

**STATE PLANNING POLICY 2/07 – PROTECTION OF EXTRACTIVE RESOURCES
A SHORT TOWN PLANNING COMMENTARY**

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Thank you, Steve, and good evening ladies and gentlemen.

The recent taking effect of *State Planning Policy 2/07 – Protection of Extractive Resources* was, by no stretch of the imagination, premature. The State Planning Policy, in its draft form, had been released for public consultation on 16 October 2004 – almost three years prior to its eventual commencement last Monday, on the third of September 2007.

The lengthy period between the notification of the draft SPP and its eventual commencement resulted in my experience of the SPP, thus far, being one of uncertainty and some complexity. And that makes perfect sense, when one takes a moment to reflect on some of the town planning events, relevant to the application of the draft SPP, that also occurred during those three intervening years:-

1. On 16 October 2004, the draft *State Planning Policy for Protection of Extractive Resources* was released for public consultation;
2. On 27 October 2004, the draft *South East Queensland Regional Plan* was released for public consultation;
3. Between 31 January 2005 and 2 October 2006, a series of five separate plans relating to koalas and development had some effect, ending with the commencement of the current *Nature Conservation (Koala) Conservation Plan 2006* on 02 October 2006;
4. On 20 November 2006, the new Regional Vegetation Management Codes and Policies, including Essential Habitat mapping and provisions applicable to development in a Key Resource Area under an adopted State Planning Policy for Protection of Extractive Resources, came into effect under the Vegetation Management Act 1999; and
5. Dozens of local government authorities continued to prepare, advertise and adopt new Integrated Planning Act compliant planning schemes.

But, at least it's all integrated.

For the last three years, we have therefore had a situation where an Assessment Manager could use their discretionary powers under IPA Section 3.5.6 to give weight to the draft SPP in assessing both Code Assessable and Impact Assessable development applications. However, the rapidly changing construct and objectives of the statutory town planning framework, and particularly the rise and rise of environmental protection and vegetation management mechanisms, along with the sustained demand for urban land, rendered it extremely difficult to establish the 'appropriate' level of weight to give to the draft SPP in assessing development applications which involved 'competing' interests, particularly those between extractive resources and environmental and biodiversity values, or extractive industries and the amenity of encroaching residential neighbourhoods.

Whilst this quandary will remain for any undetermined development applications which were lodged after 16 October 2004 but proceeded to the Decision Stage of IDAS before the SPP took effect, it is a relief to know that the commencement of the State Planning Policy last Monday has, if nothing else, resolved the uncertainty about its place in the town planning universe. That place is, as a declared State Interest, protected by a State Planning Policy, to which regard must be had in assessing affected development applications – as a Core Matter (by virtue of the definition of extractive resources as a Valuable Feature under IPA) for the preparation of local government planning schemes and as a State Planning Policy which must now be appropriately reflected in local government planning schemes.

With the uncertainty surrounding the weight of the SPP now resolved, the next challenge, as I see it, is how to 'appropriately reflect' the Policy in planning schemes. I acknowledge that determining when a planning scheme has 'appropriately reflected' the SPP, as the term is used in IPA, is at the discretion of the Minister and, in any event, a matter of legal interpretation. Nevertheless, the Guideline to the State Planning Policy does provide some guidance as to how a local government might appropriately reflect the SPP in a planning scheme on which I do feel it appropriate to comment.

The State Planning Policy Guideline, at Section 4, makes a range of recommendations as to how a local government might appropriately reflect the SPP, categorised under four key concepts:-

1. Identifying Key Resource Areas;
2. Ensuring that development in Key Resource Areas is compatible with achieving the purpose of the Policy;
3. Development to be made assessable or self-assessable; and
4. Incorporating assessment criteria.

I wish to touch only briefly on some of these key concepts, and the implications from a town planning perspective.

Firstly, it is imperative to note that the SPP, whilst endorsing the development of extractive industries in KRAs in principle, does not, in itself, approve extractive industry development. Neither does the Policy, nor the Policy Guideline, nominate the level of assessment for extractive industry development (or any development for that matter) within a Key Resource Area. I am aware that there continues to be some suggestion within the Industry that extractive industry development in KRAs should be made Code Assessable in planning schemes.

My personal opinion on this matter is that, in most cases, the establishment of greenfield extractive operations, or the material intensification of existing operations, particularly where they involve blasting and intensive road haulage, should be subject to Impact Assessment for two primary reasons. Firstly, to provide the broader community with the appropriate opportunity to make submissions, be they in support or objection, during the IDAS process. And secondly, because the particular impacts of extractive industry currently remain difficult to codify in a manner that is appropriate for the context and workings of IPA planning schemes.

