

TASMANIAN PLANNING COMMISSION

DECISION

Planning scheme	Tasmanian Planning Scheme - Brighton
Amendment	RZ 2020-03 - rezoning of 17 lots from Rural or part Rural to Significant Agriculture and insertion of West Brighton Specific Area Plan applying to land on Elderslie, Fergusson, Millvale, and Stonefield Roads, West Brighton
Planning authority	Brighton Council
Applicant	Brighton Council
Date of decision	27 April 2021

Decision

The draft amendment is modified under section 40N(1)(b) of the *Land Use Planning and Approvals Act 1993* as set out in Annexure A and is approved under section 40Q.



Marietta Wong
Delegate (Chair)



Dianne Cowen
Delegate



Rohan Probert
Delegate

Note:

References to provisions of the *Land Use Planning and Approvals Act 1993* (the Act) are references to the former provisions of the Act as defined in Schedule 6 – Savings and transitional provisions of the *Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Act) 2015*. The former provisions apply to an interim planning scheme that was in force prior to the commencement day of the *Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Act) 2015*. The commencement day was 17 December 2015.

REASONS FOR DECISION

Background

Amendment

The draft amendment proposes to:

- rezone 17 lots at West Brighton from Rural Resource and part Rural Resource to Significant Agriculture; and
- insert the West Brighton Specific Area Plan (SAP) and apply to 54 lots on Elderslie Road, Fergusson Road, Millvale Road and Stonefield Road.

Site information

The site includes 54 lots on Elderslie Road, Fergusson Road, Millvale Road and Stonefield Road.

The area covers the western edge of the Brighton township and extends to the edge of the Jordan River to the north and north-west and the foothills of Cobbs Hill to the south.

The site consists of varying lots sizes between 2,000m² and 95ha. The majority of the lots are between 5ha and 10ha.

The lots proposed to be rezoned in the certified draft amendment from Rural Resource to Significant Agriculture are:

- 59 Fergusson Road (folio of the register 111887/1)
- 95 Fergusson Road (folio of the register 10779/1)
- 140 Fergusson Road (folio of the register 30795/13)
- 141 Fergusson Road (folio of the register 30795/4)
- 150 Fergusson Road (folio of the register 30795/11)
- 152 Fergusson Road (folio of the register 30795/12)
- 155 Fergusson Road (folio of the register 30795/5)
- 157 Fergusson Road (folio of the register 30795/6)
- 159 Fergusson Road (folio of the register 30795/7)
- 160 Fergusson Road (folio of the register 30795/10)
- 171 Fergusson Road (folio of the register 30795/8)
- 174 Fergusson Road (folio of the register 30795/9)
- 177 Elderslie Road (folio of the register 17309/1)
- 252 Elderslie Road (folio of the register 31166/1)
- 297 Elderslie Road (folio of the register 167354/1)
- 299 Elderslie Road (folio of the register 167353/2)
- 610 Millvale Road (folio of the register 161330/1)

Issues raised in representations

The representors raised the following issues:

- land is not suitable for the Significant Agriculture Zone;
- residential use should only be permitted if accompanied with a Farm Management Plan;
- an irrigation scheme is necessary for agricultural production in the area;
- rezoning the quarry is inappropriate;

- the definition of the commercial agricultural use is incorrect;
- concerns regarding the performance criteria related to commercial agricultural use; and
- consideration should be given for further subdivision of lots.

TasWater provided a Submission to the Planning Authority Notice dated 24 November 2020 under section 56S of the *Water and Sewerage Industry Act 2008*. TasWater did not object to the draft amendment and had no formal comments for the Commission in relation to the draft amendment and did not require to be notified of or attend any subsequent hearings.

Planning authority's response to the representations

The planning authority considered the representations and recommended:

Advise the Tasmanian Planning Commission that four representations were received following exhibition of draft amendment RZ 2020/03 to the Brighton Interim Planning Scheme 2015 and provide copies of the representations to the Tasmanian Planning Commission; and that no modification to amendment RZ 2020/03 is considered necessary to the initial s.35 report.

Date and place of hearing

The hearing was held at the Commission's office on Level 3, 144 Macquarie Street, Hobart on 30 March 2021.

