

Resource Planning and Development Commission

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

SORELL PLANNING SCHEME 1993

Draft Amendment 3/2008

Permit Application SA 2008/10

Draft Amendment/Combined Permit Amendment

The draft amendment proposes to amend the planning scheme by deleting an existing specified departure in clause 4.2.3 and replacing this with the following:

“4.2.3 On land in CT 133725/1 at 3206 Tasman Highway, Orielton (access off Allambie Road) subdivision shall be permitted in accordance with Permit SA 2008/10 whilst development and use of this land shall otherwise be in accordance with the provisions of the Low Density Residential C zone.”

S.43A Combined permit

The combined s.43A permit grants conditional planning approval for the development of the land by subdivision of 7 lots, numbered 1 to 7, and construction of a cul-de sac head on a balance lot (Road) and extension of Allambie Road, to provide frontage and vehicular access to each of the lots. The lots range in area from approximately 5.0 ha to 7.3 ha, with frontages varying between 6.0 and approximately 30 metres.

Delegation

At its meeting on 21 October, 2008 and pursuant to Section 8 of the *Resource Planning and Development Commission Act 1997*, the Commission delegated to Mr John Vandenberg and Ms Sandra Hogue:

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 3/2008 to the Sorell Planning Scheme 1993 and Permit No: SA 2008/10; 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

Site and locality

The subject land is located at Orielton on the eastern side of Tasman Highway with frontage to an unconstructed section of Allambie Road from the south. The land consists of a single title (C.T. Vol. 133725 Folio 1), with an area of 40.002 Ha. The title is benefited by a 20.00 metre wide right-of-carriageway to the Tasman Highway and burdened by a 20.00 metre wide right-of-carriageway (in favour of adjoining land to the north) that crosses the land from south to north adjacent to the common boundary between proposed lots 4 & 5.

The subject land has a north westerly aspect and gentle to moderate slopes, substantially cleared to pasture. It is traversed by an unnamed watercourse/drainage line from east to west which drains to Orielson Rivulet and thence to Orielson Lagoon, a Ramsar wetland site. An area of approximately 3 Ha of sparse to good *Eucalyptus viminalis* (white gum) woodland is located at the eastern end of the subject land. The land is vacant and is developed with improved pasture and fencing. Soils are podsolic on sandstone but with some mixing with alluvial soils on the flatter western portions. Agricultural land capability has been assessed as predominantly Class 4 on the lower slopes with a smaller area of Class 6 on the more elevated section. There is one dam on the property but upstream dams on adjoining property were claimed to have captured much of the surface drainage across the subject land.

The subject land is zoned *Rural* and contained within the Orielson Lagoon overlay. The land is also subject to a specified departure that provides that the land may be used and developed for a maximum of 8 houses over an area of approximately 18 Ha adjacent to Allambie Road. (Refer to Figure 1 below showing the existing special area affected by the current specified departure.)

Surrounding land is zoned *Low-density Residential C* to the south and *Rural* to the north, east and west. Land to the south is used and developed for residential and hobby farm purposes while agriculture is predominant on the *Rural* zoned land.