Having said that, I do believe there exists some scope for extractive industry development, particular alterations and augmentations to existing operations, to be made Code Assessable. These opportunities, of course, depend on the relevant planning scheme containing appropriate assessment criteria and any application made being supported by comprehensive technical assessments.

I would however suggest, that extractive industry operators should remain careful of what they wish for. In my view, there is a common misconception that Code Assessment under an IPA planning scheme is a less onerous procedure than Impact Assessment. There is no doubt that IPA planning schemes, and the legislation itself, is becoming increasingly prescriptive. Extractive industry operators, and developers generally, who pursue Code Assessment therefore need to be conscious of the reality that, in many instances, Code Assessment procedures can in fact be more onerous, and provide less opportunity for performance-based outcomes and negotiation, than Impact Assessment.

Despite the somewhat chequered past that extractive industry and community consultation have historically shared, pursuing Code Assessment with the sole objective of avoiding public notification requirements should not necessarily be considered essential. It is worthwhile to remember that a well prepared Impact Assessable development application, for an appropriate development proposal, supported by a good community consultation strategy, can actually provide an opportunity for issues to be resolved and submissions of support to be lodged by engaged and well-informed community members.

The appropriate identification of KRAs in planning schemes is fundamental to achieving the Outcome sought by the Policy. Identifying the KRAs not only enables the protection of each resource, but also provides the community with a critical opportunity to be aware of the location of existing and future extractive industry operations. The fact that the Department of Mines and Energy has identified Key Resource Areas at a cadastral level, on high quality maps, is commendable and leaves local governments with no excuses for preparing anything but comparable maps for inclusion in planning schemes.

Similarly, the Key Resource Area concept, and the clear delineation of the individual components of each KRA, are strengths of the SPP that the Policy Guideline rightly requires local governments to carry through, generally as either a zone or an overlay. The clear delineation of KRAs in planning schemes, preferably at a cadastral scale, is made particularly important given that, in many instances, the Separation Area (in which, the Policy requires development does not increase the number of residents) applies to land adjoining extractive resources which may be in the ownership of persons other than the extractive industry operator. Whilst I don't think it's unreasonable, in principle, to impose the buffer area on land outside the extractive industry operator's landholding, I do believe it absolutely critical that these circumstances are reflected accurately within the local government's planning scheme, so that any person investigating either purchasing or developing affected land has the opportunity to make themselves aware of the constraint.

It is interesting to note that, whilst the majority of IPA planning schemes which have come into effect since the SPP was advertised in October 2004 have mapped KRAs consistently with the then-draft Policy, there exist some IPA planning schemes which do not, in my opinion, appropriately identify Key Resource Areas. It is likely that these mapping inconsistencies were largely a consequence of timing, and it is not my intention to criticise the scheme authors. However, the difference in the level of protection that is afforded extractive resources under the different mapping approaches is noteworthy in the context of this discussion.

The first example is taken from an IPA-compliant planning scheme that commenced in March 2005. The planning scheme does not include an Overlay which maps the location of extractive resources, so no opportunity is provided to trigger specific assessment criteria to protect the operational viability of existing or future extractive resources. Furthermore, as has traditionally been the case in many planning schemes, the scheme does not include an Extractive Industry Zone but rather, includes existing extractive industries in the Rural Zone. As a consequence, the only mapping on which it is even possible to identify Key Resource Areas is a strategic level map, such as this.

The problems with relying on strategic level mapping are relatively obvious. Most significantly, mapping at such a scale is unable to accurately represent the Key Resource Area concept, and particularly, to delineate between the individual components thereof. Secondly, relying on strategic mapping makes it very difficult to incorporate targeted development assessment criteria to support the mapping, within the construct of an IPA planning scheme.

Conversely, this second example is taken from an IPA-compliant scheme that commenced in December 2005. It is an extract from the Extractive Resources Overlay Map, which clearly delineates the Resource/Processing Area, the Separation Area and the Transport Route, and is consistent with the corresponding Key Resource Area Map under the SPP. The Overlay mapping is well supported by an Overlay Code which includes specific provisions to regulate land use and development within the KRA, as well as a separate Level of Assessment Table that elevates the level of assessment for incompatible development, thereby making that development assessable against the provisions of the Extractive Industry Overlay Code. In this manner, the structure of the planning scheme is used to its full potential to appropriately reflect and achieve the Outcome of the State Planning Policy.

The Policy Guideline, at Section 4.4, suggests that Key Resource Areas could be identified as a Zone rather than an Overlay in a planning scheme. I suggest that using an Extractive Industry Zone to identify KRAs will be largely limited in application to existing operations. Any future extractive industries are more likely to be identified on an Overlay Map, so that the location of those future areas can be identified, and an Overlay Code triggered, whilst preserving an underlying zoning of the land in order to prevent its premature development. In this way, any use rights that are conferred, and might be exercised prematurely, can be limited by the local government.