Appearances at the hearing

Planning authority: David Allingham, Manager Development Services, Brighton Council

Consideration of the draft amendment

1. The draft amendment was initiated, certified and exhibited by the planning authority under the former provisions of the *Land Use Planning and Approvals Act 1993* (the Act). However, on 14 April 2021, the Tasmanian Planning Scheme - Brighton became effective.
2. Schedule 6 of the Act provides for the saving of draft amendments that have been initiated by planning authorities under the former provisions. Under Schedule 6, clause 4 saves amendments that alter the designation of zoning and clause 5 saves amendments establishing a SAP. As a result, Part 3B of the Act applies to the draft amendment as if it were a draft amendment of the Local Provisions Schedule.
3. Therefore, under section 40M of the Act, the Commission is required to consider the draft amendment and the planning authority's section 40K report which includes the representations, the planning authority's opinion on the merit of the representations and any recommendations on the draft amendment it thinks fit. The Commission must also consider information obtained at the hearing, whether the draft amendment meets the LPS criteria as set out under section 34 of the Act and whether modifications ought to be made to the draft amendment.

Zoning of land

4. The planning authority's section 35 report states that the draft amendment implements some of the recommendations from the West Brighton and Rosewood Zoning Review (review). The review was initiated by Council in response to ongoing issues relating to competing priorities between agriculture and residential development as the subject area is fragmented by small lot subdivision (p. 27).

5. The planning authority's section 39 report notes that the representations received relate to the rezoning of the southern portion of 177, 252, 297, 299 Elderslie Road and 610 Millvale Road from the Rural Resource Zone to Significant Agriculture Zone. Although the planning authority acknowledged that these areas are generally steep, rocky and do not have access to water, in addition to other arguments that the land is unsuitable for Significant Agriculture, the rationale for their rezoning is to provide consistency with the Brighton Local Provisions Schedule (LPS). The planning authority also provided comment that feedback received from the public through previous public consultation was that the area should remain an agricultural area, however, provide opportunity for dwellings where supporting an agricultural use.
6. The Brighton Local Provisions Schedule was prepared with input from agricultural consultants who identified the land as suitable for the Agriculture Zone as 'they are part of, or have the potential to be part of, a medium to large scale agriculture enterprise'. They also considered that the quarry and Stonefield property should be zoned Agriculture if surrounded by agricultural land (p. 9).

Commission consideration

7. The Commission accepts the planning authority's submission that the site should be zoned Agriculture.
8. The land at 610 Millvale Road, 177, 252, 297, 299 Elderslie Road, 59, 95 and 155 Fergusson Road is wholly subject to the Agriculture Zone under the now effective Tasmanian Planning Scheme (TPS). Therefore, this land can be deleted from the draft amendment.
9. Land at 140, 141, 150, 152, 157, 159, 160 and 171 and 174 Fergusson Road is in the Rural Zone under the TPS. The Commission agrees that this land and the road casement for 188 Fergusson Road (folio of the Register 136778/2) and the LGA subdivision road at the northern end of Fergusson Road (folio of the Register 30795/14) should be rezoned to Agriculture to be consistent with the surrounding area as proposed in the draft amendment.

Specific Area Plan

10. The West Brighton SAP includes a Use Table that replaces the Use Table under the Agriculture Zone. The SAP includes a standard requiring residential use be accompanied by a commercial agricultural use and specifies that a residential use must not unreasonably conflict or fetter non-sensitive use (F3.6.1). This standard includes an Acceptable Solution for existing commercial agricultural uses and discretionary pathway for proposed commercial agricultural uses.
11. A further standard is included to minimise potential conflict with non-sensitive uses on adjoining properties where residential buildings are to include a shelter belt under proposed clause (F3.7.1 A2).
12. At the hearing, the Commission explored whether an Acceptable Solution is appropriate where judgement must be exercised to determine whether the existing commercial agricultural use is 'established and ongoing'.
13. David Allingham accepted that the Acceptable Solution as proposed may require a measure of judgement and considered that the standard would also deliver the planning authority's policy if it was limited to a Performance Criterion.
14. The standard for shelter belts was also discussed at the hearing, in addition to practicalities associated with the Acceptable Solution and their required location.

