Lowe, Emma

From: John Izzard <johnizzard@bigpond.com>
Sent: Monday, 15 February 2021 3:29 PM
To: Lowe, Emma
Subject: Re: Northern Midlands 2013 - draft amendment 01-2020 and permit PLN-20-0001 - directions letter post reconvened hearing, 25 January 2021
Attachments: Recusal Final PDF.pdf; Recusal FinalWord.docx

Dear Emma,

Attached please find NOTICE for RECUSAL addressed to Sandra Hogue.

Many Thanks

John Izzard.

On 25 Jan 2021, at 11:34 am, Lowe, Emma <Emma.Lowe@planning.tas.gov.au> wrote:

Good morning

Please see attached correspondence from the Tasmanian Planning Commission

Kind regards,
Emma Lowe
Executive Officer
<image001.jpg>

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<John Izzard - Northern Midlands 2013 - draft amendment 01-2020 and permit PLN-20-0001 - directions letter post reconvened hearing, 25 January 2021.pdf><Northern Midlands 2013 - draft amendment~ermit PLN-20-0001 - draft changes to IPS to address heritage streetscape values.pdf>

Sandra Hogue
Deputy Chair and Executive Commissioner,
Tasmanian Planning Commission
144 Macquarie Street
HOBART
24th Jan. 2021

Dear Sandra Hogue

Notice of Request for Recusal.

Following your Tasmanian Planning Commission hearing on the 22nd of January 2021 in Hobart regarding the Northern Midlands Council matter, **Draft amendment 01-2020 and Permit PLN -20-0001,** I believe that as a participant at that hearing, I was subject to institutional bias and a failure, by yourself, in allowing vital evidence to be presented and/or accepted. I refer to the October 2020 **RMPAT 50/20F** decision regarding 189 George Street, Launceston.

As well, your request for new submissions in your letter of 25th Jan 2021 to the NMC General Manager, Mr Des Jenkins and others, would indicate that you are now considering 'shifting the goal posts' in regards to the present **NMC** planning scheme requirements.

By needing to propose 7 amendments that would allow the application by D. McCulloch to to be agreed to by your Commission, you are I believe, actually conceding that the existing provisions of the NMC planning scheme, dictates that the McCulloch application **does not conform,** thereby confirming that the determination by NMC, should stand.

I also argue failure of procedural process and fairness in the following matters.

I therefore request that you recuse yourself from further involvement in the above hearing.

My reasons are as follows:

Institutional Bias:

It has become evident that the progression of the above hearing has had a bias; not to follow the letter and intention of the Northern Midlands Interim Planning Scheme 2013, but to seek a way to allow the above Tabernacle development application to be granted.

In my opinion this bias has been extended, to allow Heritage Tasmania to submit evidence that is not only untenable, but contrary to the lawful objectives of the Historic Cultural Heritage Act 1995, and indeed the extensive precedents created and established over many years, by Heritage Tasmania and the Tasmanian Heritage Council, in their duty to preserve Historic Cultural Heritage sites and buildings in Tasmania.

As Heritage Tasmania and the Tasmanian Heritage Council are deeply involved in the current issues before your hearing, and indeed appear to make up nearly all of the evidence, pertinent to the developers application, your past association and membership of the Tasmanian Heritage Council, should have been declared.

I refer you to the newly released Tasmanian Government Report " Independent Review of the Tasmanian Planning Commission" by Professor Roberta Ryan and Alex Law, October 2020.

> *It was strongly indicated Commissioners and Delegates involved in assessment and determination should not hold any conflict of interests. However, some highlighted perceived conflicts of interest for members of the Commission with experience in planning and related professions as well as TPC staff that act as Delegates on development assessment panels. A number of submissions expressed concern that the composition of the TPC's member ship favours developer interests to the detriment of community and environmental interests. (page 61 of the report).*

There has been virtually no examination, at the two hearings, of the issues as to why the **NMC original decision to approve the development was reversed.** Instead, the hearing has turned into an exercise whereby Heritage Tasmania is promoting the developers application, to the extent as to how to redevelop the site, and even extended to allowing Heritage Tasmania to suggest faux designs for a faux building.

