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Better Planning Outcomes Project
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Dear Sir / Madam

Better Planning Outcomes

Thank you for the opportunity to participate in the Better Planning Outcomes Project.

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. We believe that the principles of the Resource Management and Planning System and the *Land Use Planning and Approvals Act 1993* (***LUPAA***) provide a sound framework for planning decisions in Tasmania.

However, there is a need to address deficiencies in the system and to commit both energy and resources to the effective and consistent implementation of better planning outcomes. In our view, the emphasis of reform should be in the following areas:

- Improving the strategic basis of planning instruments, both at a State and local level;
- Adoption of regional planning to achieve sustainable development objectives;
- Improving planning instruments;
- Facilitating public participation in land use planning decisions;
- Improving monitoring and enforcement within the planning system; and
- Removing industry exemptions to achieve a fully integrated resource management and planning system.

Our submission responds to the issues raised in the Better Planning Outcomes discussion paper and raises a number of matters we believe should be addressed in any review of the planning system.

Policy Setting and Plan Making

1. State Policies

State Policies are intended to provide a strategic underpinning to planning decisions and to ensure a consistent, State-wide approach to particular resource management and planning issues. The limited number of State Policies that have been implemented to date, a decade after the commencement of the *State Policies and Project Act 1993*, is therefore extremely disappointing.

We agree that the Minister for Planning, rather than the Premier, should be responsible for overseeing the development and implementation of State Policies. This shift of responsibility must be complemented by a commitment within State and local governments to accept the importance of State policies and to advocate their adoption. Suggestions for future State Policies include:

- Vegetation Management
- Natural Hazards (including bushfires, floods and shoreline recession)
- Tourism
- Affordable Housing
- State Settlement Strategy

State Policies should be high-level policy statements, implemented through planning schemes and other appropriate tools, such as management plans and education programs. It is vital that State Policies explicitly identify:

- implementation responsibilities of councils and government agencies; and
- instruments that will be used to implement policy objectives.

Patently, sufficient resources must be dedicated to implementation of the policies.

Where State Policies are to be implemented through planning schemes, we support the suggestion that planning authorities be required to amend their scheme to implement the State Policy within a certain timeframe (for example, by directing the authority to initiate an amendment pursuant to section 34(2) of LUPAA).

The Resource Planning and Development Commission (***RPDC***) should also consider issuing a planning directive or Special Planning Order regarding the application of the State Policy. This instrument could override the planning scheme to the extent of inconsistency for the interim period while the scheme is amended to implement the policy.

2. Regional Planning

The objectives of the Resource Management and Planning System (***RMPS***) include the promotion of sustainable development and fair and orderly use of natural resources. Given that issues such as resource allocation, health, transport and viable ecosystems frequently transcend municipal boundaries, we do not believe that sustainable development can be achieved without an emphasis on regional planning. Regional environmental, social and economic interests ***must*** be considered in land use planning decisions.

Section 21 of LUPAA currently provides that a planning scheme for an area must "*as far as practicable, be consistent and coordinated with the planning schemes applying to adjacent areas and must have regard for the use and development of the region as an entity in environmental, economic and social terms*."

However, experience suggests that this provision is largely ineffectual and there remains little sharing of information between councils. Where participation in regional schemes is voluntary, participating councils are likely to withdraw in the event that local interests are thought to be inconsistent with regional interests.

Section 22(2A) allows the RPDC to direct a planning scheme to be prepared for one or more municipalities where this approach would "*promote a regional approach to*

planning." In our view, regional planning would be better achieved by amending LUPAA to allow the RPDC or the Minister to:

- make declarations establishing planning authorities other than local governments; and
- determine the planning areas that such authorities will administer.

This approach would allow for the development of regional plans and regional authorities to assess projects with regional impacts. Day-to-day development control would still be the province of councils.

Regional planning authorities should include representatives of each municipal planning authority and from relevant stakeholders, including industry, natural resource management groups, social welfare groups and the community.

