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BURNIE
CITY COUNCIL

27 September 2018

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Dear Sir

Draft Land Use Planning and Approvals (Miscellaneous Amendments) Bill 2018

Thank you for the opportunity to provide comment on the draft *Land Use Planning and Approvals (Miscellaneous Amendments) Bill 2018.*

The Council supports the intent of the proposed amendment to streamline the current LPS preparation and initial assessment process.

a) section 34 - LPS Criteria

The signature function of the LPS criteria in section 34(2) is that each Local Provisions Schedule when inserted in the Tasmanian Planning Scheme must promote and protect the land use objectives, policies, principles, and that are relevant for operation of an LPS in a State, regional, inter-municipal, and intra-municipal context.

The tests set by section 34(2) must be sufficiently robust to safeguard conformity to purpose and to achieve implementation and application of the requirements in each of the specified considerations.

The Council is concerned not to erode the criteria for determining the relationship of an LPS to its strategic and statutory antecedents by an anxiety to expedite certification of a draft LPS for exhibition.

Section 34(2) identifies eight separate matters for consideration. Each must be satisfied for the instrument to qualify as an LPS. The tests for compliance are variously stated, and include that an LPS "*be in accordance*"; "*further*"; "*be consistent with*", "*be consistent and coordinated with*", or "*have regard to*" a number of specified statements of strategy, policy or regulation[1].

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[1] 34(2)(b) requires a draft LPS must conform to the requirements for content - ["*in accordance with section 32*"]

34(2)(c) requires a draft LPS must add to the purpose for the resource management and planning system of Tasmania, and to the objectives for the land use planning processes set out in the Act - ["*furthers the objectives set out in Schedule 1*"];

34(2)(d) requires a draft LPS must agree with each State Policy - ["*consistent with each State Policy*"];

The principles for statutory interpretation treat each consideration as an independent test with its own standard of proof.

The various standards for compliance within section 34(2) imply a hierarchy of importance, in which "*accordance*" and "*consistency*" impart a stricter standard for compliance than do "*further*", "*coordinated*" and "*have regard to*". The latter suggest or portray a level of subordinate consideration, and invite risk of less attention, importance or relevance.

It is debatable whether understanding or observation of the nuances of meaning between the terms "*accordance*", "*consistent*", "*further*" and "*regard*" are sufficiently to have any significant benefit for certification of an LPS.

It is also debatable whether it is necessary that the Act specify differential standards for compliance to the criteria. If the function of the provision is to ensure the municipal expression of opportunity and restraint on use and development of land must serve higher order objective and operate in a broader context, then each of the matters listed for consideration should have equivalent weight.

The matters for consideration against 34(2)(a), 34(2)(b) and 34(2)(g) refer to practical issues of content.

However, the matters in 34(2)(c), 34(2)(d), 34(2)(e) and 34(2)(f) call into account matters that are multifarious in scope, and variable in detail and precision.

There is no prescribed test for determining consistency to the criteria in 34(2)(d), (e), (f) and (g). The task of demonstrating and stating satisfaction on compliance is challenging and challengeable. A requirement for absolute certainty on conformity will present insurmountable difficulty for conclusion.

It is noted the Bill simply seeks to reinstate the test formerly applied to a draft planning scheme and to a draft interim planning scheme under section 20(1)(d) and 30E(6) respectively in relation to consistency with regional land use strategy.

There is no explanation provided for how the approach described in the draft amendment will loosen the standard required to meet the LPS criteria.

Council submits it is essential to operation of the Act to note the requirements in section 34(2) apply only for the LPS instrument itself, and not to any process of determination for compliance.

