ACT CIVIL & ADMINISTRATIVE TRIBUNAL

VILLAGE NO 22 PTY LIMITED ACN 620 656 260 v ACT PLANNING AND LAND AUTHORITY & ANOR (Administrative Review) [2021] ACAT 43

AT 7/2020

Catchwords: **ADMINISTRATIVE REVIEW** – planning and land development – application by proponent developer to review primary decision of planning and land authority to refuse an application to subdivide a single block into 258 single dwelling blocks – consideration of Tribunal's jurisdiction to review – consideration of Estate Development Code (EDC) – meaning of 'desired character' in criterion C1 a) of EDC meaning of 'significant vegetation' in criterion C1 e) of the EDC – whether criterion C50 of the EDC applies to an integrated development housing parcel – consideration of "any realistic alternative" for the purposes of section 119(2) of the *Planning and Development Act 2007* – decision under review confirmed

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 s 22A
Community Title Act 2001 ss 30, 35
Environmental Planning and Assessment Act 1979 (NSW) s 112
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Human Rights Act 2004 ss 21, 30
Legislation Act 2001 ss 126, 127, 130, 140
Nature Conservation Act 2014
Planning and Development Act 2007 ss 48, 50, 54, 55, 80, 81, 82, 83, 93, 94, 96, 112, 115, 119, 120, 121, 124A, 139, 144, 148, 149, 150, 151, 162, 407, 408A, 409, Schedule 1, Dictionary
Tree Protection Act 2005 ss 8, 68, 80, 81, 82, 83

Subordinate Legislation cited:
ACT Tree Protection (Guidelines for Tree Management Plans) Determination 2010
Community Facility Zone Development Code
Draft Variation No 306
Estate Development Code

Guidelines for the preparation of Estate Development Plans, May 2009
North Weston Concept Plan NI 2008-27
Planning and Development (Plan Variation No 281) Notice 2008 NI 2008-352
Planning and Development (Plan Variation No 6) Notice 2013
Residential Zones – Single Dwelling Housing Development Code
Residential Zones – Multi-Unit Housing Development Code
Tree Protection (Appeal Criteria) Determination 2006 (No 2)
Weston Precinct Map and Code NI 2008-27

Cases cited:

Amarso Pty Ltd v ACT Planning and Land Authority [2012] ACAT 9
Anthony Worrall v Commissioner for Housing in the ACT [2001] ACTSC 72
Anthony Hordern and Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia [1932] HCA 9
Australian Iron & Steel Ltd v Hoogland [1962] HCA 13
Bailey v The Forestry Commission of New South Wales (1989) 67 LGRA 200
Baptist Community Services v ACT Planning and Land Authority and Ors [2015] ACTCA 3
Baptist Community Services v ACT Planning and Land Authority and Anor [2013] ACTSC 103
Baptist Community Services Pty Ltd – NSW & ACT v ACT Planning and Land Authority & Ors [2016] ACAT 150
Christies Sands Pty Ltd v City of Tea Tree Gully [1975] 11 SASR 255
Collector of Customs v Agfa-Geveat Ltd [1996] HCA 36
Colonial Sugar Refining Co Ltd v Valuer-General (1939) 5 The Valuer 472
Deakin Residents Association Inc v ACT Planning and Land Authority & Anor [2015] ACAT 37
DJ v RHS and JF [2004] ACTSC 12
Glass v ACTPLA [2019] ACTSC 201
Glass v ACT Planning and Land Authority and Anor [2016] ACAT 96
Houssein v Under Secretary, Department of Industrial Relations and Technology Sydney (NSW) [1982] HCA 2
Javelin Projects Pty Ltd v ACT Planning and Land Authority & Anor [2017] ACAT 87
Lee v Guo [2017] ACAT 60
Mason v ACT Planning & Land Authority and Ors [2009] ACAT 7
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom [2006] HCA 50
Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority [2017] ACAT 44

Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority [2018] ACAT 95
Oberoi v ACT Planning and Land Authority [2015] ACAT 65
Re Wilcox; Ex Parte Venture Industries Pty Ltd and Ors (1986) 66 FCR 511
Rudder v ACT Planning and Land Authority & Ors [2010] ACAT 24
Russia Lutvey & Sons Pty Ltd v Valuer-General (1980) 7 QLCR 1
Sladic & Anor v ACT Planning and Land Authority; Charter Hall Retail Reit & Ors v ACT Planning and Land Authority [2018] ACAT 38
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34
Triguboff v Valuer-General [2009] NSWLEC 9
Weston v Snowy River Shire Council (1980) 41 LGRA 1
Whitby v Garlett and Others [2000] FCA 245
Worrall v Commissioner for Housing for the Australian Capital Territory [2002] FCAFC 127

List of Texts/Papers cited:

ACT Proponents Guide for Environmental Significance Opinions (2017)
Alan Hyam, *The Law Affecting Valuation of Land in Australia* (The Federation Press, 6th edition, 2020)
Australian Concise Oxford Dictionary (Oxford University Press ANZ, 1st edition, 1987)
Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019)
Macquarie Dictionary (Macquarie Dictionary Publishers Pty Ltd, 5th edition, 2009)
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Tribunal: Presidential Member G McCarthy
Senior Member R Pegrum

Date of Orders: 21 May 2021
Date of Reasons for Decision: 21 May 2021

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 7/2020

BETWEEN:

VILLAGE NO 22 PTY LIMITED ACN 620 656 260
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

WESTON CREEK COMMUNITY COUNCIL INC
Party Joined

TRIBUNAL: Presidential Member G McCarthy
Senior Member R Pegrum

DATE: 21 May 2021

ORDER

The Tribunal orders that:

1. The decision under review is confirmed.

……..
Presidential Member G McCarthy
For and on behalf of the Tribunal

Contents

REASONS FOR DECISION

1. The applicant, Village No 22 Pty Ltd (**Village**), is the Crown lessee of Block 1 Section 82 Weston (**the site**).

2. The site is approximately 5.859ha in area with frontages of approximately 126m to Streeton Drive to the west, approximately 750m to Heysen Street to the south and approximately 750m to Unwin Street to the north. The eastern boundary of the site is approximately 230m long and adjoins land leased to the Australian National University. The site slopes downwards by approximately 22m from the south-eastern corner of the site to the north-western corner of the site. The slope is predominantly in the eastern half of the site.[1]

3. The site was previously occupied by the Australian Federal Police Training College (**the College**). The buildings and structures that comprised the College were constructed in 1978. The College operated on the site from 1980 until 2016 after which the site was sold to NEB Holdings Pty Ltd.

4. By contract dated 23 November 2017,[2] NEB Holdings on-sold the site to Village for $32.21 million. Between exchange of contracts on 23 November 2017 and settlement on 20 June 2018, the College buildings and structures were demolished and removed.[3] The site is presently a 'brownfields' site, consequent upon concrete tiering, foundations and uncontrolled fill that remain on the site particularly on the eastern half of the site.

5. The site is zoned RZ4, Medium Density Residential Zone, under the Territory Plan. Among the permissible uses are multi-unit housing and single dwelling housing (where not exempt development or code track assessable).[4]

6. Land in the vicinity of the site is predominantly zoned RZ1 Suburban Zone. Nearby are two school campuses and a public park known as Fetherston Gardens, which was previously part of the School of Horticulture in the Canberra Institute of Technology.

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[1] Witness statement of Kenneth Ineson dated 14 July 2020 at [25], Exhibit A2
[2] Witness statement of Kenneth Ineson dated 14 July 2020 at attachment B, Exhibit A2
[3] Witness statement of Kenneth Ineson dated 14 July 2020 at [31]
[4] T documents at pages 521-522, Exhibit R1

7. By development application (**DA**) submitted on 11 October 2019,[5] Canberra Town Planning Pty Ltd (**CTP**) applied for approval of an estate development plan (**EDP**) comprising the following proposed works on the site:

   (a) Creation of 261 single dwelling blocks, seven communal blocks, two internal road/verge blocks and five communal open space blocks.

   (b) Works to provide service connections.

   (c) Removal of a number of on-site trees.

   (d) Bulk earthworks and site grading to facilitate the creation of the proposed blocks and roads.

   (e) Internal roads and connections to existing surrounding road network.

   (f) Bioretention pond to the north-west of the site, including within adjoining unleased land (subject to a current direct sale application).

   (g) Shared paths and landscaping (on-site).

   (h) Ground signage.

   (i) Shared paths within adjacent road reserves driveway crossings to Unwin Street.[6]

8. In the course of this proceeding, Village revised the proposed number of townhouses from 261 to 258,[7] however, the design remains the same. It depicts approximately 126 single dwelling blocks around the perimeter of the site and seven banks of townhouse blocks in seven parallel rows in the middle of the site. Each bank would comprise between 13 and 17 single dwelling townhouse blocks.

9. Vehicular access to the site would be by means of two access roads: one on the north side of the block and another on the south side. These access roads lead to an internal road network giving vehicular access to the rear end of each

[5] T documents at pages 457-2072, Exhibit R1

[6] T documents at pages 459, Exhibit R1

[7] See applicant's closing submissions in chief dated 24 November 2020, annexure B at page 3, Revision F of the Block Compliance Plan. The reference to a total of 247 blocks in the 'complaint' column of the Block Compliance Plan appears to be a mathematical error. The total is 246

townhouse. The seven banks of townhouses are separated by an internal access road or a park area which also provide access through the site.

