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29 September 2014

Mary Massina
Executive Chair
Tasmanian Planning Reform Taskforce
22 Elizabeth Street
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By email: mary.massina@stategrowth.tas.gov.au

Dear Mary,

Land Use Planning and Approvals Amendment Bill 2014 – Consultation Draft

Thank you for the opportunity to provide comments on the consultation draft position paper on the *Land Use Planning and Approvals Amendment Bill 2014*. EDO Tasmania is a community legal centre providing advice to many people each year regarding planning and environmental issues and how to ensure that community concerns are considered in decision making. Our comments on the draft position paper are primarily concerned with the implications of proposed amendments for public participation in planning decisions.

The fundamental weakness of Tasmania's current planning framework is the absence of well-articulated, Statewide strategic planning policies to guide localised development controls. Without investing in the development of a comprehensive suite of State policies, it is unlikely that both certainty and sustainability will be achieved.

Furthermore, these reforms, and the "fairer, faster, cheaper and simpler" policy they seek to implement, focus unduly on planning process rather than planning outcomes. While there is room for improved efficiencies in the current system, development assessment is necessarily complicated, due to the complexity of environmental impacts and the importance of community engagement. As the Productivity Commission has noted:

> *…a combination of several benchmarks is often needed to reflect system performance. For example, while longer development approval times may seem to be less efficient, if they reflect more effective community engagement or integrated referrals, the end result may be greater community support and preferred overall outcome.*[4]

For this reason, we urge the Planning Reform Taskforce to ensure that any proposed reforms are considered with a view to achieving sustainable outcomes, in accordance with the objectives of the Resource Management and Planning System, rather than simply seeking quicker approvals.

We note that broader planning issues, and matters flagged for consideration in phase two of the reforms, will not be addressed in this phase. However, we reiterate our position regarding the value of public participation in resource management and planning decisions, and record our strong opposition to efforts to unduly curtail third party appeals.

Our comments in relation to the specific reforms outlined in the draft position paper are set out below.

Finalising and implementing interim planning schemes

The interim planning scheme process has the potential to alter individual property rights, as well as to remove development restrictions on public land, with little or no opportunity for recourse until after the changes have taken effect. It is important that adequate opportunities be maintained to ensure that natural justice is afforded to those affected by such changes.

Public exhibition and hearings

The draft position paper notes:

> *The Commission will be able to hold hearings regionally and to focus on thematic issues with the scheme. The changes will include a power for the Commission to decide on matters on the written submissions rather than through public hearing process.*

The paper also proposes a number of changes to make public hearings optional, at the discretion of the Commission.

We note the following concerns in relation to these proposals:

- The implications for amendments to planning schemes are often complex, making it difficult for a community member to articulate their concerns effectively. In particular, community members who are not familiar with the process for making or amending a planning scheme may struggle to compile a cogent written submission, or seek appropriate advice, in the time available for public comment. However, many of these community members would be able, when questioned at a hearing, to clearly articulate their concerns about the impact of a proposed change. Decisions by the Commission to rely solely on written submissions may disadvantage such community members, and provide an advantage to better resourced proponents or interest groups who are more experienced in the preparation of planning documents.
- Discussing regional issues according to 'themes' may also be problematic for community members who are not clear on where their particular concern sits within a schedule of "themes". Furthermore, a discussion which resolves a thematic issue at a regional level may result in changes to a local planning scheme that were not foreseen by members of the community – this may result in people not making a submission on the basis that the advertised draft interim scheme did not concern them, but finding that the final scheme has fundamentally different implications for them. Any amendments to the hearing process must ensure that natural justice is afforded to anyone whose interests are adversely affected by the final scheme.

The paper also provides for changes to be made in the final scheme that are "not necessarily direct translations of the zoning in the previous scheme" without readvertising, where the amendments:

- are supported by all representations and approved by the Commission;
- have "been resolved through the hearings".

Again, we are concerned that such amendments may be resolved through "hearings" on the basis of written submissions only or thematic discussions which do not clearly inform the public regarding the broader implications of amendments. Such amendments may have adverse impacts on members of the public who did not make a representation in relation to the original draft scheme, but would have made a representation had the amended scheme been advertised.

We also note that any such amendments should be required to be consistent with regional land use strategies.

Amendments that do not require a public process

The objectives of the RMPS explicitly encourage public participation in resource management and planning decisions. However, the draft position paper provides for a range of amendments to be made to planning schemes without requiring a public process. Significantly, these will include changes "for a purpose specified in a notice to the Minister" and "for any other prescribed reason". These are inappropriately broad criteria to exempt an amendment from public scrutiny and should be removed.

The draft position paper does not indicate whether the proposed amendments would include the qualification currently included in s.37(1)(b), that the Commission must be satisfied, in relation to the proposed planning scheme amendment, that

(b) *the public interest will not be prejudiced*

We recommend that any provisions in relation to amendments that can be made without public participation must be subject to a "public interest" test. We also recommend that any amendments made under such a provision are subject to 14 days public notification (as is currently the case under s.30IA) to allow for some level of scrutiny and, if necessary, an opportunity to challenge the amendment.

Assessment timeframes

We do not support amending the statutory timeframes for determining applications for permitted use and development. Statistically, most applications in Tasmania for such uses are already determined within 21 days.