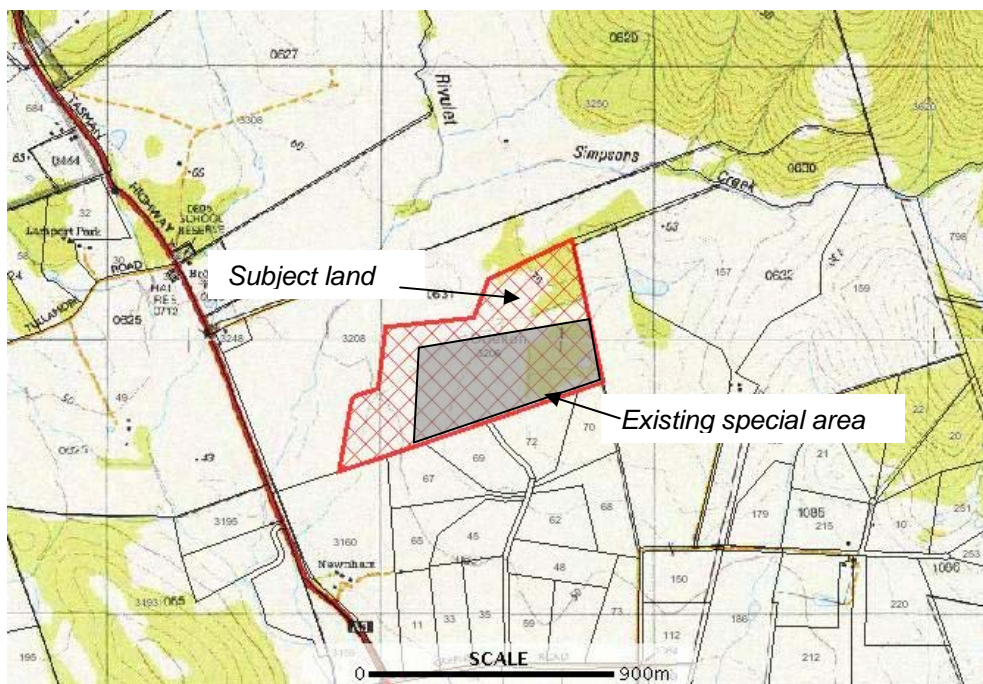


Figure 1 – Locality Map

Permit/site history

The existing specified departure was introduced as a result of a submission by surveyors Griggs Leary during hearings into the then draft planning scheme conducted by the Land Use Planning Review Panel in or about 1995.

Records show that the specified departure was designed to retain the better agricultural land within the *Rural* zone by limiting the area of rural land that could be converted to residential use for a maximum of eight houses (located on the wooded upper slopes at the south east corner of the property). The area of the specified departure was approximately 18 Ha, leaving approximately 72 Ha of the existing title to be used or developed for agriculture or other compatible uses. (Nolan & Cannell, Land Use Planning Review Panel, 1995 at pp. 63).

At the time the specified departure was approved, the land was in a parcel of approximately 90 Ha and the relevant clause was drafted to alienate as little as 8 Ha from this parcel, if the minimum lot size of 1ha, consistent with *Low Density Residential B* zoning, was adopted. However, in 2000 the planning authority approved a proposal to subdivide a 40 ha block from the parent title. That 40 ha lot was subsequently transferred to Ithaca Tasmania P/L which has now applied (per Messrs Yarnall and Langmaid) to vary the area affected by the specified departure.

The planning authority initiated draft amendment 03/2008 of the planning scheme at the request of the land owner and certified the draft amendment in accordance with s.34(a) and s.35 of the *Land Use Planning and Approvals Act 1993* (the Act) at its meeting of 20 May 2008. A combined draft permit SA 2008/1 in accordance with s. 43F of the Act was approved at the same time.

The draft amendment and s.43A combined permit were publicly exhibited for 4 weeks between 28 May 2008 and 26 June 2008). No representations were received.

Documents supplied by Planning Authority

1. Certified draft Amendment (4 copies)
2. Council's planner's s.35 report (including a copy of the consultant planner's report supporting the draft Amendment with attached agricultural, aboriginal heritage and geotechnical assessments)
3. Copy of Council minutes of 20 May 2008
4. S.43A combined permit for subdivision (copies)
5. Copy of public notice of 28 May 2008
6. Section 39 correspondence stating no representations were received.

The planning authority considered the draft amendment at its meeting of 15 July 2008 in accordance with s.39 of the Act and resolved that: -

- (a) Notice be made to the Commission that no representations had been received and
- (b) Advise the Commission that it confirms the decision of 20 May 2008 together with minor amendments to the following draft permit conditions for SA 2008/10:

- 8 *The existing dam on Lot 1 is to be repaired to the satisfaction of the Manager Engineering Services.*
- 10 *The title of the proposed road in the subdivision is to be transferred to Council ownership at the developer's cost. The Transfer Form and applicable transfer fees are to be lodged either with the Council or the Lands Titles Office prior to Council sealing the Final Plan of Survey.*

Issues for Consideration

1. Whether the draft amendment is consistent with State Policies and planning scheme objectives relating to settlement strategies and the protection of agricultural land within the municipal area.
2. Whether the existence of a specified departure in the planning scheme provides any justification for its replacement by a different specified departure.
3. Whether the drafting of the amendment is sufficiently clear and precise.
4. If the amendment is approved, whether the permit should be confirmed with additional or modified conditions.

