

32-34 Georges Bay Esplanade
St Helens Tasmania 7216
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Our Reference: TRIM 22/2408
Contact: D. Szekely

23 December, 2022

Mr. John Ramsay
Delegate (Chair)
Tasmanian Planning Commission
GPO Box 1691
HOBART TAS 7000 E: tpc@planning.tas.gov.au

Dear John,

**DIRECTIONS SCHEDULE FOR BREAK O'DAY DRAFT LOCAL PROVISIONS SCHEDULE (LPS)
BODC SUBMISSION IN RESPONSE TO FURTHER INFORMATION PROVIDED BY REPRESENTORS –
POST HEARING**

On 15 September 2022, the Tasmanian Planning Commission provided Council with a directions schedule for the Break O'Day Draft LPS. The planning authority responded to those direction responses required by the planning authority on 7 October, 2022.

The Break O'Day Council also sought an extension of time to provide a response to further information provided by representors post hearing. The TPC granted the Break O'Day Council an extension of time until close of business on the 23 December, 2022. This enabled the planning authority response to be endorsed as part of its Council Meeting on 19 December, 2022.

Please find attached the Planning Authority response to further information provided by Representors post Hearing and in relation to the Break O'Day Draft LPS.

Additionally, we wish to advise that Council is seeking further legal advice in relation to the proposed Specific Area Plans lodged with the Commission by the North East Bioregional Network (NEBN) and made available on the TPC website on 12 October 2022, particularly as they relate to sections 35K and 35KB of Act. As you are aware, we are concerned that the Commission allows for new material to be provided by Representors so late in the process and in particular after the Hearings have been concluded. To this end, we advise that it is likely that we will be once again raising our concerns regarding process with you in early 2023.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Brown', is placed above the printed name.

John Brown
GENERAL MANAGER
Attachment

ATTACHMENT

Directions Schedule for Break O'Day Draft LPS

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| Denis Buchanan (Rep 2) | Submit written evidence that all registered owners of 89 Upper Scamander Road, Scamander FRs 26754/5, 26754/1, 26754/6, 141750/1 and 137864/1 would support the application of the Priority Vegetation Area overlay to the land in accordance with the Regional Ecosystem Model mapping in the event that the land is zoned Rural, Rural Living or Landscape Conservation. |
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Representor Response:

The Representor has expressed some concerns regarding the application of the Priority Vegetation Overlays affecting two titles, in the event the land is zoned Rural, Rural Living or Landscape Conservation Zone. Mr Buchanan has not confirmed the acceptance of the Priority Vegetation Area overlay.

Planning Authority Response:

The Planning Authority recommends that the TPC engage further with Mr. Buchanan.

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| John Thompson for Jenny Sielhorst (Rep 16) | Provide a statement that outlines the natural and landscape values of the land at Ansons Bay Road, Ansons Bay FRs 101080/1 and 101081/1 with reference to the Landscape Conservation Zone application guidelines in Guideline No. 1 – Local Provisions Schedule (LPS): zone and code application. |
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Representor Response: Nil

Planning Authority Response: Nil

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| Woolcott Surveys for Marguerite Gee (Rep 43) | Provide a copy of the 2018 flora and fauna assessment that relates to the land at 50 St Helens Point Road, St Helens FRs 43185/2 and 181454/1. |
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Representor Response: Representor has provided:

- Flora and Fauna report that relates to land at 50 St Helens Point Rd, CT43185/2 and CT181454/1. – Dated DEC 2017
- Annexure to the Original Flora and Fauna Report – Dated OCTOBER 2019

Planning Authority Response:

The Tasmanian Planning Commission released their decision in relation to DA 021-2018 Scheme Amendment and Subdivision at 50 St Helens Point Road, St Helens. The permit was refused under section 43H (1) (d) of the *Land Use Planning and Approvals Act 1993*. The planning authority provided the TPC delegates with a copy of the closing submission on behalf of the Break O’Day Council dated 16/12/2019. In summary, within the closing submission, the planning authority put forward reasons why it was in support of the development proposal and maintained the proposal was consistent with the local strategies. It is understood the planning authority maintains this position.



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| Woolcott Surveys for Darrell Smith (Rep 45) | Provide a plan that identifies the location of the proposed Rural Living split-zone that would apply to 48 Brooks Road, St Helens. Furthermore, the plan must identify any other land where the Rural Living Zone is proposed. The plan must provide coordinates where necessary and confirm the proposed Rural Living Zone sub-zone that would apply (A, B, C or D). |
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Representor Response:

The Representor has provided a copy of proposed split zoning plan; proposed split zoning plan with approved subdivision overlaid; CAD Data for proposed Zoning Plan.

Planning Authority Response:

The subject site received a planning permit for a 9 lot subdivision, 1 balance lot and 1 road lot at 48 Brooks Road, St Helens. The permit was issued on 06/03/2012, Permit Number DA013-12. A review of the file notes that the applicant has:

- Aurora Energy Underground Reticulation Plan dated 9 January 2013;
- Engineering Design Plans received 17/01/2013
- Council advice 27/11/2013 that the planning permit was due to expire in March 2014;
- Applicant advice (29/11/2013) works completed to date and requesting confirmation substantial commencement of permit:
 - Title boundary survey and pegging;
 - Engineering design;
 - Preliminary earthworks of shaping the road;
 - All Aurora and Telstra works (no detail provided);
- Opteon Solutions request for advice that substantial commencement has been achieved (27/08/2017). No response to the request could be located on file.

It needs to be established that the permit has achieved substantial commencement and the Planning Authority response to Representation 45 is maintained.



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| Woolcott Surveys for Lee Hindrum (Rep 49) | Provide a statement to show how the draft LPS written document would be modified to accommodate a Site-specific Qualification that provides for 'Service Industry' and 'Transport Depot and Distribution' uses at 24833 Tasman Highway, St Helens FR 177117/1. Furthermore, provide a map or title reference to identify where the Site-specific Qualification would apply, and a statement to explain how the Site-specific Qualification would comply with section 32(4) (a) or (b) of the Land Use Planning and Approvals Act 1993. |
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Representor Response: No further action to be pursued.

Planning Authority Response: Nil

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| Department of Communities Tasmania (Rep 76) | Provide a plan or diagram that demonstrates how the split-zoning (Community Purpose Zone) of the reserve adjacent to 25 Circassian Street, St Helens FR 30960/1 would be delineated, including GIS coordinates where necessary. |
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Representor Response: Department has engaged a private surveyor to supply the GDA94 coordinates.

Planning Authority Response:

The planning authority maintains the recommendation associated with Representation No. 76 and supports the Department of Communities in seeking the Community Purpose Zone across the entire site to which development relates.

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| Van Diemen Consulting for Parnella Holdings Pty Ltd (Rep 80) | Provide any other response to the submissions made by the NEBN (Rep 81) at the hearing that concern the natural values of 36 Parnella Drive, Stieglitz FR30650/3 and the nearby Chimneys Lagoon. |
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Representor Response:

- Overview of hearing process;
- Advice addressing the Commission direction;
- Location of services in relation to the site.

Planning Authority Response:

The submission states Council representatives at the Hearing expressed a neutral position on the zoning, but further adds Council maintain its position that the land should remain zoned 'Open Space'. This recount is contradictory and the following is offered to clarify. The planning authority only responded to directions or questions from the delegates of the Tasmanian Planning Commission. The Planning Authority confirms that the recommendation contained within the 35F Report of no change to the draft LPS, remains its recommendation. To confirm, Council does not have a 'new position' as erroneously transcribed by Mr. Hamilton on behalf of the landowner.

The Break O'Day Council has not sought independent qualified assessment of the information provided by North East Bioregional Network and Van Diemen Consulting.



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| North East Bioregional Network (Rep 81(1)) | Provide any other submission about the Utilities Zone applied to St Helens Aerodrome, 21 Aerodrome Road, Stieglitz FR 214209/1. |
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Representor Response:

The Representor has provided further information as requested by the delegates of the TPC. Further information is attached to an email from Todd Dudley on behalf of the North East Bioregional Network. The report is assumed to be written by Mr Todd Dudley with his details appearing at the end of Appendix 2. Also attached is a report prepared by Lloyd Environmental Pty Ltd on the Ecological Character Description of Jocks Lagoon, which is located to the south east of the subject land title.