3. Planning Schemes

Making Schemes

The objective of LUPAA "to require sound strategic planning" recognises the importance of a strategic basis for planning decisions to ensure consistency of vision. We therefore support efforts to formalise the requirement for a clearly documented strategic basis for planning schemes. This could be achieved by requiring each planning authority to develop a land use strategy, explicitly addressing the long-term land use intent in the planning area.

To facilitate sound strategic planning, it is essential that planning authorities have access to accurate and up-to-date planning information. This includes accurate vegetation, threatened species and hazard mapping, advice regarding the regional impacts of climate change and demographic data. For example, the Threatened Species Strategy indicates that the Threatened Species Unit will "*provide local governments with appropriate information on identification, distribution, and status of threatened species, details of defined critical habitats, impacts of threatening processes (such as vegetation clearance)*."

We agree that significant effort should be focused on pre-certification preparation of planning scheme or amendments to planning schemes. The RPDC has prepared a planning advisory note regarding certification of draft amendments and we understand a further note on certification of planning schemes is being prepared.

We also support the early involvement of a range of stakeholders in developing or reviewing planning schemes. We note that the RPDC's Planning Advisory Note: *Consultation on Draft Amendments to Planning Schemes* provides

> "*Early consultation with neighbours and other interested parties and agencies can improve the quality of the draft amendment and avoid representations being made. Proponents should be encouraged to carry out their own pre-application consultation with all parties and groups who may be affected or have an interest. It is expected that the planner's report on the draft amendment will include details of the steps taken to involve the public, the consultations carried out and the advice received.*"

The RPDC recommend the early involvement of stakeholders to further objective 1(c) of the RMPS, to encourage public involvement in resource management and planning decisions.

Planning Directives

We encourage the use of planning directives, particularly in support of State Policies, to provide a consistent format and structure for planning schemes to deal with particular issues.

Many planning schemes throughout Tasmania have not been comprehensively reviewed since the introduction of the RMPS. It is essential that councils be directed to update their planning schemes to reflect the objectives of the RMPS as soon as possible.

Updating Schemes

We acknowledge there is merit in a "review" rather than "replace" approach to updating planning schemes (provided a certain standard is achieved to begin with). However, we would emphasise that this approach cannot be used to limit the scope of review.

Recently, the Break O'Day Council proposed extensive amendments to its planning scheme, covering a wide range of issues and zones within the planning area. Given the extent of proposed changes, and consistent with clear advice from the RPDC that there was no limitation on the issues that could be considered when assessing the proposed amendments, our clients prepared submissions on current deficiencies in the operation and implementation of the planning scheme.

However, at the public hearing the Commissioners made a ruling that submissions in relation to aspects of the planning scheme that were not being amended would ***not*** be heard. This approach prejudiced our clients' capacity to comment on relevant aspects of the planning scheme that they perceive as needing to be changed.

Therefore, it is essential that the efficiency of 'reviewing' a planning scheme is not achieved at the expense of legitimate public participation in the development and review of planning schemes.

We fully support introducing a requirement for planning authorities to periodically review their planning schemes to ensure consistency with strategic planning instruments.

Maintaining Schemes

We support efforts to ensure a reliable system for providing centralised, electronic access to planning schemes

Development Assessment and Control

1. Discretionary and Permitted Development

The Better Planning Outcomes Discussion Paper suggests that amendments should be considered to allow "minor" relaxation of planning scheme requirements to be approved without triggering the discretionary permit provisions (involving third party notice and appeal rights). We do not support this approach.

It is an objective of LUPAA to provide for "fair, orderly and sustainable use and development". This is what planning schemes do – provide certainty regarding development controls to provide for fair and orderly land use planning decisions.

Where the planning scheme nominates a particular parameter (such as boundary setback), the community is entitled to assume that the setback parameter was adopted for a reason and will be enforced.

It is therefore inappropriate for a planning authority to subjectively determine whether the impact of relaxing a scheme standard is "minor" or not. If a development does not comply with the planning scheme, the community should be entitled to comment on whether the development is appropriate. If the relaxation is indeed "minor", it is unlikely that there will be any objection.

