DEVELOPMENT WATCH INC

EXPANDED NOTES FOR COMMUNITY PLANNING FORUM

Development Watch Inc. is a not-for-profit, non-partisan, volunteer community group operating for over 15 years. We are not anti-development. We monitor development in the Coolum and surrounding areas and advocate respect for our Planning Scheme. We have supported our Council as a co-Respondent by Election in over 15 court cases. Unfortunately, there have been 3 occasions when we have opposed Council in court cases.

During the State Government community consultation on the new Planning Act we took note of a diagram showing the community as an equal stakeholder in the planning arena.

Whilst we agreed we should be an equal stakeholder, we often don't have a seat at the table when it comes to major planning decisions. We may have the opportunity to provide input via community consultation but on many occasions in the past we have not been listened to and it is difficult for us to be heard.

There are 3 topics I want to speak of today. Firstly, Performance Outcomes, secondly the Sekisui Court case and lastly the Planning Act.

PART ONE - PEFORMANCE BASED PLANNING SCHEMES

1. Development Watch played an integral part in the formulation of the current 2014 Sunshine Coast Planning Scheme. Statements made by our Council on the launch of that scheme included -

   - Planning Schemes can affect what you can do with your land, what your neighbour can do and what can happen in your street or neighbourhood. and
   - A planning scheme that puts the right settings in place to encourage new investment and provide certainty for the community.

2. For many reasons certainty has not prevailed and people do not know what can happen next door or down the road from them.

3. Some years after the launch of the Scheme it became apparent to us that alternate outcomes other than Acceptable Outcomes were being used by developers to meet the Performance Outcomes. Part of this had to do with the generality of the wording of the Performance Outcomes. This resulted in uncertainty and created angst for the community.

4. As an example, this large building was constructed over 5 allotments and was 3 times the allowable density under the Planning Scheme.

You can see how different the development is to those surrounding the site.

5. The Application was lodged as a Code Assessable Development Application.

   At the time the developer's planner said –

   Although exceeding the residential density specified by the Acceptable Outcome AO6, Acceptable Outcomes are only one way of achieving the corresponding Performance Outcome. In this regard an alternative solution is proposed which demonstrates compliance with corresponding performance outcome PO6. PO6 states that a multi-unit residential use has a residential density that is compatible with the intent of the zone and the preferred character for the local area in which it is located, and

   The development proposes a suitable overall residential density that is compatible with the intent of the medium density residential zone and the tourist accommodation zone. The development seeks to consolidate 5 lots into a larger and more efficient development site. This efficiency warrants additional development yield within the consolidated and integrated site …

6. The increased density was going to impact parking, traffic and character so we wrote to Council asking them to make the Application Impact Assessable. Despite our request, the Application remained Code Assessable and was approved. As the Development Application was Code Assessable there was no formal public notification period and no opportunity to lodge a submission. The community therefore had no right of appeal.

   There have been other similar developments of this kind approved in the area since.

7. We therefore have to ask the question: Do we want Planning Schemes to provide certainty? If we do, flexibility does not provide certainty.

PART 2 – SUNSHINE COAST COUNCIL'S APPROVAL OF THE SEKISUI DA

1. There have been many matters Development Watch has had to address over the years, but the most significant has been the approval of the Sekisui development on the beachside at Yaroomba.

   You may be aware the beachside at Yaroomba once formed part of the prestigious Five Star Hyatt Regency Resort.

2. The community had already fought for this site once when a previous owner, Lendlease, sought to remove most of the tourism focus and replace it with residential based on a need for more residential. The then Council voted in favour of that development and approved buildings up to 4 storeys. The highest building in the area at that time was 2 storeys. That was back in 2005.

   Lendlease proceeded to remove the prestigious golf holes and shut the Beach Club down. Lendlease developed approx half of the land with houses and then onsold the remainder of the land to Sekisui House in 2011. At that time there were still 319 dwellings to be built on the beachside under the existing approval. The sale also included a large residential parcel to the west known as Vantage.

