. This has resulted in limited use of differential general rates. Courts have held that there must be some relationship between the prospective incidence of rates on the ratepayer and the benefits the ratepayer can be expected to derive as a member of the community on which the rates are being levied.[73] However, there does not need to be a perceived benefit as required for the levying of a special rate. It will be sufficient if there is some evidence of a relationship between the purpose of the rate and the property on which the rate is being levied.

The *Local Government Finance Standard 1994* requires local governments to identify the processes adopted by local governments for identifying criteria and defining categories of land in their revenue policies. There is no express requirement in the LGA, however, for rates to be levied in accordance with a local government's revenue policy. Consequently, this does not provide any further assistance for identifying appropriate criteria.

The ability of local governments to create a category which only includes one property is also uncertain. This may occur where the local government defines a category in terms of a particular type of land use or operation and there is only one such operation in the local government area.

A further issue which needs clarification is the relationship between the powers for levying differential general rates and the power to levy infrastructure charges pursuant to the *Integrated Planning Act 1997*.[74] This should be addressed if any amendments are to be made to the LGA as a result of the review of local government revenue raising powers.

In future, guidance needs to be provided to local government for determining appropriate criteria and categories for levying differential general rates. Set categories could be adopted similar to those adopted under the *Local Government Act 1993* (NSW)[75]. Alternatively, guidelines or a procedure could be created for determining criteria and categories.[76] Examples could also be included in the LGA which illustrate how criteria and categories may be established.[77] The Department of Communication and Information, Local Government and Planning has considered the latter recommendation to be the most suitable option as it would allow flexibility and provide transparency of process.[78]

Future amendments of the differential general rate provisions should be aimed at providing flexibility and certainty and at complementing other infrastructure funding mechanisms. Differential general rates need to be levied in a manner which is equitable and consistent whilst ensuring accountability and flexibility.

Impacts on infrastructure funding and programming

The recent legislative changes discussed in this paper greatly expand local governments' powers to fund infrastructure. These changes reflect the increased focus by government on the user pays principle. This principle has always been relied upon for seeking developer contributions. However, the constraints imposed on seeking developer contributions has restricted full cost recovery.

The amendments to IPA and the LGA will now enable local governments to ensure full cost recovery occurs for all infrastructure. Benefits which will be produced as a result of this change include:

- Lower capital and operational and maintenance costs due to cost efficient assessment of the need for infrastructure items and the standards at which they should be provided.
- Reduction of the need for local governments to borrow or invest in securities for the purpose of funding infrastructure.
- Better accessibility to and availability of infrastructure due to the certainty provided by infrastructure charges plans in respect of the acquisition of funding and the encouragement of forward planning.
- The provision of infrastructure which is specially required for areas under the local governments' expanded powers for levying special rates.
- Improved cost recovery due to the ability of local government to recover outstanding infrastructure charges and rates from future landowners.
- Improved quality of life due to increased powers for funding infrastructure and for ensuring that a reasonable quality of infrastructure will be provided to the community.

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73 *MacKenzie District Council v Electricity Corporation of New Zealand* (1992) 3 NZLR 41.

74 Queensland Department of Communication and Information, *Local Government and Planning, Review of Local Government Revenue Raising Powers*, May 1999, 17.

75 In New South Wales there are four categories which have been created by statute for the purpose levying differential general rates – farmland, residential, mining and business. These categories may in turn be divided into sub-categories.

76 Queensland Department of Communication and Information, *Local Government and Planning, Review of Local Government Revenue Raising Powers*, May 1999, 31.

77 Ibid.

78 Id at 32.

- More efficient use of existing infrastructure as a result of the planning involved with adopting infrastructure charges plans.[79]

The impacts of infrastructure charges

Under IPA the local government may recover the capital cost of infrastructure from persons who are either currently benefiting from the infrastructure or will benefit from the infrastructure in the future. In addition, local governments may now recover the cost impacts for having to provide infrastructure earlier than intended due to out of sequence development. The introduction of these powers by IPA enables the local government to recover the full costs of providing infrastructure.

The requirements in respect of infrastructure charges plans and benchmark development sequences also encourage local governments to participate in forward planning. Local governments no longer need to be concerned that the costs of future infrastructure will not be able to be satisfied, as these costs may now be accounted for under infrastructure charges plans. Infrastructure charges plans and benchmark development sequences will also improve the coordination of infrastructure supply with development and provide a basis for forecasting demand and funding for infrastructure.[80]

Infrastructure charges plans will enable the status, capacity and costs of existing and proposed infrastructure items to be assessed and identified. Infrastructure charges plans encourage transparency and accountability and ensure that infrastructure charges are determined in a rational manner. Local governments are now under a statutory obligation to clearly demonstrate the manner in which infrastructure funds are acquired and distributed. This means that the community will now be able to clearly identify the capital works intentions for their local government area.[81]

Special rates

The amendments to the special rate provisions in the LGA provide the local governments with more flexibility to levy special rates and recover costs. The amendments encourage cost recovery on an a "*user pays*" basis by enabling local governments to recover the costs of infrastructure from persons who either use the infrastructure or contribute to the need for the infrastructure. The special rates provisions may be relied upon in conjunction with the infrastructure charges provisions to ensure that the capital, operational and replacement costs of infrastructure are fully recovered.

Differential general rates

Differential general rates enable local governments to distribute the costs of infrastructure in accordance with different categories of land use. This enables the costs of infrastructure to be equitably apportioned in accordance with the categories of use or the types of infrastructure which are supplied to a region. However, due to the uncertainty concerning the criteria which should be adopted for recognising these categories, differential general rates have not been used efficiently. In future, consideration should be given to amending the LGA for the purpose of clarifying the type of criteria and categories which may be adopted and the manner in which differential general rates may be used to complement infrastructure charges.

Conclusion

It can be concluded from this paper that the expansion of local government powers for funding infrastructure has the capacity to greatly improve infrastructure provision. Infrastructure charges and the special rates provisions encourage full cost recovery for infrastructure on a user pays basis. These mechanisms also enable many of the problems previously associated with funding infrastructure to be overcome.

The critical issue for local governments now will be to implement the above funding mechanisms in a manner which ensures that the objectives of full cost recovery, efficiency, accountability and flexibility are obtained. This will involve careful consideration of the outstanding issues raised in this paper.

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79 Office of Local Government, *Commonwealth Department of Human. Services and Health, Strategic Local Government Approaches to Infrastructure*, January 1994, 28.

80 Department of Local Government & Planning, IPA *Guideline 5/98 – Benchmark Development Sequencing & Assessing Cost Impacts on State Social Infrastructure*, 1998, 7.

81 Department of Local Government & Planning, IPA *Guideline 4/98 – Infrastructure Charging*, 1998, 5.

APPENDIX 1

Part 1 – Preliminary

This part should:

- Identify the name of the infrastructure charges plan.
- List the contents of the plan.
- Explain the terms used in the plan.
- Identify the purposes of the plan eg to allow new infrastructure to be provided and the costs of providing infrastructure to be recovered.
- Evaluate the different ways of funding the infrastructure and identify the proportion of infrastructure costs to be funded by infrastructure charges as opposed to other mechanisms. An explanation as to why infrastructure charges are preferred to other mechanisms for this proportion of costs should also be provided.
- Define the area of land in the local government's area to which the infrastructure charges plan applies ("*development area*"). This may be identified by a description and a map and should be defined in geographical boundaries.

Part 2 – Development infrastructure

This part should:

- Identify the development infrastructure items which will be funded through infrastructure charges and define the extent to which they will be funded. This will involve consideration of existing sources of funds, future government grants and other potential sources of funds, and the capital costs and operational and maintenance costs of the infrastructure items.
- Justify the need for the development infrastructure items. This will involve identifying opportunities for expanding and redeveloping existing infrastructure, sharing infrastructure with other local government areas and considering the most appropriate means of providing the required infrastructure items.
- State the desired levels of service of the infrastructure networks in terms of user benefits and environmental effects for each of the development infrastructure networks.
- Identify the capacity of existing infrastructure networks for meeting the identified demand for infrastructure. The assessment of available capacity will depend upon the perception of need within the community, commonly adopted standards, whether the infrastructure was provided in anticipation of new development or was funded from other sources, the rate of growth in the area and the demand on the infrastructure.
- State the proportion of capital costs to be funded through infrastructure charges and identify the other mechanisms which will be used to fund the remainder of the costs.

Part 3 – Infrastructure charges

This part should:

- Set out the formulae used to calculate each charge with an explanation of each element of the charge. Clear formulae and examples of calculations should be provided.
- Identify the lots, works and uses which will attract infrastructure charges and the circumstances in which the charges will have to be paid. A table based on the style of table adopted in existing planning scheme policies could be relied upon here ie a table detailing liabilities for different land uses expressed as equivalent units. Clear principles and guidelines should govern the apportionment of infrastructure charges across anticipated users. [82]
- State the exemptions from the charge.
- Identify the methods of payment and the times when charges are to be paid.

Part 4 – Schedules

This part should:

- Provide a schedule of works which details the capital works to be undertaken, their timing and the capital cost of the works. This will involve the determination of appropriate thresholds at which infrastructure should be provided and any special factors likely to require the provision of infrastructure before the threshold is reached.

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[82] Department of Local Government & Planning, IPA *Guideline 4/98 – Infrastructure Charging*, 1998, 5.

- Provide a schedule of infrastructure charges which identifies the rate of the charge by lot, work or use at the time the infrastructure charges plan is made.

Part 5 – Supporting information

This part should list the sources of information (eg studies or reports) used to develop the infrastructure charges plan. Sources could include community surveys, social needs studies, population census data, environmental studies, community organisations and local businesses etc.

This paper was presented at the What's New in Local Government Law seminar, Brisbane, August 1999.

Funding local government infrastructure in Queensland (Part 2)

Ian Wright | Deborah Weekes

This article discusses in detail, the nature and effect of infrastructure charges, how they are prepared and how they are calculated

August 1999

Nature of infrastructure charges

An infrastructure charge is a general charge under the *Local Government Act 1993* which is levied in accordance with the Act. Infrastructure charges are therefore levied as a user charge rather than as a condition of a development approval.

Making of infrastructure charges

The making of an infrastructure charge involves three steps:

- the levying or fixing of the infrastructure charge;
- the notification to the person on whom the charge is levied; and
- the amending of the infrastructure charges plan.

Fixing of infrastructure charge

A local government may fix an infrastructure charge where:

- The infrastructure charge relates to a development infrastructure item (land and capital works in or outside the local government area) which:
  - is being used for urban water cycle management, local transport infrastructure or local community purposes (s 5.1.5);
  - is not being developed by the State government under a community infrastructure designation (s 2.6.6); and
  - is not servicing works or a use authorised under the *Mineral Resources Act 1989* (s 5.1.5(3)).
- The development infrastructure item is listed in the infrastructure charges plan, and the charge (s 5.1.6):
  - is payable by applicant or owner;
  - is fixed in accordance with the infrastructure charges plan;
  - is no more than the proportional cost of the item that can be apportioned to the premises based on likely usage; and
  - takes account of money already spent on the item.
- The development infrastructure item is not in the infrastructure charges plan, and the charge (s 5.1.7):
  - is payable by an applicant;
  - is in respect of a development which is inconsistent with the planning scheme (such as the infrastructure charges plan) or is out of sequence; and
  - is based on the minimum life cycle costs to achieve the desired standard of service for a similar item in the infrastructure charges plan and any guidelines approved by the Chief Executive of the Department which is responsible for the administration of the Act.

Notice of Charge

When an infrastructure charge is fixed the local government must give to the person who is liable a notice stating (s 5.1.8):

- the amount of the charge;
- the land to which the charge applies;
- the day by which the charge is payable;

- the development infrastructure item for which the charge has been fixed; and
- the person to whom the charge must be paid.

When an infrastructure charge is payable by an applicant, the date the payment shall be made is as follows (s 5.1.10):

- for the reconfiguration of a lot – before the approval of the plan of subdivision, or before the operational works start if the development infrastructure item is required to service the premises before the start of the works;
- for building works – before the issue of the certificate of classification, or before the building works if the development infrastructure item is required to service the premises before the start of the works; and
- for material change of use – before the change.

Where an infrastructure charge is payable by an applicant the notice must be given (s 5.1.9):

- to the applicant within a specified timeframe after decision; and
- to the owner of the land where the applicant is not the owner.

Amending infrastructure charges plan

When an infrastructure charge is levied on an applicant pursuant to s 5.1.7 (ie the development infrastructure item is not in the infrastructure charges plan) the local government must amend its infrastructure charges plan as soon as practicable after the charge is paid (s 5.1.7).

Satisfying an infrastructure charge

A person may satisfy an infrastructure charge by:

- paying the charge by the specified date;
- doing the work for which the charge was fixed and if required securing the performance of the work (s 5.1.15(1)); or
- giving the land in fee simple if the development infrastructure item is land (s 5.1.15(1)).

If the charge is not satisfied it may be recovered as a rate under the *Local Government Act 1993* unless the applicant and the local government enter into a written agreement stating that the charge is a debt owing by the applicant to the local government (s 5.1.14).

Preparing an infrastructure charges plan

The Act defines an infrastructure charges plan as being the part of a planning scheme that (s 5.1.4(1)):

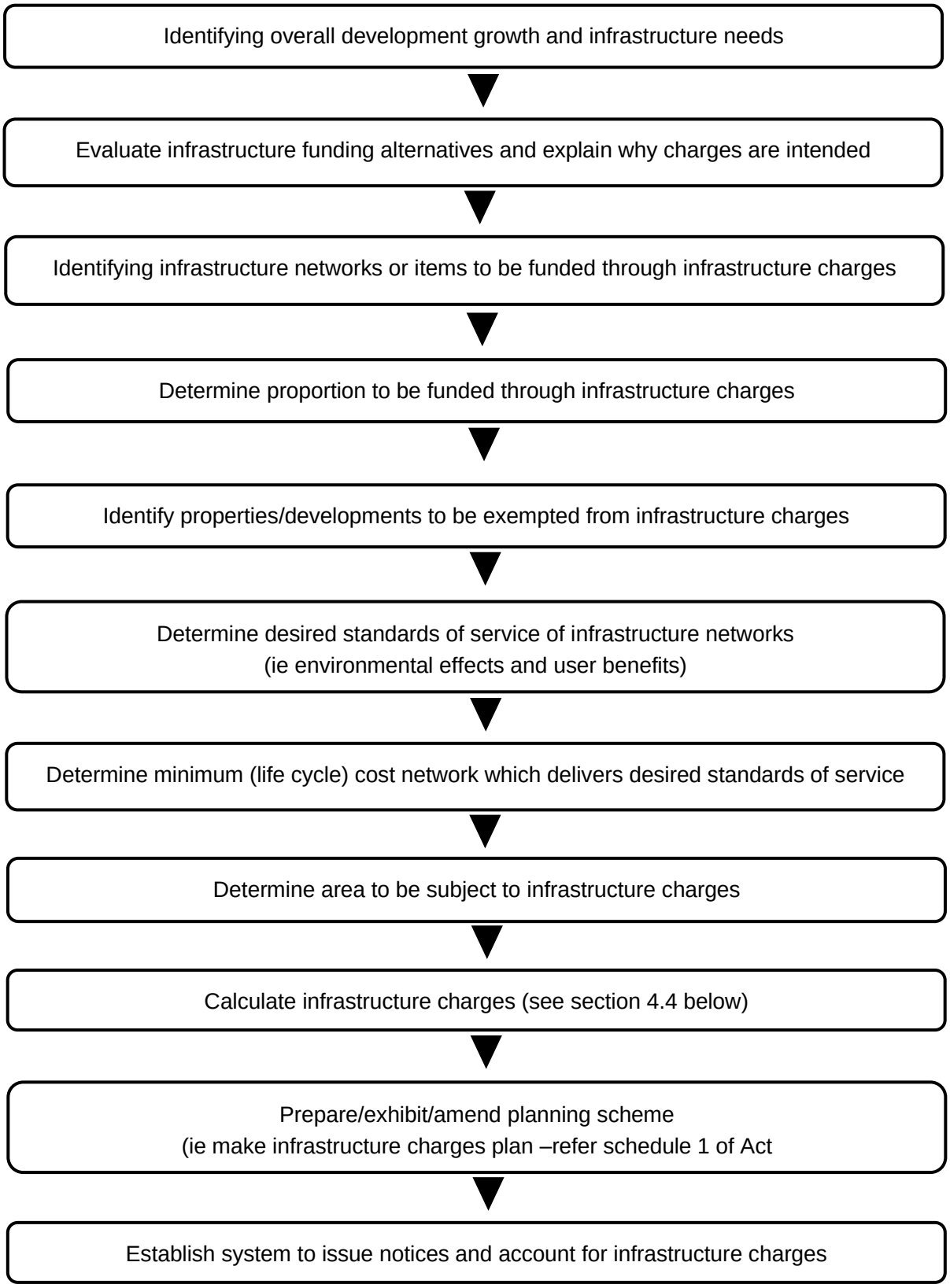
- identifies development infrastructure items making up a network of development infrastructure items;
- states the desired standard of service for the network having regard to user benefits and environmental effects of the network; and
- evaluates alternative ways of funding the items.

