Anything goes? Performance-based planning and the slippery slope in Queensland planning law

Philippa England and Amy McInerney*

This article explores the first 20 years of performance-based planning in Queensland, how it has evolved and what it means for the interpretation of planning schemes. It describes how, over the past 20 years, planning law has become significantly more discretionary, whether or not that was the intention of the original drafters of the Integrated Planning Act 1997 (Qld) and whether or not that is the inevitable result of a system based on performance-based planning. It demonstrates this thesis with some case examples of discretionary, performance-based decision-making in practice. It also considers the role the sufficient grounds test has played in the evolution of this more discretionary system. It identifies the advantages and disadvantages of a highly discretionary, planning and development control regime. Overall, it argues that, more so than any of the procedural reforms to planning law, it is the evolution of PBP that has played into the hands of developers who wish to prioritise economic development over and above other planning goals.

INTRODUCTION

In 1997, Kevin Yearbury, then Executive Director of the Queensland Department of Planning, hailed the advent of the *Integrated Planning Act 1997* (IPA) as a major reform to planning law in Queensland. While he described the Act itself as simply a "toolbox" for good planning, it was anticipated the new legal regime would drive procedural efficiencies and produce better planning outcomes for Queensland. With respect to planning procedures, the emphasis was on "integration", both in development control – by adopting a "one stop shop" for licensing – and in planning preparation – by vertical integration of State and local planning instruments. With respect to the substance of planning, the IPA abandoned prescriptive zoning in favour of a more performance-based approach. The aim was to encourage creative development proposals offering good planning outcomes whether or not they complied with the minutiae of planning scheme codes. These two themes – integration and performance-based planning – would together deliver economically competitive, liveable and ecologically sustainable communities.[1]

The enactment of the IPA set in train 20 years of continual reviews, amendments and upheavals to planning legislation in Queensland. On the procedural front, the development community and successive governments continued to argue the need for further streamlining, simplification and red tape reduction.[2] This article does not engage with those debates. Instead, it focuses on the substantive planning reform agenda. It argues that substantive reforms to planning legislation since 1997, have, over time, increasingly prioritised economic growth over liveable and sustainable communities as the

* Philippa England LLB, LLM, PhD (Lon) is a senior lecturer at Griffith University. Amy McInerney LLB is a PhD candidate at Griffith University.

[1] K Yearbury, "The Integrated Planning Act: Planning for the New Millenium" (1998) 35(4) *Australian Planner* 197.

[2] At the Commonwealth level see, for instance, Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006); K Lahey, "The 30th Anniversary: What Business Needs From The Law and Decision-Makers" (2007) 58 *Administrative Review* 49; Coalition, *The Coalition's Policy to Boost Productivity and Reduce Regulation* (2013). For Queensland, see, Queensland Department of Local Government, Planning, Sport and Recreation, *Planning for a Prosperous Queensland: A Reform Agenda for Planning in the Smart State* (2007); LNP, *The LNP CanDo Property and Construction Strategy* (2012); Planning Reform Queensland, *Proposed Development Assessment Queensland System* (25 November 2014); Department of Infrastructure, Local Government and Planning, *Better Planning for Queensland, Draft Planning Bills* (2014); Department of Infrastructure, Local government and Planning, Directions Paper, *Better Planning for Queensland: Nest Steps in Planning Reform* (May 2015).

ultimate goal of – and rationale for – planning. We investigate three aspects of the law reforms which have entrenched performance-based planning (PBP): the prohibition on prohibitions; desired environmental outcomes and measures for achieving them; and the sufficient grounds test. We argue that, in contrast to the disjointed progress of procedural, "streamlining" reforms, it is these aspects of the post-1997 legal regime which have successfully allowed the development industry to forge ahead with remodelling planning law to act as the servant of the pro-growth, development industry.

WHAT IS PERFORMANCE-BASED PLANNING?

Although underpinning the reforms, performance-based planning was neither defined nor explained in 1997. It seems the main advocates of PBP were looking to the United States where Lane Kendig had first developed his ideas for performance zoning in the 1970s. In Kendig's conceptualisation, good planning tailors land-use to particular site characteristics rather than to particular zone categories. That being the case, planning schemes should establish performance standards to safeguard the safety and amenity of development but should refrain from specifying whether or not any particular use will be allowed in any particular zone.[3] Developers will then have flexibility to design their development in any way they please while planning authorities will still have sufficient power to ensure good planning outcomes are achieved.[4] Essentially, provided the relevant performance standards are met, performance zoning allows the market to determine where to build shopping centres, housing, industrial buildings and so on.[5] With its in-built flexibility, it was believed PBP would foster flexible and innovative solutions to planning issues.[6]

IMPLEMENTING PERFORMANCE-BASED PLANNING IN QUEENSLAND

Prior to 1997, planning law in Queensland was premised on the notion that, to ensure orderly and efficient development, proposals for new development should be assessed and approved by a suitable planning authority, such as the relevant local government. A planning authority's decision-making power was not unbounded – it was to be guided by the applicable planning scheme. Planning schemes designated all land in a local planning area into a number of zones and prescribed, for each zone, whether a proposed development was prohibited, permitted with consent, or permitted absolutely. Essentially, the process sought to ensure new development was compatible with the existing built form of an area.[7]

Over the years, sustained population growth, urban sprawl and deteriorating environmental quality combined to make planning and development control an increasingly complex task. Zone-based prescriptions could not keep pace with development activity – rezonings became commonplace and undermined certainty.[8] Furthermore, as technology rapidly changed, it seemed inappropriate to make assumptions about whether development was *good* or *bad*, based solely on its name.[9] As one commentator neatly summarised:

> What can be said for a system that is riddled with exceptions, is ignored with impunity, and, when followed to the letter, frequently produces results that no one likes?[10]

[3] W Eggers, *Land Use Reform through Performance Zoning*, (Reason Foundation, California, 1990) 8.

