

Resource Planning and Development Commission

Land Use Planning and Approvals Act 1993 and Resource Planning and Development Commission Act 1997

Decision and Reasons for Decision

Clarence Planning Scheme 2007 Draft amendment A-2008/26

Draft amendment A-2008/26 is to amend the scheme in various ways to:

- **provide for boundary adjustments for sub-minimum lots,**
- **make provision for permits granted prior to the scheme taking effect;**
- **clarify the application of overlays for variation of standards; and**
- **to amend the definition of kennels.**

Background

The draft amendment has been proposed to address several errors, anomalies and issues of concern that have been identified by Council since the planning scheme commenced operation on 2nd April 2008. Council's reporting advises the draft amendment is intended to assist in the interpretation of the scheme and orderly and proper planning.

Date and Place of Hearing

Tuesday 17 February 2009 at the Resource Planning and Development Commission Macquarie Street Hobart commencing at 10.00am.

Delegation

In accordance with its decision dated 1 December 2008 and in exercise of the power conferred upon it by s.8 of the *Resource Planning and Development Commission Act 1997*, the Resource Planning and Development Commission delegated to Mr Robin Nolan and Commissioner Sandra Hogue jointly and severally:

1. its powers and functions under sections 40, 41, 41A, 41B, 42(1), and 42(2) of the *Land Use Planning and Approvals Act 1993* in relation to draft amendment A-2008/26 to the Clarence Planning Scheme 2007; and
2. in connection with the exercise of those powers in performance of those functions, its powers under Part 3 of the *Resource Planning and Development Commission Act 1997*.

Representations

Representations were received from:

M K Johns

Ms B Armstrong of Page Seager Lawyers obo Sanbar Pty Ltd

Ms C Scott of Page Seager Lawyers obo Prudentia Investments Pty Ltd

Mr J B Medbury of J B Medbury Pty Ltd

Mr C M Terry of Peacock, Darcey & Anderson Pty Ltd

Appearances at the hearing

Council:

Mr D Ford represented the Clarence City Council.

Representors:

Ms C Scott of Page Seager Lawyers obo Prudentia Investments Pty Ltd and Sanbar Pty Ltd

Mr M K Johns

Interested persons:

Mrs D Dilger

Issues raised in the Representations

The issues raised in the representations included support for the provisions to validate permits issued under previous planning schemes and to raise errors in Council's reporting of the draft amendment.

Council's Response to the Representations

Council's s.39 report of LUPAA recommended several changes to the draft amendment in response to matters raised in the representations that raised errors in the drafting of the certified document.

Commission's assessment of the draft amendment

The draft amendment has a number of parts with each part considered separately.

1. Provisions for boundary adjustments - lot size

The zoning standards currently provide for boundary adjustments as permitted development where no additional lots are created and the lots meet the minimum lot size, where specified. A boundary adjustment is prohibited when it cannot meet these standards.

This part of the draft amendment proposes changes to the subdivision standards in the Residential, Low Density Residential, Village, Rural Residential, Local Business, Rural, Intensive Agriculture, Landscape and Skyline Conservation and Kangaroo Bay Special Development zones, to allow consideration of minor boundary adjustments as discretionary development where the minimum lot size for the zone cannot be met.

The draft amendment restricts this class of boundary adjustment to those situations where no additional lots are created and no further subdivision of either lot is facilitated. Additionally in the Residential and Kangaroo Bay Special Development zones, the potential number of dwellings on each lot must not be increased.

The Commission considers it appropriate for the planning scheme to allow boundary adjustments between sub-minimum lots as this will enable Council to apply discretion on a case-by-case basis to determining the appropriateness of each permit application. However this part of the draft amendment requires modification to assist in interpretation and ensure consistency in the formatting of the planning scheme.

Under the certified amendment different approaches have been proposed to amending the subdivision standards for boundary adjustments across different zones. In the Residential, Low Density Residential, Village and Kangaroo Bay Special Development zones, the new provisions are to form part of existing clauses which set the minimum lot size for each zone. While in the Rural Residential, Local Business, Rural, Intensive Agriculture, Landscape and Skyline Conservation zones, the new provisions form a separate sub-clause.

To maintain consistency in the drafting of the planning scheme provisions, a uniform approach is preferred using a standard sub-clause and this part of the draft amendment should be modified accordingly.

