

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

**CENTRAL COAST PLANNING SCHEME 2005 (the planning scheme)
Draft Amendment 1/2008**

Draft Amendment

The draft amendment seeks to insert a special area overlay in the central Penguin Township to further the objectives of the Penguin Urban Design Guidelines.

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 hereby delegates to Commissioner Sandra Hogue and Executive Commissioner Greg Alomes 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* in relation to draft amendment 1/2008 to the Central Coast Planning Scheme 2005; 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 site consists of the central area of the Penguin Township, including the town centre, coastal foreshore, Hiscuitt Park and residential interface and is bounded by Bass Strait to the north, King Edward Street, Ironcliffe Road, Penguin Creek and Preservation Drive. Refer to Figure 1 **below**.

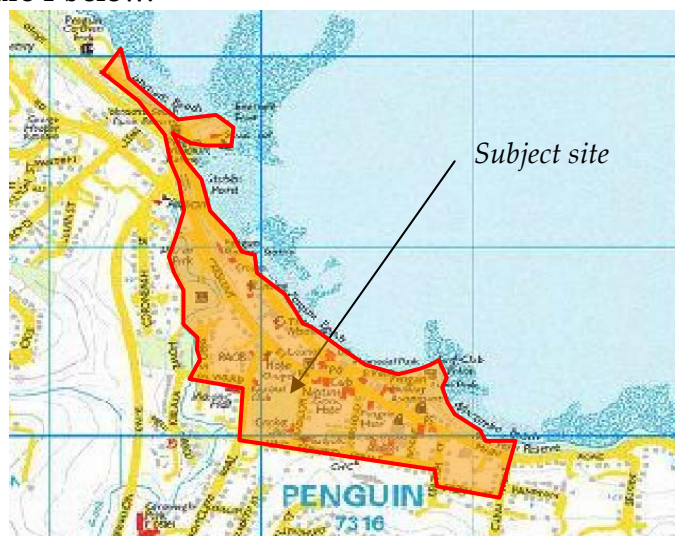


Figure 1 – Locality map (Source the LIST)

The subject site is in private and public ownership and includes land zoned RESIDENTIAL LOCAL BUSINESS, BUSINESS and RECREATION. The subject land is developed with a mixture of businesses, dwellings, roads and public areas. Surrounding land is generally residential.

Site history

The certified draft amendment was initiated by the planning authority at its meeting of 21 July 2008. The planning authority's s.35 report stated that the purpose of the draft amendment was to insert a special area overlay and provisions for the area identified in the draft amendment.

The planning authority considered a report on the modification of the certified draft amendment at its meeting of 15 September 2008. This report noted that the certified draft amendment did not comply with the Commission's Planning Advisory Note No. 14 – Format of draft amendments. The report proposed that the certified draft amendment be modified to comply with the drafting guidelines in Planning Advisory Note 14, on the basis that there are no changes to the substance of the previously approved draft amendment.

The planning authority resolved:

- 1 *The amended draft amendment (identified as schedule 14 Amendment 1/2008, a copy being appended to and forming part of the minutes) be initiated to the Central Coast Planning Scheme 2005; and*
- 2 *the Council certify that the amendment meets the requirements of section 32 of the Land Use Planning and Approvals Act 1993."*

The Executive Services Manager further reported as follows:

"Should approval for the amended draft amendment be granted, authorisation for affixing the common seal to the amendment is to be given at Minute No. 329/2008"

Documents supplied by Planning Authority

- (a) Copy of s.35(3) report and supporting information;
- (b) Copy of Council Minutes of 21 July 2008;
- (c) Copy of draft amendment certified on 27 July 2008;
- (d) Copy of Parsons Brinckerhoff (2008): Penguin Urban Design Guide Traffic & Transport Study, unpublished;
- (e) Copy of Parsons Brinckerhoff (2008): Penguin Urban Design Guidelines, unpublished, settling out public consultation undertaken before the formal amendment process;
- (f) Copy of public exhibition notice;
- (g) Copies of representations received on the draft amendment;
- (h) Copies of representations received on the draft Urban Design Guidelines; and
- (i) Copy of Council minute of s.39(2) report of 15 September 2008.

Representors and Issues raised in Representations

The draft amendment was publicly exhibited on 6 August 2008 for 3 weeks in accordance with the Regulations made under the Act.

The draft amendment was described in the public notice as:

Draft amendment 1/2008 seeks to initiate and certify (sic) the Penguin Urban Schedule, which includes a special area overlay and provisions for the area identified in the draft amendment.