3. Over the ensuing years Sekisui developed Vantage on the western side but just trickle developed the beachside land with an occasional house.

4. In 2014 a new Planning Scheme was launched. It placed a height limit on the beachside site of 2 storeys or 8.5m. This was Council's recommendation and DW agreed.

5. Several months after the launch of the new Planning Scheme, Council announced it was considering a major Planning Scheme Amendment for the beachside site to allow a massive residential development and a 5 star hotel contained in buildings up to 17 storeys. This was based on a need for a 5 star hotel. That was voted down by Council.

6. Sekisui then lodged an Application for another very dense development also containing a 5 star hotel and residential units in buildings up to 7 storeys. Council approved the development.

7. So after going against the wishes of the community and removing most of the tourism focus from the beachside back in 2005, the community now had to fight against Council who wanted to put it back. The tourism focus, however, was not the issue. The site had a height limit of 8.5m and was meant to have development that 'sits lightly in the landscape' and the adjoining beach was a known breeding site for the endangered loggerhead turtle.

8. The level of community concern soon became apparent when Development Watch held an Information Session in Coolum Beach. The Civic Centre was packed to the hilt. People were sitting on the floor, leaning in through the windows or just standing outside listening. The media were in the middle at the back and had to stay for the whole session because they couldn't get out. It also became apparent that some members of the community were expressing anger at having to fight the same fight again. Development Watch therefore thought it prudent that Yaroomba set up a separate residents group, which they did.

WE ARE NOT PROTESTERS
WE ARE PROTECTORS

WE SHALL FIGHT THEM ON THE BEACHES WE SHALL NEVER SURRENDER!

One of Save Yaroomba's posts from a rally of over 2,000 people of all ages

One of the other rallies with over 2,000 people of all ages

9. With the support of the residents' group Development Watch appealed Council's decision to the Planning and Environment Court. We lost. We then appealed to the Court of Appeal based on errors of law and won. We went back to the Planning and Environment Court in August this year for a re-hearing. We are now awaiting that decision. The residents have said if the Judge doesn't get it right, they want to appeal again.

10. The residents group was amazing. Every rally attracted over 2,000 people. They merchandised. They had sausage sizzles. They had raffles. They had art auctions. You name it, they did it. They used every available platform of social media. They had sign painting workshops where the children also helped paint the most amazingly artistic and expressive signs. They were relentless. They were passionate. But, for the most part, they were respectful.

11. The community's expectation has always been that if anything different was to be placed on the beachside at Yaroomba it would have a height limit of 2 storeys or 8.5m. They also believed there was no need for the 5 star hotel to be contained in 7 storey buildings citing Element on Bryon as an award-winning low-rise resort that sits on a parcel of land very similar in size to that of Sekisui's beachside land.

12. The Yaroomba community's lives have been put on hold now for 7 years. They have had to raise over $600,000.00 for legal fees and that's with a pro bono QC. They have sacrificed precious time with their families and have also contributed some of their own money which could have been spent on their children or grandchildren.

13. Then there is the cost to ratepayers of Council's never-ending push to have the development approved. In the Supreme Court Council and Sekisui House were ordered to pay Development Watch's costs. In the first Planning and Environment Court case Council had 3 Barristers. Sekisui only had 2. Even in the recent re-Hearing in the Planning and Environment Court Council's submissions were 10 pages longer than Sekisui's. And when our Barrister had Covid Council objected to our request for an adjournment. Even though we have some different Councillors now who seem to listen, the community has for the most part, felt abandoned by all levels of government when it comes to this development.

After the win in the Supreme Court

PART 3 - SUSTAINABLE PLANNING ACT versus PLANNING ACT

1. The change in legislation from *Sustainable Planning Act* to the *Planning Act* has –

   - Firstly, diluted the importance of the local planning schemes in the process of impact assessment; and

   - Secondly, the legislation does not afford sufficient weight to the views of the community in making the assessment be it in the local Council or the PAE Court.

