

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

LAUNCESTON PLANNING SCHEME 1996

Draft Amendment 149
Permit Application No DA0672/2007

This application comprises a certified draft amendment which proposes to rezone various strips of land from Rural and Forest Practices to Road and a permit for the construction of a bypass road in the Dilston area over the same land.

Date and Place of Hearing 27 May 2009, Launceston City Council Chambers

Delegate At its meeting on 30 March 2009 and pursuant to Section 8 of the *Resource Planning and Development Commission Act 1997*, the Commission delegated to Mr John Vandenberg:

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 149 and permit number DA067/2007 to the Launceston Planning Scheme 1996 taking into account the issues raised in the Commission's correspondence with the representors, the Council and the Department of Infrastructure, Energy and Resources dated 19 December 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*.

Representors

Some 115 representations were received.

It was evident from the issues raised in representations that the majority of representors were concerned about the impact of the proposed road design rather than the amendment.

Appearances

Mr Ron Goodes of 1279 East Tamar Highway, Dilston was the only representor to appear.

Mr Goodes had nothing to offer in terms of the draft amendment. His only concerns were with the design of the proposed Dilston bypass. It was explained that the Commission had no jurisdiction to consider a permit incorrectly applied for under S.43A. Mr Goodes indicated that he was aware that another application had been made and a

permit had already been issued. He also understood that any final determination of that process was a matter for another jurisdiction.

Amendment

The certified draft amendment proposes to rezone various strips of land from Rural and Forest Practices to Road.

Permit

The permit is for the construction of a bypass road in the Dilston area over the same land covered by the draft amendment.

Issues raised in Representations

- Road junction design
- Length of bypass
- Viability of rural properties
- Environmental impact (State and Federal jurisdictions)
- Cultural values
- Impacts on local businesses
- Provisions for bicycles
- Movement of cattle and machinery

Without exception, the representations are concerned with the permit rather than the draft amendment. For the reasons given later in this decision concerning the permit, there is no need to consider that document in any detail.

Additional issues identified by the Commission

There are a number of issues;

- whether or not the amendment to the planning scheme is required at all in order for the State road authority to construct Major New Road Works;
- the proper application of the Road Zone, and
- whether any other zoning is applicable, and
- the validity of the S.43A permit

Council's Report

The planning authority considered the representations at its meeting of 14 April 2008. It resolved the following;

- A. The Council partially supports the representations to Launceston Planning Scheme 1996, Amendment 149.
- B. That Council recommends to the Resource Planning and Development Commission that the draft amendment 149 be approved as certified and exhibited.
- C. That Council recommends to the Resource Planning and Development Commission that a Development Application DA0672/2007 permit be approved subject to the following conditions: (excluded)

The permit conditions included substantive modifications to the intersection designs for the proposed road development contained in the application.

Commission's consideration of the draft amendment

Interpretation of the Road Zone

This zone is unlike all other zones in the Scheme in the way that it is constructed. It is more akin to a schedule than anything else.

The format for all other zones in the ordinance has the following:

- Intent of the Zone
- Use of land (table)
- Development of land (table)
- Development requirements, followed by varying specific issue provisions.

The Road Zone has the following construct:

- Intent of zone
- Road definitions
- Application of zone
- Use and development of land (table)
- Approval procedure for certain roadworks
- Road hierarchy intent
- Road hierarchy classifications
- Road hierarchy access requirements
- Referrals to the Department of Transport
- Setbacks from roads
- Traffic impact assessments
- Road junctions Temporary closures
- Margaret Street Detention Basin

Intent of the Zone (31.1)

The Intent goes to enabling and ensuring that the planning area has a properly planned, integrated and sustainable road network with an established road hierarchy. It contains its own specific definitions and perhaps most importantly, its own specific method of application.

Relevant Road Definitions (31.2)

“Major New Roadworks: All roadworks required for the construction of a new section of road disassociated from any existing road, e.g. bypass of town or village, construction of a road within an existing road reserve, or the upgrading of an existing road to a higher design standard involving a number of individual ‘Minor Roadworks’, including upgrading the overall road alignment amounting to a de facto improved route;”

“Road: Land over which the general public has permanent right of passage in a motor vehicle, including all land between the boundaries of the road and its reservation and all bridges over which such a road passes, being a road which is the responsibility of the Minister administering the Roads and Jetties Act 1935 or, a road for which the Council has accepted responsibility under its seal or a road shown on the municipal map;”

“Road Zone: All that land lying within the boundaries of any road as defined by Clause 31.3:”

The Road Zone includes the following:

- (1) All land that is a Road under the control of a road authority, whether or not such roads are shown on the planning scheme maps;
- (2) All land dedicated by the Road Authority as a public Road; or
- (3) All land designated as Road on a sealed plan of subdivision; and
- (4) All land approved for Major New Road Works and which results in the creation of a Road.
- (5) *[Not relevant – exemptions for Malls in the City centre]*

In other words, land is not a Road until it has been constructed and become the responsibility of a road authority. It does not include an un-constructed road reservation. Once a road has been created and satisfies any of categories (1), (2) or (3) of the definition, it lies within a Road Zone and use and development within the zone is controlled by the table of C31.4. This allows for activities such as certain exempt minor road works, road maintenance or minor utilities without application for a permit and for other activities that are reasonably related to roads to be approved at Council’s discretion.

