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PLANNING SCHEMES AND LEGAL ISSUES – ADJUSTING THE INSTRUMENTS TO CHANGING CONDITIONS

Paul Howorth, Associate Director, SGS Economics and Planning
Clive Attwater, Associate Director, SGS Economics and Planning
Liesl Codrington, Consultant, SGS Economics and Planning

Postal/Street Address:	Unit 1, 1st floor, Sparta Building, 55 Woolley St, PO Box 788
City, State, Postal Code:	Dickson, ACT 2602
Country:	Australia
Email:	paul.howorth@sgsep.com.au
Phone:	02 6262 7603
Fax:	02 6262 7564

Abstract

Planning has what may be described as a 'special duty of care' to populations and localities in relation to how it balances and accounts for known and emerging land use issues. Planning schemes are the instruments through which local governments implement this duty.

However, though they may be effective at regulating land use in the here and now, planning schemes are not well suited to addressing changes that may occur many years in the future, such as those that may result from climate change. The current approach is to revise planning schemes as strategic changes in land use policy are required, but when making revisions to recognise all prior uses as 'pre-existing' rights. Under the changeable conditions arising from climate change and sea level rise, this is likely to become unacceptable. Over time, these risks may create legal liability exposure to claims in areas such as private nuisance, public nuisance and negligence.

A way for local governments to account for these risks is to consider adapting planning schemes in early preparation for the onset of climate change impacts. Local governments could restructure some planning scheme provisions to invoke a future acknowledgement of and / or responsibility for land use adaptation when changes occur in a foreseeable fashion, even if the timing of that future change remains uncertain or undefined.

Indicators of change (such as a rising high tide mark in coastal neighbourhoods or other triggers) could be specified along with examples of adaptation responses that may be invoked or required as changes materialise. Specific responses need not be defined, only the public interest criteria to be met by the response. This would serve to pre-notify land users of the potential for emergent adaptation requirements. An example is the resumption and protection of coastal buffers as informed by a redefinition of the coastal strip based on width from high tide not fixed lines.

Biography

Paul Howorth is an Associate Director with SGS Economics & Planning in Canberra. Paul's career has developed three streams: Urban and regional planning, urban economics and housing policy; Indigenous development; and Law. Paul has practised as a barrister. While he was a barrister, he practised mainly in planning and environment law matters. In his planning consultancy work he continues to advise around the legal implications of planning and development policies.

PLANNING SCHEMES AND LEGAL ISSUES – ADJUSTING THE INSTRUMENTS TO CHANGING CONDITIONS

The Climate Change Challenge for Planning Systems

In recent years, as a scientific and broad political consensus has developed around the acceptance that the threat, risks and hazards of climate change are real, attention has shifted to questions about what can and should be done about climate change, when and by whom.

The realisation of the pervasiveness and current momentum of climate change has led to the emergence of the key theme of adaptation. This theme accepts that some degree of climate change is already inevitable, and therefore we need to adapt society and its institutions now to adjust to some of the foreseeable consequences of climate change.

One of the major foreseeable consequences of climate change is of course sea level rise. Sea level rise threatens to directly impact coastal land and land uses. For Australia, this is of particular concern because coastal land is occupied by so much of our existing and much of our forecast future development.

Town planning systems are the established regulators of land uses, and within these systems planning schemes are the 'manuals' that notify us – these days with block by block specificity – about what types of land uses are 'available' in a locality, where they can be developed and how land use policies and controls apply. Land purchasers, residents, developers and investors use planning schemes to determine the 'use rights' that are available within a locality, and knowing this they make long term decisions about and commitments to land. In particular, they are prepared to pay a substantial premium to access certain kinds of use rights attached to coastal land.

These decisions and commitments are made because planning systems and planning schemes provide a reasonable degree of certainty to communities, and they are generally able to provide this certainty because the matters and interests that may affect land over time are themselves usually predictable within a reasonable degree of certainty. The allocation of specified use rights to land is made with the genuine expectation that, once use rights are allocated they will remain 'fixed' for the medium to long term. In fact, to protect this expectation and the certainty upon which it is based, planning systems make it reasonably difficult to alter existing land use rights without a high benchmark of due cause, consideration and some expense.

In the climate change future, however, sea level rise caused by climate change threatens to take some of this certainty away from coastal land and land uses. While we can be reasonably certain that sea level rise will happen as a result of climate change, we are less certain about the extent of sea level rise, where it will happen, and what its effects will be on land. It is easy to speculate that some – perhaps much - coastal land (and land use) faces the future threat of inundation, destabilisation and destruction. When that future threat is likely to materialise, and how planning systems and planning schemes should treat that threat, is the challenge.

