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28 July 2023

Mr Roger Howlett
Delegate (Chair)
Tasmanian Planning Commission
GPO Box 1619
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By email: tpc@planning.tas.gov.au

Dear Mr Howlett

DEVONPORT LPS - DRAFT AMENDMENT AM2022.02 AND PERMIT PA 2022.0024 - STONY RISE

Introduction

I refer to the application of Tipalea Partners dated 7 July 2023 to adjourn the hearing of the Tasmanian Planning Commission (the **Commission**).

The application has three components:

(a) Firstly, it seeks the deferment of the conclusion of the hearing of evidence from the Traffic experts and consequential submissions in respect of the proposed Specific Area Plan (**SAP**) and closing submissions from the parties; and

(b) Secondly, it would appear an indefinite adjournment of the matter is sought. I say indefinite because while it stated not before 11 December 2023, the reality of the situation of all courts, tribunals and commissions, is that it is highly unlikely to be able to list a matter at that time in December and therefore the reality will be going off until February or March 2024 at the earliest.

(c) Thirdly, time is sought to liaise with Council in respect of unspecified matters.

The open-ended indefinite adjournment is opposed by my client Goodstone Group. It is not for an applicant, for the amendment to a planning scheme to dictate the matter. No doubt the Council will agree with what is proposed.

It is for the Commission to determine whether to grant an adjournment and upon what terms.[1] In summary, no proper basis has been put forward as to why there needs to be such a protracted and indefinite adjournment.

When the matter was adjourned on 16 June 2023 there was not the slightest suggestion of unavailability of Counsel or witness and my expectation was that the matter would be relisted in short order. The dates provided by the Commission were all ones that could have been accommodated by me.

Certainly, no adjournment was foreshadowed by Counsel for Tipalea Partners on 16 June 2023.

The matters raised in the course of the hearing, albeit obliquely, are not matters that ought to have come as a surprise to Tipalea Partners and one is left with the impression that as a combination of questions from the Commission the fact that Mr Thomas Reilly, under cross-examination, conceded that the certified SAP would not protect retail hierarchy of the CBD, the decision being made to "regroup to fill in the holes of the case".

Availability

The unavailability of Counsel and Mr Petrusma have been raised in the application:[2]

> "*Address unavailability of Counsel, expert witness, and our client to attend a hearing before 11 December 2023 due to leave and other existing commitments. In particular, Mr David Morris is on*

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1 *Houghton Pty Ltd v Resource Development and Planning Commission* (2005) TASSC 58 at [7] - [8]

2 Submissions of the Appellant dated 7 July 2023 at [15(iii)]

leave and unavailable from approximately 14 August to 1 October 2023 and has existing commitments prior to that time that severely limit his capacity to appear. Our client's sole traffic expert, Mr Mark Petrusma is also on leave and unavailable during October and November. Furthermore, our client is also overseas and unavailable to provide instructions from 13 to 26 October 2023."

Firstly, even now, there would still be the opportunity of listing the matter before 14 August.

Noting availability of Counsel is not overriding importance, see *Ryan v CHC & Smith v CHC & Birdlife Tasmania v CHC & ACEN Robbins Island Pty Ltd v CHC & Bob Brown Foundation v CHC & Ors*.[3] Noting Mr Holbrook may be available or another counsel could be instructed.

Nature of the Commission hearing

With respect, the cases referred to by Tipalea Partners, for the most part they are irrelevant, particularly in relation to the reference to *Commissioner of State Revenue v Melbourne's Cheapest Cars Pty Ltd*[4] and *Tomaszewski v Hobart City Council (No 2)*.[5]

The Supreme Court authority directly on point in respect to the nature of the hearing is *R v Davis:*[6]

"26. *In this case the nature of the hearing being conducted by the Commission was largely adversarial. The adversarial nature of the process arose because what was being conducted was a hearing into the representations of the prosecutors and other persons who were opposed to the proposed amendments to the relevant planning scheme. The hospital/and the prosecutors were in direct conflict with one another, the hospital wishing to expand its operations in the promotion of its own interests and the prosecutors seeking to prevent or restrict that expansion in defence of their own interests.*

27 However, the function of the Commission was partly inquisitorial. It had to approve or reject the proposed amendments, or to approve them in a modified or altered form, following the holding of the hearing. In the performance of that function, the Commission's duty was not merely to resolve the conflict between the interests of the hospital and the interests of the prosecutors and other representors…" [emphasis added]

