Planning legislation and practice in Queensland

Swings or roundabouts?

Jeanette Davis
Southern Downs Regional Council
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Planning legislation and practice in Queensland – swings or roundabouts.

Copernicus described the movement of celestial bodies around the sky as revolution. His studies resulted in a fundamental change in understanding in society which is another definition of revolution.

This paper is not meant to be a history lesson, however it does review planning legislation in Queensland. The purpose of the paper is to promote the argument that planning in Queensland has been revolving – sometimes more like a revolving door than the sudden and violent changes associated with the French and Russian revolutions. I would like to suggest that planning in Queensland, with particular reference to the preparation of planning schemes has been going round and round, but unlike the stars which always finally return to the same location in the sky, planning in Queensland has been slowly progressing and improving with each revolution.

Much of this paper is drawn from my own personal experience as a drafter of planning schemes over a long period of time and under different planning legislation. I started work as a planner in 1978 and have worked in Queensland ever since. I have written at least one planning scheme in accordance with each new piece of planning legislation that has been developed in the last 33 years and I would like to share with you my impressions of the way that planning scheme legislation combined with planning politics have changed the way planning schemes are prepared.

History in Context

The first bit of legislation in Queensland that had planning implications was the Undue Subdivision of Land Prevention Act 1885. Although this was promoted as a public health and anti slum measure, by mandating a minimum lot size of 16 perches (404 m²) and a minimum frontage of 30 feet (10 metres) this legislation spelt the end of terrace housing in Queensland and some commentators make the point that it was the beginning of urban sprawl. It was certainly the beginning of the State government’s involvement in planning of local areas.

Apart from the City of Brisbane Act 1924 planning legislation for the rest of Queensland was quiet until 1934 when the City of Mackay and other Town Planning Schemes Approval Act 1934 was gazetted. The purpose of this Act was to enable the City of Mackay to “execute and enforce” the City of Mackay town planning scheme made by Council and also to enable other local authorities to make, execute and enforce town planning schemes and for other purposes. The Act, which includes the Town Planning Scheme as an appendix was seven and a half pages long.

Interestingly, the Act contains the history of the making of the planning scheme. On 8 December 1932 a town planner was employed by the Council, the town planner completed a civic survey and presented the planning scheme to Council and Council adopted the planning scheme on 15 May 1934. The planning scheme was therefore completed and adopted in less than 18 months. However, this Act was required to “approve, authorise and ratify” the planning scheme – the Act was assented to in November 1934 – so even with the requirement for enabling legislation the planning scheme was up and running within 2 years of the process commencing.
The *City of Mackay and other Town Planning Schemes Approval Act 1934* did not include any rules for the planning scheme however it did contain 9 definitions including a definition of “Town Planning” which is

*Town Planning – Town Planning shall include all matters necessary or expedient for securing the improvement, development, healthfulness, amenity, embellishment, convenience or commercial advancement of the City of Mackay or of the Area or part of the Area of any Local Authority.*

The planning scheme contained zones and a table of zones, it set out procedures for making an application for consent and made provision for what would essentially be a rezoning. Existing non-conforming uses were protected and the expansion of these uses was limited in an interesting manner requiring community consensus. Only 7 uses were defined in the planning scheme with 5 of the definitions concerned with industry. It is assumed that common sense and common parlance were used to decide that no definitions were required for commonly used words.

My research has not turned up the name of the planner but without doubt he or she was a trend setter for planning schemes for a long time into the future.

**Local Government Act 1936**

Hot on the heels of this legislation came the *Local Government Act 1936*. This Act was a major consolidation of local government law in Queensland. Section 33 of this Act dealt with town planning and Section 34 dealt with Subdivision of Land. Many of the first planning schemes for Shires and cities were prepared under this legislation including early planning schemes for my region. The first planning schemes for both Stanthorpe and Warwick urban areas were gazetted in 1962.

