

14 September 2021

Attention: Karen Fyfe

Ms Ann Cunningham
Delegate (Chair)
Tasmanian Planning Commission

By email: tpc@planning.tas.gov.au

Dear Ms Cunningham

GLAMORGAN SPRING BAY INTERIM PLANNING SCHEME 2015, DRAFT AMENDMENT AM 2021-01 & PERMIT DA 2020-80, TEMPUS VILLAGE 12371 TASMAN HIGHWAY, SWANSEA

I refer to your correspondence dated 7 September 2021. The Delegates have directed that a response is provided to the following:

“...the effect of the Savings and Transitional Provisions Schedule 6 - Land Use Planning and Approvals Amendment Act 2015 and in particular clauses 5 and 7 on the draft amendment for insertion of the Tempus Village PPZ.”

For the purpose of providing this response, I will assume that the reference to the *Land Use Planning and Approvals Amendment Act 2015 (Amendment Act)* is a reference to Schedule 6 of the *Land Use Planning and Approvals Act 1993 (LUPA Act)* as currently in force and containing within Schedule 6 the savings and transitional provisions introduced as part of the Amendment Act.

Unsurprisingly, the starting point is the provisions of the legislation referred to.

1 SAVINGS AND TRANSITIONAL PROVISIONS

Cl.7 of Schedule 6 provides that a request for an amendment to the relevant scheme lapses on the day on which the LPS comes into effect in relation to the municipal area unless cls.4 or 5 of the Schedule apply.

S.35M of the LUPA Act provides that an LPS comes into effect on the day that it is notified in the Gazette or at a later date that may be specified in the notice.¹

Cls.4 and 5 apply to certain types of draft amendments that have been initiated under s.34 of the former provisions of the LUPA Act before the LPS comes into effect but which have not been approved under s.42 before that event.

Cl.4 applies to a draft amendment that is for the purpose of altering the designation of a zone to an area of land.

Cl.5 applies to a draft amendment that is for the purpose of altering the requirements of a particular purpose zone or specific area plan that was designated in the planning instrument to an area of land, and to a draft amendment that is for the purpose of establishing a specific area plan.

¹ Notice is to be placed in the Gazette as soon as practicable after approving the LPS. A LPS is approved by the Commission with the consent of the Minister; s.35L(1). S.35L(3) provides for approval to be given within 90 days after receiving a report from the planning authority under s.35F, being a report following exhibition of the draft LPS.

There is a similar provision with respect to draft amendments such as the present that requires the Commission to determine the application within 90 days of receipt of the relevant report from the planning authority and for the Scheme to come into effect when notified.

2 APPLICATION TO THE PRESENT AMENDMENT

The present draft amendment seeks to alter the designation of the zoning that applies to the subject site. It proposes to rezone the land from “Significant Agriculture” to “Particular Purpose Zone 8 – Tempus Village.” The amendment further seeks to establish the requirements for assessment of use and development within that zone.

On the face of it, cl.4 would apply to the draft amendment due to the purpose of the amendment being to alter the designation of the zones to the particular area of land.

It is however noted that the draft amendment has the additional characteristic of establishing the requirements of the zone. This does not affect the application of cl.4 as one of the purposes of the amendment remains to alter the designation of the zoning.

3 ANY AMBIGUITY IN THE SCOPE OF CL.4

I have made further enquiries regarding the interpretation of cl.4 in an attempt to resolve any ambiguity in the statute as to whether it only applies when the draft amendment alters the designation of the zone as compared to cases, such as the present, where the draft amendment alters the designation of the zone as well as establishing the requirements and standards of that zone (i.e. where it may have a dual purpose). The savings and transitional provisions are silent in this regard and it is necessary to construe the legislation to give effect to the intent of the legislature.

In accordance with orthodox principles of statutory interpretation, regard may be had to extrinsic materials to assist in resolving ambiguity in interpretation. Relevant extrinsic materials include the Second Reading Speech. The Second Reading Speech relevantly records that:

“Transitional provisions also allow certain amendments to planning schemes where the assessment has not been completed when a Local Provisions Schedule comes into force, to continue as an amendment to the Local Provisions Schedule. This includes amendments to change the designation of a zone (from one zone to another), amendments to an existing particular purpose zone, specific area plan or site specific qualification, and amendments to introduce a new specific area plan. These transitional provisions aim to provide that for complex amendment proposals that may take a significant amount of time to be assessed and a final decision made, including amendments that may have an associated application for a permit, the applicant is not required to initiate what may be a costly and lengthy process from the beginning only because the new scheme has come in.”

In our submission, the savings and transitional provisions intend to allow complex amendment proposals to be determined in recognition of the time and costs involved in preparing the amendment. The savings and transitional provisions strike a balance between protecting the investment in amendment proposals and maintaining the Tasmanian Planning Scheme structure.