From this level Mr Ian Boersma, Heritage Tasmania Works Manager, was even extended the privilege to draw up and present an "envelope" suggesting a residential concept based upon a long-gone Manse, which was demolished around the 1960's.

With respect, I also draw your attention to 'Conflicts of Interest', in the Ryan report.

> *Many submissions expressed concern over the potential for conflicts of interest for State Agency representatives that are members and Commissioners of the TPC, particularly in instances where those Agencies are proponents of or have interests in planning matters before the TPC for assessment and determination. Because of this, it was suggested the State Agency representatives should only have an advisory, rather than decision-making role. (page 60 of the Ryan report.)*

Provisions of the Burra Charter and indeed the Heritage Tasmania adoption of that Charter indicate acceptance that heritage is almost exclusively based upon **'existing'** sites and structures. When I challenged Mr Boersma's notion that he could use 'retrospective' notions of a long-gone structure, demolished well prior to when the 1995 Heritage Act was promulgated, my protest was, it would appear, dismissed.

Yet a simple check of Heritage Tasmania/Tasmanian Heritage Council's "Assessing Historic Heritage Significance" booklet, October 2011 Version 5, displays photographs of 110 buildings and historical Tasmanian sites. There is no photograph of any building that does not exist.

That Mr Boersma was taking a 'decision-making' role rather that an 'advisory role' is indicated by the fact the Commission accepted Mr Boersma's 'decision' that the former Manse was a justification for the Tabernacle being separated from the the curtilage and the adjoining Sunday School, regardless of the fact that the two buildings have existed together, as a Heritage complex, for the past 141 years.

The Act covering Tasmania's Heritage Tasmania's involvement clearly states that Heritage Tasmania/Tasmania Heritage Council work with, not against, the local authority's Planning Department.

You have not questioned either why Heritage Tasmania is acting in the manner it has, nor whether any discussions with NMC by Mr Boersma, regarding the historic importance of the site, have ever taken place.

Your hearing has mainly focused on process and issues raised by Mr Boersma, in support of the developers application, and not on Heritage provisions and concerns raised by the NMC, Danielle Gray and Associates, myself and other interested parties, other than listing our submissions on the TPC hearings website.

I draw your attention to the TPC Code of Conduct:

PRINCIPLES. Obligation:

> "A Commissioner or delegate must not represent or advocate for or on behalf of a client or any interested party."

Based on evidence I have outlined I believe that it would be hard to argue that this has not taken place. With due respect, your letter of the 25th of January to Mr Des Jennings also appears to be doing just that… arguing for an outcome, favouring the developer.

No solution is required? As you didn't point out in your letter of the 25th, that E13.6.2 and about 12 other clauses and provisions in the NMC planning scheme, clearly indicate that your suggested 'solutions' are contrary to the spirit and stated intentions, and explicit provisions of the NMC planning scheme that prohibit any subdivision, with respect, I submit, represents "advocating for an interested party."

The reason why a stream of further submissions, by Longford ratepayers, who lodged the original objections, kept being submitted to your hearing, was because it was realised that the hearing was not at all addressing the issues they originally raised; but was off on a frolic, seeking ways to defeat the Council's decision and find a way, I believe, to defeat the provisions of the NMC Planning scheme; that **must** prohibit the subdivision at hand.

The institutional bias also is evident when you consider that your hearing did not show due concern for the decision of the Northern Midlands Council, acting as the 'local planning authority', representing 12,228 ratepayers and citizens, and the unanimous decision the Council had made on the matter.

Your apparent failure to show respect for the NMC decision, and its responsibility to carry out the functions of the Planning Act, I believe, is self-evident.

While it is accepted that your hearing is yet to come to a final decision, the institutional bias listed above, and my attention to the ebb and flow at both hearings, suggests to me that 'institutional bias' could, and possibly will, lead to an unjust outcome.

