

Submission by June Noble – JND Consultancy Services to the Tasmanian Planning System Review - JUNE 2008

Introduction:

I am a consultant planner providing consultancy services in Tasmania, NSW and Queensland through my company JND Consultancy Services. I have appeared as an expert witness and advocate in RMPAT appeals, and before the RPDC in hearings on planning scheme amendments. My particular area of expertise is residential development standards.

I wish to make the following points on issues within the terms of reference of the enquiry.

1. GREATER ROLE FOR THE STATE IN REGIONAL AND URBAN PLANNING

The State Government, as happens in most other states, should have a far greater role in regional and urban planning in order that there is a more co-ordinated approach than is currently the case resulting from the different approaches of a multiplicity of councils.

2. GREATER RESOURCING OF PLANNING UNIT

The Planning Unit in the Department of Justice should be better resourced in order that it can contribute more to regional and urban planning and to the development of standard codes.

3. THIRD PARTY APPEALS

I think it is important to retain the right of third party appeals although the process could be much more streamlined. I refer to two issues:

3.1 Issues which trigger notification and 3rd party appeal rights

Under the present terms of LUPAA whenever Council has to exercise a discretion on any issue the application becomes subject to public notification, representations can be made to Council, and any representor can appeal to the Tribunal if they're unhappy with Council's decision.

That system is entirely appropriate if the variation being sought is something that could significantly affect neighbours.

But in my opinion it's inappropriate in circumstances where the variation sought is very minor – for example a slightly higher fence, or a slightly smaller area of private open space for the applicant.

There should be a third category of application where not all the permitted standards are met, but Council can exercise its discretion on an identified list of minor issues without the application being subject to advertising and 3rd party appeal rights.

So for example, if applications seek variations on issues such as height, density, site coverage, setbacks – all of which could significantly impact on neighbours, they should remain fully discretionary applications subject to public notification and 3rd party appeals.

However Council should be able to exercise discretion on issues such as fence heights, parking and access issues, private open space, and privacy without turning a simple housing application into the equivalent of an environmental impact assessment.

A similar system is in force in Queensland where applications are what they call self-assessable, code assessable or impact assessable, and there is a table within the planning scheme telling you which types of applications fall into which categories. In Queensland that system is largely based on different use categories, but there's no reason it couldn't be adapted as I've outlined above.

3.2 Issues in appeals should be strictly limited to issues where discretion may legally be exercised.

In my experience many appeals are much more complicated, expensive and time-consuming than they need to be due to third parties trawling over every aspect of an application when many aspects of that application are fully permitted. For example, an application may meet density, setback and height requirements, but not the Acceptable Solutions of the private open space provisions. Since by law a discretion can only be exercised for the purpose for which it was conferred, by rights the appeal in this example should centre only on the adequacy of the private open space proposed. It would be unlawful for the determining authority to refuse the application for any reason relating to density, setbacks and height when those aspects fully comply. Accordingly the Tribunal and the parties should not be put to the time and expense of dealing with evidence on density, setbacks and height in this case. However it is frequently the case that that is what occurs.

It would assist if steps were put in place to ensure that appeals are much more focused on the issues which are the subject of the discretion. This could in part be achieved through educational material to Councils and to participants in the appeal system so that appeals could be run more efficiently and at less cost to the state and all participants. In particular, if necessary it should be made clear at directions hearings so that the issues are better clarified before the parties are put to the expense of preparing evidence on an unnecessary range of issues.

4. AMALGAMATING THE RPDC AND RMPAT

I see little merit in amalgamating the two bodies. They serve entirely different functions and require different skill sets in their staff.

5. THE NEED FOR A STATEWIDE RESIDENTIAL CODE

Part of the Review's terms of reference is to examine streamlining planning system decision making by increasing efficiency.

One key planning area which could be much more efficient is the approval of housing applications. In my experience the supply of housing is hampered by various aspects of the planning system – Getting houses through the planning system in Tasmania has become overly complicated **both in the processes it has to go through and in the standards set for permitted housing**. If we could remove inefficiencies and inappropriate planning constraints we can deliver new housing more quickly and cheaply. This is a key issue which contributes to the housing affordability problem.

Specific relevant issues are :

- The number of Planning Schemes
- The framework and wording of planning schemes

- Multiple Housing
- The period of validity for planning permits

5.1. Number of Planning Schemes

It has been raised in numerous previous enquiries that its highly inefficient to have 48 planning schemes in a small state like Tasmania but at this stage nothing's been done about it. There's currently talk of developing regional schemes, but in my opinion that doesn't go far enough. The most efficient and effective system is to have a statewide residential code as in WA and Victoria (and soon to be progressively introduced in NSW).

