

TASMANIAN PLANNING COMMISSION



Draft amendment 01-2024 to the State Planning Provisions

Hazards Codes

Report to the Minister under section 30M of the
Land Use Planning and Approvals Act 1993

November 2024

Executive Summary

In July 2024, the Minister for Planning, the Hon. Felix Ellis (the Minister), submitted draft amendment 01-2024 (the draft amendment) to the State Planning Provisions (SPPs) for the Commission's consideration and approved it for public exhibition.

As an interim measure, the Minister issued interim amendment 01-2024, which became effective on 23 October 2024.

The draft amendment applies to the SPPs, which apply to all effective Local Provision Schedules.

The draft amendment seeks to provide greater operational clarity for the application of the Coastal Erosion Hazard Code (C10.0), Coastal Inundation Hazard Code (C11.0), and Landslip Hazard Code (C15.0) (the Hazard Codes).

The Commission delegated the assessment of the draft amendment to a Panel. The draft amendment was exhibited from 12 August to 23 September 2024 with five submissions received. A hearing was held in Hobart on 31 October 2024.

Supporting documents provided by the Department of Premier and Cabinet (State Planning Office (SPO)) stated that the intent of the draft amendment was to provide greater operational clarity to the Hazard Codes by amending exemption clauses within each code.

The Commission considers that the draft amendment furthers the objectives as set out in Schedule 1 and the SPPs criteria of the *Land Use Planning and Approvals Act 1993* (the Act). This is because the draft amendment clarifies exemptions in the Hazard Codes to assist applicants and planning authorities with assessment of development and subdivision applications.

The Commission considers that the draft amendment, as exhibited, is in order. The Commission recommends that the Minister issue the draft amendment.

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1.0 Introduction

1.1 Background

In July 2024, the Minister for Planning, the Hon. Felix Ellis (the Minister) submitted draft amendment 01-2024 (the draft amendment) to the State Planning Provisions (SPPs) for the Commission's consideration and approved it for public exhibition under section 30G(3) of the *Land Use Planning and Approvals Act 1993* (the Act).

As an interim measure, the Minister issued the draft amendment as an interim SPPs amendment under section 30NB of the Act. The interim SPPs amendment became effective on 23 October 2024.

The interim SPPs amendment applies the provisions of the draft amendment at the same time it is being assessed. The interim measure is effective for a 12-month period or until the draft amendment takes effect, or the Minister revokes it, whichever occurs first.

The draft amendment applies to the SPPs, which apply to all effective Local Provision Schedules.

The draft amendment proposes to provide greater operational clarity for the application of the Coastal Erosion Hazard Code (C10.0), Coastal Inundation Hazard Code (C11.0), and Landslip Hazard Code (C15.0) (the Hazard Codes).

The Commission delegated the assessment of the draft amendment to a Panel. The draft amendment was exhibited from 12 August to 23 September 2024 with five submissions being received. A hearing was held in Hobart on 31 October 2024.

Supporting documents provided by the State Planning Office (SPO) stated that the intent of the draft amendment was to provide greater operational clarity to the Hazard Codes by amending exemption clauses within each code.

Interim SPPs amendments are a mechanism that can respond to planning matters in an immediate, uniform manner, with state-wide application. The draft amendment was proposed to provide greater operational clarity to the Hazard Codes following feedback received from planning authorities to the SPO.

The fundamental matter to be addressed in the assessment is whether the draft amendment provides operational clarity.

1.2 Assessment Process

1.2.1 Legislative power

Part 3 of the Act provides for the making, amending and review of the SPPs, and the issue of interim SPPs amendments. Section 30NB(4) states that an interim SPPs amendment may only be made if the Minister is satisfied that it urgently addresses a planning issue or matter, and is in the public interest.

Under section 30G of the Act, the Minister must approve the draft amendment for public exhibition, providing the Minister is satisfied that the draft amendment meets the SPPs criteria under section 15.

