



### **Date and Place of Hearing**

Wednesday 29 April 2009 at Brighton Council, Tivoli Road Gagebrook commencing at 10.00am. The hearing reconvened on Monday 4 May 2009.

### **Representors**

During the public exhibition period, twenty two (22) representations were received. Of those, twenty (20) representors raised objections to the proposal and two (2) were in support.

The representors are:

Mr Michael Gallagher	Mr & Mrs Steven & Linda McKenzie
Mr & Mrs SC & LM Rimon	Ms Rae Story
Mr & Mrs Michael & Linda Vamplew	Mr & Mrs Peter & Janina Bourke
Mr Patrick Pickard	Mr & Mrs Bruce & Christine Hoskinson
Mr & Mrs David & Lorraine Gandy	Mr David Roberts & Ms Sally Gregory
Ms Valerie D Arnott	Mr Hank Petrusma
T K Harrold	Mr & Mrs John & Sue Argee
Mr & Mrs R & J Bone	Mr & Mrs Lucas & Annie Jacometti
Mr D Haworth	Mr & Mrs Luis & Maria Feliciano
Ms Cheryl Baker	

### **Attendance at the Hearing**

**Council:** Miss J Tyson for Brighton Council

**Applicant:** Mr C Gunson & Ms K Turner, legal counsel  
Mr A Goodsell, Town and Country Planning Pty Ltd  
Mr I Ferris and Mr P Milner (by phone)  
Mr G Corney  
Mr L Jacometti (the applicant)  
Mr P Wood (owner)

**Representors:** Mrs S Argee  
Mr D Haworth  
Mr M Vamplew  
Mrs J Bone  
Mrs L Rimon  
Mr and Mrs P & J Bourke

### **Issues raised in representations**

Representations in support of the draft amendment and permit were expressed in terms of providing additional land for housing and to create public open space along the waterfront.

The issues raised in the representations objecting to the draft amendment and permit were expressed in the following terms:

*For the amendment*

– threaten the property's heritage significance;

- adversely impact on the habitat of native fauna using the site;
- compromise road and traffic safety and increase the cost of road maintenance;
- suitability of the site for residential purposes from climate change causing sea level rise and increasing flood events;
- residential development will reduce existing residential amenity;
- result in the devaluation of surrounding land;
- fails to further the Objectives of the Resource Management and Planning System and the Land Use Planning and Approvals Act;
- fails to comply with the State Coastal Policy;
- cause conflicts with other land use and development in the region;
- cause loss of views and recreational space;
- there is more appropriate land in the area that is available for high density residential development; and
- adverse impacts on the River Derwent.

*For the permit*

- removal of vegetation causing loss of visual amenity;
- use of Crown land for private purposes;
- validity of the application as Crown consent for the access has not been obtained;
- queries regarding the zoning of the Crown land used for the access road given the prohibited status of Major Roadworks in the Recreation zone;
- concerns regarding the proposed access and traffic safety;
- application requirements have not been fulfilled including the requirement for a site analysis showing soil conditions and a site plan;
- proposed boardwalk, gazebo and access road are located within 30m of a waterway thereby contradicting the provisions of the Waterway Overlay;
- the proposal has an adverse impact on existing residential amenity and is not consistent with the character of area;
- concerns regarding adequacy of existing infrastructure to cope with increased capacity;
- concerns regarding the suitability of the boardwalk for disabled users; and
- negative impact on heritage values.

**Council's Response to the Representations**

Following the public exhibition period, Council recommended refusal of the draft amendment on the grounds that it failed to meet (c), (f) and (g) of Part 2 of the Schedule 1 Objectives of the *Land Use Planning and Approvals Act 1993*. The reasons articulated in Council's s.39 report are as follows:

- Objective 2(c):  
*The proposal will impact adversely on flora, fauna and ecological processes and does not adequately take into account the environmental attributes of the river interface in the light of the increasing highwater mark. Additionally the land has been a source of local pride and the rezoning would have adverse social impacts on neighbouring residents.*
- Objective 2(f):

- *The proposed amendment detracts from the current pleasant sustainable residential development and a reduction of recreational land in Bridgewater and the openness it provides will devalue the amenity of that which currently exists.*
- **Objective 2(g):**  
*The conservation value of the heritage listed property know as “Fairfield” and surrounding sheds and other outbuildings will be lost or severely compromised by residential encroachment defeating the reason for the current Recreation zoning.*

In addition, Council states:

