SM+A

SHAUN McELWAINE + ASSOCIATES

17 August 2012

Mayor Barry Easther
Chairperson, Regional Management Committee
Northern Regional Planning Project
Northern Tasmania Development
PO Box 603
LAUNCESTON TAS 7250

Email: ben@northerntasmania.org.au

Dear Mayor Easther

A LETTER FROM THE TPC DATED 31 JULY 2012

I met with Tim Watson, Jo Oliver and Rolf Vos on 16 August 2012 and we discussed the content and implications of a letter from the TPC addressed to you dated 31 July 2012. As a consequence I was requested to provide detailed advice, addressed to you, and which deals with a number of questions which we discussed.

A summary of my conclusions

This is a very long advice. For the reasons which follow I:

- do not consider that the common law principles of procedural fairness preclude the making of land zoning changes as part of the interim planning schemes;
- do not agree with implied limitations upon the exercise of the powers to make an interim planning scheme, in the way characterised in the letter from the TPC; and
- consider that interim planning schemes may implement significant land use changes, by rezonings, in compliance with broad strategies as formulated in the Regional Land Use Strategy; and
- as a consequence, fundamentally disagree with the propositions expressed in the letter from the TPC.

Relevant background

With effect from 1 January 2010 Parliament amended LUPA to insert Division 1A, sections 30A-30R inclusive. The Division is titled: Regional Land Use Strategies

BARRISTERS + SOLICITORS
52 ELIZABETH ST
PO BOX 1218
LAUNCESTON TAS 7250
T. 03.6334.5884
F. 03.6334.5373
E. office@shaunmcelwaine.com.au
W. shaunmcelwaine.com.au

and Interim Planning Schemes. The purpose of the Division is stated at section 30A as;

- to ensure greater consistency between planning schemes within regional areas; and
- to ensure greater consistency between planning schemes across the State as a whole –

including by ensuring that there are regional land use strategies for all regional areas of the State.

For some time a group of northern councils, in obedience to this purpose, have worked on and ultimately finalised a Regional Land Use Strategy. Section 30C permitted the Minister to divide the State into regional areas and to declare a regional land use strategy for each area. On 27 October 2011 the Minister, by notice in the Gazette, declared a Regional Land Use Strategy for Northern Tasmania.

As might be expected this is a high level strategic planning document. It is not an analysis of individual parcels of land except to the extent that large parcels warrant inclusion in a high level strategy document. Amongst other things the document deals with;

- Regional Goals and Strategic Directions;
- Urban Growth Boundary Areas;
- Rural (Agricultural), Native Productive Resources & Rural Living Areas;
- Natural Environmental Areas;
- Regional Settlement Network Policies including Future Settlement Strategies, Future Population Growth and Housing and Dwellings and Settlement Densities;
- Regional Infrastructure Networks;
- Regional Economic Development;
- Social Infrastructure and Community Policies;
- Bio-Diversity, Native Vegetation, Natural Hazards and Climate Change Adaptation.

There are some large scale maps incorporated into the Strategy. As an example, a map on page 59 of the Strategy, deals with the Settlement Network. It simply identifies Launceston as a regional city and then satellite settlements, district centres, rural localities, rural towns and rural villages. There is another map on page 46 which deals with greater Launceston urban areas and it, in general terms, indicates an urban growth area and a greater Launceston urban area. Once again this map does not particularise individual land parcels.

Section 30D provides for interim planning schemes. In very broad terms a planning authority may provide to the Minister a draft interim planning scheme for its

municipal area. There are provisions which empower the Minister to require a planning authority to provide a draft interim planning scheme and, in default, to direct the TPC to prepare one.

A draft interim planning scheme must comply with certain form and content requirements at sections 30E and EA. The Minister may declare an interim planning scheme based on a draft planning scheme provided to him pursuant to section 30F. The Minister may only do so if the scheme complies with sections 20, 21 and 30E. If the Minister exercises this power then the interim planning scheme commences and any earlier planning scheme ceases to have effect: section 30F(5).

If the Minister declares an interim planning scheme then there is engaged an obligation to give public notice pursuant to section 30H, members of the public have a right to make representations pursuant to section 30I and it is the obligation of the TPC to conduct hearings and make a report to the Minister pursuant to sections 30K and 30L.

At the conclusion of this process the TPC has power to make a planning scheme which consists of the approved interim planning scheme pursuant to section 30N.