The hearing is one in respect of the representations:

"*… As soon as practicable after receipt by it of a report under s 39(2), the Commission must consider the draft amendment and the representations, statements and recommendations contained in the report (s 40(1)). For the purpose of its consideration, the Commission must hold a hearing in relation to each representation contained in the report (s 40(2)). Such a hearing is not required if the Commission is satisfied that all the representations are in support of the draft amendment or if persons who made representations do not wish to attend a hearing (s 40(2A))…*"[7]

"*As I have pointed out more than once, the legislation did not provide that there be a hearing into whether the proposed amendments to the planning scheme should be approved. It required that there be a hearing into the representations by the prosecutors and other representors. Essentially it was to be a hearing into the matters raised by the persons in their representations. … In a sense, therefore, it is the representors who set the agenda for a hearing by the nature of what is contained in their representations which give rise to the holding of the hearing. In this case the representations have not been put before me.*"[8] [emphasis added]

The hearing in this situation is primarily adversarial. Council and Tipalea want the amendment to be approved, my client wants it to be refused.

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3 (2023) TASCAT 97

4 [2018] TASSC 4

5 [2021] TASSC 15

6 (1999) 102 LGERA 88 at [26] - [27]

7 *R v Davis* (1999) 102 LGERA 88 at [3]

8 *R v Davis* (1999) 102 LGERA 88 at [30]

Natural Justice

We do not dispute that the Commission is obliged to afford natural justice, see *R v Davis:*[9]

> "*17 The requirement in the Resource Planning and Development Commission Act, sl0(1)(b)(v), that the Commission must observe the rules of natural justice in turn requires procedural fairness. What that requirement is in a particular case will depend on its own circumstances…*"

In *R v Resource Planning & Development Commission; ex parte Dorney (No 2)*,[10] the Supreme Court quashed a decision of the Commission on the basis of a denial of natural justice in that in amending a draft amendment, which included expanding the area in question, it adversely impacted upon landowners who had not been provided the opportunity to respond.

The Commission is under no obligation to acquiesce to requests for an adjournment in these circumstances. Particularly, and I will expand upon this, the vagueness attendant on the basis for the request. That is clearly demonstrated in *Attorney General v University of Tasmania*.[11]

That *Attorney General v University of Tasmania*[12] concerned, inter alia, a determination by the Commission to not to agree to an open-ended deferral of a hearing by an applicant for a scheme amendment. At first instance that was determined to be a denial of natural justice but that was reversed on appeal, I refer to the judgement of Pearce J as follows:[13]

> "*47 … However, it was not suggested to this Court that, if the Commission had offered an opportunity to be heard about the request for a deferral, anything more of any use could have been said by the University about the utility of a deferral. It is plainly apparent that, over the course of about seven months between October 2017 and May 2018, the Commission extended every opportunity to the University to present its case in support of the draft amendment. The Commission received oral and written evidence and consulted with the parties. Its duty was to consider the amendment which had been submitted to it. It was to approve the amendment only if satisfied that it was "in order": s 42. It was to either approve it, require a modification or alteration or reject it. Although extensions were possible with Ministerial approval, s42(2) imposed a time limit on approval of three months. It may have been that the University could have been in a better position to advance an amendment to the planning scheme, in some form, had the deferral been agreed to. However, the decision to refuse the draft amendment did not deprive the University of the possibility of a decision in its favour. The refusal was no impediment to a future request to the planning authority to initiate a new amendment if and when the further information the University proposed to obtain became available.*
>
> *48 … The failure to address and accede to the University's request, in the circumstances of this case, was not procedurally unfair and did not breach the Commission's obligation to afford natural justice."*

I also note that the Tasmanian Civil and Administrative Tribunal (**TASCAT**) will not necessarily grant an adjournment, even if it is with the consent of all the parties, see *Owens v Kingborough Council*.[14]

Stated basis for the adjournment

I have reviewed, on a number of occasions, the application but must confess I am none the wiser as to why the adjournment is to be sought and what is to occur. One can certainly posit situations where an adjournment is appropriate. It may be that, during the course of a hearing, it became apparent that some biodiversity issue needed to be addressed, perhaps the presence of swift parrot or seasonal orchid. In those situations it would be quite reasonable to say the lengthy adjournment was required, particularly in the case of vegetation which may only become apparent at certain times of the year.