1.2.2 Delegation

On 5 August 2024, the Commission delegated relevant powers and functions under the Act and the *Tasmanian Planning Commission Act 1997* to Claire Hynes and Rohan Probert, jointly and severally, to assess the draft amendment, and report to the Minister with recommendations.

1.2.3 Public exhibition

The draft amendment was publicly exhibited from 12 August 2024 to 23 September 2024. A notice in the Mercury, Examiner and Advocate newspapers as an invitation to make representations was published on 10 and 21 August 2024. The Commission also wrote to planning authorities advising them of the public exhibition period.

A copy of the exhibited draft amendment can be found in Appendix 1.

Five representations were received during the exhibition period.

A list of representors can be found in Appendix 2.

1.2.4 Hearings

The Commission held a hearing into the representations at the Commission's office in Hobart on 31 October 2024.

1.2.5 Report to the Minister

The Commission must provide a report to the Minister on its findings and recommendations on whether the draft amendment should be issued (section 30N of the Act).

Section 30N(2) of the Act outlines the matters that should be contained in the Commission's report to the Minister, as follows.

30N(2) The report in relation to a draft amendment of the SPPs is to contain –

- (a) a copy of the draft amendment of the SPPs in the form in which the draft was available for viewing by the public in accordance with section 30K(6)(a); and
- (b) a summary of the representations, in relation to the draft amendment of the SPPs, that it has considered in accordance with section 30M(b) and (c); and
- (c) the Commission's opinion as to the merit of those representations; and
- (d) a summary of the information obtained at hearings, if any, in relation to the draft amendment of the SPPs; and
- (e) the recommendations of the Commission in relation to the draft amendment of the SPPs; and
- (f) a statement as to whether the Commission is satisfied that the draft amendment of the SPPs meets the SPPs criteria.

2.0 Assessment of the draft amendment

2.1 Representations

There were a range of issues raised in the representations, some of which expressed support for the draft amendment while others raised concerns.

One representation was received that raised no objection or issues with the draft amendment. This representation was received from Burnie City Council.

The representations from West Tamar, Sorell, Devonport City and Glenorchy City Councils advised that the draft amendment requires modification to clarify its intent.

The Commission notes these representations as part of its consideration of the draft amendment.

West Tamar Council, 20 September 2024

West Tamar Council submitted that there are some circumstances in the Coastal Erosion Hazard Code and Coastal Inundation Hazard Code where development in the Residential use class is prohibited due to the access being located within a high hazard band. It suggested that incorporating driveways into the exemption under clauses C10.4 and C11.4, or in the Acceptable Solutions or Performance Criteria of clauses C10.5.1, C11.5.1, C11.5.2, C10.5.4 and C10.6.3 could address this matter.

West Tamar Council also considers that modifications are required to the Landslip Hazard Code. These modifications include:

- adding an exemption to C15.4.1(d)(i) that specifies a particular geotechnical form (Form D);
- retaining and modifying current clause C15.4.1(h) to include a qualification to allow boundary adjustments in the medium-active and high landslip hazard bands to be exempt providing no works are required; and
- removing clause C15.4.1(d)(ii) c. and d.

Sorell Council, 23 September 2024

Sorell Council agreed that the existing expression 'requires authorisation' was ambiguous and difficult to apply and supported the aspects of the draft amendment that sought to clarify associated clauses with clearer wording.

However, Sorell Council raised concerns about the application of the definition for 'building work' as defined in the *Building Act 2016* and about the uncertainty associated with assessing whether excavation or filling was incidental to certain types of building work under subclause (c) of that definition.

Sorell Council submitted that additional provisions could be added to the Hazard Codes to assist with consideration of this matter. It noted that this may be outside the scope of this draft amendment.

It further considered that clarification such as guidelines would assist applicants and planning authorities in assessing applications against the Hazard Codes.

Devonport City Council, 24 September 2024

Devonport City Council expressed general support for the draft amendment but raised the issue of consistency between the planning and building systems. It submitted that under the SPPs, a dwelling could be approved in areas subject to the medium-active or high hazard bands, but then could not proceed under the Director's Determination - Landslip Hazard Areas.