*Council concurs with the objectors letters in relation to the presence and adverse impact on wildlife in the area as well as the refusal by the Tasmanian Heritage Council. Land is currently zoned recreation the purpose of which is (a) to recognise areas for public recreation and open space; (b) to protect and conserve areas of significance where appropriate, as stated in Section 6.9.1 of the Brighton Planning Scheme 2000.*

In relation to the s.43A permit, Council’s s.39 report states:

*As access over the Crown land to the proposed 26 lot subdivision has not been finalised and the Tasmanian Heritage Council recently refused a Works Application for the subdivision the recommendation before the Council is to support the rezoning only.*

*Any future development of the site will be subject to a new development application.*

Council’s position at the hearing was that Recreation zoning was the most suitable zone to protect the area.

### **Commission’s assessment of the draft amendment**

#### ***The draft amendment***

The draft amendment is to rezone part of the land at 14 Nielsen Esplanade, Bridgewater from Recreation to Residential. Recreation zoning is retained for the creation of a riparian reserve parallel to the Derwent River.

#### ***Preliminary matters***

##### *Validity of the application*

A preliminary matter raised at the hearing was the validity of the application as there was no evidence that the owner’s consent was present in the documentation provided by Council. Section 33(2A) of LUPAA requires that a request to a planning authority to amend the planning scheme by a person who is not the owner of the land must be:

- (a) *signed by the owner or owners of land; or*
- (b) *accompanied by the written permission of the owner or owners to the making of the request.*

Mr Gunson, legal counsel for the applicant, submitted that although the provisions of the Act were considered mandatory, the absence of owners consent was not fatal to the request for the amendment as it is a procedural matter that can easily be rectified. In addition as noted later, with the removal of the permit from consideration, the need for the

Crown's approval as land owner was removed, as the application did not then involve Crown land. The Commission agreed with Mr Gunson's submission on the matter.

*Resolution of outstanding matters*

Mr Gunson sought an adjournment of the hearing in order for outstanding matters relating to the permit to be resolved. The refusal of the heritage works application for the subdivision was pending an appeal at the Resource Management and Appeals Tribunal (RMPAT) and the Crown consent to facilitate access is under review by the Minister. Mr Gunson argued against the separation of the amendment and permit on the basis that this would allow resolution of heritage matters and address issues of the validity of the permit application.

Mr Gunson also sought revision of the s.39 report by Council submitting that the document was inadequate and provided minimal grounds for Council to no longer support the application following the public exhibition period. The Commission did not concede to Mr Gunson's request for an adjournment and determined that Council's s.39 report fulfilled the intent of that part of the Act.

*S.43A permit*

The Commission rejected the s.43A permit at the hearing on the basis that the heritage works application was refused and that an altered subdivision plan, as presented by the applicant in response to the outcomes of mediation through RMPAT, represents a substantial alteration to the plan that underwent Council assessment and public exhibition.

As a result of the Commission's rejection of the permit, only those issues relevant to the draft amendment were addressed at the hearing.

***Relevant provisions of the scheme***

Part 2 of the planning scheme provides the objectives. The residential objectives include encouraging diversity in residential type, to ensure that the future patterns of residential development protect and enhance the natural and man-made assets and to encourage infill within the existing townships. The recreation and leisure objectives include encouraging open space linkages within the urban areas and along the foreshore and watercourse areas.

The purpose of the Recreation zone at clause 6.9.1 is:

- (a) *To recognise areas for public recreation and open space.*
- (b) *To protect and conserve areas of significance where appropriate.*

The standards for subdivision in the Recreation zone provide for permitted development when for consolidation of lots, boundary adjustment, public utilities or public open space. There is no minimum lot size and the lot configuration must reflect the minimum requirement to accommodate the designated use or development and its necessary infrastructure.

The permitted uses in the zone as listed in the table of use or development at table 6.9.1 are community services (public park or playground), natural and cultural values management and utilities (reticulated services). Discretionary uses are sports and

recreation, tourist accommodation, tourist operation, permitted uses not meeting the condition and undefined use or development.

The purpose of the Residential zone at clause 6.2.1 is:

- (a) *To ensure sufficient land is available to meet anticipated demand for residential use in the next 5 years.*
- (b) *To protect residential amenity by reducing the potential for land use conflicts between residential uses and other uses.*
- (c) *To allow for a range of housing types within the zone, subject to meeting performance guidelines, so as to satisfy different housing needs within the community.*
- (d) *To restrict non-residential uses to those that are compatible with maintaining residential amenity and servicing local needs.*
- (e) *A broad range of residential options should be accommodated subject to the maintenance of satisfactory levels of amenity for new and existing development.*

Permitted use and development as listed in the table of use or development at clause 6.2.3 are community services (public park or play ground), natural and cultural values management, residential (if not more than 2 dwellings) and utilities (reticulated services). Discretionary uses include residential (where not permitted) and tourist accommodation.

