

# TASMANIAN PLANNING COMMISSION



Our ref: DOC/23/92876  
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11 August 2023

By email:

To all parties

**Devonport Local Provisions Schedule  
Draft amendment AM2022.02 and permit PA2022.0092  
1,5 Friend Street & 88,90-102 Stony Rise Road, Stony Rise**

I refer to the above draft amendment and an application to adjourn the hearing of the draft amendment, so as not to be listed before 11 December 2023, from Mr Holbrook and Mr Morris on 7 July 2023. The Commission has considered the application for adjournment and the subsequent response submissions received from other parties.

Mr Holbrook and Mr Morris (Counsel for Tipalea Partners) filed an application for adjournment with the Commission in the following terms:

15. In summary, the basis of the application is to:
  - (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
  - (iii) 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 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.

The Counsel provided the following submissions in support of the application.

18. The paramount consideration in determining an application for an adjournment is justice in all the circumstances.<sup>1</sup>
19. Case management principles should not supplant that objective<sup>2</sup>. Accordingly, the fact that the Commission ordinarily should make a decision in relation to the draft amendment within 90 days of

<sup>1</sup> See, eg, *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146

<sup>2</sup> See, eg, *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30]; (2009) 239 CLR 175

receiving the section 40K report from the Planning Authority pursuant to section 40Q(2) of the Act, is to be balanced against the need to observe the rules of natural justice and afford procedural fairness.

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.
24. As a matter of natural justice, the unavailability of our client's chosen Counsel and material traffic expert, who are already intimately familiar with this matter, to attend a hearing in mid-August through to the end of November 2023 should be considered as significant factors when determining this application and the justice of the case.

The Counsel submitted no representor will suffer any specific or general prejudice from granting the application for adjournment.

26. In the circumstances, it is submitted that no representor will suffer any specific or general prejudice from the granting of the application. Any potential flow on impacts relating to unavailability of Counsel or witnesses for the representors and Planning Authority from granting this adjournment can be appropriately dealt with as part of any relisting process.

A response submission from the Page Seager Lawyers (representor) was received on 28 July 2023 stating:

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. In summary, no proper basis has been put forward as to why there needs to be such a protracted and indefinite adjournment.

The representor noted that the availability of the Counsel was raised in the application, and stated:

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*<sup>3</sup>. Noting Mr Holbrook may be available or another counsel could be instructed.

The representor submitted that the nature of the Commission hearing is a relevant consideration.

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.<sup>4</sup> [emphasis added]

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<sup>3</sup>(2023) TASCAT 97  
R v Davis (1999) 102 LGERA 88 at [30]<sup>4</sup>

The representor referred to natural justice, and stated:

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*<sup>5</sup>

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*<sup>6</sup>

With respect to the applicant's intention to liaise with the planning authority, the representor submitted:

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.

PDA Surveyors for Yvonne Rundle and David Xaxley, in their response submission, raised concerns regarding the requested adjournment, and issues associated with natural justice. Mr Ian Day, in his response submission, also raised concerns regarding the proposed length of the adjournment, and its implications on the timeframes.

The Commission considers that procedural fairness ought to be afforded to all parties. It is most disappointing that the availability of some parties was not made known at the conclusion of the hearing on 16 June 2023, particularly given the clear intent to reconvene in the near future. The availability of all parties for a hearing provides fairness in the procedures when the Commission arrives at the decision. In this case particularly the availability of Mr Morris and Mr Petrusma is considered important, given the hearing is part heard. Consequently, the Commission agrees to the application for adjournment.

It is further noted that the consideration of the items regarding planning merit, of the proposed amendment, have been completed at the hearing. Should the parties wish to raise these matters again, this can be done as final submissions. Day one of the upcoming hearing will consider traffic items. Following the completion of the traffic matters, the Commission will hear the representors who have not yet had an opportunity to participate, consider the drafting of the SAP, conditions on the permit and allow for final submissions.

The Commission is proposing to hold a hearing to conclude the matter on **Tuesday 12 December and Wednesday 13 December 2023**, commencing 10:00am at the Tasmanian Planning Commission Hearing Room, Level 3, 144 Macquarie Street, Hobart.

The Commission anticipate that the hearing will likely conclude on Wednesday 13 December 2023 but have set aside a reserve day on **Thursday 14 December 2023** should it be required.

The Commission requests all parties to advise on their availability and the planning authority to advise if they will be able to accommodate representors who wish to attend the hearing via Teams in Devonport by **30 September 2023**.

If you require further information please contact Paola Barlund, Planning Adviser, on 03 6165 6835.

Yours sincerely,



Roger Howlett  
**Delegate (Chair)**

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<sup>5</sup>(2020) TASFC 12

<sup>6</sup> (2023) TASCAT 114