The following details must be provided about development infrastructure items included in the infrastructure charges plan (s 5.1.4(2)):

- justification of the need for the works, services and facilities shown in the infrastructure charges plan;
- an estimate of the amount to be funded by infrastructure charges as opposed to other funding sources;
- the schedule of works to be funded, including timing of provision of infrastructure and costings;
- the method by which infrastructure charges are calculated;
- clear boundaries of the area to which the infrastructure charges plan applies;
- description of each type of lot, work or use to which charges apply;
- the rate at which charges apply in each area for each type of lot, work or use; and
- if the charge is payable by a person other than an applicant for a development approval, state when the charge is payable.

The Department has prepared Guidelines for the preparation of infrastructure charges plans. Figure 1 which is extracted from the Guidelines presents a flow chart for preparing an infrastructure charges plan.

Figure 1 Main steps in preparing an infrastructure charges plan



Making and amending an infrastructure charges plan

Since an infrastructure charges plan must form part of the planning scheme, local governments must follow the requirements in the Act for making and amending a planning scheme in Schedule 1, when making and amending an infrastructure charges plan.

However, Schedule 1 provides a shortened process for minor amendments to an infrastructure charges plan (schedule 1, section 2(1)). This could cover matters such as changes in discount rates or cost estimates for items, minor changes in timing of delivery, changes in development rates assumptions or other assumptions used in formulating charges.

Calculation of charges in an infrastructure charges plan

Statutory requirements

The Act does not prescribe a methodology for the calculation of charges. However, the following limitations are imposed:

- the capital cost of development infrastructure items must be calculated to minimise the life cycle cost for the desired standard of service for the network (s 5.1.4(3)); and
- regard must be had to departmental guidelines for the preparation of infrastructure charges plans (s 5.1.4(4)).

Suggested methodology

The departmental guidelines for infrastructure charges plans set out a ten step process for calculating infrastructure charges. This process can be restructured into a six step process involving some 10 tasks. See Table 1.

Table 1 Suggested methodology – 6 steps - 10 tasks

Step 1	**Identification of existing capacity and future infrastructure requirements**
Task 1	Identify infrastructure which has spare capacity to service growth and estimate: ▪ the current replacement cost; ▪ the year the item was installed; and ▪ the design/economic life.
Task 2	Identify new infrastructure that is required to service growth and estimate its capital cost at current prices.
Step 2	**Calculation of the net present value of the cost of existing capacity and the new infrastructure**
Task 3	Estimate the net present value of the cost of existing capacity of each infrastructure item by multiplying the replacement cost of the item by the ratio of the remaining economic life to the design/economic life.
Task 4	Estimate the net present value of the cost of providing new infrastructure in the future by adjusting the cost of the infrastructure in future years by a discount rate to reflect additional costs and compensating revenues.
Step 3	**Calculation of existing future demand for each service catchment**
Task 5	Define the service catchment for each infrastructure item which receives a benefit from the infrastructure.
Task 6	Calculate the existing demand in each service catchment by identifying the number of current users of the infrastructure (from Task 1) and convert to an equivalent unit such as equivalent persons.
Task 7	Calculate the future demand in each service catchment by identifying the number of future users of the infrastructure (from Task 3) and convert into the same equivalent units as for existing users.
Step 4	**Calculation of the net present value of future demand**
Task 8	Calculate the net present value of future demand by adjusting the equivalent unit (equivalent persons) in future years by a discount rate to reflect unexpected changes in future demand.

Step 5	**Calculation of the infrastructure charges and apportionment over existing and future users to derive an amount per equivalent user**
Task 9	Calculate the total infrastructure charges for each infrastructure item by dividing the net present value of the infrastructure item by the percentage share of the item's capacity attributable to existing and future demand and then aggregate the charges to produce a total charge.
Task 10	Apportion the total charge over existing and future users to derive an amount per equivalent user.
Step 6	**Adjust the charges annually**

This paper was presented at the What's New in Local Government Law seminar, Brisbane, August 1999.

Roles and opportunities for the environmental health practitioner in the next century

Ian Wright

This article discusses the increased demand for access to environmental health services. The article asserts that organisation restructuring is required due to this demand and therefore create greater opportunities for environmental health practitioners. It is suggested that practitioners subsequently must adapt to this new challenge to meet the needs of the community

August 1999

Abstract: The community is demanding increased access to environmental health services. This will result in significant organisational and program restructuring which will see environmental programs separated from traditional health departments and included in sectoral agencies whose missions will be extended to include the protection of environmental health. This will provide significant opportunities for environmental health practitioners, albeit in different roles from those which they have traditionally enjoyed. To meet these roles, environmental health practitioners will have to develop different competencies and will have to exhibit leadership in the field of environmental health. For those practitioners who take up the challenge, the future is bright. However, those who do not, will become endangered species who will be eking out a subsistence living in increasingly contracting organisational environments. The challenge for environmental health practitioners is ultimately one of leadership.

Introduction

The challenges

As we approach the millennium it is perhaps opportune to consider the future of environmental health in the next century and the roles that may be played by environmental health practitioners.

The challenges facing environmental health practitioners are enormous. Many of the environmental health problems associated with the modem world continue to become increasingly complex and some may be intractable.

The solutions

The solutions to our environmental health problems are as complex as the causes. Furthermore, opinions as to the appropriate solutions are as varied as the opinions regarding the nature and causes of the environmental health problems we face.

However all solutions to our environmental health problems are dependent on at least three basic factors:

- First, there must be a coherent view of the field of environmental health so that it becomes possible to define the problems, the needs, the solutions and the competencies of environmental health practitioners.
- Second, organisational and institutional responses to environmental health problems must be structured such that:
  - environmental health is a clear mission;
  - risk assessment is the basis for decision making;
  - public communication is entrenched in planning and decision processes;
  - data collection is adequate to support planning and decision processes; and
  - financial resources are adequate to achieve the mission.
- Third, and basic to the first two considerations, there is a professional environmental health workforce.

Themes of the paper

In this paper I will explore three themes:

- First, I will seek to define the field of environmental health so that I may express a coherent view as to the problems, needs, solutions and competencies of environmental health practitioners.
- Secondly, I will identify some of the opportunities that will be presented to environmental health practitioners as a result of the organisational and institutional changes that will occur in order to address environmental health problems.

- Thirdly, I will identify some of the challenges that will have to be addressed by environmental health practitioners.

What is environmental health?

A cause not a profession

Environmental health is not a profession or a discipline. Rather it is a cause or a field engaged in by a wide array of personnel practising within a broad and complex spectrum of organisations (Gordon 1993:30).

This is quite evident from even a cursory review of the environmental health literature. There are countless publications in which environmental health has been defined. However invariably, each publication redefines the term. This is particularly the case with organisational publications were the term is defined by reference to the programs contained within the environmental health organisation such that programs outside the purview of the environmental health organisation are called something other than environmental health.

Organisation blindness

Indeed, it appears to me that environmental health practitioners, unlike other professionals, in say, law, medicine or engineering, define themselves by reference to the organisation in which they find themselves rather than by reference to their professional competencies. What results is an often narrow and insular perspective of the opportunities that are available to environmental health practitioners.

Traditional framework

At the risk of adding yet another definition to the litany of environmental health definitions that already exist, it is necessary to define what is meant by environmental health. In that way the comments that will be made in the balance of this paper in respect of environmental health will have some context.

In my view environmental health is the art and science of managing environmental factors that may adversely impact on human health or the natural or economic environments that are essential to human health.

This approach is much wider than the traditional perspectives of environmental health. I have divided these existing perspectives of environmental health into the traditionalists (who I call the '*homocentrics*') and the modernists (or who I call the '*ecocentrics*').

The traditionalists or homocentrics view environmental health from a public health perspective and have accordingly justified, designed and managed environmental health programs based on public health components.

The modernist or ecocentrics on the other hand view environmental health from a natural environment perspective and have accordingly justified, designed and managed environmental health programs based on ecological considerations.

New framework

I believe that environmental health will, in the next century, develop beyond the consideration of purely human health and ecological considerations to include the consideration of those parts of the economic environment that are essential to human health. Indeed as each year goes by there is increasing data which strengthens the argument that there is an inextricable link between ecological ills, human disease and dysfunction, poverty and national and international trade and the related consumption of goods and services.

Accordingly, in my view, environmental health is concerned with the management of the impacts of human health and the interaction of the community, the natural environment and the economy. This interaction is illustrated in Figure 1.

It can be seen from Figure 1 that environmental health is concerned with the built environment, the social environment, and the economic environment.

The built environment is where the natural environment interacts with the community. In this case the environmental health goal is to ensure liveability. The goal of liveability is achieved where the built environment has reached a state where the long term health of the community and the natural environment is being maintained.

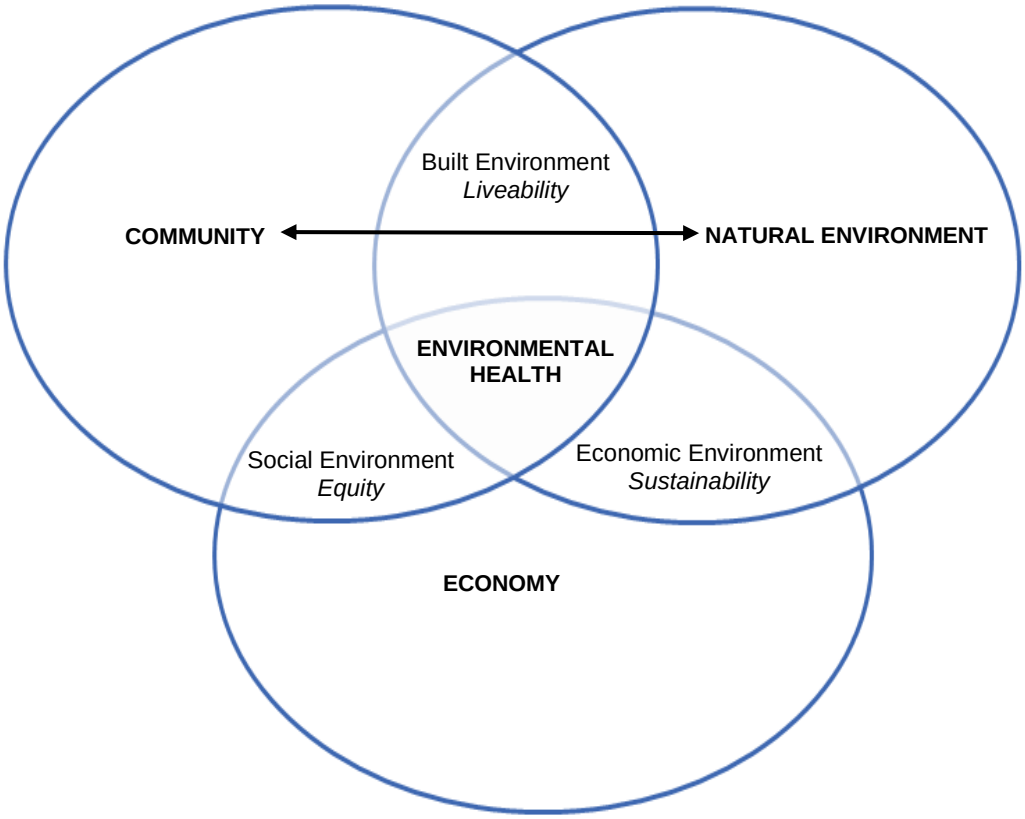
The social environment is where the community interacts with the economy. In this case the environmental health goal is to ensure equity. The goal of equity is achieved when the social environment has reached the state where the long term health of the community and the economic environment is being maintained.

The economic environment is where the economy interacts with the natural environment. In this case the environmental health goal is to ensure sustainability. The goal of sustainability is achieved where the economic environment has reached a state where the long term health of the economy and the natural environment is being maintained such that the goals of liveability and equity can be achieved.

Implications for the future

The environmental health framework that I have articulated will have significant implications for environmental health organisations and environmental health practitioners. Before considering the competencies of environmental health practitioners to work within this framework, I would like to discuss the organisational implications of the environmental health framework of the next century.

Figure 1 Environmental health framework



Future organisational structures

Current problems

Australia does not have an environmental health system. Rather it has a confusing patchwork of often overlapping and competing agencies having sometimes conflicting missions and divergent priorities. This is particularly the case in respect of the design, management and implementation of preventative programs especially at the State and local government levels.

The problems of the current system are known to anybody who wishes to look:

- Large sums are spent to solve environmental health problems whilst inadequate resources are spent on preventing those problems.
- There is widespread disagreement and confusion regarding environmental health priorities, goals and resources, as well as defining acceptable risk.
- It is not always clear which agency or which level of government has responsibility for designing and implementing programs.

The stress that will be placed on current organisational structures by the demands of the new environmental health framework of the 21st Century will be intolerable to the public and will lead to significant policy changes. These policy changes will include:

- the use of risk as a management tool;
- the acceptance of the primacy of prevention;

- the restructuring of environmental health organisations and programs;
- the implementation of comprehensive data collection systems;
- increased community demands for access to environmental health services; and
- the adoption of innovative funding models.

I would like to deal with each of these policy changes in turn in order to consider the roles and opportunities that may be available for environmental health practitioners as a result of these policy changes.

Risk management

A basic precursor to improving environmental health in the next century will be the need to establish priorities and to communicate with the public in terms of risk. We do not live in "*a risk free*" environment. Furthermore, the pursuit of "*zero risk*" as a goal is frequently unnecessary, economically impractical and frequently unattainable. It may also create unfounded public concern when the goal is not achieved. It also consumes resources which are thereby precluded from dealing with other higher priorities. Therefore the goal for environmental health programs in the future will not be "*zero risk*" but rather "*nett impact*" (Gordon 1995:31).

Risk assessment procedures can be used to assess human health risk as well as to determine the ecological, economic and quality of human life impacts. As such it will be vital to recommending priorities, designing programs, requesting funding and evaluating programs.

Environmental health practitioners have always utilised risk assessment, albeit in an informal or intuitive manner. In more recent times, some practitioners have developed even greater expertise by utilising risk assessment mathematical models. These risk assessment skills will become valuable tools in the next century.

Prevention

The changing focus from rehabilitation to prevention will also benefit environmental health practitioners. Traditionally the field of environment health has been concerned with prevention. However in recent times, significant resources have been diverted to cleaning up the problems of the past such as land contamination.

To avoid these catastrophes in the future there will be increasing calls for environmental health practitioners to be involved during the planning and design stages of energy production and alternative energy sources, land use, transportation projects, facilities construction, resource utilisation and product design and development activities (Gordon 1993:30).

Organisational and program restructuring

The current trend to separate environment health programs within different organisations will continue to gather pace in response to the demands of sectoral advocates, whether they be environment, economic or community. It will also be reinforced by the increasing trend for health departments to become more involved in health care issues to deal with the so called "*health care crisis*" and less involved in environmental health matters.

As a result, environmental health programs will be removed from health departments and included in environmental protection agencies, such as the EPA, economic agencies such as the Department of State Development or the Department of Primary Industries or community agencies such as the Department of Community Services or the Department of Emergency Services.

