Southern Moreton Bay Islands Development Entitlements Protection Bill 2004

EXPLANATORY NOTES

GENERAL OUTLINE

Short Title

The short title of the Act is the *Southern Moreton Bay Islands Development Entitlements Protection Act 2004.*

Objectives

The primary policy objective of the Act is to provide for special arrangements to ensure that owners of land on the Southern Moreton Bay Islands (SMBI) as prescribed within a regulation can personally exercise their existing development entitlements to construct a dwelling on the SMBI into the future (subject to engineering and development requirements set out in Redland Shire Council's current planning scheme), notwithstanding proposed changes under the new *Integrated Planning Act 1997* (IPA) planning scheme for Redland Shire.

Reasons for the Act

The provisions proposed within the Act will enshrine in law the right of prescribed SMBI land owners to exercise their existing development entitlements to construct a dwelling on land in the Conservation zone of the SMBI. These entitlements may otherwise be lost by the adoption of revised statutory planning instruments applicable to the SMBI. The Act is consistent with Cabinet's commitment of 29 May 2000 to protect existing development entitlements of SMBI land owners.

Estimated Administrative Cost to Government

It is anticipated that no extraordinary costs to government will arise as a result of the proposed Act.

Consistency with Fundamental Legislative Principles

The Act has been prepared taking into consideration fundamental legislative principles. It is considered that the Act is consistent with fundamental legislative principles.

There is no alternative available to the use of a regulation. The Act needs to be put to Parliament prior to Redland Shire Council's draft IPA compliant planning scheme being publicly notified (anticipated in October 2004). This will assist in ensuring anyone affected by either the draft IPA planning scheme or this proposed legislation, who wishes to make a submission to Council during the public notification of the draft planning scheme, is more fully informed.

Given this context, the first reason why there is no alternative available to a regulation is that the lots zoned Conservation in the IPA compliant planning scheme for Redland Shire cannot be definitively determined at this stage; and further in cases of lots zoned Conservation and subject to some drainage constraints the land owner may be able to demonstrate subsequently that s/he is able to overcome those drainage constraints and has a development entitlement. Therefore, the lots potentially requiring the protection of the Act cannot be ultimately determined until Council's IPA planning scheme is approved by the Minister for Local Government, Planning and Women for adoption. Redland Shire Council's IPA planning scheme is still to be publicly notified, during which time submissions may be received and subsequently further evidence may be gathered by Council in relation to which lots should or should not be zoned Conservation and which lots may still be built upon. Council is required to consider all submissions, make any changes to its draft planning scheme it considers appropriate and re-submit it to the Minister for a second consideration of State interests prior to the Minister's approval for Council to adopt it. The Minister's approval can be with conditions, and these conditions provide a further instance where the exact lots subject to a Conservation zoning in Redland Shire Council's IPA planning scheme may change. This Ministerial approval is expected in mid 2005, given that Council is required to adopt its IPA planning scheme by 31 August 2005.

The second reason why there is no alternative to the use of a regulation is that Council is currently in the process of progressing a program of voluntary land purchases or exchanges on the SMBI to assist with its overall SMBI conservation strategy. It is expected that this program will be finalised in September 2004. Lots proposed to be zoned Conservation in Redland Shire Council's IPA planning scheme but acquired by Council as

part of this program will not require protection (and in fact should not be protected) by the Act.

Consultation

Consultation has been undertaken with Crown Law; the Department of the Premier and Cabinet; Queensland Treasury; the Department of Local Government, Planning, Sport and Recreation; the Department of Natural Resources, Mines and Energy; the Environmental Protection Agency and the Department of Emergency Services.

The Office of the Queensland Parliamentary Counsel has prepared the Act.

Notes on Provisions

Short Title

Clause 1 sets out the short title of the proposed Act as the Southern Moreton Bay Islands Development Entitlements Protection Act 2004.

Definitions—the dictionary

Clause 2 outlines that a dictionary in the schedule defines particular terms used throughout the Act.

Application of Act

Clause 3 provides that the Act applies for a "SMBI application", as defined in clause 4.

What is a SMBI application

Clause 4 states a "SMBI application" is a "development application (superseded planning scheme)". A 'SMBI application' must also:

- Be an application in relation to a class 1 building (a dwelling house as defined by the *Standard Building Regulation 1993*) on "prescribed land" (see clause 5 below). (The term "in relation to" reflects the fact that a development application under the

superseded planning scheme may need to be for several aspects of development such as a material change of use, and not merely for building work).

- Be made by or on behalf of an "owner" (see clause 6 below) of prescribed land.
- State the applicant wishes this Act to apply for the assessment of the application.