The Waterway Overlay applies to the part of the site that remains in the Recreation zone. The provisions for the Waterway Overlay include a minimum setback for development of 30m from the nearest bank of a waterway and restrictions on development within the area of the waterway.

Schedule 5 – Coastal and River Foreshore Development applies to use and development within 30m of the High Water Mark of the Derwent River. Proposals must demonstrate that they ‘*will satisfy the State Coastal Policy and that any building will not be subject to inundation from the 1 in 100 year estimated flood levels (ie. 3 metres AHD)*’.

The site is listed in Schedule 9 – Heritage Schedule as being on the Register of Places of Cultural Significance. Council is required to take into consideration matters listed in Clause S9.5 before deciding on an application.

### **Consideration of issues raised by the Representors**

#### ***Loss of views and recreational space/decreased residential amenity***

Representors raised objections to the rezoning on the basis that it facilitates residential development and that would result in the loss of semi-rural character, views and open space which will detrimentally impact on their residential amenity. Access to the site is required from Gunn Street which requires the use of an area of Crown land. Representors objected to the loss of part of this Crown reserve as it is considered by residents as valuable public recreational space.

Council’s submissions were that the strategic basis for zoning the land Recreation was to preserve the site’s cultural heritage value and in the absence of a more appropriate zone, Recreation zoning was deemed to achieve this outcome. By limiting use and

development on the site the Recreation zoning protected the open space qualities, enhancing visual amenity for surrounding residents.

An analysis of the site and characteristics of the surrounding area reveals that there is adequate recreational space available to the community. While currently the majority of the site consists of vacant land in the form of disused paddocks, the recreational opportunities under the existing Recreation zoning are not available to the public because the site is privately owned. Council has indicated that there is no intention to acquire the land for public open space. In this regard, the Recreation zoning does not meet the purpose stated for that zone in terms of recognition of public recreation and open space or as discussed below to protect and conserve areas of significance. Recreation zoning does not reflect the existing use and does not of itself ensure the retention of open paddocks into the future. In addition alternative uses of the site are significantly restricted by the provisions in the Recreation zone.

While it is accepted that the draft amendment will impact the visual amenity of existing residents by changing their outlook towards the river, this outlook is not necessarily preserved with Recreation or Residential zoning unless dedicated as public open space. The rezoning facilitates the orderly expansion of residential use and development consistent with Residential zone provisions reinforcing the surrounding urban pattern and form.

#### *Land Use Strategy*

Representors questioned the need for making this land available for housing when there appears to be larger and more suitable areas of land in the vicinity which could be more appropriately used for residential purposes. Concerns were also raised regarding the ability of the land to be serviced appropriately given the adequacy of Council's existing water mains and sewerage pump stations.

The location provides for the consolidation of urban residential use and development in an area that has demonstrated suitability for such purposes consistent with the residential objectives and residential zone purpose. There is no evidence before the Commission to suggest that the provision of reticulated services to the site will cause an unnecessary burden on the capacity of existing infrastructure.

#### *Land use conflict*

Issues were raised in the representations regarding the potential for increased land use conflict as a result of the draft amendment. Representors claimed that high density residential development will conflict with those objectives of the Recreation zone that encourage the maintenance of open space linkages within urban areas and provide for long term use for recreational activity.

Although the site is zoned Recreation it is not public land and therefore can not provide public open space linkages within urban areas. The Commission does not conclude there is a potential conflict between residential and recreational land uses.

#### *Access*

Representors objected to the use of Crown land to gain access to the site. The applicant identified the availability of alternative access arrangements to the site. However the final

position on access point(s) to Gunn Street is a matter relevant to the consideration of a permit rather than the draft amendment.

#### *Traffic management and safety*

Representors raised concerns that an increase in traffic to the area will significantly affect road safety and residential amenity due to noise.

A Traffic Impact Assessment (TIA) was prepared for the site based on the 26 lot subdivision which, although the Commission has rejected the s43A permit, the TIA is nonetheless relevant to the representors' issues associated with the rezoning and reduced amenity through increased traffic as a result of future residential use. The TIA demonstrated that the refused s.43A permit would generate 349 vehicle trips per day and that this would not significantly alter the current level of service in Gunn Street or existing user amenity.

