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PERFORMANCE BASED PLANNING: CAN IT ACHIEVE SUSTAINABLE OUTCOMES IN TASMANIA?

by Jess Feehely

In recent years, there has been a move away from traditional, prescriptive planning towards performance based (or 'outcome oriented') planning schemes.

The principal attraction of performance based planning is its apparent flexibility and capacity to deliver innovative development outcomes that are better suited to the characteristics of a particular site. However, performance based planning schemes have also been criticised for reducing certainty and increasing complexity and costs for developers, local governments and representors.

This article looks at the rationale for, and the challenges introduced by, performance based planning. The article also examines the experience with performance based schemes in Tasmania and other jurisdictions and comments on the work needed to be done to facilitate sustainable outcomes through performance based schemes.

What is performance based planning?

The traditional prescriptive approach to planning schemes designates various zones and identifies land uses that are and are not allowed in each zone. These approaches generally prescribe objective limits on development, such as maximum building heights, minimum setbacks or number of parking spaces. Arguably, decisions based on zoning and universally applicable restrictions provide developers, the community and local government with certainty and consistency.

However, the approach has been criticised for being overly-prescriptive and promoting "slavish adherence to rigid zoning categorisations" and restrictions rather than a commitment to better planning outcomes.¹ For example, a housing estate that attempted to encourage residents to use public transport by reducing available parking could not be approved if it did not comply with parking code

requirements, regardless of the positive justification for the non-compliance.

Baker et al also note that the certainty offered by prescriptive approaches is often undermined by the capacity to overcome barriers to development through rezoning, specified departures and creative permit conditions. As a result, prescriptive planning is often not strategic but rather "a continuing process of ad hoc administrative decision."²

The idea of performance based planning emerged in the 1950s and became increasingly popular in the 70s and 80s as a way of addressing potential environmental impacts of development.³ 'Pure' performance based planning schemes, such as those introduced in Queensland by the *Integrated Planning Act 1997*, do not prohibit any development. An application can be made for virtually any use or development of land and this is then assessed in accordance with qualitative policies, principles and provisions.

Advocates of performance based planning argued that it was superior to prescriptive approaches because it identified desirable planning outcomes and allowed development which could demonstrate it would achieve those outcomes. That is, a performance based approach was not guided strictly by land uses, but by the potential impacts of those uses. Low Choy and Welsh observe:

Whereas conventional 'command and control' planning based on zoning attempts to regulate development through controlling the use of land, performance based planning attempts to do so by regulating the actual physical characteristics and functions (performance) of the land use activity measured against predetermined standards.⁴

More commonly, planning schemes in Australia adopt a 'hybrid' approach. Hybrid models include elements of traditional planning through designation of permitted, discretionary and prohibited developments and acceptable solutions; and

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elements of performance based planning in the way of performance criteria. This is the approach adopted in many Tasmanian municipalities, including Break O'Day, Kingborough and Waratah-Wynyard.

Performance based approaches generally comprise the following components:

1. Criteria or statements describing the desired end result. These can be articulated as objectives, performance goals, "desired environmental outcomes" or "desired future character statements".

2. Statements of how the desired outcomes can be achieved. These agreed examples of how development can meet the stated planning goals are often referred to as "Acceptable Solutions".

In general, if all relevant acceptable solutions in the scheme are satisfied, a development will be allowed and no discretion exists to refuse the application.

3. Defined standards to measure the acceptable limits of impacts to ensure the desired end result. These development standards are often articulated as "performance criteria".

In Tasmania, the Common Key Elements template for Planning Schemes is designed to accommodate both prescriptive and performance based approaches.⁵ Councils can therefore adopt a performance-based approach by describing both Acceptable Solutions and Performance Criteria, or a more prescriptive approach by electing not to provide performance criteria for any issue.

Benefits of performance based planning

Dr England explains the performance based regime introduced by the *Integrated Planning Act 1997* in Queensland as

a planning system that would be clear as to the outcomes sought, but flexible as to the means by which those outcomes would be achieved. In this sense, planning schemes would be clear and certain, but also responsive – capable of taking into account the local context and accepting of diverse solutions.⁶

For these reasons, performance based planning has been described as a "wonderfully seductive land use and control technique".⁷ Similarly, Wright describes the change from traditional activity-based regulation to outcome-based planning regulation as "revolutionary" and notes the opportunities this approach presents for landowners and local governments.⁸

The main advantages advocated for performance based planning are that it is more strategic and flexible – allowing broad sustainability goals to be achieved in a variety of innovative ways.

