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Business Regulation Benchmarking – Role of Local Government
Productivity Commission
PO Box 1428
CANBERRA ACT 2601

Dear Dr Warren Mundy,

Business Regulation Benchmarking: Role of Local Government

We take this opportunity to present our submission to the Productivity Commission.

Nekon Pty Ltd is a family company which has property interests principally in New South Wales and Tasmania. Our holdings comprise shopping centres, carparks, and office buildings along with a residential portfolio.

In the normal course of business we make ten or so development approval and building applications a year across eight different Tasmanian council jurisdictions. Applications range from construction of new complexes, additions and changes in use.

Therefore, I am well qualified to comment first hand on our company's experiences with the Tasmanian planning system and the regulatory issues that arise from dealing with Councils and the planning system.

Tasmania has 29 councils and 281 councillors for a population of just over half a million people. Councils range in size from about 65,000 people to 800. Across the 29 councils, there are 36 planning schemes with some councils having at least two planning schemes within their boundaries.

Furthermore, the size and financial capacity of councils determines the level of skills or professions that each council can attract and retain. Some are capable of supporting employment of most or all of the skill sets required to properly administer planning whereas others are forced to rely on part time or consultant advisers.

Despite the level of skills within councils, the 36 planning schemes have developed into very complex documents that even professionals both within and outside councils appear not to fully understand at times. This leads to property investors and their consultants enduring considerable frustration in navigating through the requirements of 36 different planning schemes.

This is frustrating and difficult for developers and investors and despite the inconvenience and unnecessary cost, it can, albeit as unpalatable as it is, be tolerated as an avoidable cost of doing

business. However, the effect this expensive and bureaucratic nightmare has on the ordinary home owner, sole trader, partnerships and small business person is another matter altogether. People should not have to endure the inefficiencies and waste emanating from the current planning system.

Unlike other jurisdictions where development assessment reform has occurred, namely in Western Australia and South Australia, in Tasmania there has been no attempt to take politicians out of the planning process.

Elected members have become intrinsically involved with the technical intricacies of development approvals and increasingly the advice of professional council officers is not taken.

Although the Land Use Planning and Approvals Act 1993 requires councils to act as planning authorities when deliberating on planning matters, it is strikingly obvious elected members have problems separating their roles as community representatives and being member of a planning authority when pressure is applied by their constituents.

Interference by councillors in the technical intricacies of the planning system gives rise to professional advice being overturned, conditions imposed that are not allowable matters under planning schemes, amendments to conditions that render them ambiguous and a planning system which is open to unfair influence by business adversaries and lobby groups.

Planning schemes generally provide for three basic options in relation to development applications. There are "permitted" uses in which case they can be determined by the council acting as a planning authority without advertising and triggering third party appeal rights. Secondly, there are "discretionary" uses which require public notification and provide options for third parties to make representations and ultimately appeal rights. Lastly, there are "prohibited" uses whereby there is an obligation to refuse approval. Planning schemes generally have an inordinate amount of discretionary uses which gives rise to opportunities for third parties appeals. Appeals become especially prevalent in situations where planning schemes are poorly drafted or ambiguous.

There is no necessity for the vast array of planning schemes that exist now. There should be a common planning scheme for the whole state that is unambiguous, has minimal discretionary uses, common specifications for conditions that attach to approvals and clear schedules of allowable matters.

In addition there are occasions where councils are proponents of development applications as well as being the planning authority that makes the decision. Sometimes, after applications have been made a council might decide it has an interest of its own in the subject property and decide to use its position in the approval process to progress that interest. Furthermore there are other situations where a developer might propose to purchase a council property on condition that a planning approval is granted as a condition precent to the sale proceeding.

This does not lead to clarity, consistency or certainty for the community as well as the property industry.

Ideally, the decision making processes on development applications should be completely separated from councils and placed in an independent expert panel. It is disappointing that Tasmania has not chosen to institute this necessary planning reform which other States are currently implementing. The only role councils should have is defining land use zones that integrate with their strategic development policies and approved physical and social infrastructure plans. Once zones are settled,

approval of development within should be managed completely independently of the elected body. Professional officers of councils should advise the independent expert panels of technical requirements for services and related matters to ensure councils' strategies and policies for development and services are observed.

The lack of reform of the development assessment process inevitably leads to lengthy and costly challenges to the conditions attached to approvals. This is due to conditions being outside the allowable matters of planning schemes, poor drafting, ambiguity or misinterpretation of planning scheme provisions.