2. The starting point is that it is well settled that the terms of the planning scheme reflect the striking of a balance, in the public interest, between the many interests potentially affected by the planning schemes[1]. A planning scheme is 'the embodiment of the community interest'[2]; it is 'a comprehensive expression of what will constitute, in the public interest, the appropriate

[1] *Clark v Cook Shire Council* [2007] QCA 139 at [32].
[2] *Abeleda v Brisbane City Council* [2020] QCA 257 at [54].

development of land'[3]. Thus the community is entitled to plan their lives on the footing that the p8lanning scheme will generally be adhered to when development applications are being assessed.

3. Section 326(1) of the *Sustainable Planning Act* provided that a decision to approve a development application 'must not conflict with' a planning scheme unless 'there are sufficient grounds to justify the decision, despite the conflict'. The term 'grounds' was defined to mean 'matters of public interest' but did not include 'the personal circumstances of an applicant, owner or interested party'.

4. The section imposed the requirement to first examine the nature and extent of the conflict with the planning scheme, then to consider whether there were planning grounds that were relevant to the conflict, and finally to consider whether the planning grounds in favour of the development as a whole were sufficient to justify the application, despite the conflict[4].

5. The operation of s 326(1) was described in this way in *Bell v Brisbane City Council* [2018] QCA 84 at [70] by McMurdo JA (with whom Sofronoff P and Philippides JA agreed),

> *… any consideration of the application of s 326(1)(b) of the [Sustainable Planning Act] must proceed upon the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated.*

6. The facts in *Bell* demonstrate the application of the principle. The developer proposed the construction of three towers on the old ABC site in Toowong, two of 24 storeys and one of 27 storeys. The area was one where the planning scheme imposed a limit of 15 storeys, thus there was a departure from the 'acceptable outcome' specified in the Scheme. Nonetheless the trial judge in the Planning and Environment Court held that there were sufficient grounds, in the public interest, to approve the proposed development notwithstanding conflict with the planning scheme. It was said of this conclusion by McMurdo JA that '… his Honour formed his own judgment of what was in the public interest without recognising the relevance of the Scheme to that question' and the neighbour's appeal against the decision below was allowed.

7. But the importance that has been afforded to planning schemes has been diminished, in my view, by the provisions of the *Planning Act*. That Act, by s 45(5), defines an impact assessment as an assessment that,

   (a) must be carried out –

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[3] *Bell v Brisbane City Council* [2018] QCA 84 at [66]

[4] See e.g. *Weightman v Gold Coast City Council* [2002] QCA 234 at [36].

(i) against the assessment benchmarks in a categorising instrument for the development; and

(ii) Having regard to any matters prescribed by regulation for this paragraph; 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.

8. In *Abeleda v Brisbane City Council*[5] the Court of Appeal first had occasion to consider the operation of the assessment process now required by the *Planning Act.* Justice of Appeal Mullins, with whom Brown and Wilson JJ agreed, said that the assessment framework under the *Planning Act* was 'different to the process under s 326(1)(b) of the *Sustainable Planning Act*…'[6], noting that the Explanatory Notes to the *Planning Bill* made reference to the proposed legislation dispensed with the 'two part test' earlier recognised under the *Sustainable Planning Act.*

9. The change to the standard recognised in *Bell* was highlighted by her Honour in Abeleda in the following passage,

> *[40] The absolute terms in which McMurdo JA expressed in [67] and [70] of Bell that it is in the public interest that the planning scheme is applied, unless the contrary is demonstrated, are no longer applicable to the exercise of the discretion by the decision-maker under s 60(3) of the Act, as the outcome of the development application is not necessarily determined by the degree of compliance against the assessment benchmarks and the decision-maker is permitted to have regard to other relevant matters, in addition to the mandatory assessment against the assessment benchmarks in the planning scheme. I would anticipate in most instances, where a planning scheme is not affected by changed circumstances of the type referred to in Bell at [68], that the decision-maker would give significant weight to the public interest expressed in the planning scheme in undertaking the decision-making under s 60(3) of the Act.*

10. The role now of non-compliance with a Planning Scheme was described by her Honour in Abeleda in these terms,

> *[54] Subject to recognition that the Act has not changed the characterisation of a planning scheme as the embodiment of the community interest, I also agree with the observations of Williamson QC DCJ at [53]-[54] of Ashvan[7] on the role of non- compliance with a planning scheme in the exercise of the planning discretion under s 60(3) of the Act:*

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[5] [2020] QCA 257.
[6] [2020] QCA 257 at [35].
[7] *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16.

