City of HOBART

Enquiries to: Sarah Crawford
☎: 62382157
✉: crawfords@hobartcity.com.au
Our Ref: 17/167

17 May 2021

Sandra Hogue
Executive Commissioner
Tasmanian Planning Commission
PO Box 1691
Hobart TAS 7001

Via Email: tpc@planning.tas.gov.au

Dear Ms Hogue

PLANNING DIRECTIVE 8 – EXEMPTIONS, APPLICATION REQUIREMENTS, SPECIAL PROVISIONS AND ZONE PROVISIONS

Thank you for the opportunity to provide feedback in relation to Planning Directive 8 – Exemptions, Application Requirements, Special Provisions and Zone provisions (PD8).

The following comments are made at officer level, and have not yet been considered or endorsed by Council. These comments are intended to be considered at the City Planning Committee meeting of 17 May 2021 and Council meeting of 24 May, and the minutes from these meetings will be submitted when available.

- Council has provided feedback to the Tasmanian Government on two occasions previously (July 2020 and February 2021), raising concerns in relation to legislative changes that proposed the introduction of State Planning Provisions (SPPs) into interim schemes (attached).

- The supporting documentation provided by the Planning Policy Unit relating to the introduction of SPPs into the interim schemes relies heavily on the assertion that any issues with the SPPs were resolved during the initial SPP consultation and assessment process.

  While it is noted that PD8 implements provisions that have previously been exhibited and approved by the TPC, the Commission noted that there was insufficient time to give comprehensive consideration to issues of detail during the initial assessment of the SPPs.

In its S25 Report to the Minister in relation to the SPPs, the Commission stated:

> *7.1.2 Quality Assurance*
>
> *While the Commission has made every effort to ensure that recommendations for modifications to the draft SPPs are clearly and consistently drafted, there has been limited time for quality assurance. For example, there has been no opportunity for focused consultation or release of an exposure draft to practitioners to mitigate the possibility of unintended consequences arising from modifications.*
>
> *9.0 Conclusion*
>
> *The Commission has considered the draft SPPs as exhibited and had regard to the large number of representations received. While it has had an extension of time within which to consider and report on the draft SPPs, its approach has been necessarily pragmatic. More time would have been helpful to better resolve some issues of complexity or detail.*

Given the limitations of the original SPP assessment process, SPPs should not be introduced into interim schemes until they have been assessed in more detail.

- In addition to the above, bringing forward SPPs denies planning authorities the opportunity afforded under s.35G of LUPAA to notify the Commission, and subsequently the Minister, as to whether amendment of the SPPs is required before those provisions are in operation.

- If PD8 is to be supported by the TPC, the opportunity should be taken to more closely review the drafting of the provisions to ensure they are workable and result in fair and reasonable planning outcomes.

- The following comments are provided on issues with specific provisions. It is noted some matters raised below reiterate issues that were raised by CoH during initial consultation on the SPPs:

    - **Exemptions – 5.0.3** - Clarity should be provided for what an 'actively mobile landform' is considered to be, either by way of a definition or a map overlay. As this is referred to in clause 5.0.3 as a pre-condition for all exemptions, it is very problematic to use an undefined and contested term. Chris Sharples' paper titled '*The problem of ambiguous terms in Tasmanian coastal planning policy documents for defining appropriate coastal development zones'* highlights the issues associated with using this terminology in planning instruments.

      It is noted that this ambiguous terminology was already used in the southern interim schemes, however it was only used in some of the performance criteria of the Coastal Erosion Hazard Zone as one of the discretionary considerations. Using this uncertain and contested terminology in the exemptions, which should be clear and unambiguous

about whether a proposal needs to be considered by the scheme, will make administration of the exemptions very difficult.

It is further noted there is a typographical error in this clause - 'not development listed in Table 5.1' should read '**no** development listed in Table 5.1'.

- **Exemptions – 5.3.4 -** The exemption relating to unroofed decks should not exclude those 'attached to or abutting a habitable building'. It results in unnecessary planning applications. It is noted this was also an existing issue under the exemptions of PD1.

- **Exemptions – 5.4.3** – This exemption is problematic and appears to allow for removal of potentially significant vegetation that would and should ordinarily be managed by codes. The provision allows for 'landscaping and vegetation management' as exempt in a private garden, with very few exceptions.