The preparation of planning schemes for the northern region pursuant to these provisions is well advanced. As I understand it a number have been provided to the TPC for final comment before they are submitted to the Minister. As part of this process the TPC has written the letter dated 31 July 2010. The content of this letter has caused concern. I am asked to express my opinion in respect of a number of questions which arise as a consequence of it.

The letter of 31 July 2012

The letter from the TPC purports to be a summary of legal advice received by it from the Solicitor-General. I have not been provided with a copy of the advice from the Solicitor-General which is referred to. As I understand it, despite requests, the TPC has refused to provide a copy of that advice. As such one needs to exercise considerable caution. It may be that the TPC has misunderstood the advice. It may be that the summary of the advice is imperfect or incorrect. It may be that the summary of the advice is incomplete or is selective.

For the purposes of this advice, and unless I am given a copy of the opinion of the Solicitor-General, I will assume that the summary of the advice by the TPC is accurate and complete.

The focus of the letter is upon zoning changes proposed in the draft interim schemes. The letter in part reads;

> *"However, the Advisory Committee's position is based on the 'tests' for compliance set out in the Land Use Planning & Approvals Act 1993 for interim planning schemes and it has been guided by legal advice from the*

> *Solicitor General. The Solicitor General's advice includes some significant limitations on the extent to which rezonings and other strategic changes can be included in interim planning schemes and is binding on the Commission and the Advisory Committee. ... the translation of schemes into a format required under the Planning Scheme Template and the change to zoning and provisions that this brings is taken to be an expected and acceptable change. However, the Act does not provide more generally for zoning changes, as may occur in a normal planning scheme making process. Changes beyond those associated with the translation from the current planning scheme must be reasonably necessary to being (sic) consistent with and furthering the objectives and outcomes of the Regional Land Use Strategy. Simply being consistent with the RLUS is not a sufficient test for compliance."*

The reason advanced for this is the view of the Solicitor-General that a zoning change has an immediate affect on property rights absent a formal opportunity by a landowner to participate in the process. In other words the Solicitor-General has raised concerns about procedural fairness (natural justice).

Procedural fairness: an Overview

The starting point for any consideration of natural justice is the decision of the High Court of Australia in *Kioa –V- West (1985) 159 CLR 550*. In what has since been regarded as judicial mantra Mason J said this:

> *"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to a clear manifestation of a contrary statutory intention."*

It may be accepted that property rights constitute a legitimate right or interest in this sense.

The reference to the words *"administrative decisions"* was intended to distinguish other forms of decision making, such as legislation. It was once thought that legislative decisions were not subject to any obligation to afford procedural fairness. This distinction is no longer maintainable. The High Court of Australia has rejected the notion that the applicability of procedural fairness is to be determined by categorising a decision as administrative or legislative: *Bread Manufacturers of NSW –v- Evans (1981) 180 CLR 404*. It is not , however, an irrelevant consideration. In a recent Full Court decision of the Supreme Court of Tasmania, *Irwin –v- Meander Valley Council (2008) TASSC 82,* the distinction is referred to. In that case Evans J, with whom Tennent and Porter JJ agreed said this of a planning scheme at paragraph [5];

> *"The scheme is a form of delegated legislation. Ordinarily those affected by delegated legislation have no entitlement to be consulted on proposed legislation or to be heard in relation to it."*

His Honour then referred to a 1972 English decision and then said this, continuing at paragraph [5];

> *"The above should not be taken to mean that there is no common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which directly and immediately affect the rights, interests and legitimate expectations of individuals other than as members of the public or a class of the public. However, where such a decision is one for which provision is made by statute, the application and content of the doctrine of natural justice, or the duty to act fairly, depends to a large extent on the construction of the statute, see Kioa –v- West (1985) 159 CLR 550, Mason J at 584. In the same case at 633, Deane J said: 'The precise content of the requirements of procedural fairness which must be observed by a particular administrative decision-maker is controlled by any relevant statutory provisions and may vary according to the circumstances of the particular case.'"*

With respect to decisions which affect individuals, other than as members of the public or a class of the public, Evans J referred to and endorsed some observations made in the Federal Court case of *Comptroller-General of Customs –v- Kawasaki Motors Pty Ltd (1991) 103 ALR 661 at 680* that;

> *"What this trend of authority leaves untouched is the clear distinction between statutory powers the exercise of which is necessarily directed towards the rights and expectations of individuals and those which affect the community at large or a section of it."*

