PERFORMANCE BASED PLANNING IN QUEENSLAND

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Executive summary

The Integrated Planning Act 1997 (IPA) introduced a new era of planning and development regulation in Queensland. It was based on two key philosophies that differentiated the new system from the old: integration across issues (land use, infrastructure and valuable features) and across jurisdictions (state, regional and local); and performance based planning – meaning the system should be focussed on outcomes (rather than be prescriptive and inflexible).

Despite two substantive rounds of legislation reform and various smaller scale adjustments, we have not squarely revisited performance based planning as a formational concept and whether it has delivered the efficiencies, innovation and better outcomes that it was intended to foster.

This paper reviews what is meant by performance based planning, the issues that have arisen elsewhere and the particular challenges arising from the version we have implemented in Queensland.

On-going tensions remain. In addition to complaints of complexity and a lack of efficiency, there are increasing signals from communities (and elected representatives) that there is confusion, a lack of confidence and, possibly, a sense of injustice. These issues arise from a lack of certainty, inconsistent decision making and (at least perceived) lack of transparency.

Rather than unleashing innovation and rewarding best practice, the system is more frequently grappling with whether development is “good enough” to pass performance outcomes which occur at various levels in a planning instrument and are often unclear and capable of multiple interpretations.

The weaknesses of the current approach may not serve us (planners, the community, industry) well as we face key urban growth management issues into the future, particularly hot-button issues like density and natural hazards.

Ultimately, the question is not whether we should abandon a performance based system in favour of a prescriptive one. We need to have flexibility. However, we should re-examine where and how we strike the balance between certainty and flexibility. There are potential win-wins for all stakeholders.

Some substantive changes could be achieved through the second tier of the new legislative suite – the regulation and various statutory guidelines. They include:

- re-evaluating whether all planning/regulatory aspects deserve the same level of flexibility, or whether some aspects or standards of particular importance could be treated with more certainty; and
- changing up the “rules” so that these standards can be treated as requirements unless there are special circumstances.

And, irrespective of the above, the following things are also needed:

- better policy and better construction and drafting of planning instruments (state and local);
- investment in an on-going conversation with communities about growth management issues at state or regional levels; and
- shorter, more responsive plan making processes.
1. Introduction

The commencement of the Integrated Planning Act (IPA) in 1998 was the start of a new era of planning and development in Queensland. Two key philosophies underpinned the IPA and differentiated the new system from the old. These were that:

- planning and development assessment should be integrated across issues (land use, infrastructure and valuable features) and across jurisdictions (state, regional and local); and
- the system should be focussed on outcomes and performance (rather than be prescriptive and inflexible).

It is the latter approach that we refer to as performance based planning, and with which this paper is concerned.

There have been many and varied criticisms of the planning system in Queensland since the introduction of the IPA. There have been two substantive rounds of legislation reform and various smaller scale adjustments. These have addressed, or sought to address, a number of issues, large and small. Indeed, the current review is hoped to deliver the best planning and development system in Australia.

Despite this, none of the reviews have substantively revisited performance based planning as a formational concept. We have never really examined its particular strengths and weaknesses, and whether it has delivered the efficiencies, innovation and better outcomes that it was intended to foster.

And yet, added to the complaints from within the industry of complexity and a lack of efficiency, there are increasing signals from communities (and elected representatives) that all is not well – possibly a lack of confidence in the system, and certainly confusion about what means what.

2. What is performance based planning and where did it come from?

What do we think it is?

In the only fully fledged attempts to examine the nature of performance based planning in Queensland, Frew (2011) found that we are unable to agree on what performance based planning actually is. Through interviews with multiple professionals¹ he documented a range of views along a continuum that extended from a belief that everything should be considered on its merits (there should be no particular rules to be applied), to those who said it was about achieving outcomes, recognising that more than one solution may be available, through to those who think that what we have is not actually performance based planning at all.

¹ Forty-one participants were interviewed and covered a spectrum of planners and non-planners, private sector and public sector representative, judicial officers, and elected representatives, and included architects of the legislation (Frew, 2011, ch 3 & 5).
There is no consensus about what actually causes the system we have to be performance based. The term was not used in IPA nor is it used or defined in any of the subsequent legislation. Frew concluded that the only common ground is that we agree it is the opposite of being prescriptive – an assumed hallmark of the previous system. There was, however, wide agreement that the system was meant to, and does, deliver flexibility.

