Queensland Environmental Law Association

SEQ Regional Plan - Some Key Issues

The South East Queensland Regional Plan (SEQRP) was released on 30 June 2005 after consideration of 8,500 submissions.

It is now the primary planning document for the South East Queensland Region. The State Government has referred to it as the most significant planning strategy implemented in Queensland's history. But is it so significant in reality, or is it a "wish list" of general outcomes? Can it be easily applied?

The implementation of the SEQRP raises many issues for advisers dealing with the development and management of the SEQ environment.

In this further series of seminars, the practical issues arising from the release of the SEQRP will be explored.

Presentations:

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Key Issues - The Regulatory Provisions of the South East Queensland Regional Plan

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Introduction

The Regulatory Provisions are at Part H of the Plan. If the South East Queensland Regional Plan ("the Plan") is the vehicle by which the regulators can manage the planning, the planning schemes are the engine, and the regulatory provisions are gears of control in the hands of the regulators.

The Plan is a statutory instrument under the *Statutory Instruments Act* 1992 with the force of law[1]. The regulatory provisions are planning instruments by virtue of section 2.5A.12 of the *Integrated Planning Act* 1997 ("IPA").

Owners of interests in land affected by the Plan are not entitled to claim compensation under Chapter 5 Part 4 of IPA. As planning schemes are amended to reflect the Plan the change to the planning scheme will not be compensable.[2]

However, under Chapter 1 Part 4 of IPA existing uses and rights are protected from the operation of subsequent planning instruments. Accordingly, existing uses and rights are protected from the operation of these instruments, in the same way they are protected from the operation of other planning instruments.[3]

At the outset the Government made its intentions clear that development outside the Urban Footprint would be closely monitored and subject to stricter planning controls. The regulatory provisions are the gears in the hands of the regulators to exercise those stricter controls.

To the extent that the regulatory provisions declare development to be assessable the provisions are taken to be a temporary local planning instrument. A temporary local planning instrument is an instrument made by local government. Its effect is to suspend or otherwise affect the operation of a planning scheme for up to 12 months. [4] However, the regulatory provisions are given the effect of a temporary local planning instrument but are not bound by the 12 month horizon, continuing to apply to a local government's area until that area planning scheme is updated to reflect the relevant regulatory provisions.[5]

The responsibility for assessing an application against the regulatory provisions lies with the relevant assessment manager.[6] The Office of Urban Management is now a Concurrence Agency for these development applications under the *Integrated Planning Regulation* 1998.

Material change of use applications for urban purposes (other than a single dwelling on one lot) outside of the Urban Footprint and material change of use applications for rural residential purposes where the premises is not zoned or designated for rural residential purposes and the land is outside the Urban Footprint for the Rural Living Area will be subject to concurrence agency referral to the Office of Urban Management. [7] [8]

Section 4.3.5A provides that, subject to Chapter 1 Part 4, a person must not carry out development contrary to the regulatory provisions. An offence against s.4.3.5A is a "development offence" as defined by Schedule 10 and can be the subject of enforcement proceedings as well as prosecution.

DIVISION 1-WHEN THE REGULATORY PROVISIONS DO NOT APPLY

Exemption from the regulatory provisions is provided in Division 1 to the following: —

a) a development application that was properly made before 27 October 2004; or

b) development that is exempt from assessment against a planning scheme under IPA, schedule 9 (even if further development permits are needed); or

c) development that is generally in accordance with a current rezoning approval given under stated sections of the *Local Government (Planning and Environment) Act* 1990 (repealed) , and a current approval under stated sections of the *Local Government Act* 1936 (repealed),and in an approval under IPA section 6.1.26.

"Current rezoning approval" is defined at Division 1, section 1(4).

Contextually, Division 2, sections 3 and 4, and Division 3, sections 5 and 6, are prohibitions to development other than in very prescriptive situations, allowing maximum interpretive value (discretion by policy) by regulators to the conditions stated.

To use another analogy, if a proponent of development wants to enter the four categories of land in Division 2, listed below, he or she is entering a restricted area, met by a sentry, requiring a permit under the conditions of these regulatory provisions, the conditions of the permit interpreted within the paradigm[9] of the regulator.