10. The current version of the Block Compliance Plan, supported by the Block Layout Design and site drawings, shows that the great majority of the proposed seven internal banks of single townhouse blocks would be comprised of townhouse blocks each with an area of 96m².[8] The architectural drawings show that these single townhouse blocks would be 4.4m wide and 22m long.[9] The majority of the banks of townhouse blocks on the perimeter of the site would be comprised of townhouse blocks each with an area of 116 m²-117m², although some are of varying sizes from 136m² through to 197m². Two blocks, blocks jp and jq, in the south-west corner of the site will now be 307m² and 278m², respectively, following Village's decision towards the close of the hearing to convert four blocks into two blocks. Nine blocks in the north east corner of the site would each be 312m². Eleven blocks on the ends of the seven internal banks of townhouse blocks would each have an area of between 72m² and 127m².

11. The internal roads will, in most places, be approximately 5m wide. The three park areas that divide six banks of townhouses will be approximately 17m wide and 75m long, with concrete footpaths down each side of each park area.

12. The Block Compliance Plan also depicts 64 visitor carparking spaces in five areas across the site, with each area providing between seven and 23 car spaces.

13. Regarding the intention to remove "a number of on-site trees", Village (as we understand it) removed all the trees that it was able to remove without approval, and then sought (in its DA application) approval to remove the remaining trees on the site that are regulated trees[10] under the *Tree Protection Act 2005* (**the Tree Act**). These trees are predominantly if not entirely native trees, particularly different species of eucalypt. The trees are, in the main, approximately 40 years old. During this proceeding, Village revised its proposal such that four trees on the perimeter of the site in the south-west corner (trees 40-43) would be retained

[8] Applicant's closing submissions in chief dated 24 November 2020, annexure B at page 59

[9] See witness statement of Chris Millman dated 14 July 2020, drawings prepared by Cox Architecture for the Type 1, Type 2 and Type 2A designs, Exhibit A5

[10] For the meaning of a 'regulated tree', see *Tree Protection Act 2005*, section 10

and the balance would be removed as part of Village's bulk earthworks and re-grading work across the whole site.

14. CTP lodged the DA in the merit track, being an assessment track for development proposals that can be assessed using the rules and criteria in the codes that apply to the proposal.[11]

15. On 16 October 2019, consequent upon the lodgement of the DA in the merit track, the ACT Planning and Land Authority (**the Authority**) referred the DA to the entities prescribed under section 26(3) of the *Planning and Development Regulation 2008* (**the P and D Regulation**). Those entities included Transport Canberra and City Services (**TCCS**), Access Canberra, the Climate Change and Sustainability Division of the Environment, Planning and Sustainable Development Directorate (**CCSD**) and the Conservator of Flora and Fauna (**the Conservator**). None of them supported approval of the DA.[12]

16. The Weston Creek Community Council Inc. (**the Community Council**) and several adjacent residents also objected to the proposed development.[13] The Community Council became the party joined in this proceeding.

17. On 9 December 2019, CTP lodged an amendment to the proposed works[14] pursuant to section 144 of the *Planning and Development Act 2007* (**the P and D Act**). The amended DA entailed changes to the proposed works, and further information, to address the concerns of entities that did support the proposal. By this means, and by the provision of further amendments in the course of this proceeding,[15] the objections from the entities that objected were resolved save for the objections of the Conservator.

18. The Conservator continued to object on the grounds that the amended DA proposed the removal of approximately 68 medium quality trees that are (or, in

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[11] *Planning and Development Act 2007*, section 112(2)(b)
[12] T documents at pages 371-372, 376-377, 386-389 and 399-402, Exhibit R1
[13] T documents at pages 336-370, Exhibit R1
[14] T documents at pages 166-335, Exhibit R1
[15] See for example, amendments to the design of proposed townhouses to provide mobility access for disabled persons, consequent upon Eric Martin's report dated 16 September 2020 (Exhibit A 16), and Village's agreement to construct a brick wall facing Streeton Drive to mitigate traffic noise and provide greater privacy for proposed townhouses facing Streeton Drive.

some cases, were) regulated trees under the Tree Act and where the criteria for their removal under the Tree Act were not met.[16]

19. On 7 February 2020, the Authority refused the amended DA (**the Decision**).[17]

20. By application dated 28 February 2020, Canberra Estates Consortium No 67 Pty Ltd (**Consortium No 67**) applied to the Tribunal for review of the Decision.[18] In its application, Consortium No 67 submitted that the Decision is wrong in fact and law and that the Tribunal should set aside the Decision and substitute a decision to approve the amended DA.

21. At hearing, Village (substituted for Consortium No 67 as the applicant) submitted that the Tribunal should also approve proposed rules and criteria to be added to the Weston Precinct Code to facilitate Village's development intentions and to allow the intended built form designs to progress as exempt development.[19]

22. The proposed rules and criteria are consistent with Village's planning intentions and, if inserted in the Weston Precinct Code, would prevail to the extent of their inconsistency with existing rules and/or criteria in other codes, particularly the Single Dwelling Housing Development Code (**the Single Dwelling Code**).[20]

23. Village submitted that upon inserting these additional provisions, the Tribunal could and should (then) substitute a decision to approve the amended DA on the basis that it would (then) be in accordance with the Territory Plan.

Summary of decision

24. The amended DA must not be approved if it is inconsistent with the Territory Plan.[21] That is so, irrespective of whether approval can also be refused as a matter of discretion under section 119(2) and/or section 120 of the P and D Act.

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[16] T documents at pages 116-117, Exhibit R1
[17] T documents at pages 8-20, Exhibit R1
[18] T documents at page 4-7, Exhibit R1
[19] Applicant's closing submissions in chief dated 24 November 2020, annexure B at pages 13-15; Applicant's closing submissions in chief dated 24 November 2020 at [366]
[20] *Planning and Development Act 2007*, section 115
[21] *Planning and Development Act 2007*, sections 50 and 119(1)(a)

25. For the reasons given, the Tribunal was not satisfied that the amended DA or any variant offered during the hearing achieved compliance with C1 a), C1 e), C50 or C51 of the Estate Development Code (**the EDC**), meaning it is inconsistent with the Territory Plan. Such extensive non-compliance arose, in our view, from Village's approach towards development of the site. Its focus was on a design that would, from a construction viewpoint, maximise development on the site. To that end, it considered different potential designs. Having settled on its preferred design, it then turned its attention to finding interpretations of the relevant provisions of the Territory Plan that would enable approval of its preferred design. In our view, there was no real attempt to engage with the substantive reasons for why others objected to the proposal or why it was refused. This was despite acceptance that a medium density development can and should proceed. As the Community Council stated:

> *6. Council and the community remain of the view that a plan that doesn't consist of row upon row of parallel town houses but has diversity, useable open space, some diversity of dwelling type and acknowledges the interface with the surround areas would be welcomed by the community.*[22]

26. Village seemed to give very little initial consideration to what is permissible under the Territory Plan, save for zoning, and then formulating a design by reference to what is permissible under that regulatory framework.

27. We gave consideration to making amendments to the design under section 144 of the P and D Act that would overcome the non-compliance, but concluded that this was neither appropriate nor practical. Too many subjective choices about amendments need to be made. It is Village's prerogative to make them. Accordingly, we concluded that the decision under review must be confirmed.

28. In these circumstances, it was not necessary to consider the discretionary factors in section 120 of the P and D Act or whether the Tribunal has jurisdiction to consider them. However, in deference to the extensive submissions that were made on the question, we have briefly explained why (in our view) the Tribunal had jurisdiction to do so.

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[22] Letter dated 26 August 2020 from the Weston Creek Community Council, page 2

29. In our view, the so-called 'gateway approach' to interpreting the limits on the Tribunal's jurisdiction under section 121(2) of the P and D Act, as explained in *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor*[23] (***Noah's Ark No 1***), should be preferred to the 'code compliance approach', as explained in *Sladic & Anor v ACT Planning and Land Authority & Anor*[24] (***Sladic***).

30. Also, in our view, the ambit of the Tribunal's jurisdiction to review does not vary, depending on whether it is considering a proponent's application challenging a decision to refuse a development application (as in this case) or a third party's application to approve a development application with conditions.

31. Arising from COVID-19 social distancing requirements and Village's wish for more people to attend the hearing each day than could be accommodated in the Tribunal's largest hearing room (18 people), the hearing was conducted in a conference room at a commercial hotel, save for the final two days (10 and 11 December 2020) when the Tribunal heard final submissions at its own premises.

32. Despite prior preparation at the hotel, a room festooned with recording microphones and a technician in attendance throughout the hearing, Epiq Global, which holds itself out as having the expertise and capacity to record court and tribunal proceedings, produced a transcript that bordered on farcical. Almost every page of the transcript of the hearing conducted on 21, 22, 26 and 27 October 2020 contains multiple entries stating "inaudible" and the time period for which no audible recording of what was said could be obtained. Mr Erskine SC, appearing for Village, said he has "been in litigation since 1982" and had "never seen a transcript as useless as this".[25]

33. Fortunately, the defective transcript did not preclude a proper determination of Village's application. That arose, in part, from the commendable co-operation that occurred between all the parties and in part because the material facts were not in dispute. Our conclusion that the amended DA or any offered variant to it is

[23] [2017] ACAT 44
[24] [2018] ACAT 38
[25] Transcript of proceedings 9 December 2020, page 844, lines 29-31

inconsistent with the above-mentioned criteria of the EDC arose primarily if not entirely from our interpretations of those criteria and of section 119(2) of the P and D Act.