Difficulties of performance based planning

We have found that performance based planning faces significant challenges in implementing *flexibility* when many actors (this includes developers and the community) call for *predictability*. Second, *consistency* of application within the context of the community plan forced prescriptive zones and guidelines to be imposed on open performance standards to group land uses. Third, the *complexity* of developing, applying, and maintaining performance standards has resulted in the process becoming more time-consuming and costly than the systems that they replaced.⁹

Baker et al's conclusion above indicates that, despite its promise, performance based planning has faced considerable challenges in practice. This article focuses on two fundamental difficulties: lack of certainty and resource intensity.

Lack of Certainty

The counter argument to the principal benefit of performance based planning, flexibility, is lack of certainty as to what development is acceptable. Some Australian critics argue that the broad discretions introduced by performance based planning have "lowered the standard" of regulation and increased the risks of poor standard, or poorly integrated, development.¹⁰

The Chairman of the Tribunal has also been critical of performance based schemes in Tasmania. He has commented that such schemes are inherently difficult to adjudicate on as they do not provide appropriate levels of certainty, which is inconsistent with both legal principles and the RMPS objectives.¹¹

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Drafting problems

One of the most significant difficulties relates to drafting clear and rigorous performance criteria to reflect the strategic aims of the Scheme. A government-funded review of Queensland's planning schemes concluded that most codes setting performance standards in the schemes were deficient.¹² In particular, the review noted that codes were not vertically integrated with strategic statements in the Scheme ('desired environmental outcomes'), lacked specificity and were not comprehensive enough to provide performance outcomes. The review also found considerable internal inconsistencies within and between codes.

These findings are consistent with the experience in other jurisdictions. In the United States, community uncertainty resulting from the lack of clear guidance as to acceptable land uses, and the difficulty of applying complex performance criteria has led many jurisdictions to revert to more traditional, generic planning schemes or to hybrid models.¹³

In Tasmania, the final report into *Planning Directive 1* noted the difficulties with adopting a performance based approach, including the rigour required in drafting appropriate and internally consistent standards and the difficulty of giving effect to strategy that matches services infrastructure.¹⁴

The Legislative Council Select Committee report into planning schemes in Tasmania also expressed concern about inconsistent application of Scheme standards and concluded that 'performance based planning schemes inevitably lead to different interpretation by individual planners.'¹⁵ Again, this is a common experience across jurisdictions implementing performance based planning.

In several reviews of judicial interpretation of performance based planning schemes in Queensland¹⁶, Philippa England has identified two differing assessment styles: the flexible approach and the restrained approach.

The flexible approach

This interpretive style gives greatest weight to the overarching strategic statements in the Scheme, such as intent and objectives. England argues that

this 'purposive' approach can be appropriate for outcome-based schemes which are often internally inconsistent and cannot cover *all* possibilities. In those situations, reference to more strategic statements will allow better planning outcomes than selective reliance on contradictory performance criteria.¹⁷

An example of this approach is the decision in *Bundaberg City Council v Burnett Shire Council*. In that case, the Court considered a decision to refuse a municipal landfill on the basis that it was inconsistent with the objective of protecting good quality agricultural land. Skoien SJDC weighed up this objective against other objectives in the Scheme relating to "community well being" and determined that the development was compatible with the "overall thrust" of the Scheme. His Honour was satisfied that there was a need for a landfill in the region and that the proposal was consistent with the goals promoting growth and health in the community, despite non-compliance with the particular provisions in relation to protection of agricultural land.¹⁸

Similarly, in *Luke v Maroochy Shire Council & Watpac Developments*, the Court adopted a "balanced, but not unduly pedantic" approach to an assessment of a proposed shopping complex in Coolum. In approving the development, Wilson SC DCJ held:

While instances of possible conflict with particular and very specific parts of the Planning Scheme can be argued, the analysis of the relevant provisions undertaken above shows that any suggestion of conflict evaporates when the plan is considered in its entirety.¹⁹

England notes that a flexible approach is most in keeping with the aims of performance-based planning as it gives preference to the 'best' planning outcome and allows the planning authority to deal with unanticipated developments and inconsistencies within the Scheme.