It is reasonable to say, that, with the exception of Brisbane with its own City of Brisbane town planning acts of 1959 and 1964 most of the first planning schemes in Queensland were prepared under the *Local Government Act 1936* as amended. To determine whether planning scheme preparation in Queensland is going forward or backward or just round in circles we could start with a brief examination of this legislation.

If the “purpose’ of legislation is designed to give direction to those using the legislation then *The Local Government Act 1936* fails us. There is no statement of purpose. Like the earlier *City of Mackay and other Town Planning Schemes Approval Act 1934* the Local Government Act contains a definition of “Town Planning” which is almost identical to the earlier Act. The *Local Government Act 1936* provided the mechanisms for preparing a planning scheme and amendments. It dealt with appeals and planning certificates and compensation. A 1975 amendment included the matters that Council must consider when determining an application for rezoning and a clause protecting existing lawful non conforming uses. The Act also listed unlawful conditions. In reality these were very limited and did not have to meet any ‘reasonable or relevant’ test. The Act did not provide any policy direction for planning in the State.
The compensation provisions contained in this Act were generally used to alarm Councils and any other person who may have wished to change the direction of development. In fact they were not as alarming as they were sometimes presented. Claims for injurious affection could be made any time up to three years from the date that the claim arose. There were a number of circumstances where compensation was not payable, one of the most significant exclusions was any prohibition or restriction of subdivision of land. That is, no compensation was payable if a new planning scheme changed subdivision sizes.

The planning schemes prepared under the Local Government Act 1936 all have the same architecture. Many have the same definitions and requirements for particular uses. What caused this? It was not the legislation – there is nothing in the Act about the layout of planning schemes. Perhaps it was the original “cut and paste” which was a whole lot messier without word processors. Perhaps we were a lazy profession or perhaps we were more concerned with content and saved time and effort by using a tried and true layout. Or, perhaps the staff in the Department of Local Government planning section or the printers at the Government Gazette were not prepared to entertain another layout.

What ever the reason function followed form. It was easy to read planning schemes for different shires and towns as many parts were exactly the same. It was fairly easy to write the definitions in the planning schemes as, except for a few local idiosyncrasies, definitions were freely traded and generally “bulk store’ or ‘caretaker’s residence” meant the same thing everywhere.

The accepted problem with Section 33 of the Local Government Act 1936 was that it didn’t tell us why we were planning and what we were setting out to achieve. Apart from that planning was simple, planning schemes were short, comparable between areas and easy to comprehend. Did they work? That is for each community to decide. Did they deliver? This question can’t really be answered because there was no explicit statement of what they were meant to deliver.

Local Government (Planning and Environment) Act 1990

The Local Government (Planning and Environment) Act 1990 was finally enacted in April 1991. It was a useful move to take planning out of the Local Government Act and create a new purpose made Act for planning as it facilitated the inevitable further evolution of planning legislation. It was also useful that the word “environment” was in the name of the Act as again that allowed for an acceleration of the importance of the environment in planning which was to follow. Apart from that, this Act, like Section 33 did not provide a policy position for planning in Queensland. The Local Government (Planning and Environment) Act 1990 was essentially a procedural Act that governed the procedure for development applications, town planning schemes and the new Planning and Environment Court.

It did, however, allow for planners to break the mould for planning schemes. Planners realised that the provisions of this Act could be used to develop really interesting planning schemes. A planning scheme was no longer an excerpt from the Government Gazette, the architecture that planning schemes had followed for decades was abandoned in favour of a free form that met the requirements of the Act, the community and the creativity of the plan drafter.
The Act required that the planning scheme contain a strategic plan and allowed for the inclusion of development control plans. In most of the planning schemes prepared under this legislation the Strategic Plan became the dominant part of the planning scheme. Without any overt rules from the Government about what a strategic plan looked like or how it was to be presented in the planning scheme, planners embraced the idea of the Strategic Plan to describe the preferred future pattern and character of development. The development control element of these planning schemes typically followed the strategic element and supported the realisation of the strategy. It is my view that planners were very comfortable with strategic planning as it was in accordance with the education and training provided by the tertiary education institutions at the time. As development control was a lot less complicated in this legislation training tended to be about actual planning rather than development control.