Given what it considered to be a disparity between the planning and building systems, Devonport City Council encouraged discussions with the Consumer, Business and Occupational Services (CBOS) to determine the intention for areas within medium-active and high hazard bands and for amendments to be implemented accordingly.

Glenorchy City Council, 24 September 2024

Glenorchy City Council supported replacing the phrase '*requires authorisation*' with '*defined under the Building Act 2016*' but raised concerns about the meaning of '*prescribed work*'. It advised that guidance from CBOS on this matter for planners and customers would be useful.

Glenorchy City Council queried whether Resource Development and minor utilities should also be included in the low landslip hazard band at clause C15.4.1(d) i. a), as they are listed under the medium landslip hazard band.

2.2 Hearing

A hearing was held on 31 October 2024. The following parties were in attendance:

- Mr Sean McPhail, SPO
- Ms Claire Wolf, SPO
- Mr Luke Roberts, Department of Premier and Cabinet, Office of Security and Emergency Management
- Dr Claire Kain, Mineral Resources Tasmania
- Mr Brendon Bowes, CBOS
- Mr Shane Wells, Sorell Council
- Ms Tiffany Heys, West Tamar Council
- Mr Eric Smith, West Tamar Council
- Ms Erin Kelly, West Tamar Council

The Commission and parties discussed the operation and content of the draft amendment, and the merit of the representations. The information from the hearing and the Commission's consideration on these matters are outlined below.

2.2.1 Incidental and other prescribed works

In its representation, Sorell Council considered that there is uncertainty among planners in relation to the exemption provisions of the Hazard Codes. Particularly,

this comment related to the uncertainty associated with assessing whether excavation or filling was ‘incidental’ to certain types of building work under subclause (c) of the ‘*building work*’ definition within the *Building Act 2016*. Sorell Council provided the example of a driveway, which could be considered as work that is incidental to a dwelling but that is not considered ‘building work’ unless there is a structural element to it. It stated that filling for vehicle access could create risks that should be regulated by either the planning or building systems.

The SPO provided a response to the representations dated 23 October 2024. In this response, the SPO stated:

... land excavation or filling that is ‘incidental’ to the activity of erecting, re-erecting, constructing, altering, repairing, underpinning, demolishing, removing, or adding to a building is exempt from assessment under the codes, because it is incidental to a building activity and therefore assessed under the building system.

In its response, the SPO stated that in the Building Regulations 2016, regulation 24 lists a range of work that is prescribed as building work. This assists planning authorities in considering work classified as ‘other prescribed works’.

At the hearing, Ms Claire Wolf of the SPO also explained that ‘prescribed’ was used as it is identified in the *Acts Interpretation Act 1931* and in this case relates to the *Building Regulations 2016*.

Mr Brendon Bowes of CBOS stated that if work may increase risk to buildings or occupants, it should go through the proper processes before proceeding.

At the hearing, Mr Shane Wells of Sorell Council considered that some guidance documents that identify examples of incidental work would be helpful for planners when assessing development applications against the Hazard Codes.

Ms Wolf advised that this draft amendment is part of several ‘Action Groups’ being undertaken by the SPO to the planning system. Ms Wolf advised that guidance documents could be considered during Action Group 6, which is for non-statutory guidance measures.

In its representation, Glenorchy City Council also requested guidance on the phrase ‘other prescribed works’.

Commission findings

The Commission recognises that there is some uncertainty among planning authorities regarding determining whether proposed works are incidental to the building activities listed in subclauses (a) and (b) of the ‘building work’ definition within the *Building Act 2016*. However, the Commission understands that this matter raises issues beyond the Terms of Reference of this draft amendment and that the SPO indicated these matters will be addressed in another Action Group of the SPO by potentially another separate amendment and preparation of non-statutory guidance.

The Commission is satisfied that in the meantime, regulation 24 of the *Building Regulations 2016* provides some guidance for planning authorities. It notes that CBOS will work with the SPO to develop guidance information and fact sheets to provide clarification on what is ‘incidental’, what is ‘building work’ and ‘other prescribed works’.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

2.2.2 Director's Determination - Landslip Hazard Areas

In the representation from Devonport City Council, it considered that there is a discrepancy between the SPPs and the Director's Determination - Landslip Hazard Areas. It submitted that the SPPs allow for dwellings to be constructed in the medium-active or high hazard bands, while the Director's Determination does not.