The relocation of environmental health programs from traditional health departments to other agencies will have the following consequences (Gordon 1995:30):

- Firstly the missions of these agencies will have to be extended to include the delivering of services in a manner which protects environmental health.
- Secondly, if the protection of environmental health is not included in the missions of these agencies, environmental health programs will be faced with a serious and damaging conflict of interest especially when they are organisationally included in agencies which have a mission of resource utilisation or exploitation and development. In the absence of a mission of protecting environmental health these agencies may end up actually protecting or promoting the interests of those that they are charged with regulating. A classic example of regulatory capture was the Department of Mines and Energy, whose mission was to encourage mining operations whilst at the same time having program responsibility for regulating the environmental activities of mining operations. These environmental responsibilities have since been transferred to the EPA. An equally effective approach would have been to include environmental management as part of the mission of the Department.
- Thirdly, there will be an increasing need to unify environment health programs across and between levels of government by improved inter-agency co-ordination.
- Finally, environmental health practitioners will be presented with increasing opportunities within these agencies. Those practitioners who demonstrate the necessary competencies and provide leadership in protecting environmental health are assured of a bright future. However those practitioners who identify only with traditional health departments, programs and competencies will be an endangered species who will be eking out an existence in a constantly shrinking organisational environment.

Comprehensive data collection

The trend towards risk assessment, prevention and organisation restructuring will quickly highlight the existing shortfalls in data collection. The lack of a comprehensive data collection system has resulted in the following problems:

- Firstly, it is impossible to ascertain baseline benchmarks. These are the existing environmental health conditions of a given area and are established from baseline information relating to a specific time or defined area. Currently, there is no comprehensive and integrated system to collect this baseline information.
- Secondly, it is impossible to ascertain comparative benchmarks. These are the representative conditions that may be derived from other similar areas or systems. Currently, there is no comprehensive and integrated system to establish these comparative benchmarks.
- Thirdly, it is impossible to ascertain target benchmarks. These are the future environmental health conditions of a given area. These cannot be established as there are no comparative benchmarks or baseline benchmarks from which target benchmarks can sensibly be determined.

These problems have resulted because environmental health practitioners have not identified the performance indicators that can be measured to produce the information that can be used for the purposes of determining baseline benchmarks, comparative benchmarks and target benchmarks.

There are significant opportunities for environmental practitioners in establishing the comprehensive data collection systems that will be necessary to implement the integrated management approach that will be required in respect of environmental health in the next century.

Community demand for services

The organisational changes discussed in this paper will be driven by the community who will increasingly demand increased access to environmental health services so as to ensure the improvement of their quality of life.

The community is demanding protection from factors such as toxic chemicals, polluted air and water, unsafe drinking water, unintentional injuries, unsafe food, excessive radiation exposure, solid waste, hazardous waste, airborne diseases, inadequate shelter and global environmental health problems.

Increased community access to these services will not be achievable without the involvement of adequate numbers of properly educated and experienced environmental health practitioners.

Financing environmental health

The increased community demand for environmental health services will also focus attention on the means of funding environmental health services. It has not been established that the total funding of environmental health services is inadequate. Rather, the real problem appears to be how the money is being spent or in some cases is wasted on irrelevant non-issues.

These non-issues are usually the ones that are dictated by perception, emotion and hysteria rather than science. Environmental health practitioners will have a critical role to play in identifying and assessing risks and allocating resources in a way that addresses actual and significant risks as opposed to the public perception that has driven politicians and public agencies to date.

Environmental health practitioners will also have a role to play in the reallocation of funding and the imposition of innovative financing mechanisms such as pollution taxes and other market based incentives.

Aspects of the environment	Types of conflict	Public policy goal
Built Environment	Interaction of the community and the natural environment	Liveability
Social Environment	Interaction of the community and the economy	Equity
Economic Environment	Interaction of the economy and the natural environment	Sustainability

Source: Adopted from ALGA (1993), *Ideas for Integrated Local Area Planning, The New Public Health*

Environmental health practitioners of the future

Implications of structural changes

The organisational and program restructuring that will occur in respect of environmental health in the next century will provide significant opportunities for environmental health practitioners. Many of these opportunities will involve roles that are different to those that are currently undertaken by environmental health practitioners. This has significant implications for environmental health practitioners:

- First, environmental health practitioners will require a broader range of competencies.
- Second, environmental health practitioners will have to become more interdisciplinary in their focus.
- Third, environmental health practitioners will have to choose whether they want to be leaders or followers.

Turning then to the future competencies of environmental health practitioners.

Competencies

The development and training of environmental health practitioners has not been a priority over the last 20 years. Accordingly there is a deficit of properly educated and trained environmental health practitioners. Individuals with little or no knowledge of epidemiology, biostatistics, toxicology, public policy and risk assessment have filled key positions in environmental health where such knowledge is essential.

In the coming century, environmental health practitioners will be required to be competent in the following matters (Gordon 1995:32-33):

- relevant environmental health sciences such as biology, chemistry, physics, geology, ecology and toxicology;
- environmental health technical issues;
- epidemiology;
- biostatistics;
- etiology of environmentally induced diseases;
- risk assessment;
- communications and marketing;
- personnel and program management;
- organisational behaviour;
- public policy development and implementation;
- environmental health planning knowledge (land use, energy production, resource utilisation, transportation, product design and development);
- cultural sensitivity;
- strategic planning;
- financial planning and management; and
- environmental law.

Interdisciplinary focus

Apart from these competencies, environmental health practitioners will also be required to be interdisciplinary in their focus. The field of environmental health requires the involvement of a score of disciplines. Additionally, the field of environmental health requires practitioners to function in roles varying from routine inspection and surveillance through to management, policy, education and research.

These practicalities will require environmental health practitioners to develop alliances with other professionals practising in environmental health including, but not limited to physical scientists, life scientists, social scientists, educators, physicians, environmental scientists, engineers, data specialists, planners, administrators, laboratory scientists, veterinarians, economists, political scientists and yes even lawyers.

Leadership

The development of alliances with other professionals who practise in the environmental field however should not detract from environmental health practitioners being leaders in the field of environmental health. Whilst other professionals such as myself may practise in the environmental health field, it should be environmental health practitioners like you who are the leaders in the environmental health field.

Environmental health practitioners must show effective leadership as scientists, managers, policy formulators and risk communicators. As leaders, environmental health practitioners should:

- be strategic planners addressing current and emerging issues;
- lead rather than resist desirable changes in organisations, priorities and programs;
- be visionary, proactive and become agents of change;
- show the courage to direct public and political attention to science based priorities rather than emotionally perceived priorities;
- develop and implement public policy;

- understand and communicate the net environmental health impact of proposed programs; and
- ensure that alleged problems are properly defined prior to proposing expensive solutions and programs.

Conclusions

For those environmental health practitioners who exhibit the necessary competencies and provide leadership in the environmental health field, the future is very bright indeed.

However, those who are inflexible and rely on past accomplishments, the status quo and the protection of organisational turf will become endangered species who are eking out a subsistence living in a constantly shrinking organisational environment.

By meeting the challenges of the next century, it is within the grasp of environmental health practitioners to guarantee a bright future for themselves and more importantly for the field of environmental health.

May the force be with you!

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Summary of recent changes and updates to planning and environment law in Australia and with reference to observations emerging from Canada

Ian Wright

This article discusses the recent changes and updates to planning and environment law in Australia and abroad with reference to observations emerging from Canada

September 1999

Native Title extended to Australian oceans

The Federal Court has ruled that Native Title can exist over Australia's seas, paving the way for more than 100 claims by coastal and island Aboriginal communities.. The judgment however conflicts with the Native Title Amendment Act which denies indigenous people the right to negotiate the grant of future commercial fishing licences. The case involved Australia's first Native Title claim over areas of sea involving some 10 main islands off Darwin owned by several hundred indigenous people. Justice Howard Olney ruled that Native Title rights could exist over areas of sea in the sea bed but that those rights did not override the interests of other parties. The Judge stated that Aborigines who proved Native Title rights over the sea could fish and hunt for non-commercial purposes and visit places of cultural and heritage importance. However, those rights do not allow Aborigines exclusive use of the water. The case means Aborigines have the right to their traditional use of the seas without permits. However, they cannot stop others from carrying out fishing or commercial activities.

Some observations from Canada

In a recent article in the Canadian Environmental Law Association Journal, Theresa McClenaghan makes some interesting observations about recent land use planning trends and their impacts in Canada. In the article, she identifies 10 recent trends in land use planning. It is important to note that the same observations could be made about Queensland.

- More decisions than ever are being moved to municipalities (ie local governments) from the provincial level of government (ie State governments). In the article, the author points out that examples of this trend include official plan approvals, subdivisional approvals, septic system approvals and contaminated land redevelopment. It is pointed out that this trend has the benefit of local decision making. On the other hand, a disadvantage of this approach is that many decisions are being made only at the local level with no party particularly looking for the big picture. It is also observed that many local decision makers are not prepared, for their new responsibilities and that there is an immediate need for more resources and training at the local level. This sounds very familiar.
- Almost all land use laws and regulations have undergone significant changes in the last two to four years. The author quotes various changes to Canadian Planning Statutes and Canadian Environmental Statutes. The author quotes some 25 – 30 pieces of legislation that have been amended in the last two to four years in Canada. But the ground rules have shifted significantly and very quickly thereby making accurate prediction of outcomes of particular applications and disputes very difficult. Interestingly, the author also states that even predicting the criteria that will be used in particular decisions is very problematical. No doubt most lawyers and statutory planners would agree with this observation.
- Local decision making and local participation is more critical than ever to environmental protection. In relation, to this point, the author notes that there is increased industry-based decision making (such as decisions involving contaminated lands). The author also notes that the timeframes for making decisions are increasingly short and there are significant notice issues and procedural uncertainties.
- Many opportunities for citizen input are being eroded. In relation to this matter the author notes that there has been a trend in recent times towards process matters. In particular, who decides something and based on what, are the critical issues. The author therefore notes that decision makers particularly at the local level must be pressed for good process and local residents must take advantage of the available processes.
- Many decisions that appear simply financial or structural have important environmental impacts. In this respect, the author refers to various changes to infrastructure planning legislation and local government statutes which have placed constraints on local governments to fund infrastructure. The author notes that changes in these statutes have significant implications for the environment.

- The roles of provincial (ie State) and federal agencies involved in the role of protection are being drastically altered. In this respect the author refers to the Harmonisation Accord on the Environment (and its sub-agreements) signed in January 1998 which alters the traditional role the federal government played in protecting the environment. This agreement is similar to the inter-governmental agreement on the environment signed in the early 1990s by governments of all levels together with the recently passed federal environment legislation. The author notes that in Canada the governments are often withdrawing from regulatory oversight and that many roles are being given over to industry or to industry associations. Furthermore, the author notes that many public resources are being turned into commodities, such that governments are now more often concerned about their liability than about what is the right decision from a public protection perspective. Undoubtedly these comments would also sound familiar to Queensland planners.
- There is a very significant link between land use and health that is often overlooked in planning decisions. In this regard, the author refers to decisions in respect of roads and their impact on air quality and the impact on water quality as a result of land use decisions. The author points out that land use affects the physical health, psychological health, and social and cultural health of communities and notes that the impacts of land use planning trends on the human wellbeing has often been underestimated. This is a critical point that must be addressed by human land use planners in the production of relevant planning schemes.
- It is becoming apparent that infrastructure decisions are critical to the future shape of the landscape and of the quality of life. In this regard the author refers to critical decisions including the loss of use of ground water, the location of roads, the location of sewer easements and the placement of bore water pipelines. The author notes that these infrastructure decisions are often completely divorced from the question of the shape of all future communities and as such are made often piecemeal and incrementally. As such, unconstrained road building and construction of water pipelines removes some of the environmental constraints that previously kept development out of important natural heritage function areas.
- Many agencies and organisations are attempting to move decisions to the "*front end*" of the planning process. The author notes that there is such a thing as "*good front end planning*" which looks at impacts before making a decision, which incorporates environmental concerns on an eco-system basis and which plans to a goal or a vision. On the other hand, the author notes that terrible front end planning involves land use decisions without a context, which remove public notice and appeal provisions, and alter the ground rules without public involvement.
- Planning decisions have a very long life. Communities must think about what they want to look like in 20 or 50 years. The decisions we make today will shape the landscape for our children and grandchildren.

Integrated catchment management

The Department of Natural Resources has produced four reports in relation to planning for integrated catchment management. The reports summarise the key findings of Stage 1 of the National Heritage Trust Project which provides for the incorporation of integrated catchment management into local government planning schemes. The Stage 1 Evaluation Report identifies the lessons and recommendations from Stage 1 and is intended to be incorporated into the documentation for Stages 2 and 3. Stage 2 is the preparation of good practice planning guidelines which are intended to be published by the Department of Communication and Information, Local Government Planning in September 1999. Stage 3 involves the undertaking of a training education package which is to be undertaken in November 1999.

Review of State planning policies

The State government is undertaking a review of a number of existing State planning policies as well as commencing the production of new State planning policies. The existing State Planning Policy for the Development and Conservation of Agricultural Land and the Guidelines for the Identification of Good Quality Agricultural Land are being reviewed. The State Planning Policy for Planning for Aerodromes and other Aeronautical Facilities is also being reviewed. A number of other new State planning policies are also being considered. These include:

- a State Planning Policy for intensive animal industries;
- a State Planning Policy for acid sulfate soils – this will require local government to put in place measures to ensure that acid sulfate soils are considered in the development of new planning schemes and in the assessment of development applications – this is expected to be released in 1999; and
- a State Planning Policy for natural disaster mitigation – this will require councils to take account of the need to incorporate measures to mitigate the impact of natural disasters when developing planning schemes and when assessing development applications.

Water reform

In accordance with the Council of Australian Governments (**COAG**) reform agenda, the Queensland State government has been implementing a water management planning system across the State. The water management planning regime has involved the preparation of Water Allocation and Management Plans (**WAMP**) and Water Management Plans (**WMP**).

WAMPs are being prepared for all key river basins. It is intended that these WAMPs will specify the flows necessary to maintain the health of river and ground water systems and determine water resources that can be allocated for existing and future consumption. It is also anticipated they will form the basis for the specification of defined entitlements which may be transferable within river basins. It is anticipated that new legislation will be drafted in order to implement WAMPs and also to provide for the granting of entitlements and the transfer of water entitlements. The legislation will also have to make provision for the regulation of the construction of works such as pump stations, dams and weirs to ensure that they are consistent with the WAMPs.

It is intended that WMPs will also be produced in other river basins or catchments where it may become necessary to limit the extent to which additional licensing occurs. It is intended that WMPs will not specify entitlements as explicitly as WAMPs. Therefore there will be limited scope for transfers of entitlements. It is also anticipated that licences granted will continue to attach to the land rather than land owners. It is anticipated that no new legislation will be required to implement WMPs as these are currently provided for under the Water Resources Act.

It is intended that approval for works required by users such as the construction of weirs or pumps would be approved by the Department of Natural Resources through the IDAS process under the Integrated Planning Act. It is anticipated that as conditions of these development approvals a land and water management plan may have to be prepared to address the use of water on a particular property.

Planning and Environment Court Rules

On 1 July 1999, new Planning and Environment Court Rules and Forms commenced operation. Whilst generally in accordance with the existing procedures the rules do provide for some significant changes.

- An applicant who has commenced proceedings for a declaration will be required to name as respondents those persons who will be directly affected by the relief sought. This is changed from the current practice where either only local governments are named as a respondent or alternatively disputes between land owners are commenced without the relevant local government being named as a respondent.
- The Rules provide for the provision of email addresses as part of the contact details for appellants or applicants. As a result of this notification the service of court documents may be effected by email as is provided for under the new Uniform Civil Procedure Rules.
- An entry of appearance is required to be filed within 10 days of the service of an originating process.
- Accordingly parties such as local governments which are named as a respondent or co-respondent in proceedings, whether they be applications or notices of appeal, will be required to serve an entry of appearance within 10 days of the service of those documents if they intend to be heard in respect of the appeal. Any party which has filed an entry of appearance may file and serve a notice of preliminary steps which specifies procedural matters such as the notification of issues, discovery and the conduct of without prejudice conferences between experts. Provision is also made for the filing and serving of a notice of agreement if agreement is reached in relation to an issue. Provision is also made for the filing and service of a notice of unresolved issues.
- Apart from the filing of notices of preliminary steps, notices of agreement and notices of unresolved issues, the court still has the power to make directions for the conduct of the matter following the filing of an entry of appeal.