The Act also required that planning schemes be supported by planning studies and for the first time required that in preparing the planning study the local authority must have regard to relevant State planning policies. In 1992 the first of these was developed – that is SPP1/92 Development and the Conservation of Agricultural Land. This was the first real initiative about rolling in State planning interests into local planning schemes.

This Act protected existing lawful non-conforming uses and dealt with compensation. In one way it made a change to the planning scheme potentially more alarming for Councils as although it allowed for a three year horizon to lodge a claim, it did not allow the claim for compensation to be satisfied by amending the planning scheme to remove the limitations on use rights.

The Act dealt fulsomely with applications for rezoning and added some policy content by listing the matters that Council must consider when assessing an application for rezoning. Importantly, the final decision about rezonings did not rest with Council but with the State.

In what was seen as an attempt to raise the professionalism of planning the Act provided that certain planning work was only to be undertaken by a certificated town planner. This was supported by the then RAPI as certification was contingent upon membership of the institute. Just as in any other profession, whether it be medicine or engineering, there was an assumption that the working planners would act professionally and be able to plan. As an extension to this there was an assumption that the universities and tertiary institutions had taught us well and that the professional institute would ensure we had relevant experience and that the legislation would provide the tools for us to work with. Good planning would be a result of a group of professionals working to the best of their training and abilities rather than the result of legislation.

As a book of rules the Local Government (Planning and Environment) Act 1990 was only adequate. The accepted problem with this legislation was that it didn’t deal with the inefficiencies that were arising in the development industry as the amount of legislation associated with development skyrocketed. A developer may obtain planning approval but may not be able to obtain a necessary licence or approval from a State agency. Development approvals under the Local Government (Planning and Environment) Act were not final approvals.
The strength of this legislation is that it ensured that planning schemes were soundly based by requiring planning studies, it provided the legislative requirement for strategic planning which would underpin development control and it did not mandate form as it required that planning would be undertaken by educated and professional group of practitioners.

**Integrated Planning Act 1997**

The *Integrated Planning Act 1997* (IPA) was a huge departure from all of the planning legislation that went before it. In its second reading speech to Parliament on 30 October 1997 Hon. D.E McCauley described IPA as “state of the art planning legislation”.

For the first time planning schemes in Queensland had a purpose rather than a definition. Planners finally had their own Hippocratic Oath – we will seek to achieve ecological sustainability.

This Act was still a book of rules and procedures and a lot of the criticism of the IPA was to do with the complexity of the procedures. Despite this, the goal of integration was never completely achieved during the life of the Act as some development applications such as liquor licensing were never rolled into the Act.

As well as the gigantean Integrated Development Assessment System, IPA gave us many more planning tools such as designations, regional plans and infrastructure charging. Compensation, once a major deterrent to planning change was defanged in IPA by the provisions for consideration of applications under a superseded planning scheme. Rezonings, as such, were no longer an issue as nothing was prohibited. The Act set out procedures for amending the planning scheme.

IPA told us what should be in a planning scheme but importantly it did not tell us what shape our planning scheme should have. In September 2001 the Department of Local Government and Planning produced IPA Plan Making Guideline 1/01 incorporating Scheme Template 1. It is important to remember that IPA did not mandate the template – this was entirely a creature of the Department – so the failings of the template are not the failings of the Act. It is also important to remember that in theory the template was an example for achieving the drafting outcomes. The drafting outcomes were developed by the Department as the way to *effectively achieve the fundamental concepts of the IPA* which was seeking to achieve ecological sustainability and coordinating and integrating planning and planning scheme matters. Despite the template only being a guideline, in practice, there was very little latitude to prepare a planning scheme with a different shape.