[4] T Frew, *The Implementation of Performance Based Planning in Queensland under the Integrated Planning Act 1997: An Evaluation of Perceptions and Planning Schemes* (PhD Thesis, Faculty of Built Environment and Engineering, Queensland University of Technology, 2011) 302.

[5] Eggers, n 3, 8.

[6] P England, *Sustainable Planning in Queensland* (Federation Press, Annandale, NSW, 2011) 18. Yearbury, n 1.

[7] For a comprehensive account of planning law in Queensland prior to 1997 see A Fogg, *Land Development Law in Queensland*, (Law Book Co, Sydney, 1987)..

[8] D Baker et al, "Performance-Based Planning, Perspectives from the United States, Australia, and New Zealand" (2006) 25 *Journal of Planning Education and Research* 4, 404.

[9] Yearbury, n 1, 198.

[10] J Russell, "Rethinking Conventional Zoning" (1994) *Planning Commissioners Journal* 1.

In 1993, a government Discussion Paper argued in favour of comprehensive planning law reform to replace prescriptive decision-making with a system that could foster innovation and flexibility.[11] The IPA was enacted to implement this new vision and to drive a more performance-based planning system. Nevertheless, rather surprisingly, the IPA did not specifically reference PBP.[12] There remained considerable confusion about what PBP was and how it would operate in practice for Queensland planning authorities.

The literature discussing Queensland's implementation of PBP highlights the struggles associated with shifting away from the status quo. The prevailing confusion within the profession about how to implement a performance-based planning system, the lack of any prior training and the shortage of ongoing educational and technical support no doubt all contributed to the initial chaos.[13] While the goals of innovation and creativity were lauded by developers and planning authorities alike, in practice Queensland did not revolutionise its system. Rather, a hybrid approach resulted.[14] Instead of turning their backs on zoning, Queensland planning authorities took the easiest way forward and adapted their existing planning schemes to include performance-based assessment criteria.[15] The resulting hybridised approach relied on land-use zones and a combination of strategic and prescriptive standards. In retrospect, this evolution is unsurprising because the earlier system could not, in reality, be immediately abandoned in the absence of clear and comprehensive guidance about how to make performance-based planning schemes and how to implement performance-based development assessment.[16] Comparing Queensland to other overseas jurisdictions, the American and New Zealand experiences reveal that hybridity is a common occurrence.[17]

Performance-based planning was not defined or explained in the new legislation or the accompanying guidelines.[18] In fact, the term PBP was not used at all in the legislation.[19] It was, however, indirectly embedded in the new legislation by consequence of three particular sections. These were: s 2.1.23(2), the prohibition on prohibitions; s 2.1.3, which identifies the role of desired environmental outcomes and planning scheme measures; and s 3.15.14, which allows decision-makers to approve development applications that conflict with a planning scheme in some circumstances.[20] The relevant provisions, as they were originally included in the IPA, were as follows:

Section 2.1.23(2)

(2) A local planning instrument may not prohibit development on, or the use of, premises.

[11] Department of Housing Local Government and Planning (Qld), *New Planning and Development Legislation: A Discussion Paper* (1993).

[12] Frew, n 4, 131.

[13] P England, "Damage Control or Quantum Leap? Stakeholder Feedback on the Integrated Planning Act" (1999) 8 *Griffith Law Review* 2. W Steele, *Strategy-making for Sustainability: An Institutional Approach to Performance-based Planning in Practice* (PhD Thesis, Griffith School of Environment, Science, Environment, Engineering and Technology, Griffith University, 2010) 329.

[14] See, for instance, Baker et al, n 8 and Frew, n 4.

[15] See, for instance, Frew, n 4 and W Steele and K Ruming, "Flexibility versus Certainty: Unsettling the Land-use Planning Shibboleth in Australia" (2012) 27 *Planning Practice and Research* 2.

[16] Frew, n 4, 313.

[17] Baker et al, n 8, 399. S Wypych, "Performance-based Planning in Queensland" (2005) 42 *Australian Planner* 3, 26-27.

[18] The November 2016 draft State Planning Policy has now described performance-based planning in Queensland as follows: "Performance-based planning seeks to assess development by focusing on the outcomes to be achieved, and providing certainty about one or more ways to achieve these outcomes, while expressly providing for flexibility and innovation in achieving the outcomes by other means. This approach provides the flexibility to assess each development proposal on its merits against benchmarks set by state and local government." See Queensland Government, *Draft State Planning Policy* (2016) 3

[19] T Frew et al, "Performance based planning in Queensland: A Case of Unintended Plan-making Outcomes" (2016) 50 *Land Use Policy* 242.

[20] *Integrated Planning Act 1997* (Qld).

Section 2.1.3

(1) A local government and the Minister must be satisfied that the local government's planning scheme …
   (b) identifies the desired environmental outcomes for the planning scheme area; and
   (c) includes measures that facilitate the desired environmental outcomes to be achieved;

Section 3.5.14

(1) This section applies to any part of the application requiring impact assessment.
(2) If the application is for development in a planning scheme area, the assessment manager's decision must not–
   (a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or
   (b) conflict with the planning scheme, unless there are sufficient planning grounds to justify the decision.