However, she also notes that a flexible approach is highly discretionary and may undermine the integrity of a planning scheme if compliance with detailed provisions is insufficient to demonstrate compliance with the Scheme. Equally, the discretionary nature of this approach may increase the risk that inappropriate development may be approved

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provided an applicant can 'sell' the development to the Council based on general strategic goals.²⁰

The restrained approach

This more literal approach recognises that in well-crafted performance based schemes overarching strategic goals should be explicitly reflected in lower-order detailed provisions (such as performance criteria). In the restrained approach, the decision maker must determine whether the proposal meets all the performance criteria and, if so, it should be approved. If it does not, the application should be refused. Any discretion is to be explicit in the planning scheme itself and there is no residual discretion.

In respect of this approach, England notes:

In theory, [Integrated Planning Act] schemes are coherent, hierarchical documents in which more detailed levels are premised on and consistent with higher order, strategic levels. It is not open to developers to demonstrate consistency only with the higher order levels of the planning scheme in contravention of the lower level, micro-detail of the scheme because the planning scheme should have already contemplated and determined how the higher order objectives will be met. Any acceptable alternative methods of meeting the higher order objectives should already be catered for by the planning scheme itself... To allow discretion to developers outside of what is contemplated by the planning scheme is simply to undermine the integrity of that document.²¹

In the restrained approach, discretion is exercised by the planning authority in relation to whether performance criteria are met, not whether the criteria need to be met in order to justify a development. For example, in *Mantle Pty Ltd v Maroochy Shire Council*, a group of local residents successfully appealed against approval of a tourist facility on the basis that it was out of character with the density and predominantly residential uses of the area. Robin J noted that there was some strategic basis for the proposal in the Scheme's overall support for tourism related development. However, His Honour held that compatibility with the strategic plan was not sufficient to justify conflict with the more detailed aspects of the planning scheme.²²

In *Purcell Family v Gold Coast City Council*²³, the Court considered a proposal for a 7 storey building. The relevant performance criteria provided for a maximum of seven storeys, however the strategic plan for the area stated that the maximum height was not to be achieved in most instances. Quirk DCJ held that the development clearly satisfied the Performance Criteria and was in keeping with the predominant residential character of the area. Therefore there was no basis to refuse the development, regardless of the strategic statement.

The principal advantages of adopting a restrained approach are that decisions are more consistent, easier to understand and respect the attempt to translate strategic goals into specific performance criteria. However, the more literal approach arguably stifles innovation (that is, developers will stick to designs that clearly meet the criteria rather than being adventurous).²⁴

The strongest criticism of the restrained approach is that it assumes that the planning scheme gets it right. Many analysts have noted that this is frequently not the case in practice:²⁵

[U]nfortunately, the reality is somewhat less idyllic. Under the [Integrated Planning Act], the trend has been towards longer, more complex planning schemes. Instead of providing comprehensive guidance, the result is often undue complexity, enlarged scope for discretion and, inevitably, continuing scope for internal conflicts.²⁶

Approaches to interpretation in Tasmania

In *Richard Von Witt v. Hobart City Council*²⁷, the Supreme Court held that general provisions such as the statement of objectives in a scheme could not be used to override a discretion specifically given by a schedule of the scheme. The Court was satisfied that allowing general objectives to prevail over specific provisions would rob many of the specific provisions of the schedule of any effect at all. Justice Wright held (at [16]):

The discretions that are imposed in the Council to consider and permit such a use cannot be set at nought by statements of general intent and purpose.

The Tribunal has adopted a similar approach to the interpretation of many schemes in Tasmania and held that no residual discretion can be drawn from

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scheme objectives or the general RMPS objectives where specific provisions of the Scheme are satisfied.²⁸ For example, in *Aziz-Elali v Hobart City Council*²⁹, the Tribunal held that the Council did not have a general discretion to refuse an application for a commercial building on the basis of height where the building did not exceed the maximum allowable height under the Scheme.