Date and Place of Hearing

Council Chambers, Sorell, 12 December 2008.

Attendance at the Hearing

John Molnar, Senior Planner, Sorell Council

Neil Shephard, planning consultant for the applicant

Harvey Yarnell and Ray Langmaid, for Ithaca Tasmania P/L

Decision and Reasons for the Decision

Issue 1: Consistency with State Policy and Planning Scheme Objectives

The subject land is currently zoned Rural and is partly subject to a specified departure in Clause 4.2.3 that states:

"4.2.3 On land zoned Rural UPI 0631 (part) near Allambie Drive and marked on the Plans by reference to this clause, Council may approve a development for a maximum of 8 houses generally in accordance with the provisions of the Low Density Residential B zone."

The area of the specified departure marked on the Plans is approximately 18 Ha, leaving a minimum of approximately 22 Ha to be used or developed for agriculture or other compatible uses. The Low Density Residential B zone requires a minimum lot size of 1 hectare.

The Interim State Policy on the Protection of Agricultural Land 2008 (the Interim State Policy) is founded on principles that seek to ensure that the productive capacity of agricultural land is appropriately recognised and protected in all relevant planning instruments.

These principles include: -

Principle 1 – *All agricultural land is a valuable resource for Tasmania and should not be unreasonably fettered by non-agricultural use and development.*

Principle 6 – Residential use is not inconsistent with this Policy where it is required as part of an agricultural use or *where it does not unreasonably convert agricultural land and does not fetter agricultural use.*

Principle 8 – The protection of non-prime agricultural land from conversion to non-agricultural use will be determined through planning schemes taking into account the local and regional significance of that land for agricultural use.

(Our emphasis)

[Principles 2, 3, 4, 5, 7 and 11 refer specifically to prime (i.e. Class 1, 2 or 3) agricultural land; however the documented evidence was that the subject property contained only class 4 and class 6 agricultural land.]

For the purposes of the Interim State Policy, **agricultural land** means “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 point to be drawn from Principle 1 is that, from the State’s perspective, agricultural land is an economic resource which transcends individual property boundaries. As long as it remains unconverted to other uses, and is not so ‘unduly restricted’ as to fall outside the definition of agricultural land, it is potentially available for use within an agricultural enterprise.

Principle 6 requires the Delegates to judge whether the enlargement of the area of agricultural land affected by the proposed specified departure at Clause 4.2.3 represents an ‘unreasonable conversion’ or poses an increased risk of fettering of adjacent agricultural uses. It should be noted that the subject land has not yet been ‘zoned or developed for another use’, given that the underlying Rural zone persists, regardless of the current specified departure that allows for the development of up to eight houses on a portion of the land.

Principle 8 acknowledges that local and regional factors can be taken into account in the drafting of planning scheme provisions that apply to agricultural land. This raises the question of whether the subject land is typical of agricultural land in the district or possesses some specific features that would warrant special treatment under the planning scheme.

Further strategic guidance is given by examining the objectives of the Sorell Planning Scheme, with the proviso that the approval of the Scheme predated the adoption of the first State Policy on the Protection of Agricultural Land. State Policies override the scheme to the extent of any inconsistency.

Among the Overall Objectives listed in Clause 5.1, subclauses (a), (d) and (f) are pertinent.

- “(a) To manage the continuing evolution of the Municipality from a rural and holiday area to one with a significant urban component.
- ...
- (d) To concentrate future residential growth at Sorell township and Midway Point where services exist and/or can be most economically provided.
- ...
- (f) To provide framework for orderly growth within a 5 year time frame subject to regular monitoring and review.”

Among the area-specific objectives, Clause 5.2.3 of the planning scheme states that the objectives of the planning scheme for Penna Valley, Orielton and environs are:

- “(a) To protect existing rural and agricultural enterprises.
- (b) To protect low density residential amenity where applicable.
- (c) To ensure future development of the area does not put an undue strain on Council services.”