While none of these sections have survived successive rounds of statutory fine-tuning since 1997 in quite their original form, their basic tenor continues to inform Queensland's current planning law. In the next sections, we track how these provisions have influenced the evolution of planning law in Queensland over the past twenty years.

THE PROHIBITION ON PROHIBITIONS

Consistent with Kendig's original vision for performance zoning – that any development is acceptable provided it meets appropriate performance criteria – the IPA rashly extinguished the category of "prohibited development".[21] From then on, any development could be approved, provided it met the applicable assessment criteria. This left local planning authorities scrambling for suitable assessment criteria to cover all possible eventualities – a trend subsequently associated with a huge increase in the length and complexity of IPA planning schemes.[22] By 2004, even the State government was becoming less committed to this degree of ideological purity. Statutory reforms in that year enabled the State government – but still not local governments – to identify (initially only for south-east Queensland), "aspects of development that may not occur in stated localities".[23] A small number of State-sanctioned prohibitions have been in force since that date.[24]

If, under the IPA, a local planning scheme could no longer prohibit outright any particular development, to what extent could it regulate the types of development that would or would not be allowed? Would decision-makers ever be justified in saying "no" to a development application? In other words, how much weight could and should be given to the requirements of the planning scheme and how much flexibility was built inherently into a planning scheme under the IPA?

These questions were soon raised in the context of transitional planning schemes (made under earlier legislation but now operating subject to the IPA). From 1997, the IPA required decision-makers to regard any existing "prohibitions" in a transitional planning scheme, as "an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited".[25] An early discussion of this section occurred in *Vynotas Pty Ltd v BCC*.[26] In this case, the Court of Appeal had to decide an application for development which, prior to the IPA, would have required a rezoning application (being a form of prohibited development) but now fell to be decided under a transitional planning scheme. The Planning and Environment Court (PEC) had approved the application. In

[21] *Integrated Planning Act 1997* (Qld) s 2.1.23(2).

[22] I Wright, "Drafting IPA Planning Scheme: the Challenges Facing Land Use Planners" in *Environmental Action Planning: Implementing the Agenda – Beyond 2000* (1999 QELA Annual Conference Proceedings); W Rowe and M Papageorgiou, "The Cost of the Gold Coast City Council's IPA Compliant Planning Scheme" in *What Cost the Tick?* (2003 QELA Annual Conference Proceedings).

[23] *Integrated Planning and Other Legislation Amendment Act 2004* (Qld) s 8, introducing new *Integrated Planning Act 1997* (Qld) s 2.5A.12.

[24] For current prohibitions see *Sustainable Planning Act 2009* (Qld), s 88 and Sch 1.

[25] *Integrated Planning Act 1997* (Qld) s 6.1.2(3).

[26] *Vynotas Pty Ltd v BCC* [2001] QCA 24.

refusing leave to appeal that decision, the Court of Appeal opined:

> [T]he scheme of the *Integrated Planning Act* appears to be that, so far as it applies to development and use of premises, a transitional planning scheme no longer has binding force but is of persuasive relevance only…. If prohibitions in former planning schemes are now no more than policy statements it is unlikely that the legislature intended any other provisions in such schemes to continue to have binding effect upon development applications under the Act.[27]

In *Vynotas*, the Court of Appeal appeared to favour the view that transitional planning schemes under the IPA could be interpreted more flexibly than in the past because of their focus on policy outcomes not prescriptive regulations. However, subsequent decisions of the Court of Appeal downplayed the significance of *Vynotas* and re-asserted the need for compliance. For instance, in *Grosser v Council of the City of the Gold Coast*,[28] the applicants, who had development approval to conduct a home occupation (Flower School), had breached the terms of their existing approval. In response to the issue of a show cause notice by the Gold Coast City Council, the applicants applied for a development approval allowing the use of land for an Educational Establishment (Art School), Public Recreation (Art Gallery) and Cafeteria but their application was refused on the basis of conflicts with the transitional planning scheme. On appeal to the PEC, Newton DCJ ruled the transitional planning scheme had been "overtaken by events" and, relying on the inherent flexibility built into the IPA, approved the application.[29] On further appeal to the Court of Appeal, the latter held the finding in the PEC impermissibly "cut across" the planning strategy adopted by the Council and exceeded the jurisdiction of the Court.[30] It expressed the view that, "if conflict is present, the application must be refused" unless there are "sufficient planning grounds to justify approving the application despite the conflict".[31] In a later case, the Court of Appeal confirmed that if conflict exists – whether that be in a major or a minor respect – the only route to approval is through an application of the sufficient planning grounds test.[32] Although an IPA-based planning scheme is policy driven and ultimately non-prescriptive, any decision to contravene any aspect of a planning scheme may *only* be justified on the basis of "sufficient planning grounds" and *not* on the basis of any inherent flexibility introduced by the IPA.

This hard line by the Court of Appeal reduced the flexibility of the IPA framework and created a potentially unworkable degree of rigidity. In later cases, the PEC fell back on pre-existing, familiar rules of purposive interpretation to argue:

> A planning scheme promulgated under IPA has the status of a statutory instrument and must, therefore, be interpreted in a way which best achieves its apparent purpose. The process of construction must, too, be undertaken in light of IPA's clear proscription against any elements of a scheme which purports to prohibit development on, or the use of, premises … the Court should take a common sense approach; and, the particular document should not be read too narrowly but rather, broadly (rather than pedantically) and in a way which adopts a sensible, practical approach. These statements reflect long-settled principles in relation to the judicial approach to planning schemes.[33]

Adopting this purposive, flexible approach to interpretation, Wilson DCJ decided – in a case dealing with an application to develop a full line supermarket on land designated for residential development – there was *no* conflict with the planning scheme because:

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[27] *Vynotas Pty Ltd v BCC* [2001] QCA 24, 5-6 per Davies JA. See also statements of Pincus JA at [21].