Reducing the statutory timeframe is unlikely to make any material difference to the allocation of Council resources to development assessment. Instead, such an amendment would likely mean that:

- the vast majority of applications would continue to be determined within 21 days;
- planning authorities who are not able to determine an application within that timeframe will make greater use of information requests or applications for extension; or
- there will be an increase in the number of applications determined by the Tribunal under s.59, with attendant costs for planning authorities.

Efficiencies in development assessment are more likely to be achieved through the implementation of clear policy guidance, standard condition templates and better resourcing of planning authorities than through legislative amendments.

Third party appeal fees

As noted above, EDO Tasmania is a strong advocate for public participation in planning decisions, and believes that such participation leads to better, fairer and more sustainable decisions. Furthermore, such participation is explicitly encouraged by the objectives of the RMPS.

The draft position paper states that the introduction of higher appeal fees will achieve the Government's goal of "limiting unreasonable third party appeals."

Firstly, we dispute that there is any evidence to support the view that third party appeals in the Resource Management and Planning Appeal Tribunal are unduly inhibiting development in Tasmania. A relatively forensic analysis of planning appeals in 2013, undertaken by Madeleine Figg (attached), demonstrates that third party appeals:

- are outnumbered by developer appeals;
- are regularly resolved by mediation;
- primarily comprise directly affected parties, rather than "public interest" appellants.

On this basis, we do not believe that there is any justification for efforts to reduce "third party" appeals.

The Planning Minister has argued that limitations on third party appeals are justified, as the public still has an opportunity to make representations to the planning authority. This argument is illogical without also curtailing the appeal rights of proponents and direct neighbours. It is clear that planning authorities make incorrect decisions, and opportunities to challenge such decisions should continue to be available to all affected parties.

Secondly, even if the aim of limiting "unreasonable" third party appeals could be supported, the proposed increase in appeal fees will not achieve that goal. In particular, the higher fee is intended to be applied indiscriminately to any appellant other than the developer or direct neighbours, irrespective of whether their appeal is "unreasonable". There is also no basis to distinguish between direct neighbours and other third parties – the "direct" impacts of a development, including noise, light pollution, traffic and amenity, may extend well beyond those boundaries.

Section 22A of the *Resource Management and Planning Appeal Tribunal Act 1993* already provides the Tribunal with powers to dismiss appeals which are frivolous or vexatious (that is, "unreasonable") – it is inappropriate to use appeal fees as a blanket deterrent to discourage public participation.

Planning appeal fees were significantly increased on 1 July 2014, from approximately $75 to $307. There is yet to be any analysis on whether this increase has had any detrimental impact on public participation, let alone analysis of whether a further $300 increase would serve any legitimate public purpose.

We very strongly oppose the increase in appeal fees and urge the government to abandon this policy. An article outlining our views in relation to third party appeal rights, published in the latest edition of *Tasmanian Planner*, is attached.

Copyright and indemnity for online planning schemes

We strongly support efforts to make planning schemes available online. We urge the Planning Reform Taskforce to consider further amendments to require, and provide any necessary indemnities in relation to, the publication of development applications online.

Reconstruction of destroyed buildings and works

We do not oppose amendments to clarify the extent to which destroyed buildings may be reconstructed. However, consideration should be given to conditions which may be imposed to limit the risk of a future building being subject to similar damage. For example, if the destruction results from bushfire or flooding, the planning authority (or Tasmania Fire Service) may wish to impose some conditions on the location or height of the replacement building to improve its resilience to natural hazards in future.

Subdivisions

While we do not oppose amendments to clarify that subdivisions may be permitted development, we consider it inappropriate to rely on amendments to the *Local Government (Building and Miscellaneous Provisions) Act 1993* (***LGBMPA***) to achieve this. When introduced in 1993, then Minister for Local Government, Mr Cleary, made it clear that LGBMPA was intended to apply for "two to three years" in order to "preserve temporarily provisions of the acts repealed by the Local Government Bill until amendments or new legislation have been prepared."[1] Mr Cleary went on to say:

> *In providing for subdivision to receive the same assessment as any other application for development of land, the bill provides for an assumption, which may be removed by the*

[1] Second Reading Speech, 19 October 1993, see: http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/b0c36a04-88de-4532-ad73-5b4238a439d6/5/doc/#term0_1

relevant planning scheme or interim order, that an application is to be made as if it were an application for a discretionary permit. This ensures that, until a planning scheme provides to the contrary, any subdivision proposal must be advertised, with rights of public representation flowing as a result.

It may well be that in many circumstances, planning schemes will provide for subdivision 'as of right', but until this occurs, subdivision is to be treated as a discretionary use.

Despite the clear intention for LGBMPA to be a transitional fix only, the legislation continues to guide decisions in relation to subdivisions twenty years later.

Subdivisions create a range of planning issues beyond lot sizes and infrastructure demands, touching on urban growth, coastal ribbon development, public open space requirements, bushfire clearing requirements and setbacks for inundation and other coastal hazards. Rather than simply amending LGBMPA to confirm its original intent (that is, an assumption that subdivision would be discretionary unless a planning scheme providing otherwise), efforts should be made to develop more strategic statewide policies in relation to settlements, and more consistent requirements for subdivision assessments in planning schemes.

Thank you for the opportunity to comment on the draft position paper. Please do not hesitate to contact me if you would like to discuss any of our comments in further detail.

Kind regards,

Environmental Defenders Office (Tas) Inc.

Per

Jess Feehely
Principal Lawyer

Attach: Madeleine Figg paper

EDO Tasmania article – *Preserving Representor Appeal Rights*