This leads to delays, is time consuming, inconvenient and costly. Due to the process outlined in the Resource Management and Planning Appeal Tribunal Act 1993 there are no easy mechanisms to amend approvals to correct anomalies. Once a council (i.e. planning authority) has made its decision an appeal against that decision either by the applicant or a third party must be made to the Resource Management and Planning Appeal Tribunal. The council, even if it recognises an irregularity, cannot amend the decision. The Appeal Tribunal has the option of referring the appeal to mediation or conducting a formal hearing. Regardless whichever way the appeal proceeds, the process is formal, time consuming and can be costly. It is not uncommon for frivolous and vexatious appeals to be lodged.

To highlight the issues with the planning system and the barriers that it imposes, I draw the productivity Commission's attention to two specific cases:

- Case 1: Shopping centre development we proposed in the Kingborough Council area adjacent the Australian Antarctic Division Headquarters which we own.
- Case 2: The approval process for a Kentucky Fried Chicken (KFC) restaurant outlet at a shopping centre we own at Claremont in the Glenorchy City Council area.

Case 1

The Kingborough proposal was for a large retail commercial development comprising supermarket, discount department store, speciality shops, fast food-type restaurant, fitness centre and petrol station. The site for the development was 5.7 hectares in area.

Over a period of about nine months there was continuing and detailed dialogue with council officers to ensure the application would meet with all Kingborough Council's requirements.

As a result of those meetings the architectural concept drawings and site layout plans were significantly amended on four occasions. In addition to the normal report and information required to accompany a planning approval application, we also commissioned:

- a Market Research and Strategic Positioning Study;
- a Location Decision Report;
- Traffic Impact and Management Studies;
- on site and off site environmental impact reports;
- assessments on servicing requirements; and
- Ecological Assessment and Reports required by the Commonwealth Environment Protection and Biodiversity Conservation Act.

At one point, council officers raised the ambiguity of a clause in their planning scheme called "desired future character statements" which we responded to by obtaining an opinion from senior counsel. The council also obtained an opinion from its own solicitors and both opinions concluded the provision did not constitute an impediment to an approval.

By the time our formal application was put to the council our company had incurred over half a million dollars in expenses. It was a time consuming and difficult application, but this was not so much because of the nature of the development; instead, it was due to the extraordinary complexity of the planning scheme.

Upon assessing the detail of the application, council officers recommended to the council that the proposal be approved subject to conditions which in our experience were not unexpected or unusual.

However, the council decided not to take the advice of its professional officers. Moreover, it became apparent to us that the councillors either did not read or did not understand the considerable detail that we provided with the application.

The council refused the application on fifteen grounds.

We took the refusal to appeal before the Resource Management and Planning Appeal Tribunal. The Tribunal upon considering the detail of the application and hearing from expert parties set aside 14 of the 15 grounds of refusal.

It is noteworthy that the Tribunal noted in its report on the appeal that:

> *...this Planning Scheme is a difficult document to construe and apply. In fact much of the areas of dispute that occupied the resources of the parties (and the Tribunal) was directly attributable to the complexity, and at times impenetrability of the Scheme.* (Reference: AAD Nominees Pty Ltd v Kingborough Council [2011] 24 January 2011 pp 7).

The remaining ground was the "desired future character statements" which we had dealt with prior to submitting the application.

The Tribunal's conclusion was challenged and the matter was taken to the Supreme Court of Tasmania. The presiding Justice C J Crawford concluded that the Tribunal did not err when it rejected the initial appeal and affirmed the decision of the council on that one matter. However, Justice Crawford recorded his agreement with the Tribunal's comments on the complexity and impenetrability of the Scheme. (Reference AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal [2011] 19 April 2011 pp 4).

Our legal advice even at this stage supported the initial opinion that the "desired future character statements" were ambiguous and despite the decisions of the Tribunal and the Supreme Court of Tasmania we felt we had no option but to refer the matter to the Full Court of the Supreme Court of Tasmania.

Our appeal did not succeed and that is where the matter rests. In his reasons for the judgment, Justice J Blow commented:

> *The planning scheme is very complex and exceedingly and unnecessarily difficult to comprehend or interpret. Most ordinary people would not have a chance. Most sensible people, or people with a life, would not attempt the task unless they had absolutely no choice. In order to determine how the scheme operates in relation to the appellant's proposed development, it is practically essential to have a law degree, decades of experience in interpreting legal documents, a talent for understanding gobbledygook and misused words, a lot of time, and a very strong capacity for perseverance* (Reference: AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal [2011] 5 September 2011 pp 4).

The purpose in highlighting this example to the Productivity Commission is to demonstrate the appalling mismanagement and incompetence of the Kingborough Council in the discharge of its planning responsibilities.