Finally Evans J at paragraph [7] of his decision referred to and endorsed some observations by Lehane J in *Botany Bay City Council –v- Minister for Transport and Regional Development (1996) 137 ALR 281 at 295-297;*

> *"All of the authorities to which I have referred, however, make it clear that though a decision for which an Act or delegated legislation provides is to be characterised as administrative rather than legislative, nevertheless if it affects the interests of the public, or a section of the public, at large rather than the interests of particular individuals it will, usually at least, be a decision in relation to which no particular individual or body can claim an entitlement to procedural fairness: particularly, an entitlement to be heard, in relation to a proposed decision before it is made."*

In that case Evans J applied this reasoning in support of a conclusion that a change to a draft planning scheme whereby forestry became permitted rather than

discretionary in the rural zone, did not attract an obligation to afford procedural fairness to individual landowners.

In my opinion the true rule which is to be applied in this matter is to be found in the formulation of the principle by Brennan J in *Kioa at page 619;*

> *"The legislature is not likely to intend that a statutory power of a strictly legislative nature is to be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of the power."*

In other words one must focus upon what is the essential issue where an interim planning scheme is made. It is: assuming there to be an alteration of the status quo, does LUPA require or permit consideration of individual interests? The answer is no if the alteration affects the public at large or a sufficiently large section of the public. The answer is yes if one concludes, upon a proper construction of the text, context and purpose of the legislation, that Parliament intended that an individual whose interests are to be affected, should be heard before the power is exercised.

The final matter of general principle which I find necessary to refer to is that the content of the obligation to afford procedural fairness varies depending upon the facts and circumstances of particular cases: *Minister for Immigration & Multicultural Affairs –v- Refugee Review Tribunal (2002) 76 ALJR 966 at [123]*. In other words one must not presume that if there is an obligation to afford procedural fairness, then some form of full rights based hearing is to be conducted. In some cases notice of a proposed change and an opportunity to comment upon a planning strategy, will suffice. I deal with that in much more detail in answer to the specific questions.

The legislative provisions

The commencing point must be an acknowledgement that an interim planning scheme is not intended to be a final planning scheme. By definition it is a planning scheme which has a life commencing upon the making of a declaration by the Minister under section 30F(1) and ending upon the making of a planning scheme by the TPC under section 30N.

The broad structure of the interim planning scheme provisions is:

- the purpose is stated at section 30A. It is to ensure greater consistency between planning schemes within regional areas, between planning schemes across the State as a whole including by ensuring that there are Regional Land Use Strategies for all regional areas of the State;
- they are produced as an outcome of a regional land use strategy required under section 30C;

- they are provided to the Minister as drafts under section 30D, and may be compulsorily required by the Minister if a notice is given under section 30D(4);
- the content of an interim scheme is regulated by section 30E. It must contain the mandatory common provisions, it may contain optional common provisions and it may contain local provisions. They must be consistent with and be likely to further the objectives and outcomes of the Regional Land Use Strategies. Importantly by section 30E(7) sections 20 and 21 apply;
- the Minister makes or refuses to make an interim planning scheme under section 30F after a draft has been provided. Specifically the Minister may only make an interim planning scheme if, amongst other things, it complies with sections 20, 21 and 30E: section 30F(3)(a);
- once the Minister makes a decision a notice in writing must be given if the decision by the Minister is to make an interim planning scheme: section 30G. likewise a notice not to make an interim scheme is to be given under section 30G(3);
- if the Minister makes an interim planning scheme then public notice is to be given in accordance with section 30H. Amongst other things there must be a period of at least 3 weeks public exhibition and persons must be given notice of their right to make a representation;
- representations are expressly provided for at section 30I;
- at the end of the exhibition period a planning authority must provide a report to the TPC under section 30J and that report must contain a copy of each representation together with a statement of the opinion of the planning authority about the relative merit of each representation;
- once this report is provided to the TPC then it must hold a hearing in relation to each representation, although it may consolidate hearings. Clearly a person who has made a representation is entitled to appear at the hearing and put his or her views. The person must be afforded procedural fairness in this process;
- at the conclusion of the hearing process the TPC provides a report to the Minister under section 30L. Amongst other things the TPC is required to express an opinion about whether the interim planning scheme should or should not be modified to take account of the representations;
- further after the Commission has considered the representations at a hearing then it may direct a planning authority to modify an interim planning scheme under section 30M;
- the TPC, if satisfied that in interim planning scheme, modified or not, complies with the Act, then it may with the approval of the Minister make a planning scheme which is in the same form as the approved interim planning scheme under section 30M. There is an obligation to notify this decision and to specify the date of commencement.