Future development of the site will be serviced by Gunn Street and/or via Nielsen Esplanade and must comply with relevant access standards. The planning scheme requires a TIA for developments likely to generate in excess of 100 traffic movements per day. Ultimately this is a matter for consideration with any subsequent permit application.

#### *Heritage*

'Fairfield' is listed on the Tasmanian Heritage Register, the Register of the National Estate, National Trust (Tasmania) and the Heritage Schedule of the *Brighton Planning Scheme 2000*. Representors raised concerns about the impact the rezoning and future residential development will have on the heritage values of 'Fairfield'.

Any future proposal for the site will require a Works Application to be approved by the Tasmanian Heritage Council. In addition, Clause S9.5 of the scheme lists those matters that Council must consider before deciding on an application listed on the Register of Places of Cultural Significance. They include:

- a) *the cultural significance of the place and whether the proposal will adversely affect the cultural significance;*
- b) *any applicable heritage study and any applicable conservation policy;*
- c) *whether the location, bulk, form and appearance of the proposed building will adversely affect the cultural significance of the place;*
- d) *whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and cultural significance of the place;*
- e) *whether the demolition, removal or external alteration will adversely affect the cultural significance of a place;*
- f) *whether the proposed works will adversely affect the cultural significance of a place;*
- g) *whether the proposed subdivision or consolidation will significantly adversely affect the cultural significance of a place;*
- h) *whether the proposed subdivision or consolidation may result in development that will significantly adversely affect the cultural significance of a place;*
- i) *na*
- j) *whether the pruning, lopping or development will significantly adversely affect the health, appearance or cultural significance of a tree specified on a place;*

- k) *any advice sought and/or received from the Tasmanian Heritage Council or the Aboriginal Heritage Office; and*
- l) *na.*

Although Council failed to assess the s43A permit against the provisions of Schedule 9, future use and development must take into consideration the heritage values of the site and all applications are discretionary for the title containing the heritage place. Discretionary status affords the public the right of appeal should they consider Council neglected to implement Schedule 9. A key matter for heritage is the setting and the protection of the curtilage of buildings within that setting. The principal view of the setting is from the Midland Highway causeway to Woods Point and the prominence of this setting in relation to the river that can be retained by houses being setback from the water. This setback will be achieved through the riparian reserve and the additional building setback for future coastal processes and sea level rise.

The conservation plans have defined the curtilage of the buildings and demonstrates scope for additional residential development on the site and that preserves the heritage setting.

#### *Natural hazards*

Concerns were raised regarding the impact of sea level rise on any future development due to the riparian location of the site on the banks of the Derwent River.

The Commission heard (via telephone) from Mr Ian Ferris who authored the Coastal Vulnerability Report for the subject site. It was Mr Ferris's submission that coastal processes affect this site albeit the site is in the upper extremities of the tidal zone. Mr Ferris submitted that the site is generally between 2-4m AHD with a lower area to the south. Based on a number of projected scenarios which take into consideration the extent, rate and degree of sea level rise, storm surge, surge (king) tide and wave action, Mr Ferris assessed a conservative inundation level of 2.42m AHD, based on a 100 year life of asset and a 70% exceedance probability.

Schedule 5 – Coastal and River Foreshore Development states;

- S5.3 *An application for development or use which is proposed within 30 metres of the High Water Mark of the tidal reaches of either river (Jordon or Derwent River) shall be accompanied by a report demonstrating that the proposal will satisfy the State Coastal Policy and that any building will not be subject to inundation from the 1 in 100 year estimated flood levels (ie 3 metre AHD).*

Council submitted that the figure of 3m AHD was derived from an assessment of sea level rise on land located at Old Beach but the assessment is that the 1:100 year flood is not 3m AHD. The Commission acknowledges the Ferris description of the site taking its geographical location, being located upstream of Old Beach, more protected from prevailing winds, shorter fetch reducing the size of the wave and its erosional capacity and the weakly tidal shoreline, and accepts the inundation minimum level of 2.42m AHD as appropriate for this site. Mr Ferris submitted that the 2.42m AHD should be the lowest level for development including roads, piped services, changes to the land and buildings.

