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Strategic & Environmental Planning & Policy
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Barriers to Effective Climate Change
Adaptation
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003



Dear Sir/Madam

SUBMISSION TO PRODUCTIVITY COMMISSION FROM GOLD COAST CITY COUNCIL

Gold Coast City Council (Council) supports the Productivity Commission's inquiry into identifying the barriers to effective adaptation to climate change and welcomes the opportunity to provide feedback and comments on the issues paper released in October 2011.

Council has been active in responding to the issue of climate change adaptation for over 10 years. Research into sea level rise commissioned by Council and conducted by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) commenced in 1998 which looked specifically at the Gold Coast region.

The current Gold Coast City Council Planning Scheme, *Our Living City 2003* includes 0.27 m of sea level rise by 2070 in all relevant flood mapping for development assessment, which was the central estimate based upon CSIRO modelling at that time.

Council released a Climate Change Strategy in 2009 that included 35 actions for both mitigation and adaptation. The risk analysis for this strategy was partially funded by the Local Adaptation Pathways Program, delivered by the Australian Government's Department of Climate Change. In addition, Council has more recently (2011) released a Sustainable Flood Management Strategy. Both of these documents provide strategic direction for the city in adapting to the changing climate and the future impacts.

Council is currently reviewing its planning scheme, due for release and public consultation in late 2012. An integral component of the review is to determine how the new planning scheme can ensure climate change adaptation is considered and define how adaptation options are identified and implemented through land use designation and development regulations.

The planning scheme review prompted Council to undertake a legal analysis of how hazards are identified and communicated and how adaptation options can be conditioned through the development assessment process. The broader barriers listed below were reviewed for their legal implications.

Yours faithfully

David Corkill

MANAGER STRATEGIC & ENVIRONMENTAL PLANNING & POLICY

For the Chief Executive Officer

Adaptation issues

1. Injurious affection – claims for compensation under the *Sustainable Planning Act 2009*
2. Which adaptive policy should be adopted
3. Magnitude and timing of planning response
4. Risk disclosure to the public
5. Exemption via legislative reform
6. Use of public lands for protection work
7. Issue of defend and retreat
8. Timing and processes for updating flood mapping in the planning scheme
9. Possible lack of funding under an approved adaptation strategy when the trigger point for construction of protective works is reached
10. Collaboration

Detailed information regarding the listed barriers are included below:

General legal issues

1. Injurious Affection under s704 Sustainable Planning Act 2009 (SPA).

The ‘injurious affection’ provision, provides for compensation to be paid by Local Government Authorities (LGAs) for diminishing the development rights of a particular property by changes to a planning scheme e.g. rezoning from high density to low density or future urban to open space.

There is a process whereby a claim can be made for a development application to be assessed under a superseded planning scheme. If that request is refused, compensation can be rewarded for the reduction in value caused by the changes to the new scheme.

Changes made to new planning schemes incorporating significant reductions in developable areas, combined with the current uncertainty of climate change science and its impacts, opens the door for argument on questions of fact, based on what projected climate change scenarios and impacts are incorporated into a planning scheme, and the accuracy of these projections, being quite possibly matters upon which reasonable minds may differ.

This calls for LGAs to defend climate change planning decision making in court.

2. Which adaptive policy should be adopted?

LGAs deciding on a particular adaptive policy (from planned retreat to protection by hard engineering works) can have serious consequences for individual land owners and communities. Those adversely affected by these decisions may challenge the LGA’s decisions by way of court actions, including the possibility of class actions. There are concerns that policy development by local government does not share the same immunity from judicial review as State government policy making, and that decisions to act, or not to act, may be the source of legal claims into the future.

Further, some adaptive actions can move risk to an adjacent area causing potentially detrimental affects in a new location, opening up LGAs to possible legal liability claims. Without an exemption from liability for reasonably based climate change related decision making (such as is currently part of the NSW Coastal Management Reforms) local governments are reluctant to be proactive.