Planning Authority Response:

The further information prepared by the NEBN is assumed to have been prepared by Mr Todd Dudley as his name appears in association with the report. The author of the report is nor formally identified nor the professional credentials provided. The planning authority is concerned that the NEBN continues to be afforded opportunity to provide unlimited and unconstrained ('any other') further information despite the exhibition period and the Hearings process having concluded.

The planning authority has not engaged suitably qualified persons to review the report provided by the NEBN. The report provided by Lloyd Environmental Pty Ltd is a separate matter, the purpose of which relates to another land title. We are aware of the association the NEBN is making with the subject site.

The planning authority continues to recommend that no modification to the draft LPS be made in response to the representation. Relevant information is contained within the Section 35F Report submitted to the TPC.



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| North East Bioregional Network (Rep 81(2)) | Provide a statement that further explains the methodology used to produce the Enviro-dynamics Priority Vegetation Area overlay mapping. The response must clarify the datasets and software used, how buffer distances and wildlife corridors were determined, and how the model differs from the standard Regional Ecosystem Model used by the Planning Authority to prepare the draft LPS. Furthermore, provide a copy of the GIS layer for the proposed Priority Vegetation Area overlay mapping. |
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Representor Response:

The Representor has provided a methodology report relating to the Enviro-dynamics Priority Vegetation Area mapping, prepared by Enviro-dynamics.

Planning Authority Response:

The planning authority has not modified the State’s mapping as it relates to the Priority Vegetation Area Overlay. The State Planning Provisions require a priority vegetation area overlay to be mapped, but restricts the overlay to specific zones.

Guideline No. 1 allows a planning authority to modify the priority vegetation area if field verification, analysis or mapping undertaken at a local or regional level by the planning authority, or a suitably qualified person on behalf of the planning authority:

- Finds any anomalies or inaccuracies in the State data;
- Provides more recent or detailed local assessment of the mapping and data.

The Break O’Day Council did not commission the NEBN or Enviro-dynamics to modify the priority vegetation area overlay for the purposes of the draft LPS. The planning authority was not involved in the development of the NEBN project brief, engagement of consultant or review of reports. The Priority Vegetation Area mapping prepared by enviro-dynamics has not been formally endorsed by the Break O’Day Council.

It is noted that the Enviro-dynamics report states there are only minor differences in the output of the two models (Enviro-dynamics and REM models). “Investigation of areas of difference between the two models might provide an insight into gaps in each model...”. It is further concluded from the information provided by NEBN this further investigation has not been done by either party (Enviro-dynamics or State Government). The planning authority has not been involved in the development of either data set.

The planning authority maintains the recommendation made within the Section 35F Report in response to Representation 81 Item 8.

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| North East Bioregional Network (Rep 81(3)) | Provide a copy of the GIS layer for the proposed Scenic Protection Area overlay mapping identified in the Scenic Protection Assessment: North East Tasmania by Geoscene International. |
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Representor Response: To be provided.

Planning Authority Response:

As part of Representation No 81 Item 7, the NEBN provided a report titled Scenic Protection Assessment: North East Tasmania prepared by Geoscene International on behalf of the NEBN. Additionally, the NEBN provided a draft inclusion for Section BRE-Table C8.1 Scenic Protection Areas, including images for the draft BOD LPS. The NEBN proposed four Scenic Protection Areas to be included in the draft BOD LPS. These inclusions were based on the Geoscene Report.

The report includes Stages 1 – 3 desktop analysis and GIS mapping. The report identifies further staged work that is yet to be completed. The provided report acknowledges it forms the initial basis for NEBNs future discussions with Council regarding the inclusion and application of the Scenic Protection Code within the municipality. The NEBN has not approached Council to further this work.

The Break O’Day Council did not commission Geoscene International to conduct the assessment (2019) nor was it involved in determining the methodology adopted. The Break O’Day Council has not formally endorsed the report and its findings.

The inclusion of the draft written document BRE-Table C8.1 Scenic Protection Areas would require further strategic planning and community consultation.

The Planning Authority maintains the recommendation made within the Section 35F Report that no modification to the draft LPS be made as a result of the representation.



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| North East Bioregional Network (Rep 81(4)) | Provide a draft version of the proposed amended Stormwater Management Specific Area Plan to show how the draft LPS written document would be modified. Furthermore, provide a map to identify any changes to the locations where the Specific Area Plan would apply, and a statement to explain how the amended Specific Area Plan would comply with section 32(4) (a) or (b) of the Land Use Planning and Approvals Act 1993. |
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Representor Response:

The North East Bioregional Network has provided a copy of the proposed BRE-S2.0 Stormwater Management Specific Area Plan. To support this document they have provided a statement to explain how the SAP would comply with LUPAA and background information that contributed to the development of the SAP.

Planning Authority Response:

The planning authority has had an opportunity to review the documents and offers the following, as a response to the same.

The BOD Draft LPS submitted Stormwater Management Specific Area Plan was submitted as a final proposal that had undergone many iterations all of which had been rejected by the Tasmanian Planning Commission previously. The submitted BRE-S2.0 Stormwater Management Specific Area Plan enabled consideration regarding infrastructure to be considered across eight areas identified in the Municipality where there is known issues for consideration and limited to the spatial extent of these areas. The supporting report submitted to the TPC provides further information on the drafting of the Specific Area Plan.

The Tasmanian Planning Scheme provides a state wide planning scheme that differs in its approach to stormwater management and development than the Interim Planning Scheme. There is now a gap in relation to development standards for development other than subdivision, which was previously addressed in the Interim Scheme. This caused the Break O'Day to persevere with the inclusion of the stormwater SAP within the draft LPS albeit in a more limited drafting.

The concern regarding the Tasmanian Planning Scheme deficiencies in addressing stormwater within the development standards is not limited to the Break O'Day local government. The Local Government Association Tasmania further addressed this concern on behalf of local government and obtained legal advice regarding the regulation of stormwater.

“The request for advice focuses on specific questions that go to the extend and proposed use of powers available to Councils as planning authorities under the Land Use Planning and Approvals Act 1993 (LUPAA) and as stormwater service providers (SSP) under the Urban Drainage Act 2013 (UDA).”

A copy of this legal advice is available on the LGAT website. Specifically it highlighted that there is a parallel system of approval under LUPAA and the UDA that can assist to fill gaps formed by the TPS and where the UDA may not provide an avenue of response. A tremendous body of work has been done, as a result of this legal advice, by an established 'Stormwater in Development Working Group' consisting of the following contributors:

- Derwent Estuary Program;
- Clarence City Council;
- City of Hobart;
- City of Launceston;
- Tamar Estuary and Esk Rivers Program;
- Derwent Estuary Program;
- LGAT; and
- Brighton Council.

This work has culminated in the release of the “Tasmanian Stormwater Policy Guidance and Standards for Development”, which provides a pathway forward for considering stormwater in association with development. As Councils have substantial regulatory powers under both LUPAA & UDA, the Break O'Day Council intends to further investigate a tandem approach (legislation), with Council policy being developed to communicate the strategy to be taken. Despite the Draft LPS Specific Area Plan, the Break O'Day will continue to develop its toolbox in this regard with a preferred approach being one, which utilises the LGAT publication, for guidance, before being presented to Council for consideration.

The proposed SAP put forward by the NEBN is inconsistent with the approach put forward by LGAT. The Tasmanian Planning Scheme takes a state wide approach and it is considered that mechanisms to

address stormwater, in regard to development, should also take a state wide approach and that consistency is best achieved through the LGAT publication based on common legal advice.

The proposed SAP developed by the NEBN is limited in its approach with the performance criteria being prohibitive of development. The Break O’Day planning authority would urge the Tasmanian Planning Commission to compare and contrast the proposal put forward by the NEBN with the LGAT approach. The Break O’Day Council does not support the proposed Stormwater Management Specific Area Plan put forward by the NEBN.

