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4th June 2008

CONFIDENTIALChair of the Steering Committee  
Deputy Secretary  
Review of the Planning System  
GPO Box 1691  
HOBART TAS 7001

ATTENTION: MR MICHAEL STEVENS

Dear Sir,

RE: REVIEW OF THE PLANNING SYSTEM OF TASMANIA

We welcome the proposal that the Tasmania Planning System be reviewed. The review is long overdue. The current Planning System is unduly protracted, convoluted, bureaucratic and arbitrary and open to abuse by parties with other than bona fide interests in Planning issues.

We note that the review is to identify and make recommendations on a range of matters, including reviewing the process of third party appeals. Our professional experience has been that the range a third party appeals is unnecessarily expansive and provides ample opportunity for abuse. The appeal rights of third parties should be appropriately curtailed to obviate such abuse of process.

A practice has developed for third party objectors to object to a proposed development ostensibly on planning grounds, merely with a view to causing such delay and expense to the proponent of the development that the developer is compelled to discontinue with the project. Objections can be vexatious, capricious and/or arbitrary, with only a passing relevance to Planning issues.

The lodgement of an objection generates appeal processes which necessarily involve delays and consequent expense to the significant detriment of the proponent of the development. Often those delays are, of themselves, sufficient to compel the proponent to withdraw the development proposal, with the consequence that legitimate planning issues are never ventilated.

Furthermore, third parties are at liberty to lodge objections with virtual impunity and at little cost to the objector, but at substantial cost to the proponent. From the point of view of the proponent, the direct and indirect cost (including opportunity cost) involved in dealing with an objection frequently dictates that any proposed development be abandoned, rather than remain tied down in endless disputation with third party objectors.



In our view, the scope of third party appeals currently available under the Planning System may well be considered to constitute a usurpation of the proprietary rights of a property owner.

The scope of third party appeals should be limited and there should be a cost attached to the lodgement of appeals by third parties. Furthermore there should be a preliminary independent screening of appeals to assess their legitimacy on a planning basis.

It is generally the proponent who bears the cost (both direct and indirect) involved in the processes which are generated as a result of the lodgement of third party appeals. If objectors were required to pay an appropriate sum on the lodgement of their objection and furthermore, were exposed to liability for costs in the event of their objection being unsuccessful (as is the case with other civil litigation), there may be a significant reduction in the number of third party appeals lodged for improper purposes. This however would not deny the right of third parties the legitimate right to pursue claims on a proper planning basis.

We have had professional experience where a commercial competitor of a developer pursued a third party appeal to the Planning Appeal Tribunal (as it then was) in respect of a development, with the objective of frustrating the development on competition grounds rather than on planning grounds. The defence of that Appeal involved our client in substantial delay and expense. It was only because the client was committed to the development and had adequate resources to fund the appeal, that the matter was fully tested in the then Planning Appeal Tribunal. The finding of the Planning Appeal Tribunal in this case exposed the patent deficiencies in the case of the objector. In our view, the matter should never have reached that stage. The grounds advanced for the appeal were ultimately shown to be spurious. The completed development has since provided worthwhile benefits for the Hobart Community. Those benefits would have been lost if the developer had chosen to abort the proposal in the face of the third party objections raised.

In short, we believe that third party appeals should be subject, inter alia, to the following conditions:-

1. There should be a preliminary independent test as to their bona fides and legitimacy on planning grounds, so as to eliminate objections which are patently vexatious and/or mischievous.
2. The third party objector should be required to lodge with the appropriate authority, a bond of sufficient magnitude to deter vexatious claims and to secure any costs awarded against the third party objector, if the objection proceeds.
3. The objector should bear the costs of all of its actions and in the event of an adverse finding against the objector, the costs of the proponent of the development to which the objection is made.

The design of these constraints would be to eliminate the competence of third parties to lodge objections which are capricious and/or vexatious.

As with all other civil litigation, there should be a financial penalty to pursuing a claim which is later found to be spurious. The constraints are designed to ensure that the imposition of a financial burden on a third party objector would mean that only bona fide appeals are prosecuted. That is, as it should be. By proceeding in that way, the planning process itself would be expedited by removing from the process, capricious and vexatious objections.



We also believe that the range of matters on which third party appeals may be lodged should also be reduced. In this context, we note that a range of building additions require public notification, even though there may properly be no public interest element in many of such proposals. For example, is it appropriate that third parties have the right to object to building extensions to a private residence where the proposed works comply in all respects with the Local Government Council's requirements?

If it is to be assumed that, in discharge of its statutory obligation, a local government Council properly assesses and approves of all elements of a proposed development application, why is it necessary to seek public input in respect of the works the subject of the development application? The obligation to assess and approve the development application should reside solely with the local government Council and no one else. The local government Council should not delegate its responsibility to anyone else.

A property owner legitimately seeking to effect to his or her property, works which are compliant in all respects with the requirements of the relevant Council, should properly be able to rely with certainty on the fact that the works are fully compliant and have been approved by the Council or are in order for such approval. The owner's right to effect such works should not be subverted by the claims of third parties, who have no proprietary interest in the property or in the works proposed to be conducted on the property.

A property owner should be entitled to rely exclusively upon the approval of a local government Council for works, without having to contend with objections from parties who have no legitimate proprietary interest in the way in which the works are to be undertaken on the owner's property. So long as the works meet the Building and Planning requirements and constraints of the local government Council, that should be the end of the matter.

That a property owner's rights to effect improvements to his/her property can be influenced and at worst frustrated, by third party objections, is another example of the extent to which an owner's proprietary rights in his/her property are eroded by third party objector rights. We consider that to be inconsistent with the rights conferred upon a property owner by virtue of the Torrens Title system which prevails in Australia. The indefeasible Title of a property owner and the attendant right of that owner to develop that owner's property in a manner which complies with all local government requirements, should not be subject to the claims of third party objectors. Whilst it is accepted that the local government authority has appropriate jurisdiction over the property in relation to Planning and Building requirements, that jurisdiction should not extend to the tacit acceptance of third party objector rights which are inconsistent with the inherent property rights vested in the owner.

In our view, there is an inherent incompatibility between the acceptance of third party objector rights and the inalienable property rights vested in a property owner by virtue of his/her ownership of a property. We enquire query whether this issue has been properly considered in the development and acceptance of third party rights.

The incompatibility between those two rights should form an essential part of the review of the planning system, particularly in relation to the extent to which the exercise of the property rights of an owner have been eroded by third party objection rights.

In our view, to the extent that, if at all, third parties have rights of objection, those rights should properly recognise the paramountcy of the owner's property rights and should be curtailed to an extent which recognises that paramountcy.

Currently, the balance between the two competing rights is unreasonably weighted in favour of third parties. The rights afforded to third party objectors exceed reasonable limits. The balance between the two competing rights should be redressed in favour of the property owner.



Not only would there be micro-economic benefits resulting from a redressing of the balance between the two rights, but there would also be macro-economic benefits with property owners being better able to deal with their property, with the certainty and confidence to which they should be entitled.

This submission is confidential and is made solely for the purpose of the review of the Planning System by appropriate personnel.

We await your further advices.

Yours faithfully,  
HEBBARD & CO.

R.G. HEBBARD