However, the Tribunal has also held that *Von Witt* does not strictly limit the issues that may be considered in exercising discretion. In *Woolworths Pty Ltd v Hobart City Council*³⁰, the developer argued that Council's (and therefore the Tribunal's) exercise of discretion was limited to four specific discretions. The Tribunal was not convinced that such a narrow approach was appropriate and held:

39... It would be wrong to, in the words of Wright J in *Von Witt*, use "generalised statements of Principles, Objectives and Desired Future Character [to exclude] subsequent specific provisions contained in any Schedule". But this does not mean that because the development and use is discretionary that regard is only had to the identified discretions in the particular schedules. It simply means that where those discretions arise their terms can not be overridden by using "generalised statements of Principles, Objectives and Desired Future Character [to exclude] subsequent specific provisions contained in any Schedule".

40. It follows that, consistent with the authorities referred to above and the requirements of Clause 2.3.2 the Tribunal will have regard to (a) the Principles, (b) the Desired Future Character of the Precinct in which the development is situated, (c) the provisions of any relevant Schedule and/or Code, (e) to [sic] furthering the Objectives of Schedule 1 of the Act; and (f) the Zone Objectives. The practical effect of this is to broaden the ambit of the matters for inquiry.

However, for performance based planning schemes, the Tribunal has tended to adopt a wider approach. For example, in *WJ Manning and The Friends of Four Mile Creek Bushcare Group Inc v Break O'Day Council and Morris Nunn & Associates obo R Bejah*³¹, the Tribunal considered an appeal against a decision to permit a house, studio and garage in the Environment Protection Zone at Four Mile Creek. The development relied on several performance criteria and was therefore discretionary.

The lawyer for the developer, citing *Von Witt*, argued for a restrained approach. He argued that, under a performance-based planning scheme, a development must be approved if it can demonstrate compliance with relevant performance criteria; refusing the development despite this compliance would be fundamentally inconsistent with the performance-based nature of the Scheme. In contrast, the lawyer for the appellant argued for a more flexible approach in which Council retained a general discretion to refuse an application even where a development achieved relevant Scheme standards.

The Tribunal held that the reasoning in *Von Witt*, which related to a traditional planning scheme, could be distinguished from a case involving a performance based scheme. The Tribunal considered clause 3.3.2 of the *Break O'Day Planning Scheme 1996*, which provided:

- a use of development was discretionary if it relied wholly or partly on performance criteria;
- Council may approve or refuse a discretionary use or development.

The Tribunal noted that the *Break O'Day Planning Scheme* had previously provided that demonstrated compliance with particular standards was deemed to demonstrate compliance with the Scheme intent and objectives. Those provisions were specifically removed from the Scheme by the Resource Planning and Development Commission as part of recent amendments. In considering the deletion, the RPDC stated:

First, in principle, it would be a fallacy to assume that the zone and code standards are significantly comprehensive, measureable and robust to deliver compliance with and satisfaction of the Planning Scheme or zone intent and objectives.³²

The Tribunal was therefore satisfied that clause 3.3.2 now gave Council an overriding discretion to approve or refuse a use or development where it is demonstrated that the development does not comply with any relevant Scheme provisions, including general objectives:

It is the Tribunal's view that the performance criteria constitute a measure by which the corresponding

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objectives can be subjectively assessed but do not prohibit consideration of other relevant considerations contained in the Scheme or other application legislation, policies or guidelines.³³

The relevant clause is also consistent with clause 4.11.2 of the Common Key Elements Template, which provides that Council has discretion to approve or refuse a discretionary use or development.

Ultimately, the Tribunal determined that the proposal was consistent with the Scheme objectives and allowed the development to proceed.