  'Landscaping and vegetation management' is not defined, and is ambiguous as to whether it includes tree or hedge removal. Other vegetation exemption clauses (5.4.1 and 5.4.2) refer to 'clearing or modification' or 'vegetation removal' which suggests that 'landscape and vegetation management' is something different and potentially not inclusive of clearing or removal. The Planning Policy Unit were asked for advice on whether tree removal was covered by 5.4.3, and the response received was that 'it could include removal of vegetation in the act of landscaping and managing the vegetation in these areas' but that tree removal is 'not the main purpose of this exemption'. This does not provide clarity around whether this exemption can be applied to the removal of one or multiple trees or hedges (not relating to safety or bushfire management) in absence of any other 'landscaping' works.

  Assuming trees can be removed under this exemption, this means that any vegetation removal considered to be in a 'private garden' can be removed with no regard to overlays such as the Biodiversity Code or the Scenic Landscapes Code, whose primary function are to protect vegetation for biodiversity or scenic purposes. This significantly erodes the purpose of these codes, particularly within non-urban zones.

  The PPU provided further advice that the vegetation exemptions of the SPPs are intended to correspond with the exemption for landscaping and management of vegetation in PD1 (clause 6.3.2(a)). This advice seems to indicate that there may have been an error in translation. The equivalent exemption under PD1 (which is worded very similarly to 5.4.3 of PD8) sits below a general exclusion from the exemption where, amongst others, the following apply:

  - 'a code in this planning scheme which lists a heritage place or precinct and requires a permit for the use or development to be undertaken';

- ‘a code in this planning scheme which expressly regulates impacts on scenic or landscape values and requires a permit for the use or development that is to be undertaken’;

- ‘a code in this planning scheme which expressly regulates impacts on biodiversity values and requires a permit for the use or development that is to be undertaken’;

- ‘the removal of any threatened vegetation’;

- ‘land located within 30m of a wetland or watercourse’.

Clause 5.4.3 of PD8 should retain these exceptions.

It is further noted that, structurally, the equivalent PD1 exemption sits below the general heading of ‘*the planting, clearing and modification of vegetation for any of the following purposes’* which provides greater clarity in terms of whether tree removal is covered by the exemption. This is not the case for 5.4.3 of PD8.

The background report on PD8 provided by the PPU states that the vegetation removal exemptions will assist with more appropriate bushfire hazard reduction. However, clause 5.4.3 is not related to vegetation management for bushfire hazard reduction purposes, which is specifically covered under clause 5.4.1, and therefore this justification does not apply to 5.4.3.

- **Exemptions - 5.4.1 (f)** – this subclause sits under a category of exemptions for ‘vegetation removal for safety or in accordance with other Acts’. It allows clearance within 2m of lawfully constructed buildings and infrastructure ‘for maintenance and repair’. CoH has taken this to mean that this exemption only applies where it is for an explicit purpose of removal for safety reasons (or in accordance with other Acts). 5.4.1(f) is not limited to public authorities, and therefore if a wider interpretation is taken, this may allow private landowners to remove significant trees or specifically listed heritage gardens without any regard to those codes.

- **Exemptions – 5.4.1, 5.6.2 and 5.6.3** – there is apparent inconsistency between fencing exemptions and vegetation removal exemptions. Under 5.4.1 (h), vegetation can be removed within 1.5m of a boundary for the purposes of erecting or maintaining a boundary fence (with no qualifications). However, exemption 5.6.3 (for fences within 4.5m of a frontage in the General or Inner Residential Zone) does not allow for the exempt erection of a fence where a code relating to significant trees applies.

  The fencing exemption at 5.6.2 (for fences not within 4.5m of a frontage in the General and Inner residential zones) specifically excludes the erection of a fence in circumstances where it involves ‘the removal of any threatened vegetation’.

Application of these exemptions seems to be directly inconsistent and makes it difficult to determine which exemption takes precedence.

Further, the significant tree restriction is not applied to the exemption at 5.6.2, which is inconsistent with exemption 5.6.3. The significant tree code should be referenced in 5.6.2(f), particularly given the PD8 background document states that '*where the Local Historic Heritage Code is referenced, the modified reference also refers to a code relating to significant trees as the significant tree lists operate through the SPPs Local Historic Heritage Code'*.