This uniformity principle should also be applied to the use of planning terms within clauses. The proposed clauses refer to '*undersized lot*', which is not defined or used elsewhere in the planning scheme. The clauses require modification to substitute this term with '*sub-minimum lot*', which is a term used in the *Local Government (Building and Miscellaneous Provisions) Act 1993*.

At the hearing, Mr Ford advocated a provision to allow boundary adjustment but to protect an existing subdivision potential under the zone standards. This additional standard is supported.

2. *Provisions for boundary adjustments- dimensions of lots*

This part of the draft amendment would also exclude minor boundary adjustments from being required to comply with the 'Dimensions of Lots' provisions within the Residential, Low Density Residential, Village and Kangaroo Bay Special Development zones. The clauses, as certified, were viewed as problematic as *all* boundary adjustments would no longer be required to meet minimum frontage and building envelope/internal rectangle requirements, including those that were permitted. This could result in unforeseen issues such as perpetuating or creating problems with inadequate accesses to lots, regardless of whether they meet the minimum lot size. The proposed clauses require modification to ensure the exclusion provision only applies to sub-minimum lots created from boundary adjustments.

A representor, Mr Johns highlighted several editorial mistakes in the draft amendment with suggested changes which Council has endorsed. The Commission accepts the corrections to the draft amendment and modification is required.

3. *Provisions for existing use rights and exemptions*

This part of the draft amendment proposes to address concerns that the current provisions at clause 3.12.1 do not give existing use rights or recognition to a permit for use or development that was assessed under a prior planning scheme but the permit has not been confirmed until after the new planning scheme has come into operation.

The draft amendment also proposes an additional clause 5.1.3 to Section 5 Exemptions to ensure that commencement of use or development in accordance with a permit issued pursuant to a prior planning scheme is exempt from requiring a permit under the new planning scheme. A further consequential amendment to clause 3.1.11 was proposed to assist in the operation of the new clauses.

The draft amendments have been based on legal advice received by Council following review of transitional arrangements for permits. Council has supplied copies of correspondence received from Page Seager Lawyers in April 2008 which draw attention to the issue and the subsequent legal advice sought from Mr Shaun McElwaine.

Mr Ford advised that several permits issued under previous schemes are still pending outcomes at the Resource Management and Planning Appeal Tribunal. These permits, if approved, would not lawfully establish an existing use right and do not provide certainty for commencement of use under the new planning scheme.

Two representations on the issue were received from Ms Thomas and Ms Scott of Page Seager Lawyers on behalf of Sanbar Pty Ltd and Prudentia Investments Pty Ltd, respectively. Both representations reiterate their support for the insertion of the additional clauses to enable commencement and completion of use or development in accordance with the terms of a permit issued pursuant to previous planning schemes.

At the hearing, Ms Scott submitted she concurred with Mr McElwaine's advice and provided clarification as to the necessity of the amendment in order to provide for commencement of those uses pending approval under previous schemes.

The legal advice submitted is accepted as appropriate for the *Clarence Planning Scheme 2007* but with minor modification to address drafting issues. The proposed changes satisfactorily address transitional issues relating to those permits issued under a prior planning scheme that have not substantially commenced prior to the approval date of the current scheme.

3. *Provisions to allow variations to the standards applying to overlays*

This part of the draft amendment amends clause 3.12.6 that was wrongly cited in the certified amendment as clause 3.12.3.

Currently, clause 3.12.6 allows discretionary approval of additional development in a situation where an existing development is non-conforming through the zoning provisions, provided the degree of non-conformity is not increased. The clause does not cater for non-conforming development which does not meet the requirements of a specific Overlay. The draft amendment has proposed changes to clause 3.12.6 with the intent to allow such development to be considered as discretionary.

Council advises the amended clause 3.12.6 is to principally allow for extensions to existing houses subject to the Coastal Management Overlay which prohibits development within 50 metres of any tidal flat, saltmarsh or lagoon.

In respect to the wider implications for the changes, Council considers the likelihood of additional situations arising that would be affected by other Overlays to be limited and would be addressed through the discretionary process.

With some minor modification to ensure clarity in the wording, the proposed changes to clause 3.12.6 are supported.