The Intent for the Rural zone states: -

- “(a) *To maintain the current and future opportunity for agriculture, forestry, extractive industry and other primary industries.*
- (b) *To restrict the fragmentation of land and development, principally for residential use.*
- (c) To maintain and improve environmental quality standards which reflect the necessary impacts of rural activities.
- (d) To restrict adverse impacts on the environmental qualities of adjacent zones.
- (e) To include land that is not considered appropriate for more intensive development.” (Our emphasis)

No strategic assessment of the need to convert the land from primary production has been provided by the planning authority. There is no evidence provided to show there is currently a shortage of suitable rural residential land in this locality or the planning area generally. The subject land is typical of dry farming land in the district.

The supporting material produced by the applicants’ consultants sought to show that -

- (a) the subject land has not been used for agriculture for some time; and
- (b) the balance of the subject land not subject to the specified departure is not a viable parcel for agriculture due to the size and capability of the land (Class 4 or 6).

This evidence was based on a report by GHD that adopted an area of 14 Ha for the balance of the subject land not subject to the specified departure, rather than 22 Ha.

The GHD report did not consider the agricultural viability of the land if only approximately 8 Ha of the specified departure ‘special area’ was subdivided for residential use and developed in accordance with current clause 4.2.3, which would then leave a balance of 32 Ha for rural use and development

GHD inferred that as a grazing property, the land was weed-infested, lacked water and had a grazing potential of only about 4 dry-sheep-equivalents (DSE) per hectare. It submitted that, if developed in accordance with current clause 4.2.3 the residual land was unlikely to be economically viable, or, if used in conjunction with adjoining agricultural land that it would not contribute significantly to an agricultural enterprise.

GHD acknowledged that grazing productivity of the Class 4 land could be improved from 4 DSE/ha to 10-12 DSE/ha by pasture improvement and best practice stock management. Nevertheless, GHD submitted that in the broader context neither the permissible 8-lot subdivision (on 18 ha) or the requested 7-lot subdivision (on 40 ha) would lead to more than a negligible loss of agricultural potential.

Mr Shepherd submitted that the proposed 7-lot subdivision avoided the risk of an unsustainable and derelict balance title, offered more opportunities for environmental asset protection and for buffering between residential uses and agricultural uses and would also add to the amenity and value of the proposed lots.

These propositions must be weighed against strategic and policy arguments that:

- (a) The land is good quality dry farming land and should be preserved;
- (b) The draft amendment will locate residential uses closer to other Rural zoned land; and
- (c) The draft amendment will reduce the area of land available for purchase by adjoining farmers;

It could be argued that any problems with the size of the balance area were exacerbated in 2000 when the planning authority permitted subdivision of the parent title to create the current 40 ha lot. At that time the effect of subdivision should reasonably have been anticipated, in light of the then applicable State Policy and the planning scheme's objective for orderly growth and regular monitoring and review.

The Delegates are not persuaded by the arguments for the amendment put forward by Council and the applicants. Since the first specified departure was included in the planning scheme, the State Policy on the Protection of Agricultural Land 2000 was introduced, and has evolved, but with the consistent intention of protecting all agricultural land (not just prime land) from premature or unwarranted conversion to non-agricultural uses.

In terms of the present Interim State Policy the draft amendment is considered to be inconsistent with Principle 6, in that: -

- residential use is not required as part of an agricultural use,
- the conversion of agricultural land is not required to satisfy a demonstrated need for rural-residential development, and
- the proposed extension of a rural residential subdivision would move the residential/agricultural 'edge' deeper into the Rural zone and raise the risk of fettering of agricultural uses.

Issue 2: Justification for substitution of one specified departure by another, more extensive specified departure.

The Delegates have reviewed two relevant published decisions of the delegated Panel that, in 1995, conducted the Hearing of Representations to the Sorell Draft Planning Scheme 1993. These decisions provide an insight into the reasoning for inclusion of the initial specified departure at (then) clause 5.1.3.

As noted earlier, those decisions predated the adoption of any State Policy on the Protection of Agricultural Land but the 1995 Panel was clearly mindful of the issues that underpin the State Policy.