It may be possible to introduce amendments to limit public comments to the impact of the proposed exercise of discretion. That is, if a development becomes discretionary solely because of a relaxation of a boundary setback, comments (and appeal rights) can be limited to the impact of the relaxation (for example, that the relaxation will adversely impact on the privacy of an adjoining owner). However, in our view, such a limitation is not necessary. The community should be entitled to comment on any development that does not comply with the planning scheme.

2. Private Certification

We do not support private certification for planning matters.

3. Assessment of Regionally Significant Developments

We support the adoption of regional planning initiatives, as discussed above. However, we do not believe that an additional assessment process should be adopted for regionally significant projects.

Regionally significant developments should be assessed by regional planning authorities, pursuant to the normal LUPAA procedure. Depending on the significance of the proposed development, it may be appropriate to treat the development as a Project of State Significance.

4. Pre-Permit Mediation

The opportunity to engage in mediation before a development permit is issued, pursuant to section 57A of LUPPA, is invaluable. Resolving issues before a permit is issued has the potential to improve permit conditions and significantly reduce appeals, or to narrow the issues on appeal. The fact that this option is currently underused is unfortunate.

One factor hindering greater use of pre-permit mediation is the lack of support from developers. The Act provides that "2 or all parties" must agree to the mediation. Theoretically, if a representor and council agree, mediation can proceed. However, councils remain subject to penalties for failing to determine a development application within the statutory time frame. Therefore, unless the applicant agrees to an extension of time, a council is unlikely to insist on mediation.

We would support efforts to educate council officers and the community (including applicants) about the availability and advantages of this process. Training of mediators would also improve confidence in the merit of the mediation process.

5. Determining Applications

We agree that many councils confuse the responsibilities as planning authorities under LUPAA with their responsibilities as representatives of the municipality under the *Local Government Act 1993*. This can lead to inconsistent and unsupportable land use decisions and can increase the number of planning appeals.

We support efforts to educate councillors about their roles and responsibilities. This could be complemented by:

- including the RMPS objectives in the *Local Government Act 1993*;
- amending LUPAA to include a section detailing the functions and powers of a planning authority. This would allow councillors to distinguish between these functions and those set out in section 20 of the *Local Government Act 1993*.

Council meetings should be held separately from those of a planning committee, with delegated power to make planning decisions. This would further assist the councillors to distinguish between their two roles.

Politics and community interest can have a legitimate role to play in land use planning decisions. Where a discretion involves the weighing up of various factors, it will often be appropriate for council to exercise its discretion having regard to community interests and environmental or social concerns. This decision may differ from the recommendation of the planning officer.

However, we agree that planning authorities should acknowledge when a development permit is issued contrary to the advice of planning officers and should be explicit about the reasons for its decision.

6. Coordinating Expert Advice and Other Approvals

Land use planning decisions should be informed by expert advice on relevant issues, such as the likely impact on threatened species, the location of groundwater springs and historical contamination of the development site.

While we acknowledge that it is standard practice in some councils to seek advice from relevant agencies, we consider that it would be preferable to develop explicit regulations for such referrals. To ensure that relevant advice is provided in a timely manner, we believe that LUPAA should explicitly provide for development applications to be referred to various government agencies in specific circumstances. This is the approach taken in the *Integrated Planning Act 1997* (Qld).

To develop regulations regarding referral, State Government agencies should identify matters that they may be interested in with respect to development applications. For example,

- a development proposed in an area where a threatened species has been identified should be referred to the Threatened Species Unit;
- a development that will generate significant traffic should be referred to the Department of Infrastructure, Energy and Resources;
- a development that will involve emission of particulates within 100m of a sensitive place should be referred to the Director of Public Health.

To complement the referral system, it will be necessary to ensure that planning authorities are provided with up-to-date spatial information regarding threatened

species, vegetation mapping, contaminated land and other issues that may trigger referral.