What is prescribed land

Clause 5 states that "prescribed land" is land on the "Southern Moreton Bay Islands" which is zoned Residential A, Comprehensive Development or Rural Non Urban immediately before the commencement of Redland Shire Council's IPA planning scheme (as defined). However such "prescribed land" must also be contained entirely within the Conservation zone of the first IPA planning scheme for the Redland Shire and be prescribed under a regulation under this Act. Not all former Residential A, Comprehensive Development or Rural Non Urban-zoned lots contained in the Conservation zone will be prescribed under the regulation, reflecting the fact that (based on detailed investigation undertaken by Council) not all these lots are capable on engineering grounds of development for a dwelling house. Owners of such lots will still be able to avail themselves of the normal arrangements under the IPA for a superseded planning scheme application and compensation (if appropriate).

Who is an owner

Clause 6 states an "owner" of prescribed land is an individual or individuals, legally or beneficially entitled to "an estate of freehold in possession in the land" immediately before the end of the consultation period for the Redland Shire Council's first IPA planning scheme. The definition specifically excludes executors, administrators, trustees, corporations and mortgagees in possession. Use of the term an "estate of freehold" is intended to include a life estate but exclude a lease.

The effect of excluding mortgagees in possession (in addition to executors, administrators and trustees) from the definition of "owner" is that if a dwelling is not complete, and the mortgagee wishes to sell the partially built house, the development approval will not flow on to a subsequent purchaser. In order for the house to be completed under the existing

development approval, construction of the house would need to be completed prior to sale.

Modified application of *Integrated Planning Act 1997*

Clause 7(1) states that for assessing and deciding a SMBI application, sections 3.2.5 (1)(b) and (3)(b) of the IPA do not apply.

Section 3.2.5(1)(b) of the IPA states that where an applicant seeks to have the superseded planning scheme apply to a development application, an acknowledgement notice must state that a development permit is required for the application. The Act precludes the requirement for such a statement.

Section 3.2.5(3)(b) of the IPA allows a council to opt to assess a development application (superseded planning scheme) under a new IPA compliant planning scheme. This would detract from the intent of the Act, which is to allow affected landowners to determine under which planning scheme (superseded or current) they wish to make a development application.

Clause 7(2) states any development approval made under the Act lapses if the relevant land is sold or transferred to an individual (other than another "owner" of the land) before a final inspection certificate under the *Standard Building Regulation 1993* is issued. This provision applies despite section 3.5.28 of the IPA providing development approvals attach to the land the subject of the approval. In the event a final inspection certificate has not been issued, a subsequent purchaser of the land (who does not constitute an "owner" under the Act) will be required to apply for further development approvals to complete construction of the dwelling. Any application in this regard will be made under Redland Shire Council's IPA planning scheme unless the ability to make a development application (superseded planning scheme) still applies under the IPA.

Clause 7(3) states that section 5.5.1 of the IPA does not apply unless all "owners" of the land enjoying the protection of the Act agree to have it apply. Section 5.5.1 of the IPA effectively allows local governments to compulsorily acquire land under the *Acquisition of Land Act 1967* to effect achievement of "desired environmental outcomes" contained within their planning scheme. Its application without the agreement of all "owners" would detract from the intent of the Act.

The Act is not intended to limit the application of other legislation, other than in the manner explicitly identified.

Certain IPA rights unaffected

Clause 8 clarifies an "owner" to whom the Act applies can claim compensation under section 5.4.3 of the IPA, if they have not made a "SMBI application" under the Act.

Section 5.4.3 (together with section 5.4.8) of the IPA applies if the only purpose for which land can be used under a new planning scheme is a public purpose, and effectively allows the owner of the land to directly seek compensation or the purchase of their land without first having to submit a development application (superseded planning scheme). It is not intended that the Act negate this option in the event that the Redland Shire Council's IPA planning scheme has such an effect for "prescribed" land.

Council may buy land at any time

Clause 9 clarifies the Redland Shire Council may still purchase land that is the subject of protection afforded by the Act. This provision clarifies circumstances where SMBI land owners may voluntarily wish to sell their land to Council.

Regulation-making power

Clause 10 clarifies the Governor in Council may make regulations under this Act.

Schedule

The schedule to the Act contains definitions necessary for interpretation of the Act. Most of the definitions refer to defined terms in the IPA.

Of note, however, is the definition of **"development application (superseded planning scheme)"** which, while intended to apply for development applications under the IPA in the same way as a development application (superseded planning scheme) defined under schedule 10 of the IPA, contains one key difference from that definition. This is that the 2 year period within which application may be made mentioned in the IPA definition is extended to 10 years under the Act.