The draft amendment is aptly described as complex, having its origins in 2019 and supported by numerous comprehensive reports. The assessment, both by the applicant and the planning authority, required to determine and ultimately substantiate the designation of the zoning is clearly extensive. In our submission, cl.4 applies to the draft amendment because it is an amendment for the purpose of altering the designation of the zoning and the application of cl.4 is not frustrated by the fact that the draft amendment also establishes the provisions of the zone.

Furthermore, s.5 of the LUPA Act and the objectives in Schedule 1 are of relevance to the question of construction. Providing for fair and orderly development, encouraging public participation in the planning process, sharing responsibility (the amendment here being the result of an application to the Council), and facilitating economic development are all promoted where cl.4 is given a full effect as to

apply where one of the purposes advanced by the amendment is within the ambit of its protective provisions.

4 PRACTICAL CONSIDERATIONS

It is somewhat troubling that the present draft amendment is opened to debate on the application of the savings and transitional provisions. The amendment was referred to the Tasmanian Planning Commission by correspondence dated 16 June 2021. The Commission is required under s.40 of the LUPA Act (Former provisions) to consider the amendment as soon as practicable and must hold a hearing for this purpose. Where approval is given, s.42 requires that this occur within 3-months or such time as may be extended by the Minister.

The timeline for this matter is such that the hearing will not take place until some 4-months following the commencement of the Commission process. Directions enabling the matter to proceed to a hearing were not issued until some 2-months after the process had commenced. No reasonable opportunity for compliance with the statutory timeframe has been afforded.

It is the failure to comply with the statutory timetable that exposes my client to the risk that the amendment may lapse or at the very least, to the risk that arguments to that effect may hamper the implementation of the amendment and action in reliance upon both it and the permit that has been sought.

Those risks should be managed moving forward.

My client is not blind to the practical realities and time pressures upon the Commission that have led to delay and that would now appear to make compliance with a 3-month timetable for hearing and determination impossible. However, we submit that it would be unconscionable to create a risk that the present amendment may lapse as a consequence of the introduction of the LPS for the Glamorgan Spring Bay municipality as a consequence of that delay. Such delay was wholly beyond the control of the applicant and yet it would be the applicant, and indeed the Council, that were prejudiced by adopting a course that allowed the LPS to come into effect before determination of the present draft amendment.

To the extent that it needs to be articulated, the prejudice takes the form of the significant time and costs thrown away in the preparation and assessment of the amendment. The applicant should not be required to re-commence what has undoubtedly been *“a costly and lengthy process from the beginning only because the new scheme has come in.”*

In this regard, I note that the process was commenced in 2019 ahead of lodgement of the final application in May 2020. A request for further information was issued and answered resulting in Council accepting the application in December 2020. The timeframe for assessment by the planning authority was extended by the Commission and ultimately expired in any event a little over 2 weeks before the required reports were sent to the Commission.

Given these timeframes, it would not have been appropriate for the applicant to await the outcome of the LPS process before advancing their application for the amendment. The substantial investment by the applicant is evident from both the timing of these actions as well as the substantial body of material that has been provided to assist in the assessment of the amendment. The applicant has at all times sought to work productively with the Council to ensure that adequate information was provided to enable assessment of the application and that interested members of the community could be adequately informed of the scope and intent of the proposed zone and its intended operation.

5 SPECIFYING TIMEFRAMES FOR COMMENCEMENT

As submitted, steps should be taken to ensure that the LPS does not come into effect before the present application has been determined.

It is noted that a hearing of the LPS for Glamorgan Spring Bay is listed for tomorrow, 15 September 2021. That hearing is the result of modifications to the draft amendment. It may be that the Commission's consideration of the draft amendment is finalised following that hearing. We submit that, while the Commission may finalise its consideration of the LPS, the LPS should not come into effect until such later date that enables the hearing and determination of the present draft amendment.

There is of course power to specify, in the gazettal of the LPS, that it does not come into effect until a later date; LUPA Act, s.35M. That is the course that should be adopted. Careful attention will need to be given to the management of timelines to ensure that neither the LPS nor the present draft amendment is unreasonably delayed.

Given that this matter has been listed for hearing in October and directions have been made that require the parties to supply material relied upon ahead of the hearing, the present hearing process can be managed to ensure procedural fairness to the parties and enable the prompt determination of the application.

6 CONCLUSION

While it is our view that the application is protected under cl.4 of Schedule 6 of the LUPA Act, it is my client's preference to avoid a situation where they are exposed to the risk of argument arising as to the validity of the Commission's determination.

Accordingly, we seek to ensure that the present draft amendment is promptly assessed and that directions are given for the LPS to not come into effect until after that assessment has concluded.

I am happy to expand upon any aspect of the above and note that I have not sought to speculate on what timeframes should be adopted for the commencement of the LPS. The Council may be better placed to advise on this issue in the first instance.

Yours faithfully


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cc: Mr Mick Purves, obo Glamorgan Spring Bay Council, by email: mick.purves@freycinet.tas.gov.au