ATTACH 2

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19 July 2011

Our ref: 32/15751/54778
Your ref:

Productivity Commissioner
Business Regulation Benchmarking: Role of Local Government
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioner

Business Regulation Benchmarking: Role of Local Government Submission

This submission to the Local Government Study is prepared by GHD Pty Ltd (GHD) on behalf of Humana Pty Ltd (Humana). GHD has acted in an advisory role to Humana in our capacity as planning consultants and acted as agent on Humana's behalf on a range of commercial developments, principally comprising retail development across Tasmania. The information provided within this submission is based on our experience of dealing with local government as part of the Tasmanian development approval process. Whilst it draws on a matter arising from a specific Humana development, it is it is our experience that the issues raised within this submission are not an uncommon occurrence in the Tasmanian planning system, and are not limited to the development, proponent or local government authority outlined in this correspondence.

Our submission is largely concerned with the expense and delay incurred by developers in instances where planning authorities act beyond the ambit of their power in the development approval process. To briefly provide some background, at present the planning system in Tasmania is driven significantly at the local government level in comparison to most other Australian States, with individual Council's responsible the formulation and administering of their individual planning schemes. Whilst reforms are underway to transition to a regionally based template system, the existing planning framework is predominantly embedded at the local government level and administered via individual planning schemes, creating a variation in standards across the State. Planning schemes and the planning approval process are administered under the *Land Use Planning and Approvals Act 1993* (LUPAA). Amongst other matters, LUPAA establishes the process by which Council must decide on planning applications and the process for appealing a Council's decision. LUPAA specifically requires a planning authority's decision to relate to the provisions of the relevant planning scheme, as provided under Section 51(3)(a), which states:

The decision of a planning authority on an application referred to in subsection (1A) or (1B) is to be made by reference –

> *to the provisions of the planning scheme or special planning order as in force at the date of that decision...*

The decisions and conditions applied to a planning permit are therefore required to be matters addressed by the provisions of the relevant planning scheme.

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It is our experience in acting as agent on behalf of and/or advisor to various developers that the planning decisions of Councils are being increasingly influenced by matters irrelevant to the respective planning scheme, and therefore irrelevant to the planning process. Whilst it is unlikely that a Council would refuse an application based solely on matters outside of the ambit of their planning scheme, it is not uncommon for such matters to form conditions approval. There are a number of implications that can arise in these instances:

- Conditioning beyond the purposes of achieving consistency with the planning scheme can mean developers incur costs and/or delays in project implementation, in order to meet the permit conditions. Whilst the validity of such conditioning can be disputed at the Resource Management and Planning Appeals Tribunal (the Tribunal), this will mean further costs and delays are incurred.
- As most applications for major development will be subject to a public notification period with the opportunity for third party representations to be received, issues are often raised by interested parties that are not considered under the planning scheme, and therefore do not constitute relevant planning matters. Planning authorities, however, may incorporate such issues, either formally or informally, into the decision making process prior to a permit being issued. If the issue is required to be addressed formally by the applicant via the further information process provided under LUPAA, significant costs to the project and delays to the approval process can be incurred. Again, whilst the validity of the further information requirement can be challenged at the Tribunal, it may add significant costs and delays to the project. It is more likely however, that in an effort to appease the community or other concerned parties, the planning authority may unofficially try to negotiate an agreed outcome with the developer. Whilst being outside the relevance of the planning approval process, this approach will often see developers engaging in such negotiations to assist in facilitating a timely decision.

The following account provides an example of some of the concerns raised above. It relates to a proposed KFC restaurant at Claremont Shopping Plaza, which is located in the northern suburbs of Hobart.

- GHD lodged an application for the proposal on behalf of Humana with Glenorchy City Council in December 2010. The application was for a restaurant and take-away (including drive-through) and associated development. The development was required to be assessed as a discretionary application, as it did not meet all the 'permitted' provisions of the planning scheme. The 'discretion' related to a 1m setback of the building from the front boundary. To be considered a 'permitted' application, the proposed building would need to have been built along, and not set back from, the front boundary to the street. As the application was to be assessed as discretionary, it was subject to a public notification period of two weeks, during which time Council can receive representations (submissions in support of or objection to) in respect of the proposal.
- During the public notification period a number of concerns were raised, predominantly from local residents, in regards to issues such as traffic safety, but also in relation to the retention of a number of rose beds that were on site. The rose beds were contained entirely within the property's boundaries, and were planted by community members with permission of the site owner approximately 14 years ago. It is noted that, although the rose beds came to be of moderate significance to the local residents, they were not specifically intended for a community purpose. As

part of the proposed development, the rose bed that was situated along the front boundary would be required to be removed to accommodate the new KFC building.