From a practical perspective any land, irrespective of its zoning under the planning scheme, becomes a part of the “Road Zone” immediately upon becoming a road [Cl.31.3(1)], or upon being dedicated as a road by a road authority [Cl.31.3(2)] or upon being shown as such on a sealed plan of subdivision [Cl.31.3(3)].

Clause 31.3(4) is only understandable when read as expressing some future intent as opposed to the present tense of the other sub clauses. However, it seems clear that the land in question does not form part of the Road Zone until a “Road” has been created on it.

All this leads to the question as to whether or not the Road Zone is in fact a zone or, because of the way it has been constructed, whether it operates more as a schedule that applies to roads irrespective of the underlying zoning.

How are Major New Roadworks to be approved?

First, as explained, Major New Road Works creates its own Road Zone merely by the fact of (and simultaneously with) being approved. This follows from 31.3(4) above, (provided that the Clause can be properly interpreted). (Similarly, the zone applies to any land that satisfies 31.1,2 or 3, without any need for a change to the plans.)

The Table of Use and Development shows that Major New Road Works is permitted (permit required) (P), with a condition or restriction ‘See Clause 31.5.2’ It is the only use/development to be classified in this way – all other road related uses are either ‘permitted –no permit required’ or discretionary.

Clause 31.5.2 says, “Route planning in respect of a ‘Major New Roadworks’ shall include community consultation, together with social, economic, traffic impact assessments and environmental impact assessments made in accordance with the principles embodied in section 74 of the *Environmental Management and Pollution Control Act 1994.*”

However, it is unclear whether the “route planning” is intended to be a pre-condition to the making of a planning application or a pre-condition to the approval of the application. In any event, the provisions seem to go beyond the requirements of a permitted classification.

When considered together these provisions (ss.31.3(4), 31.4 and 31.5.2) set up a process that is clearly intended to obviate the need for any scheme amendment to give effect to Major New Road Works.

No reference needs to be made to the provisions of the underlying zones (in this case Rural and Forest Practices) to determine an application for Major New Road Works. Indeed that is the point of the way scheme deals with Major New Road Works; a new highway might cut across a number of zones and it could be concluded that it should not be controlled by the various provisions of those zones (hence the applicable Road zone provisions).

The only proviso comes from the potential effects of certain overlays referred to by the Special Provisions of Part 4. (e.g. heritage places, protected catchments, flood prone areas). Development in such areas triggers discretionary status.

Clause 31.4 says *A permit issued by the planning authority should include all the conditions required by the road authority.* Therefore, once the road authority has determined the preferred route and applied for a permit, the planning authority can grant it as a permitted or at worst, a discretionary approval. The planning authority is probably not at liberty to alter the conditions or substitute its own conditions for those supplied by the road authority (although use of the word ‘should’ leaves an area of doubt).

The scheme does not prohibit Major New Road Works anywhere, so a scheme amendment is not required because upon approval of the Major New Roadworks the affected lands automatically are included in the Road Zone. That being the case, the prerequisite for a S.43A permit cannot be met (*an application for a permit which would not be allowed if the planning scheme were not amended*).

Conclusions

Draft Amendment

Unless land becomes part of the “Road Zone” because of the operation of Clause 31.3 there is no way that any existing zoning can be changed to that zone. In other words, despite the request to amend the planning scheme, it is both unnecessary and beyond power to do so.

Any amendment to show the new road in the planning scheme plans could only be for information purposes and only done after the event, but it is not a requirement for determining any use or development of the road.

The certified draft amendment shows where the road is on the zoning plans. At the same time, it attempts to insert a specific ribbon of land to Road (Class 1 Strategic Network) (as per C.31.7). This presumably is done to provide for easy identification of the road in terms of applying the provisions of the appropriate Road Hierarchy Classifications. However, these classifications are not shown on the zoning plans, but are shown on the Special Area plans. The road hierarchy classification could be shown as being inserted on the appropriate Special Area plan, but again only after the existence of the road.

The draft amendment must be therefore considered as not "in order" [S.42(1)].

Permit

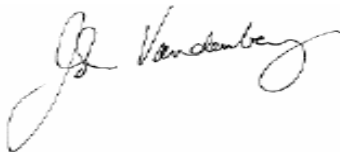
It is considered that the way that the Planning Scheme (and in particular, the Road Zone) is constructed means it is never necessary for any person seeking to make application to develop a new road to seek a rezoning for that express purpose. The act of approval of the development application and the resultant creation of a "Road" is sufficient to change the status of the land such that the Road Zone automatically applies.

Therefore, an application for the creation of a new "Road" can never be...*an application for a permit which would not be allowed if the planning scheme were not amended.* It follows that the application should have been made, not pursuant to S.43(A), but as an application pursuant to s.57 of the *Land Use Planning and Approvals Act 1993*.

The application for the permit was not in accordance with S.43A and therefore a nullity. There is no ability to make a decision pursuant to S.43H(d) as would normally be the case.

Decision

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



John Vandenberg
DELEGATE

16 June 2009