

IN THE MATTER OF the *Glamorgan Spring Bay Interim Planning Scheme 2015*

- and -

IN THE MATTER OF the Amendment to insert Particular Purpose Zone 8 – Tempus Village and rezone part of ‘Kelvedon’, 12371 Tasman Highway, Swansea from Significant Agriculture to Particular Purpose Zone 8 - Tempus Village

- and -

IN THE MATTER OF the Application for a planning permit authorising subdivision and associated development of Stage 1A of the proposed Retirement Village

SUBMISSIONS ON BEHALF OF THE APPLICANT

IN REPLY

- 1 This submission is provided in response to the written submission that has been provided by Mr Boardman on behalf of Adam Greenhill and Marie Von Haniel. Nothing within that submission causes the Appellant to depart from its existing submissions and we do not seek to restate those here.
- 2 It is however necessary to provide a submission in response.

Evidentiary Basis for Submissions is Required

- 3 It is observed that a hearing undertaken under s.40 of the *Land Use Planning and Approvals Act 1993* is largely an inquisitorial process. That process is augmented by the approach of the parties and may take on adversarial aspects; *R v Davis*.¹ In this case, the parties were in direct conflict regarding the draft amendment, and the nature of the hearing accordingly proceeded by way of a largely adversarial hearing.
- 4 The Commission is empowered to inform itself as it sees fit, may receive written and oral evidence, is not bound to act in a formal manner, and is not bound by the rules of evidence. The Commission is obliged to afford the parties procedural fairness; *Tasmanian Planning Commission Act 1997 (Commission Act)*, s.10.
- 5 While the rules of evidence do not apply, those rules provide a best practice guide to the receipt of material that is of some logical probative value. To state that the rules of evidence do not apply does not mean that a hearing occurs in a state of evidentiary anarchy; see for example *Strada Group Pty Ltd v Tasmanian Heritage Council*.² The Commission, while empowered to inform itself as it sees fit, must

¹ [1999] TASSC 22, (1999) 102 LGERA 88.

² [2012] TASRMPAT 80 at [11]. While this case involved the jurisdiction of the Resource Management and Planning Appeal, the Tribunal provides comment in respect of s.16(1)(c) of the *Resource Management and Planning Appeal Tribunal Act 1993* as was then its governing legislation. S.16(1)(c) mirrors s.10(1)(b) of the Commission Act. In relation to s.16(1)(c) the Tribunal observed as follows:

do so within the framework of ensuring that it acts on evidence and not mere intuitive hypothesis and ensuring that the parties are afforded procedural fairness.

- 6 It is within this framework that submissions of the representor need to be considered. The submissions are not evidence; *Connelly v P and O Resorts Pty Ltd T/A Cradle Mount Lodge*.³ They have no logical probative value. The submissions assert a case that is inconsistent with the evidence that was led at the hearing. They selectively quote evidence out of context and assert conclusions that are at times unsupported by any evidence. If not directed to mislead, they are apt to cause that result.
- 7 Furthermore, it is in this context that we draw the Commission's attention to the requirement to afford procedural fairness that extends to application of the rule in *Brown v Dunn*⁴ that requires a party to put their case in cross-examination to enable the witnesses the opportunity to respond. The representor invites the Commission into error by asserting a case that was not put to the witnesses.
- 8 In our submission, the Commission is not assisted by submissions that are unsupported by evidence and selectively quote the evidence out of context. Such submissions invite the Commission into error by suggesting findings of fact that are unsupported by any evidence.

Strategic Planning

- 9 The representor seeks to highlight the size of the proposal in the context of what they assert to be an absence of strategic direction and contextual consideration of broader considerations that inform land-use planning.
- 10 Any claim that the proposal is not supported by any strategic planning direction should be rejected. Presumably reference to "strategic planning" is a reference to the content of the Regional Strategy and the Swansea Structure Plan. We have provided detailed submissions that address the tests relevant to these documents.
- 11 The evidence addresses the strategic consideration of residential land supply, land use conflict, agricultural land, transport, and infrastructure. While the representor asserts that the proposal fails to address these matters, this is contrary to the weight of the evidence that provides a detailed consideration of all such issues in the voluminous reports tendered in support of the application. That evidence was not challenged by the representor at the hearing and, other than as relevant to land use conflict, and was not put to the witnesses (in particular Mr Lewis and Mr Shephard) as required. Mr Boardman himself acknowledged the consideration afforded by the applicant to infrastructure, services and like when cross-examined on these points.

"In the Tribunal's view, Section 16(1)(c) does not mean that hearings before the Tribunal are to be conducted in some sort of procedural and evidentiary state of anarchy. All the provision does is relax the rules of evidence; it does not abolish them. All the provision means is that the more technical aspects of the laws of evidence applicable in courts do not necessarily apply in the Tribunal. For example, hearsay evidence subject to questions of relevance - and weight - will be material to which the Tribunal may have regard in appropriate cases. Another example might be that there is probably no place for the operation of those technical rules of evidence which deal with an uncooperative witness. But tempered against the relaxation of the rules is the fact the Tribunal is obliged to observe the rules of natural justice. Those rules are a complex system of rules designed to ensure a fair hearing. In many respects the laws of evidence are but byproducts of the rule of natural justice. This does not suggest that the law of natural justice (or procedural fairness) "gave birth to" the laws of evidence. But the reality is that both sets of rules are designed to achieve the same end, namely the ensuring that hearings are conducted in circumstances as fair as is possible to all the participants therein."