In its response to representations, the SPO considered that the SPPs and Director's Determination are intended to complement each other. It stated that:

These [SPPs] requirements set a very high threshold for buildings and works for dwellings in a medium-active hazard band and may determine that a planning permit is not granted in the high hazard band.

The Directors [sic] Determination operates so that some dwellings in the medium-active hazard band and some minor buildings or works in the high hazard band may be granted a building permit subject to the relevant assessments through a landslip hazard report and design criteria being met.

At the hearing, Mr Bowes considered that this may be a misunderstanding from Devonport City Council, as while there are heavier restrictions for development in the high hazard band, the Director's Determination does provide an approval pathway for development within the medium-active hazard band and high hazard band (but significant restrictions) provided it was supported by suitably qualified technical expertise.

Commission findings

The Commission notes the representation from Devonport City Council. The Commission agrees with Mr Bowes that it appears to be a misunderstanding of the Director's Determination.

Furthermore, the Commission finds that including the same provisions in both the planning and building systems is unnecessary and causes duplication in the assessment process.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

2.2.3 Relationship with Use Classes

West Tamar Council submitted a representation that raised concerns about the use class prescribed to driveways. It advised that driveways associated with dwellings are categorised in the Residential use class, which is prohibited in the high hazard band of the Coastal Erosion Hazard Code and Coastal Inundation Hazard Code.

West Tamar Council considered that driveways should be exempt under these codes to ensure that residential development is not prohibited at the site.

In its response to the representations, the SPO advised that applying an exemption for such driveways is not supported. The SPO stated:

It is considered appropriate to assess the suitability of driveways in areas at risk from coastal erosion or inundation to determine whether it:

- will cause or contribute to the occurrence of coastal erosion or inundation on the site or neighbouring land; and
- can provide appropriate access to the site having regard to the risk associated with the coastal hazard.

In addition, the SPO stated that adding an exemption for driveways in the Hazard Codes is beyond the Terms of Reference for the draft amendment, which intends to clarify the operation of the existing exemptions rather than include additional ones.

At the hearing, Mr Luke Roberts of Department of Premier and Cabinet, Office of Security and Emergency Management considered that there are two concerns relating to access that make the request from West Tamar Council difficult to implement. These are that driveway works can cause or contribute to erosion on the site and be eroded as the land recedes. The second is the risk that the dwelling would not have access as there is an ongoing possibility that the access could be compromised.

Commission findings

The Commission agrees with the SPO that the request from West Tamar Council is not appropriate as an exemption in the Hazard Codes. The Commission also considers that the request is outside the scope of this draft amendment.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

2.2.4 Boundary adjustments

In its representation, West Tamar Council considered that the modification to remove the boundary adjustment exemption from the medium-active and high landslip hazard bands was onerous and unnecessary. It stated that this was because boundary adjustments with no works should not require a landslip assessment.

In its response to the representations, the SPO stated that including boundary adjustments as an exemption in the medium-active and high landslip hazard bands is not supported for the following reasons:

- the existing exemption for subdivision involving no works in the medium-active and high hazard bands was identified as an error in the SPPs;
- the medium-active and high hazard bands are active landslips that pose the greatest risks. As such, considering applications for subdivision in these areas against the Landslip Hazard Code is appropriate. This is because the subdivision may facilitate additional development rights; and

- the Acceptable Solution at clause C15.7.1 provides a permitted pathway for subdivision beyond minor boundary adjustments. This permitted pathway does not rely on an assessment or exemption in the Landslip Hazard Code.

The matter was discussed at the hearing where Mr Roberts advised that the intention is to avoid the creation of additional development rights that may be unable to be fulfilled due to limitations arising from landslip hazard on the land, and this is not known without assessment of the landslip impacts and risks.