[28] *Grosser v Council of the City of the Gold Coast* [2001] QCA 423.

[29] *Grosser v Council of the City of the Gold Coast* [2000] QPEC 047. His Honour did not apply the sufficient planning grounds exception.

[30] *Grosser v Council of the City of the Gold Coast* [2001] QCA 423, [47].

[31] *Grosser v Council of the City of the Gold Coast* [2001] QCA 423, [49].

[32] *Weightman v Gold Coast City Council* [2002] QCA 234, [37].

[33] *Luke v Maroochy Shire Council & Watpac Developments* [2003] QPEC 005, [44]. See the *Acts Interpretation Act 1954* (Qld) s 14A(1) for statutory endorsement of the purposive test of interpretation.

> While instances of possible conflict with particular and very specific parts of the Planning Scheme can be argued, the analysis of the relevant provisions undertaken above shows that any suggestion of conflict evaporates when the plan is considered in its entirety.[34]

This "balanced, but not unduly pedantic" method of interpretation has been frequently applied in the PEC.[35] In 2011, the Court of Appeal also softened its line, acknowledging that:

> [I]n a particular case the effect of a [planning scheme] provision … might be materially qualified by other provisions of the planning scheme in which it is found.[36]

This reasoning is consistent with the evolution of performance-based planning schemes since 1997 as we discuss next.

PLANNING FOR OUTCOMES: DESIRED ENVIRONMENTAL OUTCOMES AND MEASURES

A fundamental tenet of PBP is that planning schemes should set performance criteria but not otherwise dictate what uses may be permitted in any particular zone or on any particular site. The IPA set very few prescriptions about the form or content of planning schemes but it did require that planning schemes, at a minimum, identify desired environmental outcomes and measures for achieving those outcomes.[37] In the IPA scheme of things, desired environmental outcomes (DEOs) would be a succinct, high-order statement of the overall strategic outcomes that development in the planning scheme area should strive for. Importantly, all other measures and provisions would be consistent with and flow from the DEOs – hence achieving the vertical "integration" aspired to by the drafters of the IPA. In this way, DEOs would serve as an important driver for the entire planning scheme. In fact, the IPA stated that a development application must be rejected if it compromised the achievement of the DEOs.[38]

In 2009, the requirement to identify DEOs was replaced with a different requirement – to identify strategic outcomes including a desired strategic framework.[39] These elements serve largely the same purpose as DEOs (being strategically focussed and outcome oriented) but they allow for greater detail and explanation and, as such, should give a clearer sense of direction to decision-makers.

Although DEOs (and now strategic outcomes) were/are the ultimate performance measure in an IPA (now *Sustainable Planning Act 2009* (Qld)) based planning scheme, the real engine room of a Queensland planning scheme lies in the measures (or codes). From 1997 onwards, codes were devised for different uses and for different areas of a planning scheme. To some extent they absorbed and continued the zone and use prescriptions of earlier legislation but there were important differences in their modus operandi. All codes now had to be drafted in a performance-based way incorporating an overall purpose (or overall outcome), performance criteria (now performance outcomes) and acceptable solutions (now acceptable outcomes). Precise technical criteria (formerly prescriptions) were generally redefined as acceptable outcomes. If a development application complied with the applicable acceptable outcomes it would be assumed to be complaint with the performance and overall outcomes of a code and, ultimately, with the overall DEOs. It would have to be approved.[40] However, an application that did *not* comply with the acceptable outcomes could still be approved provided it met the higher level performance outcomes of any applicable code.[41] Unlike acceptable outcomes,

[34] *Luke v Maroochy Shire Council & Watpac Developments* [2003] QPEC 005, [41].

[35] See, for instance: *Westfield Management Ltd v Pine Rivers Shire Council* (2004) QPELR 337; *Stappen Pty Ltd v BCC* [2005] QPEC 003; *Metroplex v BCC* [2009] QPEC 110, [23]; *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] QCA 358.

[36] *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] QCA 358, [35].

[37] *Integrated Planning Act 1997* (Qld) s 2.1.3.

[38] *Integrated Planning Act 1997* (Qld) s 3.5.14(2).

[39] *Sustainable Planning Act 2009* (Qld) s 88.

[40] *Integrated Planning Act 1997* (Qld) s 3.5.13.

[41] Provided also the application did not conflict with the overall DEOs. See *Integrated Planning Act 1997* (Qld) s 3.5.13. For a relevant discussion, see *SDW Projects Pty Ltd v Gold Coast City Council* [2007] QPELR 24, per Judge Rackemann at [46] – [48].

these levels of a code were generally cast as statements of preferred outcomes written in a more open ended, policy oriented style. This had to be the case in order to ensure the planning scheme did not prohibit outright any particular type of development (contrary to s 2.13 of the IPA). This flexible, hierarchical pecking order was the cornerstone of PBP in Queensland.