**Origins**

There is some value in looking at the origins of the concept of performance based planning to understand what we have in Queensland, what benefits it offers, whether lessons can be learned and whether other possibilities exist.

The term appears to have originated in the United States, dating from the 1950s when it was used in an industrial context, on the basis that technology was overtaking traditional zoning and definition based regulations. The approach sought to define quantitative standards for various types of impacts (noise, odour etc), while leaving open how those standards might be met (Baker et al 2006, p2).

Later (in the 70s and 80s), the approach was extended to various small US communities. The thinking here was that there should be a move away from an exclusionary single-use zoning system which makes presumptions about the suitability of uses and leads to ad-hoc, reactionary decision making. The reliance on zones and use definitions should be replaced with a focus functional districts within which development limits were determined based on things like open space ratio, floor area or density or even carrying capacities (Baker et al 2006 p3). In “pure” forms there would be no spatial limitations, and any use would be possible subject to meeting performance standards related to its operational effects (Frew 2011, p10).

Evaluated later (notably around 1998, after IPA had commenced), most of the communities had abandoned the approach. Issues identified included (Baker et al 2006, pp3-6):

- the difficulties of establishing suitable standards to measure development performance (the need to be precise and clear; the need to consider the cumulative effects of different standards; the fact that there are different types of planning/urban issues to manage and some are more complex or carry more risk than others);
- the resources required to implement the approach, and the time and cost of approval processes;
- unpredictability and uncertainty,
- complexity; and
- difficulties explaining the system to communities.

This approach has more contemporary application in the from-based concepts of the US Smart Growth movement. Here, the type of use is not the central concern, it is the form of development that matters. However, the Smart Growth codes themselves are quantitative and prescriptive.
Frew (2011, pp10-11) summarises that these original performance based planning approaches had the following hallmarks:

- an alternative to spatial zoning and defining of uses as a means to regulate development;
- a focus on the characteristics and effects of development to determine suitability; and
- quantitative standards to set limits to development and measure effects (with flexibility as to how they could be met).

Closer to home the concept was being given a run under New Zealand’s Resource Management Act in the early 1990s. This was said to be “effects based” – primarily concerned with managing the effects of development, particularly on natural resources rather than land uses. Criticisms there have included that the system became inefficient and costly for applicants and resource hungry for authorities (Baker et al 2006, p7). The New Zealand experience was a reference point in the development of IPA.

Frew (2011) concludes that Queensland has a hybridised version of the original performance based planning concept – to the extent that we did not discard zones or use definitions and continued to rely on spatial means of regulating development (as opposed to a purely effects or impacts based approach). Another point of difference from the classic model is that we have extensively used subjective, qualitative performance criteria (or outcomes) rather than quantitative standards as our tests.

It is also interesting to observe that many of the difficulties that emerged for performance based planning elsewhere appear to parallel the issues that have arisen here.

3. A short history of planning & development regulation in Queensland

For a long time, there was minimal regulation and minimal decision making guidance when permissions were required. Generally, when planning schemes were widely used, we embraced the traditional approach - predominantly single use, exclusionary zones based primarily on what existed on the land at that moment in time, rather than strategic thinking. The zones were accompanied by an intent statement and a table of development identifying as-of-right, permissible and prohibited development, and a set of land use definitions.

**Figure 1**: An abridged history of planning regulation in Queensland
From the 1970s and 1980s, the need for forward thinking and more nuanced approaches to regulating development gave rise to the introduction of strategic plans and development control plans. These generally sat over the top of, and often were somewhat disjointed from, the underlying zoning. But they provided better guidance for the assessment of applications, and were particularly important in guiding rezonings.

While prescriptive, there was flexibility in the system. Particular development standards were capable of relaxation (albeit with limited guidance as to when) and, if development was identified as prohibited, applications could be made for rezoning. Queensland distinguished itself from other jurisdictions in allowing for applicant-led rezoning.

The former system was not immune from concerns about the nature of development being approved and the transparency of the process. Ministerial rezonings were legendary, and decisions at local government level were also often controversial. These issues are not unique to the current system.

Other criticisms related to the disjointed nature of regulation. The planning approval system (and planning schemes) may have been one thing, but applicants faced a slew of other approval processes from state authorities. Each of these had to be tackled separately and often sequentially, and there were varying degrees of transparency around the requirements other authorities may have had.