- **Exemptions – 5.6.3 -** The exemption relating to front fences will result in poor planning outcomes in terms of streetscapes, communities and potential for crime. 1.8m with a 30% transparency is only likely to be acceptable as a front fence in limited circumstances even under discretion, let alone as an exemption or acceptable solution. The exemption should retain a maximum of 1.2m.

- **Exemptions - 5.6.5** – this exemption relating to retaining walls could be clarified with respect to the words 'excluding any land filling'. At the moment it isn't clear if those words intend to remove land fill from the exemption, or remove landfill from the qualifications attached to the exemption. The latter approach has been assumed, but this should be qualified.

- **Special Provisions – 9.1.1(a)** – this special provision does not explicitly specify that bringing an existing use into conformity or greater conformity with the scheme can involve changes from that existing non-conforming use to a different non-conforming use. This should be expressly catered for. In addition, this clause should make reference to any applicable Local Area Objectives. It is noted this was also an existing issue under the special provisions of PD1.

- **Special Provisions - 9.3 (b)** – the reference to 'minor changes' to lot shapes in order to qualify as a boundary adjustment causes issues in terms of definition and application. Some boundary adjustments that improve the usability of sites must be categorised as 'subdivision' due to this reference, and in some circumstances this results in them being prohibited despite offering a more positive planning outcome than the existing situation.

  For example, the amount of land being transferred between a large lot and a small lot may be considered 'minor' in relation to the larger lot, but not the smaller, and therefore not meeting the conditions of a boundary adjustment. This is particularly noteworthy where an existing sub minimum lot is altered to become closer to the zone's minimum lot size. It is recommended that reference should instead be made to the size, shape and orientation of lots achieving the Zone Purpose Statements and any Desired Future Character Statements. It is noted that this was also an existing issues under the special provisions of PD1.

- **Special Provisions - 9.5** - change of use of a place listed on the Tasmanian Heritage Register or a heritage place – the application requirements under this provision are not as strong as those previously under the HIPS. PD8 refers to 'any' heritage impact statement and 'any' conservation management plan, whereas the previous provisions stated that a heritage impact statement and conservation management plan must be provided and 'written with regard to the proposed use'. This requirement should be retained.

- **General/Inner Residential Zone Provisions - 10.4.2/11.4.2 P2** – the primary issue for this performance criterion should not be whether the new garage or carport is compatible with existing garages or carports in the street (which may include some highly undesirable garages or carports), but whether the development maintains or improves the quality of the streetscape.

- **General/Inner Residential Zone Provisions - 10.4.2/11.4.2 A3** – The removal of a rear boundary setback in the building envelope is not supported. This is likely to be problematic for neighbouring lots that are smaller or part of a strata, where their 'window' of amenity is already limited and further intrusion may be unreasonable.

  A recent example for CoH is an application that was intended to be refused based on the previous building envelope provisions due to the proposal's unacceptable impact on a neighbouring property. After the introduction of IPD4, this application became permitted under the new building envelope provisions, despite the poor outcome.

  Loss of rear garden spaces in suburbs is likely to significantly alter the character and amenity of these areas, reduce recreation space, reduce privacy, increase land use conflict and reduce vegetation in neighbourhoods. This is also at odds with heritage precinct provisions that value rear garden settings, and increases the discrepancy between permitted zone provisions and code provisions where heritage precincts apply. The issue is exacerbated by allowing private open space to apply to areas that are used for car parking and manoeuvring. (see comment under clause 10.4.3/11.4.3 below).

  These issues are particularly important for the General Residential Zone, even if they were to be more relaxed for the Inner Residential Zone.

- **General/Inner Residential Zone Provisions - 10.4.2/11.4.2 A3(b)(ii)** - it should be clarified whether the 9m/one third of the boundary limit for walls is intended to apply to only the side boundary or also the rear boundary. While the preamble for A3(b) refers to 'side or rear' boundaries, only 'side' boundaries are referred to in A3(b)(ii). It does not seem logical that this should only apply to side boundaries if there are no longer rear boundary setback provisions.

- **General/Inner Residential Zone Provisions - 10.4.3/11.4.3 A2 -** The acceptable solution for Private Open Space should still include the requirement that it not include areas used for car parking. This is particularly important given the removal of a rear boundary setback provision. Removing requirements for it to be accessible and to receive sunlight also not ideal. The performance criteria should be further strengthened from the previous PD1 provisions to support refusal of inappropriate outcomes.

