PROPOSED OVERHAUL OF QUEENSLAND'S PLANNING LAWS

CLAYTON UTZ

www.claytonutz.com

Consultation drafts of the proposed Planning and Development Bill and the Planning and Environment Court Bill (P&E Court Bill) have been released, with submissions being accepted until 26 September 2014.

The draft Bills propose to repeal and replace the current Sustainable Planning Act 2009 (SPA), with the Planning and Environment Court continued through its own legislation.

The draft Bills introduce changed terminology for many of the planning concepts that would be retained, and de-regulates and streamline a number of processes that exist under SPA. There are a number of matters under SPA that are not proposed to be continued under the draft Bills, including:

- State planning regulatory provisions and standard planning scheme provisions;
- the EIS process;
- designations of land for community infrastructure by a local government; and
- compliance assessment.

In this paper we examine some of the key aspects of the draft Bills.

PURPOSE OF THE PLANNING BILL

The purpose of the Planning Bill is expressed to be "to facilitate Queensland's prosperity, including by balancing economic growth, environmental protection and community wellbeing". The existing SPA purpose of "managing the effects of development on the environment, including managing the use of premises" is not included.

As for SPA, the Act is expressed to bind all persons, including the State, but does not apply to the Coordinator General's functions and powers under the State Development and Public Works Organisation Act 1971.

Planning instruments

Similarly to SPA, the Planning Bill provides for two types of planning instruments:

- a **State planning instrument**, which is a State planning policy or a regional plan; and
- a **local planning instrument** which is a planning scheme, temporary local planning instrument or planning scheme policy.

State planning regulatory provisions and the standard planning scheme provisions would not be continued, however it is likely that some aspects of these instruments will be continued through regulations.

The hierarchy in the case of inconsistency is that:

- a State planning policy applies over a regional plan or local planning instrument;
- a regional plan applies over a local planning instrument;
- a planning scheme applies over a planning scheme policy; and
- a temporary local planning instrument applies over a planning scheme policy.

The contents of local planning instruments are to be prescribed by regulation, and the Minister is to make guidelines and rules for making local planning instruments adopted by regulation. The process for making a planning scheme will be contained in a notice given to the local government by the chief executive, prepared having regard to the Minister's guidelines. That notice will set out the requirements for public consultation and how the local government must publish a notice after the planning scheme is made.

DESIGNATING LAND

The ability for local governments to designate land for community infrastructure would be removed, however Ministerial infrastructure designations can still be made where the Minister is satisfied that:

- the infrastructure will satisfy statutory requirements, or budgetary commitments, for the supply of infrastructure;
  or
- there is or will be a planning need for the efficient and timely supply of infrastructure.

We understand that the intent is that designations will only be made by the Planning Minister, not any Minister of the State.

As for SPA, the designation can only be made if the Minister is satisfied there has been adequate environmental assessment and consultation in carrying out the environmental assessments, however the identified environmental assessment processes are not prescribed as the only way in which the Minister can be so satisfied. The Planning Bill provides that the Minister is taken to be satisfied if the guidelines process adopted by regulation has been followed, or may be satisfied of those matters in another way.

Development under a designation is accepted development, except to the extent the development is building work that is building assessment work under the Building Act. Unlike the position under SPA, all development (except building work) under a designation is accepted development, and the designation provides exemptions beyond the planning scheme.

While the transitional provisions are noted as being under further development, at this stage the Planning Bill does not transition existing community infrastructure designations.

DEVELOPMENT ASSESSMENT: INSTRUMENTS

There are two key documents that define the development assessment process.

The **categorising instrument** which is a regulation, or a "local instrument" (planning scheme, a temporary local planning instrument or a variation approval) identifies:

- the category of assessment;
- when public notification is required for a merit assessment (see below); and
- assessment benchmarks.

The **development assessment rules** must be made by the Minister and approved by regulation. The development assessment rules **must** provide for:

- how notification is required to be carried out for applications for which public notification is required; and
- the consideration of properly made submissions,

and **may** provide for:

- the development assessment process;
- the standard conditions of a deemed approval;
- lapsing and extending development approvals and noting approvals on the planning scheme;
- the lapsing of applications;
- the revival of lapsed applications.

DEVELOPMENT ASSESSMENT: CATEGORIES

The Planning Bill provides for three categories of development:

- **prohibited development** is development that a categorising instrument states is prohibited development. Similar to SPA, a local instrument can only state that development is prohibited if permitted by regulation;
- **assessable developmen**t is development that a categorising instrument states is assessable development, however, a local instrument cannot state that development is assessable development if a regulation prohibits a local instrument from doing so;
- **accepted development** is:
  - development, or an aspect of development, that a categorising instrument categorises as accepted development; or
  - any other development, or aspect of development, that is not categorised by a categorising instrument as prohibited development or assessable development.