Review of Planning Schemes

The May and June editions of the American Planning Association's Zoning News contain a two part article entitled "*So You Gonna Revise the Zoning Ordinance?*". The article sets out a number of interesting check lists in relation to review of planning schemes. It suggests that the zoning revision process should follow a basic five-step process:

- put someone in charge;
- identify what is wrong with the ordinance;
- agree upon the scope of necessary changes;
- redraft the ordinance; and
- review and adopt the ordinance.

Who is in charge?

In determining who should be put in charge of an ordinance review the following factors are to be considered:

- the zoning revision is essentially a policy process and the group charged with the revision should have a policy orientation;
- a revision cuts across many areas of expertise including law, planning, architecture and urban design, real estate and construction amounting to more than just an adjustment of regulatory provisions; and

- a revision will involve various constituencies with different issues and concerns and as a result the group should be skilled and comfortable.

It is also pointed out that the assignment of staff to the revision group is critical in that the process is too demanding and too important to be assigned to an individual who is overloaded with other duties.

What is wrong with the present ordinance?

It is noted that in order to fix a zoning ordinance it is necessary to agree on what is broken. Accordingly, it is important that a careful and complete listing of problems and issues is undertaken and that this list is best developed through a program of community input that reaches out to key members of the zoning constituencies including staff of the local council, the real estate community, sales, construction, design and finance sectors and the community including representatives of community based organisations.

It is also pointed out that three key analyses should be performed in order to complement the issues addressed by the various constituencies. These include a review of the relationship of the zoning ordinance to the overall planning scheme provisions, a technical review of the structure and consistency of the zoning ordinance in light of current best practices and an analysis of zoning change actions over the past five years to gain a sense of key problems. It is also suggested the following issues should be addressed or investigated:

- *The utility of the current ordinance organisation*. Does the ordinance clearly specify who is responsible for various application reviews and approvals? Is that responsibility assigned to the most appropriate person or position?
- *The relationship of individual areas to the overall structure of the plan*. Do the purpose and standards of each zoning district relate to applicable policies of the whole planning scheme?
- *The adequacy of the current administrative structure*. Can applicants easily identify who to see or what to apply for when they have a zoning problem or need? Do the reviews and approvals happen in a timely manner?
- *The utility of current development standards*. Are current parking, landscape, environment or similar requirements easily applied and do they have the desired results?
- *The currency and/or lack of definitions*. Are terms defined in a contemporary manner and are all major terms used in the ordinance clearly defined?
- *The scope of ordinance interpretation*. Does the ordinance clearly specify district requirements in the related approval process or do applicants often depend on staff interpretation of such requirements?
- *The relationship of zoning bulk standards to the development being constructed*. Do the height and yard regulations encourage or discourage a desired type of development? Does it result in buildings of desirable scale and design?

What changes are necessary?

It is suggested that the scope of new changes be thought of as a proposed zoning policy. The document makes the important point that comprehensive planning or structure planning is often thought of as a policy exercise whilst zoning is often viewed as a regulatory exercise. However the point is well made that there is as much or more policy development inherent in the zoning process as within the overall structure planning process. The document also points out that zoning is not a general regulatory measure but a highly specific approach towards addressing details such as the placement of buildings, specifying the type of land uses that can be located on specific sites and addressing a myriad of small but significant requirements for parking spaces, sign location and design and tolerable noise vibration and dust levels throughout site users. The guidelines and policies required to provide such direction are extensive and their development is very demanding.

Drafting the Ordinance

The article explores various current approaches and techniques for drafting of ordinances. In particular, it provides guidance in relation to the drafting of administrative provisions, district structures, development standards and definitions. The comments in relation to administrative provisions is of limited application in Queensland because of the provisions of IPA. However some interesting comments are made about district structure, development standards and definitions.

In relation to district structure, it is pointed out that typical zoning district sections contain a purpose statement, use regulations, bulk regulations and site development standards. In relation to purpose statements, it is pointed out that the purpose statement should set forth the intent of the district, the objectives to be achieved by the district and its linkage to the comprehensive structure planning. The purpose statement is intended to be a key tool in establishing the link between the comprehensive structure plan and the zoning ordinance and as such is important in turning the zoning ordinance into an implementation mechanism for the plan. This is particularly important when the zoning is challenged as part of a development application as it can be used to show that the district is arranged in a fashion that carries out the intent of the comprehensive structure plan.

In relation to use regulations the article points out that the traditional form of zoning control provides for a specified list of land uses to be allowed in particular zoning districts. It also points out however that some performance zoning approaches have been adopted to bypass land uses as a surrogate and establish district controls permitting any use if adhering to certain performance characteristics. However it is noted that such ordinances have met with some disfavour as a result of community difficulty in understanding the kinds of uses that might be located in a particular area, the complexity of applying such procedures and a lack of predictability regarding possible development patterns.

It is pointed out that current trends in use regulation include conditioning the character and location attributes of uses by establishing more permitted uses and standards and focussing the conditional use process on those uses that tend to create the greatest land use friction in the community. The departure from the extensive listing of uses in favour of more general terms that are precisely defined in a performance manner has also resulted from the significant array of new commercial activities that are occurring, the mixing of uses and the wide variety of building types. It is also pointed out that the mixed use phenomenon is growing and that this may be culminated either through the district use list or through a broadening of accessory uses where the use is considered to be accessory to a principle building.

In relation to bulk controls it is pointed out that contemporary trends include the use of sliding scale height standards where maximum height is held back at a considerable distance from the front building line to prevent over building. Another trend is the adoption of "build to lines" which help to establish design character. This technique differs from setbacks by establishing a line that buildings must adhere to rather than be set back from. The purpose of "build to lines" is to encourage the development of a unified street wall that brings buildings closer to the street. In relation to development standards some interesting observations are made about parking and loading, landscaping and sign control provisions.

Town planning consultants beware

Urban Regeneration Agency and English Partnerships (Medway) Ltd v Mott McDonald (High Court Case) 1996 NJ 736 October 1998) the United Kingdom High Court has held an engineering consultancy liable to an amount of $45 million for negligence in respect of professional advice provided in respect of the clean-up of the former royal dockyards site in Chatham, London. It was claimed in the case by the plaintiff, the Urban Regeneration Agency (**URA**), that the consultants failed to provide proper estimates of the contamination and clean-up costs at the beginning of the project. During the remediation process it was found that the amount of contaminated material had been underestimated by more than 700,000m^3 and that this had imposed considerable cost overruns on the project such that the URA argued that it would never have started the project if it had known the eventual costs. It is apparent that the URA, its engineering consultants and occupiers and future occupiers of the land and their financiers had very different perceptions of what contamination and clean up suitable for residential end use actually meant. The URA considered any contamination which was either harmful or perceived to be harmful by a potential purchaser or financier to be unacceptable. The engineering consultants on the other hand adopted a more scientific approach arguing it was only necessary to remove contaminated material which was considered to pose a danger to the public health or the environment regardless of public perception. The High Court found that the engineering consultants had failed to exercise reasonable care at various stages of the project. Delivering the judgment the court made the following observations:

- consultancy teams must have the proper expertise – in this case the court found that the consultancy team had been set a task which was beyond their collective or individual expertise;
- good communication between the client and consultant was critical throughout the project;
- there was a continual need throughout the project to clarify the basis of professional judgment and scientific advice and to make explicit the assumptions made; and
- to ensure during contract negotiation that standards are agreed on the definition of clean or acceptable contamination and that the methods to be used to derive those standards (such as human health risk assessment) are agreed.

Acid sulfate mapping

The Department of Natural Resources, the Natural Heritage Trust and various local governments have completed a three year mapping program identifying soils in South-East Queensland where acid sulfate soils could cause environmental problems if they were disturbed by excavation or development. The map has revealed that there are 60,000 hectares of acid sulfate soils between the New South Wales border and Noosa and that of these, 15,000 hectares have already been developed upon for urban purposes and sugar cane is grown on some 9,000 hectares.

Plan making in New South Wales

The New South Wales Department of Urban Affairs and Planning has released a discussion paper on plan making. The *Environmental Planning and Assessment Act 1997* (**EPA Act**) provides for the making of State Environmental Planning Policies (**SEPPs**), Regional Environmental Plans. (**REPs**), Local Environmental Plans (**LEPs**), Development Control Plans (**DCPs**) and Section 94 Contribution Plans. These plans are often preceded by a regional or local environmental study or strategy. As well as these formal instruments the Minister for Urban

Affairs and Planning makes directions and determinations under the Act to formally guide local governments on the format, structure and subject matter of LEPs.

Plan making under the EPA Act traditionally had an urban or built environment bias and has largely been concerned with the allocation and regulation of land use. As a result there are a growing number of plans and strategies being prepared outside the EPA Act especially in the area of natural resource management. The links between these plans and the EPA Act are often unclear to the detriment of their effect and implementation. A number of weaknesses and limitations have been identified in the existing plan making system:

- the complexity of the system;
- a perceived weakness in the setting of State direction and strategic regional planning;
- the static, inflexible nature of plans and their limited guidance on how to manage change or better manage existing uses; and
- the general low level of public input in the early stages of developing a plan.

The discussion paper sets out three possible planning framework models for reform.

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Putting the horse before the cart: Integrating environmental health practice into sustainable development

Ian Wright | Natalie Hewitt

This article discusses the concepts of environmental health and sustainable development and how they can be integrated successfully by placing environmental health at the centre of sustainable development policy

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Abstract: Sustainable development has traditionally been seen as the integration of the natural environment and economic development. However it is becoming increasingly apparent that the social environment can have a significant impact on and be impacted by the natural and economic environments. The issue is not so much about the integration of sustainable development into environmental health practice but rather the integration of environmental health practice into sustainable development. To speak in terms of incorporating sustainable development into environmental health practice is frankly to put the cart before the horse. The challenge for the environmental health profession is to incorporate environmental health into sustainable development. That is to put the horse before the cart. This paper will investigate those technical, legal, policy and institutional matters that are the necessary prerequisites to the proper integration of environmental health practice into sustainable development. The thesis of the paper will be that environmental health has not been properly incorporated into sustainable development at a policy, legal or institutional level and that the achievement of sustainable development is being fundamentally constrained by this failure on the part of environmental health professionals.

Introduction

On 7 October 1999 the Federal Health and Aged Care Minister, Dr Michael Wooldridge, launched the National Environmental Health Strategy. The document was the result of extensive consultation between the National Environmental Health Forum and the Australian Institute of Environmental Health and as such held much promise.

However, the document falls short of expectations in respect of the view it takes of the future direction of environmental health. Specifically, rather than examining how the discipline of environmental health fits within the broader framework of sustainable development, the National Environmental Health Strategy proceeds from the basis that sustainable development should be merely one of a number of principles guiding the future direction of environmental health. This, in my opinion, is to put the cart before the horse in the debate as to the future of environmental health.

In order to examine this argument is it instructive to first define the key concepts of "*sustainable development*" and "*environmental health*".

Defining the concepts: environmental health and sustainable development

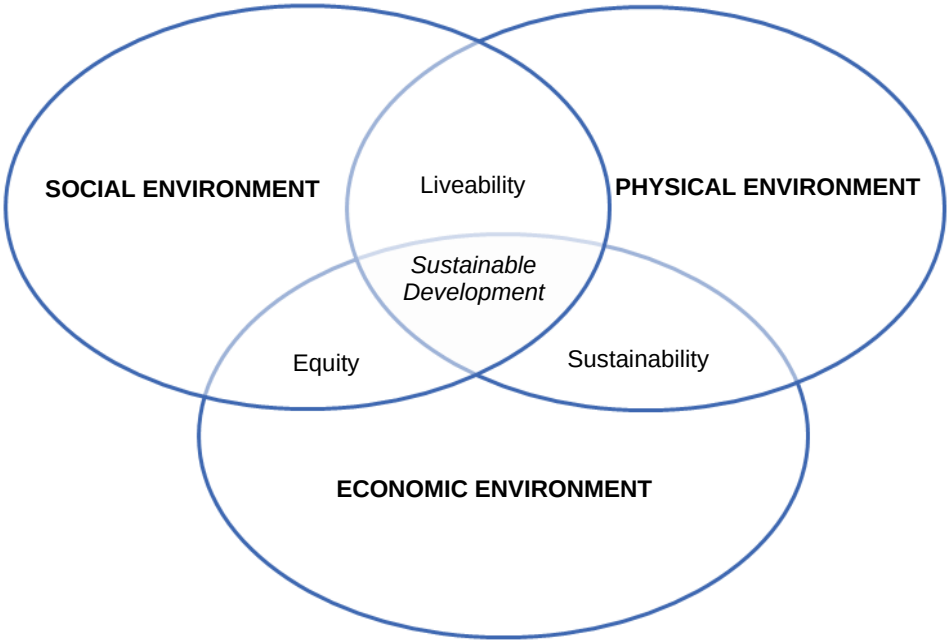
Sustainable development

The concept of sustainable development was popularised by the World Commission on Environment and Development in the document Our Common Future, more commonly known as the *Brundtland Report*. The Report defined sustainable development as:

> "*Development that meets the needs of the present without compromising the ability of future generations to meet their own needs*."[83]

[83] World Commission on Environment and Development*, Our Common Future*, p.87.

The key components of sustainable development are often summarised in the following model:



The model clearly illustrates that sustainable development is a product of the inter-relationship between the social, economic and physical environment. Sustainable development exists at a point where the social, economic and physical environments are in balance, that is, where liveability, sustainability and equity exist.

Environmental health

The term "*environmental health*" is considerably more problematic to define with the concept being considered in innumerable, equally authoritative, publications. However, I think it is generally accepted that traditionally environmental health has been viewed simply as a phenomenon of the interaction between human beings and their physical environment.

Environmental health was recently defined in the National Environmental Health Strategy as:

> "*Those aspects of human health determined by physical, chemical, biological and social factors in the environment*".[84]

The Strategy goes on to state that, central to environmental health is the understanding that human health is dependent upon the physical and social environment.[85] That is, environmental health is confined to consideration of the "*liveability*" component of the sustainable development model.

In terms of a strict definition of "*environmental health*", I would suggest that the definition provided in the National Environmental Health Strategy would generally be acceptable. However, for the purposes of this discussion, I consider that it is far more meaningful to focus not upon environmental health in the abstract, but upon the quality of a community's environmental health.

In considering the quality of a community's environmental health, I think that it is important to note, as has the National Environmental Health Strategy,[86] that the economic environment plays a significant role. It has been well documented that the socio-economic status of a particular community is a significant determinant of its environmental health, as is the impact of the level and nature of economic development upon the surrounding physical environment.

I would therefore suggest that the quality of environmental health is dictated not only by the interaction of the social and physical environments, but also the interaction of the social and physical environments with the economic environment.

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84 *National Environmental Health Strategy*, p.3.

85 *National Environmental Health Strategy*, p.3.

86 *National Environmental Health Strategy*, chapter 4.

Putting the horse before the cart: Integrating environmental health into sustainable development

It should hopefully be evident from the discussion of the concepts of sustainable development and the quality of a community's environmental health that both are concerned with the interaction of the social, physical and economic environments. What we are now faced with is the question of the horse and the cart. Do the principles of sustainable development act merely as a guide to achieving good environmental health, or is sustainable development in fact the ultimate objective, the horse rather than the cart? The National Environmental Health Strategy states,[87] as indeed does the title of this conference, that it is the former, but as the title of this paper suggests, it is my view that it is the latter.

Sustainable development operates at the doctrinal level. It is an overarching framework in which all disciplines should operate – planners, engineers, lawyers and environmental health practitioners. It cannot, by definition, be integrated into a particular discipline. It is the goal each discipline is to pursue.

Turning specifically to the discipline of environmental health, it is evident from the key documents concerning sustainable development that ensuring quality environmental health for the community is a fundamental component of achieving the broader goal of sustainable development:

- The Rio Declaration on Environment and Development, which states the principles of sustainable development, has as its very first principle that:

  > "*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*."

- Agenda 21, the 'action plan' for the implementation of sustainable development which resulted from the United Nations Conference on Environment and Development discusses reducing health risks from environmental pollution and hazards as an integral component of achieving the goals of sustainable development.[88]
- At a national level, the National Strategy for Ecologically Sustainable Development discusses public health as a key issue to be considered in achieving ecologically sustainable development.

