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Office of the President

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Our ref: [WD:P&E]

Commencement of HAAPOLA Feedback
Planning Group
Department of Housing, Local Government, Planning and Public Works
GPO Box 690
BRISBANE QLD 4001

**By email:** [redacted]

Dear Planning Group

**Consultation drafts of supporting materials for the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Act 2023***

Thank you for the opportunity to provide feedback on the consultation drafts of materials to support the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Act 2023* (Qld) (***HAAPOLA Act***), proposing amendments to the:

- *Planning Regulation 2017* (**Regulation**) by way of the draft Planning and Other Legislation Amendment Regulation 2024 (**Draft POLA Regulation**)
- *Minister's Guidelines and Rules*
- Development Assessment Rules (**Draft DA Rules**).

The Queensland Law Society (**QLS**) appreciates being consulted on these important instruments.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals and assist the public by advising government on improvements to laws affecting Queenslanders.

This response has been compiled by the QLS Planning and Environmental Law Committee, whose members have substantial expertise in this area.

**Executive Summary/Key Points:**

- QLS is concerned there is an error in the drafting approach through the insertion of a proposed new section 15A of the Regulation and proposed new Tables 1 and 2. These provisions should be amended to the effect that a reference to 'prohibited development' in a development control plan is taken to be 'assessable development' subject to 'impact assessment' under the *Planning Act 2016* (**Planning Act**).

- We recommend that new section 43B of the Regulation be amended to provide certainty and ensure that any affordable housing condition imposed in accordance with this section is enforceable.
- We have suggested a number of cross-references be checked before the instruments are made.

**Drafting error in allowing a local planning instrument to prohibit development under the *Planning Regulation 2017***

QLS is concerned by clauses 8 and 9 of the Draft POLA Regulation, which proposes to allow for development control plans (**DCPs**) to categorise particular development as 'prohibited development'. Such an approach is:

- contrary to over 25 years of planning law policy in Queensland; and
- contrary to the overall intent of the *HAAPOLA Act*, which seeks to make housing available and affordable, not prohibited.

The Planning and Environment Court's decision in *JH Northlakes Pty Ltd v Moreton Bay Regional Council* [2022] QPEC 18 (***Northlakes***) found that development applications in development control plan (**DCP**) areas are to be made and processed (assessed and decided) under the assessment system provided by the repealed *Integrated Planning Act 1997* (***IPA***).

As was recognised by the Explanatory Notices to the *Housing Availability and Affordability (Planning and Other Legislation Amendment) Bill 2023*:

> *"... [this] presents a risk to previous approvals and applies an outmoded assessment and decision process that is unfamiliar, complicated and does not function as intended. The Bill seeks to validate past approvals and modernise the development assessment system applying to DCPs."*
>
> *"The Bill will achieve the policy objectives of validating past approvals in DCP areas and modernising the assessment framework that applies to development in DCP areas..."*
>
> *"Government action is considered to be effective and proportional as it applies the contemporary development assessment process under the Planning Act to DCP areas, while ensuring the DCPs remain in effect, continue to categorise development and set assessment benchmarks."* (Emphasis added)

The commencement of the *IPA* in 1998 saw a significant shift in planning policy in Queensland with the introduction of performance-based planning. Prior to that time, under the repealed *Local Government (Planning and Environment) Act 1990* (***LGP&E Act***), local planning instruments (including DCPs) were able to prohibit development. However, even if development was categorised as prohibited, section 4.3 of the *LGP&E Act* made provision for the rezoning of land, which provided a mechanism allowing a prohibition in a planning scheme to be overturned by changing the zoning of the land.

The performance-based planning approach introduced by the *IPA* meant that local governments could no longer prohibit development. Indeed, since that time, development

could only be prohibited if it was categorised as such by the State.[1] The inability of a local government to prohibit development was made clear by section 2.1.23(2) of the *IPA*, which provided that *"[a] local planning instrument may not prohibit development on, or the use of, premises"*.

Under *IPA*, even if a certain use was inconsistent with the intent of a particular zone, a development application could still be made and assessed on its merits. This approach applied to planning schemes that had been in effect prior to commencement of the *IPA*, which were prepared under the repealed *LGP&E Act* and which did categorise development as prohibited. To give effect to the new performance-based approach under *IPA*, section 6.1.2(3) stated that *"[a] prohibited use in a former planning scheme is taken to be an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited"*.

The effect of the proposed amendments in the Draft POLA Regulation is to allow a local government, through its planning scheme (which incorporates a DCP), to prohibit development. This is a fundamental shift in the performance-based planning policy that has been central to planning law for over 25 years.