Four expressions are met in the regulatory provisions which are opaque in meaning and allow considerable discretion to the regulator. These are:

(i) "urban activities"[10] ;

(ii) the development which "is consistent with the planning intent… under the planning scheme";

(iii) "there is an overriding need for the development in the public interest"[11] ;and

(iv) "whether the community would experience significant adverse economic social or environmental impacts if a development proposal were not to proceed."

Each will be dealt with in their context when discussing the Divisions.

DIVISION 2. PROVISIONS AFFECTING PLANNING SCHEMES- IPA S.2.5A.12(2)(A)-(C)

Section3. Urban activities

The regulatory provisions require that any material change of use application for "urban activities"[12] outside the Urban Footprint, is subject to Impact Assessment (see Division 2, section 3(1)). Those categories of land are:

a) Regional Landscape and Rural Production area; or

b) Rural Living Area; or

c) Investigation Area; or

d) Mt Lindesay/North Beaudesert Study Area.

The bar to the hurdle is raised further in assessing the impact[13] by subsection (3) as there are additional "relevant matters applying under a planning scheme for assessing and deciding a development application under section 3 (1)" which apply. The application will comply only if —

a. for premises adjoining a rural village — the development is consistent with the planning intent for the village under the planning scheme; or

b. if paragraph (a) does not apply —

(i) the locational requirements or environmental impacts of the development necessitate its location outside the Urban Footprint; and

(ii) there is an overriding need for the development in the public interest.

Subsection (2) exempts from section 3 (1) premises zoned for urban activities under a planning scheme in either a rural village or the Mt Lindesay/North Beaudesert Study Area.

"Urban activity" is defined in Schedule 2 as:

"*Urban activity, in relation to the use of premises, means a residential, industrial, retail, commercial, sporting, recreational or community purpose normally found in a city or town."*

This definition is different from that of "urban purposes" in Schedule 10 to IPA.[14]

The term 'normally found' is opaque and invites the inclusion of most activities into the definition, for prohibition. A tourist facility that does not have a direct connection with the rural, natural or resource value of the surrounding area, including, a general theme park, water slide or go kart track is an urban activity, whereas tourist accommodation for a farm stay and bed-and-breakfast, or accommodation for up to a maximum of 20 accommodation units, is an exemption.

The exemptions are spelt out in the definition; primarily excluding a single residential dwelling on a lot, or purposes reasonably associated with a predominant non urban purpose, for example a rural residence, farm workers accommodation, farm/workshop buildings, and sporting, limited recreational and retail facilities serving a ' local area'.

Interestingly, other exceptions include extractive industries, emergency services, water cycle management infrastructure and waste management facilities, thus allowing Government intervention in infrastructure provision, without requiring impact assessment.

A proponent must then deal with any relevant matters under a prevailing planning scheme for assessing and deciding a development application and if the premise adjoins a rural village the proposal must be 'consistent with the planning intent for the village'. Schedule 5 lists Rural Villages.

Consistent with the planning intent

How is a proposed premise 'consistent with the planning intent'? As His Honour Justice Skoien said, on different occasions:

> *"It is seldom appropriate in matters such as these to rely on any specific statement of* ***intent or of aims or objectives in the planning*** *documents as determinative. It is rare that an express imprimatur or injunction can be found in them for a particular proposal. Almost invariably a diligent search of the planning documents can unearth in such statements passages which appear to argue for or against the proposal but generally speaking it would be unwise to place too much weight on such a passage. The planning documents, while they are given the force of law…are not drawn with the precision of Acts of Parliament and the statements of intent or of aims or of objectives are intended to provide guidance in the difficult task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular proposal should be approved or rejected. So such statements should be read broadly".*[15]

It is for the proponent and the respective planners to decide what is determinative. By definition "consistent" means compatible, not contradictory, and constant to the same principles.[16]

If the premise does not adjoin a rural village it must either meet locational requirements or have environmental impacts which necessitate its location outside the Urban Footprint and there is an overriding need for the development in the public interest.

An overriding need for the development in the public interest

Schedule 3 sets a very high hurdle for How to Determine Overriding Need in the Public Interest. The section draws the regulator to the second paragraph to determine if the development could reasonably be located within the Urban Footprint. This is a wide domain. If it is determined that it cannot it has to meet scrutiny and evaluation of many a value laden word in subsection (a), and also pass a test to prove that (b) "the community would experience significant adverse economic, social or environmental impacts if the development proposal were not to proceed."

It would be reasonable to suggest that very few development applications would satisfy these criteria.