For assessable development, there are two categories:

- **standard assessment** which:
  - is assessed against assessment benchmarks, and having regard to other matters prescribed by regulation;
  - must be approved to the extent the development complies with the assessment benchmarks, and may only be refused to the extent that the development does not comply with the assessment benchmarks and compliance cannot be achieved by lawfully imposing development conditions; and
- **merit assessment** which is assessed against the assessment benchmarks, any other matters prescribed by regulation and any other relevant matters.

For variation requests, akin to the current preliminary approval that varies a planning instrument, the assessment must have regard to the consistency of the variations with the relevant local planning instrument other than the aspects sought to be varied, the effect of the variations on submission rights for later applications and any other matter prescribed. A variation approval may state that the development is accepted, assessable or prohibited and the assessment benchmarks for assessable development.

The Planning Bill provides for exemption certificates to be given that exempt an owner of land from having to obtain a development approval for assessable development where the assessment manager is of the view that:

- the effects of the development are minor or inconsequential;
- the circumstances under which the development was categorised as assessable no longer apply; or
- the development was categorised as assessable in error.

DEVELOPMENT ASSESSMENT: AGENCIES

The Planning Bill removes the distinction between advice and concurrence agencies. An applicant is required to give a copy of the development application to a referral agency where a referral agency is prescribed by regulation, or an agency decided by the Minister to be a referral agency.

The referral agency response powers are expressed differently to those under SPA, and include that the referral agency can decide to direct the assessment manager to:

- give development approval subject to stated conditions;
- give development approval for only a stated part of the development;
- give only a preliminary approval;
- require a stated currency period for any development approval given;
- refuse the application.

It does not appear to be the case that a referral agency can just give conditions without directing an approval, although it is not clear whether this is the intention, particularly given that referral agencies have limits to their jurisdiction.

Decisions of the assessment manager must comply with all actions required under a referral agency response, including that conditions must be imposed exactly as stated in the response.

DEVELOPMENT ASSESSMENT: DECISION NOTICE

The Planning Bill restricts the ability to give a decision notice if the application is accepted as properly made, but owner's consent (where required) has not been given. In those circumstances, the decision notice can only be given if the development approval includes a condition that the development must not start until the owner has agreed to the development starting or given an easement for a purpose consistent with carrying out the development.

DEVELOPMENT CONDITIONS

The conditions tests remain the same as SPA, in that conditions must:

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

A development condition may limit how long a use may continue or works may remain, state that development may not start until a certain event, require compliance with an infrastructure agreement for the land (although cannot require an infrastructure agreement), require development be completed within a stated period or require the payment of security under an agreement.

A development condition must not:

- be inconsistent with a condition of an earlier development approval unless the earlier condition was imposed by the same entity and the applicant and owner otherwise agree in writing:
- require an entity other than the applicant to carry out works for the development;
- require an entity to enter into an infrastructure agreement;
- other than in accordance with the infrastructure charging provisions, require a monetary payment for infrastructure;
- require an access restriction strip;
- limit the period of development for a use of work forming part of a network of infrastructure, other than State owned or State controlled transport infrastructure;
- be imposed for water infrastructure about a matter for which the SEQ Water Act requires a water approval.

The Planning Bill provides similar provisions for negotiated decision notices to be issued, as under the current legislation.

CHANGING APPROVALS

A change application for a development approval must be made to:

- the Minister for a change to a development condition imposed under a Ministerial direction or if the application was called in;
- a referral agency for a minor change to a development condition imposed by a referral agency;
- the P&E court where the development approval was given because of a court order and there were properly made submissions for the application; or
- otherwise the assessment manager.

The process for assessing and deciding the change to the approval depends on whether or not it is a minor change. The definition of minor change is substantially similar to the SPA definition. For other than minor changes, the responsible entity must assess the application under the original assessment provisions, however, public notification does not apply if the change is not a minor change only because it causes a referral agency referral, other than to the Chief Executive or referral to additional referral agencies other than to the Chief Executive.

LAPSING APPROVALS

The standard lapsing periods are longer than the existing SPA provisions, and are:

- for a material change of use – if the first change does not happen within six years;
- reconfiguration of a lot – four years; and
- any other aspect of the approval – two years.