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| North East Bioregional Network (Rep 81(5)) | Provide a draft version of the proposed Coastal Environment and Character Specific Area Plan statement to show how the draft LPS written document would be modified. Furthermore, provide a map to identify where the Specific Area Plan would apply, and a statement to explain how the Specific Area Plan would comply with section 32(4) (a) or (b) of the Land Use Planning and Approvals Act 1993. |
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Representor Response: The Representor has provided a draft version of the proposed Coastal Environment and Character Specific Area Plan and statement.

Planning Authority Response:

The Break O’Day Council, acting as the Planning Authority, publicly exhibited the Break O’Day draft LPS from 11 October 2021 – 10 December 2021 and exercised discretion to include in its report any representation received until close of business on Friday 17 December 2021. The NEBN was one of the Representors seeking acceptance of their submission outside of the public exhibition period of 60 days.

A review of Council records demonstrates discussion with previous Council staff and NEBN concerning a possible proposed Coastal SAP by the NEBN dating back to 2019. The NEBN did not provide Council with a copy of the same during 2019 and nor did they provide a copy through the Exhibition period (11/10/2021 – 10/12/2021). Additionally, the NEBN failed to provide Council with a copy of the proposed Coastal SAP at the time of the recent Hearings (August / September 2022) where further representation was heard. The TPC delegates have now afforded the NEBN more time to produce the draft document, which was eventually sent to the Commission on 7 October, 2022. Council was then given 14 days to provide a response until a request for extension of time was granted by the TPC.

Early discussions with the Tasmanian Planning Commission eventuated in the Commission directing the Break O’Day Council to transition the Environmental Living Zone to the Landscape Conservation Zone. Furthermore, advice from the TPC was that a Specific Area Plan or Particular Purpose Zone to address the 1km prohibition on subdivision within the Environmental Living Zone and Rural Resource Zone as contained in the Interim Scheme, would not be supported, as it would be inconsistent with the Section 8A Guidelines. The Break O’Day Council observed this direction and is disappointed it now finds itself having to review a similar proposal by the NEBN. It should be noted that the historical events outlined above were conveyed to the delegates at the recent Hearings by the Planning Authority representative who has been consistently involved in the development of the draft LPS from the outset.

The submitted BRE-S3.0 Coastal Environment and Character Specific Area Plan, developed by the NEBN, goes further than the Development Provisions within the Interim Scheme, prohibiting subdivision within 1km of the HWM when zoned Environmental Living and/or Rural Resource Zone. The proposed SAP also seeks to further control development within the Coastal Zone by furthering use and development controls for multiple dwellings in the Low Density Residential Zone and Visitor Accommodation within particular zones. The proposed SAP goes much further than the development provisions within the existing Interim Scheme in relation to subdivision within the Coastal Zone. The proposed SAP additionally imposes greater restrictions that go beyond the State Planning Provisions in relation to the Low Density Residential Zone and the Use Class Visitor Accommodation.

Proposed Subdivision Prohibition within Coastal Zone

The existing Interim Scheme prohibits subdivision within 1km of the HWM within the **Environmental Living and Rural Resource Zones**. The proposed SAP introduces Development Standards for Subdivision for the:

- Low Density Residential Zone;
- Rural Living zone;
- Landscape Conservation Zone;
- Rural Zone;
- Agriculture Zone; and
- Environmental Management Zone.

Proposed BRE-S3.8.1 Subdivision, effectively prohibits subdivision within the above draft LPS zones within the Coastal Zone. The definition of the Coastal Zone is 1km from the High Water Mark and is consistent with the Tasmania State Coastal Policy 1996. As a preliminary comment, the definition of the coastal zone as being reliant on a distance from the high water mark is outdated and does not reflect more advanced criteria in identifying the coastal zone. The proposed SAP perpetuates the outdated methodology.

The unique characteristics and natural values associated with the Coastal Zone of the Break O'Day local government area, are being considered in isolation to the remainder of the state when managing development within the coastal zone. Development provisions and standards for subdivision within the Coastal Zone, as well as strategic planning direction, should be consistent across the State and expertly and effectively addressed within the Tasmanian Planning Scheme, Regional Land Use Strategies and Tasmanian Planning Policies (i.e. planning instruments). The blanket application of a proposed Specific Area Plan addressing subdivision within the Coastal Zone of the Break O'Day Council is inconsistent with the remainder of coastal local governments in Tasmania and how the Coastal Policy is reflected in the planning instruments. It would be an expectation that the existing State Planning Provisions adequately and expertly addresses subdivision development within the Coastal Zone and satisfies the State Coastal Policy 1996 in all Tasmanian local government areas.

Council has undertaken an analysis of properties within the Coastal Zone that are affected by the proposed SAP. It should be noted that the proposed SAP is not proposed to apply to Particular Purpose Zone Ansons Bay Small Lot Residential or PPZ Coastal Settlement. For the purposes of considering the proposed SAP, properties were limited to the zones listed above, however PPZ zoning was documented. This equates to approximately 2570 properties affected by the proposed SAP. A further breakdown (approximate) is below:

- Low Density Zone – 1250 properties
- Rural Living Zone – 50 properties
- Landscape Conservation Zone – 520 properties
- Rural Zone – 41 properties;

- Agriculture Zone – 70 properties
- Environmental Management Zone – 95 properties
- Mixed Zone – 190 properties
- Particular Purpose Zone – 235 properties.

The Break O’Day area has a total of 8241 hectares of land assigned to Residential, Rural living and Environmental living Zones, that is zones that allow for a residential use class as either no permit required or permitted. Since 2016, the growth rate within the BOD LGA has averaged 2.4% per annum compared with 1.5% for the state, the 9th fastest growth rate of all LGAs.

LOW DENSITY RESIDENTIAL ZONE

The Low Density Residential Zone represents approximately 317.27 hectares or 3.8% of residential land within the local government area with just over 50 hectares vacant.

Land proposed to be zoned LDRZ within the Coastal Zone with subdivision potential (i.e. >2400m²) in accordance with the SPP, amounts to 154 properties that would be potentially impacted by the proposed SAP.

This loss of development potential within a local government area with a population of 6936 (ERP) is considerable when considering housing availability, affordability and housing choice in a local government area that is experiencing growth.

RURAL LIVING ZONE

| <u>RURAL LIVING ZONE</u> | <u>MIN LOT SIZE AS</u> | <u>MIN LOT SIZE PC</u> |
|--------------------------|------------------------|---------------------------|
| <u>RLZ A</u> | <u>1 ha</u> | <u>8000 m²</u> |
| <u>RLZ B</u> | <u>2 ha</u> | <u>1.6 ha</u> |
| <u>RLZ C</u> | <u>5 ha</u> | <u>4 ha</u> |
| <u>RLZ D</u> | <u>10 ha</u> | <u>8 ha</u> |

The Rural Living Zone (IPS) represents approximately 442.26 ha or 5.4% of residential land within the local government area. Across the municipality, there are 111 properties within the RLZ, with land holdings varying in size from approximately 572 m² to 12.26 ha. The average RLZ land holding is approximately 2ha. Of the 111 properties in the RLZ, 21 properties are vacant, totalling approximately 60ha. Additionally, only 19 properties (17%) are 4ha in area or greater. Based on the C Classification application, only 4 properties in the RLZ could be subdivided further. The current situation demonstrates our ability to respond to demand for Rural Living land is constrained regardless of restrictions within the coastal zone.

When applying the above table, there are 19 titles within the coastal zone proposed to be zoned Rural Living, that will be potentially impacted by the proposed SAP. All of these properties are proposed to be Zoned Rural Living Zone C with a minimum lot size 5ha (4ha PC). Only 2 of these properties have a land area greater than 8 hectares. This demonstrates existing and proposed constraints in the supply of Rural Living Zoned land within the coastal zone.

LANDSCAPE CONSERVATION ZONE

In most instances, the IPS land zoned Environmental Living Zone, will transition to the Landscape Conservation Zone in accordance with advice received from the Tasmanian Planning Commission early in the process. Specifically, direction was received from the TPC to transition the ELZ to the LCZ and

that a Specific Area Plan or Particular Purpose Zone to replace the 1km restriction on subdivision, would not be supported as it would not be consistent with the guidelines. The Break O’Day Council observed this direction.