Vital Evidence: allowed, dismissed or rejected:

RMPAT

Evidence submitted by Heritage Tasmania to your hearings, which was just about entirely 'opinion' and not based on any factual examples, or Heritage Tasmania's stated aims, needed to be vigorously challenged by the Commission.

It wasn't.

At the 22nd January hearing you failed to allow me to submit evidence of the 8th January 2021 findings of the RMPAT 50/20F hearing into the 189 George Street Launceston appeal. You dismissed my submission on the grounds that, RMPAT findings were not applicable or had no standing, at your hearing. I was arguing RMPAT evidence, not the RMPAT finding.

This evidence should have been vital to your deliberations, as evidence in the RMPAT determination, totally contradicted the evidence given to your hearing by the same Mr Ian Boersma. Two different arguments submitted, over basically the same issues.

The extraordinary thing with your decision to reject the evidence, that had been lodged with RMPAT, was that the RMPAT determination also contained and quoted evidence from previous TPC and RMPAT hearings.

It would appear to be a conflict whereby you say the RMPAT hearing decision has no standing with your hearing, yet you found it necessary to discuss the contents of RMPAT findings, or at least my submission on the RMPAT decision, with Heritage Tasmania.

Nothing has been posted on the appropriate TPC website dealing with **Permit PLN -20-0001, or Draft Amendment PIN 20_0001** about the RMPAT issue**,** so the participants have no idea what transpired **privately** between Mr Boersma (I presume), and yourself.

If your above decision on rejection of RMPAT evidence is later found to be unacceptable, then I believe any determination on this development application, will be unsound.

My understanding of Australian law is the Common Law is made up of findings of other courts and proceedings. Without precedence, flowing through, we have no Common Law.

You did not allow 'flow through' from the RMPAT hearing.

Title Trust:

You disallowed my submission that there was doubt, as to the status of the land title regarding 41/43 Wellington Street Longford.

The proponent curiously had not submitted evidence regarding title to the land, causing me to wonder why, and to undertake extensive investigation.

I submitted documentary evidence to your hearing that the above land title was subject to a trust entered into with the 1880 purchase of the land by the Gibson family, that clearly stated that the land was to remain **'forever'** as a place of worship.

The descendants of the Gibson family still live at 'Native Point', 10 kilometres from the Tabernacle site that the family donated to the Baptist Church. The cultural and historic connection between a living family and the site still exists, after 141 years.

This covenant, within the land title, was sold to the Baptist Church in 1888 was part of the Gibson Trust, which then owned the land. No mention of the covenant appears to have been declared when the Baptist Church Trustees sold the site, to the penultimate owners, in 1994.

The status of the covenant, the lack of action by the trustees of the Trust that governs the covenant, and indeed the land title itself, places the TPC hearing in doubt as to whether the subdivision and rezoning can actually be determined. Does **not** the covenant still stand?

You refused to accept the evidence of this 'doubt', saying it was for another jurisdiction and it was my obligation to follow through with that issue, in that another place.

I beg to differ.

I believe that the TPC has a 'duty of care' and a responsibility to ensure its determination is on a sound legal basis, hence a duty to refer the question to either the present owners of the land, who are also the applicants, or a duty to refer the question to the Supreme Court for consideration.

I argued that the TPC hearing should not continue until the status of the title has been resolved. I also argue that it is not my responsibility to undertake this quest.

For future purchasers of the site, or proposed lots, should the TPC disallow the NMC decision, the issue is vital; that they could possibly be buying land that could be subject to a future legal challenge**…** and that a government agency was fully aware of the matter.

Once again the bias was towards facilitating the developers application, rather than a deliberation on the argument... that the Draft Amendments are possibly unsafe.

Imperative:

I wrote a submission, following my confusion as to what the hearing was using as an the 'imperative'; *i.e.* what was driving the decision-making-process of the TPC hearing.