In theory, decision-making under the IPA *narrowed* the scope for discretionary decision-making. This is because, in a truly performance-based planning scheme, discretion relates to *how* a performance measure will be met, not *whether* it will be met. To the extent discretion is allowed, it should relate only to the *means of achieving* the required performance measures/outcomes. The outcomes themselves should be non-negotiable.[42] The reality, however, has been quite different. Planners trained to draft prescriptive planning schemes struggled at first to identify their core desired outcomes. Their task was compounded by the need to state (and harmonise) outcomes at many different levels – from the highest order DEOs to the performance criteria of many specific codes – and by the overarching requirement that no particular development could be prohibited outright. As a result, many early IPA planning schemes included some rather vague and often highly discretionary statements of preferred outcomes. For instance, in the Brisbane City Plan 2000, a desired outcome for low-density residential areas was:

> Low density living environments predominantly comprise separate houses of no more than 2 storeys.[43]

As the planning scheme did not make clear when an exception might be made to the desired predominant outcome the scope for discretion was significant.

Over time, the drafting of performance-based codes has improved enabling greater clarity and a clearer focus on the planning outcomes being aimed for. Nevertheless, a degree of flexibility (and it would seem associated discretion) remains inherent to the nature of performance-based codes in Queensland. To the chagrin of the community, that inherent flexibility has underscored numerous cases in which buildings of greater height, size or bulkiness have been approved despite their conflict with clearly stated and apparently applicable, acceptable outcomes.[44]

In a recent controversial example, in May 2016, Brisbane City Council approved an application to develop West Village in the heart of Brisbane. West Village is a major urban renewal project worth an estimated $800 million.[45] Although the developer initially observed the planning scheme's acceptable outcomes on maximum building height (15 storeys) the total approved site cover was 95%, ie 15% more than the maximum site cover specified in the applicable South Brisbane Riverside Neighbourhood Plan Code. The community was up in arms but, sadly for them, compliance with the table for maximum site cover in the neighbourhood plan was simply one possible acceptable solution – leaving the door open to alternative proposals. Tracking up the hierarchy of performance measures, a developer who could not meet a particular acceptable solution could, in the alternative, demonstrate compliance with the relevant performance measure and/or the overall purpose of the Code. In this case, the applicable Code's overall purpose stated:

> The overall outcomes for the neighbourhood plan area are…
>
> (c) Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.[46]

As identified in the subsequent ministerial call in notice, the development proposal could readily claim to meet a community need – for in fill housing – and an economic need by generating employment and commercial opportunities. Indeed, the 2016 State Planning Policy identifies

[42] P England, *Integrated Planning in Queensland* (2004, 2nd ed, Federation Press, NSW) 185.

[43] Low Density Residential Area DEO 5.2.2 BCC, Brisbane City Plan, 2000, chapter 3: 29.

[44] *Grieves v Townsville City Council* [2009] QPEC 142; *K Page Main Beach Pty Ltd v Gold Cost City Council* [2011] QPEC 001; *Glastonbury v Townsville City Council* [2011] QPEC 128; *Friend v Brisbane City Council* [2013] QPEC 77.

[45] Call in notice for a development application under the Sustainable Planning Act 2009, 14/09/2016, available at: http://www.dilgp.qld.gov.au/planning/development-assessment/west-village.html (viewed 20/01/2017), 2.

[46] Brisbane City Plan, South Brisbane Riverside Neighbourhood Plan Code, at chapter 7.2.19.4.2 at (3)(c).

promoting economic growth / development and construction as one of its key objectives for planning:

> Planning supports employment needs and economic growth by facilitating a range of residential, commercial, retail and industrial development opportunities, and by supporting a strong development and construction sector.[47]

Desirable as these State-wide, economic goals may be, none of these performance statements indicate or require a credible alternative solution for dealing with the issue of site cover. In effect, the need for infill housing and economic opportunities justified an approach that simply rode rough shod over the detailed design requirements of the planning scheme even though those requirements were put in place subsequent to, and in accordance with, relevant state planning instruments.

In June 2016, the West End Community Association (WECA) filed a submitter appeal in the PEC. A week later, the local councillor requested a ministerial call-in, a request that was acted on by the Planning Minister in September 2016.[48] On 7 November 2016, the Planning Minister, Jackie Trad, approved the development subject to a number of variations in the conditions. The revised conditions set the maximum number of apartments at 1,250 and a maximum site cover of 80%. It required a minimum of 30% of the site area be kept as publicly accessible open space. However, it also varied the maximum building heights stated in the Brisbane City Plan to allow for development up to 22 storeys (the maximum height previously was 15 storeys). As stated by one community observer:

> [A]lthough the State Government has sought in the media to frame this approval as a compromise, in truth, it looks more like a gift to the developer.[49]

As this example illustrates, performance-based planning schemes have caused disenchantment in the community which, contrary to decision-makers, tends to expect full compliance with the "limits" set out in the planning scheme.

THE SUFFICIENT GROUNDS TEST

For those decision-makers who were gallant enough to define a development application as "non-compliant" with an IPA-based planning scheme, there was one alternative route to approval. The IPA allowed a decision-maker to approve a development application even if that decision would conflict with a planning scheme (except the DEOs) if there were "sufficient planning grounds" to do so. The term "sufficient planning grounds" was not defined in the Act.

In 2006, amending legislation changed the term "sufficient planning grounds" to "sufficient grounds"[50] in an attempt to harmonize the terminology between code and impact assessment.[51] The same legislation added a very basic definition of "grounds" which clarified that grounds must relate to "matters of public interest" and not "the personal circumstances of an applicant, owner or interested party".[52] In 2009, a statutory guideline was issued to give some further guidance on the term. Interestingly, the range of sufficient grounds identified in the guideline was quite narrow – referring to out of date, incorrect or inadequate coverage by a planning scheme and contemplating, also, an urgent need for a proposal. This range of considerations fell well short of existing practice in the courts – where questions of need, amenity and other planning considerations were often considered in depth – but the guideline did not purport to be a complete list and decision-makers were invited to have regard to case law for additional considerations.[53]

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[47] State Planning Policy, April 2016 at 22.

