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Via Email

Review of the Planning System
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Review of the Planning System: Comment

My experience with the planning system comes from my involvement as an investor in Ari Property Pty Ltd and Little Lion Pty Ltd, both of which are developers in Northern Tasmania. I am also a lawyer by training, currently working towards an LLM in Environmental Law at Australian National University. As part of this program I have been undertaking research regarding aspects of the planning system in Tasmania. Based on this experience, as well as on interviews with others involved in the planning system in the State both on the Council side and developer side (who had no time or inclination to put in comments themselves, some of them being jaded by the serial planning system reviews), I have provided comments below.

The comments largely relate to point 1 a)—the first 4 bullet points—and c) of the Terms of Reference.

Suggestion 1: Create a State Department of Planning

The Minister of Planning in Tasmania is still technically the Premier. There is no planning division of the State Government. If planning is truly that important to the State, then it deserves to be allocated its own department, or, at the minimum, its own division within DPIW and resourced appropriately to provide both direction to the local governments and support. The State needs to commit resources to an actual planning program. Reference might be made to the Western Australian model recently put in place under the Planning and Development Act 2005.

Suggestion 2: Provision of strategic base services

One existing problem is that the “strategic base” seems to have gone missing. Where are the background departments that are supposed to gather State-wide information that can then be made available to local governments and regional agencies (e.g., the regional NRM organisations). At the local level, funding is already constrained and struggling to cope with existing obligations and workloads. Besides state-wide mapping and other state-wide databases, such services would ideally include geo-technical support (a service which appears to be disappearing completely from this State). For example, there is a requirement to use such services to assess landslip risk; however, no qualified services are currently available without excessive expense by arranging it from the Mainland. We are also short of base research sources such as

cultural heritage consultants (and in some parts of the State, Aboriginal Heritage consultants), yet these assessments are required to be made on a regular basis. It is a problem to set the requirement without ensuring that there are the means to comply.

Suggestion 3: Expanding the list of State Policies

If we are truly following the "Oregon model" (and that is debatable), then the State is responsible for setting over-arching policy and the local governments are charged with giving it effect through the planning schemes and carrying them out through various development controls. The State has only formulated three policies: Water Quality, Protection of Agricultural Land and Coastal Policy. Oregon has 19 State-wide planning goals and guidelines, including housing, transport, forestry, recreation, natural hazards, scenic and historic areas and open spaces. With respect to Tasmania, a few suggest themselves and have been discussed before, the most obvious being Preservation of Scenic and Cultural Landscapes on a state-wide (vs. coastal) basis. Issues such as affordable housing, public transport resources, open spaces, naturally suggest themselves as State policies which can be advanced through the planning system. Certainly by crafting State policies and guidelines to support them the State local councils and regional bodies would have improved direction to give appropriate weight to State policy priorities. To the extent that a policy is a priority, it makes sense to designate it such and add it the pathetically short list.

If there is uncertainty as to how we go about it, Oregon did it originally through consultation with stakeholders, such as councils, residents, industry groups, and social action agencies. It takes time and resources but public involvement, in and of itself, is a basic tenet of the planning system; therefore, this approach seems to fit naturally. After the data has been gathered, a special committee with a broad based participation would review and select from the suggested policies. The "short-list" could then be put out for comment before a final cut was made.

Suggestion 4: Incorporating other state agencies into the planning system

With respect to the new EPA and its role in the planning system as well as other agencies that have to sign off, the system in place in Queensland and New South Wales seems to be workable here as well. In those states, there is a single approval authority and referrals are made to different agencies, such as the EPA, to ensure timely involvement, all coordinated by the consent authority. This insures parallel input into the process and should save it time. Even if substantial changes are required, the review of the scope of those changes should be relatively fast if the agencies are already familiar with the project.

Suggestion 5: Development Controls and the RPDC

Zoning and planning seems to be taking a back seat to development controls at a time when resources are extremely scarce at the local level. The lack of a policy framework at the state level to assist in resolution of development applications and the heavy workload on planning officers will only add to the delay and frustration in the system. When Victoria instituted performance-based planning, such as that embodied in the template for the new planning schemes, the system ground to a halt. With all levels of government lacking resources, the burden tends to be thrown back

at the applicant, resulting in significantly higher costs, which risks creating a chilling effect on development.

A great deal of time and effort has gone into the drafting of the new planning schemes, which are little more than basic frameworks for a system of development control planning. In the meantime, as these draft schemes go back and forth between Council and RPDC, development grinds to a halt, as developers are told to "wait for the new scheme." (In West Tamar the draft scheme has been on the drawing board for over four years.) This serves no one's interests. Planning schemes by their nature are fluid, not static, documents. In some states they are reconsidered every five years. It is ridiculous to hold the property and building industry hostage while new schemes and large-scale amendments, such as Meander Valley Council has been considering for almost three years regarding giving proper effect to the Protection of Agricultural Land Policy in its ageing planning scheme. In the meantime, the PAL policy is being amended with new wording and new guidelines.