34(2)(e) will require a draft LPS must, to the extent possible, be capable of agreeing with regional strategy - ["*as far as practicable, consistent with the regional land use strategy, if any, for the regional area in which is situated the land to which the relevant planning instrument relates*"]

34(2)(f) will require a draft LPS must be concerned with or have a connection to the general strategy of a council for its municipal area - ["*has regard to the strategic plan, prepared under section 66 of the Local Government Act 1993, that applies in relation to the land to which the relevant planning instrument relates*"];

34(2)(g) requires a draft LPS must, to the extent possible, be capable of agreeing with and be coordinated with the LPS for other municipal areas - ["*as far as practicable, consistent with and co-ordinated with any LPSs that apply to municipal areas that are adjacent to the municipal area to which the relevant planning instrument relates*"]; and

34(2)(h) requires a draft LPS must be concerned with protecting the safety of the natural gas pipeline - ["*has regard to the safety requirements set out in the standards prescribed under the Gas Pipelines Act 2000*"]

Council notes the requirement that an LPS must meet the LPS criteria remains a pivotal consideration for approval of an LPS. Many of the procedural steps required to take an LPS from inception to approval repeat the requirement to meet the LPS criteria.

Flexibility is appropriate when determining compliance. However, it is not appropriate to embed flexibility within the compliance criteria. Such an approach creates uncertainty and confusion, and does not require accountability or transparency in the decision process.

Council makes the following observations on the specifics of the amendments proposed in the draft Bill -

i) The test in 34(2)(e) will not be less rigid or onerous by inserting the words "*as far as is practicable*" before "*consistent*"

Both terms are undefined, and both are open to interpretation and confusion.

An LPS will be "*consistent*" if it agrees with and is compatible with each State Policy, regional land use strategy, and a municipal strategy.

Consistency could be determined at one level by a general agreement that the provisions and effect of a draft LPS accord to the thrust and purpose of the relevant Policy or strategy as a whole, in which case a draft LPS is compatible because it will not create any obvious conflict or contradiction.

Alternatively, a forensic approach requires a draft LPS is not consistent unless it will comply with each objective, test, and standards contained within a strategy.

A common sense approach allows a draft LPS is consistent with each of State Policy, a regional land use strategy, and a municipal strategic plan if –

a. reasonably and logically harmonious with the purpose, principles, and intended outcomes expressed for the Policy or strategy;

a. satisfies any test set by the Policy or strategy;

b. is able to reliably deliver and sustain the purpose and standards required by the Policy or strategy; and

c. does not contain any requirement that is contrary or counterproductive to any specified objective, principle, or requirement of the Policy or strategy

The Bill seeks to qualify the test for consistency as it applies in 34(2)(e) to require the relevant planning authority must be satisfied that the draft LPS is "*as far as practicable",* consistent with a relevant regional strategy.

The word "*practicable*" simply means capable of being successfully used, done or performed.

There is no prescribed test for practicability. A fine line exists between practicable and impracticable.

The term "*as far as practicable*" is understood to mean that in order to satisfy section 34(2)(e) a draft LPS must, to the extent or degree to which it is possible, be consistent with a relevant regional land use strategy.

The test for practicability is objective, and requires firstly determining what must be done in order to achieve consistency; and to then determine whether in the circumstances it can be done. The proposed change is likely to increase and not reduce the resources in enquiry and time required to determine compliance.

The proposed amendment does not assist enhances clarity for how a draft LPS will satisfy the test in 34(2)(e).

There is no qualification on "practicability". The test may be read to requires an either/or outcome. If consistency can be practicably be achieved, then the test is satisfied. If it cannot, the draft LPS is not consistent, and must fail.

However, this does not appear the objective for the draft amendment. The Bill appears to intend consistency is only necessary to the extent that it is achievable. If so, then the test significant reduces the relevance for consistency to regional strategy – not only when considering whether suitable for exhibition, but also at the final point of decision for approval of the LPS.

The Bill does more than attempt a more streamlined process for advancing a draft LPS to exhibition. The changes proposed for section 34(2)(e) represent a fundamental shift in the criteria that must be satisfied in order that an LPS may lawfully be approved.

It is more appropriate to facilitate acceleration of an LPS to exhibition by modifying the standard of proof required by the decision-maker under section 35B rather than by diminishing significance of the test.