During the public exhibition period, the planning authority received thirteen (13) representations, as below:

Ms Jenni Adams	Ms Tana McMullen
Mr Ken Blundell	Ms Trina Moule
F & B Dixon	Mr & Mrs Anthony & Lee-Anne Smith
Mrs D Dutton	Mr & Mrs David & Robyn Smith
Dr S A Hutchinson	Ms Cath Thomas
Ms Janeen Lillas	Mr & Mrs Malcolm & Mavis Wall
Mr Neil Maggs	

The issues raised by the representations are summarised below:

- 1 The principles in the Guidelines go a long way to clarifying the issues which have arisen over development in the last few years
- 2 Whilst buildings may exceed the maximum height if they meet the requirements of the Schedule, this leaves much open for interpretation and opinion
- 3 An absolute height limit of 10 metres should be maintained.
- 4 Concern about accessibility to the amendment during the public exhibition period, understanding of the process, availability of Council Agendas.
- 5 "Anyone who reads the draft amendment without having access to the appendices would assume that the height limit of 8/10 metres was absolute. And indeed this was the conclusion reached by the Resource Planning and Development Commission when they assessed the proposed changes in March this year."
- 6 Concerns with the proposed wording for clauses S12.4.3 Performance Criterion 1, S14.1(g) - particularly the definition of 'coastal village character', and that clause S14.4.1 Acceptable Solution 6, clause S14.4.1 Acceptable Solution 7 and clause S14.4.1 Performance Criterion 4 are incompatible with each other, and in effect, invalidate each other.
- 7 The consultation for the Penguin Urban Design Guidelines did not give any indication that the community wanted the maximum height limit removed.
- 8 Clause S14.4.1 Acceptable Solution 6 and 7 are only there to provide for development over the height limit.
- 9 The proposed amendment was not in the print media.

Council's Response to the Representations

The planning authority considered the representations received during the public exhibition period at its meeting of 15 September 2008 as part of the report made under s.39 of the *Land Use Planning and Approvals Act 1993*.

The planning authority resolved:

"That the Resource Planning and Development Commission be advised that there be no alterations to the draft amendment (identified as AM2008.1, Schedule 14 Penguin Urban Design Guidelines Schedule) as a result of the 13 representations received during the public exhibition period."

Date and Place of Hearing

10:30 AM on Friday, 27 February 2009 at
Central Coast Council Chambers, 19 King Edward Street, Ulverstone

Attendance at the Hearing

The delegates heard from the following parties:

<i>Party</i>	<i>Represented by:</i>
<i>Planning Authority</i>	Theresia Williams - Land Use Planning Group Leader Central Coast Council Heidi Goess - Planner, Central Coast Council
<i>Representors</i>	Neil Maggs David Smith Lee-Anne Smith Mavis Wall Tana and Patrick McMullen David Smith Trina Moule Mrs D Dutton
<i>In attendance</i>	Bob Mesibov Kerrie Fleming Declan Bannion Jan Bonde Brian Robertson Corey Spears James Coffey Gerry Howard Cheryl Fuller Ken Blundell

Issues for Consideration

Although this was primarily a hearing into the representations, procedural matters in relation to the certified draft schedule required clarification.

The certified draft amendment did not describe how the planning scheme is to be altered to allow the Penguin Urban Schedule overlay to be included and did not provide any purpose, objectives or standards for the overlay or any relevant schedule.

The planning authority appeared to recognise the flaws with the certified draft amendment and sought to correct these at the meeting of 15 September 2008 by resolving, before reporting on the representations in accordance with s.39 of the Act, that:

- 1 *The amended draft amendment (identified as schedule 14 Amendment 1/2008, a copy being appended to and forming part of the minutes) be initiated to the Central Coast Planning Scheme 2005; and*

As the planning authority did not resolve to recommend any changes to the draft amendment in accordance with s.39(2)(c) of the Act, submissions were sought from the planning authority at the hearing to allow a number of matters to be considered by the Delegates. In particular, the planning authority was requested, by letter of 4 February 2009, to respond to issues including:

Procedural matters

- *The Certified amendment provides for a proposed zone (sic) to be inserted into the planning scheme. There is no provision relating to the proposed Schedule 14.*
- *Council's decision of 15 September to modify the draft amendment after its certification decision of 21 July is considered beyond power.*
- *Clarification of the documents placed on public exhibition.*

The Commission would be pleased to receive a submission from Council as to the actual content of the draft amendment.

At the hearing the planning authority submitted a summary of its legal advice about the procedural matters, contending that the certification and exhibition processes were not technically deficient as to make the process invalid. It also contended that provisions relating to the proposed Schedule 14 were incorporated into all documents.