As I have noted sections 20 and 21 are expressly incorporated. One of the objectives set out in schedule 1 of LUPA, which a planning scheme must seek to achieve, is:

> *"To encourage public involvement in resource management and planning."*

Obviously this points to an intention on the part of Parliament not to exclude members of the public from decisions which have an individual impact on those persons.

However, by contrast, Parliament has expressly provided for no formal system of public exhibition, comment or review before an interim planning scheme is made. Rather Parliament has expressly provided that representations are to be made after the Minister has made an interim planning scheme. This strongly indicates that Parliament intended that there would not be an opportunity to make a representation, or some other form of hearing right, before the commencement of an interim planning scheme. This is explicable on the basis that we are dealing with interim schemes and not final ones.

When the TPC conducts a hearing pursuant to section 30K, it does so in respect of each representation made during the public advertising period. The TPC must conduct these hearings in accordance with the Tasmanian Planning Commission Act 1997. Pursuant to that Act, section 10(1)(b)(v) the TPC is obliged to observe the rules of natural justice.

I turn now to consider the individual questions which we discussed.

Question 1: Are active rezonings permissible?

This is a shorthand phrase, which it appears the TPC is fond of. It is more accurately summarised in the letter of 31 July in this sentence;

> *"However, the Act does not provide more generally for zoning changes, as may occur in a normal planning scheme-marking process."*

One assumes that this is the putative opinion of the Solicitor-General. If it is, then I disagree. There are four reasons why. To an extent some of them overlap.

The first reason is that the common law principles of procedural fairness do not apply where the statutory provision expressly, or by implication, excludes them. This exception was considered, extensively, in *R –v- RPDC ex parte Dorney (2003) 12 TAS.R.69*. That case comprised many elements. In substance the RPDC conducted hearings, in relation to representations, concerning proposed zoning changes to land in Hobart. In doing so it considered a draft amendment to the City of Hobart Planning Scheme. Many persons appeared at the hearing to express their views. The RPDC then published a decision which substantially altered one of the publicly advertised zonings, which in turn substantially impacted upon the rights of an

individual landowner at Porters Hill, which is immediately behind the suburb of Sandy Bay. Those persons commenced Supreme Court proceedings to overturn the decision of the Commission. The proceeding ultimately succeeded because the court concluded that the changes went beyond modifications and constituted alterations to a substantial degree, which ought to have been the subject of a new public advertising process. The case also considered the rules of procedural fairness. It was argued that the RPDC was obliged by the common law procedural fairness rule to give notice to all landowners affected by the draft amendment and subsequently to all landowners affected by the proposed modification to it. Blow J rejected this argument. In doing so he made observations which are particularly relevant to this case. At paragraph [54] he said;

> *"I think it is important to bear in mind that the processes of public exhibition and advertising do not just serve the purpose of providing notification to those whose interests might be affected by the making or amendment of a planning scheme, but also form part of the process of inviting and obtaining submissions from members of the public, some of whose interests might be theoretical, ideological or political, rather than proprietary or pecuniary. It is from representations made by members of the public that a council and the Commission can be exposed to a variety of points of view, and learn of aspects of a proposal of which they might otherwise be insufficiently or inaccurately informed. See Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493 per Stephen J at 542. In view of the wording of the relevant provisions of the LUPA Act, the roles that are played by representations from members of the public, and the decision of the New South Wales Court of Appeal in Vanmeld, I believe that Parliament intended that councils were not to be subject to any duty to accord procedural fairness to any person or body who or which might be affected by the provisions of a draft planning scheme or a draft amendment to a planning scheme. Parliament made it the role of the Commission, rather than councils, to afford procedural fairness to such persons, pursuant to the RPDC Act, s10(1)(b)(v).*

Thus, at least in Tasmania, we have specific authority in support of the proposition that a council is not subject to a procedural fairness obligation in favour of any person who might be affected by the provisions of a draft planning scheme or a draft amendment to a planning scheme even though those persons may be individually and adversely impacted by a proposed change, such as a change of zoning. Blow J was clearly of the opinion that it is role of the Commission to afford procedural fairness as part of its hearing process.