15. David Allingham submitted that shelter belts are common in agricultural areas where dwellings are separated from the balance of the land by vegetation and a shelter belt near a dwelling would need to be twice the length of the building where adjoining another property with an agricultural use to provide the desired outcome.
16. David Allingham considered that there are instances where the subject lots are not wide enough to meet the 40m side and rear setback requirements and shelter belts assist to mitigate potential land use conflict.

Commission consideration

17. The Commission considers that the SAP provisions have the potential to make the conversion of land to residential use less onerous. Lots could be developed for residential use as long as they are accompanied at the time of application by evidence of an established and ongoing agricultural use, or an intended commercial agricultural use. This is in contrast to a dwelling 'being required as part of an agricultural use' under the Agriculture Zone.
18. The Commission was not convinced that the standard could be clearly interpreted and consistently applied, for example with respect to evidence of commerciality and the measures applied to ensure the use remains active.
19. The Commission finds that the standards in the SAP are potentially difficult to apply and could result in unintended inconsistency with the intent of the Agriculture Zone.

Section 32(4)

20. Under section 32(4) of the Act, an LPS may only include a specific area plan 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.
21. In a further submission dated 23 March 2021, the planning authority submitted that section 32(4)(b) applied to the West Brighton area as it has particular environmental, economic and spatial qualities that are unique to the land.
22. The planning authority submits that the area has unique spatial, environmental and economic characteristics that:
 - 'Unlike many agricultural areas, the land consists mainly of smaller 5 to 10 ha lots and only a few large-scale agricultural enterprises.'
 - 'Many of the lots in the area have poor soil quality and the area is in a low rainfall area and has no access to irrigation water. On-site water storage is made more difficult due to the lot sizes and the limited amount of drainage lines through the properties. A TasWater town supply is available, but is too expensive to be used as irrigation water.'
 - 'the land is on the western fringe of the Brighton urban settlement. The proximity to the Brighton township and the attraction of the smaller lots for "hobby farm" type developments has driven up the price of land making it too expensive to purchase as just farming land, particularly given the environmental constraints listed above.'

23. The planning authority submits that although the area should remain an agricultural area, many landowners believe they should have the right to build a dwelling on their property if the necessary controls to manage land use conflicts are in place and if an agricultural enterprise was taking place.
24. The planning authority submits that the Agriculture Zone standards in the SPPs set a threshold that is too high given the unique qualities of the area with reference to clause 21.3.1 A4 and P4.
25. At the hearing, David Allingham referred more specifically to P4 (a) which necessitates the residential use is required as part of an agricultural use; and to P4 (b)(ii) under which a residential use must be located on a site that is not capable of being included with other agricultural land (regardless of ownership) for agricultural use.
26. David Allingham further submitted that the Agriculture Zone provisions present compliance issues, whereby a legitimately established dwelling in support of an agricultural use may become non-compliant if the property is sold and the agricultural use ceases or is reduced to a hobby farm.
27. He submitted that the SAP overcomes this issue by imposing a requirement for a residential use to be allowable where it is accompanied by an established and ongoing commercial agricultural use on the site.

Commission consideration

28. The Commission does not accept that the area has particular environmental, economic, social and spatial qualities that require provisions that are unique to that area.
29. The area is essentially rural in character and is largely in agricultural use, with a mix of existing dwellings and vacant lots, including smaller lots.
30. While the Commission accepts the standards for the Agriculture Zone limit opportunities for dwellings when the area comprises a number of smaller lots, it considers that the Agriculture Zone standards are appropriate where the continued agricultural use of the area has been recognised by the application of the Agriculture Zone.

Regional land use strategy

31. The LPS criteria under section 34 of the Act require that a draft amendment of an LPS is, as far as is practicable, consistent with the regional strategy.
32. The planning authority submits in its section 35 report that the proposed amendment is consistent with policies under PR1 (PR1.1 to PR 1.4) and furthers the requirements of the Southern Tasmania Regional Land Use Strategy 19 February 2020 (the regional strategy).
33. The regional strategy states that whilst the southern region has negligible prime agricultural land, there is productive agricultural land in the southern region (Class 4 and 5 land) and that the land should be afforded the highest level of protection from land use conflicts and fettering recognised through its status as 'significant agricultural land' with reference to Principle 7 under the State Policy for the Protection of Agricultural Land.