Council note the intention of draft section 35B is to progress a draft LPS that fails one or more of the section 34(2) tests, provided the inconsistency is later addressed. It appears the draft amendment in section 34(2)(e) may have conflated process with content.

The test in 34(2)(e) may, if change is necessary, be more usefully expresses as "*in so far as it is reasonably practicable*".

The standard of "reasonably practicable" has been accepted for many years as an appropriate qualifier of a duty imposed on an individual or entity, and requires a risk management approach rather than a simple yes or no determination.

"Reasonably practicable" represents what can realistically, sensibly, and soundly be done in the circumstances. To determine what is reasonably practicable in relation to managing risk requires taking account of and weighing up all relevant matters, including -

a. the likelihood for the LPS to harm purpose or delivery of the regional strategy;

b. the degree of harm that might result if the LPS is inconsistent;

c. what is known or ought reasonably to known about the hazard or risk and the means by which to avoid, manage or mitigate such risk;

d. the availability and suitability of ways to eliminate or minimise the risk; and

e. the cost associated with the risk , and with available ways of eliminating or minimising the risk, including whether the cost of consistency is grossly disproportionate to the cost of the risk

ii) The draft in section 34(2)(f) proposes a draft LPS must "*have regard*" to the municipal strategic plan.

The words "*have regard*" mean no more than what they say, which is to identify the matters that must specifically and separately be considered.

The context in which the words are used will dictate whether they are or are not the only relevant considerations to take into account.

A requirement in proposed 34(2)(f) to "*have regard*" requires the relevant planning authority must give the municipal strategic plan such genuine attention, thought, and weight as considered appropriate, and be able to show it has done so. However, having done that the relevant planning authority is entitled to conclude the matter is not of sufficient significance, either alone or together with other matters, to outweigh other contrary considerations that it must also address in accordance with the obligations in section 34(2).

The standard in proposed 34(2)(f) does not compel a draft LPS must conform, implement or apply the municipal strategic plan in order to achieve the purposes of the Act.

The effect of the proposed amendment in section 34(2)(f) may be said to relegate the relationship between a municipal strategic plan and a draft LPS from one of mandatory importance to one of passing reference.

The success or otherwise of the proposed amendment to section 34(2) will very much dependent on how the relevant planning authority interprets and applies the provision.

The Council submits the draft amendment does not adequately resolve the perceived prescriptive and inflexible nature of the tests contained in 34(2).

The Bill does not remove the requirement for a draft LPS be "*consistent*" to State Policy, or to be "*consistent and coordinated*" with the LPS for adjacent municipal areas. In this regard, the Bill does not address any genuine concern for over-prescription and inflexibility within the balance of section 34(2).

b) <u>Section 35B - Certification of a draft LPS</u>

The purpose of section 35B is to establish whether a draft LPS can safely be released to initiate a process of third party and independent scrutiny for merit and legality.

The test is whether the draft LPS will meet the LPS criteria.

Section 35B currently imposes a duty on the Tasmanian Planning Commission to be satisfied that a draft LPS meets the LPS criteria in section 34(2) before it can recommend to the Minister that the draft LPS is suitable for public exhibition.

The duty under section 35B(2) is absolute. The Commission must be satisfied the draft LPS meets each of the tests. There is no discretion to do otherwise.

The draft amendment to section 35B proposes to provide the Commission discretion to advance a draft LPS to public exhibition in the event the draft does not demonstrate strict compliance to the criteria in section 34(2).

The Act currently specifies seven (7) separate occasions on which a decision must be made for whether a draft LPS will meet the LPS criteria –

- *section 35B(2)* under which the TPC must not request the Minister to approve exhibition *"unless it is satisfied the draft meets the LPS criteria"*

- *section 35B(3)* under which the Minister may approve or refuse exhibition of a draft LPS, implicitly because they are not satisfied the draft meets the LPS criteria

- *section 35C(4)(c)* under which the public, State agencies, and adjacent and co-regional planning authorities are invited to scrutinise the draft LPS and make representations in relation to content and merit

  The Act does not currently specify a representation may address the matters in section 34(2). However, such a proposition is so fundamental to whether an LPS will be lawful that it does not need to be expressly stated.