Any provisions regarding referral should clarify when an agency response will be:

- **mandatory** (that is, the planning authority ***must*** refuse the development or impose particular conditions at the direction of the agency – see section 25(8) of EMPCA, for example); **or**
- **advisory** (that is, the planning authority ***may*** refuse the application or impose conditions on the recommendation of the agency, but is not compelled to do so).

7. Exemptions

The Resource Management and Planning System was introduced to create an integrated system providing independent, democratic and sustainable management mechanisms for land and resource development. It is therefore appropriate that ***all*** land uses within Tasmania be regulated pursuant to the RMPS.

We do not support the existence of separate decision-making processes for various industries within the State. Removal of all exemptions and protections for the marine farming and forestry industries would ensure that decisions relating to these uses are subject to sustainable development objectives and accountable through the RMPS public participation processes.

Therefore, we recommend the following actions:

- Repeal s.20(7) of LUPAA;
- Amend the definition of "works" to remove the exclusion of forest practices carried out in State Forests.
- Enact legislative amendments to make the RPDC responsible for reviewing marine farming development plans.
  Note: there has been a significant increase in the functions of the RPDC recently (for example, they are now responsible for reviewing water management plans). The RPDC must therefore be provided with sufficient resources to fulfil all its roles.

8. Timing

The role of development assessment is to ensure that the impacts of a proposed development are properly understood and considered by the planning authority before a decision is made. Clearly, expediency should be less important than ensuring that the impacts of a proposed development are properly assessed. Therefore, we recommend amendments to extend the decision-making period, or to facilitate the unilateral extension of the decision-making period where a planning authority is unable to properly assess the impacts within the statutory timeframe.

Deemed refusals

Section 59 of LUPAA currently provides that failure by a planning authority to determine an application within the statutory period (or any further period agreed between the parties) is deemed a decision that the permit is granted, subject to conditions to be determined by the Tribunal. In our view, it is more consistent with a precautionary approach for failure to determine an application to be deemed a

decision that the application is refused. This approach would still encourage planning authorities to make a decision within time, as the applicant is likely to appeal to the Tribunal against the deemed refusal. However, the assumption should be that unless an approval is given, the development should not go ahead.

Asking for Additional Information

Pursuant to section 54 of LUPAA, planning authorities are able to request additional information from the developer within 21 days of receiving the development application. In our view, this period is not sufficient. Representations or responses from government referral agencies may identify issues that the planning authority needs further information to assess. Therefore, the period for requesting further information must at least extend beyond the period for making representations.

Representation Period

Currently, section 57(5) requires discretionary applications to be available for public comment for 14 days. In our experience, it is incredibly difficult for community members to review a development proposal and make a detailed representation within this period of time. In the interests of encouraging effective public participation in land use planning decisions, we recommend that representations be accepted for a minimum period of 28 days from the date of the public notice regarding the proposed development.

We support the suggestion in Appendix 4 of the Better Planning Outcomes Discussion Paper that the representation period be extended over the Christmas holiday period. However, in our view it is preferable to provide for the "clock" to stop during a nominated period (for example, 20 December to 4 January) rather than simply providing for a slightly longer representation period. That is, the standard period for making a representation would apply, but nominated days during the Christmas / New Year period would not count.

Review and Enforcement

1. Costs / Fees

In any review of the costs / fees imposed by the Tribunal, it is important to consider the role of the Tribunal and the need to continue to encourage public participation.

Pursuant to r.6 of the *Resource Management and Planning Appeal Tribunal Regulation 2004*, the Chairperson may waive, reduce or refund a fee for reasons of financial hardship. This provision took effect on 1 January 2005 and efforts should be made to ensure that all Tribunal officers and the public are made aware of it.

2. Enforcement

Planning authority enforcement

Effective enforcement is critical to maintaining public confidence in the land use planning system in Tasmania. While we acknowledge that lack of resources continues to hinder planning authorities' capacity to monitor compliance with planning permits, we do not believe that this justifies the lack of enforcement activity within the State.

In addition to resources, planning authorities must have a number of enforcement options available to them. At present, the options available under LUPAA are very limited, particularly when compared to the enforcement tools available under other legislation (for example, the *Environmental Management and Pollution Control Act 1994*). In our view, planning authority officers should be given a broader range of enforcement "tools" to facilitate appropriate and timely control of planning activities.