Additionally, clauses 8 and 9 of the Draft POLA Regulation would have the unintended consequence of prohibiting residential development in certain circumstances. For example, the land the subject of the decision in the *Northlakes* judgment is located within the Central Open Space Sector of the Mango Hill Infrastructure DCP, under which a range of residential uses are identified as Column D (prohibited development).

If clauses 8 and 9 are adopted in their present form, all forms of residential uses would be prohibited under the Planning Act on the *Northlakes* land, including the following defined uses: accommodation units, apartments, community dwelling, detached house, duplex dwelling, retirement village and townhouse units.

This prohibition on residential uses appears to be contrary to the overall intent of the *HAAPOLA Act*, which seeks to encourage housing availability and affordability, not to prohibit it. QLS notes that the Explanatory Notes from the 3rd Reading of the Bill state that the objectives include:

> *"to give effect to commitments in the Homes for Queenslanders plan to deliver a package of reforms that simply and expedite the supply of housing in the right locations …"*
>
> *"to deliver on key initiatives in the Homes for Queenslanders plan including streamlining planning for faster housing …"*

QLS suggests that the Draft POLA Regulation should be amended such that development categorised as prohibited under a DCP should be assessable development subject to impact assessment. This is consistent with the performance-based planning approach that has been fundamental to planning law in Queensland since the commencement of the *IPA*.

[1] See sections 88(2)(d) and 777(4) of the *Sustainable Planning Act 2009*, and section 43(5)(a) of the *Planning Act 2016*.

This should be achieved by the deletion of clause 8 (insertion of new section 15A) in its entirety, and the Amendment of Tables 1 and 2 to read as follows:

| **Table 1 – Kawana Waters development control plan** | | |
|---|---|---|
| **Column 1**<br>**DCP category of development** | **Column 2**<br>**Applied category of development** | **Column 3**<br>**Applied category of assessment** |
| 1 prohibited development | assessable development | impact assessment |

| **Table 2 – Mango Hill development control plan** | | |
|---|---|---|
| **Column 1**<br>**DCP category of development** | **Column 2**<br>**Applied category of development** | **Column 3**<br>**Applied category of assessment** |
| 1 prohibited development | assessable development | impact assessment |

**Section 14 of Draft POLA Regulation – inserting new sections 43A – 43C to the Regulation**

*Clarifying affordable housing information required*

QLS recommends the new section 43B of the Regulation be amended to require the development application to:

1. include further details of the proposed affordable housing component i.e. the details referenced in new section 43A(b); and
2. identify which of the housing arrangements identified in new section 43C is being proposed.

New section 43B, as presently drafted, sets out a requirement for the development application to include information that demonstrates that the affordable housing:

(a) "can be provided" and

(b) "can be maintained as an affordable housing component for a stated period."

This drafting is potentially uncertain. While an assessment manager can request further information, it would be helpful to clearly identify any information that is required and / or include examples of the type of information that may be provided.

There is also a risk that a condition imposed in accordance with this section, as currently drafted is unenforceable.

We recommend new section 43B be redrafted. Otherwise, an application might face issues in attempting to demonstrate the affordable housing component can be maintained if it is later sold.

*Kawana Waters DCP provision – section 68L Categorisation*

The table under section 68L appears to contain an error in relation to 'conditional permitted development'. It cannot require code assessment if it is accepted development.

We query whether the reference to 'accepted development' should be a reference to 'assessable development'.

**Draft DA Rules**

We have identified the following issues for further consideration:

- Chapter 2, Part 2, section 8 – all references to section 6 should be changed to refer to section 7 (i.e. the cross-referencing seems incorrect).
- For Chapter 2 (Applications for State facilitated development) there is no equivalent to Chapter 1, Part 6, which is about changes to an application. We query whether this is an omission.
- Footnote 31 – the reference to section 21 should be a reference to section 19.
- It is noted that Chapter 2, Part 5, section 19.1 refers to a confirmation notice but not a notification notice.
- Schedule 1, section 2(b), the reference to Chapter 2, Part 5 does not appear to be correct.
- Schedule 3, section 2, amend to clarify the public notice requirements may be set by the chief executive in a confirmation notice or a notification notice (i.e. add a reference to confirmation notice).
- Schedule 4, definition of *Confirmation notice*, paragraph (d)(i) should refer to the assessment manager or the chief executive.
- Schedule 4, definition of *Current period* should refer to 'chapter 2, section 20', not 'chapter 2, section 22'.
- Schedule 4, definition of *Further advice*, should refer to 'chapter 2, section 22', not 'chapter 2, section 25'.
- Schedule 4, definition of *Further agreed period*, should refer to 'chapter 2, section 21.1', not 'chapter 2, section 23.1'.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or [redacted]

[redacted]