Consideration of quality environmental health as a fundamental component of sustainable development is complicated by the fact that the various components of sustainable development are interdependent. That is, in order to ensure the community-wide quality environmental health of which the documents speak, it will be necessary to embrace other key components of sustainable development such as the pursuit of intra and inter-generational equity. However, I think it must be made clear that quality environmental health is nevertheless a component of sustainable development. It is one of a number of concurrent prerequisites for the achievement of sustainable development.

The position of the National Environmental Health Strategy, and indeed this conference, that sustainable development can somehow be integrated into environmental health is a myth that must be exposed. Sustainable development cannot be integrated into environmental health, rather quality environmental health must be considered as part of the broader goal of achieving sustainable development.

The National Environmental Health Strategy: The need to reorientate the debate

The Australian Charter for Environmental Health is found in Chapter Two of the National Environmental Health Strategy. The Charter identifies the basic entitlements and responsibilities required to maintain and improve the quality of health for all Australians. The following are listed as its guiding principles:

- protection of human health;
- inter-relationship between economics, health and environment;
- sustainable development;
- local and global interface;
- partnership;
- risk-based management;
- evidence-based decisions;
- efficiency; and
- equity.

Based upon the previous discussion of the concepts of environmental health and sustainable development and their relative roles, I believe that the guiding principles listed are seriously deficient and demonstrate a confusion of concepts.

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87 *National Environmental Health Strategy*, p.9.

88 Agenda 21, *Chapter 6: Protecting and Promoting Human Health*.

- Firstly, as we have discussed, sustainable development can simply not be a guiding principle of environmental health, it is the broader objective which environmental health must seek to achieve.
- Secondly, the document lists sustainable development as a guiding principle alongside, and presumably with equal status, to the other guiding principles. However, the other guiding principles are in fact components of sustainable development:
  - inter and intra generational equity is implicit in the very definition of sustainable development;
  - protection of human health is the subject of the first principle of the Rio Declaration on Environment and Development;
  - the inter-relationship between economics, health and environment is recognised by Agenda 21 as the basis of its chapter dealing with the protection and promotion of human health conditions;
  - evidence based decisions is a restatement of the precautionary principle; and
  - risk management, the local and global interface and the need for issues to be addressed as a partnership between the various levels of government with adequate public participation are all issues the subject of the Brundtland Report.

For sustainable development to be seen as a guiding principle of the Australian Charter of Environmental Health is a dangerously erroneous policy position. It is contrary to the very idea of sustainable development as set out in the Brundtland Report, the Rio Declaration, Agenda 21 and federal policy documents such as the National Strategy for Ecologically Sustainable Development.

More importantly, guiding principles which are so fundamentally wrong in their application of the concept of sustainable development will prove to be unworkable when the time comes to implement the Charter. How can programs be developed which have sustainable development as a guiding principle when achieving sustainable development should be the very objective of the program?

The guiding principles do not promote programs that take account of the bigger picture within which environmental health practitioners operate. Specifically, they fail to promote interaction with other disciplines or launch environmental health beyond its traditional boundaries to the centre of the sustainable development implementation agenda.

I would suggest that rather than pursing the broader goal of sustainable development, programs will be developed which merely perpetuate the introspective standpoint of the profession. This is not an Australian Charter for Environmental Health, it is a document that is written by the profession for the profession.

Achieving sustainable development: the environmental health contribution

Given that the National Environmental Health Strategy has just been launched, realistically the question is not whether or not it should be abandoned, but how best the profession may pick up the concepts and run with them – in the right direction.

Initiatives for the discipline of environmental health to orientate its objectives towards the achievement of sustainable development may be categorised as follows:

- institutional;
- policy;
- legal; and
- technical.

Institutional

A central tenant of the doctrine of sustainable development is that actions are taken in an integrated manner, across all levels of government. However, environmental health is, by its nature, an inter-sectoral issue. Although it is most visibly addressed by environmental health units within a health department or environmental protection authority, environmental health impacts are equally relevant to urban planning practices, and transport, trade and economic policy making. Such a fragmentation of responsibility has been recognised as a major impediment to better environmental health management.[89]

The National Environmental Health Strategy[90] has identified that in order to achieve quality environmental health it is essential that better inter-sectoral links are established. This recognition has translated into the recent establishment of the National Environmental Health Council as the peak environmental health advisory group for Australia. The council has been briefed with providing leadership and a focal point for co-operation on all environmental health issues. As a formal subcommittee of the National Public Health Partnership Group, the council will provide Australian Health Ministers with advice on environmental health issues.

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89 *National Environmental Health Strategy*, p.12.

90 *National Environmental Health Strategy*, p.12.

However, I would suggest that the council should also be responsible for launching environmental health into the centre of the sustainable development implementation agenda. The council should seek to bring environmental health issues not only to the attention of Health Ministers, but those Ministers responsible for local government and planning, transport, environment, water resources, trade and economic policy making. The council needs to provide leadership in projecting the discipline of environmental health into the bigger picture.

Policy

Agenda 21 provides a number of policy objectives for environmental health in the context of sustainable development. For example:

- to incorporate appropriate environmental and health safeguards as part of national programs in all countries; and
- to identify and compile, as appropriate, the necessary statistical information on health effects to support cost/benefit analysis, including environmental health impact assessment for pollution control, prevention and abatement measures.

While the objectives are clearly in the appropriate vein it must be remembered that Agenda 21 is a consensus document and as such it is not able deal with the issue as definitively as is required. The National Strategy on Ecologically Sustainable Development has however, refined the policy objectives of Agenda 21 for the implementation of sustainable development in Australia. They include:

- examine mechanisms for incorporating health impact assessment into relevant environmental and economic decision making processes;
- systematic identification, development, analysis and monitoring of agreed environmental health indicators;
- monitoring the state of the environment and population health;
- improving public understanding of health risks and benefits;
- improving the scientific assessment of these risks and benefits; and
- ensuring cooperation and coordination between levels of government across all sectors.

I would suggest that the National Strategy for Ecologically Sustainable Development provides a clear articulation of the policy objectives necessary to orientate environmental health towards the goal of sustainable development. However, considering that the National Strategy for Ecologically Sustainable Development was published in 1992 the challenge lies in their implementation. Or, to put it another way, we now have the horse before the cart, we have taken it to the water, we just have to make it drink!

Legal

The legal arena has an important role to play in the implementation of policy objectives. However, I believe reform is needed in order that the law may better serve the discipline of environmental health in orientating its goals towards sustainable development. Specifically, the law needs to move from providing environmental health practitioners with merely reactionary tools to providing practitioners with preventative mechanisms.

For example, Queensland's *Integrated Planning Act 1997* has as its object to seek to achieve ecological sustainability[91] which is defined as a balance that integrates:

- protection of ecological processes and natural systems at local, regional, State and wider levels; and
- economic development; and
- maintenance of the cultural, economic, physical and social wellbeing of people and communities.[92]

I would suggest that a necessary strategy in achieving this objective is to require environmental health to be a mandatory component of all planning schemes. Such reform is particularly important given that planning schemes are the framework within which development proposals are assessed.

A similarly desirable reform is to require all development that currently demands that an environmental impact assessment be conducted to instead require impact assessment that deals with the impact of the development proposal on both the physical environment and human health. Given the inseparable nature of the impact upon the physical environment and human health, this is considered to be preferable to a separate environmental impact assessment and a health impact assessment.

Such reform would significantly contribute towards the achievement of sustainable development by providing decision-makers with the information necessary to enable a balance to be found between economic development, environmental quality and health and social needs.

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91 *Integrated Planning Act 1997*, section 1.2.1.

92 *Integrated Planning Act 1997*, section 1.3.3.

Technical

Traditionally, the role of the environmental health officer has been as an enforcer of legislative requirements. Indeed regulatory enforcement has previously been viewed as the cornerstone of environmental health practice. However, it has been recognised that this is not necessarily the way of the future.[93]

With the law and government policy increasingly focusing towards the goal of sustainable development, the role of the environmental health profession is undoubtedly set to change. I believe the move to sustainable development will have two major effects for environmental health practitioners:

- a much more proactive approach to environmental health will be required, with, for example, environmental health being considered as an integral part of development assessment; and
- the environmental health profession will find itself at the centre of the implementation of sustainable development as the only discipline trained in the management tools of sustainable development – risk assessment, risk communication and risk management.

Conclusion

There is little doubt that the paradigm shift from industrial development to sustainable development will continue in Australia, and indeed the world. The challenge for the discipline of environmental health is not to wait for the values of sustainable development to trickle down from policy documents such as the National Strategy for Ecologically Sustainable Development, merely making incremental changes to current practices. Instead, the challenge for the discipline of environmental health is to take advantage of its training in the essential skills of sustainable development management and direct environmental health to its rightful place as the central component of sustainable development policy and implementation.

The National Strategy for Environmental Health can assist in meeting this challenge if in its implementation its shortcomings are recognised and a point is made of putting the horse before the cart in order that implementation programs may be developed which seek to achieve the broader goal of sustainable development.

Most importantly, it must be recognised that the goal of achieving sustainable development has been with us for over a decade. It has been the springboard for many politically correct strategy documents, high on rhetoric and low on achievable implementation initiatives. The real challenge is to not let the National Strategy for Environmental Health to be yet another such document. The challenge is that once we have the horse before the cart, we actually ensure that it is harnessed as an effective vehicle to achieve sustainable development.

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[93] *National Environmental Health Strategy*, p.ii.

Negotiated planning: Infrastructure agreements under IPA

Ian Wright

This article discusses the Kawana Waters Infrastructure Agreement made under IPA. The article considers the negotiation of the agreement, the legal documentation of the agreement, the impact of IPA on the agreement and how it affects the drafting procedure of infrastructure agreements

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Introduction

On 6 September 1996 an Infrastructure Agreement was executed between the Minister of Natural Resources, Caloundra City Council, Kawana Estates Pty Ltd (**Kawana**) and Buddina Pty Ltd. This Infrastructure Agreement was executed pursuant to the provisions of the then *Local Government (Planning and Environment) Act 1990* (**PEA**) and was the culmination of some three years of negotiations between the parties. It represented not the conclusion of a process but rather the beginning of a process which will be ongoing for the next 20 years.

Themes of the paper

In this paper I would like to explore four themes:

- First, I will consider the legal, technical and commercial issues underpinning the negotiation and execution of the Kawana Waters Infrastructure Agreement.
- Second, I will discuss the structure of the legal documentation that arose out of the Kawana Waters Infrastructure Agreement.
- Third, I will discuss the impact of the Integrated Planning Act (**IPA**) on the Kawana Waters Infrastructure Agreement and other infrastructure agreements executed prior to IPA.
- Fourth, I will consider the impact of IPA on the drafting of infrastructure agreements.

Turning to the first of these four themes – the background to the negotiation and execution of the Kawana Waters Infrastructure Agreement.

Background to the Kawana Waters Infrastructure Agreement

Location

The Kawana Waters Infrastructure Agreement relates to land located in the local government area Caloundra City Council. The land which is referred to in the legal documents as the "*developable area*" is bordered by Nicklin Way to the east, the Mooloolah River to the west and extends from Currimundi in the south to the Mooloolah River in the north. The extent of the developable area can be seen from Map 1 of the Kawana Waters Development Control Plan. In this instance the developable area comprises the land designated Urban, Detailed Planning Area and Open Space. Importantly, it should be noted that the Kawana Waters Development Control Plan encompasses the developable area as well as other land.

Interests of the parties

So why did the parties execute an infrastructure agreement in respect of the developable area? I can only speak definitively about the council's position as that was the party on whose behalf I was acting. I can however, make some general observations about what I perceived to be the motivations of Kawana and the State government.

Council's position

The council's conduct in relation to the infrastructure agreement was heavily influenced by five factors:

- First, the developable area had been previously included by the council in the Residential A zone and accordingly various uses such as detached houses on 650 square metre allotments were as of right uses in this zone – therefore, the council had no say in the land use planning of the developable area.
- Second, the developable area was predominantly comprised of leasehold land as well as some limited freehold land. As a result the subdivision of the developable area is generally regulated by the Minister of Natural Resources under the development lease and the *Land Act 1994* rather than by the council under the PEA. Therefore, the council had no say in the subdivision of the developable area, although it did have some technical involvement for which it was paid no fees which was limited to the approval of engineering drawings in respect of subdivisions approved by the Minister of Natural Resources.

- Third, the council had entered into a series of agreements during the 1970s and 1980s with Kawana whereby the council had agreed to forego the right to seek infrastructure contributions in respect of sewerage headworks on the basis that Kawana had contributed land to the council for its sewerage treatment plant and ocean outfall projects. Therefore the council was constructing at its cost all sewerage headworks (exclusive of sewerage reticulation works) that were necessary to serve the developable area. As time went by this was starting to impact on the council's infrastructure funding program.
- Fourth, the council had a financial interest in the development of the developable area in at least two respects. First, the council obtains a commission for each block that is developed within the developable area. This commission was payment for land which the council had previously surrendered to the Crown and which was then included in the development lease issued to Kawana. Secondly, the council also wished to increase its rates base through the development of the developable area.
- Fifthly, the development that has historically taken place in respect of the developable area was causing increasing concern amongst the community in terms of the adequacy and provision of open space and community facilities as well as the quality of urban design. This manifested itself in terms of political pressure on local government councillors as well as State Members, particularly the Member for Caloundra, the Honourable Joan Sheldon.

The position of the State

The State on the other hand was motivated by conflicting interests. When one thinks of the State of Queensland it is easy to make the mistake that the State is a monolithic or homogeneous entity. As we all know, that is not the case. Indeed, in terms of the developable area, the State's position varied depending on the government department involved. However, in short the State was motivated by three factors:

- First, the Department of Natural Resources which administers the development lease pursuant to the *Land Act 1994* has a financial interest in the development of the developable area. The State receives a commission for each lot that is developed. As such, the State like the council has a financial interest in seeing the developable area developed.
- Secondly, the Department of Main Roads was faced with significant transport infrastructure costs as a result of the development of the developable area, in particular, and the development of the North Coast in general. Since Kawana was not required to make development applications, the provisions of the *Transport Infrastructure Act 1994* were not being triggered. Therefore, the Department of Main Roads was applying pressure to the Department of Natural Resources to ensure that land and other infrastructure contributions in respect of State controlled roads were forthcoming as part of the Minister of Natural Resources' approval of the subdivision of the developable area. Kawana for its part was resisting overtures to this effect from the Department of Natural Resources.
- Thirdly, increasing community concern over the quality of previous development manifested itself in political pressure being applied to State Members, one of whom was ultimately to become the State Treasurer.

Kawana's position

In light of these factors it is clear that Kawana was being put into a difficult if not impossible commercial situation. From my perspective as council's legal adviser it appeared to me that at least five factors were influencing Kawana's conduct in relation to this matter:

- First, it had established legal rights and obligations which had been granted to it by the State under its development lease and by the council under its planning scheme and various infrastructure agreements. Both the State and the council were in fact seeking to alter those rights and entitlements.
- Second, the term of the development lease had to be extended to allow Kawana more time to complete the development of the developable area.
- Third, the Department of Natural Resources had refused to approve further subdivisions of the developable area until infrastructure and planning issues had been addressed in a comprehensive fashion.
- Fourth, the market for residential blocks had changed and concepts such as mixed use development, transit orientated development, master planned communities and new urbanism were starting to infiltrate into the market place and professional planning practice. These concepts could not be implemented without significant changes to the council's planning scheme – changes that could only be effected by the council.
- Fifthly, the predecessor to IPA, the Planning Environment and Development Assessment Bill (or **PEDA**) was in the public domain and it appeared that the council would be given significantly wider powers to extract infrastructure contributions in respect of both hard and soft infrastructure from Kawana.

It can therefore be seen that there was a wide range of factors that brought the parties together. Undoubtedly, there were other matters of which I was not aware that were influencing the conduct of all parties. However, what I can say, is that on balance it was in the economic and political interests of all parties to do a deal. And so they did. That is not to say that the negotiating of the infrastructure agreement was easy. Indeed, I can say without a shadow of doubt that in my legal career it is the most technically difficult and stressful thing I have ever done. I know that the other parties felt the same. So what did the parties agree?