The Environmental Living Zone (IPS) represents approximately 6818.2 hectares (approximately 83%) of residential land within the BOD local government area. Of this, approximately 2,200 ha (185 properties) is vacant. It is important to remember that Residential Use Class is permitted within the zone. When the land transitions to Landscape Conservation Zone, Residential Use Class will be discretionary and is no longer considered to be Residential land and represents a significant loss of residential land.

A review of the land titles and land area within the proposed Landscape Conservation Zone, demonstrates there are approximately 40 properties with land area 40 hectares or more which may have subdivision potential in accordance with the SPP. Of these properties, 11 are split zoned and further refinement as to subdivision potential has not been done. There are therefore 29 properties zoned Landscape Conservation Zone only, that are 40 hectares or greater in land area, within the coastal zone of the Break O’Day Council. Any application for subdivision of these properties, would require comprehensive assessment against the Zone and relevant Codes including Natural Assets Code, Coastal Hazard Codes etc. It is reasonable to expect the State Planning Provisions to adequately ensure the State Coastal Code is being reflected in the provisions of the planning instrument. It should be noted that State Coastal Plan and the Codes within the SPP relating to the coast, do not prohibit development. Development assessment within the coastal zone should not require a Specific Area Plan if the State Planning Provisions are adequate. If there is a perceived problem then this is a matter for the review of the State Planning Provisions and not single out the Break O’Day local government area for extra development standards and deny developers an opportunity for scientific reporting to allow for performance based consideration.

RURAL ZONE

The Rural Zone does not have any prescriptive minimum lot size criteria within the performance criteria and as such it is difficult to ascertain the number of titles potentially affected by the proposed SAP and prohibition on subdivision within the coastal zone. The performance criteria restricts subdivision potential by restricting residential use and ensuring lots are appropriate for a rural location.

PROPOSED DEVELOPMENT CONTROLS – VISITOR ACCOMMODATION WITHIN THE COASTAL ZONE

The proposed SAP relates to Visitor Accommodation Use Standards within the:

- Low Density Residential Zone;
- Rural Living Zone;
- Landscape Conservation Zone;
- Rural Zone;
- Agriculture Zone; and
- Environmental Management Zone

Within the LDRZ, RL Z and LCZ (also introduces the PPZ later in the document), visitor accommodation is limited to one building with no other existing habitable building on the site, in addition to prescriptive elements relating to gross floor area. Similarly within the RZ, AZ and EMZ. The proposed restrictions do not reflect the broad definition of Visitor Accommodation and severely inhibit growth within Visitor Accommodation in the Coastal Zone of the Break O’Day local government area.

The East Coast Tasmania regional economy remains one of the highest dependent upon tourism in the nation, ranked second of 82 national tourism regions for its dependence on tourism (total effects from

direct and indirect contribution). Tourism's share of regional economy within the East Coast region is 50%. In monetary terms, tourism consumption in 20/21 in the East Coast region was \$411 million and contributed to the Gross Regional Product to a value of \$222.9 million (*Source: Tourism Research Australia – East Coast Region Glamorgan and BODC*).

At a more local level, the following statistics are relevant to the proposed Use Standards within the proposed Specific Area Plan:

- 2020/21 the total tourism sales in the BODC area was \$36.2 million;
 - This consists of \$13.5M direct and \$22.9M indirect;
- 2020/21 the total value added was \$15.2 million;
- 2020/21 the total employment in tourism was 305 jobs which is 15.9% of total industry;
 - This consists of direct employment in tourism being 124 jobs, which is 6.5% of the total industry;
 - This consists of the total indirect employment in tourism being 181 jobs which is 9.4% of the total industry;
- 2020/21 there were 653,775 Domestic Visitor Nights.

The data presented above demonstrates the importance of Tourism to the Break O'Day local government area and is a key industry and major contributor to the local, regional and state economy. The proposed SAP as it relates to Visitor Accommodation has a very real potential to affect economic development within the Break O'Day local government area.

Proposed BRE-S3.6.2 as it relates to the RZ, AZ and EMZ is inconsistent with a statewide approach to supporting Agritourism potential in regions and existing public camping facilities on Crown Land.

Additionally, the proposed SAP is inconsistent with the state wide approach to the Visitor Accommodation Use Class and unfairly burdens/restricts the Break O'Day area in relation to other coastal local government areas without being evidence based. The Break O'Day Council does not support the proposed Specific Area Plan provisions.

PROPOSED DEVELOPMENT CONTROLS – LOW DENSITY RESIDENTIAL ZONE

The proposed SAP aims to ensure multiple dwellings are prohibited within the Low Density Residential (Coastal Zone) Zone by substituting the Use Table.

The State Planning Provisions provide for multiple dwellings within the Use Table (Clause 10.2) of the Low Density Residential Zone and identifies the level of assessment as Discretionary which ensures the use standards and development standards of the zone and applicable codes is relevant to any assessment procedure. The singling out of the Break O'Day Council to impose further provisions within the Residential Use Class is not substantiated by the submitted representation and not supported by the Break O'Day Council.

GENERAL

The Break O'Day Council is critical of the drafting and workability of the proposed Specific Area Plan as it relates to the Coastal Zone. There are technical and administrative errors and inconsistencies within the document that have not been documented here simply because Council is not supportive of the proposed SAP in its entirety in any case. Any further amendments to the provisions for development within the Coastal Zone of the BODC will be the product of strategic investigation, comprehensive public consultation and a matter for amending the LPS in accordance with Part 3B LUPAA once the draft LPS is accepted.

The Tasmanian Planning Commission is reminded of the fact that the BODC attempted to address development within the coastal zone as it relates to subdivision and the TPC was not supportive.

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| North East Bioregional Network (Rep 81(6)) | Provide evidence of the qualifications (preferably a curriculum vitae) for the following experts who gave evidence at the hearing and in the representation: <ul style="list-style-type: none">• Mr. Simon Roberts;• Mr. Dennis Williamson;• Mr. Nick Fitzgerald;• Mr. Eric Woehler;• Mr. Peter Mcquillan; and• Mr. Vishnu Prahalad. |
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Representor Response: Information provided

Planning Authority Response: Nil.

Contact: Robert Holbrook
Our Ref: R.JH:R.JH:223983

10 March 2023

Mr John Brown
Break O'Day Council
32-34 Georges Bay Esplanade
ST HELENS TAS 7216

By email john.brown@bodc.tas.gov.au

Dear Mr Brown,

LPS-BRE-TPS – Break O'Day Draft Local Provisions Schedule (LPS)

1. Introduction and Summary

- 1.1. We have been asked to consider the Tasmanian Planning Commission's ('**Commission**') letter of 15 September 2022. Specifically, the directions schedule contained in Attachment A of that letter in relation to the North East Bioregional Network ('**NEBN**') items 4 and 5 (respectively) stated as follows:

Provide a draft version of the proposed amended Stormwater Management Specific Area Plan to show how the draft LPS written document would be modified. Furthermore, provide a map to identify any changes to the locations where the Specific Area Plan would apply, and a statement to explain how the amended Specific Area Plan would comply with section 32(4) (a) or (b) of the Land Use Planning and Approvals Act 1993.

Provide a draft version of the proposed amended Coastal Environment and Character Specific Area Plan to show how the draft LPS written document would be modified. Furthermore, provide a map to identify any changes to the locations where the Specific Area Plan would apply, and a statement to explain how the amended Specific Area Plan would comply with section 32(4) (a) or (b) of the Land Use Planning and Approvals Act 1993.

- 1.2. A response to those directions was provided via an email from Mr Todd Dudley, the President of NEBN, to the Commission dated 7 October 2022. NEBN's submission contained draft proposed versions of a BRE-S2.0 Stormwater Management Specific Area Plan ('**NEBN Stormwater SAP**') and BRE-S3.0 Coastal Environment and Character Specific Area Plan ('**Coastal SAP**'). It also contained a letter from Mr Dudley purporting to address the

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requirements of section 32(4) of the *Land Use Planning and Approvals Act 1993* ('Act').