The planning authority submission was that the decision of 15 September to modify the draft amendment after its certification of 21 July was without legal effect and beyond power, but that did not invalidate the process and could be disregarded.

In response to questions by the delegates, the planning authority agreed that the certified draft amendment consisted of only the overlay plan. However, the other documents, including the Urban Design Guidelines and Parsons Brinckerhoff report were made available during the public exhibition period.

A copy of the modified draft amendment (exhibit C2) and versions 1 and 2 of the modified draft amendment (exhibits C3 and C4) were submitted by Council.

In response to the Council's submissions, Ms Wall submitted that the public notice concerning the draft amendment was understood to be notice of the Penguin Urban Design Guidelines being incorporated into the planning scheme. She submitted that if it had been understood that the draft amendment also proposed to remove the absolute height restriction in Penguin that there would have been many more representations received.

Council responded that all documents provided were available during the exhibition period and that the proposed schedule was not advertised during the notification period except in the form of the Parsons Brinckerhoff report.

Decision and Reasons for the Decision

The evidence before the delegates is that s.35(2) of the Act, which requires the planning authority to certify by instrument in writing affixed with the common seal of the planning authority that the draft amendment meets the requirements of s.32(1), is a mandatory obligation rather than directory.

The planning authority determined that the draft amendment met the requirements of s.32(1) on 21 July 2008 and resolved that the draft amendment be certified. The draft amendment was certified in writing under the common seal of the Council by the General Manager on 27 July 2008.

The certified draft amendment consists of a plan showing a hatched area to be known as the Penguin Urban Schedule 'zone'. This is inconsistent with the drafting requirements for Template planning schemes (Planning Advisory Note No. 13 Common Key Elements Template Guide) and the delegates consider that the Penguin Urban Schedule 'zone' is not a zone in the normal sense, but an 'overlay'.

The delegates find that the draft amendment was certified in accordance with the Act.

Notice of the certified draft amendment was published in the Advocate newspaper on 6 and 9 August. The notices were as follows:

AMENDMENT 1/2008

CENTRAL COAST PLANNING SCHEME 2005

Notice is hereby given that draft amendment 1/2008 to the Central Coast Planning Scheme 2005 has been initiated and certified by the Central Coast Council. The draft amendment may be inspected at the Administration Centre, 19 King Edward Street, Ulverstone during office hours.

Draft amendment 1/2008 seeks to initiate and certify the Penguin Urban Design Schedule, which inserts a special area overlay and provisions for the area identified in the draft amendment.

In accordance with s.39(1) of the Land Use Planning and Approvals Act 1993. Representations (sic) in relation to the draft amendment may be submitted to the General Manager, Central Coast Council, PO Box 220, Ulverstone 7315 on or before 27 August 2008.

*Dated at Ulverstone this
4th day of August 2008*

*19 King Edward Street,
Ulverstone, Tasmania 7315
Tel 03 6429 8900*

*SANDRA AYTON
General Manager*

*Fax 03 6425 1224
www.centralcoast.tas.gov.au*

The wording of the planning authority resolution of 21 July, the certified draft amendment and the notice all differ to some degree.

The evidence was that the form of the notice specified in s.8 of the *Land Use Planning and Approvals Regulation 2005* is directory, not mandatory. As such, it is sufficient that there was substantial compliance with the description of the certified draft amendment in the notice. (See *Gruneth v Resource Planning and Development Commission* (2008) TASSSC 35 at [63]).

The delegates find that the notice substantially identified the area to which the draft amendment applied and the intent to insert an overlay related to the Penguin Urban Design Schedule. As a result, the delegates find that the notice was technically defective, but did not make the process invalid.

The Act does not allow a planning authority to modify or alter a certified draft amendment. Only the Commission or its delegates can modify or alter a certified draft amendment, pursuant to s.41 and as a result of evidence obtained from the planning authority's s.39 report and from any evidence and submissions received as part of a hearing(s) held.

The only opportunity for a planning authority to change a draft amendment is after it is initiated and before it is certified and exhibited, and then only for the purpose of compliance with s.32.

It therefore follows that the modifications purportedly made to the certified draft amendment were beyond the planning authority's powers. This was accepted by the planning authority at the hearing.

The delegates must therefore consider the draft amendment that was certified on the 27 July, consisting of only the plan of the proposed overlay.

The delegates consider that this certified draft amendment is unable to be implemented without change. The options available to the delegates are to:

- (a) Reject the draft amendment in accordance with s.41(b) of the Act; or
- (b) Require the planning authority to alter the certified draft amendment to a substantial degree, in accordance with s.41(a) of the Act.