34. The "one area"[26] where there was disagreement about the transcript concerned whether Dr Coyne, who gave evidence in the Authority's case, agreed that numbered tree 158 need not be retained. However, where we accept the statement from counsel for the Authority that Dr Coyne did not take issue with the Conservator's position conveyed at the conclusion of the hearing that tree 158 did not need to be retained,[27] [28]and counsel for Village's description of that statement as "small mercies",[29] we concluded that any controversy about the transcript did not need to be resolved.

Acronyms

35. Conscious of the length of this decision and the quantity of acronyms used to limit its length, to assist with readability we note the acronyms used in alphabetical order:

    (a) **ASIC** – Australian Securities Investments Commission.

    (b) **CCSD** – Climate Change and Sustainability Division of the Environment, Planning and Sustainable Development Directorate.

    (c) **CTP** – Canberra Town Planning Pty Ltd.

    (d) **DA** – development application.

    (e) **EDC** – Estate Development Code.

    (f) **IHDP** – integrated housing development parcel.

    (g) **Multi-Unit Code** – Multi-Unit Housing Development Code.

    (h) **NC Act** – *Nature Conservation Act 2014*.

    (i) **P and D Act** – *Planning and Development Act 2007*.

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[26] Transcript of proceedings 9 December 2020, page 883, line 18
[27] Transcript of proceedings 9 December 2020, page 888, line 33
[28] We construed this to mean that removal of tree 158 would not be inconsistent with the Conservator's advice
[29] Transcript of proceedings 29 October 2020, page 812, line 44

(j) **P and D Regulation** – *Planning and Development Regulation 2008*.

(k) **PPOS** – principal private open space.

(l) **RZD Code** – Residential Zones Development Code.

(m) **Single Dwelling Code** – Single Dwelling Housing Development Code.

(n) **Tree Act** – *Tree Protection Act 2005*.

(o) **TPU** – Tree Protection Unit.

(p) **WP Code** –Weston Precinct Code.

(q) **WP Map** – Western Precinct Map.

Standing

36. Section 408A of the P and D Act states:

> *An eligible entity for a reviewable decision may apply to the ACAT for review of the decision.*

37. An 'eligible entity for a reviewable decision' is defined in section 407 of the P and D Act as follows:

> *"**eligible entity**", for a reviewable decision—*
>
> *(a) means an entity mentioned in schedule 1, column 3 for the decision; and*
>
> *(b) for a reviewable decision in relation to a development application or development approval if the applicant is not—*
>
> *(i) the lessee—includes the lessee; and*
>
> *(ii) for a land sublease, the sublessee—includes the sublessee.*

38. A 'reviewable decision' is defined in section 407 paragraph (a) to mean:

> *…a decision mentioned in schedule 1, column 2, made by a decision-maker*.[30]

39. Column 2 lists different kinds of decisions made under the P and D Act. In this case, the Decision is a decision under section 162 of the P and D Act "to refuse to approve the application", that being one of two kinds of decisions described in item 3 of schedule 1. It follows that the Decision is a 'reviewable decision'.

[30] Section 407(b) provides an exception which is not relevant for present purposes

40. For the purposes of paragraph (a) of the definition of 'eligible entity', for a decision of a kind defined in item 3 to Schedule 1 (meaning, in this case, the Decision) the entity mentioned in item 3, column 3, is the "applicant for development approval". In this case, the applicant for development approval was CTP. However, it did not apply to the Tribunal for review of the Decision.

41. For the purposes of paragraph (b)(i) of the definition of "eligible entity", for a decision of a kind defined in item 3 to Schedule 1, Village (as the lessee of the site) is also an eligible entity. However, it too did not apply for review of the Decision.

42. Consortium No 67 did not have standing to apply for a review of the Decision. This circumstance led Consortium No 67 to apply, by application dated 20 March 2020, for Village to be substituted for it as the applicant in this proceeding. In support, CTP relied on a statutory declaration made on 20 March 2020 by Mr Ineson, the general manager of The Village Building Co Limited (**VBC**), who stated:

> *For accounting and risk management purposes, each new project acquired by VBC is purchased in the name of a fresh wholly-owned subsidiary company or a company held and controlled by VBC.*

43. Mr Ineson explained that he "made a mistake", when reading the records of VBC, by nominating Consortium No 67 as the applicant rather than Village. Mr Ineson stated (and we accept) that Consortium No 67 is a wholly owned subsidiary of VBC, as is Village.

44. The error was understandable. Records of the Australian Securities Investments Commission (**ASIC**) show that Village is but one of many subsidiary companies of VBC, sequentially numbered from Village No 1 Pty Limited through to Village No 32 Pty Limited, among other subsidiary companies. Village, together with Village No 23, Village No 24, Village No 25, Village No 26 and Village No 27 were all registered on 25 July 2017.

45. In response to Consortium No 67's application, on 30 March 2020 the Tribunal made an order by consent to "correct" the name of the applicant from Consortium

No 67 to Village. On the same day, the Tribunal ordered that the Community Council be added as a party joined.

46. In our view, despite being made by consent, the order was beyond power. The order did not "correct" the name of the applicant. It substituted one legal entity as the applicant for another, namely Village for Consortium No 67. Nothing in Chapter 13 of the P and D Act empowered Consortium No 67 to apply for review of the Authority's decision or empowered the Tribunal to substitute Village for Consortium No 67 or to extend time for Village to apply for review. Section 409(3) of the P and D Act prohibited an extension of time for anyone to make an application for review, save for CTP which was the "applicant for the development application". CTP did not apply for review.

47. In *Australian Iron & Steel Ltd v Hoogland*, the High Court per Windeyer J said:

> *Statutory provisions imposing time limits on actions take various forms and have different purposes. Some are for preventing stale claims, some for establishing possessory titles, some for the protection of public authorities, some in aid of executors and administrators. Some are incidents of rights created by statutes. Some prevent actions being brought after, some before, a lapse of time. It may be that there is a distinction between Statutes of Limitation, properly so called, which operate to prevent the enforcement of rights of action independently existing, and limitation provisions annexed by a statute to a right newly created by it. In the latter case the limitation does not bar an existing cause of action. It imposes a condition which is of the essence of a new right.*[31]

48. If we are correct, the application for review should have been dismissed at the outset. Nevertheless, in circumstances where views may differ, where the issue has not been previously raised and where the outcome of the application is the same, we concluded that we should continue to consider the application on its merits.

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[31] *Australian Iron & Steel Ltd v Hoogland* [1962] HCA 13 at [5]. See also, by way of example, *DJ v RHS and JF* [2004] ACTSC 12; *Whitby v Garlett and Others* [2000] FCA 245 at [18]

Jurisdiction

49. The Tribunal's power to review government decisions is not large. It can review decisions only where empowered to do so and to the extent it is empowered to do so.[32]

50. For the purposes of the P and D Act, 'reviewable decision' is defined in section 407 to mean "a decision mentioned in schedule 1, column 2, made by a decision-maker".[33] Schedule 1, column 2, lists different kinds of decisions that are amenable to Tribunal review. Each decision is referenced, in column 1, to an "item" number. Item 3, column 2, describes two kinds of decisions and "the extent" to which the Tribunal can review either of them as follows:

> *decision under s 162 to approve a development application in the merit track subject to a condition or to refuse to approve the application,* ***to the extent that*** *the development proposal—*
>
> *(a) is subject to a rule and does not comply with the rule; or*
>
> *(b) is not subject to a rule* [emphasis added].

51. Regarding paragraphs (a) and (b), debate has been occurring for more than a decade about the limits on the Tribunal's jurisdiction arising from the materially similar words in sections 121(2)(a) and (b) of the P and D Act. Section 121(2) states:

> *(2) If there is a right of review under chapter 13 in relation to a decision to approve an application for development approval for a development proposal in the merit track, the right of review is only in relation to the decision, or part of the decision, to the extent that—*
>
> *(a) the development proposal is subject to a rule and does not comply with the rule; or*
>
> *(b) no rule applies to the development proposal.*

52. Village submitted that the limits on the Tribunal's jurisdiction under section 121(2)(a) and (b) to review a decision to approve an application for development approval for a development proposal in the merit track do not apply to an appeal brought by a "proponent" of a decision to refuse. In support, Village relied on

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[32] *ACT Civil and Administrative Tribunal Act 2008*, section 22A

[33] The definition is subject to an exception, namely where the Minister decides that considering the application would not be in the public interest. That does not apply in this case.

explanatory statements[34] and comments in *Hansard*.[35] We agree. There is no need to consult extraneous materials. Section 121(2) is unambiguous to this extent.

53. Village submitted that item 3 should be construed consistently. We disagree. Such a conclusion overlooks "the present basis for interpreting legislation"[36] stated by the High Court in *SZTAL v Minister for Immigration and Border Protection*[37] (***SZTAL***). In that case, Kiefel CJ, Nettle and Gordon JJ said:

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.*[38]

54. In this case, we did not need to consider context or refer to extraneous materials in order to ascertain the two kinds of decisions described in item 3, column 2. The words are clear. Item 3 concerns:

    (i) a decision under section 162 to approve a development application in the merit track subject to a condition, to the extent stated in paragraphs (a) and (b); and

    (ii) a decision under section 162 to refuse a development application in the merit track, to the extent stated in paragraphs (a) and (b).

55. Whatever may be the meaning of the words of limitation in paragraphs (a) and (b) in item 3, column 2, the words apply equally to both kinds of decisions.