- *section 35F(2)(d)* under which a planning authority making a report to the Commission on representations received during an LPS exhibition period must provide *"a statement as to whether it is satisfied that the draft LPS meets the LPS criteria"*

- section 35J(1)(c) under which the Commission must, as soon as practicable after a hearing, consider *"whether it is satisfied that the draft LPS meets the LPS criteria*'; and

- Section 35L(2) under which the Commission must not approve an LPS *"unless satisfied the Local Provisions Schedule meets the LPS criteria"*

The test remains the same from inception to approval.

The inherent purpose of public exhibition, agency and other planning authority referral, and the hearing process, is to invite wider scrutiny and assessment of the ability of the draft LPS to meet the LPS criteria.

An exhaustive interrogation for exact fit and adherence to creed is not necessary or appropriate prior to exhibition when a draft LPS is still in its preliminary form. Indeed, it may not be possible to form an opinion of the nature required by section 35B(2) in the absence of feedback from other parties.

Certification as suitable for exhibition should be a "first blush" examination for likely compliance.

The Council supports the objective of the Bill to –

i) *Remove a requirement for Ministerial approval to exhibit a draft LPS*

Ministerial approval at the pre-exhibition stage serves no practical purpose.

The Minister should remain detached from the process until the draft LPS is ready for final approval.

ii) *Permit the Tasmanian Planning Commission to certify a draft LPS as suitable for exhibition*

The proposition is a practical means by which to advance a draft LPS.

However, the Council submits there is another alternative to better accelerate the LPS process to exhibition.

A planning authority is to certify and exhibit a draft amendment to an interim planning scheme.

The process requires a planning authority take initial responsibility for the statutory adequacy and accuracy of the draft instrument. The public exhibition period and any subsequent hearing and assessment process tests the position of the planning authority.

The Act could be amended to require a planning authority must certify the draft LPS as likely to comply with the LPS criteria.

It would be useful for consistency to include in the Act an explanation or standards on which to determine likely compliance.

Planning authority certification would remove need for independent assessment by the Commission prior to exhibition, and the inevitable and associated time delays associated with a need by the Commission to deal with multiple draft LPS.

Self-certification would not compromise validity or rigour of the compliance process in the final LPS. The public exhibition and independent assessment phases provide opportunity for to hold the planning authority to account; and to correct errors, oversights, and misjudgement.

There is a current requirement to re-exhibit and re-assess any significant change resulting from the exhibition process.

Planning authority certification would also remove potential for conflict within the Commission.

The changes proposed to section 35B will require the Commission to form an independent opinion on whether to exhibit. The Commission must return to the draft LPS at conclusion of the exhibition and representation period, and again determine whether it is satisfied it will meet the LPS criteria. In effect, it will be required to examine its own opinion.

The Commission may make internal structural arrangements to separate opinion from determination. However, the arrangements cannot diffuse the conflict embedded in the statutory functions proposed in the Bill.

The Council submits section 35B be amended instead to require that the planning authority who has prepared a draft LPS must certify the draft LPS under seal and state its reasons for why the draft LPS is likely to meet the LPS criteria.

Any involvement of the Commission in a decision on whether a draft LPS should be exhibited could be limited to circumstances where it is necessary to issue a LPS criteria outstanding issues notice.