- **General/Inner Residential Zone Provisions – 10.4.7/11.4.7** – note previous comment about inappropriate front fence exemption. Both the objective and the performance criteria for the frontage fences provision should relate to the proposed fence's impact on the streetscape, which is a critical consideration for front fences. The performance criteria should not relate to 'privacy' being a mandatory requirement for a front fence. 'Privacy' and 'passive surveillance' are contradictory outcomes, but both are required in P1 (a), which is nonsensical.

- **HIPS General/Inner Residential Zone Provisions – 10.5.1/11.4.9** - Under the HIPS as amended following the introduction of IPD4, there is now an error in clauses 10.5.1 and 11.4.9 dealing with non-dwelling development in the General Residential and Inner Residential zones. A1(b) of these clauses requests that non-dwelling development must comply with 10.4.3 A1 (a) and (c), however there is no longer a clause 10.4.3 A1 (c) following the changes introduced by the directive. This clause reference should be deleted.

Attachments: Letter to Planning Policy Unit dated 28 July 2020

Letter to Planning Policy Unit dated 5 February 2021

Yours sincerely

(Neil Noye)
DIRECTOR CITY PLANNING

City of HOBART

Enquiries to: James McIlhenny
☎: 62382891
✉: mcilhennyj@hobartcity.com.au
Our Ref: F20/76102
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28 July 2020

Mr Brian Risby
Director Planning Policy
Department of Justice

Via Email: planning.unit@justice.tas.gov.au

Dear Mr Risby

DRAFT LAND USE PLANNING AND APPROVALS (MISCELLANEOUS AMENDMENTS) BILL 2020 - CONSULTATION

I write in response to your letter dated 20 July 2020 seeking comments on changes to the Land Use Planning and Approvals Act 1993.

The following comments are provided in relation to each of the intended amendments:

1. The proposal to give additional time for notices for public exhibition of a draft LPS is supported.

2A. The proposal that an LPS could come into operation prior to directed substantial modifications being made may result in poor outcomes. Presumably the Commission has determined that substantial modifications should be made after exhibition for a reason and approving the LPS to operate without the changes may be problematic.

It is noted that there is intended to be provisions similar to S35K(2)(d) to prevent permits being determined in the interim that could directly convene the intended modification. This however could get quite complicated to administer, would these applications if submitted have to be put on indefinite hold? It may be necessary to assess an application in order to ascertain if it would contravene the modifications. Also, as the modifications will be advertised again, it is not certain what the final form will be, and therefore determining if an application would contravene them could be difficult.

Perhaps a better solution would be to provide a process for consideration of the substantial modifications that is less onerous than the full LPS exhibition process?

2B. It is agreed that a draft LPS midway through a process should continue in the process they are currently going through.

3. The proposal to provide for the inclusion of amendments to current planning schemes in the LPS is supported.

4. The provision of a process for parts of the SPPs to be brought into effect early in interim planning schemes, through the planning directive process without public exhibition and assessment by the Commission is not supported.

This proposal appears to be based on the assumption that all issues with the SPPs were resolved through the initial SPP assessment process. While the SPPs have been through a public exhibition process and assessment by the Commission, by the Commission's own admission there was not sufficient time to resolve all issues. In its S25 Report to the Minister, the Commission stated:

> *7.1.2 Quality Assurance*
>
> *While the Commission has made every effort to ensure that recommendations for modifications to the draft SPPs are clearly and consistently drafted, there has been limited time for quality assurance. For example, there has been no opportunity for focused consultation or release of an exposure draft to practitioners to mitigate the possibility of unintended consequences arising from modifications.*
>
> *9.0 Conclusion*
>
> *The Commission has considered the draft SPPs as exhibited and had regard to the large number of representations received. While it has had an extension of time within which to consider and report on the draft SPPs, its approach has been necessarily pragmatic. More time would have been helpful to better resolve some issues of complexity or detail.*

To bring parts of the SPPs into the interim schemes is fraught with difficulty and may have unintended consequences. Some of the SPP provisions may not function effectively with the interim schemes given they are different schemes, and significantly different between regions. There should at least be some process for assessment and a chance for planning authorities to make comments to ensure that any directives bringing forward SPPs actually work with the interim schemes.

In addition this proposal would deny planning authorities the opportunity provided under S35G of the Act to notify the Minister as to whether amendment of SPPs is required.

