

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

NEW NORFOLK PLANNING SCHEME 1993

Draft Amendment 01/2008

Draft Permit DA 87/2008

The draft amendment is to insert a specified departure into the scheme to allow the shore base for Devil Jet Pty Ltd on the Esplanade at New Norfolk to be used and developed for a restaurant and take-away food shop.

The permit is for the use and development for a restaurant and take-away food shop within the premises used by the Devil Jet Pty Ltd.

Date and Place of Hearing

Tuesday, 17 March 2009 at the Derwent Valley Council Chambers, Circle Street, New Norfolk commencing at 10:00am.

Delegation

At its meeting on 2 February 2009 and pursuant to Section 8 of the *Resource Planning and Development Commission Act 1997*, the Commission delegated to Mr R Nolan and Commissioner R Howlett, jointly and severally:

1. Its powers and functions under sections 40, 41, 41A, 41B, 42(1), 42(2), 43G, 43H and 43I of the *Land Use Planning and Approvals Act 1993* in relation to draft amendment DER 01/2008 to the New Norfolk Planning Scheme 1993 and Permit No:DA 87/2008; 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

Three representations were received as follows:

Dr M D & Mrs V A Bruce

Mr R J Bruce

G Wharton

Attendance at the Hearing

Council:

Mr Martin McCance, Council Planner represented the Derwent Valley Council.

Applicant

Mr Frazer Read of GHD represented Devil Jet Pty Ltd with Mr B Harwood, Mrs K Harwood and Mr C Harwood in attendance.

Representors:

Mr Even Boardman represented Dr M D & Mrs V A Bruce with Dr Bruce in attendance.

Issues raised in the representations

- Incorrect and inadequate advertising of applications
- Documentation not available for inspection
- Site is flood prone
- Inadequate public consultation
- Technical flaws in the documentation
- Loss of amenity and could attract anti-social behaviour
- Alienation of public land
- Commercial viability and need for an additional restaurant in the town
- Devil Jet operation should relocate to its former site upstream
- Conflicts of interest in Council's decision making

Council's Response to the Representations

Because of the matters raised with the exhibition process, Council resolved to recommend to the Commission that the draft amendment and permit should be refused due to inadequate and incorrect processes followed.

Council's representative Mr Mc Cance tabled at the hearing a document (Exhibit C1) that sought to clarify Council's position to the effect that, whilst the permit was doomed Council supported the draft amendment and contended that the merits of the draft amendment were before the Commission. However this submission could not be accepted as the Council's position because there was no formal resolution of the Council to that effect. This leaves the position as per Council's decision in the s.39(2) of LUPAA report.

Commission's assessment of the draft amendment

Preliminary

Representations raised issues of process with the applications and although the process and the non-existent permit (as considered later) have confused the applications, the Commission is satisfied that the process applying to the notification of the amendment has been such that the draft amendment can be dealt with on its merits.

The draft amendment is to insert the following specified departure under the heading Schedule 11 – Specified Departures:

'Notwithstanding the provisions of Clause 7.5 of the Scheme, use and development of the Devil Jet Pty Ltd. building on the Esplanade for the purpose of a restaurant and take-away shop shall be in accordance with DA 87/2007'.

Site and locality

The subject site forms part of The Esplanade reserve at New Norfolk and consists of the former Regatta Association building located partly on the southern riverbank and partly over the Derwent River. The site is unallocated Crown land. There is no separate title and the applicant holds a Crown land licence to occupy the site.

The site and the Esplanade generally is flat land and part of the Derwent River flood plain. The surrounding land is a popular public recreational reserve with many established recreational facilities. Land use to the south forming the escarpment to the recreation area and flood plain is principally residential.

The site is currently used for the Devil Jet tourist boat operation as its shore base facility. The existing development comprises a concrete block and steel building, timber jetty and pontoon. The building over the water is supported on timber piles. The building contains an office and store for the Devil Jet rides operation and an ancillary kiosk for patrons.

Planning scheme provisions

The site and the Esplanade generally is zoned Open Space. The part of the site extending over the Derwent River is uncoloured on the plans and is therefore in the General Rural zone. Land to the south is zoned Residential.

The current use class for the site is tourism facility. There are no specific use or development standards applying to the site except clause 8.2 concerning flood prone areas. The application principally concerns land use. As development is confined to the existing building, development approval for either use is probably not required.

Merit

In terms of the planning scheme policy the application is to allow the use classes restaurant and take-away food shop in the General Rural and Open Space zones specific to the site. The merit of making these use classes available is found in the zone intents and the attributes of the site for the proposed uses.

The intent of the Open Space zone refers to encouraging recreational use, protecting scenic and environmental values and to provide facilities for a range of leisure activities. The intent for the General Rural zone is not relevant to the application, as it concerns principally subdivision. However in respect to the location of the site this is not viewed as significant to the decision as the proposed uses relate principally to the Open Space zone.

Planning for the Esplanade that includes the site, has been considered in various reports. The 1989 Master Plan, albeit not adopted by Council, refers to the Esplanade as a regional focus for recreational activity. The master plan recommended the regatta pavilion move upstream to a shared facility with the Devil Jet. The Devil Jet subsequently relocated to the regatta pavilion. Whilst the location has changed from that recommended the principle of consolidating activities and to reduce alienation of public with private (although with a public focus) activities on the riverfront has been retained and this is a principle to adopt for the current application.