In view of the extensive nature of the changes required, the delegates consider that these must be considered an alteration to a substantial degree in accordance with directions to be determined by the delegates.

Before making a direction on this matter, the parties were given an opportunity to make submissions on the form of the direction by the Commission to alter the draft amendment to a substantial degree.

It was submitted by Ms L Smith that the acceptable solutions should be quantifiable.

The delegates consider that many of the acceptable solutions in the proposed schedule are contrary to the accepted structure of a planning scheme prepared in accordance with the Common Key Elements Template adopted under Planning Directive 1 (the Template).

An application for planning permit that complies with all relevant Acceptable Solutions is required to be determined in accordance with S.58 of the Act and has a permitted status. As such, the Acceptable Solutions should be unambiguous and readily quantified or measured. They should not contain subjective language that requires the exercise of broad judgement or discretion.

Many of the Acceptable Solutions provided in the submitted Schedule 14 are considered vague or subjective statements that cannot be readily quantified or measured. They are more appropriately considered Performance Criteria.

For example, clause S14.4.1 Acceptable Solution 1, provides:

Objective: <i>To protect and enhance the human scale of built form along Main Road.</i>	
<i>Performance Criteria</i>	<i>Acceptable Solution</i>
<i>P1 No Performance Criteria.</i>	<i>A1 The height and mass of buildings facing the foreshore along Main Road: (a) be in keeping with the coastal village character; (b) not visually dominate the beach environs; and, (c) ensure that views from the foreshore to the Penguin hinterland are maintained through laneways or appropriate design responses.</i>

A number of the acceptable solutions are contradictory in nature and require redrafting. For example, Clause S14.4.1 provides a Performance Criterion (P3) for the relaxation of building height in the BUSINESS zone to allow for multi-storey buildings. However, purpose (a) of the schedule is:

- (a) *to maintain and enhance the coastal village character of Penguin;*

The delegates find it potentially contradictory to achieve both multi-storey and ‘*maintain and enhance the coastal village character of Penguin*’.

In addition, a number of standards apply only to the BUSINESS zone as the buildings fronting Main Road are wholly in the BUSINESS zone and the standards appear to be designed to only apply to commercial developments. A smaller number of standards apply across the entire overlay and it is unclear if these are intended to apply to residential, as well as commercial developments. For example, clause S14.4.2 provides:

S14.4.2 Movement

Objective: <i>To provide safe and functional movement for pedestrians.</i>	
<i>Performance Criteria</i>	<i>Acceptable Solution</i>
<i>P1 No Performance Criteria.</i>	<i>A1 Design Responses must contribute to the improved movement of people and maintenance of rhythmic urban form when: (a) Utilising an existing laneway or driveway; or (b) Undertaking new (sic) development.</i>

As the Acceptable Solution A1 is not restricted in its operation, any residential development within the overlay ‘*must contribute to the improved movement of people*’. It is unclear how this is achieved or why it is necessary.

The delegates will direct the planning authority to review all the acceptable solutions as part of the alterations.

Resource Planning and Development Commission

ANNEXURE A

DIRECTIONS

The following matters are to be taken into account when altering draft amendment 1/2008 to the Central Coast Planning Scheme 2005:

1. Provide details of each amendment proposed to the planning scheme ordinance and plans in accordance with the Guidelines provided in Resource Planning and Development Commission (2008): *Planning Advisory Note 14, : Format of Draft Amendments*, Hobart; and
2. Provide a Penguin Urban Design Guidelines Schedule prepared in accordance with Common Key Elements Template adopted under Planning Directive 1 and the requirements of Resource Planning and Development Commission (2008) *Planning Advisory Note 13; Common Key Elements Template Guide*, Hobart that specifies:
 - (a) the schedule is an overlay on the planning scheme plans; and
 - (b) the purpose of the Penguin Urban Design Guidelines Schedule; and
 - (c) the application of the Penguin Urban Design Guidelines Schedule; and
 - (d) standards for use in the Penguin Urban Design Guidelines Overlay; and
 - (e) standards for development in the Penguin Urban Design Guidelines Overlay; and
 - (f) objectives for each standard with performance criteria and acceptable solutions as appropriate for each objective; and
3. Ensure that Acceptable Solutions are drafted to be unambiguous and readily quantified or measured and do not require the exercise of broad judgement or discretion, in accordance with the requirements of Resource Planning and Development Commission (2008) *Planning Advisory Note 13; Common Key Elements Template Guide*, Hobart.