[48] Call in notice for a development application under the Sustainable Planning Act 2009, 14/09/2016, available at: http://www.dilgp.qld.gov.au/planning/development-assessment/west-village.html (viewed 20/01/2017).

[49] "Proposed development on the former Absoe site" available at: http://jonathansri.com/absoe (viewed 20/01/2017).

[50] *Integrated Planning and Other Legislation Amendment Act 2006* (Qld) s 37.

[51] *Integrated Planning and Other Legislation Amendment Act 2006* (Qld), Explanatory Notes at 14. The grounds test for code assessment was at all times qualitatively different to that for impact assessment and was later removed altogether.

[52] *Integrated Planning and Other Legislation Amendment Act 2006* (Qld) s 82.

[53] Statutory guideline 05 /09 – Sufficient grounds for decisions that conflict with a relevant instrument, at 3.

The courts have not ruled definitively on the difference between "sufficient planning grounds" and "sufficient grounds" but have acknowledged the latter definition seems more open-ended than the former.[54] What does this mean for developers and the courts? If a major development proposal will create jobs in construction and thereby contribute to the local economy, however temporarily, is that a relevant and potentially sufficient ground? We argue the test of "sufficient planning grounds" would not properly admit of this consideration because a temporary boost to the local economy has no direct bearing on the function, form and appearance of the physical environment over the long term. It is not a valid *planning* consideration. The promise of new jobs may, however, become relevant when the test is more simply stated as whether there are "sufficient grounds" – defined as *any* matters of public interest – to justify a conflict. After all, a healthy economy and job creation are clearly matters falling within the compass of the "public interest". The 2016 SPP (cited above) gives additional credence to that argument. Our concern, however, is that these essentially "economic" considerations are now weighted equally (or perhaps more heavily) than conventional planning and land-use considerations, such as neighbourhood amenity, well laid-out infrastructure and the preservation of environmental quality. The West Village proposal, described above, is a good example of the huge leeway that has, perhaps inadvertently, been given to decision-makers in the switch away from the test of "planning grounds" to simply "grounds" as justification for approving non-compliant development.

An increasing focus on purely economic arguments is not confined to ministerial planning decisions. The courts, too, are being presented with essentially economic arguments as "grounds" for justifying an approval. For instance, in *Rainbow Shores P/L v Gympie Regional Council*,[55] Gympie Regional Council had refused an application to develop a major tourist/residential and commercial development on the Inskip Peninsula – a sparsely populated, environmentally sensitive area popular with campers during the holiday season. The developer argued there were sufficient grounds to justify approving the application despite any conflicts with the relevant planning instruments. The developer's arguments relied heavily on economic considerations as evidence of "need" for the development. For instance, applying value added multipliers and adopting an initial time frame of 20 years – subsequently lengthened to 40 years for the tourism related development – the appellant's expert argued this development would generate significant economic benefits including:

> (a) total construction costs of $1.2b over the construction period;
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> (b) total value added economic contribution to the Cooloola region of $0.8b and to the state of $1.4b during the construction period;
>
> (c) directly employ 5,200 full time equivalent (FTE) person years onsite during the construction period;
>
> (d) generate total employment in the Cooloola region of 7,800 FTE person years and in the State of 11,500 FTE person years during the construction period;
>
> (e) generate annual revenues of $140m once fully operational;
>
> (f) contribute $125m to the Cooloola region's economy and $170m to the state's economy annually once fully operational …[56]

Whether or not these predictions were reliably gauged (and the judge held some doubts on this score), the judge was prepared to consider the information as potentially relevant to the question of need. On the particular facts of this case, he concluded these optimistic measures of future economic activity did not really answer to any demonstrable or current need among the existing population of approximately 1,000 people:

> The scale of tourist facilities contemplated for RS2 by the plan of development appears, on the evidence, to be more of an entrepreneurial vision for a possible future than a response to an identified and established need.[57]

[54] *Grieves v Townsville City Council* [2009] QPEC 142 per Judge Durward at [97]

[55] *Rainbow Shores P/L v Gympie Regional Council* [2013] QPEC 26.

[56] *Rainbow Shores P/L v Gympie Regional Council* [2013] QPEC 26, [237].

[57] *Rainbow Shores P/L v Gympie Regional Council* [2013] QPEC 26, [215].

Eventually, after a careful consideration of a range of economic, environmental and town planning issues, the judge held there was not sufficient economic, community or planning need to justify an approval.[58]

While the developer did not succeed in establishing sufficient grounds in this case, three points are noteworthy:

- the developer attempted to argue that an overall upsurge of economic activity (including eventual contributions to the local tax base) was a sufficient ground for overriding the spatial, physical and environmental stipulations of the existing land-use planning instruments;
- whilst that argument was not successful in this case, it was duly considered and appraised as part of an overall discussion of whether there were sufficient grounds for the development to go ahead; and
- without discussing the matter further, Judge Rackemann's final decision acknowledged different types of need – economic, community and planning need – all of which may fall to be considered when applying the sufficient grounds test.