Mr Goodsell referred to the fact that setting a minimum floor height of 2.75m would protect against a 1:100 year event in 2100. The evidence is that for the purpose of the draft amendment most of the site will not be subject to inundation for estimated sea level rise. A final position on building setback from the Recreation zone boundary, a building site free of inundation as required by s.109(1)(h) of the *Local Government (Building and Miscellaneous (Provisions) Act 1993* and the establishment of a minimum habitable floor level are matters for subsequent subdivision and residential approval processes. At this stage however the evidence partly supports the claim of the representors that the land is unsuitable for residential development where below 2.42m AHD. Figure 4 page 6 of Mr Ferris's evidence plots the 2.42m AHD contour, this should define the limit of development, with the actual residential yield from the site yet to be determined. Part of the evidence suggested 'backyards' of lots could be in the area below 2.42m AHD, the appropriateness of this is also a matter for later determination.

#### *Environmental impacts*

Representors raised concern that future use and development facilitated by the rezoning will adversely impact on the environment, including destroying the habitat of native bird species.

A Vegetation Assessment, Flora and Fauna Habitat Survey for the site was undertaken by Philip Milner. Mr Milner's submission was that no threatened species of flora or fauna observed on the property. The submission noted that the extent of the foreshore reserve will adequately conserve the foreshore zone and its remnant vegetation and provide opportunities for revegetation and shoreline management.

The representors questioned the adequacy of the survey in providing a representative account of the diversity of species using the site given the temporal restraints that are a cause of limitation to such assessments. Mr Milner made the distinction between those species that are 'residents' and those which are 'visitors' to the site. A resident animal requires the use of the site to perform its ecological functions while a visitor may use the site for some of its ecological functions on what is fundamentally an opportunistic basis. While Mr Milner agreed that threatened species such as the White Bellied Sea Eagle and Wedge Tailed Eagle may be seen in or around the site, such species have large feeding territories and are likely visiting the site for foraging purposes. With the riparian setback for buildings, the impact of the draft amendment on visiting animals is considered acceptable.

#### *Riparian reserve*

As noted above the riparian area of the site is to remain in the Recreation zone and as part of any subdivision it should be dedicated as public open space. The plan scales this area as a minimum setback of 30m from high water. Based on the evidence of Mr Ferris, the high water mark at the south eastern end of the site should be the 'current terrace' as shown on Figure 2, page 3 of his evidence. The Recreation zoning is then a minimum width of 30m. This then may be expanded as part of an open space contribution taking additional land based on the design of any subdivision with a minimum development height of 2.42m AHD.

## **Application of State Policies**

### *State Coastal Policy 1996*

The draft amendment provides for residential development based on an existing town, retains Recreation zoning on the foreshore to protect coastal features, aquatic environments and provides separation from coastal hazards. The draft amendment is assessed as being prepared in accordance with the Policy.

### *State Policy on Water Quality Management 1997*

The site is within the sewerage area and erosion and stormwater can be appropriately managed. The draft amendment is assessed as being prepared in accordance with the Policy.

### *Interim State Policy on the Protection of Agricultural Land 2008*

The Policy defines 'agricultural land' as meaning:

*All land that is in agricultural use or has the potential for agricultural use that has not been zoned or developed for another use or would not be unduly restricted for agricultural use by its size, shape and proximity to adjoining non-agricultural uses.*

The site is not agricultural land. Rezoning to Residential is not inconsistent with the State Policy.

### NEPMs

The national Environmental Protection Measures 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 site has been significantly modified from its original riparian habitat. The draft amendment is assessed as not a threat to ecological processes or genetic diversity.

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

The draft amendment represents the fair, orderly and sustainable use and development of land as it provides for residential consolidation in an area that is adequately serviced for that purpose.

- (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 facilitates economic development in accordance 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 and subsequent use or development will require the sharing of responsibility consistent with the objective.

**Part 2 Objectives**

Part 2 Objectives are furthered principally in terms of helping to deliver sound strategic planning and co-ordinated action by State and local government while ensuring systems of land use and development planning policy integrate environmental, social, economic, conservation and resource management policies at State, regional and municipal levels.

**Conclusion**

The draft amendment to rezone land from Recreation to Residential is appropriate in terms of the suitability of the site for residential use and the limitation of Recreation zoning where there is no intention to acquire for public open space. Residential zoning through subsequent development offers the prospect of public open space and riparian reserve on the Derwent River foreshore that remains in the Recreation zone.

As determined at the hearing the permit is refused because of the redesign as part of the gaining of a works permit under the Historic Cultural Heritage Act 1995 but with no assessment by the Council.

**Decision**

The Commission is satisfied that the draft amendment is in order and gives its approval pursuant to Section 42 of the *Land Use Planning and Approvals Act 1993*.

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



Robin Nolan  
Delegate  
Resource Planning and Development Commission  
30 June 2009