Commission findings

The Commission accepts the SPO's submission that the Landslip Hazard Code incorrectly exempts boundary adjustment of land in the medium-active and high landslip hazard bands without appropriate consideration of the landslip hazards.

The Commission agrees with the comments from the SPO and Mr Roberts that there is a need to assess applications for boundary adjustments against the Landslip Hazard Code due to the potential for additional development rights which require consideration of landslip risk and impacts.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

2.2.5 Use and development exempt from Hazard Codes

In the representation from West Tamar Council, it considered that the development listed under C15.4.1(d)(ii) c. and d. are not required as they are covered by e.

In its response to representations, the SPO considered that:

It is understood that the specific references to development for Resource Development and Utilities are included to clarify what kinds of development and works associated with the listed exempt Use Classes at clause C15.4.1(c) are intended to be exempt. It is accepted that subclause c. may not be strictly necessary however it is considered that continuing the existing approach will aid interpretation of the code and clarify its intent in conjunction with the variety of references to specific uses in the qualifications for these Use Classes in zone or other Use Tables. It will also be consistent with the approach towards development for Resource Development in other codes.

No other concerns regarding this matter were raised at the hearing.

Commission findings

The Commission accepts the SPO's submission and is satisfied that the proposed drafting aims to improve clarification of the provision and is consistent with the approach in SPPs.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

3.0 SPPs criteria

Section 15(2) of the Act states:

The SPPs criteria to be met by a relevant planning instrument are that the instrument –

- (a) only contains provisions that the SPPs may contain under section 14; and
- (b) furthers the objectives set out in Schedule 1; and
- (c) is consistent with each State Policy; and
- (ca) is consistent with the TPPs that are in force before the instrument is made; and
- (d) has regard to the safety requirements set out in the standards prescribed under the Gas Safety Act 2019.

In the explanatory notes prepared by the SPO, it considered that the draft amendment meets the SPPs. It stated that the draft amendment furthers the objectives of the Act as:

... the three hazard codes subject to the draft amendment ensure ‘... a pleasant, efficient and safe working, living and recreational environment for all Tasmanians and visitors to Tasmania’ (Part 2(f)) and provides ‘... a planning framework which fully considers land capability’ (Part 2(i)). This further provides for the fair, orderly and sustainable use and development of the land (Part 1(b)). (p. 16)

The SPO considered that as the draft amendment improves the operation of the Coastal Erosion, Coastal Inundation and Landslip Hazard codes, consistency with the *State Coastal Policy 1996* is met.

The SPO advised that the draft amendment would only have a potential impact on major gas infrastructure for development arising from the draft amendment if it were located inside a declared gas pipeline corridor. It advised that these development applications would be referred to the relevant gas pipeline licensee under the *Gas Safety Act 2019*.

Commission findings

The Commission has considered the draft amendment against the SPPs criteria under section 15 of the Act. The Commission considers that the draft amendment only contains provisions that the SPPs may contain under section 14 of the Act.

The Commission agrees with the SPO that the draft amendment would further the objectives of the Act.

The Commission has considered the draft amendment against each State Policy and considers that it is consistent with each State Policy.

There are no TPPs in force and the Commission is satisfied that there are adequate measures to have regard to the safety requirements of the *Gas Safety Act 2019*.

Recommendation

The Commission recommends that the Minister approves the draft amendment as exhibited.

4.0 Conclusion

After considering the representations and information obtained at the hearings, the Commission is satisfied that the draft amendment is in order.

The Commission recommends that the Minister issues draft amendment 01-2024 of the SPPs as exhibited, in accordance with section 30P of the Act.

Appendices

Appendix 1 - Exhibited draft amendment

Appendix 2 - Representations received

Name, position	Company
Manieka Reeve, Executive Assistant to Director Operations	Burnie City Council
Kristen Desmond, Chief Executive Officer	West Tamar Council
Shane Wells, Manager Planning	Sorell Council
Matthew Atkins, General Manager	Devonport City Council
Lyndal Byrne, Coordinator Strategic Planning	Glenorchy City Council