Of course there is a material distinction between a draft planning scheme or a draft amendment to a planning scheme and an interim planning scheme: a draft planning scheme does not have legal effect until after the hearing process has been concluded. An interim planning scheme commences before the hearing process is

begun. This point of distinction, however, does not mean that the reasoning of Blow J is inapplicable to the interim planning scheme provisions of LUPA.

The reason is that if the drafting of the interim planning scheme provisions is such that Parliament has impliedly manifested an intention to displace the common law rule, then the intention of Parliament prevails. Thus, are the interim planning scheme provisions of LUPA drafted in a way whereby Parliament has manifested an intention to exclude the procedural fairness rules? Certainly Parliament has not expressly said so. But this is not dispositive. If the form, structure and content of the provisions is such that Parliament has impliedly manifested this intention, then that is sufficient. In the *Dorney* decision Blow J refers to a decision of the Queensland Court of Appeal in *Hannay –v- Brisbane City Council 1997) 94 LGERA 212,* from paragraph [42] of his decision. That was a planning case. The court concluded that the relevant Queensland legislation constituted;

> *"a code by which local government or the Minister may undertake the planning of an area to facilitate orderly development and the protection of the environment."*

As such the code provisions excluded the common law implication. A similar conclusion was reached in another planning case, by a majority of the New South Wales Court of appeal in *Vanmeld Pty Ltd –v- Fairfield City Council (1999) 46 NSWLR 78*. The New South Wales case is referred to, with approval, in the decision of Evans J in *Irwin –v- Meander Valley Council at [11].* Thus if the relevant provisions of LUPA are drafted in a way whereby they indicate a legislative intention that, except to the extent that the express requirements apply, there is no duty to accord procedural fairness, then the common law rules do not apply.

In my opinion there is a very strong argument that the text, context and structure of the interim planning scheme provisions do, by implication, manifest an intention to establish a code and thereby to exclude any common law implication of procedural fairness. Parliament has expressly provided for a regime which is different to the normal process of making or amending a planning scheme pursuant to sections 20-30 and 31-43 inclusive. In very broad terms a planning scheme cannot be made, or amended, unless the proposal is first publicly exhibited, the public then has a right to make representations and the TPC has conducted a hearing in relation to each of the representations. Parliament could have chosen a similar system for the introduction of interim planning schemes. But it did not. For example Parliament could have provided for a system whereby the Minister is to direct planning authorities to prepare new planning schemes and in default for the Minister to require the TPC to prepare them. Parliament could have provided that the new planning schemes be prepared in accordance with an adopted and declared Regional Land Use Strategy. And then Parliament could have provided for the normal public exhibition, representation and hearing process to occur. In other words the formulation and promulgation of interim planning schemes could have

been achieved by making relatively minor amendments to the existing provisions which regulate the making of a planning scheme.

But Parliament did not do this. It adopted a radically different approach in an entirely new set of provisions pursuant to Division 1A. In doing so the legislation expressly provides, amongst other things, for the following;

- an obligation to prepare a Regional Land Use Strategy: section 30C;
- a voluntary system whereby a planning authority may provide a draft interim planning scheme to the Minister or, if it does not, a compulsory system for the Minister to require on: section 30D;
- an obligation that an interim planning scheme must contain certain provisions and must be consistent with and be likely to further the objectives and outcomes of a Regional Land Use Strategy: section 30E;
- a power whereby the Minister upon the publication of a notice in the Gazette, may declare there to be an interim planning scheme in the form of a draft submitted to him/her: section 30F;
- that upon the making of such a decision by the Minister, the interim planning scheme commences and displaces any existing planning scheme: section 30F(4) and (5);
- the Minister gives notice of the making of that decision pursuant to section 30G and may in so doing specify that the public exhibition period is to commence: section 30G(2);
- upon the receipt of a notice under section 30G, a planning authority must ensure that a copy of the scheme is publicly exhibited for a period of two months and must give notice to members of the public that they have a right to make representations: section 30H(1)(3) and (6)(g);
- members of the public may then make representations to the planning authority in relation to any aspects of the interim planning scheme: section 30I;
- a planning authority must within four months of the close of the exhibition period provide its report to the TPC and must include a copy of each representation together with a statement of its opinion in relation to the representations: section 30J;
- the TPC must after receipt of the section 30J report hold a hearing in relation to each of the representations and is expressly obliged in so doing to consider the interim planning scheme, the representations, the matters raised at the hearings and the Regional Land Use Strategies: section 30K(1) and (3);
- the TPC then provides a report to the Minister expressing its opinion as to whether the interim planning scheme should or should not be modified and it must provide that report within nine months of receipt of the section 30J report: section 30L(1)(5) and (8);