In summary, although good work was done by many (and many remember it nostalgically), the former system was not ideal. It struggled with the balance of certainty and flexibility, and it struggled with transparency when it came to discretionary decision making. It was fragmented and did not offer especially meaningful opportunities for community involvement.

4. The drivers for change

Other drivers for change in Queensland emerged during the late 1980s and 1990s. Notably, the Inquiry into National Competition Policy, and the resulting Hilmer report, advocated public sector changes. In particular, it wanted the public sector operate on more commercial lines and pointed to the need for regulatory reform. The Local Approvals Reform Program (LARP) of the early 1990s also emphasised the need for integration of processes and efficiency in the approvals system.

The concepts and drivers emerging from this agenda continue to influence public policy to the present day and have been reflected in recent nation-wide reviews undertaken by the Productivity Commission, Council of Australian Governments (COAG), the National Urban Policy (2011) and the (now defunct) Development Assessment Forum which advocate in various ways for red tape reduction.

Juxtaposed with the neoliberal reform agenda, there was increasing focus on ecologically sustainable development (ESD). While planning has always concerned itself with the balance of social, environmental and economic objectives, the ESD concept reflected increasing community expectations for governments (and planning systems) to do more in protecting important values and thinking beyond the need of the current generation.
It was also around the same time that the Australian Model Code for Residential Development (AMCORD) was developed. AMCORD was a best practice manual which pioneered small lot housing and subdivision in the face of emerging housing needs and inefficient use of urban land. It was presented in a performance based format – providing a prototype of performance based codes as we now know them.

These agenda set an important context for change, highlighting the particular concerns with the former planning system in Queensland. In summary, the things the IPA reform was specifically aiming to change were (Queensland Department of Housing Local Government and Planning (1993)):

- fragmentation of approval processes causing inefficiencies, costs and delays;
- lack of joined-up thinking and co-ordinated planning between state and local government and across issues;
- complexity and legalistic pre-occupation;
- inadequate opportunities community consultation at an early stage of planning (as opposed to objections at the development application stage); and
- a lack of flexibility which discouraged innovation.

5. What makes the current system performance based?

The drivers described above manifested themselves in the two formational philosophies that underpinned IPA: integration and performance based planning. The rationale for performance based planning included that:

- we needed more flexibility to encourage innovation;
- we ought to make the basis on which discretion is to be applied transparent and “above the table” (as distinct from the less clear criteria that may have been applied to the former relaxations and rezonings);
- we ought to be more concerned with outcomes than conforming with process or arbitrary standards; and
- we ought to be more focussed on the actual effects or impacts of development than artificial definitions or spatial designations (taking a leaf from the origins of performance based planning and the New Zealand experience in particular).

Fundamentally, the system was premised on creating more flexibility, twinned within improving efficiency.

The legislation, then and now, does not mention or define performance based planning. Instead, IPA changed our language (outcomes, code and impacts) and removed what were seen as the obstacles to a more flexible approach. Consistent with the philosophy, IPA itself concentrated on the outcomes it expected of planning schemes, rather than form or process.

Frew (2011) refers to this as change by omission rather than commission. However, the IPA contained the following beacons for a performance based planning system:

- the prohibition on prohibitions, which put an end to the notion of rezoning and (arguably) categorical statements pre-empting the unacceptability of certain types of development (this feature essentially remains although extended by SPA to certain state mandated activities);
• the “outcome focus” primarily expressed through the requirement for planning schemes to state desired environmental outcomes;
• the requirement for measures that achieve the desired environmental outcomes – essentially requiring vertical integration within a scheme (a feature that was not prominent in pre IPA schemes);
• but otherwise, a lack of specific content requirements for schemes – another reflection of the focus on outcomes rather than form (although codes were to be established to regulate development); and
• the change in language to impact assessment (heralding an emphasis on the effects of development); and
• the fact that an application for any form of development (with the exception of the state mandated prohibitions) can be made and is to be assessed against the relevant planning instruments.

While nothing precluded a mix of prescriptive and performance based approaches (at least up until QPP), the department actively sought to implement performance based planning in its day to day direction on plan making. (This culminated in the plan making guidelines of 2002/2003.) A particular emphasis in the early days was the need to use only positive language (express what we do want and not what we don’t want), avoid de-facto prohibitions by being too specific, adopt performance based code formats and moves away from the terms like “zone” and “strategic plan”.