³ [1996] TASSC 132

⁴ (1894) 6 R 67. The rule in *Brown v Dunn* is an obligation in procedural fairness such that if it is to be asserted that the witness is mistaken in fact or opinion, they are to be given to opportunity to respond to that claim. To make an adverse claim against the witness and invite a finding contrary to their evidence without allowing the witness the opportunity to respond amounts to a failure to afford procedural fairness.

- 12 Insofar as the representor seeks to draw parallels to Cambria Green, those parallels are rejected. This draft amendment is discrete and targeted in nature to the particular purpose of establishing a retirement village and nursing home. Cambria Green is something altogether different.
- 13 In relation to the size of the proposal, the representor fails to recognise that the development will occur over time. It will take time to complete the development of facilities, independent living units, and the nursing home. It will take time for the development to fill, despite strong interest from the community as evidenced through the representations. This is consistent with the growth of Swansea as a whole and indeed the gradual development of the Piermont site. It is not the case that the future residents will arrive *en masse* overnight.

Reply to representor

- 14 We make the following specific comments in reply, adopting the numbering provided from the representor's submission:
- [2] The representor asserts that the land affected by the amendment is 3.7km from the town of Swansea. The evidence establishes that the land is 3.7km from the town centre. The proximity of the site to the town boundary is much closer.
- [3] The representor asserts that viticulture is a critical economic driver for the region. There is no evidence before the Commission that supports this finding. It is not something that the Commission can take judicial notice of. There is no evidence that establishes the role of Gala Vineyard within the broader economic framework of the viticultural industry.
- [9]-[10] The representor asserts facts that are contrary to the evidence, including Mr Boardman's own concessions in cross-examination. Evidence of proposed shuttle bus operation in connection with the Retirement Village was provided by Mr Lewis and it should not be overlooked that retirees (defined under the *Retirement Villages Act 2004* as over 50) are not invalids but capable individuals, many of them can and do drive.⁵
- [12] The representor selectively quotes comments from Dr Wells. Regard needs to be had to the whole of Dr Well's evidence in context and not isolated statements. The applicant acknowledges that there is potential for land use conflict between a retirement village and a vineyard. The potential is not the test or relevant consideration. The relevant consideration is whether that potential would eventuate and whether the draft amendment provides a suitable framework to manage the risk of that potential arising.
- See also [15], [16], and [22] in relation to other witnesses. The selective quoting of evidence and focus on potential rather than likelihood leads to the claim at [17] that is accordingly unsupportable.
- [13] The representor references measures put forward to reduce conflict. The availability of alternative approaches is relevant to the question of whether agricultural use is unreasonably fettered or constrained under the State Policy for the Protection of Agricultural Land 2009. Furthermore, the evidence establishes the participation of the representor (Mr Greenhill) in discussions by which alternate options were put forward.⁶

⁵ While descending into the minutiae of future applications, the presence of horse riding facilities is evidenced in the Site and Master planning documents. A horse paddock is indicated adjacent the highway and a network of recreational trails is indicted within setbacks to the boundaries. This issue represents another example of the representor raising new issue after the conclusion of evidence, the consideration of which denies the Applicant the opportunity to respond.

It is not clear whether the representor has simply not considered the material or deliberately chosen to overlook it in making his submissions. It is appreciated that the application is supported by numerous and voluminous documents and there is a lot of information that one must comprehend in order to undertake an assessment of the proposal.

- [21] The representor asserts that trees could not survive because the land is not suited to viticulture. This was rejected by the experts who all expressed confidence that this could be achieved and highlighted differences between viable agricultural practices and targeted revegetation and buffer planting regimes.
- [23] The representor asserts that the vegetated buffer is absent from the bushfire assessment. Such a submission ignores the evidence of Mr Murphy at the hearing and the fact that the buffer is not required as part of the first stage of the development.
- [24] The representor contends that there is no standard that requires the planting of the buffer. This submission ignores the operation of the performance criterion P3 relating to the setback requirements for a sensitive use and, based on the evidence of the agricultural experts, the reality that a buffer is a means of achieving compliance with that standard. The Commission can be satisfied that a buffer could be development to address the performance criterion and enable compliance with the standard, the specific details of how that is achieved is a matter to be resolved on presentation of an application for sensitive use that seeks relaxation of the 200m separation to the vineyard.
- [25] [27] [28] The representor's concerns are addressed through the modified format of the draft amendment.
- [26] The representor invites the Commission into legal error. The only evidence in support of a submission regarding future use by non-retirees was Mr Boardman's evidence in cross-examination that illegal use may eventuate. The Commission must assume regularity. The planning authority has powers available to it to ensure compliance with its planning scheme. Furthermore, there are parallel regimes that ensure the occupation of a retirement village by retirees; refer Retirement Villages Act 2004.
- [29] The representor asserts that 3-4 storey units could not be refused. The height of buildings is regulated under cl.8.6.2. No complaint in response to this standard was put to the Applicant during the hearing. It is not clear what issue could be taken with the height of buildings relevant to the standards that govern visual impact in context.
- [31]-[35] The representor again references the potential for land use conflict and references the potential for complaints to arise. We have addressed this in detail in our primary submission including the interpretation of the State Policy for the Protection of Agricultural Land 2009. The risk of complaints is not a fetter on agricultural use and the evidence establishes that the risk of complaints is capable of being mitigated such that there can be no reasonable assertion of the land use conflict arising. The presence of constraining land uses in the form of the approved strata lots that are approved for residential use in proximity to the vineyard cannot be ignored.

Dated this 2nd day of December 2021.

BILLETT LEGAL
Per: 
For the Applicant (Tempus Village Management Pty Ltd)