

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

DEVONPORT & ENVIRONS PLANNING SCHEME 1984
Draft Amendment 2008/04

Draft Amendment

The Draft Amendment proposes to alter the planning scheme ordinance by inserting into Table 2.2 Classification of Reservations, "Private Recreation" as a land use for the Public Open Space, Private Open Space and Proposed Public Open Space Reservations.

Delegation

In accordance with its decision dated 5 January 2009 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 John Vandenberg 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* (LUPAA) in relation to draft amendment AM 2008/04 to the Devonport & Environs Planning Scheme 1984; 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*.

Background

The application has come about as a consequence of Council officers investigating the type of planning application required, should the Devonport Bowls Club wish to relocate to land at North Fenton Street, adjacent to the Devonport Oval. The potential site is "reserved" Public Open Space (not zoned) and a Table at Clause 2.2 establishes the purpose for which particular categories of land can be used.

Council's legal advice was that a bowls club should be categorised as a Private Recreation use class, a use not currently allowed on any category of reserved land. Council reported that the prohibition of Private Recreation on reserved land has wide ranging consequences for a large number of other facilities should they wish to expand or redevelop; these included the Council owned swimming pool, Spreyton Bowls Club, East Devonport Bowls Club and Devonport Golf Club.

Council identified that the changing nature of sport makes the allocation of a Use Class more difficult because of the similarities between the defined use Private Recreation and another related definition, Recreational Grounds. The Private Recreation definition cites examples as squash courts, tennis courts, swimming pools, bowls clubs and golf clubs. Recreational Grounds by definition includes such things as grounds for athletics,

licensed club rooms, racecourses, showgrounds etc. Private Recreation is a prohibited use whereas Recreational Ground is an allowable use in the Public Open Space, Private Open Space and Proposed Public Open Space Reservations.

Council contends that a Private Recreation facility is unlikely to have any greater impact than a similar sized Recreational Ground facility and therefore, both use classes should be treated similarly.

Because of the impending introduction of a new planning scheme, Council does not wish to go through a process of zoning the various parcels of land which are currently reserved.

Documents Supplied by planning authority

- s.35 certification report and supporting documentation;
- four copies of the certified Amendment; and
- s.39 report.

Representors and Issues raised in Representations

Representations were received:

Mr Michael Derrico	A M Pizzirani (withdrawn)	Mr Nigel Armstrong
Ms Therese Derrico	L M Hollister	Mr Shane Armstrong
Mr Darryn Derrico	S Medwin & K Tillack	S Waters
E T Lord	Mr Les Davidson	T Waters
Mr Nick Derrico	R Loome	M Lord
S Lafters	M Lillico	M J Conway
Ms Danielle Harris	Mr George Chaklias	B McKelvey
G A Ross	Mr John Derrico	J & L Savage
D Papas	Ms Lisa Brinkman	Ms Barbara Conway
Ms Brenda Leary	W Derrico	G Archer
Ms Maureen Imlach	D P Derrico	Wayne McConachy
J & M Smith	Ms Patricia Matthews	D B Chisholm
Mr Mark Stedman	C Goodrick	J G Fore
Plus three unidentifiable signatures		

The representations were almost identical, being a form letter. Many of the issues raised related to: -

- (a) anticipated development for a bowls club on a specific parcel of public land adjacent to the Devonport Oval, and thus consequential loss of opportunities that this open space provided for other activities such as, cricket nets, overflow car parking, emergency access, and as a buffer area and part of the City's 'green belt';
- (b) opposition to privatisation of public open space for the benefit of one organisation prior to completion of other assessments, such as a recreational facility master plan, a traffic assessment, an environmental impact assessment, a community impact assessment and a pending decision by the Resource Management and Planning Appeal Tribunal (RMPAT).

Council's Response to the Representations

Council considered the issues in the representations and resolved not to recommend any alteration to the Draft Amendment.

Council's response noted as follows:

- Whilst the amendment makes way for a bowls club on a particular parcel of reserved land, it will also accommodate future expansion of other existing Private Recreational uses such as the golf club, swimming pool and other bowls clubs.
- Private Recreational uses are unlikely to have greater impact than the already permitted use Recreational Grounds.
- The amendment is not inconsistent with the intent of the new Recreation Facility Master Plan.
- The land surrounding the Devonport Oval (North Fenton Street) is not required for unstructured recreation and the concerns in respect of access, car parking, buffers between residential development etc can be dealt with through a (future) development application process.
- A preliminary assessment indicates that the land adjacent the Devonport Oval is suitable for future development. In any case, the issues in respect of a specific development are not part of this amendment.