The Sustainable Planning Act (SPA) did not significantly alter any of the performance based features of the legislation, modifying the prohibition on prohibitions only to the extent that development identified by the state could be prohibited, and changing desired environmental outcomes to strategic outcomes. The new Planning Bill also doesn’t change the fundamentals.

Of course, SPA also introduced the standard planning scheme provisions, known as the Queensland Planning Provisions (QPP). The QPP is significant to the question of performance based planning in two ways: it enforces the performance based format of codes (with performance outcomes and optional acceptable outcomes); but more significantly, it imposes a new set of interpretation rules.

These include:

• a hierarchy of parts within the planning scheme in which the strategic framework and overlays outrank anything below them to the extent of any inconsistency (section 1.5 of QPP and QPP schemes); and
• a set of code interpretation rules that enforce that:
  o acceptable outcomes are only one way of achieving a performance outcome;
  o if you meet all performance outcomes you comply with a code;
  o even if you do not meet the performance outcomes, you may still comply with a code if you simply meet the purpose and overall outcome statements; and
  o even then, you can “have regard” to the strategic framework (which outranks everything else in the scheme).
The rules mean that there is a significant amount of flexibility and discretion available at each hierarchical level in a plan. This is in addition to the discretion available via the decision making rules in the Act (viz. the current sufficient grounds tests and the proposed relevant matters consideration). The new rules also increase the significance of the higher level and more general statements in a planning scheme in the assessment process.
The hierarchy may have been imposed to underscore the importance of strategic planning. But it militates against the integration of policy in planning schemes – where lower order parts are designed to deliver the overarching vision in more specific and considered ways, and more tailored to particular areas and aspects of development. It harks back to the times when there was a disconnect between strategic plans and static zoning regimes.

These new QPP rules could well exacerbate the dilemmas of a performance based assessment system. They create even greater challenges for scheme drafting – when drafting inadequacies have been a key part of the problem (refer the discussion in section 6). They add up to even less certainty for stakeholders.

6. How has the system been performing?

In general

It is ironic that a system which was trying so hard to be outcome focussed has resulted in more criticism than ever that planning and planners are process driven, box-tickers.

Aside from that, there is little hard evidence around whether our performance based system has been successful (or more successful than an alternative system) in achieving what we were aiming to deliver. Has it led to the innovation it was supposed to unleash? Have better outcomes been achieved? Has it been more efficient? We have never really examined the particular strengths or weaknesses of the performance based approach we have created and implemented.

Efficiency, innovation and outcomes

Documented criticisms have included the slowness, complexity and cost of the IDAS process (England, 2011). It appears to have achieved a less efficient system. There has certainly been a focus in the legislative reform to address procedural issues. But there are also impediments to system efficiency that can be related to the performance based nature of the assessment process - where performance outcomes are many and unclear, decisions are unpredictable.

It is difficult to be definitive as to whether we have achieved innovation and better outcomes. The system has certainly provided more flexibility. It is likely that the system has allowed for innovation in various ways. I would point to approaches to new communities, community assets and place making in greenfield and larger brownfield redevelopment areas as likely examples. (Although, it is also in these sorts of contexts that the various “work around” provisions have come into play, including master plan processes and Economic Development Queensland’s priority development areas.)

In other contexts, and notably for smaller inner urban sites, it looks less like innovation and more like – depending on your world view - taking rational action to maximise development entitlements or just pushing the envelope. This seems to be the aspect which attracts significant community angst both in Queensland and elsewhere (Kelly & Donegan, 2015 & Taylor et al, 2016).

The assessment process grapples with whether a development is simply good enough to get across the relevant tests much more often than with whether a development is innovative or ground-breaking.
Frew (2011) suggests that not all policy elements may work equally well under a performance based approach and concludes there is:

- inconsistency in decision making because of the range of interpretations that may be given to outcome statements;
- tension between flexible plans and political and community expectations for accountable decision making; and
- a lack of broader confidence and acceptance.

He also identifies the following issues:

- uncertainty in the system fuels development speculation, because greater yields might be achieved; and
- difficulties in land valuation because development potential is not clear and straightforward.

**Planning schemes**

Planning schemes are the place where the challenges of our performance based system crystallise. They have been roundly criticised for being too long and complex, being verbose and containing many internal tensions (if not outright contradictions). Although fair, not all of these criticisms can be sheeted home to their performance based nature. Many issues have arisen because of the weight and difficulty of the policy integration and co-ordination agenda, and the desire to accommodate the many and varied views of stakeholders. Also to blame is the cumbersome and slow nature of the preparation and amendment processes.