My concern was that I gained the impression the hearing was ignoring the LUPAA Act 1993 which clearly stated:

> Clause 1(a), **sustainable development** means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and their health and safety while –
> sustaining the potential of natural and physical resources to meet the reasonable foreseeable needs of future generations; and:
> safeguarding the life support systems of air, soil and ecosystems; and:
> avoiding, receding or mitigating any adverse effects of activities on environment.

I believe the above reference to physical resources, adverse effects, environment, cultural and economic wellbeing, covers the issues regarding the Longford Tabernacle site.

> **The above section also states: " meet the foreseeable needs of future generations…"**

I argue that the above phrase is in lock-step with all of the wording and spirit of Tasmanian heritage legislation, and the specific objectives of State Government policy.

In straying from the above, and concentrating on finding a way to facilitate and approve the developers application, I believe the hearing is failing in both due process and fair-ness.

I repeat:

> "A Commissioner or delegate must not represent or advocate for or on behalf of a client or any interested party."

I suggested that an on-site hearing in Longford would enable the establishment of what I believed to be the essential object of the hearing; that is, whether the NMC had made a fair assessment of the site, and if it did so, the TPC should uphold that NMC decision.

Was the historic importance of the intact Tabernacle site of greater value as an amenity and asset to the Town of Longford, or did the approval for rezoning and subdivision fore fill the application's stated need ... to enable the present owners to dispose of the site?

The request for an on-site hearing in Longford was rejected, but the main question as regard to the 'imperative', was not, and still has not, been addressed.

A most vital point was raised by Danielle Gray, (representing the NMC,) at the 22nd January 2021 hearing.

Danielle Gray questioned whether the subdivision between the Tabernacle and the Sunday School would result in the Sunday School 'falling off' the Tasmanian Heritage Register.

The problem is that the Tabernacle and the Sunday School are connected, by 1970's infill structure and if the demolition of the infill takes place the complex becomes two separated buildings.

The issue being, if the Sunday School then becomes a seperate building, on a seperate title, would its Heritage Register listing still exist? Apparently the answer is no.

As stated earlier in this document, you questioned Mr Boersma regarding this, and whether he could undertake the task of asking the Tasmanian Heritage Council if the Sunday School could be urgently added to the Heritage Register.

Mr Boersma was reluctant to say whether this could be **urgently** done, and stated something to the effect that staff controlling the Heritage Register were very busy etc.

In any event, the individual listing of the Sunday School requires a statutory process that in itself, is subject to appeal to the RMPAT.

I believe that this situation is, more than likely, to the developers advantage; that is, **NOT** to have the Sunday School listed on the Heritage Register.

In this submission for your recusal, I believe that you should have **at least** suspended the hearing until such time that the Tasmanian Heritage Council registered the Sunday School, or because of the doubt regarding the listing of the Sunday School, rejected the developers application outright.

Due Process.

Due process should have entailed the 'submitted proposition' that the NMC Interim Planning Scheme amply provided the necessary provisions and clauses that would have totally justified the NMC council decision... that is that the application did not comply with clauses of the NMC planning scheme, and therefore could not be approved.

It is not unreasonable to argue that the 'first port of call' is to examine the provisions of the NMC planning scheme that indicate or specify what is, and what isn't, applicable to the development application.

A simple check of the NMC planning scheme reveals about **12 sections** or clauses that point to the protection or retention of Historic, Heritage, and Cultural sites and buildings, as well as amenity, streetscapes, tourist sites protection and public viewing availability.

The most specific, are:

> E13.1.1 (d) Conserve specifically identified Heritage places. and;
>
> E 13.6.3 Subdivision and development; which states: P1 subdivision **must**
>
> **(c) not result in the separation of buildings or structures from their original context where this leads to a loss of their historical heritage significance.**

I raised the above issue with yourself at the first hearing and again at the hearing on the 22nd of January 2021. On both occasions you stated that the above clause E13.6.2 was subject to 'discretion'; (presumably by the TPC).