3. Magnitude and timing of planning response

In the absence of guidance on how and when to respond to the potential impacts of climate change, LGAs may be vulnerable to liability for both action and inaction and will continue to struggle with the question of what constitutes a reasonable response.

The identification of the need for significant further study in state and federal commentary on climate change underlines the fact that, at present, LGAs, whilst being adjured to 'act now' must still grapple with the issues of uncertainty in identifying the trigger points for action.

If such decision making is left to LGAs, then the potential exists for damages claims by the disaffected at some future time, for breach of statutory duty, negligence, and action of judicial review of decisions made, which inevitably involve a significant amount of public resources to defend.

At present climate change planners are questioning whether on the basis of the precautionary principle, the highest Intergovernmental Panel on Climate Change scenarios (A1FI emission levels) should be adopted where the State has not mandated a response, rather than a more balanced scenario. On the basis of the current case law, it would be difficult at present to justify decision making at the higher emission scenario end, where in a risk management framework this is considered to be less likely to eventually occur, and the precautionary principle is just one of a number of factors for a decision maker to take into account.

There is also a requirement under the common law for conditions of development to be relevant and reasonable, being reflected in the *Sustainable Planning Act 2009*. There is Queensland authority to the effect that setting the bar too high, (i.e. above what has already been set for comparable development) without an existing basis to do so in the planning scheme, will not be supported by the Court.

These considerations may restrict an LGA's response to climate change even when consideration is given to the global view that emission rates are currently tracking above the worst case scenario. It appears that the existing legislative and legal framework may restrict LGAs in developing an adequate planning response potentially leaving the community vulnerable to future risk.

To ameliorate these issues the State or Federal Government is encouraged to mandate the climate change parameters that LGAs adopt by:

- § Working with local government to agree on which modelling data to use, which scenario to adopt and detail on what the state/federal government considers reasonable to create defensible constraint mapping
- § embedding these requirements into relevant mandatory policy, such as by way of the standard planning scheme provisions, or other mandatory instrument.

The State has a significant role in working with local government in defining how to undertake local and regional modelling to inform local planning approaches. For several climate change parameters (e.g. wind) regional modelling has not provided sufficient data to develop local planning approaches. In these instances currently no planning response can occur.

4. Risk disclosure to the public

A further area of potential legal liability for LGAs is the issue of risk disclosure to the public. LGAs face the dilemma of full disclosure of the latest risk information based on a policy of the public's right to know, and the risk of injuring the interests of individual property owners when such disclosure leads to a devaluation of property values. Whichever decision is

made, an LGA is at risk of a liability claim from those who either may have purchased a property unknowingly which does become adversely impacted (where known risks were not publicised), or from property owners whose property values are adversely impacted by a report based on climate change modelling which is later proven not to come to pass.

5. Exemption via legislative reform

The current planning systems in Queensland provide a number of road blocks and present various liability risks to LGAs. To enable LGAs to include climate change into its local planning provision it is requested that not only a mandated planning response be specified but that these provisions be embedded in such a way as to exempt LGAs from potential liability and claims for compensation.

In the interests of legislative certainty, it is suggested that a solution would be to put this matter beyond doubt by including any adaptation requirements into the mandatory part of the Standard Planning Scheme provisions, as provided for by SPA section 706 (1)(b).

Further, an exemption from liability for climate change related decision making similar to the NSW Coastal Reform Legislation would enable LGAs to undertake integrated, long term decision making through the incorporation of climate change parameters into its planning instruments, and enable proactive strategic planning to occur without opening itself up to the myriad of risks discussed above.

Specific Coastal Protection Issues

6. Use of public lands for protection work

Gold Coast City Council and the State Government have historically co-operated in the design, location and approval processes for construction of a protective boulder seawall for private and public property along the active coastal foreshore. Recently State Government has requested additional requirements of private seawalls built on public land as well as putting forward the proposition that private land holders adjoining public land that supports a seawall may be subject to a lease agreement in the future, with an annual fee for the use of that public land. Additionally the State Government has also posed that if Council constructs a sea wall on public land, it should own it and be responsible for its maintenance into perpetuity.