Another example on a similar theme might be the presence of indigenous relics. There may be a situation where, through no fault of an applicant, it had not considered the presence of indigenous relics. If that arises,

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9 (1999) 102 LGERA 88 at [17]

10 (2003) 12 Tas R 69

11 (2020) TASFC 12

12 (2020) TASFC 12

13 *Attorney General v University of Tasmania* (2020) TASFC 12 at [47] - [48]

14 (2023) TASCAT 114

it would be reasonable to enable some time for an accredited expert to undertake a site inspect, archival analysis and prepare a report.

That then brings us to what one can discern as a basis for this open-ended adjournment.

> "*(i) A potential jurisdictional issue associated with the proposed deletion of the DEV-S2.0 Devonport Homemaker Service Industrial Centre Specific Area Plan ('Industrial SAP') and associated assessment against the relevant provisions of the Act;*
>
> *(ii) A potential conflict between the underlying Commercial Zone purpose and clause 17.3.2 of the TPS dealing with discretionary uses, as initially raised in item 3 of the Commission's letter of 24 March 2023; and*"[15]
>
> "*8. As the hearing progressed, other various matters and potential issues were raised by the Commission delegates and representors. Our client apprehends that some of these matters to date have not been adequately responded to.*"[16]
>
> "*14. As detailed below, by applying for this adjournment our client seeks the opportunity to fully respond to the anticipated issues that have been raised by the Commission delegates and the representors at the hearing. It is submitted that granting the application will ensure that our client is afforded procedural fairness and given the opportunity to assist the Commission in making the correct or preferable decision.*"[17]
>
> "*(i) Afford our client sufficient time to further consider and respond to various matters that were raised by the Commission delegates and representors at the hearing on 15 and 16 June 2023;*
>
> *(ii) Afford our client the opportunity to liaise with the Planning Authority in relation to the matters raised by the Commission delegates, including; the proposed removal of the Industrial SAP, drafting of the amended Homemaker SAP and the draft Retail Activity Centre Hierarchy that we understand was initially considered at the Council's 22 August 2022 meeting; and*"[18]

See further paragraphs [21] and [23] which I set out below:[19]

> "*21. It is submitted that any consideration of the justice of this case and procedural fairness to our client dictates that it should be afforded the opportunity to properly consider and fully respond to the various matters raised by the Commission delegates at the hearing.*
>
> *…*
>
> *23. This is undoubtably a complex matter that requires detailed consideration. In the circumstances, it is not reasonable and would be procedurally unfair to require our client and/or the Planning Authority to effectively respond 'on the fly' to the matters raised at the hearing prior to any new hearing date. This is particularly so given the possible implications of the potential jurisdictional issue raised by the Commission delegates.*"

With all due respect, what then can one discern as the basis for the adjournment. In my submission, fairly read, there are two components:

(a) That issues "have arisen" that the appellant is not in a position to deal with.

(b) That it wishes to liaise with Council but we are not told as to what that liaising is about or would hope to produce.

Firstly, it needs to be born in mind that the issues, or difficulties, we say are attendant on the draft amendment which militates refusal have been canvassed. Specifically:

(a) Representation filed by Page Seager Lawyers dated 29 November 2022, which included an accompanying report prepared by Equilibrium Town Planning (Theresia Williams) dated 28 November 2022;

(b) Representation filed by PDA Surveyors (Justine Brooks) dated 29 November 2022;

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15 Submissions of the Appellant dated 7 July 2023 at [7(i)] - [7(ii)]

16 Submissions of the Appellant dated 7 July 2023 at [8]

17 Submissions of the Appellant dated 7 July 2023 at [14]

18 Submissions of the Appellant dated 7 July 2023 at [15(i)] - [15(ii)]

19 Submissions of the Appellant dated 7 July 2023 at [21] and [23]

(c) Statement of Evidence (Theresia Williams) dated 8 June 2023.

I reiterate that Tipalea Partners is represented by extremely experienced Counsel and none of these issues ought to be a surprise, in particular the significance of s32(4) of *Land Use Planning and Approvals Act* 1993 (**LUPAA**).