That would give consistency for building companies operating throughout the state and reduces their costs of having to deal with umpteen different schemes, definitions and philosophical approaches. It would also greatly simplify the work of the Planning Tribunal.

There may be some resistance from some Councils to this approach, but having a statewide code doesn't mean there's no room for individuality in regions or local councils.

Firstly, the adopted State Residential Code can have various zones reflecting different levels of density, so for example a rural-based Council could choose to have most of its residential areas zoned Rural Residential or Low-Density residential as compared to a city Council which may choose a combination of Low Density, Standard Density and Medium Density Residential Zones. So Councils would have flexibility on density issues, - but wherever you went in the State, the definitions and requirements applying to a Low-Density Residential Zone would be the same.

Secondly, in terms of flexibility, there is provision in the Victorian and Western Australian state systems to have "overlays" – which means Councils can identify a particular neighbourhood, or class of applications where special provisions should apply. However in order to avoid a repeat proliferation of different standards in each municipality, the approval of special Neighbourhood Character Overlays has to be evidence based. The onus is on the Council to provide evidence and justification that special controls are appropriate.

5.2. Framework and Wording of Planning Schemes

One of the current problems is that the provisions of some Tasmanian Schemes are so poorly structured or poorly worded that it's not clear to Councils, applicants and neighbours what is permitted and what is discretionary. In my opinion that sometimes leads to unnecessary appeals, or appeals which are unnecessarily long, complex and costly.

The introduction of new Planning Schemes in the format of the Common Key Elements Template should go a long way towards resolving that situation. However at this stage while any Council producing a new Scheme must do it in the Template format, there's no deadline for Councils to replace their Schemes.

The introduction of a Tasmanian Residential Code would resolve the problem, but in the event that that doesn't happen, or doesn't happen soon, there could at least be a requirement on Councils that any amendments to their Schemes must as far as practicable be in the format and terminology of the Common Key Elements Template so we start introducing some consistency and greater clarity to Tasmanian Schemes.

5.3 – Multiple Housing

One of the impediments to getting new housing through the systems as efficiently and cheaply as possible is the fact that many Tasmanian Schemes have no permitted standards for multiple housing applications.

That means there is no certainty for an applicant that they will ever get approval. They can have discussions with officers and put a great deal of money into design and other studies associated with an application– only to have it knocked back when it reaches council level. **That process can be repeated unlimited times without any guarantee of an outcome.**

That uncertainty in the process can be easily overcome by imposing a requirement on Councils to have permitted standards for multiple house applications in all planning schemes as exists already in many interstate schemes. The Cairns planning scheme for example has a list of standards for a single house, a separate list for a dual occupancy, and a further set of standards for multiple dwellings. This means any applicant can buy a piece of land confident in the knowledge of the minimum number of dwellings they can build there. And if they meet all of the required standards for multiple dwellings they can avoid all the costs of going through appeal processes and keep the cost of delivery of housing to a minimum.

An aspect of this problem is that many Tasmanian councils don't have a housing strategy or a density strategy. There are successful strategies employed elsewhere (in Western Australia and Queensland) where either the state code or the local scheme has a menu of allowable densities and Councils have to choose which densities apply to which parts of their municipalities. That approach involves going through the process of identifying which areas are most suitable for medium density and higher density development and zoning them accordingly rather than dealing with every application on a case by case basis.

Some elements of that approach exist in some Tasmanian Schemes – for example Hobart has three residential zones with different permitted densities attached, but they haven't gone as far as identifying which areas would be suitable for medium density development – for example there are no zones in Hobart where you can apply for flats as a permitted application.

5.4 Period of validity of planning permits

Permits in Tasmania are currently valid for years. That's an insufficient time period which results in some houses and other developments not being built which otherwise would have been built had the time period been longer. Many factors – economics, market changes, personal circumstances and labour shortages for example, can combine to make it difficult to undertake substantial commencement within 2 years.

It's also out of kilter with other states – Queensland has a valid permit period of 4 years, and NSW is 5 years. Tasmania should increase the valid permit period to at least 4 years.

6. THE NEED FOR REASONABLE AND LIMITED STANDARDS WITHIN A STATEWIDE RESIDENTIAL CODE

While it's important to have common and easily understood standards, it's even more important to ensure that the standards themselves are limited in number and that the bar is not set so high that most applications cannot meet them and a situation then ensues where most applications are discretionary.