In *East Coast Surveying Pty Ltd obo K Hateley v Break O'Day Council*, the Tribunal held that compliance with relevant performance criteria meant that it had no obligation to refuse the development, but retained a discretion to refuse the development after considering relevant Scheme objectives:

[I]n this planning scheme compliance with the performance criteria gives rise to the capacity to exercise the discretion, it does not result in an automatic favourable exercise of the discretion.³⁴

In that case, though the building could be modified through conditions to meet the performance criteria, the Tribunal considered that the proximity to the high water mark and the public foreshore, high risk of flooding and the added permanence of a new building gave rise to an "unsatisfactory situation when assessed against the objectives of the Planning Scheme".³⁵

These cases demonstrate that the Tribunal may be more willing to adopt a flexible approach where schemes are explicitly performance-based. This is also consistent with the report on Planning Directive 1, which notes that the general RMPS objectives must be addressed by a development application:

Whilst the Act objectives are required to have been embodied in to the planning scheme and satisfied through the drafting of the planning scheme, the objectives remain as 'umbrella obligations' on permit applications. In practice the objectives of the Act should only need to be called up on a permit application if some matter arises that is outside the capacity of the planning scheme to address or the planning scheme were to allow a use or development that is shown to not further the Act's objectives.³⁶

Resource Intensity

A further challenge associated with drafting difficulties and inconsistent application is the expense for all parties involved in the implementation of performance based planning schemes. In particular:

- Planning authorities incur additional expenses in drafting rigorous and comprehensive Scheme standards, and in assessing developments against these standards;
- Developers incur expenses in obtaining the more extensive amount of information required to address performance criteria;
- Representors are often put in a position of having to obtain evidence to challenge developments that rely on performance criteria;
- The emphasis on discretion arguably makes more planning authority decisions susceptible to appeal.

Baseline information requirements

The effectiveness of a performance based system is dependent on sufficient information, including robust baseline data and a rigorous assessment of the potential impacts of proposed development. This requires ongoing resources to be committed to ensuring reliable information is maintained. As Wright notes:

an effects based approach is not only a more sophisticated basis of development control requiring the input of other professionals, it also represents a continuing duty to keep pace with professional and scientific knowledge. Standards cannot be treated as gospel, but must be regularly updated.³⁷

Wright also argues that effects-based planning works best on greenfields sites, where the impacts are more readily identifiable. In his view, performance-based assessment can be difficult in urban and peri urban areas where cumulative and synergistic impacts are harder to assess.³⁸

In an effort to comprehensively 'cover all bases' and outline information requirements, many Schemes have become complex and overly detailed. Such documents are often difficult to implement and are susceptible to internal conflicts.³⁹ Recent criticism of

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the draft Hobart Planning Scheme reflect concern that an emphasis on detailed design moves away from the achievement of more strategic sustainability goals and will require considerable resources to implement.⁴⁰

Assessment costs

Baker et al identified considerable discontent amongst local and regional governments in New Zealand regarding the level of resources necessary to support outcome-based development assessments under the *Resource Management Act*. This additional burden had particularly significant impacts on small councils. Where a council did not have the skills within their staff to address all relevant issues (e.g. planning, environmental, cultural and economic impacts), Councils were required to contract out the assessment to consultants at considerable cost:

In the longer term, a broader skill base would be necessary amongst council technical staff to undertake comprehensive and legally robust development control.⁴¹

Even where resources were available, Baker et al noted that the additional administrative burden of implementing an outcome-based assessment often took its toll and led to considerable turnover in planning staff.⁴²

This also reflects the experience of many local councils in Tasmania, where staff are not adequately experienced or resourced to assess complex development applications. This can lead to a cautious approach which involves requesting copious additional information from the developer. Many developers have been critical of the range of information requested by Councils.

Equally, lack of resources can lead to a situation in which a Council places undue reliance on assurances presented in the development application, without effective critical analysis of the impacts of the proposed use or development. Arguably, this approach results in more representors commencing appeal proceedings to challenge information provided by the developer, at considerable expense to all parties.

Ultimately, performance based schemes impose an obligation on the developer to demonstrate compliance with scheme standards. In *Artas Architects obo Boat Harbour Beach Blue Waters Pty Ltd v Waratah Wynyard Council*, the Tribunal considered performance criteria in relation to parking spaces. The Tribunal noted that the Scheme required proposals to demonstrate compliance with Scheme standards and held that where compliance was mandatory, each relevant standard should be the subject of expert evidence:

It is worth reiterating that it is the Tribunal that must make the decision, not the expert. When the Tribunal is required to be satisfied of something under a statute or planning scheme, it becomes necessary that those matters be addressed by evidence. This is fundamental. It is the Tribunal which must be satisfied, not the expert witness.