5. A more streamlined process for making amendments to the SPPs that meet the criteria under section 30H(3) of the Act is supported.

6. Heading change to S40O of the Act is supported.

Thank you for providing the opportunity to comment.

Yours faithfully

(Neil Noye)
DIRECTOR CITY PLANNING

City of HOBART

Enquiries to: Karen Abey
☎: 6238 2179
✉: @hobartcity.com.au
Our Ref: F20/121996

5 February 2021

Brian Risby
Director Planning Policy
Planning Policy Unit
Department of Justice

Via Email: planning.unit@justice.tas.gov.au

Dear Mr Risby,

CONSULTATION ON DRAFT *LAND USE PLANNING AND APPROVALS AMENDMENT (TASMANIAN PLANNING SCHEME MODIFICATION) BILL 2020* AND *HOUSING LAND SUPPLY AMENDMENT BILL 2020*

I refer to your letter dated 13 November 2020.

The following comments are provided in relation to the proposed amendments.

Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Modification) Bill 2020

1. The Minister is not required to consult with planning authorities prior to making a "minor amendment" to the SPPs which may impact on LPSs, in draft s.30NA(1)(a)(viii). Draft s.30NA(2) states that the Minister "may consult with planning authorities. This is a discretion: s.10A of the *Acts Interpretation Act 1931*. The amendments could potentially have a significant impact and it is important that planning authorities are consulted. It is therefore proposed that in s.30NA(2) that the Minister **must** consult with planning authorities.

2. There is also no requirement to consult with the Commission for minor amendments. Draft s.30NA(3) states that the Minister "may" consult. If the Minister chooses not to consult, as he or she would be entitled to do, then this process would effectively become unilateral. This is contrary to the information package which you have circulated (see the diagram on page 9). It is proposed that "may" is changed to **must**.

3. Similarly, for interim amendments of the SPPs, in draft s.30NB, the Minister "may" consult with the Commission. For the reasons stated above, it is proposed that this is changed to **must**.

4. Further, in s.30NB, there is no requirement to consult with planning authorities. If nothing else, from a practical point of view for planning authorities in communicating with developers and determination of development applications, there should be consultation of proposed amendments to SPPs. Given that planning authorities have the practical experience in implementing the SPPs, the failure to consult with planning authorities could lead to poor outcomes.

5. In relation to substantial modifications of draft LPSs, addressed in draft s.35KB, we reiterate the concerns which have been raised with you previously, that we anticipate that this may lead to poor planning outcomes. This is less of a concern for contemplated changes to zones, but more of a significant risk for the application of codes or policy-type changes to a draft LPS. It is proposed as an alternative that the subsequent public notification and feedback process is truncated to an extent, so that the implementation of the LPSs is expedited.

6. The proposed changes to s.51 are broadly welcomed and will address some of the difficulties we have experienced when amendments to a scheme commence after an application has been made. However, we repeat our concerns for the scenario where a "substantial modification" is required to an LPS. To make the substantial modification apply, irrespective of whether or not it has been made as an amendment to the LPS, undermines the public notification and assessment by the Commission of the substantial modification. Again, we anticipate that this may result in poor planning outcomes.

7. It is noted that the words "is made" have been omitted from draft s.51(3C)(a), after "on the day on which the decision".

8. The proposed amendment to clause 3 of Schedule 6 by inserting (2A) to (2D) for the amendment of planning directives is not supported. We repeat our earlier comments:

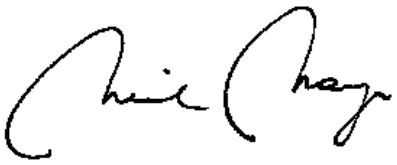
   To bring parts of the SPPs into the interim schemes is fraught with difficulty and may have unintended consequences. Some of the SPP provisions may not function effectively with the interim schemes given they are different schemes, and significantly different between regions. There should at least be some process for assessment and a chance for planning authorities to make comments to ensure that any directives bringing forward SPPs actually work with the interim schemes.

   In addition this proposal would deny planning authorities the opportunity provided under s.35G of the Act to notify the Minister as to whether amendment of SPPs is required.

Housing Land Supply Amendment Bill 2020

No specific concerns are raised in response to this Bill.

Yours faithfully



(Neil Noye)
DIRECTOR CITY PLANNING