6.1 Specific provisions of Planning Schemes

It used to be the case that getting approval for houses was a relatively simple process and the main area of detailed scrutiny for Councils was on commercial and industrial applications which genuinely had the potential to have a significant impact on the community.

However in the last 2 decades, the standards required for a permitted house have increased dramatically in both number and complexity to the point where, in my opinion, the bar is set far too high in many cases.

An example of that is that of the applications before the Hobart City Council 3 years ago – a staggering 73% were discretionary applications subject to the full processes of notification and appeal. I haven't seen any more recent figures but I would expect that figure to be considerably higher today since a package of even more strict provisions have been introduced since then.

So instead of the full evaluation processes being targeted at the small proportion of proposals which are really pushing the envelope (in terms of neighbour impact), the vast majority of applications in Hobart are now subject to the full processes with all the attendant cost and time delays which that adds to any project.

Part of the problem is that there appears to be a culture in some Council Planning Departments and in the RPDC, that the only issue which should be taken into account in framing scheme provisions is residential amenity.

That approach is contrary to the Schedule 1 objectives of LUPAA which clearly also require economic considerations to be taken into account.

Gerry Bates (one of the country's leading commentators on planning and environmental law) raises the issue that "sustainable development" is often construed to mean environmental protection, whereas in fact its aim is to integrate *and find a balance between* environmental and economic factors. In particular he says that sustainable development "attempts to maximise the combined total of economic, social and environmental values of resource use, but to do this some of the elements that make up these values may have to be traded one against the other. Application of ... (sustainable development) may therefore be said to pursue *optimum* protection of environmental values rather than *maximum* protection."

To paraphrase that -if you have too little regulation, you harm the environment – if you have too much regulation you harm the economy. In my opinion we haven't reached the right balance in Tasmania– housing has now been overregulated to the point that it is adding to the cost of housing and limiting supply due to the unnecessarily complex processes and unreasonable standards applied. Many schemes are still based on an outdated "house on a quarter acre block" model of housing and don't cater to 21st century needs, tastes and economic dictates.

As to the solutions – firstly there needs to be greater education that there is a nexus between the degree of planning regulation, and the costs of housing.

Secondly in any new schemes or Scheme amendments, Councils should have to justify and demonstrate the need for the planning regulations proposed, and both Council and the RPDC should be required to look at both the costs and benefits of those proposals.

In my experience that doesn't currently happen. For example – in the last major suite of changes to Hobart Council's residential code, setbacks were increased significantly and allowable site coverage was decreased significantly (in the latter case to a level well below comparable interstate standards for urban areas).

Evidence was provided that those aspects of the Amendment (a) was unnecessary, (b) would increase the number of discretionary applications, and (c) would accordingly increase the costs due to the more complex processes (potential appeals). There was no evidence provided that there was any problem with the existing standards. Yet the RPDC approved the changes regardless on the basis that they would improve amenity.

The current trend of seeking "ideal" maximum amenity standards will continue to result in inefficient housing regulation, unnecessary and costly appeals and unaffordable housing unless there is a change in culture and approach in Councils and the RPDC. Such a culture change can only be driven by a suitably balanced approach by the State.

More detailed background information on some of the issues raised above is provided in Attachment A which is an excerpt from a postgraduate paper by the author.

June Noble
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Attachment A

Excerpt from

Postgraduate Paper: Developing Effective and Sustainable Residential Development Standards

By June Noble, September 2005

A. Introduction:

Developing a Residential code for a planning scheme involves determining the specific planning controls or standards which will apply to residential buildings. There are few authoritative guides on how a strategic planner should go about that process. This paper argues that in order to develop effective and sustainable residential development standards there are 5 key areas of consideration which the planner must examine as part of the process. These key issues are:

- a) the statutory framework in which the residential development standards will be created and applied.
- b) the concept of “sustainable development” and how it can be practically applied in framing the development standards.
- c) the key economic, social and environmental strategic objectives for the locality.
- d) the specific development control mechanisms which should be employed to deliver the strategic objectives
- e) the appropriate format and structure for the planning instrument - for example should it be based on a prescriptive or performance-based planning approach.

These issues are discussed below. It is noted that this paper does not seek to address the broader issue of urban planning generally, nor does it cover subdivision issues.

B. Statutory Framework

Australian and Tasmanian Statutory Framework for Residential Development Controls

In most Australian states, development controls for residential buildings are formulated by the local council and incorporated in the local planning scheme. In turn the manner in which the planning scheme is to be created and administered is generally governed by state legislation.