Structure of legal arrangements

Legal instruments

The commercial deal reached between the parties involved four legal instruments:

- First, an infrastructure agreement pursuant to the *Local Government (Planning and Environment) Act 1990*.
- Second, a transport infrastructure agreement pursuant to the *Transport Infrastructure Act 1994*.
- Third, amendments to the development lease pursuant to the *Land Act 1994*.
- Fourth, amendments to the council's Planning Scheme and the introduction of a development control plan pursuant to the *Local Government (Planning and Environment) Act 1990*.

I do not intend to analyse in detail the provisions of each of these legal instruments. Rather, I would like to discuss the key principles to which the parties agreed and which were ultimately reflected in the legal instruments.

Key principles

In essence, the legal instruments were drafted around four key principles:

- First, a combined vision for the development of the developable area that represented world best practice in terms of urban design.
- Second, a master planning design process that implemented the vision in respect of the development of the developable area and involved all parties.
- Third, a subdivision process that implemented the outcomes of the master planning design process and involved all parties.
- Fourth, the provision of infrastructure that was sufficient to achieve the vision for the development of the developable area.

Combined vision

The vision for the development of the developable area was discussed between the parties and set out in a proposed development control plan. The Kawana Waters Development Control Plan that was prepared by the council addressed not only the developable area but also a much larger area to ensure that the relationship between the developable area and other adjacent areas was clearly indicated in the Development Control Plan.

Master planning design process

The broad vision specified by the council in the Kawana Waters Development Control Plan in respect of the developable area was to be implemented by a master planning design process. The master planning design process was structured to satisfy three minimum requirements:

- First, the master planning design process had to be mandatory on Kawana.
- Second, the master planning design process had to be flexible enough to allow urban design to proceed at the district level, the neighbourhood level, the precinct/estate level and the site level.
- Third, the master planning design process had to involve all parties.

The master planning design process that was implemented satisfied these criterion in the following manner:

- First, Kawana agreed that almost all of its existing use rights could not be exercised until the master planning design process had been followed. This was reflected in the infrastructure agreement with the council and the State, the development lease with the State and the Tables of Development in the Planning Scheme.
- Second, the master planning design process was specified in the planning scheme in respect of freehold land and in the infrastructure agreement in respect of the leasehold land. The master planning design process involves the preparation and approval by the council and the Minister of a series of development plans at the district, neighbourhood, precinct/estate and site levels.
- Third, the development plans that were prepared pursuant to the master planning design process had to be approved by the council in respect of the freehold land pursuant to the Development Control Plan and by the Minister (after consultation with the council) in respect of the leasehold land pursuant to the infrastructure agreement.
- Fourth, Kawana agreed in the infrastructure agreement not to develop the developable area until the development plans required by the master planning design process were approved. This provision was also duplicated in the Development Control Plan.

Subdivision process

Like the master planning design process, one of the key principles underlining the agreement between the parties was that the council was to be involved in the subdivision approval process in of the leasehold land. Since the developable area comprised primarily leasehold land as well as some freehold land an innovative solution was required. In essence, the solution involved the following:

- In relation to freehold land the council would determine applications in accordance with its powers under Part 5 of the then *Local Government (Planning and Environment) Act 1990*.
- In relation to leasehold land Kawana agreed in the infrastructure agreement not to seek the approval of the Minister of Natural Resources under the *Land Act 1994* to the subdivision of leasehold land in the developable area until the council had assessed the subdivision for compliance with the Development Control Plan and the approved development plans and provided its recommendation to the Minister. Also, Kawana and the Minister agreed in the infrastructure agreement that any subdivision of the leasehold areas had to be in accordance with the Development Control Plan and all development plans approved under the master planning design process.

Infrastructure contributions

Finally, turning to the issue of infrastructure contributions. Whilst the parties could agree generally about the vision for the developable area, the master planning design process and the subdivision process in respect of the developable area, it was when the parties turned to infrastructure contributions (ie money) that the real divisions between the parties became obvious. In the end the parties negotiated themselves to a standstill on infrastructure contributions. The agreements that were ultimately reached between the parties can be summarised as follows:

- In respect of infrastructure contributions for State controlled roads Kawana executed a transport infrastructure agreement under the *Transport Infrastructure Act 1990* with the Department of Main Roads. In the infrastructure agreement executed by the council and the Minister of Natural Resources, Kawana agreed to comply with the transport infrastructure agreement.
- In respect of contributions for local government roads it was agreed that these could be imposed as part of the approval of development plans under the master planning design process, the subdivision approval process as well as under the normal development approval process under Part 4 of the then *Local Government (Planning and Environment) Act 1990*.
- In respect of open space and recreation contributions Kawana agreed to provide significantly increased open space and recreation areas on the basis that its liability was capped to these levels.
- In respect of sewerage and water supply headworks the previous agreements with the council were terminated and new agreements were embodied within the infrastructure agreement.
- In respect of community facilities, Kawana agreed to provide contributions both in terms of money and land on the basis that its liability was capped to these levels.

Apart from the quantum and timing of the infrastructure contributions the other significant issue that weighed upon the minds of the parties was to determine the liability of Kawana and its successors in title in respect of infrastructure contributions. In essence, this problem was resolved the following way:

- First, Kawana remains liable under the infrastructure agreement until a Deed of Novation is executed with the council, Kawana and the proposed purchaser.
- Second, a subsequent owner will be liable for infrastructure contributions under the infrastructure agreement unless:
  - the lot that is to be purchased is a fully developed lot (that is, it has been subject to the master planning design process and the subdivision process); or
  - in the case of an undeveloped lot a Deed of Novation has been executed between Kawana, the council and the subsequent owner which provides that the subsequent owner is not liable for infrastructure contributions.

Finalisation of documents

These key principles were after much discussion embodied in the various legal instruments I have previously identified. In essence, the finalisation of the legal arrangements proceeded as follows:

- First, the Infrastructure Agreement was executed in September 1996.
- Second, the Transport Infrastructure Agreement was executed in November 1996.
- Third, the Development Control Plan was gazetted in December 1996.
- Fourth, the amendments to the development lease were approved in early 1997.

However, as I stated in the introduction to this paper the execution, gazettal and approval of these legal instruments did not constitute the end of the process. Rather, it represented a beginning (a new beginning) which saw all parties committed (legally as well as commercially and politically) to a new process. A significant step in that process was achieved in September 1999 when the structure plan for the developable area was approved pursuant to the master planning design process.

I would now like to turn to the third of the four themes that I intend to consider in this paper. That is the impact of IPA on the Kawana Waters Infrastructure Agreement.

Impact of IPA on existing infrastructure agreements

The Kawana Waters Infrastructure Agreement is only one of a number of infrastructure agreements that were in existence before the commencement of IPA. These infrastructure agreements are protected by the transitional provisions of IPA:

- Pursuant to s.6.1.45 of IPA those infrastructure agreements made under the *Local Government (Planning and Environment) Act 1990* such as the Springfield Infrastructure Agreement and the Kawana Waters Infrastructure Agreement are deemed to have effect and are to be binding on all parties as if the *Local Government (Planning and Environment) Act 1990* had not been repealed.
- Pursuant to s.6.1.46 of IPA the Robina Central Planning Agreement which was made under the *Local Government (Robina Central Planning Agreement) Act 1992* is deemed to apply as if that Act had not been repealed.

The introduction of IDAS under IPA has also meant that transitional provisions have had to be introduced into IPA to deal with the master planning design process and other similar processes provided for in the development control plans made under the *Local Government (Planning and Environment) Act 1990* in conjunction with the various infrastructure agreements. Section 6.1.45A of IPA provides that development control plans that contain these provisions are valid and that development must comply with the development plans that are approved pursuant to these processes.

Finally, I would like to turn to the impact of IPA on future infrastructure agreements. This being the final theme that I would like to pursue in this paper.

Impact of IPA on future infrastructure agreements

A comparative analysis of the infrastructure provisions of *Local Government (Planning and Environment) Act 1990* and those in IPA indicate that there are two significant differences:

- First, the circumstance in which an infrastructure agreement can be used.
- Second, the extent to which an infrastructure agreement can fetter the exercise of a discretion of a public sector entity.

Scope of infrastructure agreement

In relation to the scope of an infrastructure agreement under IPA it is important to note that infrastructure agreements under the PEA could deal with any item of infrastructure provided that land was within a development control plan. It was for this reason that many infrastructure agreements executed under the PEA were also accompanied by the gazettal of development control plans – Kawana and Springfield being cases in point. The equivalent provision in IPA (s.5.2.1) appears to be more restrictive despite the fact that the requirement for the land to be in a development control plan has been removed.

In essence, IPA recognises three categories of infrastructure agreements:

- The first category of infrastructure agreements are those infrastructure agreements that are negotiated as part of IDAS in respect of State infrastructure contributions for out of sequence developments. This category is equivalent to the Transport Infrastructure Agreements that have been previously negotiated under the *Transport Infrastructure Act 1994* such as the one negotiated by Kawana with the Department of Main Roads in respect of the development of developable area.
- The second category of infrastructure agreements are those infrastructure agreements that are negotiated as part of the application of an infrastructure charge. These infrastructure charges are imposed independently of IDAS and are only imposed in respect of development infrastructure items identified in infrastructure charges plans. This category of infrastructure agreement has no equivalent under the PEA.
- The third category encompasses those infrastructure agreements that were previously prepared under the PEA. Pursuant to s.5.2.2 of IPA infrastructure agreements in this category can provide for:
  - the funding of a development infrastructure item in an infrastructure charges plan;
  - the supply of a development infrastructure item to a standard different to that specified in an infrastructure charges plan;
  - the supply of a development infrastructure item not identified in an infrastructure charges plan;

- the supply of infrastructure other than a development infrastructure item specified in an infrastructure charges plan.

This third category of infrastructure agreements appears to be more limited than those made under the PEA in that the power to provide funding (ie the payment of money) is limited to development infrastructure items in an infrastructure charges plan. It is strongly arguable that the distinction between "*funding*" and "*supply*" in s.5.2.2 of IPA means that an infrastructure agreement cannot provide for the making of financial contributions other than in respect of a development infrastructure item in respect of an infrastructure charges plan. In respect of the other matters specified in s.5.2.2, infrastructure agreements can only provide for the "*supply*" (ie the provision) of these types of infrastructure.

In short, s.5.2.2 of IPA would appear to prevent infrastructure agreements under IPA from requiring financial contributions other than in respect of a development infrastructure item under an infrastructure charges plan. This is certainly more restrictive than was provided for under s.6.6 of the PEA.

Limits on discretion

It is also contended that IPA is much more restrictive than the PEA in terms of the impact of infrastructure agreements on the exercise of a statutory discretion.

Under s.6.8 of the PEA an infrastructure agreement was said not to be invalid because it had the effect of limiting the exercise of a discretion by a local government. On the basis of this provision, local governments could for example agree to exercise a statutory provision in respect of the making of an infrastructure contribution in a particular way. For example, local governments could agree to exercise a statutory provision to the extent of not requiring an infrastructure contribution or requiring a smaller infrastructure contribution than would otherwise be required.

The equivalent provision in IPA (s.5.2.6) appears to be much narrower. It provides that an infrastructure agreement is not invalid because it depends on the exercise of the discretion in respect of a development application. This provision could be interpreted narrowly to mean by way of example that an infrastructure agreement is not invalid because its terms are to be fulfilled only after a development application has been approved. In my view, the provision does not authorise a public sector entity to limit the exercise of its discretion as was the case with local governments under the PEA.

In short, I believe that the infrastructure agreement provisions of IPA need to be revisited to remove two restrictions:

- First, infrastructure agreements should be able to provide for the making of financial contributions in respect of all items of infrastructure whether they are development infrastructure items in an infrastructure charges plan or not.
- Second, infrastructure agreements should be able to provide for limitations on the exercise of a statutory discretion by a public sector entity at least to the extent that it was permissible by local governments under the PEA.

Conclusions

In conclusion, I would like to make three points:

- First, the infrastructure agreements negotiated prior to IPA, such as Robina, Springfield and Kawana continue to have effect as if IPA had not commenced. Furthermore the master planning design processes that are provided for in the development control plans introduced in conjunction with such infrastructure agreements are preserved by IPA.
- Second, infrastructure agreements negotiated after IPA are subject to more stringent provisions than those provisions under the PEA. These provisions will unnecessarily limit the use of infrastructure agreements under IPA. Urgent consideration should therefore be given to the review of these provisions.
- Finally, in closing I would like to make the point that an infrastructure agreement cannot be drafted unless the draftsperson has an intimate understanding of the ultimate form of development and the timing and sequencing of that development. With infrastructure agreements it is impossible to divorce the planning from the law. The quality of the infrastructure agreement is to be judged by the extent to which the draftsperson has achieved the marriage between planning and the law. In my humble opinion the infrastructure agreements in respect of Robina, Springfield and Kawana achieve this marriage albeit in different ways.

This paper was presented at the Queensland Environmental Law Association seminar, November 1999.

Out of sequence development: The impact of IPA

Ian Wright | Stuart Clague

This article discusses the impact of the *Integrated Planning Act 1997* on infrastructure planning

November 1999

Introduction

Infrastructure planning

Infrastructure planning is a key component of the integrated planning system established by the *Integrated Planning Act 1997* (**IPA**).

IPA requires infrastructure planning to be undertaken in three main ways:

- First, in the planning scheme preparation process, local governments are required to include as part of their statement of intention to prepare an IPA planning scheme a statement as to how infrastructure is to be addressed (schedule 1 of IPA).
- Second, a finalised IPA planning scheme is required to co-ordinate and integrate infrastructure (which is defined as a core matter in Schedule 1 of IPA) (section 2.1.3(1)(a) of IPA).
- Third, in the implementation of an IPA planning scheme, public sector entities are required to ensure that infrastructure is supplied in a co-ordinated, efficient and orderly way and that urban development is encouraged in areas where adequate infrastructure exists or can be provided efficiently (section 1.2.3(1)(a) of IPA).

Benchmark sequencing is the key mechanism that has been adopted in IPA to ensure that infrastructure planning is integrated into the Queensland planning system.

Themes of the paper

In this paper I will explore four themes:

- First, I would like to define some key concepts that are essential to an understanding of the policy and legal framework that governs infrastructure planning.
- Second, I would like to consider the infrastructure planning framework that was in place under Queensland legislation prior to the commencement of IPA.
- Third, I would like to consider the infrastructure planning framework that is to be implemented under IPA.
- Fourth, I would like to provide some general guidance as to the relevant legal principles that will govern the preparation of benchmark development sequences and associated development approvals under IPA.

Basic concepts

Types of infrastructure

In order to understand the policy and legal framework that governs infrastructure planning it is important to distinguish between social infrastructure and private benefit infrastructure.

Social infrastructure

Social infrastructure refers to infrastructure which is funded by governments through general rates or taxes rather than by immediate users.

Social infrastructure is deliberately subsidised by governments on the basis that it delivers wider community benefits or forms part of a social fabric which is the responsibility of the wider community to maintain.

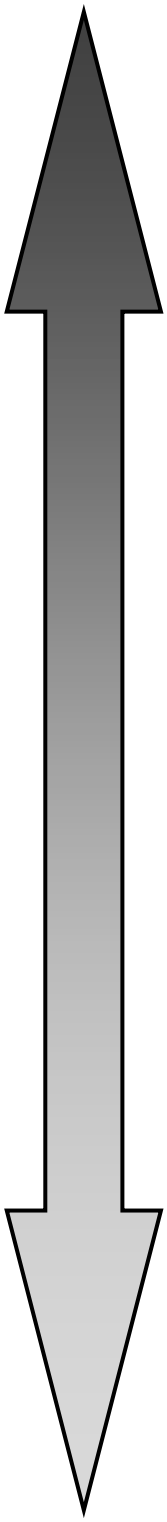
Private Benefit infrastructure

Private Benefit infrastructure on the other hand is infrastructure which is funded on a user pays basis.

Categorisation of infrastructure

In practice infrastructure items do not fall into two distinct social and private benefit groups. Rather there is a continuum of infrastructure items from those that involve a 100% user subsidy (such as schools, policy and prisons) to those where all cost recovery from users may be appropriate (such as power supply, sewerage connections and water supply). A notional continuum is shown in Figure 1 (Better Cities Program 1993: 27-28).