I argued on both occasions that the word **MUST** is absolute. This is understood to be so under Common Law. If the intention is otherwise then a lesser word should be used in the legislation, such as "may" etc. Presumably the writers of the NMC planning scheme meant **MUST. (see Acts Interpretations Act, 1931. Tasmania.)**

The argument then shifted to the the last few words of **E13.6.2. (c),** "where this leads to loss of their historical heritage significance". (separation of two Historic buildings by subdivision.)

I have been advised that this qualification only applies to **whether** the separation (subdivision) will lead to a loss of 'Historic Heritage significance'. It does not **grant discretion for the whole clause.**

You have not sought any evidence regarding potential loss of historical heritage significance, other than the actual separation by subdivision.

Any consideration of the potential loss of Historic Cultural Heritage significance (Clause 13.6.2 P1 (c) must firstly be preceded by establishment of its actual 'heritage protection' and include whether such 'heritage protection' is transferred, should a separation (by proposed subdivision) be allowed to occur.

If that existing 'heritage protection' does not **immediately transition**, then there is an clear loss of "Historic Heritage Significance", should subdivision be granted.

Firstly, in regards to "loss of Historic Heritage Significance" this is not just limited to the line drawn on a map or title deed. It deals with repercussions, such as aesthetics and status, all of the issues listed in the Burra Charter as to why the reduction of historic sites **should not take place.**

Specifically, failure to assess the impact of such a separation (by subdivision) that could lead to activities such as fencing (type and height) and obstructions, carports, Hills hoists, parked caravans, trampolines, workshops, garden sheds, solar panels and other legitimate rights, allowed under 'residential' zone, should have been considered as part of your deliberations as to exactly what Historic Heritage Significance was going to be lost.

The above 'residential' (allowable) possibilities should have been self-evident and indicated to the Commission, the eminent potential danger to the integrity of the Tabernacle site.

Therefore the 'loss of historical significance' will occur not because of, not only subdivision, per say, but as a result of the consequences, of that subdivision.

The loss of protection that surely will occur should have been self-evident. The Commission, and the Commission should have exercised its responsibility to **do no harm**.

Once the provisions of E13 are ignored, and a rezoning takes place, the historic Sunday School, which has been part of the Tabernacle complex, for the past 141 years, simply becomes a residential site with no heritage protection (should the Tasmanian Heritage Council, fail to act in time). And it has shown no inclination to act, in this matter, so far.

Residential zoning offers virtually no aesthetic or cultural or visual site protection.

While it is noted that you have proposed certain potential changes to the existing NMC planning scheme, by way of specific amendments to the NMC scheme, I believe that you have not demanded or received sufficient or adequate evidence at the hearings, for you to undertake that task.

Until a ruling has been made on the status of E13.6.2, this uncertainty should have prevented you from undertaking requests for comment from the NMC on the 7 proposed amendments.

Your proposed amendments almost totally removes the Heritage protection the site now enjoys, and would create an unacceptable precedent.

If your proposed amendments are approved, future developers will use the Longford Tabernacle experience as evidence that, by simply applying for 7 amendments (or what ever number are deemed necessary) to the planning scheme, they can simply defeat any heritage provisions, on any planning scheme requirements, anywhere in Tasmania.

Procedural fairness:

At the 22nd January 2021 hearing you announced that you and your co-Commissioner were working towards a decision in favour overturning of the NMC decision, 'to refuse the developers application', and were looking to find a way to achieve an outcome, favouring the developers application.

Your Commission hearing is in its seventh month, trying to achieve the above task.

The NMC took less that one hour to decide that the above development application should not be approved, because it did not comply.

Your 25th Jan 2021 letter of request to the NMC General Manager seeks further information and opinion to reinforce your apparent preference for approval. So there is very little doubt that I am not prejudging the eventual outcome, that you have in mind.

In your above letter to Mr Des Jennings you are asking for Council to comment upon your preferred solutions, to a basic proposition that the NMC has already rejected. You seek of an officer of Council to disavow their previous actions and decision, of Council itself.