56. We were not persuaded by Village's submission that if the legislature had intended to limit a proponent's right of review in the same way that it limited third-party rights of review, it would have said so. The limitations already exist in item 3, meaning the legislature has already said so. If the legislature had wanted

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[34] Explanatory Statement 2006 and the Supplementary Explanatory Statement 2007 (see Amendment 30, referred to on page 13 of the Supplementary Explanatory Statement) to the *Planning and Development Bill 2006*. See also the Exposure Draft Planning and Development Bill 2006, Report 22, October 2006, pages 77-78.

[35] *Hansard*, 14 December 2006, pages 4141-4142

[36] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019) paragraph 2.1

[37] [2017] HCA 34

[38] *SZTAL* at [14] per Kiefel CJ, Nettle and Gordon JJ. See also Gageler J at [37]–[39]

to remove those limitations from item 3, it would have done so. Instead, it left the limitations in place.

57. Village also submitted that a limitation on a proponent's right of review "runs foul"[39] of sections 21 and 31 of the *Human Rights Act 2004*. The submission was somewhat perplexing. If that were true for a proponent's right of review, we struggled to see why it would not be equally true for a third party's right of review – which would compel a reader to disregard section 121(2)(a) and (b) and the jurisdictional limits on the Tribunal's power to review the kinds of decisions stated in item 3, column 2, entirely. Nothing in sections 21 and 31 of the *Human Rights Act 2004* suggests such an outcome.

58. The second and more difficult issue is the meaning of the limiting words. This issue has been the subject of many decisions of the Supreme Court and of the Tribunal. Varying interpretations have been expressed.

59. We begin with the words "is subject to a rule and does not comply with the rule" in item 3, column 2, replicated in section 121(2)(a).

60. Uncertainty exists about the extent to which the Tribunal can further consider an issue or point where it is the subject of a rule and is found to be compliant with the rule. In *Glass v ACT Planning and Land Authority and Anor*[40] (***Glass***) the Tribunal concluded that it cannot do so.[41] The Tribunal adopted that reasoning in relation to tree protection. On that subject, rule 21 of the Community Facility Zone Development Code required the Authority to refer the development proposal to the Conservator if the development was "likely to cause damage to or removal of any protected trees". The Authority did so. Where there was compliance with the rule, the Tribunal found (pursuant to section 121(2)(a) of the P and D Act) that it had "no jurisdiction to review the Conservator's response or the Authority's subsequent actions or decisions."[42]

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[39] Transcript of proceedings 19 October 2020, page 189, line 44

[40] [2016] ACAT 96. It did so after reviewing the earlier decisions of the Tribunal in *Mason v ACT Planning & Land Authority and Ors* [2009] ACAT 7 and, on appeal, *Rudder v ACT Planning and Land Authority & Ors* [2010] ACAT 24.

[41] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 96 at [44]

[42] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 96 at [233]

61. On appeal to the Supreme Court, in *Glass v ACTPLA*,[43] Penfold J commented that the Tribunal's observation about lack of jurisdiction to review subsequent actions or decisions "may go too far".[44] Her Honour noted that sometimes it may be necessary to identify, exactly, what is the "point" or "issue". Regarding rule 21, is it the referral of the development proposal to the Conservator or is it tree protection generally? Referring to an earlier Tribunal decision in *Deakin Residents Association Inc v ACT Planning and Land Authority & Anor*,[45] her Honour said:

> *The decision in Deakin …might suggest that the "point" or "issue" will be narrowly defined so as not to narrow ACAT's review powers unduly. On the other hand, the real significance of Deakin may be not that the subject of a rule should be narrowly defined but that the significance of a rule and whether it has been complied with* [will] *disappear as soon as ACTPLA purports to exercise a discretion conferred separately from the rule (such as under s 119(2)).*[46]

62. We infer from her Honour's opinion, given without the benefit of argument, that the Tribunal's observation in *Glass* about lack of jurisdiction went too far. We agree with her Honour's viewpoint.

63. The issue did not arise in *Glass* because the Conservator was taken to have approved removal of the regulated trees.[47] However, it would have been a different situation had the Conservator advised within the prescribed 15 working days that it opposed the development on the basis that it would require removal of nominated regulated trees. Had that occurred, as it has in this case, the Authority would have needed to consider, among other things, whether there was "any realistic alternative" to removal of the trees and the Tribunal on review would have had jurisdiction to consider that question. In other words, the Authority's referral of the development to the Conservator, under rule 21, would not have defeated the Tribunal's jurisdiction to consider the issue.

64. The parties in this case agreed, hence the extensive debate (discussed below) about whether the regulated trees on the site can and should be removed pursuant

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[43] *Glass v ACTPLA* [2019] ACTSC 201
[44] *Glass v ACTPLA* [2019] ACTSC 201 at [101]
[45] [2015] ACAT 37
[46] *Glass v ACTPLA* [2019] ACTSC 201 at [100]
[47] *Glass v ACTPLA* [2019] ACTSC 201 at [20]-[24]

to section 119(2) notwithstanding that their removal would be inconsistent with the advice of the Conservator. No party suggested that the Tribunal lacked jurisdiction to determine that question.

65. Greater uncertainty exists about the meaning of the words "is not subject to a rule" in item 3, column 2 materially replicated in section 121(2)(b).

66. At present, the debate has distilled to two propositions:

    (a) On review, the Tribunal can consider only whether a development proposal complies with all applicable rules and/or criteria in applicable codes – the so-called 'code compliance approach', as explained in *Sladic*.

    (b) On review, if the Tribunal finds that a development proposal complies with all applicable rules and/or criteria, it can then consider the matters in section 120 in the same way that the Authority was required to do – the so-called 'gateway approach'. This term was coined in *Javelin Projects Pty Ltd v ACT Planning and Land Authority & Anor*[48] (***Javelin***), and explained in *Noah's Ark No 1*.[49]

67. Where we have concluded that the development proposal in this case does not comply with four applicable criteria in the EDC, it was unnecessary to consider whether the Tribunal would have had jurisdiction also to consider the matters listed in section 120 had we found code compliance. However, in light of the extensive submissions made, we feel obliged to comment on which construction of paragraph (b) in item 3 – and inferentially section 121(2)(b) – should be preferred.

68. In this proceeding, Village submitted that *Sladic* was "wrongly decided".[50] It did so on several grounds.

69. First, Village referred to the Supreme Court's decision in *Baptist Community Services v ACT Planning and Land Authority and Anor*[51] and the Court of Appeal's decision (on further appeal) in *Baptist Community Services v ACT*

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[48] [2017] ACAT 87 at [117]
[49] at [230]
[50] Applicant's submissions on jurisdiction, undated, at [92]
[51] [2013] ACTSC 103

Planning and Land Authority and Ors[52] (***Baptist Care***) where the central issue was the manner in which the Tribunal should consider "the objectives for the zone" as the "decision-maker" is required to do under section 120(a) of the P and D Act. Village observed that everything the Courts wrote would be redundant if, as held in *Sladic*, the Tribunal lacks jurisdiction to consider zone objectives or any other factor in section 120. Village submitted it "defies belief" that none of the parties in the proceedings before the Supreme Court and/or before the Court of Appeal "noticed" that the Tribunal lacked jurisdiction.

70. Second, Village noted that in *Noah's Ark No 1* the Tribunal came to a "significantly different conclusion" which is not "so obviously wrong that it cannot be ignored."

71. Third, Village put forward some "hypotheticals"[53] to highlight what it described as unexpected results that would or could occur if the Authority can rely on section 120 of the P and D Act when deciding to refuse a development application or to approve a development application subject to a condition, but the Tribunal does not have jurisdiction to review that reliance.

72. For example, if the Authority refused a development or imposed conditions by reference only to its consideration of a factor or factors in section 120, no appeal right to the Tribunal would lie.

73. As another example, if a development application is refused by reference to inconsistency with a relevant code (per section 119(1)(a) of the P and D Act) and with reliance on a factor in section 120, there would be no purpose in challenging the finding under section 119 because the refusal would remain in place under section 120, even if the Authority's original finding regarding inconsistency with the relevant code affected the basis for the Authority's finding by reference to section 120.

74. Village adopted as "correct" the Tribunal's interpretation of section 121(2) in *Noah's Ark No 1*.

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[52] [2015] ACTCA 3
[53] Applicant's submissions on jurisdiction, undated, at [75]–[86]

75. The Authority joined with Village in submitting that we should adopt the Tribunal's interpretation of section 121 in *Noah's Ark No 1*.[54]

76. The Authority acknowledged that the analysis in *Noah's Ark No 1* occurred by reference to the limiting words in section 121(2), but submitted that the analysis applies equally to the words of limitation in item 3 to Schedule 1 because the words in both provisions are materially the same.

77. The Authority also agreed with Village's observation that the *Baptist Care* litigation occurred without any suggestion that the Tribunal's jurisdiction to review proponent appeals is limited to code compliance. The Authority also agreed that the extraneous material concerning section 121 makes no mention of proponent appeals or the operation of item 3. It agreed too with Village's observation, per its hypotheticals, about the significant procedural problems that could arise if a primary decision by reference to section 120 is immune from Tribunal review.

78. Having considered the submissions of the parties, in our view the Tribunal's construction of section 121(2) in *Noah's Ark No 1* should be preferred. We reached that conclusion primarily by reference to the decisions of the Court of Appeal in *Baptist Care*, the Supreme Court in *Glass* and the Tribunal in *Noah's Ark No 1*, reviewed in *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Ors*[55] (***Noah's Ark No 2***).