- as a consequence of this process the TPC may direct a planning authority to modify an interim planning scheme or may undertake that task itself: section 30M;
- if the TPC is then satisfied that an interim planning scheme, which may or may not have been modified, is in order then it has the power, with the approval of the Minister, to make a planning scheme which consists of the interim planning scheme and, importantly, apart from sections 20 and 21 Divisions 1, 2 and 2A do not apply: section 30N; and
- the TPC may only make a planning scheme if satisfied that it complies with sections 20, 21 and 30E: section 30N(3).

If Parliament had intended to give individual members of the public a right to make representations before the commencement of an interim planning scheme, then it could easily have said so. It did not. Rather Parliament has chosen a system which is distinctly different from the ordinary provisions which apply to the making and amending of a planning scheme. Specifically Parliament has provided for the commencement of an interim planning scheme without any obligation to engage the public, or any individual.

In my opinion there is a compelling argument to the effect that these statutory provisions constitute a code and by implication manifest an intention by Parliament to exclude the common law procedural fairness rules as applicable to any stage of the process before the giving of a public notice pursuant to section 30H. Thereafter Parliament has expressly provided for a right of representation and hearing.

The second reason is that Parliament has provided for a multi-stage decision making process and has expressly incorporated a right to be heard at a particular stage. In doing so Parliament has provided for a preliminary decision being the formulation, lodgement and declaration of a draft interim planning scheme. Parliament has set a time limit. Clearly an interim planning scheme is not intended and cannot be in place for an extended time period. There is a two month time period for public exhibition which commences once the Minister makes a declaration that the scheme begins. There is then an obligation on the TPC to finalise its hearing and reporting process within a period of nine months from the close of the representation period. Inevitably there will be a further period of time for the Minister to consider the recommendations of the TPC and for any modifications. But it should not be thought that this would be an extended period.

By proceeding in this way Parliament has expressly imposed the obligation to afford procedural fairness upon the TPC and pursuant to its obligations to conduct a fair hearing. Thus, and like the position in *Dorney*, this strongly indicates that Parliament has displaced the common law procedural fairness implication which might otherwise arise in respect of;

- the formulation of a draft interim planning scheme by a planning authority; or

- the making of the decision by the Minister pursuant to section 30F.

The third reason is that Parliament has expressly made provision for a representation and hearing process. In *Twist –v- Randwick Municipal Council (1976) 136 CLR 106* the High Court of Australia determined, in that case, that the owner of a building which was made the subject of a demolition order by a council, did not have a right to procedural fairness to put his/her case to the council before it decided to make the demolition order. That is because the statute expressly provided for a right of appeal from the decision of the council to a district court. The court said that the terms and nature of the right of appeal manifested an intention by Parliament that an owner would not have a right to be heard at any earlier stage in the process. In the course of his decision in the case Barwick CJ said this at page 110;

> *"If the legislation has made provision for that opportunity to be given to the subject before his personal property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded to the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court, being bound by the legislation as is the citizen, has no warrant to vary the legislative scheme."*

That is the position here in my opinion. LUPA expressly provides when members of the public, inevitably affected by the making of an interim planning scheme, have a right to be heard. The legislation comprehensively deals with that right. It is a full merits based provision. It is a right to be heard before an independent statutory commission.

The fourth reason is that, as a fact, each council has engaged in a process of public consultation even though it was not obliged to do so pursuant to the LUPA provisions. I am instructed that at least each draft interim planning scheme;

- was publicly notified, and in particular was placed on each council website;
- was the subject of public consultation, for example meetings;
- has been produced as a consequence of considering comments from various affected members of the public; and
- at least in the case of the Launceston City Council, was the subject of specific correspondence to each affected landowner where a zoning change was proposed.

As I have noted above, a simple statement that there is a common law obligation to afford procedural fairness, is not the end of the inquiry. The form and content of the obligation varies in individual cases. There is a very strong argument in my opinion that, despite my opinion that no procedural fairness was obliged to be

afforded, that as a matter of fact it was and that therefore the likelihood of any successful challenge based on its denial is remote.

Finally I think it important to emphasise that my opinion on this point does not distinguish between;

- broad scale changes which affect the public generally or a large section of it; and
- individual changes which affect individual parcels of land.