In addition clause 3.12.6 refers to Permit requirements specified in any applicable overlay'. 'Permit Requirements' refers to a heading that appears across the 13 overlays, but the heading varies and appears as 'Permit Required' and 'Permit Requirement'. The overlays and the contents pages should be modified to refer consistently to the heading '*Permit Requirement*'.

4. Definition of Kennels

The amendment proposes to amend the Definition of "Kennels" to decrease the number of domestic dogs subject to regulation through the planning scheme from 5 or more to 3 or more.

Council's rationale for the change is that under the previous 1963 Scheme, control was provided over the keeping of 3 or more dogs. Since operation of the new scheme, there is now no control for keeping up to 4 dogs on any property without requiring a permit which has the potential to substantially reduce amenity in urban areas, and the *Dog Control Act 2000* does not provide adequate control measures.

The proposed changes to the definition of "Kennels" are supported.

Application of State Policies

State Policies are not applicable to the draft amendment.

Schedule 1 Objectives

Part 1 objectives

- (a) *to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity;*

The draft amendment furthers the objective for sustainable development of physical resources through allowing for Council's consideration of further development associated with existing non conforming development.

- (b) *to provide for the fair, orderly and sustainable use and development of air, land and water;*

The draft amendment furthers the objective for fair and orderly use and development through provisions for the recognition of permits issued under previous planning schemes.

- (c) *to encourage public involvement in resource management and planning;*

The draft amendment has included public processes.

- (d) *to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c);*

The draft amendment furthers this objective consistent with the above objectives.

- (e) *to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.*

The draft amendment involves the sharing of responsibility for use or development principally relating to the transition between previous planning schemes and the Clarence Planning Scheme 2007.

Part 2 objectives

The part 2 objectives are furthered principally in terms of establishing a system of planning instruments to be the principal way of setting objectives, policies and controls for the use, development and protection of land.

Conclusion

In accordance with Section 40(1) of LUPAA, the draft amendment, representations and Council's report have been considered. The draft amendment is to allow consideration of boundary adjustments between sub-minimum lots, enable commencement of use and development under a permit issued pursuant to a prior planning scheme, allow existing non-conforming development to include reference to overlays and modify the definition of Kennels. The basis for which Council has proposed the changes is supported and with modification to redraft clauses and maintain consistency in formatting, the draft amendment is suitable for approval.

Decision

Pursuant to Section 41(ab) of the *Land Use Planning and Approvals Act 1993* the Commission modifies the draft amendment as set out in Annexure A and gives its approval to the draft amendment as modified pursuant to Section 42 of the Act.



Robin Nolan
Chairman



Sandra Hogue

Delegates
Resource Planning and Development Commission

6 March 2009

Attachments:
Annexure A: The modified draft amendment.

Annexure A

CLARENCE PLANNING SCHEME 2007 AMENDMENT – A-2008/26

- (1) Amend the Use and Development Standards in the Residential zone as follows:
 - (a) Insert a new clause after clause 6.1.3(c)(ii) as follows:

“(iii) If a subdivision is a minor boundary adjustment between one or more existing sub-minimum lots where:

 - *no additional lots are created; and*
 - *further subdivision potential of each lot is not facilitated; and*
 - *the potential number of dwellings on each lot is not increased,*

then it must be considered as a Discretionary development in accordance with Clause 3.1.8B.”
 - (b) Delete from Clause 6.1.3(d), the word “All” and substitute with *“Excluding any sub-minimum lots resulting from a minor boundary adjustment pursuant to Clause 6.1.3(c)(iii), all”*
- (2) Amend the Use and Development Standards in the Low Density Residential zone as follows:
 - (a) Insert a new clause after Clause 6.2.3(c)(ii) as follows:

“(iii) If a subdivision is a minor boundary adjustment between one or more existing sub-minimum lots where:

 - *no additional lots are created; and*
 - *further subdivision potential of each lot is not facilitated; and*
 - *the potential number of dwellings on each lot is not increased,*

then it must be considered as a Discretionary development in accordance with Clause 3.1.8B.”
 - (b) Delete from Clause 6.2.3(d), the word “All” and substitute with *“Excluding any sub-minimum lots resulting from a minor boundary adjustment pursuant to Clause 6.2.3(c (iii), all”*
- (3) Amend the Use and Development Standards in the Village zone as follows:
 - (a) Insert a new clause after Clause 6.4.3(c)(ii) as follows:

“(iii) If a subdivision is a minor boundary adjustment between one or more existing sub-minimum lots where:

 - *no additional lots are created; and*
 - *further subdivision potential of each lot is not facilitated; and*

- *the potential number of dwellings on each lot is not increased,*
then it must be considered as a Discretionary development in accordance with Clause 3.1.8B.”
- (b) Delete from Clause 6.4.3(d), the word “All” and substitute with “*Excluding any sub-minimum lots resulting from a minor boundary adjustment pursuant to Clause 6.4.3(c)(iii), all*”
- (4) Amend the Use and Development Standards in the Rural Residential, Local Business, Rural, Intensive Agriculture and Landscape and Skyline Conservation zones by inserting the following after 6.3.3(b)(ii), 6.7.3(c)(ii), 6.8.3(b)(ii), 6.9.3(b)(ii) and 6.10.3(b)(ii) respectively:
- “(iii) *If a subdivision is for a minor boundary adjustment between one or more existing sub-minimum lots, where:*
- *no additional lots are created; and*
 - *further subdivision potential of each lot is not facilitated,*
then it must be considered as a Discretionary Development in accordance with Clause 3.1.8B”
- (5) To amend the Use and Development Standards in the Kangaroo Bay Special Development zone as follows:
- (a) Insert a new clause after Clause 6.13.4(d)(ii) as follows:
- “(iii) *If a subdivision is a minor boundary adjustment between one or more existing sub-minimum lots where:*
- *no additional lots are created; and*
 - *further subdivision potential of each lot is not facilitated; and*
 - *the potential number of dwellings on each lot is not increased,*
then it must be considered as a Discretionary development in accordance with Clause 3.1.8B.”
- (b) Delete from Clause 6.13.4(e), the word “All” and substitute with “*Excluding any sub-minimum lots resulting from a minor boundary adjustment pursuant to Clause 6.13.4(d)(iii), all*”
- (6) Omit Clause 3.12.1 and substitute with the following:
- “3.12.1 ***Extent of existing use rights***
An existing use right is established in relation to the use of land under this Planning Scheme where section 20(3) of the Act applies.”
- (7) Insert a new clause after Clause 5.1.2 at the end of Section 5.1 of the Scheme as follows:
- “5.1.3 *Despite any other provision of this Planning Scheme, including any Use Condition, the Use and Development Standards, the requirements of any*

Specific Provision and the requirements of any overlay, the following use and development is exempt from the provisions of this Scheme:

- (a) *the commencement of a use in accordance with the terms of a permit issued pursuant to a prior planning scheme; and*
- (b) *the commencement and completion of development in accordance with the terms of a permit issued pursuant to a prior Planning Scheme;*

where:

- (i) *a prior Planning Scheme is a reference to the Eastern Shore (Area 2) Planning Scheme 1986, the Eastern Shore Planning Scheme 1963 or the Richmond Planning Scheme number 3 of 1993; and*
- (ii) *the permit has not expired in accordance with section 53(5) or (7) of the Act.”*

- (8) Omit Clause 3.1.11 and substitute with the following:

“3.1.11 Where use or development is proposed on land covered by an overlay in Section 7, the provisions of the overlay apply in addition to the provisions of the zone and Specific Provisions. The overlay provisions override those of the relevant zone, Specific Provisions and the exemption criteria under Section 5 (except Clause 5.1.3) to the extent of any inconsistency. However, unless specifically stated, the overlay provisions do not allow for a Prohibited Use or Development to be applied for contrary to the zone provisions or alter the status of a Discretionary Use or Development to that of a Permitted Use or Development.”

- (9) Omit Clause 3.12.6 and substitute with the following:

“3.12.6 Existing non-conforming development

A permit may be granted for a variation to the Use and Development Standards in the zone, other than those applying to subdivision, where the development currently does not comply with the relevant standard, or Permit requirement specified in any applicable Overlay provided the degree of non-conformity is not increased. The application must be considered as a Discretionary Development in accordance with Clause 3.1.8B.”

- (10) At Clause 4.3, omit the Definition of “Kennels” and substitute with the following:

“Land used for the keeping of 3 or more domestic dogs over 6 months of age (not including working farm dogs)”.

- (11) For applicable overlays and contents pages omit the heading ‘**Permit Required**’ where appearing and substitute ‘**Permit Requirement**’.