The alternate approach has potential to significantly reduce the workload on the Commission in relation to advancing a draft LPS to exhibition.

iii) *Introduce a mechanism which is similar to that formerly available to the Tasmanian Planning Commission under section 24(3)(b) to certify of a draft municipal planning instrument for exhibition subject to a qualification that approval of the scheme will be subject to the issues identified in the qualification being dealt with to the satisfaction of the Commission*

The draft amendment requires the Commission is not permitted to direct the exhibition of a draft LPS unless –

i) it has formed an opinion that all of the LPS criteria are met; or

ii) after having done all that is realistically possible to determine whether the draft LPS meets the LPS criteria, it remains unconvinced the draft will meet the LPS criteria but is able to identify the criteria on which it is requires further information before it can form the necessary opinion that the draft LPS meets the LPS criteria

The Council submits the test for a draft LPS to be eligible for exhibition may still be too strict.

The amendment replaces a requirement the Commission be able to say that a draft LPS can achieve or is of a sufficient standard to fulfil the LPS criteria, with a requirement that in the estimation or judgement of the Commission the draft LPS will meet the LPS criteria.

The test implies more than a superficial or first blush assessment for "likely compliance".

The provision in 35B(4A) anticipates a comprehensive and thorough examination of the draft LPS before the Commission may form an opinion that either the LPS criteria will be met, or could be met if specific further information is provided.

To do so it must form a very precise and detailed position in relation to compliance. It must say and publish its reasons for –

i) why all or part so of a draft LPS meets the LPS criteria;

ii) why all or parts of a draft LPS cannot meet the LPS criteria;

iii) what must be done in order that the draft LPS can meet the LPS criteria; and

iv) why the draft LPs will meet the LPS criteria if the further information is provided

The planning authority, State agencies, other planning authorities, and the public may not agree with the position of the Commission, and may challenge through representation. The Commission must then adjudicate such challenge.

It is possible also that the Commission may be moved to alter its opinion because of material that comes to it from the exhibition period. It must be careful not to be too absolute in a position that the draft LPS will meet the LPS criteria.

The exhibition and hearing process provide opportunity to explore the credentials of the draft LPs for approval and insertion in the Tasmanian Planning Scheme. It is important that the Commission retain a relatively impartial position on compliance to the LPS criteria prior to delivering its final determination for approval.

It should be sufficient that the relevant planning authority be "*of the opinion that the draft LPS **is reasonably likely** to meet the LPS criteria*".

The Council submits it is perfectly proper for the draft LPS to be released even if it is flawed and does not observe each criteria stipulated by section 34.

A draft LPS cannot be approved and included in the Tasmanian Planning Scheme until it has been exposed for community consideration and comment, and survived a process for independent assessment and review during which the material supporting the draft LPS, third party representations, and the views and opinions of the planning authority are presented and examined.

Section 35L(2) provides the ultimate security for compliance to the LPS criteria. The Commission cannot ask the Minister to agree to the approval of an LPS unless satisfied the draft will meet the LPS criteria.

A decision on whether a draft LPS meets the LPS criteria is most appropriate after the point at which all the parties entitled to express an opinion and present their views on the draft LPS has been exhausted. The widest possible body of information and submission will not be available to the Commission until after the hearing.

The Council submits the Bill is unclear on the mechanics for –

i) when the planning authority who has prepared the draft LPS must provide the information required by a *LPS criteria outstanding issues notice* to the Commission;

ii) whether the information required by a *LPS criteria outstanding issues notice* must be made available to the public, State agencies and relevant planning authorities during the exhibition period; and

iii) when the Commission will consider the matters addressed in a *LPS criteria outstanding issues notice*

The draft Bill only appears to require that the *LPS criteria outstanding issues notice* itself must form part of the relevant exhibitions documents.

The information required by a *LPS criteria outstanding issues notice* is critical to determining whether the draft LPS will meet the LPS criteria; and it should be introduced into the exhibition and assessment period at the earliest possible moment. This is particularly

relevant given the Bill intends to insert into section 35E an express invitation for a third party to make a representation in relation to whether or not the draft meets the LPS criteria. A person or body is at a disadvantage if the information relied upon for compliance is not available.