- The roses had no protection status under the planning scheme in respect of either landscape/vegetation provisions or heritage provisions. It is further noted that, had the proposal been designed to be located along the front boundary, in accordance with the 'permitted' provisions of the planning scheme, then the proposal would not have been advertised, Council would not have had the opportunity to receive objections and the rose bed would had to have been removed for the building to comply with the planning scheme's requirements.
- As a result of the community interest generated over the public notification period, meetings were held between community residents and the Mayor of Glenorchy City Council, as well as with Independent Federal MP Andrew Wilkie, whom community members engaged to gain support for their cause. Council encouraged an agreement being reached between the community and the developer in respect of the roses.
- The owner of the site was subsequently contacted by Federal MP Andrew Wilkie to attend a site meeting with him, his advisor and around six community members. The owner and GHD's Principal Planner, Frazer Read attended.
- As a gesture of goodwill to the community, the developer agreed to a number of measures in regards to the rose bed, including the transplanting to a nearby community park and pruning. The proposed vehicle access on the main road frontage was also relocated to avoid disturbance of another rose bed on the site. Whilst Council did not request such measures through the formal request for information process, Council's planners informally requested updates to the treatment of the rose beds via telephone calls and emails. This informal process ran concurrently to Council's formal further information requests, which pertained to acoustic and lighting impact requirements.
- Mr Wilkie's office subsequently contacted Frazer Read of GHD on one further occasion for an update on the handling of the rose matter.
- As part of the approval process the Development Application was referred to the Glenorchy Planning Authority (GPA) for approval. It is noted that Council was required to seek an extension of time to consider the proposal, which GHD granted, in order for the proposal to be reviewed by the GPA. Due to community lobbying in respect of the rose beds and traffic concerns, the issue became a significant item on the agenda and as part of the discussions around the proposal's approval. The GPA members approved the proposal with the following conditions included:

  All reasonable attempts must be made to relocate the existing roses which were planted in recognition of Rose breeder Lilia Weatherly. Prior to the removal of the roses, a report must be provided by a suitable qualified horticulturist, and detailed management plan must be submitted and approved by Council's Co-ordinator Planning Services.

  That in the event of demolition or relocation of the Pink Iceberg Rose Garden a qualified Heritage Consultant produces and extant recording of the Pink Iceberg Rose Garden before the removal of any fabric or contents. A copy of which must be given to the GCC for archival purposes.
- Due to a condition placed on the permit that related to vehicle access arrangements for the site, it became necessary for GHD to appeal the conditions on the Permit to the Tribunal.

- Agreement was reached via the mediation process between the applicant, GHD, and the Council. As part of the mediation process, all permit conditions are drafted and amended where necessary, forming a consent memorandum, which is then signed by all parties. The significance of the appeal process and subsequent consent memorandum is that final sign off was not able to be obtained by the Tribunal, as a number of conditions were deemed invalid on account of not forming relevant considerations under the planning scheme. Amongst these conditions were those pertaining to the rose beds. Consequently, the consent memorandum that was finally agreed to and formed conditions to the Permit subsequently issued, did not include any conditions relating to the treatment of the rose beds.

The account above represents an example of how Council has attempted to return a popular outcome to the community through the planning system, and essentially overstepped its role as a planning authority. However, in the context of the legislation, the history of Tribunal decisions on planning matters and standard planning practice, it is clear that planning decisions, including the conditioning of permits, must be relevant to matters the within planning scheme, or directly referred to by the planning scheme, and matters contained within LUPAA.

As outlined in an earlier section of this correspondence, the approach taken by the Glenorchy City Council is an example not limited to that particular planning authority, and is far from an isolated incident. It is noted that, in order to maintain harmonious community relations, the developer has acted on the agreement to transplant the roses concerned, despite the removal of the conditions from the Permit. However, of concern are the significant time delays and costs incurred in reaching agreement over the rose beds and redesigning access arrangements; the time and costs associated with arranging for consultants to negotiate with Council and the community representatives, meet with Mr Wilkie, prepare for appeal and negotiate the consent memorandum; and the costs incurred by the developer for the transplanting of the rose beds.

As outlined, the roses had no status under the planning scheme or legislation, yet as result of Council's role in the matter, the issue managed to add significant costs and time delays to the project. It is felt by our client, and it is our experience, that such instances act as a deterrent to development and investment in Tasmania, and as such have the capacity to hinder the state's competitiveness and economic growth.

I trust that this submission will assist you with your enquiry, and I look forward to your findings. Should you have any queries or require any further information, please do not hesitate to contact me.

Yours faithfully
GHD Pty Ltd

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