79. In *Baptist Care*, at paragraph 17, the Court stated:

> *The first question that needs to be determined by this Court is how s 120 of the Planning Act operates, specifically what is the significance of the statement that the decision-maker (**in this case originally ACTPLA and now the Tribunal**) "must consider", among other things, the objectives for the relevant zone (s 120 (a)).*[56] [emphasis added]

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[54] Outline of closing submissions on behalf of respondent dated 4 December 2020, at [47]. This submission entailed the Authority abandoning its earlier submission (Respondent's statement of facts and contentions dated 25 August 2020 at [51]), that the Tribunal is confined to review of code compliance per *Sladic.*

[55] [2018] ACAT 95

[56] *Baptist Community Services v ACT Planning and land Authority and Anor* [2015] ACTCA 3 at [17]

80. Implicit in this statement is that the Court of Appeal accepted that the "decision-maker" for the purposes of section 120 is the Authority at first instance and, on review, the Tribunal. The Court of Appeal then canvassed how consideration of zone objectives should occur, without any question or debate about whether the Tribunal has jurisdiction to do so. The Court of Appeal allowed the appeal, set aside the 'first instance' decision of the Tribunal and then made the following order:

> *(c) The matter is remitted to the Tribunal to deal with the development proposal in accordance with the Planning Act and the Territory Plan, having regard to the views expressed at [58] and [59] above about s 120 of the Planning Act and at [69] to [71] above about RZ1 zone objective (a).*[57]

81. True, there is no mention of section 121 in the judgment. It would appear that the question of jurisdiction was not raised. It does not "defy belief" (as Village submitted) that the Court did not notice the lack of jurisdiction. Rather, the Court, as it states, determined the appeal by reference to "the only matters remaining in issue between [the parties] and requiring determination by the Court"[58] being "the correct approach to s 120" of the P and D Act and "the difference in the parties' interpretation of RZ1 zone objective (a)".[59]

82. Nevertheless, we cannot overlook the Court's statement at paragraph 17 of its judgment quoted above. In our view, the Tribunal's jurisdiction to consider the factors in section 120 is implicit, if not express, in this statement. Also, at paragraphs 59 and 71 of its judgment referred to in its remittal order, the Court concluded that section 120 gives a "discretion to approve or reject a proposal that is code-compliant". The remittal order would have been frustrated if the Tribunal did not have jurisdiction to consider the matters stated in section 120 (which picks up consideration of zone objectives) and (if it thought fit) to exercise the discretion that the Court determined it grants.

83. On remitter, the Tribunal approved the development application. It did so, after finding code compliance. It also did so:

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[57] *Baptist Community Services v ACT Planning and land Authority and Anor* [2015] ACTCA 3 at [78(c)]
[58] *Baptist Community Services v ACT Planning and Land Authority and Anor* [2015] ACTCA 3 at [9]
[59] *Baptist Community Services v ACT Planning and Land Authority and Anor* [2015] ACTCA 3 at [9]

> [O]*n the basis that under section 120 of the Planning Act compliance with the relevant codes is not sufficient; regard also needs to be had to other matters, including the zone objectives. Inconsistency with a zone objective does not mandate rejection of a proposed development, but it may provide a basis for discretionary rejection of a proposal, even one which is code-compliant.*[60]

84. Then there is the comment of Penfold J in *Glass v ACTPLA* "that the significance of a rule and whether it has been complied with will disappear as soon as ACTPLA purports to exercise a discretion conferred separately from the rule". True, her Honour refers to ACTPLA exercising the discretion in section 119(2), but the comment was by way of querying the Tribunal's observation about its lack of jurisdiction. It is implicit in her Honour's comment that the Tribunal has power, on review, to exercise a discretion conferred separately from a rule.

85. Then there is the decision of the Tribunal in *Noah's Ark No 2*.[61] In that case, the Tribunal – constituted by the President and a Senior Member – "carefully considered"[62] *Sladic* and decided to proceed by reference to its earlier interpretation of section 121, as stated in *Noah's Ark No 1.*

86. These decisions all support preference for the so-called 'gateway approach' to the Tribunal's jurisdiction when interpreting section 121(2)(a) and (b) and, by extension, the limiting words in paragraphs (a) and (b) of item 3, Schedule 1.

87. Village's hypotheticals did not, in our view, assist the debate. Village characterised the outcomes of its hypotheticals as unexpected results, but why? Nothing in the limiting words suggests an intended outcome. It could equally be said, as applicants for development approval have often done, that the legislature intended to restrict the Tribunal's jurisdiction to review of applicable rules and criteria. The limiting words in item 3, column 2, do not have one meaning for a decision to approve a development application subject to a condition and another meaning for a decision to refuse to approve an application.

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[60] *Baptist Community Services Pty Ltd – NSW & ACT v ACT Planning and Land Authority & Ors* [2016] ACAT 150 at [259]

[61] [2018] ACAT 95

[62] *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority and Anor* [2018] ACAT 95 at [32]-[33]

The Estate Development Code

88. Village had different options for developing the site. It could have retained it as a single block and developed it under the Multi-Unit Housing Development Code (**the Multi-Unit Code**). It chose to apply for approval to subdivide the site into smaller blocks. This choice required preparation of an estate development plan.[63] Having chosen this path, Village needed to demonstrate compliance with the EDC. The Introduction to the EDC states:

> *This code applies to all proposals in the ACT for the subdivision of land requiring the preparation of an estate development plan.*

89. That may be so, but what compels compliance with it? Ordinarily, compliance with codes is mandated under section 119(1) of the P and D Act, which states:

> *(1) Development approval must not be given for a development proposal in the merit track unless the proposal is consistent with—*
>
> *(a) the relevant code; and*
>
> *(b) if the proposed development relates to land comprised in a rural lease—any land management agreement for the land; and*
>
> *(c) if the proposed development will affect a registered tree or declared site—the advice of the conservator of flora and fauna in relation to the proposal.*
>
> *Note 1 An application cannot be approved if it is inconsistent with the territory plan*
>
> *(see s 50) or the National Capital Plan (see Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth), s 11).*
>
> *Note 2* ***Relevant code*** *—see the dictionary.*

90. 'Relevant code' is defined in the Dictionary to the P and D Act as follows:

> ***relevant code****, for a development proposal, means a code that the relevant development table applies to the proposal.*

91. With reference to the definition of 'relevant code', 'relevant development table' is defined in the Dictionary to the P and D Act as follows:

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[63] Per section 94(1) of the *Planning and Development Act 2007*, an estate development plan sets out the proposed development of the estate, and the creation of blocks in the estate, in a way that is consistent with applicable codes. The "note" to section 94(1), stating that a development application must be accompanied by an estate development plan per section 139(2)(r) of the *Planning and Development Act 2007*, is incorrect to the extent that the reference should be to section 139(2)(s).

> ***relevant development table****, for a development proposal, means the development table that applies to the proposal.*

92. With reference to the definition of 'relevant development table', 'development table' is defined in the Dictionary to the P and D Act as follows:

> ***development table****, for a development or development proposal, means the development table in the territory plan that covers the zone in which the development or development proposal is to take place (see s 54).*

93. With reference to the definition of 'development table', section 54 of the P and D Act states (with examples omitted):

> ***Development tables***
>
> *(1) A development table for a zone must set out—*
>
> *(a) the minimum assessment track that applies to each development proposal; and*
>
> *Note Assessment tracks are dealt with in ch 7.*
>
> *(b) development that is exempt from requiring development approval; and*
>
> *Note Exempt developments are further dealt with in div 7.2.6.*
>
> *(c) development that is prohibited; and*
>
> *(d) the code that development proposals must comply with.*
>
> *(2) A development table may exempt a development proposal from requiring development approval subject to a condition.*
>
> *(3) The assessment tracks, from minimum to maximum, are as follows:*
>
> *(a) code track;*
>
> *(b) merit track;*
>
> *(c) impact track.*

94. Section 54 does not provide a pathway out of this maze: it only takes the reader back to the beginning (meaning the relevant code). The only code noted in the RZ4 development table with which "development proposals must comply" is the Residential Zones Development Code (**the RZD Code**) which nowhere picks up the EDC. To the contrary, in relation to subdivision and consolidation, Part D of the RZD Code sets out rules and criteria to be met in order to approve the subdivision, but states that they do not apply to "proposals lodged as an estate development plan".

95. Rule 1 of the RZD Code requires compliance with the Single Dwelling Code for single dwelling housing (as proposed in this case), but it does not require compliance with the EDC for the purpose of single dwelling estate development.

96. The development table that applies to the development proposal in this case is the RZ4 – medium density residential zone development table. Under that development table, the relevant code is the RZD Code.

97. Village said that the requirement to comply with the EDC seems to arise simply from the general statement in section 50 of the P and D Act that the Authority, and the Tribunal on review (among others), cannot do any act or approve the doing of an act, "that would be inconsistent with the Territory Plan".[64] Where the EDC is part of the Territory Plan and "applies to all proposals in the ACT for the subdivision of land requiring preparation of an estate development plan", the amended DA must be consistent with it.

98. That accords with the requirement under section 94(1)(b) of the P and D Act, which requires an estate development plan, as this is, to be consistent with "any other code that applies to the estate". The EDC is such a code.