We support the introduction of infringement notices and on-the-spot fines for minor planning offences. However, infringement notices impose a penalty but cannot require any particular action to be taken. To address planning offences, it would be preferable to be able to order the offender to take actions, such as removal of an illegal structure or rehabilitation of a development site. Therefore, we would support the introduction of an instrument to allow a planning authority to require particular actions to be taken.

In our view, the Enforcement Notice provisions in the *Integrated Planning Act 1997* (Qld) (Chapter 4, Part 3, Divisions 2 and 3) provide a useful example of such an instrument. Under these provisions:

- The planning authority may issue a ***show cause*** notice, outlining the reasons that they think that a development offence is being or has been committed.
- The offender is given an opportunity to make representations about why enforcement action should not be taken;
- If the planing authority remains satisfied that a development offence is being or has been committed, the planning authority can issue an ***enforcement notice*** requiring the person to refrain from committing the offence and / or to remedy the breach in any way stated in the notice.
- It is an offence not to comply with an enforcement notice.

The system of building notices and building orders, pursuant to sections 163 and 170 of the *Building Act 2000*, is another possible model for enforcement notices for development offences.

In addition to these enforcement instruments, planning authorities should have the following powers:

- Power to enter property and conduct investigations (where an offence is suspected);
- Power to request information;
- Emergency powers to direct particular action to be taken;
- Capacity to cancel or suspend planning permits as a consequence of non-compliance with an enforcement notice, permit condition or a provision of LUPAA.

We would also support amendments to allow planning authorities to recover the costs of investigation and enforcement activity. We acknowledge that, even with these amendments, prosecutions and enforcement action involve significant costs and expenses. We recommend that greater technical and financial assistance be given to local governments to pursue enforcement activities.

We support the suggestion that councils be required to conduct a periodic audit of compliance with planning permits. The results of this audit, and any enforcement activities, should be publicly available (ideally, on the council's website).

Third party enforcement

The civil enforcement provisions of LUPAA provide a useful option for third parties to take action to ensure compliance with planning instruments. We would therefore support amendments to broaden the parties who are able to bring an action under section 64, as discussed below.

We support an amendment to allow **any** party to apply to the Tribunal for an enforcement order under section 64. We believe that allowing any party to bring an action for civil enforcement would provide an important safeguard in the event that the local government does not take action. Such an amendment would not "open the floodgates" for civil enforcement activity because:

- Pursuant to section 22A of the *Resource Management and Planning Appeal Tribunal Act 1993*, the Tribunal is able to dismiss an application if it is satisfied that the application is frivolous or vexatious; and
- The expense and technical complexity of a civil enforcement action will continue to deter the public from taking action without sufficient likelihood of success.

Obviously, we are enthusiastic about the proposal to increase funding to the EDO to allow us to act as an advocate for public interest review and enforcement matters. However, we wish to emphasise that primary responsibility for enforcement still lies with planning authorities and should not be delegated to the community. While third party enforcement is important, particularly in situations of council inaction, planning authorities cannot rely on third parties, with fewer resources and less technical expertise, to act as watchdogs.

Other Issues

1. Planning information

Several EDO clients have expressed concern that councils frequently rely on outdated or broad GIS and TASVeg mapping to determine whether threatened species will be impacted. We clearly support moves to improve information sharing between government agencies and councils to ensure that planning authorities have access to up-to-date spatial and mapping information when assessing developments. Requiring councils to seek the advice of relevant government agencies will also address this concern.

To ensure effective public involvement in land use planning, it is essential to allow easy and equitable access to planning information. At present, the approach to providing public access to development application material differs widely between councils throughout Tasmania.

Section 57(4) of LUPAA clearly provides that "a copy of the application, and of all plans and other documents submitted with the application, will be open to inspection by the public at all reasonable hours during the period for which representations may be made."