However, a performance based approach does place significant demands on the drafting of a planning scheme. QPP attempts to, and probably succeeds in, standardising some terminology and structure. But it has not addressed the underlying problems of excessive length and complexity, while the QPP rules potentially exacerbate the problem of a lack of clarity and certainty.

**Clarity**

A primary issue - which directly affects development confidence, assessment efficiency and community expectations – is the clarity with which the planning scheme’s intentions are expressed. In particular, there have been longstanding issues with the clarity of performance outcome statements in codes. Some fairly typical examples are set out in figure 3.

In general, planning schemes have provided detailed acceptable outcomes, but have not spent enough effort in clearly expressing the more critical performance test. Often the performance outcome statements are vaguely expressed and capable of multiple interpretations. In reality, many do not set a very high or meaningful bar.

This is stark contrast to what should have been one of the strengths of the performance based approach - that the parameters on which alternatives are to be judged should be made clear, giving transparency to discretionary decisions.

This kind of transparency was not provided by the former system either, but the starting position was different. If quantitative requirements were given pre-IPA, they were expected to be achieved except in limited circumstances (in which cases relaxation may have been given). In the new system such standards have merely become alternatives / options / suggestions. In
practice, this has been a substantial game-changer in terms of certainty, and the relative negotiating positions for applicant, assessment manager and the community.

Initially, the drafting challenge was compounded by departmental instructions to use only positive language (expressing what is wanted) rather than negative language (what is not wanted), and avoiding what were referred to as de-facto prohibitions. They would not accept, for example, definitive references to a particular building height in a performance outcome. In later schemes, in a search for greater certainty, more specific intentions have been expressed in outcome statements. However, there has been some criticism (Frew (2011) pp278-279) that this is not in the spirit of performance based planning and should not be tolerated.

Acceptable outcomes are also often unclear or uncertain, and fail to provide a quick and easy path to approval. Sometimes, acceptable outcomes do not fully address the performance outcome, and on some sites may not, in fact, actually achieve the outcome at all – and yet they must be accepted if offered.

Compounding these problems, the clarity of strategic framework statements will come under closer scrutiny as a result of the new QPP rules - when the assessment turns to higher order components of a planning scheme which are drafted as more general, local government wide intentions. The certainty of the outcomes from this level of assessment is far less clear cut for all concerned. Counter-productively, the rules encourage greater detail to be included at this strategic level of the document.

**Complex, inexact concepts**

Another reason that outcome statements are difficult to draft is that they often grapple with subjective, relative or complex concepts. As much as we might aspire to make it more so, planning is not an exact science. When put under the reductive scrutiny of our assessment rules, some performance outcomes may wobble and fall over.

Despite this, some of these things can represent important lines-in-the-sand for particular communities or for particular planning objectives which will be important in managing cities of the future. Objectives relating to urban design quality, building height, open space, set backs and buffers and environmental values can often fall into this category.

For example, there may be little to distinguish the impacts of a four or six storey building; yet height may be an important determinant of the form in which density is to be achieved in a particular community or locality. Similarly, there is no scientifically proven minimum amount of outdoor space needed for occupants of a multiple dwelling, yet it is clear open space adds to the level of amenity for residents and the wider community. A quantitative standard then represents a line-in-the-sand policy about the quality of development.

The combination of poor drafting and the flexibly rules of the system may unnecessarily weaken the negotiating position on what might be matters of importance to the local authority and the wider community.

That is not to say that there should not be a path available to challenge a planning scheme or that there should be no checks and balances in the system. Flexibility is needed to guard indeed against silly and unreasonable outcomes and for genuinely new approaches.

The sheer volume of code content is often cited as a consequence of the performance based approach. While this may not provide a full explanation, there may well be a tendency to
increasingly extrapolate the dimensions of a particular issue or objective in order to deal with the forensic scrutiny demanded of performance based assessment.

This may be like trying to define the individual elements that combine to create an artwork. Or perhaps we have simply dressed up the wolf of over-regulation in a sheep’s performance based clothing. It is probably both.