The principle of an overriding need for development in terms of public benefit has been considered by the Court in relation to **State Planning Policy 1/92** which is to conserve good quality agricultural land which is described as the "best and most versatile farming land". Such land is a "valuable resource" and "should not be built on unless there is an **overriding need for the development in terms of public benefit** and no other site is suitable for the particular purpose".

The policy is that the land should be "productive" or capable of being productive, either by itself or amalgamated with other good quality agricultural land. Good quality agricultural land should be preserved regardless of the effect of market fluctuations on its viability. The amalgamation of small holdings which are not agriculturally viable should be encouraged if that would enhance farm viability. Rural residential development should occur in such a way that avoids conflict with farming operations and does not inhibit farming practice.

Policy 1/92 provides in its text as follows:

> *"4.6 Cases will arise where local authorities have to consider development proposals on good quality agricultural land. In such instances, a ' key ' principle should be whether an overriding need in terms of benefit to the community can be demonstrated for the development at that particular location."*

In a number of cases issues such as production viability, a volume of commercial size, that there was no future possibility of it being farmed with adjoining land, where rural residential subdivision had already encroached, were issues which determined that a need other than agriculture was supported.[17] The test that there were no other suitable sites is also relevant (as with Regulatory Provision, Division two, Section 3 (b) (1)).[18]

This provision is similar to the regulatory provisions contained in the Plan. It concedes that the general prohibition on the loss of quality agricultural land is not absolute but may in proper cases be relaxed. Most often a Strategic Plan requires the local government to consider whether other suitable land is not available and an assessment on the merits. [19]

The Court of Appeal has recently ruled [20] on the Minister's powers under section 30 of the *Gaming Machine Act* 1991 concerning the Minister's determination of appeals. In that instance, having considered the body of material "... if the Minister is satisfied that the integrity of gaming and conduct of gaming will not be jeopardised and that *the public interest will not be adversely affected*, the Minister may direct... that the appeal be allowed." However, if the Minister is not so satisfied "... the Minister must direct that the appeal be disallowed".

It was held that the *Gaming Machine Act* "does not require the Minister to give reasons for not preferring a position which may have more 'scientific' support over another which does not."

His Honour Justice MacPherson made this reflection:

> *"A statutory provision which sets up, without defining it, "public interest" as the relevant criterion for decision and there is the power of determining it in a Minister of the executive government leaves little room for challenging the decision in a court of law. The expression 'in the public interest', when used in the statute, was said in O'Sullivan v Farrer (1989) 168 CLR 210,216, to import:*
>
> > *"a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable... given reasons to be [pronounced] definitely extraneous to any objects of the legislature could have had in view'."*[21]
>
> ....
>
> *"The ' whole object ' of a statutory provision placing a power in the hands of a Minister is so that ' he may exercise it according to government policy ': ibid."*

The Plan is taken to be a "State interest" for IPA.[22] A State interest means — "an interest that, in the Minister's opinion, affects an economic or environmental interest of the State or a region."[23] The Minister for Local Government and Planning can give directions to an assessment manager about development applications concerning a State Interest. The direction can be to refuse an application.[24]

It follows therefore, that the Minister may ultimately exercise that discretion.

Whether the community would experience significant adverse economic social or environmental impacts if a development proposal were not to proceed

In the regulatory provisions at Schedule 3, when determining overriding need in the public interest, the regulator must ask the question whether the community would experience significant adverse economic social or environmental impacts if a development proposal were not to proceed, and in the alternative, could the development reasonably be located in the Urban Footprint.

Some guidance can be gained from the decision in *Emmanuel College Cairns Ltd v Cairns City Council & Ors*[25] . His Honour Justice Daly found that:

(i) the land was good quality agricultural land for the purposes of Policy 1/92;

(ii) were the Court to find conflict with the planning instruments, it would also find that despite that conflict there were sufficient planning grounds to justify approving the application despite the conflict;

(iii) the proposal for an educational College with a curriculum to teach horticulture and small-scale agriculture, albeit on a limited site area, was of a rural nature rather than an urban nature; and

(iv) in the terms of Policy 1/92 the guideline provisions concerning overriding need for the development in terms of public benefit, and the suitability of other sites for the purpose, were satisfied.