THE SLIPPERY SLOPE CONTINUES: QUEENSLAND'S 2016 PLANNING ACT

Continuing the trend of merging economic and planning considerations in our planning law, in 2013 the Queensland Government announced its intention of developing comprehensive new planning legislation, the *Planning for Queensland's Development Act*, to facilitate "the economic growth and prosperity of Queensland".[59] In January 2015, the ballot box frustrated the intentions of the Newman Government in this respect. However, in May 2015, the newly-elected Labor Government also promised "real reform" of planning law. For the Palaszczuk Government, the economic driver for reform remained strong but, in contrast to the neo-liberal language of its predecessor, that language was now tempered with a more conciliatory tone:

> We believe that planning reform can deliver a more efficient system that supports investment and jobs, but don't believe this must come at the expense of community participation or the role of local government.[60]

In due course, the *Planning Act 2016* (Qld) was passed on 25 May 2016. The *Planning Act* will come into force in mid-2017and will repeal and replace the current *Sustainable Planning Act 2009* (Qld) (the SPA).

Although much of the existing planning framework will remain substantially the same, there are two important changes to the decision rules for development assessment that, we believe, will continue to render Queensland planning law ever more malleable to purely economic arguments. First, with respect to code assessment,[61] the *Planning Act 2016*, s 60(2), states:

> To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment–
>
> (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and
>
> (b) *may decide to approve the application even if the development does not comply with some of the assessment benchmarks* [authors' emphasis]; and
>
> ...
>
> (d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.

[58] *Rainbow Shores P/L v Gympie Regional Council* [2013] QPEC 26, [417].

[59] Queensland Government, "Planning reform" at <http://www.dsdip.qld.gov.au/about-planning/planning-reform.html> (viewed 12/12/2013).

[60] Queensland Government, *Better Planning for Queensland: Next Steps in Planning Reform*, Directions Paper, May 2015 at 1.

[61] In the *Planning Act 2016* (Qld) there are two categories of assessable development – code assessable development and impact assessable development. Code assessable development requires a more limited form of assessment against applicable planning scheme codes and other assessment benchmarks. Impact assessable development requires assessment against applicable benchmarks including their strategic objectives and may hay have regard to the relevant grounds. See *Planning Act 2016* (Qld) s 45.

Section 60(2) clearly indicates that code assessable development applications should always be approved if conditions can be imposed to address particular design issues. Our concern, however, is with s 60(2)(b) which, effectively, allows decision-makers to approve development that does not comply with relevant assessment benchmarks *whether or not* conditions will directly and adequately substitute for that lack of compliance. As currently expressed in the *Planning Act*, this discretion is not actually limited in any way at all. An example stated in the Act suggests this discretion may be appropriately exercised to resolve conflicts between applicable assessment benchmarks – but that is only one possible scenario.[62] Perhaps a more appropriate statutory requirement, consistent with the true intent of PBP, would be:

> [T]he assessment manager, after carrying out the assessment–
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks provided conditions are imposed to adequately address the non-compliance and /or to resolve any conflicts between applicable assessment benchmarks.

The second major change to development decision-making relates to the sufficient grounds test. In the *Planning Act 2016*, the sufficient grounds test has been replaced by a "relevant matters" consideration:

> An impact assessment is an assessment that–
>
> (a) must be carried out–
>
> (i) against the assessment benchmarks in a categorising instrument for the development; and
>
> (ii) having regard to any matters prescribed by regulation for this subparagraph; and
>
> (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.[63]

As with section 62 above, the legislation gives some examples of what this subsection is alluding to – a planning need or the current relevance of the assessment benchmarks in the light of changed circumstances.[64] Nevertheless, these examples are not exclusive and nor is there a definition of "relevant matters" in the Act other than to reiterate that a person's personal (including financial) circumstances are not a relevant matter.[65] No doubt, most decision-makers will, at least initially, draw parallels with the notion of "sufficient grounds" in the previous Act but it is certainly arguable the "relevant matters" test continues to expand the range of issues that may be considered.

Of even greater concern, the requirement for "sufficiency" has been altogether dropped from the new section. In previous iterations, decision-makers were required to follow and apply their planning instruments *unless* – as an exception to the norm – there were "sufficient grounds" to make a decision in conflict with a relevant planning instrument. Under the IPA, and subsequently the SPA, a healthy and abundant case law developed around the meaning and application of the sufficient grounds test. In general, strong grounds were needed to justify a decision to approve a development despite a conflict with the planning scheme. The proper approach of the court (or a planning authority) was described as one of restraint:

> Adopting the phraseology of those cases which deal with the non-derogation principle, I feel that to allow this appeal would be to "cut across" in quite unacceptable manner, a planning strategy which has been adopted by the Planning Authority and publicly exhibited for community comment.[66]

With the imminent implementation of the *Planning Act 2016*, the future of this established case law is uncertain. The Explanatory Notes to the new *Planning Act* suggest the previous "sufficient grounds" test had become "unproductive", detracting from a focus on the merits of the proposal "based on established policy". Decision-makers are now being asked to focus on the merits of the

[62] *Planning Act 2016* (Qld) s 60

[63] *Planning Act 2016* (Qld) s 45(5).

[64] *Planning Act 2016* (Qld) s 45(5).

[65] *Planning Act 2016* (Qld) s 45(5).