It was also submitted that another planning exercise, the New Norfolk Spatial Plan 2006 saw the potential for combining the Devil Jet operation with a restaurant facility.

The attributes of the Esplanade site for making restaurant and take-away food shop available under the planning scheme include; sufficient parking, separation from residential uses and the provision of additional services for use by the public in an area that contemporary society expects for a waterfront.

The representors claim the site is flood prone and there is no dispute about this. The planning scheme at clause 8.2.1 requires an assessment of applications in flood prone areas in terms of not unduly restricting the free flow of a water course in flood and not causing undue risk to occupants and users of the site. For the purpose of the amendment, the flood prone status of the land is recognised, however there is no evidence of the current building unduly restricting the free flow of flood water. However in that respect, and for any assessment of risk, it is for any subsequent permit to address. Clause 8.2.1 is styled in terms that mean an application will not be approved unless the assessment requirements are satisfied. It is a matter of either meeting the requirements or not with no exercise for discretion under section 57 of LUPAA.

The counter submissions from the representors, who advocated rejection of the draft amendment, contended that the absence of a permit did not allow the details of the proposal including hours of operation, night lighting and car parking to be known. These submissions do not assist the consideration of the draft amendment in terms of the policy settings for the planning scheme.

To summarise, the consideration of a restaurant and a take-away food shop for the site in the general rural and open space zones is considered reasonable in terms of merit. The planning scheme should recognise this in terms of a policy position for the site. In this context the merit of making a restaurant and take-away food shop generally available in the two zones has not been examined as this would be beyond the scope of the draft amendment.

Modification to the Draft Amendment

The draft amendment as certified established the principle of a restaurant and take-away food shop in the Devil Jet building. Further, the draft amendment attempted to set aside all the provisions in the planning scheme through a 'notwithstanding' clause, did not identify the intended use classification for restaurant and take-away food shop and required such uses to be in accordance with the permit.

As referred to below the permit does not exist, it is only the table of uses that require 'notwithstanding' and the use status required to be stated. The uses should be discretionary because as originally proposed the public would have had input on the permit, but the failure to properly deal with this has left the public without this input. Discretionary status for the use classes restaurant and take-away food shop will retain the public processes on the details of the permit application under s.57 of LUPAA.

Commission's Assessment of the Permit

Council, the applicant and representors agreed that the planning authority had not issued a planning permit as part of the s.43A combined permit and amendment process of LUPAA. Therefore there is not a permit before the Commission and any purported permit is refused.

Application of State Policies

State Coastal Policy 1996:

The draft amendment involves land in the coastal zone as defined in the Policy. The draft amendment is prepared in accordance with the Coastal Policy where the need is minimised for engineering or remediation works to protect land, property and human life

from flooding; there is environmental capacity and little conflict with the natural and aesthetic qualities of the coastal zone beyond that existing; and the public's common right of access to and along the coast is not further diminished. In addition the intended uses, whilst associated with the Devil Jet, are associated with a use that is coastal dependant.

Interim State Policy on the Protection of Agricultural Land 2008:

The draft amendment does not involve agricultural land as defined in the Policy.

State Policy on Water Quality Management 1997

The Policy does not have application to the draft amendment. Any subsequent permit application will need to ensure appropriate water quality and stormwater measures consistent with the Policy.

National environmental protection measures

National environmental protection measures do not have application for use or development of the site.

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;

There is no evidence that the draft amendment conflicts with this objective for the sustainable development of natural and physical resources or that the maintenance of ecological processes and genetic diversity are matters applicable to the site.

(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 allowing for applications to be made for a restaurant and take-away food shop in a location that has capacity for these uses.

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

The draft amendment has included public processes. Any subsequent permit applications will involve 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 furthers this objective by the involvement of government, the community and industry in the planning process.

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 and to secure a pleasant, efficient and safe working, living and recreational environment.

Conclusion

In accordance with s.40(1) of LUPAA, the draft amendment, representations and Council's report have been considered. The draft amendment with modifications is to make the use classes restaurant and take-away food shop available as site specific uses in the Open Space and General Rural zones. The modified draft amendment should be approved.

The purported permit, by failure of process, does not exist and should be refused.

Decision

- (a) 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; and
- (b) Pursuant to Section 43H (1)(b)(i) of the *Land Use Planning and Approvals Act 1993* the Commission refuses the permit.



Robin Nolan
Chairman



Roger Howlett

Delegates
Resource Planning and Development Commission.

1 April 2009

Attachment: Annexure A The modified amendment

ANNEXURE A

Resource Planning and Development Commission

New Norfolk Planning Scheme 1993 Draft Amendment 1/2008

The scheme is amended as follows:

- (i) S11.4 Notwithstanding the status of development in the restaurant and take-away food shop use classes in Table 10 for the General Rural zone and Table 13 for the Open Space zone, the use or development for a restaurant or take-away food shop shall be discretionary in accordance with clause 7.5.1 for land comprising the former regatta building and external deck structure as existing at 1 April 2009 on the Esplanade at New Norfolk and as indicated on the Plan by reference to this clause.
- (ii) The Plan is amended as follows to identify the site at the Esplanade New Norfolk with reference to clause S11.4.

