simmons WOLFHAGEN Lawyers

Contact: David Morris / Robert Holbrook
Our Ref: DJM:RJH:230427

7 December 2023

Mr Roger Howlett
Delegate (Chair)
Tasmanian Planning Commission
GPO Box 1619
HOBART TAS 7001

**By Email: tpc@planning.tas.gov.au**

Dear Mr Howlett,

**Devonport LPS - Draft Amendment AM2022.02 and Permit PA 2022.0024 - Stony Rise**

1. The following is a brief but necessary response to Mr Spence SC's correspondence to you dated 5 December 2023.

2. Hearings of this nature are an iterative process and can be inquisitorial.[1] Accordingly, section 10 of the *Tasmanian Planning Commission Act* 1997 ('**TPC Act**') provides, inter alia, that the Commission may inform itself in any way it thinks fit, can receive oral or written evidence and is not bound to act in a formal manner.

3. While section 40L(1) of the *Land Use Planning and Approvals Act* 1993 ('**Act**') provides that the hearing is in relation to the '*representation*[s]', it does not follow that the hearing can only be in relation to matters raised in representations.[2] It is submitted that is not consistent with the statutory framework of the Act, is contrary to section 10 of the TPC Act and would unreasonably limit the scope of any hearing.

4. For example, section 40M(1) of the Act that provides that the Commission "*must consider … the information obtained at the hearings*" and "*whether modifications ought to be made to the draft amendment of an LPS*."

5. Section 40L(6) also provides that the Commission is not to consider "*a matter*" that if it were included in a representation, would in accordance with section 40J(5), not be taken to be part of one. Section 40L(6) would be otiose if

[1] See, eg, *Attorney-General v University of Tasmania* [2020] TASFC 12 at [62] & [84]-[86].
[2] See, eg, *R v Davis and Vandenberg* (1999) 103 LGERA 169 at [25] cf *R v Davis & Ors* (1999) 102 LGERA 88 at [30], noting that the legislative framework of the Act has been amended since that decision.

hearings under section 40L(1) were only in relation to matters raised in representations.

6. Applications to re-open are commonly applied for and granted. One of the four recognised classes of case in which a court or statutory body such as the Commission may grant leave to re-open is to adduce fresh evidence.[3]

7. The overriding principle governing the exercise of a discretion to re-open is to determine whether the justice of the case favours the grant of leave to re-open.[4] For example, as explained by Justice Kirby in *Goldsmith v Sandilands*:[5]

> *"The **guiding principle** for the grant or refusal of leave to call evidence in response to the evidence of another party, where this is sought by a party, **is, ultimately, what the justice of the case - including procedural fairness - requires.** That principle should not become unduly entangled in precedents or procedural rules.*
>
> *Whilst efficiency and economy in the conduct of civil trials are important requirements of the contemporary trial process, those objectives are valid only as they contribute to just outcomes. Once the trial process is under way, rigidity should be avoided, certainly at a time before the evidence has been closed and before the decision foreshadowed or announced. To exclude relevant evidence during a trial, in response to evidence tendered by another party in its case, simply because it could, or should, have been adduced earlier may, in particular circumstances, deny the party tendering such evidence the fair opportunity to present its case. …"* [emphasis added]

8. Here the evidence of both Ms Riley and Mr Davies responds to matters raised by the Commission delegates and parties at the hearing on 15 and 16 June 2023, is clearly relevant and does not offend section 40L(6) of the Act.

9. As previously indicated, it is our client's position that the evidence of Ms Riley and Mr Davies is relevant to determining whether modifications ought to be made to the draft amendment in accordance with the relevant provisions of the Act. It is submitted that the justice of the case weighs in favour of allowing the evidence to be heard. In this respect, the suggestion that our client is contending it has an endless right to present its case, should be eschewed.

10. Our client does not wish to pre-empt any decision from the Commission in relation to the receipt of the evidence of Ms Riley and Mr Davies provided in our correspondence of 27 November 2023. That is properly a matter for the Commission to determine.

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[3] See, eg, *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24] and *Goldsmith v Sandilands* [2002] HCA 31 at [58].
[4] See, eg, *RV Pty Ltd v Connector Park Pty Ltd (No 4)* [2022] TASSC 66 at [26], *Tomaszewski v Hobart City Council (No 2)* [2021] TASSC 15 at [19], *Spotlight Pty Ltd v NCON Australia Limited* [2012] VSCA 232, 46 VR 1 at [26]; *Ezra Abrahams Pty Ltd v Milburn* [2017] VSCA 355 at [46]
[5] (2002) 190 ALR 370 at [58]-[59].

11. Our client acknowledges that it would be procedurally unfair for Ms Riley and Mr Davies' evidence to be heard and delivered at the resumption of the hearing without a reasonable opportunity for the parties to obtain their own advice and/or evidence in relation to that.

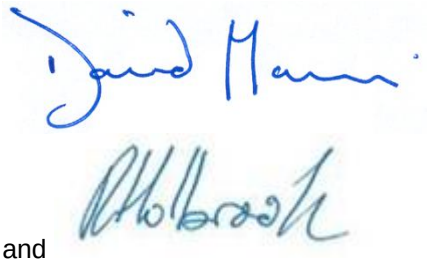
12. However, it is submitted it would be procedurally unfair to our client, having now provided the evidence of Ms Riley and Mr Davies, for the Commission to proceed in this matter without hearing it.

13. Accordingly, we intend seek appropriate directions to allow that evidence to be heard. For the avoidance of doubt, we are instructed to consent to any further (reasonable) adjournment to facilitate that occurring.

Yours faithfully,

**SIMMONS WOLFHAGEN**

Per:



and

Counsel for Tipalea Partners