[66] *Grosser v Council of the City of the Gold Coast* [2001] QCA 423, [38].

proposal and, after considering established policy, make a "balanced decision in the public interest".[67] We note, however, the "relevant grounds" test, as currently stated in the *Planning Act 2016*, s 45(5), does not frame the discretion in this way or limit it to "established policy". Admittedly, general administrative law principles require decision-makers to limit their deliberations to matters which are relevant to the exercise of the statutory power,[68] but the overall objective of the *Planning Act 2016* is to facilitate "ecological sustainability".[69] As ecological sustainability is defined to include environmental protection *and* economic development *and* the maintenance of the cultural, economic, physical and social wellbeing of people and communities the potentially relevant considerations seem almost unbounded.[70]

We argue the evolution from the "sufficient planning grounds" test in the IPA, to the "relevant matters" head of consideration in the *Planning Act 2016* represents another nail in the coffin of PBP. Decision-makers are now being urged to assess development applications holistically, in the light of their planning instruments and with reference to any other relevant matters – including, no doubt, strategic economic considerations – but with no particular priority attributed to the performance measures stated in their formal planning instruments. We believe that, in a truly performance-based system, there should be flexibility with respect to the *method of achieving* performance-based measures but that does not go so far as to make the need for their achievement optional at the discretion of the decision-maker.

Reflecting on 20 years of planning law reform in Queensland, we ask: Have we now journeyed full circle, returning, for instance, to the highly discretionary style of decision-making that characterised re-zoning applications prior to the 1997 reforms? We recall the words of the Minister for the Environment in New Zealand, when he first introduced New Zealand's PBP legislation (to which the Queensland drafts people paid considerable attention). The right honourable Mr Upton was called upon to explain why his new legislation rejected the "balancing approach" to development decision-making. He explained:

> The problem with such a prescription is that it requires the kind of directive and controlling approach to economic and social activity that must inevitably focus on trade-offs reached in a judicative euphoria. Many still feel comfortable with that approach, usually on the grounds that their view of needs and opportunities will win out on the day. In truth, it is an approach to resource use that is fraught with uncertainties for developers and environmentalists alike.[71]

CONCLUSION: LAND-USE PLAN, STRATEGIC PLAN OR BUSINESS PLAN?

There is a longstanding debate about the appropriate balance between predictability and flexibility in planning law.[72] Planning is a dynamic activity which requires scope for responsiveness and adaptability. Planning schemes normally have a lifespan of up to 10 years[73] and may, in addition, take many years to prepare. Planning and market conditions may change a lot in that period – especially in high growth areas. To overcome this in-built inertia some amount of discretion is a desirable and necessary part of planning. Nevertheless, the importance of transparency and accountability in planning decisions cannot be overlooked. It is the key to confirming public confidence in decision making and ensures the public know the difference between rational and irrational (and equitable and

[67] Queensland Government, *Planning Bill 2015, Explanatory Notes* (Qld) at 74.

[68] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223, 227-229.

[69] *Planning Act 2016* (Qld) s 3(1).

[70] *Planning Act 2016* (Qld) s 3(2).

[71] S Upton, "Purpose and principle in the Resource Management Act" (1995) 3 *Waikato Law Review* 17, 25.

[72] Steele and Ruming, n 15; P England, "Flexibility or Restraint? Interpreting Queensland's Performance Based Planning Schemes" (2006) 11 LGLJ 209; P England, "IPA Planning Schemes: Is There a Difference?" (2006) 23 EPLJ 81; U Rivolin, "Conforming and Performing Planning Systems in Europe: An Unbearable Cohabitation" (2008) 23 *Planning Practice and Research* 65; P Booth, "Discretion in Planning versus Zoning" in J Cullingworth (ed), *British Planning: 50 years of Urban and Regional Policy* (1999, London, Continuum Publishing) 31-44.

[73] *Planning Act 2016* (Qld) s 25.

inequitable) exercises of discretion.[74] In this respect, planning schemes are important. They are not just an aspirational business plan. They are prepared by local governments to reflect the community's views about the future shape of their communities. The community plays an important role in their making.[75] Planning law insists on extensive public consultation requirements to ensure new planning schemes reflect a balance of community views. Once made, planning schemes should provide a level of predictability and certainty about a local government's planning intentions, serving to promote accountability and transparency in planning. If planning schemes are undermined by the legal framework around deciding a development application, it triggers questions about whether the law is compromising public participation, predictability and accountability in planning.

In its 2015 Directions Paper for planning law reform, the Queensland Government unequivocally declared:

> The planning system should be open, transparent and accountable to ensure that both the community and industry can have confidence in the decisions that are made.[76]

One of the ways in which the Government pledged to achieve this goal was by reinstating the rights of third-party submitters to appeal to the PEC without fear of having costs awarded against them.[77] That promise has been acted upon and from mid-2017 each party to planning litigation will ordinarily pay their own costs.[78] The Government claims this is a major win for the community, accountability and transparency. Our analysis, however, suggests that what has been given out with one hand has been taken away with the other. Reforms in the *Planning Act 2016* take PBP to a new level of uncertainty. They serve to obfuscate and undermine the certainty and accountability required of decision-makers when they apply their planning schemes. Despite any favourable changes in the costs rules, under the new "relevant matters" test courts will be as powerless as the community to stop development that flies in the face of substantive planning scheme "requirements". This is because, in the new scheme of things, provided local governments give a sensible (or reasonable) explanation for their decision – based on economic or other grounds – there is no recourse in law for their decision. In these circumstances, where will the bounds of a "relevant matter" end?

[74] M Sparrow, *The Character of Harms* (2008, University Press, United Kingdom) 244-254.

[75] Explanatory note, *Planning Bill 2015* (Qld) at 16.

[76] Queensland Government, n 60, 8.

[77] Queensland Government, n 60, 8.

[78] *Planning and Environment Court Act 2016* (Qld) s 59.