- 1.3. The letter from Break O'Day Council's ('Council') General Manager, Mr John Brown to the Commission on 23 December 2022 confirmed that the Council was seeking further legal advice in relation to the proposed NEBN Stormwater SAP and the Coastal SAP.
- 1.4. That letter also attached a response from the Council's Planning Authority ('PA Response'), which inter alia, addressed the NEBN Stormwater and Coastal SAP.
- 1.5. This letter provides the foreshadowed legal advice to the Council.
- 1.6. In summary, it is our opinion that NEBN's draft proposed Coastal SAP and Stormwater SAP should be rejected by the Commission as:
 - (a) The proposed SAPs do not comply with the fundamental threshold requirements of section 32(4)(a) or (b) of the Act; and
 - (b) Is beyond the Commission's power to approve as, both separately and together, the changes contained in the proposed SAPs are so substantial that it would change and transform the Break O'Day draft Local Provisions Schedule ('LPS') into a different proposal to that which was publicly exhibited.

2. Background

- 2.1. We are instructed that the relevant background of this matter is as follows.
- 2.2. On 24 September 2021, the Commission directed the Council's Planning Authority to publicly exhibit the draft LPS.
- 2.3. The draft LPS included BRE-S2.0 Stormwater Management Specific Area Plan ('Council Stormwater SAP'). The purpose of that Coastal Stormwater SAP is that "*stormwater quality and quantity is managed to protect natural assets, infrastructure and property.*"¹
- 2.4. The Council Stormwater SAP had undergone many iterations, all of which had been previously rejected by the Commission.
- 2.5. The statutory exhibition period for the draft LPS was conducted from 11 October 2021 through to 10 December 2021. During this period, there was one public holiday.
- 2.6. On 6 December 2021 NEBN requested an extension of time until 20 December 2021 to submit a representation concerning the draft LPS.

¹ Council Stormwater SAP BRE-S2.1.1.

- 2.7. On 6 December 2021 the Council's Planning Authority advised the NEBN that it would include a representation it made after the end of the exhibition period, within its section 35F report to the Commission. The NEBN was further advised that to be included within the Section 35F report, the representation must be received by Council prior to 5:00pm on 17 December 2021.
- 2.8. On 17 December 2021 and prior to close of business, Council received a representation from the NEBN by way of four (4) emails.
- 2.9. Email 1 contained four (4) Attachments as follows:
- (a) Attachment 1 – Representation Letter Break O'Day LPS Final.docx
 - (b) Attachment 2 – Attachment A Supporting Report LPS Final.doc
 - (c) Attachment 3 – Attachment B Draft LPS Written Document Final.doc
 - (d) Attachment 4 – Representation Letter Break O'Day LPS Final.Replacement.docx
- 2.10. Email 2 contained three (3) Attachments as follows:
- (a) Attachment 1 – Attachment C Draft LPS Zone Maps Response Final.doc
 - (b) Attachment 2 – Attachment D Land Use Plan.pdf
 - (c) Attachment 3 – Attachment E Protection of Coastal natural values in the Break O'Day Municipality (Nick Fitzgerald 2021).pdf
- 2.11. Email 3 contained four (4) Attachments as follows:
- (a) Attachment 1 – Attachment F Review of impacts of residential development on receiving waters.docx
 - (b) Attachment 2 – Attachment G Threats of residential development to aquatic natural values in the Break O'Day Municipality.docx
 - (c) Attachment 3 – Attachment H Scenic Protection Report.pdf
 - (d) Attachment 4 – Attachment I Draft LPS Written Document Scenic Protection Areas.doc
- 2.12. Email 4 contained seven (7) Attachments as follows:

- (a) Attachment 1 – Attachment J Estimated breeding populations of resident shorebirds and small terns Break O’Day municipality (Eric J. Woehler Birdlife Tasmania 2020).pdf
 - (b) Attachment 2 – Attachment K Saltmarsh comments Vishnu Prahalad.doc
 - (c) Attachment 3 – Attachment K Saltmarsh Maps.pdf
 - (d) Attachment 4 – Attachment L Priority Vegetation Area Mapping for Break O’Day Municipality (Nick Fitzgerald 2021).pdf
 - (e) Attachment 5 – Attachment M Linking Landscapes Map.pdf
 - (f) Attachment 6 – Attachment M Linking Landscapes – New Reserves for North East Tasmania.doc
 - (g) Attachment 7 – Attachment N Verification of the Heritage Values of ENGO – proposed reserves.pdf
- 2.13. The NEBN representation was considered by the Council’s Planning Authority and was identified as Representation No. 81 within the Section 35F Report submitted to the Commission on 2 May 2022.
- 2.14. Attachment 1 to the Section 35F Report, details Council’s Planning Authorities’ response to representations. Representation 81 item 1, submitted by the NEBN, proposes a draft Specific Area Plan – Coastal Zone to be applied to land within 1km of the high-water mark along with development controls.
- 2.15. NEBN’s representation 81 item 4 also proposed a modification to the Council Stormwater SAP to limit the area of a site covered by impervious surfaces and avoid and minimise negative ecological impacts arising from storm water.
- 2.16. We note the NEBN representation did not include a copy of a draft Coastal SAP nor NEBN Stormwater SAP. Rather the submitted information simply provided a general overview of the intended SAP’s contents.
- 2.17. The Planning Authority response within the Section 35F report recommended no modification to the Draft LPS in relation to items 1 and 4 of the NEBN representation. This was subsequently endorsed by the Council at its meeting on 26 April 2022 and again on 27 June 2022.
- 2.18. On 28 July 2022 the Commission advised of the hearing dates, hearing schedule and additionally issued a directions schedule for relevant parties to submit further information prior to the hearings (due 17 August 2022).

- 2.19. We understand the Commission did not issue a directions schedule requesting the NEBN to provide a copy of the proposed draft Coastal SAP or NEBN Stormwater SAP prior to the hearings.
- 2.20. The Commission conducted hearings for the draft LPS on the following dates:
- (a) 24, 25 and 26 August 2022 in St Helens;
 - (b) 1 September 2022 in Hobart; and
 - (c) 7, 8, and 9 September 2022 in St Helens.
- 2.21. The matters concerning the proposed Coastal SAP and NEBN Stormwater SAP were primarily heard on 8 September 2022.
- 2.22. At the hearing on 8 September 2022, the NEBN, with the support of external agencies, presented their representation in relation to the proposed Coastal SAP and NEBN Stormwater SAP. The NEBN did not provide the delegates of the Planning Authority with a copy of any draft documents.
- 2.23. On 15 September 2022 the Commission issued the Council and representors with a post hearing directions schedule regarding matters, which required further information from the Planning Authority and other parties to be lodged with the Commission by 7 October 2022.
- 2.24. Additionally, the Commission directed any further submissions by parties wishing to respond to any of the information received to be lodged with the Commission no later than 14 days from the documents being placed on the Commission's website.
- 2.25. The Council, through its legal Counsel, responded to the Commission directions schedule on 7 October 2022. That correspondence requested an extension of time to consider further information provided by the NEBN in response to the directions schedule and in relation to the proposed draft Coastal SAP and NEBN Stormwater SAP.
- 2.26. On 14 October 2022 the Commission granted an extension of time to the Council to consider the information submitted by the NEBN in relation to the proposed SAPs and confirmed the due date for the response submission was 23 December 2022.
- 2.27. The PA Response was lodged with the Commission on 23 December 2022.

3. Legislative Framework for Assessment

- 3.1. Part 3A of the Act deals with Local Provision Schedules. Within that part, section 35J(1) of the Act states:

(1) As soon as practicable after receiving a report under section 35F(1) in relation to a draft LPS and holding any hearings under section 35H, the Commission must consider –

(a) the report and the draft LPS to which it relates; and

(b) the information obtained at the hearings; and

(c) whether it is satisfied that the draft LPS meets the LPS criteria; and

(d) whether modifications ought to be made to the draft LPS.