> *[53] An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. The existence of a non-compliance with such a document will be a relevant 'fact and circumstance' in the exercise of the planning discretion under s 60(3) of the [Act]. Whether that fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question. That question is no longer answered by a provision such as s 326(1)(b) of the SPA. It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s 60(3) of the [Act]. It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established.*
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> *[54] In practical terms, the change to the statutory assessment and decision making framework may call for an assessment manager (or this Court on appeal) to reach a balanced decision in the public interest where two competing considerations are at play: (1) the need for the rigid application of planning documents on the one hand; as against (2) the adoption of a flexible approach to the application of planning documents to, inter alia, exercise the discretion in a manner that advances the purpose of the [Act].*

11. The decision in Abeleda suggests that Planning Scheme have lost their primacy in the assessment process. It seems to us that it will inevitably follow that departure from the terms of the Planning Scheme will be more frequently be permitted.

12. The second point we wish to make concerns the use to be made by the assessment manager of submissions made by members of the public in relation to Impact Assessable Development Applications. Section 45(5)(a)(ii) of the *Planning Act* requires the impact assessment to be undertaken 'having regard to' any matters prescribed by regulation. Regulation 31(1) of the *Planning Regulation 2017* (Qld) requires regard to be had to, amongst other things, 'the common material', a term defined in Schedule 24 to the *Regulations* as including 'any properly made submissions about the application, other than a submission that is withdrawn'.

13. The difficulty is that the legislation provides no assistance with the meaning of the expression 'have regard to'. The result seems to be that insufficient weight is given to the views of the community as set out in the properly made submissions. Thus, in *Development Watch Inc. v Sunshine Coast Regional Council & SH Coolum Pty Ltd* [2020] QPEC 25, 11,666 properly made submissions had been made in relation to a Development Application approved by the Council. 9,288 of them, including 3,167 from local residents, opposed the development, but the

submissions were not taken into account because opposition to the proposed development was seen by the trial judge to be 'out of step with the Planning Scheme when read as a whole'[8]. That was held by the Court of Appeal to involve an error of law, in part, because it 'gives primacy to the planning scheme to such a degree that it set at nought the evidence sourced from the local community'[9].

14. In *Development Watch Inc v Sunshine Coast Regional Council and SH Coolum Pty Ltd* the Court of Appeal found in favour of Development Watch and the matter was remitted back to the Planning and Environment Court. It remains to be seen what weight will be given to the views of the community in the re-hearing but one would have thought that the level of opposition (or support) ought be given considerable weight in determining questions of public interest.

15. Public consultation in a Development Application allows the community (an equal stakeholder in the planning arena) to raise it's concerns with a particular development. The expectations of the community are that any properly made submissions will be taken into account, the very reason public consultation in an Impact Assessable Development Application occurs. The submissions lodged by the submitters are the very documents that allow individuals or groups not only to have their say but to become a party to a court case so submissions play a vital role in the process.

CONCLUSION

So in conclusion can I make these four points -

- The community should be treated as an equal stakeholder in the planning arena;
- The community should be able to plan their lives on the footing that a Planning Scheme will generally be adhered to when decisions are made on Development Applications;
- Planning Schemes should be there to provide certainty for the community; and
- The relevant Legislation should provide certainty and set out a clear process (as was the case with the SPA) to determine whether a conflicting development should be approved or refused taking into account the public interest and the views of the community.

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[8] [2020] QPEC 25 at [301].
[9] [[2022] QCA 6 at [47].

Thankyou for listening.

Development Watch Inc.

Outside the Supreme Court