A single state wide planning scheme and independent and expert development assessment processes, whilst not necessarily resolving all legal technicalities would at least remove the ambiguity and complexities that the Tribunal and Supreme Court attest to as well as eliminating the angst and costs developers endure.

Case 2

The second case involves another of our companies, Humana Pty Ltd, which owns a shopping centre at Claremont, which is a suburb within the Glenorchy City Council boundaries.

Humana Pty Ltd, through its consultant planners submitted an application to construct an addition to existing shopping centre premises for a KFC restaurant and takeaway including a drive-through and associated development.

The development was required to be assessed as a "discretionary" application under the council planning scheme because it did not meet the one metre setback requirement from the front boundary.

Because it was a discretionary application, it had to be publicly notified and this raised concerns, mainly from local residents, on traffic safety and the retention of a number of rose beds on the site. The rose beds were contained within the property boundaries and were planted by community members, with our permission, approximately 14 years beforehand. Local residents obviously had some attachment to the rose beds but they were never intended to be or used for a community purpose.

The development of the KFC restaurant required removal of the rose beds.

The rose beds had no protection status under the planning scheme in respect of either landscape/vegetation or heritage provisions. If it had not been for the one metre set back provision that made the proposal a "discretionary" application, it would have been a "permitted" use and the council would not have had an opportunity to receive objections.

Residents took their concerns about traffic matters and removal of the rose beds to Federal Denison MP, Andrew Wilkie, who met me at his request along with his adviser, six community representatives and our consultant planner.

Notwithstanding the irrelevance of the rose beds from a planning scheme perspective, as a gesture of goodwill a number of measures to ameliorate the residents' concerns including transplanting in a nearby community park and pruning were agreed to. We also agreed to relocate the vehicle access on one frontage to avoid disturbance of one particular bed.

While, the Glenorchy City Council did not request these measures, council officers requested updates regarding the treatment of the rose beds via email and telephone. This process ran concurrently with other formal requests by council officers for additional information on the development. Mr Wilkie's office also followed up the handling of the rose beds.

Council officers could not complete their assessment of the application within the 42 day statutory period and upon request we acquiesced and granted an extension of time as a gesture of goodwill.

Due to the lobbying of councillors by residents regarding the rose beds and traffic concerns, the application became a significant item of business at the council meeting where the application for planning approval was considered. It should be noted that councillors are required by the Land Use Planning and Approvals Act 1993 to act as members of a statutory planning authority when deliberating on planning matters and should disregard their role as a member of Council representing the interests of constituents.

Due to the community pressure and the involvement of Mr Wilkie, the Council, acting in its capacity as a planning authority, approved the proposal but with the following conditions:

> *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 horticulturalist, and detailed management plan must be submitted and approved by Council's Co-ordinator of 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 [Glenorchy City Council] for archival purposes*

Because of another condition on the permit regarding vehicle access to the site, we appealed the council decision.

The appeal was referred by the Appeal Tribunal to mediation and agreement was achieved on the traffic matter, but the Tribunal would not formally sign off on the traffic access amendment because the permit included a number of conditions (namely those regarding the rose gardens) which were invalid on account of not forming relevant considerations under the planning scheme. The amended permit therefore excluded references to the rose beds.

In this particular instance, the initial application was made to the Glenorchy Council in December 2010. The decision by the Resource Management and Planning Appeal Tribunal was delivered on 10th May 2011. By any measure this was a simple addition to an existing shopping centre where the proposed development was consistent with the land use zoning and predominant use of the site, yet it still took on six months to complete the formal approval process.

This case demonstrates how the council bent over backwards to ameliorate the concerns of Mr Wilkie and residents to the extent of abrogating it's responsibilities as a statutory planning authority. It also clearly shows how councils are prepared to include conditions in planning permits that are outside the provisions of their planning schemes. These are schemes they are responsible for preparing and amending from time to time, yet they still are not prepared or able to comply with the provisions of their own planning schemes.

Quite apart from the technicalities of interpreting and administering the planning scheme, we were required to devote a considerable amount of our time, the time of our consultants and endure delays in obtaining approval. All this emanated from a one metre boundary setback provision requiring the application to be dealt with as a "discretionary" use rather than a "permitted" use and the Council failing to discharge its obligation and responsibilities in a competent manner.

We have attached copies of a number of documents to support the cases outlined in this submission.

If it would assist the Productivity Commission, we would be only too pleased to attend any hearing that may be held in the course of this inquiry.

Yours faithfully
NEKON PTY LTD

Per:

ROBERT ROCKEFELLER