3.2. In accordance with section 35J(1)(c) of the Act, the Commission must be satisfied that the draft LPS meets the LPS criteria. In our opinion for the purpose of section 35J(1)(b) of the Act, this includes the draft proposed NEBN SAPs as information that can be considered obtained at the hearings.

3.3. The relevant LPS criteria are provided sections 32 and 34 of the Act. If the Commission is not satisfied that the draft LPS meets the LPS criteria, it cannot approve it per section 35L(2).

3.4. Section 34(2) of the Act relevantly states:

The LPS criteria to be met by a relevant planning instrument are that the instrument –

...

(b) is in accordance with section 32;

3.5. Subsection 32(3)(b) of the Act relevantly provides that a LPS may include a specific area plan that applies to *“land in addition to, or in modification of, or in substitution for, a provision, or provisions of the [State Planning Provisions]”*.

3.6. Importantly, subsection 32(4) of the Act also states:

(4) An LPS may only include a provision referred to in subsection (3) in relation to an area of land if –

(a) a use or development to which the provision relates is of significant social, economic or environmental benefit to the State, a region or a municipal area; or

(b) the area of land has particular environmental, economic, social or spatial qualities that require provisions, that are unique to the area of land, to apply to the land in substitution for, or in addition to, or modification of, the provisions of the SPPs.

- 3.7. Only after considering the requirements contained in section 35J(1)(a)-(c) above can the Commission properly turn its mind to section 35J(1)(d) and whether modifications ought to be made to the draft LPS.
- 3.8. Section 35K of the Act relevantly deals with modifications to draft LPS and states:
- (1) The Commission, after complying with section 35J in relation to a draft LPS in relation to the municipal area of a planning authority, may –*
- (a) by notice to the planning authority, direct the planning authority to modify the draft LPS in the manner specified in the notice; or*
- (b) modify the draft LPS itself and notify the planning authority of the Commission's modification; or*
- (c) by notice to the planning authority, reject the draft LPS and direct the planning authority to submit to the Commission a substitute draft LPS within 28 days, or a longer period allowed by the Commission, from the date of the notice.*
- 3.9. Section 35KB of the Act distinctly deals with substantial modifications to a draft LPS and states:
- (1) The Commission, after complying with section 35J in relation to a draft LPS in relation to the municipal area of a planning authority, may issue, in relation to the draft LPS, a direction to the planning authority.*
- (2) The Commission may only issue, in relation to a draft LPS, a direction under subsection (1) if the Commission is of the opinion that the draft LPS requires substantial modification but that the modification required is such that it is suitable for it to be made by way of an amendment, under Part 3B, of the LPS in relation to the municipal area of the planning authority, after the LPS comes into effect.*

4. Assessment of NEBN's Draft Proposed SAPs

- 4.1. This part considers NEBN's draft proposed SAPs broadly against the requirements of the Act. It does not address issues relating to detailed drafting.
- Section 34(2)(b) – In Accordance with Section 32
- 4.2. In our opinion section 32 of the Act, in particular section 32(4), provides a fundamental threshold test that the Commission must consider in relation to the draft proposed SAPs.

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- 4.3. Section 32(4)(a) refers to a use or development to which the provision relates. Adopting the proper approach to statutory construction requires considering the broader text, context and purpose and mischief of the Act.²
- 4.4. In our view the reference use or development to which the provision relates should be construed as a specific request to amend an LPS, such as introducing a specific area plan **only** if combined with an application for a permit pursuant to section 40T of the Act.³ This is because there needs to be some level of certainty about what is proposed to properly understand the degree and extent of what will occur on land to be able to assess if there is a significant benefit.
- 4.5. As no use or development is actually proposed by the draft SAPs (as opposed to a combined permit and amendment application) it is submitted that this test is not relevant and has no role to play in these circumstances. Indeed, we note NEBN's submission concedes that section 32(4)(b) '*is considered the most appropriate*' for both the NEBN Stormwater SAP and Coastal SAP.⁴
- 4.6. To allow a broad consideration under section 32(4)(a) of hypothetical / conceptual development and use is contrary to the purpose and mischief of the Act as contained in the objectives, because it would:
- (a) Not provide for fair, orderly and sustainable use and development of air, land and water;⁵
 - (b) Not encourage public involvement in the resource management and planning;⁶
 - (c) Be contrary to sound strategic planning;⁷
 - (d) Would not ensure that the effects on the environment are considered and provide for '*explicit consideration*' of social and economic effects when decisions are made about the use and development of land;⁸ and
 - (e) Not provide for the consolidation of approvals for land use or development, nor co-ordinate planning approvals with related approvals.⁹

² See, eg, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, 262 CLR 362 at [14].

³ Act s 32(3)(b)

⁴ NEBN submission pp 7 [2.3] and 12 at [3.3] (respectively).

⁵ Act sch 1 pt 1 cl 1(b).

⁶ Act sch 1 pt 1 cl 1(c).

⁷ Act sch 1 pt 2(a).

⁸ Act sch 1 pt 2(c).

⁹ Act sch 1 pt 2(e).

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- 4.7. In our opinion there is simply no evidence or sufficient information in relation to any significant economic benefit to the State, the east coast region and Council's municipal area that could allow the Commission to be satisfied that the NEBN Stormwater SAP or Coastal SAP comply with section 32(4)(a) of the Act.
- 4.8. Accordingly, as a fundamental threshold test, NEBN's draft proposed SAPs are unable to satisfy section 32(4)(a) of the Act and should be dismissed.
- 4.9. In relation to section 32(4)(b), in our opinion the areas proposed to be subject to the NEBN draft proposed SAPs do not have particular environmental, economic, social or spatial qualities that require unique provisions to apply otherwise than what is provided in the draft TPS-BRE State Planning Provisions.
- 4.10. It is acknowledged there may be factors such as the natural values within the Council's municipality, which may or may not be unique and make it desirable to impose additional controls. However, in our view simply being desirable is not the same as being required which is the higher test that section 32(4)(b) establishes.
- 4.11. As noted in the PA Response, the Tasmanian Planning Scheme does not include development standards to expressly deal with stormwater other than for subdivision. This is a significant departure from the interim planning schemes and represents a regulatory gap at the planning stage to manage stormwater.
- 4.12. We understand that in part to address this, the Council sought to include the Council Stormwater SAP in the draft TPS-BRE. The Council also intends to further develop its 'toolbox' to be able to address stormwater issues associated with development at a planning stage.
- 4.13. The Local Government Association Tasmania ('LGAT') has also proposed an alternate approach as set out in the "*Tasmanian Stormwater Policy Guidance and Standards for Development*" document dated November 2021.¹⁰
- 4.14. As aptly noted in the PA Response regarding the NEBN Stormwater SAP:¹¹

The proposed SAP put forward by the NEBN is inconsistent with the approach put forward by LGAT. The Tasmanian Planning Scheme takes a state wide approach and it is considered that mechanisms to address stormwater, in regard to development, should also take a state wide

¹⁰

Available

via:

https://www.lgat.tas.gov.au/_data/assets/pdf_file/0018/1075311/Tasmanian-Stormwater-Policy-Guidance-and-Standards-1-December-2021-15MB.pdf

¹¹ Pdf pp 8-9.

approach and that consistency is best achieved through the LGAT publication based on common legal advice.

The proposed SAP developed by the NEBN is limited in its approach with the performance criteria being prohibitive of development. ...