The Estate Development Code – criterion 1 a)

99. Criterion 1 (**C1**) of the EDC requires that the proposed "subdivision layout and movement networks **achieve all**" the outcomes stated in paragraphs a) – k) of C1 [emphasis added].

100. C1 a) states:

> *blocks that are suited to their intended use and are consistent with the desired character of the relevant land use zone.*

101. To 'achieve' the outcome stated in C1 a), the (proposed) blocks must satisfy the two stated factors:

(a) suitability to their intended use; and

(b) consistency with the desired character of the relevant land use zone.

[64] Applicant's closing submissions in chief dated 24 November 2020 at [326]

102. Regarding suitability, the intended use is residential townhouses.

103. Village submitted that the proposed single dwelling blocks are suited to their intended use because "the dimensions of the proposed blocks readily enable them to have townhouses of the kind proposed in the indicative designs built on them".[65] Village referred to its planning controls plans that will ensure that the eventual built form will "match" that which is proposed in its drawings. On this basis, Village submitted that the proposed blocks are suited to their intended use.[66]

104. The Authority disputed that the proposed blocks are "suited to their intended use". By reference to the latest version of the Block Compliance Plan, we calculated that at least 196[67] of the 258 proposed blocks will be less than 6m wide, that being the minimum width for a compliant compact block under the block compliance tables in appendix A to the EDC, referred to in R47 of the EDC.[68] The Authority noted that 170 of the 196 non-compliant compact blocks will be oriented east-west and so not receive any northern sun. It also noted that for some of the proposed townhouses the principal private open space (**PPOS**) will be on the first floor of the townhouse or on its southern side.

105. Almost all the blocks to which the Authority referred form part of Village's integrated housing development parcel (**IHDP**). Village submitted that the Authority's reliance on the block compliance tables in appendix A, picked up by R47, is misplaced because that rule does not apply to blocks in an IHDP – an issue to which we will return.

106. In our view, Village's submission about suitability avoids the issue. Suitability is to be assessed by reference to intended use, not suitability for the intended structures. Were it the latter, any purpose of the first limb of C1 a) would be defeated because compliance would often (as in this case) be self-fulfilling.

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[65] Applicant's closing submissions in chief dated 24 November 2020 at [342]
[66] Applicant's closing submissions in chief dated 24 November 2020 at [342]
[67] Most of the non-complaint blocks at the ends of the internal banks of townhouses seem also to be less than 6m wide.
[68] Outline of closing submissions on behalf of respondent dated 4 December 2020, page 36-38, at [7]-[8]

107. In the context in which it is used, the ordinary meaning of 'suited' is "to be or prove satisfactory, agreeable, or acceptable; to satisfy or please", "to be appropriate or suitable; accord", "to be satisfactory, agreeable or acceptable".[69] To be 'suited' entails a positive assessment of a block for its intended use, not mere possibility or capability, in the same way that some plants are 'suited' to an environment or an aspect, but not another, even if their survival is possible in an unsuitable environment.

108. We acknowledge that views can reasonably differ about whether a block is 'suited' for use as a residential townhouse, especially in terms of size, dimensions and orientation. Townhouses in areas such as the older parts of inner Sydney or Melbourne often have tiny widths, poor solar access and little (if any) private open space, and yet (for reasons of age and location) are suited for their use. They are desirable and valued. In other places, for example semi-rural areas, blocks of such a small size would not be suited for use as a townhouse or residential use generally.

109. Whether proposed blocks in an intended subdivision are "suited to their intended use" should be determined objectively by reference to relevant considerations such as siting, aspect, zoning, surrounding uses, size, accessibility and compliance with other applicable planning requirements.

110. In this case, Village's design drawings[70] show that it is possible to construct a two or three level townhouse on each of the proposed blocks, but we were not satisfied that the blocks (as opposed to the site as a whole) are 'suited' for use as residential townhouses. For example, the Type 1, Type 2 and Type 2A townhouses are intended to be constructed on single dwelling blocks oriented east-west that are 22m long and 4.4m wide giving an area of 96.8m². That is, on any view, an extremely small single dwelling block. We calculated that 68 of the intended 258 blocks[71] will be of those dimensions. Most of the remaining blocks in the IHDP have areas of between 104m² and 116m².

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[69] Macquarie Dictionary (Macquarie Dictionary Publishers Pty Ltd, 5th edition, 2009)

[70] See witness statement of Chris Millman dated 14 July 2020, annexed preliminary drawings, which show the different proposed types of buildings and their dimensions, Exhibit A5

[71] Applicant's closing submissions in chief dated 24 November 2020, annexure B, page 59

111. We acknowledge that the site's RZ4 zoning is a legislative statement that the site is "suited" for medium density residential use, but the extent of that density must be guided by other planning considerations. In particular, an assessment of suitability should take into account the size and dimensions of the proposed blocks which will necessarily constrain and inform the size, dimensions and liveability of any residential dwellings built on the blocks. For example, the 'address' of many of the proposed townhouses to the street is dominated by a car space or a garage so that daytime living areas behind the car space or garage would obtain little if any solar access.

112. In this respect, referring to the latest version of Village's Block Compliance Plan provided as part of its closing submissions,[72] 208 of the (now) 258 proposed blocks[73] (meaning 80%) do not comply with the EDC Block Compliance Table.[74] Of the 50 blocks (meaning 20%) that do comply, 39 are "compact blocks" and 11[75] are "mid-sized blocks". There are no proposed "large blocks". Nine of the 11 "mid-sized blocks" are 'in a line' with a north-south orientation in the north-east corner of the site facing Unwin Street. The proposed subdivision in this case is tightly planned and inflexible.

113. Taking the layout and size of the blocks as a whole, all but 11 of the 258 blocks will be "compact", and of those only 39 will be compliant with R47 of the EDC. The result is that within the proposed subdivision, 95% of the blocks will be able to support only very high density living. Zone objective a) for the RZ4 zone calls for the "establishment and maintenance of residential areas where the housing is medium rise and predominantly medium density in character". The two or three level townhouses may be fairly described as "medium rise", but the overall character of the development is "high density" not "medium density". Notwithstanding the approval by the TCCS, we share the Community Council's

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[72] Applicant's closing submissions in chief dated 24 November 2020, annexure B at page 3

[73] Applicant's closing submissions in chief dated 24 November 2020, annexure B, Block Compliance Table, Rev F, has a discrepancy in that the blocks said to be compliant total 246 blocks, not 247.

[74] Village accepted that the proposed blocks in the IHDP do not comply, but submitted that they do not need to comply because (it says) neither R47 nor C50 apply to an integrated housing development parcel.

[75] We obtained this number by adding the nine mid size blocks and the two proposed 'amalgam' blocks, jp and jq.

concerns about the quantity and the size of the townhouses (meaning the number of people and cars on site) and the narrowness of the internal roads. Much of the proposed parking for townhouses is tandem parking. We share the Community Council's concern that these features will lead to constant problems regarding safe pedestrian access and parked cars blocking access to and from the site, especially with only two access roads to the site.

114. Village's reliance on the fact that most of the non-compliant blocks would form part of an IHDP, to contend that the blocks are suited to their intended use, is misplaced. Even if the block compliance tables in R47 do not apply, directly, to blocks in an IHDP, there is no suggestion that C1 a) does not apply to blocks in an IHDP.

115. The site view showed that the scale and density of the proposed subdivision would be unusual in the immediate environs of Weston Creek. The slope of the site and the presence of mature plantings are also factors to be considered in the design.

116. The Tribunal believes that the bar for "suited to intended use" in residential subdivision should be set quite high. The proposed development consists mostly of narrow front compact blocks in parallel rows dominated by almost continuous paving and carparking. Relevant considerations in the assessment of the 'suitability' of the site planning should also include provision for pedestrian movement and safety, privacy, solar access and appropriate plantings of trees to provide shade and other environmental benefits. These features too are poorly addressed.

117. For these reasons, we have concluded that the subdivision layout does not achieve blocks that are suited to their intended use. The outcome would not be agreeable, satisfying or pleasing within the immediate environs of Weston Creek. The first requirement under C1 a) is therefore not met.

118. We turn to the second requirement to achieve compliance with C1 a) – consistency with the 'desired character' of the RZ4 zone.