The NMC decision to reject the application **Draft Amendment 01-2020 and Permit PLN-20 0001** was based upon extensive history of the Tabernacle and the Gibson family as well as the connection to nine other Tasmanian Baptist Tabernacles, which formed a collection of Historic Heritage buildings and sites, that the family funded.

The Tabernacle is not only the most prominent 'stand alone' historic building in Longford, it is part of a group of buildings, unique to Tasmania. It dominates a large section of the town's main street, Wellington Street, and is the most visible monumental historic building, I believe, in the township.

As the NMC has already accepted the historical and heritage evidence, and made a firm judgement on the matter, your request to the council to commit to answering matters 1 to 3 , I believe is what is called 'wedging', that is 'loaded questions', putting the Councillors in a compromising position.

It falls into the historic example of the loaded question: “have you stopped beating your wife”? *(Plurium Interrogationum)*.

It would, from my perspective, be somewhat perverse, if not intimidating, to undertake your suggested course of action. The NM Councillors know full well that they opposed any notion of a subdivision and rezoning of the Tabernacle site.

Your site-specific questions regarding General Residential Zone and Heritage Specific Plan (SAP), are I believe an ingenious concept designed to defeat the letter and intention of the Heritage Precinct provisions, the NMC planning scheme and the NMC’s preferred outcome, and in so doing, subvert the present protection afforded by the planning scheme.

In respect to my submission that the NMC must uphold the provisions of the Northern Midlands Interim Planning Scheme 2013, I refer you to the Land Use Planning and Approvals Act 1993:

> **48. Enforcement of observance of planning schemes**
>
> Where a planning scheme is in force, the planning authority must, within the ambit of its power, observe, and enforce the observance of, that planning Scheme in respect of all use or development under-taken within the area to which the planning scheme relates, whether by authority or by any other person.

How can they do this, when you are suggesting to them, to do the exact opposite?

Planning is concerned with the public good, not private interests.

Planning schemes are developed to reflect community aspirations for the future of their municipal area. Website: Premier of Tasmania, Hon. Peter Gutwin.

As well, I have advised your hearing that Heritage Tasmania refuses to divulge its ‘secret’ coding system, which denies both the Commission and the hearing participants vital information. I believe that the Commission should have insisted that this secret coding be divulged, so the Commission could understand why 189 George Street, Launceston, had a greater standing, under the same Code, than the Longford Tabernacle site. Apparently!

In the United Kingdom, heritage sites are graded Grade1, Grade 2, and Grade 3 etc. The grading allows owners and others to know the status of each heritage unit.

I believe that you should have insisted that Heritage Tasmania divulged the code for both the Longford Tabernacle and 189 George Street, Launceston.

In seeking your recusal I am of the belief that the hearing is not operating on a level play-ing field. I am not writing this notice because I feel that we are loosing the argument, I am writing because I believe that our argument isn't even being reasonably considered.

Transitioning

You raised the issue of the forthcoming State Planning Scheme and mentioned that the Minister may be reluctant to transfer certain heritage provisions from the NMC Interim planning scheme to the new State Planning Scheme. I believe the words you used were "reluctant so sign off".

In your letter of 25th January you again raise the issue of transition of the "Local Provisions Schedule". You say " ...this specific area plan in the interim planning scheme will therefore also not transition".

Again, I would interpret this as some what intimidating, as the NMC has many towns and vil-lages thriving under the protection of Heritage Precincts.

The thought of losing these protections, through 'non-transition', would be a anathema to both Council and citizens of these towns.

Which begs the question whether there is a political issue to be addressed. And whether the Minister or his department have expressed a point of view or commented about issues generally, that may seriously affect the outcome of your hearing.

Parliament, let alone the NMC and the public, have yet to see and contributed to this proposed State Planning Scheme, so notions of non-transitioning would appear to be somewhat, out of order.

Finally I believe that you and the Commission, and the NMC have been ill-served by the actions of Heritage Tasmania and the Tasmanian Heritage Council.

I hope that you do not take this request to recuse personally. You have at every stage been fair regarding access to the Chair, and for that, I thank you.

Sincerely,

John Izzard.