The Hearing

The following persons attended:

Therese Derrico

Loretta Hollister

Lisa Brinkman

Council was represented by Rebecca Wilson and Stuart Jones.

As far as the issue raised in representations in respect to the perceived consequential loss of opportunities to use the open space provided for other activities, the Council tabled the decision of RMPAT (B. Wylie and Other v. Devonport City Council [2008] TASRMPAT 267, delivered on 27 October 2008). The appeal was against Council's decision to lease land adjacent to the Devonport Oval to the Devonport Bowls and Croquet Club.

Council's decision was made in accordance with s178 of the *Local Government Act 1993* and the appeal was made on the ground provided by s. 178A that the community would suffer undue hardship by loss of access to public land or that there was no similar facility available. The Tribunal found, at para 24, that "whilst some inconvenience will result to the community from Council's decision, it does not constitute undue hardship within the meaning of the section" and dismissed the appeal. The Tribunal's decision has no bearing on the Commission's deliberations concerning the merits of this draft amendment.

Analysis

Key issues for this amendment are considered to be: -

1. Whether the draft amendment appropriately resolves the anomalies and difficulties identified by Council in the way applications for recreational use and development on reserved land are categorised and considered;
2. Whether the draft amendment contributes to fair and orderly development of the City;
3. Whether the draft amendment furthers the objectives of Schedule 1 of the Act, in terms of encouraging public involvement in resource management and planning.

The scheme provisions which currently apply predate the *Land Use Planning and Approvals Act 1993* and employ a structure that is outmoded. Recent planning schemes categorise use and development on the nature of the proposed activity rather than the kind of land tenure involved. Now that s.4 of LUPAA has established that that Act binds the Crown in the State of Tasmania the distinction between 'reserves' and 'zones' is no longer relevant in planning schemes.

Part 2 of the planning scheme deals with Reservation of Land and the Table to Clause 2.2 then establishes the particular types of defined use that are allowable in each category of reservation, as shown below.

Column 1 Land Reserved and its indication on the plan	Column 2 Purposes for which land reserved
All land shown as Public Purposes (coloured yellow)	Government purposes, Council purposes, Community Centres, Education Establishments, Hospitals, Health Centres, Car Parks, Cemeteries & Crematoria, Welfare Institutions, Churches.
All land shown as Public Open Space (coloured mid silk green)	Botanical Gardens, Public Park and Passive Recreation, Recreational Grounds, Museums and Zoos. The installation of Utility Services (minor)
All land shown as Private Open Space (coloured green)	Botanical Gardens, Recreational Grounds.
All land shown as Main Road (coloured persian orange)	Main Road
All land shown as Proposed Public Open Space (coloured mid silk green with black diagonal lines)	Botanical Gardens, Public Park, Passive Recreation, Recreational Grounds, Museums & Zoos.

The Table also includes a number of undefined purposes for which land may be reserved (such as cemeteries, crematoria, botanical gardens, museums and zoos) as well as anything deemed to be Government or Council purposes, regardless of the type of use or development involved. This is different treatment compared to the defined use classes in the scheme.

Clause 5.3.1 provides that Council must consent conditionally or unconditionally (i.e. permitted "P" use status) to development on reserved land that is in accordance with a purpose specified in Table 2.2. The Draft Amendment does not propose to alter Clause 5.3.1. The inclusion of various potentially 'private' activities in Table 2.2 sets up a contradiction in the scheme, between applicants who wish to develop and use public land in a reservation and those who wish to develop and use land within a zone.

Clause 5.3.3 then establishes that development is also subject to the provisions of Part 10 (Heritage Overlay Controls) of the planning scheme. Since the Clause cites that (only) Part 10 applies, there can be drawn an inference that other development standards and provisions of the scheme do not apply; certainly, the scheme is not clear in this regard.

It is quite anomalous that Clause 5.3.1 gives "permitted" status to use and development that have the potential for significant off-site impacts on reserved land (many of which are in urban areas) and yet in Schedule 1, the use Private Recreation has "discretionary" status in all urban, village, low density and rural residential zones (and the Rural zone), with some zones abutting reserved land.

It is considered that the draft amendment does not resolve the contradiction existing in the scheme but merely expands its scope by proposing to include 'Private Recreation' in rows 3, 4 and 6 in the Table to Clause 2.2. Also, few, if any, development standards would appear to apply to reservations, compared to zones.