However, EDO clients have reported on a number of occasions being advised by council officers that they could not see a development application because it was confidential. Where they are permitted to see the development application, clients are often denied access to supporting documents (such as traffic reports) on the basis of confidentiality or copyright. Clearly, it is necessary to ensure that all council officers are aware that the public are entitled to see the application and supporting documents.

We also recommend a number of amendments to improve public access to planning information:

- Clients are often advised that they can only inspect the planning documents. It should be made clear that the public may also make ***copies*** of the development application and supporting material, subject to the payment of reasonable copying fees.
- At present, planning authorities are only required to provide access to the development application for the representation period. We believe that the development application and supporting material should be available to the public from the time the application is lodged with planning authority until the expiration of the appeal period. This allows any person who did not obtain a copy of all relevant material before lodging their representation to get access to the material before deciding whether to appeal against a decision to grant a permit.

We support the amendment proposed in Appendix 4 to clarify that planning permits are publicly available.

2. Planning Advice

We support the initiatives suggested in the Better Planning Outcomes Discussion Paper to improve the pool of planning professionals in Tasmania.

3. Operation of Tribunal

Appendix 4 suggests a number of amendments to the operation of the Resource Management and Planning Appeal Tribunal. We support the following recommendations:

- Allowing an extension of the 90-day period for determining appeals without Ministerial approval if all the parties consent to the extension. However, an extension should still be available with Ministerial approval in the event that the parties cannot reach agreement;
- Allowing the consolidation of parties to an appeal where there are common grounds of appeal. However, the consolidation should occur with the consent of the parties.

We strongly oppose the proposal to legislate for parties initiating enforcement proceedings seeking temporary (injunctive) orders to be liable for losses and damages if the order was wrongly made. In relation to costs of a planning appeal, section 6.7 of the Better Planning Outcomes discussion paper notes that it was necessary to clarify that each party should bear their own costs because "*without this clarification, potential appellants may have been deterred from making an appeal by the threat of costs being awarded against them should they lose the appeal*". We submit that the situation with civil enforcement proceedings is no different.

We acknowledge that it is the current practice of the Tribunal to require applicants to give an undertaking to pay losses and damages where a temporary order is not uphold in the ultimate hearing of the matter. However, it is not consistent with the objective of encouraging public participation in resource management to entrench this practice.

Section 478 of the *Environment Protection and Biodiversity Conservation Act 1999* prevents the Federal Court from requiring an undertaking as to damages as a condition of an interim injunction. We submit that the Tribunal should also adopt this approach where civil enforcement is undertaken in the public interest. If the applicant presents sufficient *prima facie* evidence to satisfy the Tribunal that a temporary order should be issued, the applicant should not be required to give undertakings as to damages.

We would also like to express some concerns about public participation in the Tribunal. The second reading speech for the Resource Management and Planning Appeal Tribunal Bill 1993 gives an indication of the original aims of the Tribunal:

> "*The Tribunal itself should operate in a way which is informal and designed to deal with substantive issues rather than points of legal technicality. As a consequence, the Tribunal is empowered to set to one side minor procedural or inconsequential difficulties, so that it can deal with the merits of a particular application.*"

Section 16 of the *Resource Management and Planning Appeal Tribunal Act 1993* provides that appeals are to be conducted with "little formality and technicality", the Tribunal is not bound by rules of evidence and can inform itself in any way it considers appropriate.

However, in our recent experience, the Tribunal is increasingly formal and legalistic in its approach. The process is now incredibly daunting for unrepresented litigants (such as many representors) and appeals are often determined on the basis of technical interpretations. In our view, this is inconsistent with the original aims of the Tribunal and the objective of public participation.

While we are obviously supportive of the proposal to fund the EDO to act as an advocate for public interest planning matters, this does not address our fundamental concerns regarding the accessibility of the Tribunal. Rather than funding more solicitors to represent clients, it would be preferable to encourage the Tribunal to comply with its objectives – to be an informal, merits-based forum in which the public could seek review of resource management and planning decisions.

The Environmental Defenders Office appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:

Jessica Feehely
Principal Lawyer