Figure 1 The Infrastructure Continuum

ITEMS WITH A HIGH WARRANTED USER SUBSIDY COMPONENT		▪ Primary Schools ▪ Secondary Schools ▪ Metropolitan Open Space ▪ Emergency Services ▪ Community Services ▪ Police ▪ Community Health Care ▪ Pre-Schools ▪ Neighbourhood Centres ▪ Library Services ▪ Hospitals ▪ District open Space ▪ Child Care Centres ▪ Universities and TAFE ▪ Sporting, Recreation and Cultural Facilities ▪ Public Transport ▪ Arterial Roads ▪ Local Parks ▪ Dams ▪ Water Treatment Plants ▪ Truck Water mains ▪ Water Supply Pump Stations, Service ▪ Reservoirs, Feeder Mains and Lead-in Mains ▪ Estate Reticulation ▪ (Sewerage) Water Treatment and Outfall ▪ Trunk Sewer ▪ Pump Stations, Intermediate Carriers and Lead-in Mains ▪ Estate Sewer Reticulation ▪ District Stormwater Management ▪ Estate Stormwater Management ▪ Sub-Arterial Roads ▪ Distributor Roads ▪ Trunk Energy ▪ Estate Roads ▪ Energy Reticulation ▪ Telecommunications
ITEMS WITH A HIGH 'USER PAYS' COMPONENT		

The appropriate mix of subsidy and direct user revenues in the funding profile of particular infrastructure items is ultimately a matter for political rather than technical determination.

As a result the policy and legal framework governing infrastructure planning in Queensland has significantly changed over the last decade. I will first consider the legal and policy framework that was in existence prior to the commencement of IPA before turning to consider the changes that have been brought about by IPA.

Framework prior to IPA

Legislative framework

The story of infrastructure planning in Queensland prior to IPA starts with the insertion of section 33(6A)(e)(iv)(A) (Application for rezoning of land) into the then *Local Government Act 1936* (**LG Act**).

Section 33(6A)(e)(iv)(A) of the LG Act provided as follows:

> "*In respect to any application made pursuant to this sub-section (ie a rezoning application) the Local Authority shall, amongst other things, take into consideration, whether, having regard to permissible uses of land in the proposed zone and the potential for subdivision if the rezoning is effected – water, gas, electricity, sewerage and other essential services would be available to the land and to each separate parcel thereof if the land was subsequently subdivided*".

This section was subsequently amended in 1980 by replacing the reference to "*permissible uses*" with the words "*permitted uses with or without the consent of the Local Authority*". The effect of this decision was to require local governments as a consideration of rezoning applications to consider the infrastructure needs of both as of right uses as well as consent uses in the zone to which the land is being rezoned.

The section was further amended in 1982 whereby the words "*would be available*" were replaced with the words "*should be made available*". The reason for this change was to overcome arguments raised by developers that services would be available to a development when the relevant public sector entities get around to providing them and accordingly, the development complied with this provision. Accordingly, the words "*should be made available*" were inserted to make it clear that local governments, when assessing a rezoning application, are to assess whether the services should be made available (see Hansard 30 March 1982: 5283; 21 September 1982: 989).

At the commencement of the *Local Government (Planning and Environment) Act 1990* (**PEA**) on the 14th of April 1991, section 33(6A)(e)(iv)(A) of the LG Act as amended was replaced with section 4.4(3)(e) (Assessment of proposed planning scheme amendment) of the PEA. Section 4.4(3)(e) of the PEA was essentially the same in all relevant respects with section 33 (6A)(e)(iv)(A) of the LG Act which it replaced.

Prematurity principle

It was this legislative framework upon which the courts gradually built a body of case law based on the so called "*Prematurity Principle*".

The prematurity principle provides that the development of an area will be considered to be premature if the infrastructure that is necessary to service that development is incapable of being provided to service that development.

The application of the prematurity principle to a particular development therefore requires three issues to be addressed:

- First, what is the infrastructure that is necessary to service the development?
- Second, what is the required standard of infrastructure that is necessary to service the development?
- Third, can the necessary infrastructure of the required standard be provided by the relevant public sector entity or the applicant to service the development?

Necessary infrastructure

In determining what type of infrastructure items are required to service a development, the courts have had regard to the proposed development, the relevant infrastructure item and the requirements of the relevant planning scheme. In general, the courts have laid down the following guidelines:

- Private benefit infrastructure items such as road, sewerage and water supply are considered to be necessary to service urban development.
- Social infrastructure items are not generally considered to be necessary to service urban development.

As a result the availability or otherwise of social infrastructure to service a development did not trigger the application of the prematurity principle.

Standard of infrastructure

Having identified the various types of private benefit infrastructure items that are required to service the development, it is then necessary to identify the required standard of those infrastructure items.

In determining what is the required standard of the infrastructure items, the court also had regard to the proposed development, the infrastructure item and the requirements of the relevant planning scheme. Ultimately, this is a question of fact that is based on technical determinations. Two cases, on either side of the line, highlight this point.

On one side of the line is *Kennedy & Ors v Redland Shire Council* (1985) QPLR 28. This case concerned a subdivision of land in the Non-urban zone into 10 lots of 4,000m^2 each for rural residential purposes in circumstances where no reticulated water could be provided to the subdivision. The court held that the development was not premature because adequate water could be provided from roof drainage and reticulated water was not generally regarded as an essential in rural residential type subdivisions.

On the other side of the line is *Garnet Lincoln & Associates & Anor v Fitzroy Shire Council* (1985) QPLR 311. This case concerned a rezoning of land from the Rural A zone to the Rural B zone for the purpose of a rural residential subdivision comprising 360 lots with a minimum area of 1 hectare. Once again, no reticulated water could be provided to the subdivision. In this case, the court held that the development was premature because reticulated water could not be provided and it was considered undesirable that dwelling houses should be dependent on a tanker service for the provision of a domestic water supply service.

The court's attitude to the standard of service can also be highlighted with reference to sewerage services. For example, in *Thomas & Anor v Brisbane City Council & Ors* (1982) QPLR 309, the court held that development in the Future Urban zone was not premature because sewerage was not available because a development condition could be imposed requiring the installation of a septic tank and an on-site effluent disposal system.

However, in *Bonton No. 1 Pty Ltd v Brisbane City Council* (1984) QPLR 297, the court held that a rezoning from the Future Urban zone to the Residential A zone was premature in circumstances where sewerage was not available, because the provision of a septic system for serving Residential A land was not an acceptable method of disposal of sewerage, be it on a temporary or a permanent basis.

Servicing development

The third and final issue to be considered in the application of the prematurity principle to a proposed development is to determine whether the proposed development can be serviced by the necessary infrastructure to the required standard.

The courts have considered a proposed development to be capable of being serviced by an infrastructure item and therefore not premature in at least three categories of circumstances:

- First, a public sector entity has already provided the infrastructure item. In this case, the prematurity argument never arises.
- Second, a public sector entity is in the course of providing the infrastructure item that will be available in the immediate future. An example of this situation is *Dennis & O'Neill Pty Ltd & Ors v Mulgrave Shire Council* (1982) QPLR 394 where the proposed development was held not to be premature because it could be serviced by a sewerage treatment plant, the upgrading of which would be completed in some 12 months.
- Third, a public sector entity can impose a lawful condition requiring an applicant to provide the infrastructure item. Examples of these situations are provided by *Peel & Anor v Brisbane City Council* (1982) QPLR 251, *Dennis & O'Neill Pty Ltd & Ors v Mulgrave Shire Council* (1982) QPLR 394, *Lewiac Pty Ltd v Gold Coast City Council* (1983) QPLR 133; *Tulle v Toowoomba City Council* (1986) QPLR 199, *Jesberg & Ors v Hervey Bay Shire Council* (1989) QPLR 190, *Grant v Pine Rivers Shire Council* (1991) QPLR 160 and *Reilly v Kilkivan Shire Council* (1994) QPLR 366.

On the other hand, the courts have considered a proposed development has not been capable of being serviced by an infrastructure item and is therefore premature in at least three categories of circumstances:

- First, the relevant public sector entity has not planned for the provision of the infrastructure. Examples of this situation are provided by *Aspley Gardens Pty Ltd v Brisbane City Council* (1968) 15 LGRA 232, *Hollingsworth & Ors v Brisbane City Council & Anor* (1975) 31 LGRA 429, *Alexcal Pty Ltd v Brisbane City Council* (1985) QPLR 111 and *Capricorn Survey Constructions Pty Ltd & Anor v Livingstone Shire Council* (1983) QPLR 347.

  However, a public sector entity will be considered by the court to have planned for the provision of infrastructure, notwithstanding the following circumstances:

  - The planning scheme did not provide for the development, but the council has resolved to amend the planning scheme to provide for the development – see *Suncorp Insurance & Finance v Logan City Council & Ors* (1987) QPLR 112.
  - The public sector entity has not prepared staging or sequencing plans for development already provided for within the council's planning scheme – see *Gregory Charles Copley v Beaudesert Shire Council & Anor* (1994) QPLR 216, *Palmwoods Residents and Ratepayers Association Inc. v Maroochy Shire Council & Anor* (1997) QPLR 331.
  - The provision of infrastructure may affect a listing in the Register of the National Estate – see *Transtate Developments Pty Ltd v Brisbane City Council* (1994) QPLR 258.

- The provision of infrastructure may affect a future planning scheme – see *Jesberg & Ors v Hervey Bay Shire Council* (1989) QPLR 190.

- The second category in which a development would be considered premature is where the council has planned for the provision of infrastructure but the construction of the infrastructure is very much in the future. Examples of this situation are provided by *Arpedco Pty Ltd v Beaudesert Shire Council* (1977) 35 LGRA 103 and *Alan J Fox Pty Ltd v Redland Shire Council* (1976) 33 LGRA 36, where the construction of the infrastructure items was between 5 and 10 years into the future.
- Thirdly, a development will be considered premature if the public sector entity cannot impose reasonable and relevant conditions requiring the applicant to provide the infrastructure items. Examples of this situation include:
  - *QM Properties Pty Ltd v Council of the Shire of Maroochy & Ors* (1992) QPLR 186 – where the court held that it could not order the applicant to provide higher order retailing, health facilities, garbage and post, public transport, day care facilities and recreational activities for youth.
  - *Cullinanes Pty Ltd & Ors v Maryborough City Council & Anor* (1986) QPLR 322 – where the court had that it could not order the applicant to provide a discount department store tenant for a shopping centre.
  - *Gold Coast Carlton Pty Ltd & Anor v Beaudesert Shire Council & Anor* (1985) QPLR 343 – where the court could not order retailers to be tenants in a development.
- Finally, it is important to note that the court has no power to overcome a premature development by ordering a public sector entity to provide infrastructure to service the development. The principle was established in *Knox v Brisbane City Council* (1975) 31 LGRA 108, applied in *North Coast Quarries Pty Ltd v Pine Rivers Shire Council* (1976) 33 LGRA 1 and upheld by the Full Court of Queensland in *Logan City Council v Harderan Pty Ltd* (1989) QPLR 11.

Policy framework prior to IPA

Having regard to this analysis, the following conclusions can be made about the legal and policy framework governing out of sequence or premature developments prior to IPA:

- First, the prematurity principle was limited to private benefit infrastructure and, as such, had no application to social infrastructure.
- Second, a development was out of sequence or premature if it could not be serviced by necessary infrastructure to the required standard provided by the relevant public sector entity or by the applicant in response to a reasonable and relevant development condition.
- Third, a public sector entity cannot be required by a court to provide necessary infrastructure to the required standard to an out of sequence or premature development. This can only be achieved by a negotiated agreement between the public sector entity and the applicant.

It was this third point that led to the negotiation of rezoning agreements and development agreements between public sector entities and applicants. However, since the lawful scope of these agreements was limited by the general conditions power under both the *Local Government Act 1936* and the *Local Government (Planning and Environment) Act 1990*, most of the agreements negotiated in respect of out of sequence developments were unlawful. As a result, the *Local Government (Planning and Environment) Act 1990* was amended to provide for the negotiation of infrastructure agreements which were not constrained by the general conditions power.

Having considered the policy and legal position in respect of out of sequence or premature developments prior to IPA, I will now consider the position of these developments after IPA.

Framework after IPA

Policy position

IPA has substantially changed the legal and policy framework in respect of out of sequence developments. The IPA framework is based on the following principles:

- Firstly, local governments are expected to work with State government infrastructure agencies to identify a preferred sequence of development for up to 15 years comprising three 5 year stages (Schedule 10 of IPA and Draft Guidelines).
- Secondly, the preferred development sequence should be consistent with regional strategies and should be designed to deliver efficiencies in the provision of both social infrastructure and private benefit infrastructure (Draft Guidelines).
- Thirdly, developers can take on projects outside the preferred development sequence but are liable to compensate State and local governments for any additional delivery costs of social infrastructure (section 3.5.35(1)(b)(i)-(iv) and 3.5.35(5) of IPA) and private benefit infrastructure (section 3.5.35(1)(b)(v) and 3.5.35(6) of IPA).

- Fourthly, the additional costs of the delivery of social infrastructure and private benefit infrastructure are the difference between the net present value cost of providing the infrastructure items under the preferred development sequence and the net present value cost of providing the same level of service (including timing) under the development sequence proposed by the developer. In practice, this means the developer would pay the cost of bringing forward the infrastructure items (section 3.5.35(5) and (6) of IPA).
- Finally, once infrastructure agencies have been compensated for the bring forward costs of the infrastructure item they are then required to provide the infrastructure item in accordance with the amended development sequence or repay the moneys to the developer (section 3.5.36(6) of IPA).

It should be noted in passing, that any payments for the bring forward costs of social infrastructure are in addition to any user pays contributions for private benefit infrastructure. The bring forward payments should not be seen as developer contributions for social infrastructure. Rather, they represent compensation to governments whereby governments can be returned to a financially neutral position with respect to their social infrastructure programs. If such compensation were not forthcoming, the general taxpayer would be called upon to more heavily subsidise out of sequence development whilst existing communities would be forced to wait longer for essential services because of the limits on the aggregate infrastructure funds available to the government.

In this new policy context, what then is the value, if any, of the existing case law in respect of the prematurity principle.

Relevance of the prematurity principle

The case law in respect of the prematurity principle is still relevant, although its application has been altered somewhat by IPA. In essence, the prematurity principle now only has application to development which is outside the benchmark development sequence (ie outside the 15 year time horizon provided for in the planning scheme).

Development outside the benchmark development sequence

In respect of development which is premature, that is, outside the benchmark development sequence, the legal position under the PEA has been retained by IPA:

- First, public sector entities can impose reasonable and relevant conditions requiring applicants to provide the necessary infrastructure to the required standard of service to service the premature development (section 3.5.35(1)(a)(i) of IPA).
- Second, public sector entities cannot be required to provide infrastructure (see *Logan City Council v Harderan Pty Ltd* (1989) QPLR 11).
- Third, public sector entities can enter into infrastructure agreements in respect of the provision of infrastructure for a premature development (section 3.5.35(4) of IPA).

Developments within the benchmark development sequence

The prematurity principle however no longer has any effective application in respect of developments within the benchmark development sequence, irrespective of whether they are in accordance with that benchmark development sequence or not. It has been altered in three important respects:

- First, a development which is within the benchmark development sequence (ie within the 15 year horizon) but is not in accordance with that benchmark development sequence is not premature, as the local government has power to impose reasonable and relevant conditions requiring the applicant to compensate both State and local governments in respect of the bring forward costs of delivering social infrastructure and private benefit infrastructure (section 3.5.35(5)(6) of IPA).
- Second, a court can by imposing reasonable and relevant conditions, require an applicant to pay the bring forward costs of social infrastructure and private benefit infrastructure, thereby requiring State and local governments to provide that infrastructure (sections 3.5.36(3) and (6) of IPA). Accordingly, the principle in *Logan City Council v Harderan Pty Ltd* (1989) QPLR 11 no longer applies in respect of development within the benchmark development sequence, as it has been expressly overruled by IPA.
- Third, the quantum of the bring forward costs that can be imposed by way of condition is to be calculated having regard to the guidelines issued by the Chief Executive.