Clearly my opinion in this is stronger when one is dealing with broad scale changes. But the reasoning is equally applicable to individual impacts especially as Parliament has provided for a statutory code. If individual zoning changes are authorised by the interim planning scheme process, then the same result follows. It is this issue to which I next turn.

Question 2: The extent of change

The gravamen of concern is the following passage in the TPC letter:

> *"However, the Act does not provide more generally for zoning changes, as may occur in a normal planning scheme-making process. Changes beyond those associated with a translation from the current planning scheme must be reasonably necessary to being (sic) consistent with and furthering the objectives and outcomes of the regional land use strategy… Simply being consistent with the RLUS is not a sufficient test for compliance."*

This is a difficult passage to comprehend. It is followed with this sentence:

> *"While it is acknowledged that the Act does not contain express limits on the scope of changes, the Solicitor-General has advised precaution as the introduction of interim planning schemes has an immediate effect on property rights prior to landowners having a formal opportunity to participate the (sic) process."*

I do not agree. The Act is to be construed in accordance with the usual principles of statutory construction. At its most basal level this requires a consideration of the text, context and purpose of the provisions. I have comprehensively set out that the text, structure and context of the provisions when dealing with the first question. There is no need to repeat my observations. The view of the Solicitor General, in my respectful opinion, gives no or insufficient weight to the declaration of a Regional Land Use Strategy in accordance with section 30C(3). The express purpose of the interim planning scheme provisions, section 30A, is to ensure greater consistency including by ensuring that there are regional land use strategies. Section 3 of LUPA simply says that a regional land use strategy *"in relation to a regional area, means the regional land use strategy declared under section 30C(3) in relation to the area."*

Relevantly this means the strategy declared on 27 October 2011 and which is titled: Regional Land Use Strategy for Northern Tasmania. As I have noted it is a broad strategic planning instrument. It sets out policies, principles and objectives designed to achieve the purpose stated at section 30A in a way which is consistent with the objectives of the resource management and planning system of Tasmania which must be considered by application of section 20. It is not necessary for the purpose of this advice for me to detail, by way of summary, the content of the strategy. It suffices for me to note, and adopt, the following summary provided to me by Jo Oliver at our meeting. That is to say the strategy, amongst other things:

- recognises existing land use patterns, and provides for the expansion of existing boundaries;
- adopts a rural living strategy;
- targets urban growth areas and boundaries;
- identifies strategic growth areas and plans for future development;
- establishes principles and outcomes to achieve a coordinated strategic set of planning scheme provisions.

It is clear, as a consequence, that section 30A did not contemplate nor require the adoption of a regional land use strategy so as to provide for micro level zoning changes. Rather these changes are to be contained within the draft interim planning schemes.

Importantly by section 30E(6) a draft interim planning scheme must be consistent with and be likely to further the objectives and outcomes of the regional land use strategy. Self evidently this is a broadly based requirement. What is consistent with and is likely to further the objectives and outcomes of the regional land use strategy is a matter for the application of evaluative judgment, the adoption of sound planning principles and the formulation and translation of the broad required outcomes into individual draft planning schemes. The draft planning schemes thus become the instrument whereby the broad principles of the land use strategy are implemented in individual cases.

Thus I do not construe the words *"consistent with, and likely to further the objectives and outcomes of, the regional land use strategy"* as restrictive words of limitation. When read in their context, and with a proper understanding of what a regional land use strategy is and how that strategy is then translated into the provisions of a draft interim planning scheme, these words in my opinion provide a very broad authority for the drafting of interim planning schemes designed, in individual municipal cases, to achieve the broad outcomes of the strategy. As a consequence these words provide considerable flexibility to implement significant and fundamental change. If that change is consistent with and likely to further the objectives and outcomes of the declared strategy, then the change is authorised by section 30E(6).

It is no answer to this interpretation in my opinion to assert that the provisions should be read restrictively and in a way which limits or indeed prohibits the ability to rezone individual parcels of land. Such a view in my opinion is misconceived in that it misunderstands the nature of a regional land use strategy and then how that strategy is implemented by way of provisions in a draft interim planning scheme.

In my opinion this interpretation is also consistent, as required by section 8A of the Acts Interpretation Act 1931 and the obvious purpose of the interim planning scheme provisions. What is required is regional coordination and change. How that is achieved is through the provisions of individual planning schemes. To take a simple example, there is no point in adopting a regional strategy which provides for urban growth if that strategy is not then translated into an interim planning scheme provision which rezones land as suitable for residential use and development.