<table>
<thead>
<tr>
<th>Performance outcome</th>
<th>Acceptable outcome</th>
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<tbody>
<tr>
<td>Developments provides open space that is:</td>
<td>The open space is at least 25% of the site area and:</td>
</tr>
<tr>
<td>a) useable;</td>
<td>a) has a minimum dimension of ten metres;</td>
</tr>
<tr>
<td>b) clearly defined;</td>
<td>b) has a maximum gradient not exceeding one in ten;</td>
</tr>
<tr>
<td>c) a safe and attractive living environment.</td>
<td>c) is designed and located so that it is subject to informal surveillance from dwellings on the site.</td>
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In this example the acceptable outcome of very specific. But if a substantially smaller amount of open space was proposed, the performance outcome does not really provide a very high test. There are multiple interpretations possible as to what would satisfy those requirements.

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<tr>
<th>Performance outcome</th>
<th>Acceptable outcome</th>
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</thead>
<tbody>
<tr>
<td>Development provides a side boundary setback that provides for privacy, natural light and breezes.</td>
<td>Side boundary setback is 3 meters.</td>
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In this example, an outcome that is substantially less than 3 metres has every chance of meeting the performance outcome even though it may be a significantly less desirable outcome for neighbours.

<table>
<thead>
<tr>
<th>Performance outcome</th>
<th>Acceptable outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>All buildings are of a height which is in keeping with the predominant residential character of the surrounding area.</td>
<td>The building has a maximum of two storeys.</td>
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The critical test here is the predominant character of the area and not the height nominated in the acceptable outcome.

<table>
<thead>
<tr>
<th>Performance outcome</th>
<th>Acceptable outcome</th>
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<tbody>
<tr>
<td>The streetscape is activated by commercial or residential activities.</td>
<td>Frontages at street level are not dominated by service areas or blank walls</td>
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In this example, what is meant by activation is not clear cut. The acceptable outcomes offered may not produce the desired result and is itself open to interpretation.

Figure 3: Examples of performance outcomes and acceptable outcomes
Conclusion

Although some of the problems arising from unclear drafting might have been anticipated and avoided, it is not just a case of a good idea having been implemented badly.

It is also not just a question of whether we abandon performance based planning in favour of a prescriptive system. We need flexibility to respond to unusual circumstances and emerging needs that will inevitably arise. There is good logic in the idea of making clear the reason (the outcome sought) when certain standards are nominated – this should provide a solid basis for assessing alternatives.

Ultimately, the question may be less about whether we should have a performance based system or not, and more about where the optimum balance of certainty and flexibility should lie; and how to ensure there is sufficient rigour and transparency when discretion is used.

7. Community expectations

The big picture

Planning is an activity that is undertaken in the public interest. It is firmly concerned with achieving the greatest good for the greatest number. It is also involves a fine balance between taking a regulatory light-touch, pro-actively planning for change and betterment (social, environmental and economic) and facilitating community involvement rather than dictating a social agenda. It inevitably involves a number of stakeholders whose needs are to be respected.

It is legitimate that the system is cognisant of the private sector, because it provides the development, employment and economic activity which enables visions to be achieved and needs to be met. Regulation should be targeted to those things that need to be regulated and we should expect the private sector to act rationally to exercise development rights. The development industry needs an effective regulatory system:

The state regulates developers because urban development is not possible in an unregulated environment any more that trade is possible under uninhibited piracy or capital formation is possible when theft is unpunished. Without the state defining property rights and development potential there can be no property market and thus no urban development. (Dawkins, J. (1996))

While flexibility is needed, complexity, a lack of clarity, uncertainty of outcomes and community hostility do not add up to a comfortable market position.

There is also a problematic middle ground in which public and private interests can be difficult to separate – and where they may align or diverge. Local communities’ concerns about a particular development proposal may relate to impacts on their private interests. This may reflect broader community concerns, or it may cut across the wider community’s need for the development.

Properties affected by potential storm tide or flood hazards provide another example. Those affected may not wish the hazard to be identified creating impacts on their property rights and values (and insurance costs). While they represent the most directly affected community, their

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2 Also cited in England, P (2011)
views may be at odds with a broader community interest in minimising the future social, environmental and economic costs of the hazard.

These can be difficult waters to navigate and a reason why we may benefit from more certainty and why transparency and accountability is needed when discretion is applied.