The Council therefore submits there may also be need to amend the Act in relation to –

a. *section 35D*, and insert a provision that the material exhibited with the draft LPS must include the information required by a LPS criteria outstanding issues notice; or

b. *section 35F*, and insert a provision that the information required by a LPS criteria outstanding issues notice must be included in the report provided by a planning authority to the Commission

c) section 30E and 40J- Representations

The Council submits the current provisions in section 30E and 40J are sufficient to allow a representation may address whether a draft LPS or draft amendment to an LPS meets the LPS criteria.

Section 34(2) embodies the essence of what is required of an LPS. The requirements prevail from conception to approval of the instrument and must ultimately be satisfied.

It is inconceivable that a representation that relates to the content of a draft LPS and the relationship between the draft LPS and the SPPs is not a representation in relation to the draft LPS if it deals with matters relevant to whether or not the LPS criteria are satisfied.

However, the Council does not object to the provision intended as 35E(3)(ba) and 40J(3)(ba) if it is deemed necessary for clarity and certainty.

d) section 40FA – Notice to agencies

The Council has no issue with the proposed specification of a period for referral of a draft LPS amendment to State agencies.

The proposed provision calls to the attention of the Council a matter in relation to operation of those provisions within the SPPs that require a planning authority must have regard to any advice from a relevant State entity when determining a permit application.

The SPP codes C4 Electricity Transmission; C5 Road and Railway; C7 Natural Assets; and C16 Safeguarding of Airports, each include a requirement in some standards to have regard to any advice from a relevant external body when determining a permit application against the performance criteria in that standard.

There is no power available to a planning authority to approach the entity for the purposes of obtaining or soliciting such advice.

A planning authority could make a further information request of an applicant and require they provide the necessary advice from the entity. However, there are risks in that the planning authority is not managing the relationship and cannot control the nature of the request to ensure it is particular to the tests applied.

Amendments to the Act some time ago removed the referral powers formerly contained in section 60.

The notification powers set out in section 57 only apply if the relevant entity is an adjoining landowner or occupier.

Section 11(2)(e) allows that a planning instrument may require specific things be done to the satisfaction of a 'relevant agency' if that agency is a relevant agency as defined by section 3 (prescribed under the Land Use Planning and Approvals Regulations). There is nothing currently in the Regulation prescribing relevant agencies for the purpose of section 11(2)(e).

It is uncertain whether the relevant agency provision is appropriate for the purposes of facilitating referral of a permit application for advice.

The Council submits the is a need to amend the Act to provide a referral power in order that a planning authority may lawfully solicit and obtain advice from a relevant entity in relation to a matter for which the SPPs require such advice must form part of the matters for determination of a permit application.

A provision in the nature of the former section 60 or in the nature of draft section 40FA(1) may assist.

e) section 55 – Correction of Decisions

The Council is uncertain on the purpose of the proposed amendment; or the correctness of including the amendment in section 55.

Part 4 of the Act contains the requirements for a permit under a local planning scheme and for enforcement of compliance to the requirements of a scheme.

Section 55 provides a planning authority may correct a permit issued under the Part to address a clerical mistake, or an error or a evident material miscalculation or description.

The Council's understanding of Part 4 is that it provides no function or power to the Tasmanian Planning Commission; and therefore invites no opportunity for a decision of the Commission. In such circumstances, there is no requirement to provide a power to correct a mistake or error in a decision of the Commission.

It is inappropriate to insert a general power to correct a mistake or error in a decision of the Commission in that part of the Act that deals expressly with matters for which the Commission has no jurisdiction.

Council notes section 42D provides authority for the Commission to correct a mistake or error in a permit issued under the combined permit and amendment process described in Division 4 Part 3B.

Council suggests that if a general power for the Commission to correct a mistake or error in any decision made under the Act is required, then the draft amendment identified as section 55(2) would be better located within section 8 or inserted as section 8A.

Council appreciates the opportunity to provide comment on the Bill, and trusts its comments will assist.

Yours faithfully

Patrick Earle
Director Land and environmental Services