- 4.15. In our opinion the Council's municipality does not have particular qualities that require the provisions of the NEBN Stormwater SAP.
- 4.16. In our view the NEBN have also not provided sufficient information to demonstrate that the Council's Coastal Zone has sufficient broad scale attributes to require the application of the Coastal SAP to the entire Coastal Zone.
- 4.17. There are also strong arguments that the State Planning Provisions contained in the draft TPS-BRE already adequately address use and development within the Council's Coastal Zone.
- 4.18. As noted in the PA Response regarding the Coastal SAP:¹²

The unique characteristics and natural values associated with the Coastal Zone of the Break O'Day local government area, are being considered in isolation to the remainder of the state when managing development within the coastal zone. Development provisions and standards for subdivision within the Coastal Zone, as well as strategic planning direction, should be consistent across the State and expertly and effectively addressed within the Tasmanian Planning Scheme, Regional Land Use Strategies and Tasmanian Planning Policies (i.e. planning instruments). The blanket application of a proposed Specific Area Plan addressing subdivision within the Coastal Zone of the Break O'Day Council is inconsistent with the remainder of coastal local governments in Tasmania and how the Coastal Policy is reflected in the planning instruments. It would be an expectation that the existing State Planning Provisions adequately and expertly addresses subdivision development within the Coastal Zone and satisfies the State Coastal Policy 1996 in all Tasmanian local government areas.

... It should be noted that State Coastal Plan and the Codes within the [State Planning Provisions] relating to the coast, do not prohibit development. Development assessment within the coastal zone should not require a Specific Area Plan if the State Planning Provisions are adequate. If there is a perceived problem then this is a matter for the review of the State Planning Provisions and not single out the Break O'Day local government area for extra development standards and deny developers an opportunity for scientific reporting to allow for performance based consideration.

- 4.19. In our opinion based on the information provided, there is simply no reasonable basis for the Commission to conclude that particular

¹² Pdf pp 10 & 12.

environmental, economic, social and/or spatial qualities present within the Council's municipality, particularly that relating to the Coastal Zone, require the unique provisions of the Coastal SAP.

- 4.20. For all the above reasons, in our opinion NEBN's draft proposed SAPs cannot satisfy the fundamental threshold tests included in section 32(4) of the Act and should be dismissed by the Commission.

Section 34(2)(c) – Objectives in Schedule 1 of the Act

- 4.21. Section 32(4)(c) requires the LPS to further the objectives of the resource management and planning system as set out in schedule 1 of the Act.
- 4.22. It is trite to observe that those objectives include providing for "*fair, orderly and sustainable use and development of air, land and water*", encouraging "*public involvement in resource management and planning*" and requiring "*sound strategic planning and co-ordinated action by State and local government*".¹³
- 4.23. In our opinion the NEBN Stormwater SAP and Coastal SAP are contrary to these objectives and do not provide for fair, orderly and sustainable use and development of air, land and water. In particular, the NEBN Stormwater SAP is contrary to the approach adopted in the LGAT publication, is overly prohibitive and would not result in fair and orderly use and development of air, land and water.
- 4.24. A fundamental issue with both the draft text of the NEBN Stormwater SAP and the Coastal SAP only being provided after the hearings is that it is completely antithetical to public involvement in resource management and planning. These documents were not advertised, and, in our view, an overwhelming majority of the public would simply not be aware of them, despite the vast implications that would flow from the NEBN SAPs applying to the proposed areas of land.
- 4.25. NEBN's draft proposed SAPs are also contrary to the abovementioned objectives of the resource management and planning system as they do not promote sound strategic planning and co-ordinated action by State and local government, such as the Council.
- 4.26. Accordingly, in our opinion NEBN's draft proposed SAPs also cannot satisfy the requirements in section 34(2)(c) and should be additionally dismissed by the Commission on that basis.

¹³ Act sch 1 pt 1 cl 1(b)-(c) & pt 2 (a).

5. Sections 35K and 35KB of the Act – Modifications

- 5.1. In our view, as outlined above, the Commission cannot be reasonably satisfied that NEBN's draft proposed SAPs meet the requirements of section 34(2) of the Act. Accordingly, in our opinion the Commission need not turn its mind to whether modifications ought to be made to the draft TPS-BRE to effectively introduce those SAPs.
- 5.2. Notwithstanding this principal position, we provide the following advice in relation to the potential operation of sections 35K and 35KB of the Act.
- 5.3. Section 35K permits modifications to a draft LPS. This can occur by a notice to the planning authority directing it to modify the draft LPS or the Commission itself can undertake that work per section 35K(1)(a)-(b).
- 5.4. Alternatively, section 35KB of the Act permits '*substantial modification*', only where the Commission is satisfied that the modifications required can be appropriately achieved via an application to amend the LPS under Part 3B of the Act.¹⁴
- 5.5. Ordinarily, any such substantially modified draft LPS would need to be publicly exhibited for at least 28 days in accordance with section 40H Act. In our view the Commission could not exempt any draft amendment to incorporate the draft NEBN SAPs into the LPS from public exhibition, as it could not be satisfied that the public interest would not be prejudiced by not being publicly exhibited.¹⁵
- 5.6. We are not aware of any Tasmanian Supreme Court decisions that concern the application of section 35KB of the Act, or section 40P which uses the same expression. However, the Commission can appropriately guide itself in its approach by considering the previous test applied prior to the Act being amended in 2015, which was '*alter to a substantial degree*'.
- 5.7. In our opinion the same standard that applied to '*alter to a substantial degree*' and '*substantial modification*' is the same, given that:
 - (a) Section 35KB of the Act was introduced in 2015 by the *Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme) Act ('Amending Act')*. Section 10 of the Amending Act repealed Parts 2 and 3 of the Act, as then enacted, and replaced them with the current Part 2 and 3.
 - (b) The predecessor to section 35KB (and 40P) was section 41, which was in the following terms:

¹⁴ Act section 35KB(1)-(2).

¹⁵ Act section 40I(2).

The Commission may, after its consideration under section 40 of a draft amendment prepared by a planning authority–

*(a) require the planning authority to modify, or alter to a **substantial degree**, the draft amendment after having regard to the report made under section 39 , and any evidence and submissions made in a hearing under section 40 , in relation to it; or*

*(ab) modify, or alter to a **substantial degree**, the draft amendment after having regard to the report made under section 39 and any evidence and submissions made in a hearing under section 40 ; or*

(b) by notice in writing given to the authority, reject the draft amendment. [emphasis added]

- (c) It is immediately obvious that there are strong parallels between section 35KB(2) of the Act and section 41 prior to the enactment of the Amending Act including that:
- (i) Section 41 and section 35KB(2) achieve similar purposes in that both conferred a power on the Commission to affect a substantial modification of a draft amendment; and
 - (ii) The operative standard of '*substantial*' is used both in sections 41 and 35KB(2) to distinguish between a modification that does not require re-involving the public by re-advertising (and etc.) and a modification that does.¹⁶

5.8. The omission of the word '*degree*' from section 35KB is inconsequential. The word degree is simply defined '*the amount, level, or extent to which something happens or is present.*¹⁷ Its usage (or omission as the case is currently) adds nothing to the exercise of the Commission as it is plainly required to determine whether the change(s) caused by any modification(s) are substantial in all the premises.

5.9. In our opinion the question of whether amendments result in a substantial modification is a question of degree, having regard to the resultant aggregate change from the modification(s) on the draft TPS-BRE as originally exhibited.

5.10. As stated by the Honourable Justice Cox (as he then was) in *R v Resource Planning and Development Commission; ex parte Aquatas Pty Ltd*:¹⁸

¹⁶ See also section 40N(1) of the Act, noting the limitations contained in section 40I(2) of the Act relation to exemptions to re-advertise.

¹⁷ Oxford online dictionary.

¹⁸ (1998) 100 LGERA 1; BC9803160 at 9.