Why Should Planning Systems and Planning Schemes Adapt to Meet this Challenge?

It is a sound principle of good planning that plans are adapted to meet the changing contexts to which they apply. While it is always hoped that sound principle is pursued for its own sake, the more urgent motivation for adapting planning systems and planning schemes to meet the climate change challenge is likely to be the compulsive force of legal liability. Emerging directions in law are a significant driver of adaptation in any context. In Australia we are already seeing the emergence of 'climate change law' in relation to the decisions of authorities and individuals. The much noted decision in *Gray v Minister for Planning* [2006] NSWLEC 720[1]

[1] For a detailed discussion of this case and other recent climate change developments in planning case law see England, P (2007) *Climate Change: What Are Local Governments Liable for?* Urban Research Program, Griffith University

has opened the door for judicial review of decisions that fail to take into account the effects of a development approval on greenhouse gas emissions. And this is happening in the absence of legislative directions that are bound to be set as the wave of regulation that must surely accompany any serious climate change policy breaks.

Planning authorities are of course already exposed to liabilities associated with the quality, reasonableness and integrity of planning decisions. Existing categories of liability such as administrative review, private nuisance, public nuisance and negligence are all very alive.[2] There are signs that these existing categories will be adapted to make explicit allowance for the issue of climate change. This adaptation of the law is likely to proceed with some pace now that the debate about whether climate change is real has moved on to accepting that climate change is happening, creating the expectation that authorities will respond appropriately to it. In summary, if a planning authority does not consider the foreseeable impacts of climate change in its decision-making it will increasingly risk legal liability.

It is easy to see how liability can arise in cases where a planning authority completely fails to account for sea level rise risks. Let's take the example of a developer who wishes to acquire coastal land for developing a residential retirement village. The developer looks at the planning scheme to find land allocated for this use. The developer identifies some land and she assumes that the planning authority has determined that this land is suitable for the intended use for the medium to long term. In the zoning information, no guidance is given about the future threat to the land from sea level rise, and how that threat is to be managed should it materialise. There is a requirement that there be a 'coastal buffer' maintained at all times, using a fixed boundary as the marker for this buffer. Investments are made, the land is acquired and developed in line with planning requirements, and the development is sold to residents. Sea level rise occurs and part of the development is inundated. Significant damage is done to residences, land values plummet and land owners seek compensation. The coastal buffer is also lost as the high tide mark increases well beyond the original fixed boundary, damaging the public interest in seeing the coastal buffer retained.

In this scenario, the insurance industry (already concerned about the scale of potential liabilities arising from climate change impacts) is unlikely to be forgiving. A planning authority that is found to have failed to act in regard to foreseeable consequences such as these is likely to find itself facing full liability.

However, liability may also arise where a planning authority has tried to take account of sea level rise risks, but not adequately so. In such cases, the information, processes and mechanisms that a planning authority has used to take account of sea level rise risks may be challenged. Sometimes the challenge will be that a planning authority did not go far enough, and sometimes the challenge will be that an authority went too far, particularly with relation to how processes and mechanisms might affect pre-existing use rights. Given current uncertainties about when and to what degree impacts such as sea level rise will affect land, authorities that set processes and mechanisms now may be given some benefit of the doubt should these found to be short of the mark or overdone in the future. However, in the future as impacts become better understood and potentially more predictable, the opportunity for this leeway will diminish.

These liability threats are ultimately why authorities should begin to adapt planning systems and planning schemes now.

How Should Planning Systems and Planning Schemes be Adapted to Meet the Liability Challenge?

Though they may be effective at regulating land use in the here and now, planning systems and planning schemes are not well suited to pre-emptively addressing changes that may occur many years in the future, such as those that may result from climate change.

[2] Dr Philippa England, Griffith University *Climate Change: What are Local Governments Liable for?* Presented at the 'Adapting to Climate Change Law and Policy Coneference' ANU College of Law, 19 & 20 June 2008.

The standard approach is to revise planning schemes as strategic changes in land use policy are required, but when making these revisions to recognise all prior uses as 'pre-existing' rights. For the reasons outlined above, under the changeable conditions arising from climate change such as sea level rise, this approach is likely to become unacceptable if adaptation is to be successfully pursued.

At law, however, the maintenance or defence of pre-existing land use rights in the face of changes to planning schemes is a fundamental matter. Land use rights are purchased for value, and the purchasers of these rights are quick to claim material loss whenever these rights are diminished. Usually it is only in exceptional circumstances that land use rights are removed from part or all of a land holding. Compulsory acquisition is an example, and this is usually accompanied by fair compensation. In fact, pretty much all planning decisions that result in the diminishing of existing land use rights for specific parcels of land result in some form of compensation or negotiated settlement. Compensation and settlements may not always be purely financial. Land swaps, transferrable development rights, increased plot ratios, and development concessions are all examples.