In regard to the representation concerning the subject land at the time of the Sorell Draft Planning Scheme hearings, (R23, DE & RO Kemp) the Panel said,

“The submission to the Hearing included a proposal plan showing 8 lots in the south east corner of the property. At the Hearing the Delegated Panel indicated support for the proposal and invited further submission, maintaining the concept but to consume a smaller area of land. This was based on two considerations:

1. Proposed Low Residential B zoning structure in the Draft Planning Scheme provides for 1 ha lots, whereas lots greater than 2 ha as proposed would have subdivision potential.
2. to minimise the intrusion onto the cropping land and to maximise separation.”

(Nolan & Cannell, 23 May 1995)

The decision of the Delegated Panel in 1995 is not binding on the current Delegates but it is supportive of a view that the drafting of the planning scheme intended to minimise the area of agricultural land that could be converted for residential development.

The Delegates consider that the specified departure now shown at clause 4.2.3 of the scheme does not confer any rights on the land owner. It represents merely an opportunity to apply to the Council for a permit for a particular form of development on a specified portion of the property. That opportunity has not been exercised so far.

That being the case, the current specified departure is not an asset that can be bartered or exchanged for a new and different specified departure. Nor is it a precedent for creating a fresh specified departure.

The draft amendment should be divorced from the history of the property and be considered simply on its merits in terms of State Policy and planning scheme strategy. As indicated previously under Issue 1, the draft amendment does not pass that scrutiny.

Issue 3. Clarity of the draft amendment

The draft amendment does not change the underlying zoning, but provides that:

“...subdivision shall be permitted in accordance with Permit SA 2008/10 *whilst development and use of this land shall otherwise be in accordance with the provisions of the Low Density Residential C Zone.*” (Our emphasis)

It is unclear whether the draft amendment intends use or development to comply with the provisions of the Low Density Residential C Zone:

- (a) only after the land is subdivided in accordance with permit SA 2008/10 and for other use and development to comply with the underlying zoning provisions for the land until it is subdivided; or
- (b) from the date the draft amendment becomes effective, including any subdivision other than SA2008/10.

At the hearing Mr Shepherd and Mr Molnar accepted that it would be desirable to modify the draft amendment to clarify the intention that the subdivision standards of the Low Density Residential C zone would apply as set out in the permit, not that the full range of uses permissible in that zone would be available.

However, because of the conclusions reached under Issues 1 & 2, it is not necessary to pursue this matter further. Similarly, it is unnecessary to examine the details of the draft permit.

Conclusion

The Delegates consider that the draft amendment should not be approved, for reasons of inconsistency with the Interim State Policy on the Protection of Agricultural Land 2008 and the strategic basis and objectives of the Sorell Planning Scheme 1993.

Schedule 1 Objectives (Part I)

- (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity;
Comment: The draft amendment is not considered to promote sustainable development of natural resources (agricultural land) because it encourages conversion of land to residential use in a manner that is not consistent with State Policy.
- (b) to provide for the fair, orderly and sustainable use and development of air, land and water;
Comment: The draft amendment is not considered to be consistent with the stated objectives of the Sorell Planning Scheme 1993 that encourage an orderly expansion of residential settlement.
- (c) to encourage public involvement in resource management and planning;
Comment: The draft amendment has been considered through a process that encourages public involvement.

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

Comment: The draft amendment seeks to facilitate economic development but does not do so in an orderly and sustainable manner.

- (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;

Comment: The draft amendment has been assessed in the context of State Policies and local planning objectives, illustrating the shared responsibilities for management of the State's agricultural resources.

Application of State Policies

Interim State Policy on the Protection of Agricultural Land 2008

As discussed earlier the draft amendment is considered to be inconsistent with this State Policy.

State Coastal Policy 1996

The subject land is located more than 1 kilometre from the coastline and the Policy is not applicable to the draft amendment.

State Policy on Water Quality Management

The draft amendment is considered to have been prepared in accordance with the Policy.

The Permit

The permit provides for the subdivision of the subject land into 7 lots and the construction of road access. However a decision to reject the draft amendment requires that the permit must be refused.

Decision

The Commission rejects the draft amendment pursuant to Section 41(b) of the *Land Use Planning and Approvals Act 1993*) and refuses the permit.



John Vandenberg
DELEGATE



Sandra Hogue
DELEGATE

29 January 2009