In my view the template was a straitjacket. In my day to day working life I work with the Warwick Shire planning scheme which was the first IPA compliant planning scheme adopted in Queensland. The Warwick Shire planning scheme review was well underway when IPA was introduced and the planning scheme was approved before the first of the templates. This planning scheme contains a very strong strategic element as well as detailed guides to strategic decision making. I also work with the Stanthorpe planning scheme which is a template scheme. Although there is a provision for a strategic framework in the template its role is limited as it does not provide a basis for development assessment and only provides a guide for related decisions for local government, developers and the community. There is
also no opportunity in the template to elaborate on what particulars should be considered when assessing particular applications. In terms of guidance for development control decisions the Warwick Shire planning scheme with its strong, overt, strategic element is a clear winner.

**Sustainable Planning Act 2009**

No one needs reminding of the content of the *Sustainable Planning Act 2009*, we work with it every day. It is very like IPA and contains many of the IPA elements including the Integrated Development Assessment System which is one of the tools used to integrate State agency concerns into planning decisions. The big change that I would like to discuss is the part of the Act concerned with planning schemes.

The *Sustainable Planning Act 2009* provides that the key elements of planning scheme are:

A *local government and the Minister must be satisfied the local government’s planning scheme –*

(a) Appropriately reflects the standard planning scheme provisions; and
(b) Identifies the strategic outcomes for the planning scheme area; and
(c) Includes measures that facilitate achieving the strategic outcomes; and
(d) Coordinates and integrates the matters, including the core matters, dealt with by the planning scheme including any State and regional dimensions of the matters; and
(e) Includes a priority infrastructure plan; and
(f) If land in the planning scheme area is a declared master planned area – includes a structure plan for the master planned area.

The first three elements of the planning scheme are new and the question is - are these elements a revolution in the way that planning schemes are prepared in Queensland or are they a roundabout?

The Queensland Planning Provisions (QPP) are certainly a change in how planning schemes look and feel. The purpose of the QPP was to provide consistency in the form of planning schemes throughout the State. At the time when every local government has a planning scheme that appropriately reflects the QPP it will be easy for developers and planning professionals to discover the planning requirements for any new local government area as the provisions of the planning scheme will be in the same part of every planning scheme.

As revolutions go the QPP could be seen as more of a roundabout. The planning schemes gazetted under the Section 33 of the *Local Government Act 1936* all had the same look and feel. Planners and communities appeared to be happy to abandon the advantages of consistency in favour of innovation and creativity when the *Local Government (Planning and Environment) Act 1990* was in force. The difficulties arising from idiosyncratic planning schemes may well have contributed to the Department’s keen adherence to the infamous template and finally we are back where we started with standard planning scheme formats. However this is not a complete reverse – the QPP has advantages that the old Section 33 could never lay claim to and has therefore progressed the planning adventure in Queensland.
The QPP is not a choice – all planning schemes will be consistent in terms of layout, zones, definitions and administrative matters. This will be of great assistance to the development industry and planners working in local government and ultimately the community. The QPP saves time in plan preparation as the structure and nuts and bolts of the planning scheme including definitions and zones are preordained. The QPP is designed so that it can easily accommodate State interests in codes in future iterations. This will aid integration of State interests and save time and conflict at the stage of the first State interest review. The QPP remains flexible enough for local interests to be clearly and effectively articulated in the planning scheme. While the QPP is not perfect at the moment it is a useful tool for planners and will only become more useful as State interests are rolled in and the definitions are refined and improved.

The other big revolution in the Sustainable Planning Act 2009 is the requirement for planning schemes to identify strategic outcomes. The QPP framework requires that the strategic framework is located at the beginning of the planning scheme. This is the obvious location as the strategic element in the planning scheme informs all of the other elements in the planning scheme from the choice and location of zones to the tables of assessment and the performance outcomes and acceptable outcomes of the codes.

Apart from the requirement to actually produce a planning study to the Department that supports the strategic plan the requirements in SPA for a strategic plan does not differ substantially from the Local Government (Planning and Environment) Act 1990. What sets SPA apart and makes it an obvious improvement on the earlier Act is the articulation of the strategic plan in the QPP.