In my opinion the view of the Solicitor-General is not only contrary to the plain meaning of the provisions, but substantially undermines their intended effect.

There is no doubt that the opinion that I favour will, in individual cases, have impacts. They may be positive or negative. A landowner may be entirely satisfied or entirely dissatisfied with a zoning change. A neighbour likewise may be entirely satisfied or dissatisfied with the impact of a change on him or her. Such individual impacts will be taken into account as part of the representation and hearing process. The fact that there will be impacts is however no reason to read down in a very restrictive way the provisions which must be applied. Such change is the inevitable consequence of planning in accordance with a Regional Land Use Strategy. The outcome of this process, inevitably, has positive or negative impacts on individuals but this is a case where individual impacts must yield in favour of the public good. Ultimately if, at a hearing before the TPC, the individual impacts are accepted as contrary to sound strategic planning, then the TPC will, in obedience to its obligations, require amendments or modifications to an interim planning scheme before it becomes a planning scheme.

Question 3: what is the legal status of the regional land use strategy?

I have largely answered this in dealing with question 2. There is however a further nuance in the TPC letter. It concerns these words in the fourth paragraph:

> *"Changes beyond those associated with a translation from the current planning scheme must be 'reasonably necessary' to being (sic) consistent with and furthering the objectives and outcomes of the regional land use strategy."*

I do not agree. Section 30E(6) does not contain this gloss. There is no requirement that the changes be *"reasonably necessary".* The only requirement is that a draft interim planning scheme is to be *"consistent with, and likely to further the objectives*

and outcomes of, the regional land use strategy." That is the statutory provision. There is no warrant to read into it words which Parliament has not inserted.

And in any event the phrase *"reasonably necessary"* is in the context of these provisions entirely ambiguous. If Parliament had intended to limit the ambit of an interim planning scheme in this way, then it would have said so. In contradistinction Parliament has only provided that the draft interim scheme be consistent with and be likely to further the objectives and outcomes of the regional land use strategy. That is the test which is to be applied. No other test is permissible.

Question 4: what is the process after a planning authority delivers a draft interim planning scheme to the Minister?

I have set out the steps above.

The Minister is not obliged to make any declaration of an interim planning scheme pursuant to section 30F. The Minister is constrained not to do so if the requirements of section 30F(3) are not met. Principally, if the Minister concludes that the draft interim scheme does not comply with sections 20, 21 and 30E.

Clearly the matters which the Minister may take into account are broad. They are as broad as the regional land use strategies. They include the obligation to take into account and seek to give effect to the objectives of the resource management and planning system of Tasmania which are set out in the schedule to LUPA. These are not fixed or defined concepts. There is room for debate, obviously, as to whether any particular draft interim scheme does or does not satisfy the requirements of sections 20, 21 and 30E.

Clearly the Minister may consult. Doubtless the Minister will seek the advice of the TPC. The Minister may choose to entertain representations from planning authorities. Unless the Minister:

- plainly takes into account irrelevant matters;
- plainly fails to take into account relevant matters; or
- fails to exercise his or her discretion according to law, such as if the Minister acts on a preconceived view or at the behest of the TPC

then there is no scope which a planning authority has to challenge a decision of the Minister not to declare an interim planning scheme. In that event the remedy is essentially political, not legal.

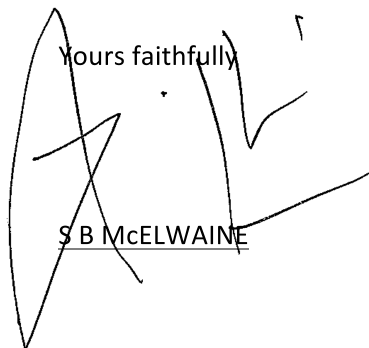
That said, although the Minister may clearly consult with the TPC it has no especial status whereby it is engaged pursuant to a provision of the Act to give dispositive advice to the Minister. It certainly has a statutory role after the Minister has made a declaration under section 30F(1) and it must discharge its duties and obligations in accordance with the statutory provisions.

The point is that one should not think that the TPC has a formal (in the sense of statutory) role to play in advising the Minister as to whether he or she should or should not make the necessary declaration under section 30F(1).

This is a long opinion

There may be further issues or questions which arise. Doubtless if there are, then I will be contacted.

Yours faithfully



S B McELWAINE