RPDC is intended to act as an independent, objective review body of planning schemes and their use by Councils as a policy tool. Councils regularly use individual planners at the RPDC to consult as they draft planning schemes and amendments. However, this is not considered "official" advice. There are few sources of such "official advice".

One way to provide "official" support to Councils in an ongoing manner might be to allocate to the RPDC a directional role, similar to that performed by the Director of Building Control, to provide answers regarding interpretation with respect to LUPAA objectives and State policies, including as they impact the objectives of the Resource Management and Planning System. This advice could be both provided in response to specific queries and published in a set of guidelines and interpretive rulings. Again, reference to WA might be useful. The new Planning and Development Act requires the Western Australian Planning Commission to give local planning schemes more 'weight'. Clear definitions will be given to circumstances that would allow a scheme to be overridden, with the objective of ensuring consistent decisions are made that reflect the objectives and purposes of the new legislation. Adopting this function for the RPDC could save all the parties a lot of time by providing more certainty at the start and direction earlier in the process, before Council may have travelled to far down the wrong road.

Suggestion 6: Provide some basic safeguards for consistency within the RPDC, including a three person review panel

Most decisions of the RPDC are rendered by a single member. Given the flexible nature of the RPDC review process, there is little control over the manner in which information is collected and considered, the hearing is conducted and decisions made. This results in some measure of inconsistency whereby two cases with substantially similar facts each heard by a different RPDC member can result in approval of one and rejection of the other.

At times, the processes by which the RPDC makes its decisions can lack transparency. Denial might be based on a matter that was not in evidence at the hearing, and which the RPDC also failed to raise before making the decision. Once the decision is

rendered, recourse is virtually non-existent. Ari Property has had experience with such a result in a Section 43A hearing relating to its land in the West Tamar, attempting to rezone the land to the zoning assigned to it under the draft scheme so that development could proceed prior to enactment of the elusive scheme. Planners, surveyors and others with regularly involved in RPDC matters suggest that Ari's experience is more than anecdotal. Introducing a set of procedural guidelines would help to reduce arbitrariness (or what is perceived as arbitrariness). There should still be the opportunity for flexibility; however there should also be a certain degree of predictability about how the decision process will be carried out by the RPDC.

The RPDC denies that it is judge, jury and prosecutor (Response to the Legislative Council Select Committee of Inquiry into Planning Schemes, 7 February 2007, at 8-9). It then asserts that it is "not solely reliant upon the material and information presented by Council, the applicant or a representor." I read that to say that the RPDC has the right to look at information that is not put before it in order to make a determination that furthers the objectives of schedule 1 of LUPAA. It can then reject the application without giving Council or the applicant any right to respond. If that is the case, then an obvious procedural guideline is presented: before denying an application based on information that was not made available to the Council or on a grounds unrelated to information put forward during the course of proceedings, it is only fair to require the RPDC to notify Council of its pending decision and the grounds for the decision in order to grant the Council an opportunity to respond to this new information or to remedy a lack of information. There are many other rules or guidelines that the experience of others involved in the system might recommend.

Another possible safeguard might be to allow for a three person RPDC panel of review in cases where the single RPDC member has turned down the application, something like the system of the single judge and panel of judges in the judicial system. Obviously, the panel would consist of three members other than the one who had denied the application. This approach would not strain the resources of the RPDC to the same extent as requiring a three person panel for all matters. The availability of review by peers would probably discourage most maverick tendencies of individual RPDC members. This also responds to the problem that many have with non-appellable nature of most RPDC rulings as documented in the Legislative Council Select Committee's report on Planning Schemes, 2006 to which the RPDC was replying (more generally rebutting) in its Response cited above.

Suggestion 7: Allow appeal for RPDC Denial of Section 43A Applications

If local Council rejects an application for a planning permit, the applicant has the right of appeal of the denial to RMPAT. However, in a case where an applicant seeks simultaneously to rezone land and obtain planning approval consistent with the rezoned land under Section 43A of LUPAA, LUPAA requires RPDC approval. This can result in the Council approving the application, but RPDC on review overruling the Council. Neither the Council nor the applicant has any recourse at this point. It would be fair and reasonable to provide for an independent review of such decisions. One possible avenue might be to appeal to RMPAT, whose authority could be specifically expanded to deal with Section 43A appeals. Another option, if RMPAT is not considered an appropriate appeal forum, might be to allow for review of such denials by an expanded panel of RPDC members as outlined above.

Thank you for the opportunity to provide input.

Yours truly,

Robin L. Pollack