Given the sanctity of existing land use rights before the law, how can planning authorities adjust their instruments to cater for changeable conditions? Is it possible and legitimate for planning authorities to allocate land use rights now but foreshadow that these rights may be altered if and as conditions change?

The answer to both of these questions lies in recognising that the latent value vested in the holding of existing land use rights is a value formed through expectation. If a planning authority manages the expectations associated with land use rights at the time they are acquired, there should be no difficulty. Legitimately allocating land use rights now that may be subject to change in the future is mostly a matter of pre-notification, backed by clear and certain processes and mechanisms for changing existing land use rights as circumstances change.

An approach that avoids the potential liabilities associated either with 'doing nothing' or 'doing something but getting it wrong' would include the following steps:

- Acknowledging, accepting, understanding as best as possible and communicating the risks;
- Adopting appropriate future land use policies for unreleased and / or undeveloped 'at risk' land; and
- Establishing and notifying clear and certain triggers for adapting land use policies and rights for already released and / or developed 'at risk' land.

1. Acknowledging, accepting, understanding and communicating the risks

As a starting point in the process of adapting planning systems and planning schemes, planning authorities should accept the reality of climate change, publicly and transparently investigate the potential future impacts on vulnerable localities and areas of land, make information about potential future impacts available to the community, and monitor and make use of new advice and information about impacts.

Acknowledging, accepting, understanding and communicating the risks posed by impacts such as sea level rise places planning authorities on the front foot for making decisions about how land and land use plans could or should be adapted. However, it also signals to the world at large that a planning authority is giving due consideration to the issue. This offsets the liability risks associated with 'doing nothing'.

2. Adopting appropriate future land use policies for unreleased and / or undeveloped 'at risk' land

For unreleased and undeveloped 'at risk' land, planning authorities can begin the adaptation of land use policies immediately. With an understanding of which land is at risk and the potential extent of risk, there should be no hesitation about ensuring that any future releases of 'at risk' land come with clear consideration of the potential for climate change impacts, and prescriptions for

managing 'at risk' land in light of the special risks presented.

For example, the threat of sea level rise to coastal land and land uses should mean that planning authorities immediately adjust standard planning benchmarks (such as the levels set for major flooding events) for future coastal land releases.

3. Establishing and notifying clear and certain triggers for adapting land use policies and altering land use rights for already released and / or developed 'at risk' land

In the face of uncertainty about when and to what degree sea level rise will impact coastal land and land uses, planning authorities should establish and notify clear and certain triggers for adapting land use policies and altering land use rights over time.[3] The use of triggers in planning systems and planning schemes should not be problematic if the triggers are clearly articulated and soundly based. Formal and timely pre-notification and explanation of triggers is most important.

As a concept, trigger mechanisms are easily understood – 'if or when X happens then Y follows'. The law can and does work with the concept of triggers in many other contexts. The difficulty lies beyond the concept. Planning authorities would need to be careful to clearly define and support with clear rationales what the 'ifs' and 'whens' are, and then provide clear guidance as to what follows.

Triggers could be based on:

- The passage of time e.g. naming a year in which a land use policy for nominated zones / land areas will change;
- The occurrence of an event e.g. a significant average increase in the high tide mark during any 12 month period;
- The staging of changes in land use policies for nominated zones e.g. nominating periods during which specified changes to land use policies will occur; or
- The transfer of land e.g. changing land use rights when the ownership of land changes.

Planning schemes should then be clear about what happens once a trigger occurs and what the joint responsibilities of planning authorities and land owners would be for mitigating risks or adapting to change.

In Conclusion

The emergence of climate change its impacts present a new challenge for planning authorities. Planning systems and planning schemes must be adapted to meet this challenge in the face of the increasing risk of legal liability if they fail to do so. This is not an easy challenge to face given uncertainty about the timing and extent of impacts, and the changeable conditions that will generally prevail under a climate change future. Meeting the challenge will require planning authorities to develop mechanisms that can continue to allocate beneficial land use rights now while foreshadowing the potential future need for land use rights to be altered as impacts happen. In the processes and mechanisms they adopt for meeting this challenge, planning authorities must be careful to pay attention to all potential liabilities, including not only liabilities associated with 'doing nothing' but also liabilities associated with 'doing something but getting it wrong.'

[3] A companion paper *Establishing Triggers for Adaptive Response to Climate Change* by Attwater et al explores the issue of triggers in some detail.