The Commission has heard all the evidence in respect of planning, the evidence remaining is limited to traffic evidence.

I note that in *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[20] an entire Full Court complicated administrative appeal was prepared for and argued in under 48 hours and 32 page decision delivered 4 days after the Sunday hearing.

Therefore, with respect, this is simply not a viable reason to adjourn the matter indefinitely.

Liaise with Council

One of the stated reasons for the adjournment is to afford time for Tipalea Partners to liaise with Council. I have considered this very carefully and I can see no basis for why there ought to be some form of confidential discussions between a developer and the Council. This is not transactional between Council and the developer.

The statutory process to certify the proposed amendment has been completed and there is nothing further for a developer to discuss with Council. One can posit what other requests the developer will put to Council.

In the absence of any information provided we are left with speculating. Are we going to see the creation of some Council strategy to retrofit an application which, in our submission, is clearly not in accordance with strategic documents?

Prejudice

In light of all the other matters I almost left this matter alone but on reflection as it's erroneous I must bring that to the attention of the Commission. Paragraph [28] is in the following terms:[21]

> "*28. It is submitted that our client will suffer general prejudice from the adjournment insofar as it will not be able to act on the permit granted by the Planning Authority, now being reviewed by the Commission in accordance with section 42B of the Act, until the matter is determined. Our client is willing to accept this prejudice*."

This is misconceived. It is equating an appeal in respect of a permit granted, initiated under LUPAA and heard under the TASCAT regime with the current hearing of a combined amendment and permit.

If a council has issued a permit and that is subject to a third party appeal, then the permit is stayed by operation of the appeal, see s53(3) of LUPAA. In those circumstances TASCAT, and previous to it RMPAT, took into account that a developer had a permit which had been stayed pending the outcome of the appeal.

The reference to s42B is misconceived. The applicant has no permit.[22] Simply on its terms it requires the Commission to also determine the permit. Of course if the draft amendment is refused it follows that the permit must similarly be refused.

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20 (2022) 289 FCR 21

21 Submissions of the Appellant dated 7 July 2023 at [28]

22 "*42B. Commission to review planning authority's decision about permit*

(1) The Commission must, at the same time as it makes a decision under section 40Q in relation to a draft amendment of an LPS to which a request under section 40T(1) relates -

(a) confirm the decision of the planning authority under section 40Y in relation to the application for a permit to which the request relates; or

(b) if the decision in relation to the application for a permit to which the request relates was to grant a permit -

(i) refuse the permit; or

(ii) modify or delete a condition or restriction attached to the permit or add new conditions or restrictions to the permit; or

(c) if the decision in relation to the application for a permit to which the request relates was to refuse to grant a permit - grant a permit subject to the conditions or restrictions that the Commission thinks fit; or

Conclusion

In summary, it is the submission of Goodstone Group that the open-ended request for adjournment ought to be refused.

Rather a directions hearing ought to be called with a view to hearing the balance of the evidence and closing submissions.

I note the time limits applicable in determinations, see s40Q(2) and I am not aware as to what, if any, further period has been allowed by the Minister.

This is not an indefinite process and there is a legislative intent that it be determined within a specified time.

Yours faithfully

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(d) if the Commission decides under section 40Q to refuse to approve the draft amendment of an LPS - refuse the permit.

(2) If the Commission decides under section 40Q to approve a draft amendment of an LPS to which a request under section 40T(1) relates, the decision by the Commission under subsection (1) in relation to an application under section 40T(1) for a permit is to be made by reference to the provision of the planning scheme as in force at the date of the decision, as if the scheme had been amended in accordance with the draft amendment of the LPS.

(3) If the Commission decides under section 40Q not to approve a draft amendment of an LPS to which a request under section 40T(1) relates, the decision by the Commission under subsection (1) in relation to an application under section 40T(1) for a permit is to be made by reference to the provision of the planning scheme as in force at the date of the decision.

(4) The Commission must give notice in writing, of a decision under subsection (1) in relation to an application under section 40T(1), to -

(a) the planning authority to which the application was made; and

(b) the applicant; and

(c) each person or body who or that made a representation under section 41(1) in relation to the permit to which the application relates; and

(d) the Board of the Environment Protection Authority, if the permit application has been referred to the Board under section 24 or 25 of the Environmental Management and Pollution Control Act 1994."