Council representatives submitted that to eliminate the contradiction between zones and reservations, it would be necessary to rezone all reservations to an appropriate alternative zone. This would be a formidable exercise that was not considered justified in the face of Council's intention to submit a replacement planning scheme to the Commission in the near future. The draft amendment was proposed as a pragmatic way of dealing with applications for private recreation on reservations in the short term, until a new planning scheme was approved.

For the representors, it was submitted that the draft amendment should be modified to exclude the parcel of land which Council had agreed to lease to the Devonport Bowls and Croquet Club. That course of action is not favoured by the Delegates, as it is not considered desirable to include a site-specific special provision of that kind in a generic text amendment.

Conclusions

The Delegates are concerned that Clause 2.2 gives unwarranted special treatment to some kinds of applications on reserved land by not specifying development standards, circumventing the public scrutiny process and denying the public an opportunity to appeal against a permit or the conditions attached to a permit.

The Delegates' concerns can be addressed by improving the mechanisms for public scrutiny and capacity for the exercise of Council's discretion by modifying the

amendment, as outlined in Attachment A. The required modification will make most use or development for reserved purposes permissible at Council's discretion. This will trigger public scrutiny in accordance with s. 57 of LUPAA. Only Botanical Gardens, Public Parks, Passive Recreation, Main Road and Utility Services (minor) would remain as Permitted purposes.

Schedule 1 Objectives

With modification, the draft amendment is considered to further the Objectives.

State Policies

Interim State Policy on the Protection of Agricultural Land 2008

The draft amendment does not relate to specific parcels of land. With modification, the draft amendment will enable the agricultural significance of any site to be assessed in accordance with the Policy.

State Coastal Policy 1996

The draft amendment does not relate to specific parcels of land. With modification, the draft amendment will enable the proposed use or development of any site to be assessed in accordance with the Policy.

State Policy on Water Quality Management 1997

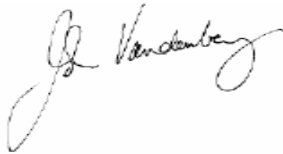
The draft amendment does not relate to specific parcels of land. With modification, the draft amendment will enable the proposed use or development of any site to be assessed in accordance with the Policy.

National Environment Protection Measures

The draft amendment is not considered relevant to these Measures.

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.



John Vandenberg
Delegate



Sandra Hogue
Delegate

24 March 2009

Annexure A

DEVONPORT AND ENVIRONS PLANNING SCHEME 1984

AMENDMENT AM 2008/04

1. Insert in the Table at Clause 2.2 Column 2, Row 3, "Private Recreation" after the word "(minor)".
2. Insert in the Table at Clause 2.2 Column 2, Row 4, "Private Recreation" after the word "Grounds".
3. Insert in the Table at Clause 2.2, Column 2, Row 6, "Private Recreation" after the word "Zoos".
4. At Clause 5.3 of the Planning Scheme, alter the heading, alter subclause 5.3.1, add sub-clause 5.3.2 and renumber the subsequent sub-clauses so that Clause 5.3 reads as follows (changes shown in bold text): -

"5.3 Determination of Application for **Use or** Development of Land in Reservations

In determining such application for permission to **use or** develop land within any reservation:

- 5.3.1 If such proposed **use or** development is for the purpose for which the land is reserved under Section 2.2 of the Scheme Council shall issue a consent permitting such use **or development** either conditionally or unconditionally.
- 5.3.2 **Notwithstanding clause 5.3.1 if the proposed use or development is for the purpose of any of the following – Government purposes, Council purposes, Community Centres, Education Establishments, Hospitals, Health Centres, Car Parks, Cemeteries, Crematoria, Welfare Institutions, Churches, Museums, Zoos, Recreational Grounds, Private Recreation – Council may exercise its discretion to either refuse the application or issue a permit permitting such use or development either conditionally or unconditionally. In doing so, the Council shall have regard to the matters it may take into consideration as specified in Parts 6, 7, 8 and 10 of this Scheme.**
- 5.3.3 Subject to clause 2.3.5 if such proposed development is for the purpose for which the land is not reserved under Section 2.2 of the Scheme the Council shall refuse the application.
- 5.3.4 Where proposed development of reserved land is also subject to the provisions of Part 10 of this Scheme the requirements of that Part shall also apply."