The evidence in this case establishes a clear, unambiguous and substantial non-compliance with the Acceptable Solution and offers no proper basis for a conclusion that the applicable Performance Criteria have been met or can be met.

The Tribunal has no option but to conclude that in respect of this aspect the development application fails to meet the Performance Criteria and as such, having regard to the mandatory nature of the matter (ref. Clause 17.2.4), the development application must fail.⁴³

This decision reflects the impost on parties involved in a development application to rigorously assess the proposal against the relevant performance criteria.

Can performance based planning work?

Following a comprehensive review of international experience with performance-based planning, Baker et al conclude that:

There is little robust international evidence to assess the general claim in the policy literature that performance-based assessment is inherently more efficient than traditional prescriptive approaches.⁴⁴

As the Tribunal Chairman has commented, the lack of certainty attendant upon most performance based schemes threatens orderly and sustainable development and can compromise effective public participation in planning decisions.⁴⁵

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However, in theory performance based planning remains appealing. The critical issues that need to be addressed to facilitate a successful performance-based scheme relate to clear drafting and dedication of sufficient resources to support its implementation.

In terms of drafting, Baker et al consider that assessment codes need to be:

Comprehensive (for example, embracing all the development standards), simple (not too difficult to administer), and technically worded (use legally defensible technical measurement).⁴⁶

The translation of broad strategic goals into clear performance standards remains a significant challenge. It is important for schemes to clearly distinguish between objectives and statements of how those objectives can be realised.

It is also preferable for schemes to include clear, measurable statements of objectives rather than to attempt to comprehensively outline *all* requirements. The scheme should also make clear which documents are part of the Scheme and must be observed, and which documents provide guidance only. Where reliance is placed on detailed overlays and comprehensive design guidelines, implementation becomes more complex and may discourage designs which attempt to meet the criteria in an innovative way.

Clearer policy direction is also needed at a regional and State level to guide local planning objectives. The successful implementation of regional planning initiatives and the development of State Policies on relevant issues such as climate change, transport infrastructure, vegetation clearance and affordable housing will be a major milestone towards more effective performance-based planning.

Wherever possible, the scope of any discretion should be clearly articulated in the scheme standard itself. That is, where a use or development is discretionary, some clear criteria should be specified to guide the exercise of discretion. For example, a desired outcome for a "low density living environmental predominantly comprising detached houses up to two storeys" does not provide criteria as to when exceptions to the standard will be

appropriate. Guidance should be given as to when a move away from the dominant character of the area would be acceptable. Clear guidance on the exercise of discretion should eliminate the need to resort to general objectives and policy statements.

As more performance-based schemes are adopted, the Tribunal may move towards a more restrained approach to interpreting such schemes. However, until schemes are clearly drafted to avoid inconsistencies, there is some merit in adopting a more flexible approach to interpretation.

As discussed above, it is critical that sufficient resources are committed to enable Councils to:

- collate baseline data;
- develop Scheme standards that effectively manage impacts on natural resources;
- analyse information presented by developers and representors.

The seduction of performance based planning remains strong. However, the experience in Tasmania and other jurisdictions indicates that considerable work must be done before performance based planning will achieve consistent, broadly acceptable and sustainable outcomes.

ENDNOTES

¹ England, P. 2006. "Flexibility or restraint? Interpreting Queensland's performance based planning schemes". 11 *Local Government Law Journal* 209: 209

² Baker, D, N. Sipe and B Gleeson. 2006. "Performance-Based Planning: Perspectives from the United States, Australia and New Zealand". 25(4) *Journal of Planning Education and Research* 396: 398 (<http://jpe.sagepub.com/cgi/content/abstract/25/4/396>). See also, Kendig, L. 1980. *Performance Zoning*: 281 (quoted in Baker et al at 398).

³ Low Choy, D. and S. Welsh. 2004. "Enhancing IPA outcomes through adaptive management: a call to get real" 10 *Local Government Law Journal* 83: 83.

⁴ Low Choy, D. and S. Welsh at 84.