Commission consideration

34. The Commission notes the planning authority's consideration of the regional strategy.
35. However, the Commission also notes that the regional strategy includes further regional policies that are relevant. These are found in the Tasmanian Planning Scheme Addendum (9 May 2018) which applies to amendments to the LPS:
 - PR1 Support agricultural production on land identified as significant for agricultural use by affording it the highest level of protection from fettering or conversion to non-agricultural uses.
 - PR 2 Manage and protect the value of non-significant agricultural land in a manner that recognises the potential and characteristics of the land.
36. The Commission considers the opportunity to consolidate the zoning of land in the West Brighton area is justified and will allow the land to be utilised for agricultural production consistently across the area.
37. However, the Commission considers that the SAP, with reference to the above, may not be, as far as is practicable, consistent with the regional strategy.

State Policies and Resource Management and Planning System Objectives

38. The site is considered to be agricultural land within the meaning of section 7 of the *State Policy on the Protection of Agricultural Land 2009* (PAL Policy) as addressed above.
39. The planning authority submits that the amendment is consistent with the PAL Policy:
 - Based on the recommendations of the Zoning Review, the proposed SAP does not propose to convert agricultural land to non-agricultural uses, rather it recognises the constraints within this lower productive area and that the one size fits all approach has not worked in this area. Based on the recommendations of the Zoning Review, the SAP aims to promote controlled environment agriculture which is more suitable for the area. Further, it aims to ensure that agricultural land is not unreasonably converted, and agricultural use continues if a residential use is established.

Commission consideration

40. The Commission considers that the rezoning of those lots zoned Rural to the Agriculture Zone recognises that the land is productive agricultural land. This is considered to be consistent with the PAL policy.
41. The Commission is not convinced that the SAP, which effectively lowers the test for conversion to residential use, is consistent with the PAL Policy. It considers that principle 5 of the PAL policy is particularly relevant.
42. The SPPs have been prepared in accordance with State Policies and the standards restricting residential use in the Agriculture Zone are taken to be consistent with Principle 5. Principle 5 gives scope to an alternative outcome where residential use of agricultural land 'does not unreasonably convert agricultural land and does not confine or restrain agricultural use on or in the vicinity of that land'. The Commission finds that this is not the case in this instance.
43. The Commission finds that no other State Policies are relevant to the draft amendment.
44. The Commission concludes that the draft amendment, subject to the deletion of the SAP, seeks to further the Objectives of the Resource Management and Planning System in Schedule 1.

Modifications required to draft amendment

45. The draft amendment requires modification to:
- remove 610 Millvale Road, 177, 252, 297, 299 Elderslie Road, 59, 95 and 155 Fergusson Road from the scope of the rezoning as these lots are now wholly in the Agriculture Zone under the TPS;
 - rezone 140, 141, 150, 152, 157, 159, 160 and 171 and 174 Fergusson Road and the road casement for 188 Fergusson Road (folio of the Register 136778/2) and LGA subdivision road at the northern end of Fergusson Road (folio of the Register 30795/14) from Rural to Agriculture to be consistent the Brighton LPS.
 - delete the West Brighton Specific Area Plan and associated overlay as the SAP is not supported.

Decision on draft amendment

46. Subject to the modifications described above, the Commission finds that the draft amendment is in order and gives its approval.

Attachments

Annexure A – Modified amendment

Annexure A

Modified amendment RZ 2020-03

The Brighton Local Provisions Schedule is amended as follows:

Rezone from Rural to Agriculture:

- 140 Fergusson Road (folio of the register 30795/13);
- 141 Fergusson Road (folio of the register 30795/4);
- 150 Fergusson Road (folio of the register 30795/11);
- 152 Fergusson Road (folio of the register 30795/12);
- 157 Fergusson Road (folio of the register 30795/6);
- 159 Fergusson Road (folio of the register 30795/7);
- 160 Fergusson Road (folio of the register 30795/10);
- 171 Fergusson Road (folio of the register 30795/8);
- 174 Fergusson Road (folio of the register 30795/9);
- the road casement for 188 Fergusson Road (folio of the Register 136778/2); and
- the LGA subdivision road at the northern end of Fergusson Road (folio of the Register 30795/14)