All the content in the strategic framework is determined by the local government. The strategic plan is the part of a planning scheme that is most interesting to the community and it is the part that the community can most easily understand. All planners who have been involved with development control will agree that the development decisions that are in alignment with the strategic direction will be more easily accepted if the community has some ownership of the strategic direction of the planning scheme. One of the most common tools to gain community interest in Strategic Planning is for the community to try to envisage the community at some time in the future. This future-scape is generally well outside the time frames offered by a planning scheme and frequently includes elements that cannot be delivered by a planning scheme but the vision for the future is wonderful platform for devising strategies.

QPP V 2 provides for the strategic vision to be extrinsic material to the planning scheme. This is an excellent position as the publication of the vision in the planning scheme keeps faith with the community who devised it and as the vision is not actually part of the planning scheme it does not have to be censored but can remain the true vision of the community. In my view it is important for the Council and community (who are not planners) to let go of planning considerations when they are visioning the future. This allows them to be reasonably uninhibited about thinking out side of the normal paradigms.

Given that the decision rules in the QPP mean that all parts of the Strategic framework are considered as part of any development decision (code or impact) it is critical that everything
in the Strategic framework can potentially be achieved by provisions in the planning scheme. Conversely, it is also critical that all provisions in the planning scheme accord with the Strategic framework. It is illogical to have a statement in the Strategic framework that cannot be achieved by provisions contained in the planning scheme. Unless the strategic vision remains as extrinsic material to the planning scheme planners starting a planning scheme will have to advise their communities and Councils to rein in their visioning to something that can be achieved by the planning scheme. This will be a very unfortunate outcome as a free ranging vision is a very useful tool for planners.

The QPP requires the inclusion of four elements in strategic framework in addition to the map. These are:

**Strategic outcomes**
This is the first opportunity in the QPP structure to make a statement about local policy decisions. It is critical to the legibility of the planning scheme to make this statement of policy clear and unambiguous. Because this part describes a desirable end state it provides an opportunity to articulate the “visions and desires” of the community and the Council that arose during the consultation process. It provides a good link between the plan and the early scoping sessions and the vision.

**Elements**
This is a list of items and issues that are specifically addressed in the Strategic framework. The list of elements is the ladder providing the connection between the very high order strategic outcomes and specific outcomes and land use strategies. There is no mandatory list of elements – the QPP therefore allows the planning scheme to focus on the issues that are important to the local area. Elements are generally self describing and do not need additional elaboration as that is provided in the specific outcomes.

**Specific outcomes**
This part lists the policy for each of the elements. Again it describes a desirable end state and again provides an opportunity to link the plan to the matters raised in early consultation. It also provides an opportunity to link State policy to local issues which ensures that the planning scheme addresses the mandatory planning issues in the State planning policies.

**Land use strategies**
This is the core of the strategic framework and indeed of the whole planning scheme. This section is used to clearly spell out how decisions will be made about land use. The section should be numbered and referenced for use in any planning dispute as the decision rules in the QPP require compliance with the strategic plan.

The land use strategies are derived from the strategic and specific outcomes and they then support the other elements of the planning scheme and provide a clear, concise and definite tool for future decision makers.

Reference to the land use strategies will help explain every other part in the planning scheme from the choice of zones to the acceptable solutions in the codes. It is the “Rosetta Stone” of the scheme. In a well crafted planning scheme every provision will accord with the land use strategies.
**Conclusion**

I trust that I have illustrated through this brief examination of the impact of Queensland Planning legislation on planning scheme preparation that the evolution of planning schemes has not followed a straight path. There have been twists and turns of legislation and politics along the way that resulted in some less than adequate planning schemes. In my opinion the QPP is not so much of a revolution as there are roots to the provisions of the QPP in history, however it is clear that the QPP is an advancement and will certainly help the creation of dynamic planning schemes that are responsive to the unique needs and aspirations of local communities and result in well planned localities.