*It is not disputed that it is for the Commission to decide into what category the changes to Q2 and Q3 fell. **Such decisions involve matters of degree** and unless the categorisation is patently erroneous or it is shown that in forming that judgment the Commission placed reliance upon wholly irrelevant considerations, it is not for this Court to substitute its own view should that be at variance with that of the Commission.*

*... this Court may quash a determination of a tribunal where the alteration is too great; **but it is reasonable to say that, where it is a matter of degree, the tribunal is well placed to determine the limit beyond which the alteration should not fairly go.** Each case, of course, depends on its own facts, and reference to other cases merely reveal the laments of others because of the problems presented and illustrates how in the particular case the problem was resolved. [emphasis added]*

- 5.11. Justice Wright agreed with Justice Cox's above approach in *R v Land Use Planning Review Panel; ex parte MS Cas Pty Ltd*,¹⁹ save that his Honour said that a change is no longer a 'modification' if it something that is not '*...identifiable as the original entity, otherwise it can only be said that it has been transformed or metamorphosed into something new.*'²⁰
- 5.12. Plainly, if something amounts to more than a substantial modification, then the modification exceeds that which the Commission has the power to do. That is also consistent with the observations of the Supreme Court in *St Helens Area Landcare and Coastal Group Inc. v Break O'Day Council* when it said that a 'substantial difference' is something less than a 'significant difference'.²¹
- 5.13. Justice Underwood (as he then was) provides the most useful guidance to the Commission as to the standard that 'substantial' means in this context in *R v Resource Planning and Development Commission; ex parte Stevens*.²² There, his Honour agreed with the approach of Justices Cox and Wright's approach (set out above) and stated:²³

*In my opinion, little assistance is gained from trawling through the cases which have considered the meaning of the words "substantial" and "alter" enacted in entirely different legislative contexts because the context in which any expression is used has an important bearing on the meaning to be attributed to that expression.... **In considering the breadth of the expression "alter to a substantial degree", regard must be had to the provisions of the Act, ss41A and 41B which require the Council to put the alterations on public exhibition once they have been effected and***

¹⁹ (1998) 103 LGERA 38.

²⁰ *Ibid* at 10.

²¹ [2007] TASSC 15 at [19]

²² (1998) 103 LGERA 38; [1999] TASSC 60.

²³ At [20] – [22].

thereafter the whole process of representations, Council report, Commission hearing and decision is repeated. These provisions make it likely that the intention of Parliament was to give the broadest possible scope to the expression "alter to a substantial degree". To do so promotes the general purpose and scheme of the Act. The process of public consultation following such an alteration is precisely the same as that which follows initiation of an amendment. Indeed, having regard to the context, I find it difficult to envisage an alteration that is so substantial that it has the effect of transforming the proposed amendment into something quite different.

Whether the Commission has directed an alteration to a substantial degree or directed an alteration so substantial that it changes or transforms the proposal into a different proposal, is a question of degree and impression. Consideration of this issue needs to bear in mind that an alteration that has the effect of changing the essential core or substance of a proposed amendment will nonetheless be an alteration to a substantial degree, for the word "substantial" encompasses the essential essence of a thing. [emphasis added]

- 5.14. Justice Blow (as he then was) applied the foregoing cases in *R v Resource Planning and Development Commission; Ex parte Dorney* ('**Dorney**').²⁴ *Dorney* was a case concerning amendments, or purported amendments, to the *City of Hobart Planning Scheme 1982* which provide for certain areas of land to be rezoned as 'Community Bushland', and for restrictions on the use of land so zoned.
- 5.15. In his Honour's analysis of whether the subject changes altered to a substantial degree the draft amendment, his Honour stated:²⁵

*The final document contained some very significant changes from the draft amendment as exhibited. It provided for no uses other than "passive recreation" to be permitted or discretionary in some 465.6 ha of land, whereas the draft amendment as exhibited provided for certain domestic uses to be discretionary in some 254.3 ha in the Landscape and Skyline Conservation Zone, and for a wide range of commercial uses to be discretionary in some 204.3 ha in the Bushland Conservation and Recreation Zone. **Members of the public were likely not only to have views as to the appropriateness of such changes, but also as to the related issue of whether compensation pursuant to the LUPA Act, s66, should be payable in consequence of all uses other than passive recreation being designated as prohibited in the Community Bushland Zone. That is very significant because the critical aspect of the legislative distinction is that only an alteration to a substantial degree requires repetition of the process of public exhibition, advertising, representations, a council report thereon, and a hearing.** It is true that*

²⁴ (2003) 133 LGERA 226; [2003] TASSC 69.

²⁵ *Ibid* at [40].

*the draft amendment as exhibited did not provide for any uses other than "passive recreation" to be permitted as of right in the proposed Landscape and Skyline Conservation Zone or the Bushland Conservation and Recreation Zone, as the Recreation Zone was intended to be renamed. The changes to the draft amendment would have been more substantial if they involved the designation of use groups being changed from "p" (permitted) to "X" (prohibited). Despite that, designating all use groups except "passive recreation" as prohibited in a large zone, and making "passive recreation" uses discretionary in the areas covered by Schedule L, in my view involved a substantial degree of change from what was proposed in the draft amendment as exhibited. The final document allowed practically no use or development in relation to a large area of suburban land. **An alteration of a draft amendment to prohibit almost every use or development in relation to an area of land is almost as substantial an alteration as one can get.** It follows, in my view, that it was not reasonably open to the delegates to categorise the changes that they required to the draft amendment as exhibited as mere modifications, as distinct from alterations to a substantial degree. It follows that they erred in law by categorising those changes as modifications, and that their decision of 29 November 2001 is able to be quashed pursuant to the Rules of the Supreme Court, r627(2)(a). [emphasis added]*

- 5.16. We understand NEBN's draft proposed Coastal SAP would affect approximately 2,570 properties as follows:²⁶
- (a) Low Density Zone – 1,250 properties;
 - (b) Rural Living Zone – 50 properties;
 - (c) Landscape Conservation Zone – 520 properties;
 - (d) Rural Zone – 41 properties;
 - (e) Agriculture Zone – 70 properties;
 - (f) Environmental Management Zone – 95 properties;
 - (g) Mixed Zoner – 190 properties; and
 - (h) Particular Purpose Zone – 235 properties.
- 5.17. In our opinion, it is not reasonable to expect that members of the public will review submissions made on what has been already exhibited to ascertain if there may be new and substantive changes to the draft TPS-BRE. Accordingly, the path that NEBN is seeking to utilise to amend the draft TPS-BRE by providing the draft SAPs after the hearing is likely to deny

²⁶ PA Response, pdf pg 10.

many affected community stakeholders the opportunity to be properly consulted with and engaged in this matter.

- 5.18. As noted above at paragraph [4.24], in our view the way that NEBN's draft proposed SAPs have been obtained/provided at the "eleventh hour" is completely antithetical to the objectives of encouraging public involvement in resource management and planning.
- 5.19. We note that potential impacts stemming from the proposed subdivision controls within the Coastal SAP on these properties is outlined in the PA Response.²⁷
- 5.20. In our opinion, the situation in *Dorney* (above) is analogous to the current circumstances, insofar as members of the public are not likely to be aware of the potential significant prohibitions that might apply to land subject to the NEBN's draft proposed SAPs.²⁸ Those draft SAPs were not included in the publicly exhibited draft TPS-BRE, nor were they included in the representation made by NEBN in response to that.
- 5.21. The combined amendments required to implement NEBN's draft proposed SAPs, particularly those relating to the Coastal SAP, would result in the draft TPS-BRE as originally exhibited, not being identifiable as the original entity and would result in that impermissibly being transformed or metamorphosed into something entirely new.
- 5.22. Accordingly, in our view the Commission should not seek to amend the draft TPS-BRE to effectively introduce NEBN's draft proposed SAPs in purported reliance of the powers contained in sections 35K or 35KB of the Act, as to do so would exceed the power of the Commission.
- 5.23. We consider that re-advertising any subsequent draft amendment of the TPS-BRE to introduce NEBN's draft proposed SAPs would not appropriately cure the prejudice to the public, noting that we anticipate many members of the public would not be aware of nor engaged in that process.

6. Conclusion

- 6.1. In conclusion, we consider that NEBN's draft proposed Stormwater SAP and the Coastal SAP do not meet the fundamental requirements contained within section 34(2) of the Act.
- 6.2. Furthermore, in our opinion it would be beyond the power of the Commission to approve NEBN's draft proposed SAPs as, both separately and together, the changes contained in the proposed SAPs are so substantial that it would change and transform the draft LPS into a different proposal to that which was publicly exhibited.

²⁷ Pdf pp 11-13.

²⁸ See, eg, Coastal SAP cl BRE-S3.8.1.

- 6.3. For all of the above reasons, the Commission should proceed to approve the draft TPS-BRE without any modifications that would effectively implement NEBN's Stormwater SAP or the Coastal SAP.

Yours faithfully
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