The identification of State significant extractive resources however, is only part of the Outcome sought by the Policy. The Policy also seeks the protection of those resources from development that might prevent or severely constrain their current or future extraction.

For this reason, the Policy applies to a broad range of development under IPA, including particular Reconfigurations of a Lot, Material Changes of Use and Operational Works.

Despite the broad range of development to which the Policy applies, exception is made for development not achieving the Policy Outcome in instances where that development either:-

1. provides an overriding benefit to the State or regional community and cannot reasonably be located elsewhere; or
2. constitutes a Development Commitment.

I would like to discuss briefly the Development Commitment mechanism, as it has been incorporated in the Policy.

The concept of a Development Commitment is not new, nor is it exclusive to the new SPP. It is relatively clear that the concept is incorporated in new statutory plans to limit the degree to which existing use rights are prejudiced by their commencement – primarily by providing an easier passage through the new statutory framework for development which is considered ‘committed’ by virtue of its designation under the previous planning framework.

In the new State Planning Policy, a Development Commitment is defined as any of the following:-

- (a) Development the subject of a current development approval; or
- (b) A material change of use clearly consistent with the purposes of codes of the relevant zone in the planning scheme and, if applicable, the regulatory provisions of the SEQ Regional Plan; or
- (c) Reconfiguring a lot consistent with the purposes of codes of the relevant zone in the planning scheme and, if applicable, the regulatory provisions of the SEQ Regional Plan.

The implications of a particular development achieving Development Commitment status should not be underestimated. A committed development need not achieve the Policy Outcome and is only required to reduce any adverse impacts on the long term availability of the extractive resource, to the greatest extent practicable. Obviously, this represents a significantly lower threshold than the Policy requires of uncommitted development.

Given the significance of the potential implications, the definition of a Development Commitment under the Policy is worthy of some scrutiny and discussion, from a town planning perspective. The current definition of a Development Commitment raises a number of questions which I suggest will provide plenty of opportunities for wholesome debate in the future. However, as I see the questions raised largely as matters of legal interpretation, I only wish to identify them in a general sense.

Firstly, I refer to Part B of the definition, which pertains to material changes of use.

The definition provides for development that is clearly consistent with the purposes of codes of the relevant zone, to constitute a Development Commitment. In my view, it is unclear as to whether this statement requires that development be clearly consistent with the purpose of only the applicable Zone Code, or whether the Secondary codes (including overlay codes and codes for particular development types), are also relevant, to the extent that would apply to the proposed development.

If it is the case that the determination is made only against the stated purpose of the zone code, I believe that the Development Commitment definition is too broad. For example, remembering that many extractive resources are included in the Rural Zone under IPA Planning Schemes, it is foreseeable that development which is clearly incompatible with extractive industry, could quite easily demonstrate consistency with the stated purpose of a Rural Zone Code, which are often drafted quite broadly.

Making the Development Commitment determination against only the purpose of the applicable Zone Code also removes the opportunity to take into consideration particular development constraints which have been mapped as Overlays. Relevantly, it is on Overlay Maps that KRAs are identified in most current IPA planning schemes. It therefore appears as though the current definition of a Development Commitment under the SPP may represent something of an Achilles' Heel, in that applicable Overlays (including those on which Key Resource Areas are mapped) could possibly be irrelevant to any determination of a Development Commitment.

If, as one would expect, most local governments elect to appropriately reflect the SPP by identifying Key Resource Areas on an Overlay Map, supported by an Overlay Code, rather than zoning the full extent of all KRAs as Extractive Industry, it is foreseeable, even if only distantly, that this apparent Achilles' Heel could jeopardise the very Outcome sought by the Policy.

An interesting comparison to make is the definition of a Development Commitment, as it has been included in the *Nature Conservation (Koala) Conservation Plan 2006*, and with which extractive industry development must comply in order to trigger the less onerous requirements of that Plan. Annex Two to the Koala Conservation Plan defines a Development Commitment as any of the following:

- (a) A development with a current development approval; or
- (b) A material change of use clearly consistent with:
 - (i) if within the Regional Landscape and Rural Production Area, Rural Living Area, Investigation Area – the regulatory provisions of the SEQ Regional Plan; and the purposes of the codes of the relevant and any applicable overlays in the relevant planning scheme; or
 - (ii) if within the Urban Footprint – the purposes of codes of the relevant zone and any applicable overlays in the planning scheme;... and so forth...