§ Ideally, the State Government should agree to a location for the boulder seawall on public land, provide public funding for the construction of the wall and maintain it for a period of time?

7. Issue of Defend and Retreat

The previous point brings into question the issue of defend and retreat. It could be assumed that LGAs will be expected to protect and defend the foreshore area from erosion, sea level rise and storm surge, for the purposes of protecting property and community infrastructure. The case of *Vaughan vs Byron Council* explored this issue in detail. How long should LGAs be expected to defend coast lines regardless of policy, who should pay for this and will the community accept a retreat option as the only viable option? The capital cost of adaptation options and the long term maintenance and reconstruction costs are barriers.

GCCC makes the following recommendation:

§ A cost benefit analysis of adaptation options could assist LGAs to make informed decisions

§ A national time frame for adaptation options in the high hazard areas of the coast to be maintained and funded by LGAs or other government

§ A mandatory retreat/abandon option linked to occurrences, severity, cost, level of flood/sea level rise.

8. Timing and processes for updating flood mapping in the planning scheme

As discussed above Council has within its planning instruments a Statutory Flood Map for triggering a flood search as part of the development assessment process, Council's new flood data and maps will be released next year with the new planning scheme, they will include 0.80 m sea level rise amongst other updated information. LGAs, under the current planning regime cannot update flood data as new information becomes available, for example the Bureau of Meteorology is releasing new rainfall data in June 2012, because the flood data is linked to the statutory flood maps. The Queensland planning legislation, the *Sustainable Planning Act 2009*, sets out the process for amending planning instruments, this process can take up to, two years. The process does not allow the flexibility for updating data. It is advised that Council has met its duty of care by following the only process available for amending planning instruments. Good governance would dictate that Council officers condition a development approval using the latest flood data to set flood levels for buildings; however this can only occur if the new flood data has been processed as an amendment to the current planning instrument.

§ It is therefore recommended that there be Embed flexibility for updating flood data and flood maps for areas subject to coastal and flood hazards into the SPA.

9. Possible lack of funding under an approved adaptation strategy when the trigger point for construction of protective works is reached

The Queensland Government has developed a Coastal Plan which has mapped the State's coastal hazard areas. The Plan incorporates sea level rise of 0.8 m by 2100, storm surge and increased cyclone intensity by 10%. Areas identified as high hazard can be developed or intensified if the LGA infrastructure plan identifies a timeframe for future adaptation or risk mitigation works, such as a boulder sea wall. However there is a risk that the high hazard area is allowed to be developed and funding for the risk mitigation work is no longer available at a future point in time.

§ Future infrastructure for adaptation defence works require long term planning and funding arrangements, a form of 'future fund' would guarantee availability of funding at the point in time that defensive structures are required. (E.g Boulder seawall along active coastal foreshore to be constructed in 2040)

While the GCCC legal review is specific to our needs a wider review has recently been published by Baker & McKenzie for Australian Local Government Association entitled: Local Council risk of Liability in the Face of Climate Change – Resolving Uncertainties http://www.alga.asn.au/publications/Baker_and_McKenzie_Legal_Liability.pdf

10. Collaboration

Progress in relation to adaptation to climate change has been gradual, Council would welcome a greater degree of collaboration between all concerned parties particularly between the three levels of government. Indeed, the GCCC currently participates in the Coastal Councils Adaptation Taskforce established by the Local Government Association of Queensland that may assist in this regard and has contributed to the National Sea Change Taskforce.

Council would like to encourage the use of the Gold Coast principles for intergovernmental climate change collaboration that were developed at the Climate Change Summit in 2009 which are now promoted by ICLEI as a means to ensure collaboration around Australia.

<http://www.goldcoast.qld.gov.au/attachment/publications/strategy/climate-change-collaboration.pdf>