119. 'Desired character' is defined in the "Definitions" part of the Territory Plan as follows:

> ***Desired character*** *means the form of development in terms of siting, building bulk and scale, and the nature of the resulting streetscape that is consistent with the relevant zone objectives, and any statement of desired character in a relevant precinct code.*

120. There is no statement of desired character in the Weston Precinct Code, it being a relevant precinct code. Compliance therefore turns on consistency with the zone objectives for the RZ4 zone, which are as follows:

> *(a) Provide for the establishment and maintenance of residential areas where the housing is medium rise and predominantly medium density in character and particularly in areas that have very good access to facilities and services and/ or frequent public transport services*
>
> *(b) Provide opportunities for redevelopment by enabling changes to the original pattern of subdivision and the density of dwellings*
>
> *(c) Provide for a wide range of affordable and sustainable housing choices that meet changing household and community needs*
>
> *(d) Ensure development and redevelopment is carefully managed so that it achieves a high standard of residential amenity, makes a positive contribution to the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties*
>
> *(e) Provide opportunities for home-based employment consistent with residential amenity*
>
> *(f) Provide for a limited range of small-scale facilities to meet local needs consistent with residential amenity*
>
> *(g) Promote good solar access*
>
> *(h) Promote energy efficiency and conservation*
>
> *(i) Promote sustainable water use*
>
> *(j) Promote active living and active travel*
>
> *(k) Encourage an attractive, safe, well-lit and connected pedestrian environment with convenient access to public transport*

121. Village drew on definitions of 'form' in the Macquarie Dictionary to submit that 'desired character' is concerned only with the shape or structure of a proposed development, not features such as energy efficiency or sustainable water use.[76]

[76] Applicant's closing submissions in chief dated 24 November 2020 at [148]–[149]

Village quoted (and relied on) the meanings numbered 1, 2, 4, 5 and 10 in the Macquarie Dictionary which are follows:

> *1. definite shape; external shape or appearance considered apart from colour or material; configurations.*
>
> *2. the shape of a thing or person.*
>
> *…*
>
> *4. something that gives or determines shape; a mould.*
>
> *5. a particular structural condition, character, or mode of being exhibited bio things; water in the form of ice.*
>
> *…*
>
> *10. due or proper shape; orderly arrangement of parts, good order.*[77]

122. Building on these meanings, Village submitted that 'desired character' addresses only certain kinds of 'form', namely siting, building bulk and scale and the nature of the resulting streetscape. It then submitted that C1 a) does not address these kinds of form generally, but only in relation to the "layout of blocks".[78]

123. Building on that proposition, Village then submitted that "as a result" only zone objective a) "speaks directly" to C1 a), although it acknowledged that zone objectives b) and d) may have "a very limited role". Applying this chain of reasoning, Village submitted that C1 a) is met because the siting, building bulk and scale and resulting streetscape of the proposed townhouses on the blocks will be medium rise and predominantly medium density.

124. The Authority accepted that the proposed development is consistent with zone objective a), but contended that zone objectives d), g) and h) are also "relevant" and that the proposed development is not consistent with them. It described the proposed development as follows:

> *a monoculture of compact block townhouses with poor solar orientation and numerous instances of reduced setbacks and private open space.*[79]

125. We accept that 'desired character' is concerned with the 'form of development' in the terms stated,[80] but do not accept that 'form' is confined to shape and

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[77] Macquarie Dictionary (Macquarie Dictionary Publishers Pty Ltd, 7th edition, 2017)
[78] Applicant's closing submissions in chief dated 24 November 2020 at [154(i)]
[79] Outline of closing submissions on behalf of respondent dated 4 December 2020, annexure A at [7(b)]
[80] Meaning in terms of siting, building bulk and scale, and the nature of the resulting streetscape.

structure. 'Form' is a broad word with many meanings. The Macquarie Dictionary gives 52 different meanings. Among them are qualitative meanings. Those following the meanings numbered 4 and 5 relied upon by Village, are as follows:

> *6. the manner or style of arranging and coordinating parts for a pleasing or effective result, as in literary or musical composition.*
>
> *7. the formal structure of a work of art; the organisation and relationship of lines or colours in a painting or volumes and voids in a sculpture so as to create a coherent image.*

126. In our view, these other meanings are also relevant, and must be taken into account when assessing the siting, building bulk and scale and resulting streetscape of a proposed development. The references to a literary or musical composition, and to a painting or sculpture, are by way of example or illustration rather than to confine the meanings to items of this kind. The definition of 'desired character' permits consideration of whether the manner or style of arranging and co-ordinating the component parts, and in this case the proposed townhouses, will have a "pleasing or effective result" regarding siting, building bulk and scale and resulting streetscape.

127. A 'pleasing or effective result' is not to be judged at large. It must be assessed by reference to relevant zone objectives. Accordingly, we concluded that zone objective d) is also a relevant zone objective.

128. We were not satisfied that the proposal is consistent with zone objective a). As mentioned, the proposed townhouses can be described as "medium rise", but the proposal as a whole is not "predominantly medium density in character". 80% of the blocks would be significantly smaller than a compact block, which is the smallest kind of block ordinarily permitted in an estate development plan. The overall character of the proposal is high density.

129. In many respects, zone objective d) replicates factors that are relevant when assessing suitability for intended use. Where we have concluded that the proposed development is high density and ill-suited to its immediate environs in Weston Creek, and where it proposes removal of all but four of the mature trees presently

on the site that contribute to the neighbourhood, we were not satisfied that the proposal is consistent with zone objective d).

130. For these reasons, we have concluded that criterion 1 a) of the EDC is not met.

The Estate Development Code – criterion 1 e)

131. The "subdivision layout and movement networks" of the proposed estate development must also achieve the outcome in C1 e), which states:

> *retention of significant vegetation and habitat areas including consideration of ecological connectivity.*

132. 'Significant' is not defined for the purposes of the EDC or the Territory Plan generally. The parties agreed, as do we, that it is an ordinary word and should be given its ordinary meaning. However, like many ordinary words, it has different meanings depending on the context in which it is used. That is apparent from its definitions in the Macquarie Dictionary (7th edition) as follows:

> 1. *important; of consequence.*
> 2. *expressing a meaning; indicative.*
> 3. *having a special or covert meaning; suggestive*

133. Likewise, in the Australian Concise Oxford Dictionary (1st edition), it is defined as follows:

> *having a meaning; expressive, suggestive, with unstated or secret sense, inviting attention; noteworthy, of considerable amount or effect or importance, not insignificant or negligible.*

134. Referring again to the principle of statutory construction stated in *SZTAL*, the task is to apply the statutory text, having regard to its context and purpose if, and in so far as, context assists in fixing the meaning of the statutory text.

135. The word 'significant' is often used in legislation. Courts have commented that its meaning must be assessed in the context in which it is used. In *Worrall v Commissioner for Housing for The Australian Capital Territory*[81] the ACT Supreme Court, per Crispin J, considered a claim for a reduction in rent under section 71 of the *Residential Tenancies Act 1997* on the grounds that the tenant's use or enjoyment of leased premises had diminished "significantly". The

[81] [2001] ACTSC 72

language of the section obliged the Court to consider the meaning of 'significantly' or 'significant'. In this respect, Crispin J said:

> *39. … The term "significant" has been considered in a number of cases.*
>
> *40. …*
>
> *41. In Truswell v Minister for Communication and the Arts (1996) 42 ALD 275 Matthews J said at [121] that the word "significant" had acquired a number of meanings in common parlance. Her Honour cited both the Oxford English Dictionary's definition of "full meaning or import; important, notable; and having or conveying a meaning" and the Macquarie Dictionary's formulation of "important; of consequence; expressing a meaning; indicative". Her Honour also said that she had derived assistance from considering that the word is the opposite of "insignificant" which the Macquarie Dictionary had defined as meaning "unimportant, trifling or petty" or as "too small to be important". Whilst such formulations may be of some assistance, one must obviously exercise some care in applying them. There may be room for many shades between the descriptions "important" or "notable" on the one hand and "unimportant, trifling or petty" on the other and it would be rash to assume that the term "significant" was always used in statutory provisions to denote anything not falling within the latter descriptions. Perhaps most significantly, her Honour explained at [121] that:*
>
> > *One thing is very clear, namely that there is necessarily a fair degree of value-judgment involved in attributing significance to something. Significance must also depend upon context. The very use of the term must frequently involve the subsidiary question significant for what?*
>
> *42. …*
>
> *43. In Jarasius v Forestry Commission of NSW (No 1) (1990) 71 LGRA 79 Hemmings J held at 93-94 that in considering whether developments had a significant impact upon the environment the term "significant" meant something of "importance" or "more than ordinary".*

136. On appeal to a Full Court of the Federal Court, their Honours found there to be no error of law in Crispin J's approach. They commented on the meaning of 'significantly' as follows:

> *59 The word "significantly" is an ordinary English word to be interpreted in its context. Thus, a proposal by a wine bar to make additions to licensed premises having the effect of adding 22 seats to the existing 122 was held not to "significantly" affect the "nature or extent" of the business. "Significantly" was considered to mean much more than "appreciably". It was to be regarded as equivalent to "substantially or materially".*

137. The Federal Court[82] also made the following observation about whether something is significant:

> *61 The extent to which there is a judgment made that an accepted factual situation amounts to a "significant diminution", is a question of fact not law.*[83]

138. In *Lee v Guo*[84] (***Lee***) the tribunal, per Senior Member Robinson, after noting the decisions of the Supreme Court and the Federal Court in *Worrall*, said:

> *The cases established that a 'significant' interference means something "material", of "importance", something "more than ordinary" or something that has an "active adverse effect on the ability of the claimant to lead the sort of life the claimant normally led." This is a question of fact.*[85] [footnotes omitted]

139. In *Bailey v The Forestry Commission of New South Wales* (***Bailey***),[86] the NSW Land and Environment Court, per Hemmings J, considered the Forestry Commission's logging activities in the Mistake State Forest to the west of Macksville, NSW. Section 112 of the *Environmental Planning and Assessment Act 1979* (NSW) prohibited the Commission from carrying out logging that is "likely to significantly affect the environment", subject to an exception. On this issue, with reference to earlier authority, Hemmings J said:

> *The test to determine whether the activity is likely to "significantly" affect the environment in this context is whether it is "important", "notable", "weighty" or "more than ordinary".*[87]

140. Having regard to these decisions, whether vegetation is 'significant' depends on whether it is important or of consequence. That is a question of fact to be decided in this case.