This third point leads into the final matter I want to deal with, that is the preparation of the benchmark development sequence and drafting of associated conditions of development approvals.

Preparation of benchmark development sequence and conditions

IPA requires benchmark development sequences and conditions of development approvals requiring the payment of the bring forward costs for out of sequence development to be prepared, having regard to the guidelines approved by the Chief Executive.

The guidelines are statutory instruments under the *Statutory Instruments Act 1992* (section 7). As such, they are subordinate legislation and must be complied with.

However, IPA only requires that regard be had to these guidelines in the drafting of benchmark development sequences and the calculation of the bring forward costs to be included in conditions of development approvals.

The courts have held that the use of the phrase "*having regard to*" means that the guidelines should not be interpreted as limiting the consideration of other relevant matters, but rather should be interpreted only as a guide of the matters that should be considered. (See *Consolidated Abalone Divers Group Inc. v Department of Fisheries*, Supreme Court New South Wales, Dunford J, 15 May 1998, *Briggs v Mt Gambier City Council* (1981) 49 LGRA 177).

Conclusions

In conclusion, the benchmark development sequence model adopted in IPA provides in theory a more economically efficient and effective model of infrastructure planning than that provided under previous legislation and the associated prematurity principle developed by the courts.

However, there are a number of prerequisites to the successful implementation of the benchmark development sequence model:

- First, governments must determine what its liveability goals are for new communities. This will require policy decisions as to the range of services that must be in place when residents move in and the reasonable wait time for other social infrastructure.
- Second, benchmark development sequences depend on State and local government infrastructure agencies developing more sophisticated planning strategies which focus on integrating their work programs and forward plans.

There is much work to be done by State and local governments in relation to these matters if the benchmark development sequence model adopted in IPA is to work. I wish them the best of luck in their endeavours.

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Queensland's new environmental nuisance regulation

Ian Wright

This article discusses the implementation of Queensland's new environmental nuisance regulation including the issuing of nuisance abatement notices

December 1999

Introduction

On 26 November 1999, the *Environmental Protection Regulation 1998* was amended by the *Environmental Protection Amendment Regulation (No. 2) 1999* to introduce Part 2A. The object of Part 2A is to help protect Queensland's environment from environmental nuisance. Part 2A seeks to achieve this object by:

- providing for the issue of "nuisance abatement notices" to control emissions that cause unlawful environmental nuisance; and
- creating a number of specific "noise offences" for which a nuisance abatement notice cannot be issued.

Unlawful environmental nuisance

Central to the operation of Part 2A is the concept of "unlawful environmental nuisance". The term "unlawful environmental nuisance" is defined to mean environmental nuisance which is not authorised under an environmental protection policy, an environmental management program, an environmental protection order, an environmental authority, a development condition of a development permit or an emergency direction. Importantly, the definition does not include:

- animal noise if the animal which made the noise is not a domestic animal;
- noise from an audible traffic signal at pedestrian lights;
- noise from a blasting operation or an outdoor shooting range which comply with specified criteria; and
- cooking odour from cooking on residential premises.

Further, the defence to unlawful environmental harm set out in section 119(2) of the *Environmental Protection Act 1994* (ie compliance with the general environmental duty) also applies to unlawful environmental nuisance under Part 2A.

Investigation of unlawful environmental nuisance

Where a person believes that an emission from a person, place or thing is causing unlawful environmental nuisance, the person may make a complaint to the administering authority about the emission. The term "emission" is defined to mean an emission of ash, dust, fumes, light, noise, odour or smoke. The administering authority cannot investigate an emission unless a nuisance complaint has been made for the emission. The administering authority must investigate a nuisance complaint unless:

- the authority decides to reject the complaint on the grounds that the complaint is frivolous, vexatious or based on a mistaken belief; or
- the authority considers the complaint would be more appropriately dealt with under another law, for example, the *Liquor Act 1992* or a local law.

After investigating a noise emission the administering authority must decide whether a noise offence has been committed. If the emission is not noise or if the authority does not consider that a noise offence has been committed, the authority must consider whether a nuisance abatement notice should be given or whether any other action is appropriate.

Nuisance abatement notices

The administering authority may give a nuisance abatement notice to the person responsible for an emission if:

- a nuisance complaint has been made for the emission;
- the authority reasonably believes that the emission is, or has been, causing unlawful environmental nuisance having regard to the general emissions criteria (specified in section 6S) and in the case of noise, the noise emission criteria (specified in section 6T).

It is important to note that a nuisance abatement notice must not be given for a "noise offence" or if the emission was caused by an environmentally relevant activity carried out under a development approval or environmental authority.

A person who has been given a nuisance abatement notice, which complies with the relevant requirements specified in Part 2A, must comply with the notice unless they have a reasonable excuse. The maximum penalty for a failure to comply with a nuisance abatement notice is 40 penalty units in the case of an individual and 80 penalty units in the case of a corporation.

Noise offences

Division 4 of Part 2A specifies a number of "noise offences" relating to the following matters:

- the carrying out of building work on a building site by a builder or building contractor;
- the operation of a "regulated device" other than by a builder or a building contractor who is carrying out building work on a building site. The term "regulated device" is defined to include, for example, a grass-cutter, a leaf-blower or an electrical, mechanical or pneumatic power tool;
- the use by an occupier of premises of a spa blower or pump for a swimming pool or spa pool;
- the use by an occupier of premises of airconditioning equipment;
- the use of refrigeration equipment by an occupier of premises or by the owner of refrigeration equipment on or in a vehicle;
- the use of a building by the occupier of the building as an indoor venue. The term "indoor venue" means a building, other than a licensed premises, used for musical, sporting or other entertainment or for cultural or religious activities;
- the use of premises by the occupier of the premises for an open-air event. The term "open-air event" means an open-air activity, competition, concert, display or race;
- the operation of an amplifier device, other than at an indoor venue or an open-air event. The term "amplifier device" means, for example, a loudhailer and a megaphone;
- the use of a powerboat on a waterway for a power boat sport. The term "power boat sport" includes, for example, water skiing and the operation of a jet ski; and
- the operation of a power boat engine at premises.

However, a person does not commit a noise offence if a "noise offence exemption" applies. Part 2A specifies that a noise offence exemption applies in any of the following circumstances:

- the noise happened while a lawful activity was being carried out and a general environmental duty was complied with by the person who caused the noise. The duty may be complied with as stated in section 36 of the *Environmental Protection Act 1994* or by complying with any relevant code of practice;
- the noise was not unlawful environmental nuisance;
- the noise was caused by an environmentally relevant activity which was carried out under a development approval or an environmental authority; or
- an environmental protection policy, an environmental management program, an environmental protection order, an environmental authority; a development condition of a development approval, an emergency direction or a local law provides or allows for the noise to be made or for the carrying out of an activity in a way that makes the noise.

The administering authority, the administering executive or an authorised person cannot start a proceeding for a noise offence unless a noise complaint has been made for the noise, the subject of the proceeding.

Local government jurisdiction

The administration and enforcement of Part 2A in relation to any emission from residential land is devolved to the local government for the area where the land is situated.

Transitional provisions

Prior to the introduction of Part 2A of the *Environmental Protection Regulation 1998*, Part 4 of the *Environmental Protection (Noise) Policy 1997* (**noise policy**) made provision for the abatement of unreasonable noise. In order to avoid duplication, Part 4 was repealed on the commencement of Part 2A. However, the *Environmental Protection Regulation 1998* has been amended to provide that where a complaint was made under the noise policy prior to the commencement of Part 2A, Part 4 of the noise policy continues to apply to noise, the subject of the complaint, as if it had not been repealed.

Amendment to Justices Regulation 1993

In addition to amending the *Environmental Protection Regulation 1998*, the *Environmental Protection Amendment Regulation (No. 2) 1999* amends the *Justices Regulation 1993*. The purpose of these amendments are to allow for the issue of infringement notices for all offences introduced under Part 2A. As the amendments to the *Justices Regulation 1993* do not commence until 1 February 2000, authorised officers will not be able to issue infringement notices until that date.

Review of environmental compliance reporting, NSW contaminated land legislation and State Environment Planning Policy, land trust for South-East Queensland and a discussion of the numerous definitions of 'zoning'

Ian Wright

This article discusses the recent changes and updates to planning and environment law in Australia. The article particularly considers amendments to environmental compliance reporting, contaminated land legislation, amendments to New South Wales State Environment Planning Policy, land trust for South-East Queensland and a discussion of the numerous definitions of 'zoning'

December 1999

Environmental compliance reporting

Amendments to the Corporations Law require that directors' reports contain details of the Company's performance in relation to environmental regulation in certain circumstances. Section 299(1)(f) of the Corporations Law commenced operation on 1 July 1998. The section requires a directors' report to contain details of the entity's performance in relation to environmental regulation if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory.

- What companies must comply with section 299(1)(f)?

  The following companies must comply with section 299(1)(f):

  - all public companies;
  - all registered managed investment schemes;
  - all disclosing entities;
  - all large proprietary companies.

- What disclosure is required?

  Section 299(1)(f) is not particularly clear. The words "*particular and significant environmental regulation*" are the cause of the uncertainty. The word "*particular*" in association with the term "*environmental regulation*" could mean an environmental regulation which has particular application only to the reporting corporation. For example, a pollution licence would be a "*particular*" environmental regulation which relates specifically to the reporting corporation. Alternatively, the expression could relate to the reporting corporation being subject to an environmental regulation which has general application within the jurisdiction, but has "*particular*" significance to the reporting corporation by virtue of the nature or extent of its operations. For example, a manufacturing corporation is more likely to be affected by the operations of the *Clean Waters Act 1970* (NSW) or, after 1 July 1999, the *Protection of the Environment Operations Act 1997* than an insurance company.

  The confusion caused by the wording of section 299(1)(f) is heightened by the fact that the term "*significant*" is not defined in the Corporations Law. It seems that the legislature intends the word "*significant*" to relate, to the degree of importance of the environmental regulation, as opposed to the degree of financial impact of the regulation on the reporting corporation. This new provision heightens the need for directors to have regard to environmental issues associated with their company's activities. Directors are, in effect, obliged to disclose material breaches of environmental laws with the attendant risk of adverse publicity for the company. Companies will need to adopt strategies which ensure compliance with environmental laws.

Contaminated land legislation NSW style

The *Contaminated Land Management Act 1997* (**CLM Act**) applies to land in New South Wales. Most of the CLM Act commenced operation during late 1998. Section 60 of the CLM Act commenced operation on 1 July 1999. Briefly, the CLM Act:

- outlines the functions and powers of the Environment Protection Authority (**EPA**) concerning land contamination;

- gives the EPA power to make investigation orders and remediation orders where the EPA determines that land contamination constitutes a "*significant risk of harm*" to the environment or human health;
- provides for the making of voluntary investigation agreements and voluntary remediation agreements with the EPA;
- establishes a regime where those who are ordered to investigate or remediate land contamination may recover part of their costs from the persons responsible for causing the contamination (polluters);
- provides a system of accreditation for site auditors who conduct environmental audits in certain circumstances; and
- establishes a system of public record-keeping about contaminated land.

Mandatory reporting of contamination

Section 60 of the CLM Act requires polluters and property owners to give written notice to the EPA after they become aware that land has been contaminated such as to present a "*significant risk of harm*" to the environment or human health. The CLM Act applies to contamination which existed before 1 July 1999. So, on 1 July 1999, all property owners who are aware of contamination of their land such as to present a significant risk of harm will have a duty to report the contamination, even if the contamination was caused by someone else, and even if the land was contaminated before they became the owner. Similarly, "*polluters*" who have in the past caused contamination which has not been remediated, will have a duty to report if the contamination presents a significant risk of harm.

Update on present state of compliance with NSW SEPP53

This New South Wales State Environment Planning Policy commenced on 26 September 1997. The policy applies only to councils which have not met the State government's Urban Consolidation Strategy Requirements. Once compliance with these requirements occurs, a council can expect to be exempted from SEPP53. The only New South Wales councils that are yet to meet the requirements for exemption are Ku-ring-gai, Burwood and Wyong. Ku-ring-gai has been given an extension until March 2000 and the other two councils are still in discussion with the Department of Urban Affairs and Planning. The aims of SEPP53 are to encourage the provision of housing in metropolitan areas that will:

- broaden the choice of building types and locations available in the housing market;
- make more efficient use of existing infrastructure and services;
- reduce the consumption of land for housing and associated urban development on the urban fringe; and
- be of good design.

SEPP53 implements the housing principles of the metropolitan strategy for the Greater Sydney Metropolitan Region. It does this by promoting more compact cities. The compact cities principle is based on taking up less new land, getting more out of new and existing land and infrastructure, improving access between jobs, housing and services by locating these activities close together and providing better transport links, and promoting equity in access opportunities.

Zoning definitions

The August 1999 edition of Zoning News of the American Planning Association offers a compendium of terms and definitions for emerging or progressive land use concepts. Some of the terms referred to are not new, but in fact have seen a resurgence in recent times. The terms that are defined include "*aesthetic zoning*", "*automatic teller machine*", "*auxiliary massage establishment*" (the mind boggles), "*artist studio*", "*brew on premises store*", "*large box retail*"; "*brew pub*", "*microbrewery*", "*megachurch*", "*store front church*", "*copy shop*", "*coffee kiosk*", "*outlet centre*", "*power centre*", "*regional centre*", "*super-regional centre*", "*strip centre*", "*megaplex*", "*home improvement centre*", "*massage establishment*" (no doubt about this one), "*transit orientated development*", "*town centre*" and "*video rental store*".

Land Trust

The Queensland government has recently released a discussion paper on a Land Trust for South-East Queensland. The proposed Trust is intended to help protect wildlife and native plants, preserve areas of natural interest, beauty and cultural values and provide appropriate community amenities. The Land Trust is intended to be a non-government, non-profit organisation that works with local groups and land holders at their request to manage land for community benefit.

Field of bad dreams

The September 1999 edition of Zoning News of the American Planning Association contains the following interesting story.

The 1989 movie "*Field of Dreams*" was set in an Iowa cornfield where the ghosts of baseball stars came back to play the game they loved. "*Is this heaven?*" asked the long-deceased "*Shoeless*" Joe Jackson to Ray Kinsella, the farmer who constructed a baseball field in the middle of his corn crop. "*No, it's Iowa*", answered Ray. The actual field where the film was shot in Dyersville, Iowa, is still intact, and remains one of the top tourist destinations in the state.

But all is not level on this playing field. A property line runs through the left side of the infield; to the right are the farmhouse and the property of Don and Becky Lansing, and to the left, the rest of the playing field and cornfields, owned by Al and Rita Ameskamp. Both parties have souvenir stands on the site, and charge no admission to play ball on the actual field.

The portion of the field owned by the Ameskamps has undergone significant changes. The property manager that oversees the commercial aspects of their land, a group called "*Left and Center Field of Dreams*", successfully petitioned for a zoning change of the farmland from A-1 to B-1 in order to support increased commercial ventures. The field is two and a half miles outside of Dyersville and has the only business zoning classification in the area. All the surrounding land is zoned as agricultural. The reason for the change is a three mile maze through the cornfields cut in the image of Shoeless Joe, which features trivia questions and factual markers throughout. A $6 admission fee is charged for entrance to the maze, which was completed well before the approval for the zoning change on June 21. Also under development consideration is a 507 foot high tower from which to view to the maze in, its entirety.

The Lansing family is opposed to the extreme exploitation and commercialisation of the site; on which they have banned television commercial shoots and weddings, preferring to keep their portion of the site as "*authentic*" as possible. The Lansings are not in agreement with the developments on the Ameskamps' side. "*The issue here is money, with a lot of bad blood between the two camps*," says Paul Buss, the Dubuque County zoning administrator. "*What the County would like is to rezone the two farms as C-1, a very strict commercial conditional zoning prohibiting anything but Field of Dreams-related uses. No fast-food restaurants or anything of the sort would be allowed, and if the cornfield closed down, the zoning would revert to A-1*".

The Lansings are challenging the B-1 designation, telling The New York Times it could lead to a proliferation of "*hotels, bowling alleys (and) bus depots*," though Buss says none of those uses would be permitted. And with what Buss says is "*a multi-million dollar business*" and the leading tourist attraction in the region at stake, this zoning dispute is a sure candidate to head into extra innings.

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