The College in question was for boarders and day students primarily of an indigenous background. His Honour reflected on the evidence about the intentions of the applicant and the underlying philosophy. He stated: "to say that such a basic philosophy has immense attraction for both the actual community is referred to and for the larger communities of Queensland and, indeed, Australia must be in incontrovertible ". The comments could be read as an argument that there would be significant adverse economic and social impacts if the development proposal were not to proceed.

Division 2. Section 4-Rural residential purposes

In this section an application for a rural residential purpose in the restricted areas requires impact assessment if it is not zoned for rural residential purposes, and moreover will only comply with the regulatory provisions "if there is an overriding need for the development in the public interest".

DIVISION 3. PROVISION IS REGULATING DEVELOPMENT- IPA S.2.5A.12(2)(D)

Section 5-Particular subdivision prohibited

The purpose is to prohibit subdivision of less than 100 ha in the areas:

a) Regional Landscape and Rural Production Area; or

b) Investigation Area.

At subsection (2) the minimum area for subdivision if located in a rural precinct is the minimum size lot under the planning scheme, 100 ha or greater than 100 ha.

The exemptions are at subsection (3); where the 100 ha minimum does not apply if the subdivision:

a) does not increase the number of lots in the application;

b) is carried out in association with a current development approval for a material change of use; or

c) is in a rural village; or

d) is for rural residential purposes on land zoned for rural residential purposes and relates to a development application properly made before the 27th of October 2006, for reconfiguring a lot; or

e) creates a residual lot; or

f) is carried out under an exemption given by the Minister and an approval of an development application that is properly made within six months of the exemption being given.

The effect is to give proponents of development a window to make applications for rural residential purposes before 27 October 2006 or seek a Ministerial exemption, and gain approval within six months of that exemption being given.

Schedule 4 — defines the requirements as to how the Minister considers a request for exemption. Importantly, exemptions will only be considered if lodged before 30 September 2005. This is a very narrow window of opportunity. Only if a development application was in an advanced stage of a readiness for lodging with a local government on 27 October 2004, will the Minister give it consideration. The evidence that constitutes readiness is at subsection (c) (i) to (v). It does not require each of these items to be evidenced, nor is it a conclusive list.

A request for exemption lodged before 30 September 2005 may be approved after that date, and the applicant if successful, must then achieve an approval of an application that is properly made[26] within six months.

Subsection (4) clarifies subsection (3) (b) and (d) (ii), in that a Ministerial exemption does not apply if the subdivision is in association with a development approval for a material change of use of premises that is current, or the applicant is seeking before 27 October 2006 to reconfigure a lot for rural residential purposes in a rural residential zone.

Section 6- Subdivision in the Mt Lindesay / North Beaudesert Study Area

The purpose is to prohibit subdivision until expiration of this section on 26 April 2006.

It is a blanket prohibition unless the application for subdivision does not increase the existing number of lots, or is in association with a development approval for a material change of use which is current, or is in a rural village for an urban purpose or zoned for urban activities, or is carried out under an exemption given by the Minister under Schedule 4.

Prior to determining how the proposed development is to be treated under Division 3, attention is drawn to the transitional arrangements in Division 4, section 7(2). Section 7 (2) exempts premises zoned for rural residential purposes from the application of Division 3, relating to subdivision in the Regional Landscape and Rural Production Area, the Investigation Area or the Mt Lindesay/North Beaudesert Study Area provided that the subdivision:

(i) is on premises identified in the previous draft regulatory provisions as being in the Urban Footprint or Rural Living Area; and

(ii) is identified in these regulatory provisions as being in the Regional Landscape and Rural Production area Investigations Area; and

(iii) is for rural residential purposes; and

(iv) is carried out under a development approval for reconfiguring a lot provided that the application to which the approval relates is properly made within two years of the day these regulatory provisions came into effect (27 October 2004).

This is a restricted exemption.

DIVISION 4. TRANSITIONAL ARRANGEMENTS FOR THE REGULATORY PROVISIONS- IPA S.12.5A.12(2)(E)

Section 7. Development Applications

Section 7 (1), directs the regulator to these regulatory provisions before assessing and deciding a properly made development application. All applications are subject to the regulatory provisions.[27] The assessment manager under s. 3.5.11(4A) must take into account these regulatory provisions. The assessment manager's decision must not be contrary to the regulatory provisions.[28]

Applications will be regarded as "not properly made" if they propose development that is contrary to the regulatory provisions - 3.2.1(7)(f) of IPA. The discretion that an assessment manager has to accept a not properly made application and deem it properly made for an application within the Urban Footprint, is removed for applications in the restricted areas of the regulatory provisions.[29] Any application submitted in a restricted area which fails to accord with these regulatory provisions, will be automatically contrary to the provisions and not be a *properly made application*.