The situation is different in Western Australia and Victoria. In common with other states, both Western Australian and Victoria have state legislation which governs the administration of planning in the state. But unlike other states, the Western Australian and Victorian state governments have formulated a *statewide* residential development code which is applicable in all local government areas.

In Western Australia that code is outlined in a single document – the *Residential Design Codes of Western Australia 2002* (RDCWA) which comprises both Practice Notes and Statutory Codes.

In Victoria, the residential development standards are called *Rescode*, the elements of which form part of the *Victorian Planning Provisions 1999* (VPPs). A supplementary document is the *Planning Practice and Advisory Notes 1999*.

Whilst the statewide statutory codes are compulsory for all Councils in WA and Victoria, Councils still have their own planning schemes which outline strategic objectives for the local government area, and which incorporate the respective state residential design codes. Councils in both states can add, or in some cases vary state prescribed planning controls.

In Tasmania, the main land use planning legislation is the Land Use Planning and Approvals Act 1993 (LUPAA). LUPAA governs: the means by which planning schemes are created or amended; the processes of development control; public notification and participation rights and obligations; and the circumstances in which appeals can be made against development decisions of Councils.

Under that Act each Tasmanian Council is required to have a planning scheme which, amongst other things, outlines the standards for development control of residential buildings. The standards which are proposed by a Council are reviewed by the Tasmanian Resource Planning and Development Commission (RPDC), following a period of public exhibition and comment. The RPDC may approve, amend or reject any proposed standards according to whether they are technically proficient, and whether they comply to an acceptable degree with the Schedule 1 Objectives of LUPAA. The Schedule 1 Objectives of LUPAA are based on the concept of “sustainable development.”

Since all Tasmanian planning schemes are required by law to “further the objectives set out in Schedule 1” [LUPAA 1993. S 20.(1)(a)], the sustainable development approach in Schedule 1 is one of the driving forces which shapes residential development standards and all other development controls in Tasmania.

C. Sustainable Development – Achieving an Appropriate Balance

As outlined by Bates, while “Australia has fully embraced the concept of sustainable development through both policy initiatives and legislative reform”, the concept itself is open to multiple interpretations, and its practical application is problematic (Bates , 2002, pp. 125-127).

“Sustainable development” is often interpreted as “environmental protection”. However it is in fact intended to be an outcome which *integrates* economic, social and environmental objectives and finds an appropriate balance between them.

Planning decisions are often seen as conflict between public and private interest (Bates 2002, p24) but as Bates (2002, p128) points out there can also be significant tensions between various “public interest” objectives:

“ESD¹ introduces the notion of *integrating* economic and environmental factors, although arguably in decision-making this will become a *balancing* exercise where, as inevitably happens, the fulfilment of both objectives cannot be maximised. In other words, there are bound to be trade-offs between the often competing components of ESD. ESD attempts to maximise

¹ ESD as referred to by Bates is Ecologically Sustainable Development

the combined total of economic, social and environmental values of resource use; but to do this some of the elements that make up these values may have to be traded one against the other. Application of ESD may therefore be said to pursue *optimum* protection of environmental values rather than *maximum* protection.”

In relation to development control of residential buildings, these tensions manifest themselves in the competing objectives outlined below:

- a) Achieving an appropriate level of environmental or amenity protection *vs* limiting the level of regulation so that the cost of applying and administering the planning system are not unreasonably high.
- b) the right of an individual to develop their land, *vs* the need for environmental protection or amenity protection for neighbours or the general community.
- c) amenity protection of individual neighbours adjoining new developments *vs.* the need to pursue broader strategic goals such as urban consolidation and “aging in place”² on behalf of the broader community.
- d) the preservation of “existing neighbourhood character” *vs* the desirability of avoiding stultified communities lacking in innovative housing design which best utilises modern construction materials and methods.

These issues are explored further in the following sections.

D. Key Regulatory and Strategic Issues affecting Effective and Sustainable Development Controls on Residential Buildings

Economic, social and environmental objectives are part of the higher level task of urban planning. However a comprehensive and effective planning scheme must frame its development standards in such a way that they *deliver* the desired objectives. Development standards then can’t be developed in isolation or based on “one-size fits all” generic guidelines. They must be specifically tailored to the strategic objectives of a locality in a way which best balances those objectives.

Three examples of strategic objectives which must inform development standards are housing affordability, urban consolidation, and aging in place. These are further discussed below.

