DISCUSSION PAPER

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THE PROBLEM WITH MANAGING AN ONGOING RISK ON DEVELOPMENTAL LAND

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1. INTRODUCTION

1.1. If a development proposal manages to tick all the planning boxes but will require ongoing impact assessment and management, for example as regards land slip, and the Council is unwilling to take on that monitoring role, the development application must be refused. So says the Resource Management and Planning Appeals Tribunal in A Moon v West Tamar Council [2016] TASRMPAT 11.

2. BACKGROUND - THE APPEAL TO RMPAT

2.1. The original appeal against refusal of the application in 2014 was resolved by the Tribunal ordering the approval of the application subject to the Council and the proponent entering into an agreement under Part 5 of the *Land Use Planning and Approvals Act 1993* ('LUPA Act'), which had to contain ten[1] fairly arduous requirements relating to the impact of water runoff and drainage on what was obviously a 'difficult' piece of land.

2.2. The suggestion of a Part 5 Agreement was made by the proponent. The issue for the Tribunal was, it felt, whether there was "*...an appropriate methodology for ensuring risk management*", providing "*a framework to create maintenance obligations and require continued implementation even if there are changes of ownership*", that could be incorporated into a Part 5 Agreement.

2.3. The Tribunal ordered what it called a "*provisional approval*". Provisional, that is, on the formulation of a suitable Part 5 Agreement (and completed drawings). Those orders meant that the Tribunal, exercising the powers of the Council and re-making Council's decision on the application, was compelling the Council to enter into the Part 5 'Agreement'.

3. THE SUPREME COURT APPEALS

3.1. If The Council duly appealed to the Supreme Court and the Chief Justice determined, in a very short judgment[2], that the Tribunal was empowered to make a decision in substitution of the Council's decision and "*there is no reason why such a substituted*

[1] The tenth requirement was that "all other recommendations of a geotechnical engineer shall be adhered to".
[2] *West Tamar Council v Resource Management and Planning Appeal Tribunal* [2015] TASSC 32

decision should not be a decision that the council must both issue a permit and [must] enter into a Part 5 Agreement".[3]

3.2. The Full Court of the Supreme Court decided a further appeal in favour of the Council.[4] ('**Full Court Decision**') Porter J and Estcourt J gave separate judgments, while Pearce J agreed with the latter.

3.3. Justice Porter could not find a construction of the powers conferred on the Tribunal by s. 23 of the *Resource Management and Planning Appeal Tribunal Act 1993* ('**RMPAT Act**') which would allow it to "*impose a condition of a permit that the planning authority and the applicant enter into an agreement…against the will of the authority*".

3.4. Justice Estcourt noted that the Tribunal could act "*against the wishes of the Council in determining an appeal*", but "*it is a step too far…to suggest that the Tribunal, absent clear express power, could ever force a council to enter into an agreement under which it would assume unwanted, and, to varying degrees, onerous, contractual duties*".

4. THE TRIBUNAL RECONSIDERS

4.1. On 31 May 2016 the Tribunal published its reasons for reconvening to consider the matter following the Full Court decision. The parties were invited to make submissions – the Council did but the developer did not.

4.2. The Tribunal affirmed that the landslip situation created a risk that could not be overlooked or left to chance (or goodwill or common sense presumably). It needed to be managed in some formal manner which created clear obligations and duties.

4.3. The Tribunal noted that its original decision was provisional and that the things required to be done were not, in fact, done. That includes the formulation of a Part 5 Agreement.

4.4. The Tribunal considered possible alternatives to a Part 5 Agreement as a means of managing the risk but could not find an acceptable one. The situation required "*certainty*" and "*a monitoring regime [which] will be ongoing, supervised in its implementation, and the subject of reporting to the planning authority*".

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[3] *West Tamar Council v Resource Management and Planning Appeal Tribunal* [2015] TASSC 32 at 13
[4] *West Tamar Council v Resource Management and Planning Appeal Tribunal* [2015] TASFC 12

4.5. The possibility of achieving that through a restrictive covenant was rejected on the basis of it being capable of removal or discharge by agreement between owners.

4.6. The civil enforcement provisions under s 64 of the LUPA Act were also considered but thought likely to be "*ineffectual*". That particular "*mechanism*", the Tribunal considered, "*relies upon active participation in the process…long after a development has commenced…[and] is fraught with the risk of becoming a forgotten obligation*". That risk was compounded in this case "*given the disclosed reluctance of the planning authority to be involved in the management of continuing landslip risk*".

5. CONCLUSION

5.1. It is clear that a Council's common law freedom to contract, or not contract, is not over-ridden by the powers given to the Tribunal to determine development applications.

5.2. Specifically, a Council may not be compelled to enter into a Part 5 Agreement.

5.3. Where there is a risk associated with land subject to a development application which requires an ongoing monitoring regime, including supervision by an unwilling Council, the planning system may not be able to provide a satisfactory method of enabling the development to proceed.

For further information in relation to the issues discussed in this paper, please contact either John Kirkwood or Roger Curtis.

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