There is a positive obligation on the assessment manager to give the applicant and owner notice that an aspect of an approval is due to lapse on a stated date and that the currency period may be extended. Where the notice is not given between 3-6 months before the application is due to lapse, the aspect does not lapse until three months after the assessment gives the notice.

There are further lapsing provisions for failure to complete development. An aspect of a variation approval lapses if the development relating to the aspect is not completed within the stated period or five years after the approval states to have effect.

CALL-INS

The Ministerial call in powers are simplified and more closely resemble those under the original IPA. The call in notice may be given up to 20 business days after:

- the day the chief executive receives notice of an appeal against the application; or
- the end of the appeal period for the application.

The existing consultation provisions prior to a call-in notice being issued are proposed to be removed.

At the time of giving the call-in notice, the notice must state the reasons for the call-in, the State interest, whether the Minister intends to assess and decide or reassess and re-decide the application and the point in the development assessment process from which the process must restart.

In deciding the application, the Minister may consider anything the Minister considers relevant. The Minister is not bound by any referral agency response.

The Minister also may step in to an application for a change, extension or cancellation application that has been made.

INFRASTRUCTURE

Given that the current infrastructure charging provisions in SPA only commenced on 4 July 2014, amendments to the infrastructure charging process under the Planning Bill are limited to changes in terminology, and in recognition of the discontinuance of SPRPs.

The current Adopted Infrastructure Charges SPRP is to be replaced by regulation which will prescribe charges.

OFFENCES, ENFORCEMENT AND APPEALS

The offences include:

- carrying out prohibited development, unless under a development approval for a superseded scheme development application;
- carrying out assessable development without approval;
- contravening a development approval; and
- using premises unless the use is a lawful use, complies with the planning scheme or TLPI or is a lawful use before designation or complies with requirements about the use of premises that is part of the designation.

Show cause and enforcement notices are continued.

Schedule 1 deals with the appeal rights setting out where appeals can be made, what matters can be appealed and who the appellant is.

A decision of a Minister under the Planning Bill is "not appealable" meaning that the decision:

- is final and conclusive; and
- "may not be challenged, appealed against, reviewed, quashed, set aside or called in question in any other way, under the Judicial Review Act 1991 or otherwise (whether by the Supreme Court, another court, a tribunal or another entity)."

The P&E Court Bill continues the Planning and Environment Court through its own legislation. Relevantly, once enacted:

- existing judges of the Court will become P&E Court Judges;
- the current rules of the Court will continue for six months from commencement and are taken to be the rules of the P&E Court, unless new rules are made earlier, and are adapted as required to enable the operation of the rules to all enabling Acts;
- existing orders and directions made prior to commencement will continue in effect as orders or directions of the P&E Court; and
- existing proceedings started prior to commencement continue to be decided by the P&E Court under SPA as if the P&E Court Bill and the Planning Bill had not been enacted.

EXISTING USES AND APPROVALS

To the extent an existing use of premises was lawful immediately before the Act commences, the use is taken to be a lawful use on commencement.

A planning instrument (which is a State planning instrument or a local planning instrument) cannot stop a use from continuing, further regulate a use or require a use to be changed. A planning instrument also cannot affect a development after a development approval is given.

TRANSITIONAL PROVISIONS

The transitional provisions are noted as not yet being completed, and there remain a number of matters to be transitioned through.

The repealed SPA would continue to apply to:

- undecided applications;
- appeals in relation to undecided applications;
- any negotiated decision notice in relation to an undecided application;
- existing SPA proceedings and rights to commence proceedings.

Compensation claims lodged under SPA but not decided become compensation claims under the draft Bill.

State planning regulatory provisions and standard planning scheme provisions under SPA no longer have effect and do not become State planning instruments.

CONTACTS

Karen Trainor
Partner
T +61 7 3292 7012
ktrainor@claytonutz.com

Kathryn Pacey
Partner
T +61 7 3292 7475
kpacey@claytonutz.com

Xavier McMahon
Special Counsel
T +61 7 3292 7109
xmcmahon@claytonutz.com

Ian Motti
Senior Associate
T +61 7 3292 7182
imotti@claytonutz.com

Melissa McKenzie
Senior Associate
T +61 7 3292 7276
mmckenzie@claytonutz.com

Juliette King
Lawyer
T +61 7 3292 7292
juking@claytonutz.com

Avril Prior
Lawyer
T +61 7 3292 7552
aprior@claytonutz.com

Trina Obed
Lawyer
T +61 7 3292 7060
tobed@claytonutz.com

CLAYTON UTZ