Conclusion

The regulatory provisions leave many questions open. The four " opaque" expressions discussed will be fertile ground for interpretation by the Court.

An unanswered question is what avenue is open to a proponent whose application has been rejected by the Office of Urban Management on the grounds that the test of an overriding need in the public interest has not been met; or the Minister has refused an exemption.

At first blush the response is that the proponent could seek redress under section 4.1.21 IPA, for a declaration supporting the applicant's contentions. Such redress would be more in the nature of a judicial review[30], posing the question whether the Office of Urban Management, or the Minister, weighed all relevant considerations.

Yet, can the Minister use his discretion to cut off access to the appeal process by the inherent power of the application being considered a "State interest" under IPA?

That is a fertile question for another paper.

Endnotes

1 *Integrated Planning Act* 1997, Section 2.5A.10(2)

2 Section 5.4.4910(a)

3 Hinson M SC, *Legal Implications of the Draft SEQ Regional Plan*, QELA Seminar, 30 November 2004, see particularly ss.1.4.2 to 1.4.5, IPA

4 Sections 2.1.9,2.1.10, IPA

5 Section 2.5A.12(3), IPA

6 Section3.5.11 (4A)-the assessment manager's decision must not be contrary to the regulatory provisions.

7 Section 5 and item 13, schedule 2, Integrated *Planning Regulation* 1998 and s.3.1.8, IPA

8 Lister-Browne L, *Understanding the South-East Queensland Regional Plan*, QELA Annual Conference 2005.

9 Example or pattern, *Concise Oxford Dictionary*

10 Schedule 2 Dictionary, Definition of "urban activity"

11 Schedule 3 How to Determine Overriding Need in the Public Interest

12 Division 2,s.3(a) Regulatory Provisions

13 **impact assessment** means the assessment (other than code assessment) of the —

the environmental effects of proposed development; and

the ways of dealing with the effects. Schedule 10.

14 "urban purposes means purposes for which land is used in cities or towns, including residential, industrial, sporting, recreation and commercial purposes, but not including environmental, conservation, rural, natural or wilderness area purposes."

15 *Degee & Anor v BCC* (1988) QPELR 287, at 289

16 The Concise Oxford Dictionary

[17] *Power v Sarina Shire Council* [1999] QPEC 56.

[18] *Emmanuel College Cairns Ltd v Cairns City Council &Ors* [1997] QPELR 377

[19] State Planning Policy 1/92, s.4.15;see *Emmanuel College Cairns Ltd v Cairns City Council &Ors* [1997] QPELR 377

[20] *Harburg Investments P/L as trustee for Peter Victor Francis Harburg v The Honorable Terrence Michael Mackenroth* [2005] QCA 243

[21] See note XX at para. [3]

[22] Section 2.5A.21

[23] Schedule 10, IPA, definition 'State interest'

[24] Section3.6.1, IPA

[25] [1997] QELPR 377

[26] Section 3.2.1 (7), IPA

[27] Section 2.5A.16(3), IPA

[28] Sections 3.5.4, 3.5.5, 3.5.5A and3.5.11, IPA

[29] Sections 3.2.1(9) and 3.2.1(10)(b), IPA

[30] In *Eschenko v. Cummins* [2000] QPELR 386 at 389, Judge Newton held that the proceedings under ss4.1.21 and 4.1.22 of the IPA are analogous to "judicial review" proceedings under the *Judicial Review Act*. The Court held that an application for a declaration is not a hearing anew in which the onus of proof would fall upon the local authority. Instead Judge Newton held:-
"the court is not directly concerned with the merits of the approval in question, but rather must consider whether the approval given was validly given. The onus of establishing invalidly falls upon the applicant".
In upholding the Council's approval Judge Newton stated:-
"*in these circumstances it is not open to this Court to substitute its own opinion for that of [The Council] unless its approval is shown to be unjustified based on irrelevant considerations or no reasonable Council could have granted: MLC Properties & Anor v. Camden Council & Ors (1997) 96 LGERA 52 at 56 per Lloyd J. Thus, this Court is not entitled to disregard the fact that the legislature has vested the power to exercise a discretion in the Council".*