

Contact: David Morris / Robert Holbrook

Our Ref: DJM:RJH:230427

7 July 2023

Mr Roger Howlett
Delegate (Chair)
Tasmanian Planning Commission
GPO Box 1619
HOBART TAS 7001

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

Dear Mr Howlett,

Devonport LPS - Draft Amendment AM2022.02 and Permit PA 2022.0024 - Stony Rise

1. As the Commission is aware, this firm acts for Tipalea Partners in this matter.
2. The purpose of this letter is to make an application to adjourn the hearing of the matter to a date to be listed not before 11 December 2023. It is submitted that granting the application is necessary to ensure justice in all the circumstances.

Background

3. It is necessary to briefly address the background of this matter.
4. Our client, though its agent GHD Pty Ltd, on or about 6 May 2022 filed an application with the Planning Authority for a scheme amendment and permit pursuant to sections 37(1) and 40T (respectively) of the *Land Use Planning and Approvals Act 1993* ('Act'). The scheme amendment as applied for was in the form of a Particular Purpose zone.
5. The section 40F report prepared by the Planning Authority and considered at its meeting on 24 October 2022 varied the amendment to set aside the proposed Particular Purpose Zone and instead sought to amend the existing DEV-S1.0 Devonport Regional Homemaker Centre Specific Area Plan ('Homemaker SAP'). It was this varied amendment that was subsequently certified by the Planning Authority.
6. Following the receipt of the sections 40F and 40K reports, the Commission wrote to the Planning Authority on 24 March 2023 requesting further information to clarify issues that were identified following a preliminary

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consideration of the draft amendment by the Commission. The Planning Authority provided a response to those directions in its submission dated 24 April 2023.

7. At the outset of the hearing on 15 and 16 June 2023, the Commission delegates raised various matters with the Planning Authority. This included:
 - (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
 - (iii) General issues relating to the proposed drafting of the amended Homemaker SAP, including the proposed removal of the existing floor area standard in clause DEV-S1.6.1 and 10m building setback standard contained in DEV-S1.7.2 A2 of the Homemaker SAP.
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.
9. The matter is now part heard.
10. It is trite to observe that the Commission has a very wide discretion in relation to the content of planning schemes, as it operates at the top of the hierarchy of authorities responsible for land and resource planning management within Tasmania.¹
11. It is submitted that as a result the Commission has a duty to make the correct or preferable decision in this matter.² Because of that duty, it will sometimes be appropriate for the Commission to take on an inquisitorial role.³ That is effectively enshrined in section 10(1) of the TPC Act, noting that the Commission can inform itself about any matter in any way it thinks fit.⁴
12. The Commission must consider information obtained at hearings per section 40M(1)(b) of the Act. Following a hearing, the Commission also has broad powers to either direct a Planning Authority to, or alternatively, modify or substantially modify itself, a draft amendment pursuant to section 40N(1) of the Act.

¹ See, eg, *Attorney-General v University of Tasmania* [2020] TASFC 12 at [62].

² See, eg, *Commissioner of State Revenue v Melbourne's Cheapest Cars Pty Ltd* [2018] TASSC 47 at [16] which are apposite to the duty of the Commission.

³ See, eg, *Tomaszewski v Hobart City Council (No 2)* [2021] TASSC 15 at [16] which are similarly apposite to the Commission.

⁴ TPC Act s 10(1)(b)(i).

13. Such modifications are common and allow the Commission and the parties respond to matters raised at the hearings and ensure that a draft amendment meets the relevant LPS criteria provided in section 34(2) of the Act.
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.

Basis of the Application

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.

Submissions in Support

16. The following submissions are provided in support of the application. The principal submission is that the adjournment sought is necessary to ensure justice in all the circumstances.
17. Section 10(1) of the *Tasmanian Planning Commission Act 1997* ('**TPC Act**') provides the power to the Commission to grant this application. In accordance with that section, the Commission is not bound to act in a formal manner and must observe the rules of natural justice as part of any hearing.⁵

⁵ TPC Act s 10(1)(b)(iv)-(v).

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18. The paramount consideration in determining an application for an adjournment is justice in all the circumstances.⁶
 19. Case management principles should not supplant that objective.⁷ Accordingly, the fact that the Commission ordinarily should make a decision in relation to the draft amendment within 90 days of 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.
 20. Although technically the draft amendment as certified is the Planning Authorities, it is submitted that our client's interests as the original applicant are of principal, if not equal importance when determining this application.
 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.
 22. While it is principally our client's position that the materials currently before the Commission are sufficient to demonstrate compliance with the relevant provisions of the Act,⁸ granting the application will not only ensure procedural fairness to our client but will also assist the Commission in its duty of reaching the correct or preferable decision.
 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.
 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.
 25. The interests of justice also include consideration of the public use in the efficient use of publicly funded resources of the Commission.⁹ It is submitted that as no future hearing date has been listed by the Commission, there is no

⁶ See, eg, *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146.

⁷ See, eg, *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30]; (2009) 239 CLR 175.

⁸ Noting however, the absence of a proper analysis of the removal of the Industrial SAP against the relevant provisions of the Act.
exception in relation to the assessment of the removal of the

⁹ See, eg, *Zetta Jet PTE LTD v The Ship "Dragon Pearl"* [2018] FCAFC 99 at [56]-[57].

risk of inefficiencies in the application of resources as an effect of the adjournment sought.

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.
27. Furthermore, the Commission could establish a timetable for the exchange of any further material, including sufficient time to allow the representors and Planning Authority to consider and possibly respond to any additional material, prior to a relisted hearing.
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.
29. In the circumstances our client and to a lesser degree the Planning Authority will suffer significant prejudice if the application is not granted. It is submitted that both parties would not be afforded the opportunity to fully present a comprehensive case that responds to the matters raised and therefore assist the Commission to reach the correct or preferable decision.
30. For all of the above reasons, the Commission should grant the application.

Yours faithfully,

SIMMONS WOLFHAGEN

Per:



and

Counsel for Tipalea Partners