The wider community should have an expectation that we establish and operate an effective planning and development system. Drawing together the various high level reviews that have occurred at a national level in recent years (including the Planning Institute of Australia, Productivity Commission, COAG, Development Assessment Forum and the National Urban Policy), planning and development regulatory systems should have the following hallmarks:

- accountable, transparent, lawful, accessible;
- balanced, fair and reasonable, evidence based;
- coordinated, integrated policy/action across agencies and functions;
- clear policy and decision rules, resolving policy tensions/conflicts as far as possible (not left to site by site development assessment where resolution of “policy balance” will vary);
- effective and efficient, simple, streamlined, risk tolerant, rationalised, prioritised;
- sustainable (financially, socially and environmentally, short and long term view);
- locally focussed, subsidiarity (decisions should be made by the lowest level of governance capable of properly doing so);
- outcomes focussed, balancing flexibility and certainty, allowing innovation and variety;
- based on community engagement; and
- evaluated and monitored, responsive to the need for change in policy settings.

The Crime and Corruption Commission’s submission to the new bill reminds us of risks, saying:

> The desire to enhance flexibility to adapt processes to unique circumstances must not undermine the ability to achieve consistent and predictable outcomes. The desire to achieve efficiencies in the process must not remove the obligation to have effective checks and balances or lower standards of accountability.

**Emerging community concerns**

Speaking more specifically, what do the issues discussed in sections 5 and 6 of this paper translate to from the community’s perspective? Local Government Association of Queensland’s (LGAQ) on-going tracking of local government performance (LGAQ 2015), does not point to a declining level of satisfaction in councils’ planning and development functions. While development was an issue in the recent local government elections, the results suggest we are not at a tipping point of concern.

Yet there are strong indications that there is confusion and bemusement, if not a sense of injustice and a lack of confidence. The system makes it difficult to call a spade a spade. Our assessments and language can sound like weasel-words and Sir Humphrey-isms.

Councillors are feeling the heat. LGAQ passed a resolution at its conference last year that said:

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That the Local Government Association of Queensland make representations to the State Government for a return to a planning framework that:

- provides certainty of outcomes;
- the community understands; and
- allows for the use of prescriptive standards and assessment benchmarks in local government planning schemes where appropriate; and

That the Local Government Association of Queensland makes representations to the State Government to initiate a broad education campaign explaining how a performance based planning system operates.

Traditionally, reasonable community expectations are said to be based on the intentions expressed in the planning scheme. This makes good sense. The plan should reflect a considered and balanced view and be the result of good consultation and proper process. It is important for stakeholders to have confidence in the plan and for authorities to stick to the plan, because:

- it’s the agreed plan and it embodies the agreed balance;
- it creates a level playing field (fairness and transparency);
- it creates certainty for both public and private investment; and
- shaping the future of a place takes time and commitment.

But reality falls short. The performance based language and rules make plans seem unreliable. It is difficult for communities to make clear sense of a planning scheme when nothing represents firm ground. If a plan mentions a quantifiable metric, it shouldn’t be a surprise that the community may see it as a firm policy position. Despite the logic of the performance based approach, we have never been able to effectively communicate the subtleties of the actual approach we use. Perhaps we can do better. The bottom line is, despite our intentions, planning schemes (and the wider system) seem unjust and officious.

Plan making resources are constrained and the challenge of engaging with communities about strategic issues is well known. It has long been an aspiration that we have failed to consistently meet. (In fact, it was an objective of the legislative review that led to IPA (Queensland Department of Housing Local Government and Planning (1993)). And even if plan-making engagement is done well, people will inevitably be interested in individual development proposals.

The recently activated Brisbane Residents United\(^4\) articulates the following concerns:

1. **All development applications that are not in line with the Building Code must be advertised by a notice on the site when the Plan is finalised or when preliminary discussions between the developer and the local authority take place, whichever is the earlier. Time for submission must be adequate and submissions should be given weight when a decision is made on the outcome.**

2. **All applications for development that decrease open space will be rejected and any new development must include open space of a type and size in line with the applicable regulations.**

3. If any measurement on a development application deviates from the relevant code by more than 10%, the application will be denied. If the deviation is less than 10%, the assessor may allow it, if there are sufficient countervailing advantages e.g. a slight increase in height can be balanced by a larger setback.

4. If any development will result in increased traffic and/or increased need for public transport and/or more educational facilities, the developer will pay the amount that the State Government and the local authority assesses will be needed to pay for the changes needed to cope with the increase. These funds must be dedicated to making such changes to public transport etc. as will remedy the problems that have been caused.