⁵ Department of Justice. 2001. *Simplifying Planning Schemes: A Discussion Paper About Common Key Elements for Planning*

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Schemes. Note, the earlier Model Framework for Planning Schemes (DPIWE, 2000) was more explicitly supportive of performance-based planning approaches.

⁶ England, P. 2006. "IPA Planning Schemes: Is there a difference?" 23 *Environmental Planning Law Journal* 81: 97.

⁷ Jaffe, M. 1993. "Performance Zoning: A reassessment." 45(3) *Land Use Law* 3: 9

⁸ Wright, I. 2001. "Plan Making and Development Assessment under Queensland's Integrated Planning Act – Implications for the Public and Private Sectors". 7 *Local Government Law Journal* 78: 80

⁹ Baker et al, n2 above at 408

¹⁰ Baker et al, n2 above at 404.

¹¹ Simon Cooper. "Planning is Law" Lecture delivered to the Planning Institute of Australia Tasmania Branch CPD Lunchtime Series, 31 July 2009.

¹² C&B Group. 2003. *IPA Plan-making Consultancy (Summary Report)*. Queensland Department of Local Government and Planning. p1

¹³ Baker et al, n2 above at 399.

¹⁴ Resource Planning and Development Commission. 2003. *Report on the Assessment of Draft Planning Directive No 1 – the Format and Structure of Planning Schemes*.

¹⁵ Legislative Council Select Committee. 2006. *Planning Schemes – Final Report*. Available at <http://www.parliament.tas.gov.au/ctee/lcselect-PlanningSchemes.htm>

¹⁶ See England, P. 2005. "Judicial Interpretation of Planning Schemes under the Integrated Planning Act 1997 (Qld)". 22 *Environmental Planning Law Journal* 281; and England, P. n1 above. Please note, in Queensland planning schemes are not able to explicitly prohibit any development.

¹⁷ England, P, n1 above at 211 and England, P, n16 above at 289.

¹⁸ [2004] QPEC 004 at [72]

¹⁹ [2003] QPEC 005 at [41]

²⁰ England, P, n1 above at 216

²¹ England, P, n16 above at 288

²² [2002] QPEC 047 at [51]

²³ [2004] QPEC 009

²⁴ England, P, n1 above at 216-217

²⁵ See, for example, Wright, I, n8 above at 84 and Baker et al, n2 above.

²⁶ England, P, n1 above at 217

²⁷ Unreported decision, Supreme Court of Tasmania No. A4/1995. This case has been cited with approval in *Nettlefold v. Hobart City Council* [2001] TASSC 120 and *DP & LJ Kruska Pty Ltd v. Janet Peacock & Ors*

²⁸ See, for example, *National Trust of Australia v Hobart City Council* [2003] TASRMPAT 310 at [26]

²⁹ [2009] TASRMPAT 191

³⁰ [2006] TASRMPAT 194

³¹ [2006] TASRMPAT 26

³² *Break O'Day Planning Scheme 1996* [2005] TASRPDComm 6 (30 March 2005)

³³ *WJ Manning and The Friends of Four Mile Creek Bushcare Group Inc v Break O'Day Council and Morris Nunn & Associates obo R Bejah* [2006] TASRMPAT 26 at [19]

³⁴ [2005] TASRMPAT 290 at [39]

³⁵ [2005] TASRMPAT 290 at [40]

³⁶ Resource Planning and Development Commission. 2003. *Report on the Assessment of Draft Planning Directive No 1 – the Format and Structure of Planning Schemes*. p11

³⁷ Wright, I, n8 above at 85

³⁸ Wright, I, n8 above at 86

³⁹ See Wright, n8 above at 84 and England, n1 above at 217

⁴⁰ See comments of Bob Graham in "In The Too Hard Basket", *Sunday Tasmanian*. McKay, D. 23 August 2009, p7-8

⁴¹ Baker et al, n2 above at 402

⁴² Baker et al, n2 above at 406

⁴³ [2008] TASRMPAT 241 at paragraphs [52] – [54]

⁴⁴ Baker et al, n2 above at 397

⁴⁵ Simon Cooper. "Planning is Law" Lecture delivered to the Planning Institute of Australia Tasmania Branch CPD Lunchtime Series, 31 July 2009.

⁴⁶ Baker et al, n2 above at 401