The additional strength and certainty provided by the definition of a Development Commitment under the Koala Conservation Plan in calling up any applicable overlays under the planning scheme, is obvious. Whether, despite the current ambiguity, the definition of a Development Commitment under the SPP should be taken to have the same effect as the definition under the Koala Conservation Plan however, is a question best left to the legal professionals.

Secondly, in again referring to that part of the definition of a Development Commitment pertaining to material changes of use, I draw your attention to the requirement that a material change of use be *clearly* consistent with the purposes of at least the applicable Zone Code.

For town planners, demonstrating that a proposed material change of use is clearly consistent with the purpose of a Zone Code is no easy task, particularly given that in many IPA-compliant planning schemes, the Purpose of Zone Codes are no longer expressed as a succinct statement but rather as

a series of Overall Outcomes addressing a broad range of land use and environmental considerations. There then arises a question (again, largely of legal interpretation) as to exactly how consistent a material change of use needs to be with the series of Overall Outcomes comprising the purpose of a Code, in order to be *clearly* consistent.

Is it sufficient to be clearly consistent with the majority of the Overall Outcomes?

Is it necessary to be clearly consistent with all of the Overall Outcomes (and, if so, what is the likelihood of this ever occurring, given the breadth of issues addressed by Overall Outcomes)? or

If the Overall Outcomes which, collectively, are taken to be the purpose of a Code, are expressed as Specific Outcomes within the code, is it then necessary to demonstrate clear consistency with all of the applicable Specific Outcomes of the Code, (or even the Acceptable Solutions), in order to demonstrate a *clear* consistency with the purpose of the Code?

Happily, these questions are best left for interpretation as matters of law. However, the answers are likely to have an interesting effect on the applicability, mechanics and ultimate success of the State Planning Policy.

The other consideration which I see as fundamental to the success of the SPP is a Concurrence Agency jurisdiction for the Department of Mines and Energy. Having briefly reviewed the current Referral Agency arrangements under IPA, there are discernable links between State Planning Policies, or other statutory planning instruments that have the effect of a State Planning Policy, and the jurisdiction of Referral Agencies.

The first example relates to *State Planning Policy 2/02 – Planning and Managing Development Involving Acid Sulfate Soils*. The IP Regulation nominates the Department of Natural Resources as a Referral Agency, albeit an Advice Agency, for development to which the SPP applies (where the nominated thresholds are exceeded).

The IP Regulation nominates Queensland Transport as a Concurrence Agency for all development within the operational airspace of an Airport. Whilst this referral jurisdiction is not explicitly linked with the *State Planning Policy for Development in the Vicinity of Certain Airports and Aviation Facilities*, the referral jurisdiction of Queensland Transport (as the ‘shopfront’ for the Brisbane Airport Corporation and the Commonwealth Department of Transport) is a fundamental mechanism indirectly associated with the achievement of the SPP.

Further, the SEQ Regional Plan has the effect of a State Planning Policy for the purposes of IPA. Schedule 2 of the Regulation nominates the Office of Urban Management as a Concurrence Agency for Material Change of Use applications to which the Regulatory Provisions of the SEQ Regional Plan apply.

In my view, the issues to which the *State Planning Policy for the Protection of Extractive Resources* responds, represent a well defined and important jurisdiction in which the Department of Mines and Energy could assume a Concurrence Agency role. Whilst I am not a lawyer, my town planning interpretation of the legislative framework is that there exists no constraints to the DME seeking a Concurrence Agency jurisdiction under IPA. In fact, having the DME as a Concurrence Agency for any development application to which the SPP applied would present an excellent mechanism to ensure that the Outcome sought by the SPP is achieved.

A Concurrence Agency role for the Department of Mines and Energy would be particularly valuable in circumstances involving Code Assessable development within a KRA as the Department would have the jurisdiction to protect State significant resources and represent extractive industry operators who would not have the opportunity to make an objection or secure third party appeal rights to protect their

interests. It is my view that such representation is fundamental to the achievement of the Outcome sought by the State Planning Policy.

The Outcome and provisions of the Policy represent a strong and necessary acknowledgement from the State Government of the value of extractive resources, along with the urban development and environmental protection pressures which will continue to jeopardise their long term availability. However, whether the SPP contains sufficiently robust measures that are appropriately and effectively reflected in planning schemes, and whether the Outcome sought is ultimately achieved, remains to be seen.

What the State Planning Policy for Protection of Extractive Resources does do, is throw another ball into the mix. We've already started to falter with the balls we've been juggling – just about everyone has thrown a ball at us in recent years, and demanded that we juggle theirs too. Each of the balls has been a different size and shape, and the last couple have been green. Some of those balls are now colliding – and some of them we've just dropped cold.

But, the reality is, we've only got two options – we either learn to juggle faster, or we quit the circus.