5. Community consultation about any large scale projects e.g. any changes to Community Infrastructure Designations must be early, open and documented and the opinion of the local community must be an important factor in deciding whether the project is approved.

Some of the issues of concern are relatively universal and relate to development scale, open space and the ability of infrastructure to keep pace. Other themes call for additional and direct community involvement – and explicitly say this should not just be limited to plan making stages. Other literature points to an increasing desire for direct participatory decision making models in planning in response to the tensions arising from a neoliberal agenda (Schevallar et al 2015 and Schatz et al 2016). Generally, they point to a desire for more certainty.

Looking to the future, there is a number of issues that will become critical to success of our cities, some of which may be expected to draw a range of views from the community. Infill development within existing urban areas will continue to be both an important policy position and a controversial Issue for the community (Kelly et al 2015 & Taylor et al 2016). “Density done well”5 will be a critical factor. In addition, responding to climate change and natural hazards issues will be difficult and controversial. Investment in infrastructure and services to support urban growth and change is also critical.

It is worth examining whether the current performance based regulatory regime will assist or hinder our success in managing these sorts of matters. In particular, whether it will help in navigating the difficult path between change to address our future needs and existing communities’ acceptance.

8. What should we change?

The question is not whether we should give up on a performance based system in favour of a prescriptive one. Rather: how should we balance certainty and flexibility in the planning and development regulation system? We need flexibility, but we also need discretionary decision making to be consistent, accountable and transparent.

We should be open to possibilities for improvements that can make a real difference and establish win-wins. The system has not been able to deliver the efficiency and innovation it promised, and that there are clear and on-going tensions arising from the way in which we have designed and implemented our performance based approach.

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5 A term coined by Brent Toderian, http://www.planetizen.com/node/61643
Changing the names of the development assessment paths between code, standard, merit and impact in the Planning Bill will make little difference, even though a fair amount of energy seems to have been spent in that debate.

The following suggestions do not require change to the Planning Bill, but could be things that can be given effect in the next level of documents which effectively will make up the successor to QPP: the regulations and plan making and planning scheme content guidance.

**Firm up the rules**

We might start by exploring whether all aspects deserve the same amount of flexibility. We treat the urban footprint boundary as a firm policy position. Why can’t we allow other aspects of significance to local communities and local governments to have a greater level of certainty? The potential win-win is that greater certainty will give communities confidence and support a more efficient assessment process.

This is not to advocate removing all flexibility. But we could firm up the negotiating position on certain matters. We should be clever enough to modify our approach to achieve a better balance. Perhaps we can identify these as things as specific requirements or minimum standards (rather than optional), and that they are to be met unless there are special circumstances or a higher level of performance can be achieved.

The current “sufficient grounds” tests and the new act’s “relevant matters” considerations would continue to provide room to move. Reasonable guidelines could be established and the approach can be monitored and guided through the state review process.

**Better planning schemes (and state instruments)**

Whether or not any substantive change is made along the lines suggested above, part of the answer lies in improved drafting and construction of planning schemes. This requires skill and experience, and a clear head amidst the competing and compounding demands of a wide range of stakeholders at state and local level.

A good start is to pass everything through the questions:

- what exactly am I asking of a development proposal (especially when all the parts are added together)? and
- what really needs to be regulated to achieve our strategic plan/vision (and what doesn’t)?

**Engagement and leadership**

More and better engagement is highly desirable, however we cannot continue to put all our eggs in the “local government should do better consultation in the plan making process”. In many cases, comprehensive consultation is not undertaken due to a lack of resources, rather than a lack of will or understanding of the benefits. This is unlikely to change without a new approach. Better engagement at the strategic level has been an important goal for many years, it is not the whole solution to current community discontent with the planning system.

A good start would be state funding and regional level co-ordination of community awareness and engagement programs should be initiated and set up so that local planning processes can tap into them – this would support a well-rounded, informed and on-going community discussion.
The plan making process

It is also important that we find ways to reduce the overall length of the planning scheme preparation process. Balancing state review and consultation requirements within a relatively short timeframe is needed to make sure planning policy is responsive, effective and relevant.

Overall

Neither of the legislation review processes since IPA was introduced has really involved a clear-eyed discussion about the strengths and weaknesses of the performance based operating system. Irrespective of the suggestions given above, I am hopeful this paper might stimulate some debate.
References


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