D1. Housing Affordability and the Cost of Regulation

A key objective in most communities is to keep housing costs at an affordable level. However the nexus between the degree of planning control and the cost of housing is not always recognised by planners, and this is an ongoing source of tension between those in the housing industry who have

² “aging in place” is a term which refers to facilitating appropriate housing so older people can remain in their own communities. (WAPC, 2002, p iii)

to actually apply the provisions of planning schemes, and the planners who create them (Day, 2005, p6).

The housing industry's claims are backed by independent observers, for example Monk and Whitehead's study (1999, p74) which commented that:

“...planning constraints make all house prices higher and also make relative prices rise more for housing in more constrained areas and property types.” (cited in White and Allmendinger, 2003, p961)

While this is not an argument *against* planning constraints per se, it is a significant consideration to be taken into account when framing development controls for housing. In order to achieve other planning aims (such as keeping housing affordable), planning constraints must be kept to the minimum possible level which can achieve *reasonable* levels of neighbour amenity and environmental protection.

In other words if the approach espoused by Bates earlier is applied, residential development controls should aim to achieve *optimum* levels of both amenity and housing affordability, rather than aiming for a *maximum* level of amenity protection which in turn results in higher housing costs.

D2. Urban Consolidation

The issue of urban consolidation is a significant factor to be taken into account in developing effective and sustainable development controls for residential buildings.

The rationale for urban consolidation is that: “More compact residential development will ... assist the better and more economic use of vacant land and spare infrastructure capacity in the established urban areas. It will also give households more housing choice in the favoured inner urban locations, and this will result in improved access to facilities and assist the better use of existing under-utilised housing.” (Australian Institute of Urban Studies, 1982, p.i)

Up till 2000, this issue had far greater significance in mainland states due to their significantly greater population growth. However as noted in the 2003 Tasmanian State of the Environment Report, the recent housing boom in Hobart has led to greater development pressures and land conversion, with particular pressures on higher slopes and ridgelines. (RPDC³ 2003a, p.5.5). As the report states:

“Without effective controls, continuing residential development of privately-owned land and clearing of bushland can lead to a loss of biodiversity and visual amenity – qualities valued by residents and visitors to the State.” (RPDC, 2003a, p.5.5)

While the emerging problems of urban sprawl in Hobart are recognised in theory, practical measures to effect greater density in existing serviced areas have not been readily forthcoming in changes to the city's principle planning scheme – the City of Hobart Planning Scheme (COHPS). In fact in a range of Scheme Amendments since the mid 1990's the opposite trend can be seen, with an increasing range of more stringent residential controls being introduced in the last decade.

³ RPDC – Resource Planning and Development Commission

An example is the attempt by Hobart City Council in the 6/2002 Amendments to the COHPS to limit development on battleaxe and internal lots to single storey development, thereby significantly reducing opportunities for infill development.

The Amendment was ultimately rejected in its entirety by the RPDC on the basis that it “was not well founded from the perspective of urban strategy” in that it encouraged peripheral growth rather than efficient infill housing and didn’t adequately consider the economic and social effects of the amendment. (RPDC, 2003b, pp.9-10)

In other words it did not create a sustainable development outcome, because amenity protection for immediate neighbours was given undue weight over social objectives for the broader community. This underscores the need to aim for the proper balance when formulating residential development standards.

D3. Aging in Place

The aging of the population is another factor which must be taken in to account in formulating residential development standards. Australians over 65 currently account for over 12% of the population – a figure which is expected to rise to 16% by 2016. (Young, 2004, p7). Accordingly some state strategies take into account the need to accommodate “aging in place” (WAPC, 2002, piii) – that is, planning strategies to provide accommodation so that older people can remain in their own suburbs.

As outlined by the Tasmanian state manager of Archicentre, Michael Cooper, accessibility will become an increasingly important issue in housing design, and there will be an increasing demand for accommodation with lifts. (Young, 2004, p7)

Such issues are now starting to be taken into account in residential development controls for Hobart. For example, until 2005 flats were a prohibited use in the largest residential zone in the COHPS – Residential Zone 2 which covers virtually all of the suburban areas south of the CBD.

With the approval of Amendment 8/2005, flats may be approved at the discretion of Council. It is therefore now possible to apply for low-rise apartments which can provide accommodation (a) all on one level, and (b) with lift access. This is an example of how residential development standards can be amended to better reflect changing social needs and market trends.

However it is not yet possible to apply for flats or apartments as a permitted application which greatly limits the prospects of successfully delivering apartments in the Hobart Council area.

End excerpt

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⁸ Resource Planning and Development Commission (Tasmania)

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