141. Debate occurred between the parties about the meaning of 'significant' in the context of vegetation and in the context of the EDC. Debate also occurred about whether the word 'significant' in C1 e) applies only to "vegetation" or also to "habitat areas". Debate also occurred about whether the word 'areas' should be

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[82] *Worrall v Commissioner for Housing for the Australian Capital Territory* [2002] FCAFC 127 at [43], [61]
[83] The Court cited *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36 in support.
[84] [2017] ACAT 60
[85] *Lee v Guo* [2017] ACAT 60 at [57]
[86] [1989] NSWLEC 24; (1989) 67 LGRA 200
[87] *Bailey v The Forestry Commission of New South Wales* [1989] NSWLEC 24; (1989) 67 LGRA 200, 211

interpreted as meaning retention of "significant vegetation areas" and retention of "habitat areas" or retention of "significant vegetation" and retention of "habitat areas".

142. Village submitted that C1 e) should be interpreted as requiring "retention of vegetation that is classed as significant" and that "the requirement is that all of it has to be retained".[88] As discussed below, we agree with that interpretation.

143. In our view, the word 'significant' attaches to 'vegetation' and also to 'habitat areas'. Village agreed that that is "probably the better view".[89] The word 'areas' attaches only to the word 'habitat'.

144. Village made a series of submissions in a seemingly cascading matter, each apparently designed to marginalise if not eliminate C1 e) as a barrier to its proposed development. We acknowledge the Community Council's frustration that so much attention was given to "technical legal argument" without getting to what it saw as "the issues of the matter".[90]

145. Village began with a submission that 'significant vegetation' does not include trees at all. It noted that the protection and retention of trees on land in built up urban areas (such as the site) is the subject of the Tree Act administered by the Conservator. Village noted that the Tree Act has "statutory links" to the P and D Act via sections 119 and 148 of the P and D Act. Pursuant to section 148(1), the Authority must refer a development proposal to the Conservator, and (pursuant to section 119(2)) must not approve a proposal in the merit track if it is inconsistent with the advice of the Conservator unless satisfied that the matters set out in section 119(2)(a) have been considered and that (pursuant to section 119(2)(b)) the decision would be "consistent with the objects of the territory plan" notwithstanding the inconsistency with the Conservator's advice.

146. With reference to that statutory structure, Village relied on the so-called "Anthony Hordern" principle of statutory construction to submit that because there is a comprehensive statutory scheme governing retention and protection of

[88] Transcript of proceedings, 9 December 2020, page 852, lines 39-44
[89] Transcript of proceedings, 9 December 2020, page 865, line 15
[90] Letter dated 8 October 2020 from the Weston Community Council to the Tribunal at page 1.

trees, C1 e) could not, in addition to that structure, be construed as applying to trees. By way of illustration of the submission, Village observed (hypothetically) that a tree might be "significant" by reason of its "historical content", obtain "heritage listing" and so not be at risk of removal. The submission seemed to be that if a tree is protected by other processes then "what is it that makes it significant"[91] for the purposes of C1 e)?

147. The Anthony Hordern principle, drawn from the High Court decision in *Anthony Hordern and Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia*,[92] is as follows:

> *When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.*

148. Village submitted that the Anthony Hordern principle is a "species of the *expressio unius* maxim", which translates to the general principle of statutory interpretation that an express reference to one matter indicates that other matters are excluded.

149. We were not persuaded by reference to the Anthony Hordern principle that 'significant vegetation', for the purposes of C1 e), does not include trees. The principle, in our view, has no application for the purpose of construing 'significant vegetation'.

150. First, it is a principle that governs whether a particular procedure should be followed to achieve a result, and whether other procedures should therefore be excluded.[93] C1 e) does not state a procedure at all. Nor does the Tree Act. C1 e) is a feature that must be 'achieved' in a proposed subdivision layout and movement network.

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[91] Transcript of proceedings, 9 December 2020, page 861, lines 37-46

[92] [1932] HCA 9

[93] See a review of the principle in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50 at [50] and following. See generally Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019) paragraph 4.47

151. Second, the Federal Court has commented that the Anthony Hordern principle "has little, if any, applicability to powers expressly conferred in separate enactments".[94] Dennis Pearce, in his authoritative work, *Statutory Interpretation in Australia* now in its ninth edition, suggests, however, that there seems to be no particular reason for adopting this qualifier, and that the issue "will depend on whether or not the specific enforcement mechanism is intended to be exclusive".[95] In this case, Pearce's 'qualifier' does not change the situation. C1 e) does not set up an enforcement mechanism. Also, there is no suggestion, express or implied, that the legislature intended, by reason of the Tree Act alone or in conjunction with sections 119 and 148 of the P and D Act, to exclude trees as significant vegetation for the purposes of C1 e).

152. Third, after a review of judicial decisions that have considered the principle, Pearce stated that it can be seen that the application of the principle is "largely one of impression".[96] Pearce referred to the High Court's decision in *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)*[97] in which the Court said:

> [The] *maxim must always be applied with care, for it is not of universal application and applies only when the intention expressed is discoverable upon the face of the instrument …It is "a valuable servant, but a dangerous master".*

153. In our view, nothing appears "upon the face" of C1 e), the Tree Act or the P and D Act to suggest an intention that 'significant vegetation' does not include trees or does not include trees that are 'significant' under other legislation. It would be a result that, in our view, a reasonable person would find surprising.

154. Next, Village submitted that C1 e) addresses only "ecological matters". This, it submitted, "is clear" from the terms 'ecological connectivity' and 'habitat areas' within C1 e). We disagree. C1 e) must be read as a whole. As a matter of ordinary

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[94] *Re Wilcox; Ex parte Venture Industries Pty Ltd and Ors* (1986) 66 FCR 511, 530-1

[95] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019)paragraph 4.48

[96] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019) paragraph 4.44

[97] [1982] HCA 2; 148 CLR 88 at 94

language, that to be 'achieved' is "retention of significant vegetation". The only qualifier is that the vegetation be 'significant'.

155. Factors to be considered, when deciding whether vegetation should be regarded as 'significant' or a habitat area should be regarded as 'significant', may be many and varied. Each "subdivision layout and movement network" would need to be considered on the facts relating to it. The words "including consideration of" do no more than specify that "ecological connectivity" is a factor (among others) to be considered for the purpose of determining whether 'vegetation' or a 'habitat area' is significant.

156. The drafter's use of the word 'including', rather than 'means', should also be understood as an intention not to limit what should be considered, when determining whether vegetation or a habitat area should be regarded as 'significant'.

157. C1 e) can be contrasted with, for example, the words and expressions defined in the Definitions part to the Territory Plan where the definition states what each word or expression 'means'. Many of those definitions state what the word or expression "means" and have within the definition a factor or factors that are or may be included in the definition. This pattern of usage is a strong indicator of the drafter's intention that factors to be 'included' are not exhaustive of what the primary words (in this case, retention of "significant vegetation and habitat areas") mean. Courts have commented that where a pattern of usage of this kind is shown, those who are interpreting and applying definitions should be slow to depart from that pattern.[98]

158. This distinction between 'means' and 'includes' is acknowledged in the *Legislation Act 2001,* section 130, which provides that "a definition is a provision (however expressed) of an Act or statutory instrument[99] that (a) gives a meaning to a term; or (b) limits or extends the meaning of a term". Section 130 then provides, by way of examples, "X means Y" and "X includes Y".

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[98] See generally, Dennis Pearce, *Statutory Interpretation in Australia* (9th edition, 2019) paragraph 6.8
[99] The Estate Development Code is a notifiable instrument under the P and D Act, NI 2008-27

159. The drafter's inclusion of 'ecological connectivity', as a factor to be considered when deciding whether vegetation or a habitat area is 'significant', does no more than make clear that consideration must be given to an ecological connection (if there is one) with an area or areas outside the land proposed for the subdivision for the purpose of deciding whether vegetation or a habitat area within the land proposed for the subdivision is significant. Vegetation or a habitat area might not, in itself, be significant but is significant in the context of other areas.

160. Next, Village submitted that C1 e) does not address any residential amenity that vegetation (including trees) may provide or any aesthetic value that vegetation (including trees) may have. It submitted that vegetation cannot be 'significant' in either of these respects, for the purposes of C1 e), because features of these kinds are dealt with elsewhere in C1 including C1 a) and C1 j).

161. We were not persuaded by this submission. C1 a), as stated above, is concerned with the proposed "blocks" and requires that the two stated features be achieved on each block. C1 e), by contrast, is concerned with the entire site to be subdivided and requires the subdivision to be done in a manner that will enable retention of significant vegetation.

162. Also, there is little in common between retention of significant vegetation, per C1 e), and either of the two features to be achieved on each block, per C1 a).

163. Regarding the first feature, nothing about the intended use of a proposed block brings into consideration its existing use, natural or otherwise.

164. Regarding the second feature, Village referred to the definition of 'desired character' in the Definitions part of the Territory Plan, discussed above. It pointed out (correctly) that it is directed only to "the form of development in terms of siting, building bulk and scale, and the nature of the resulting streetscape" and only insofar that these features are "consistent with the relevant zone objectives". Only zone objective h), promotion of conservation, has a connection with retention of vegetation, significant or otherwise.

165. Regarding C1 j), in our view there is no material overlap with C1 e) – regardless of what meaning is attributed to 'significant vegetation'. C1 j) is (relevantly)

directed to features that "surround" the proposed subdivision and requires "integration" with those features: it looks to whether the subdivision will 'fit in' with the "surrounding" urban environment, and with the existing (and in our view surrounding) streetscapes and landscapes provided they are 'attractive'. None of these issues, which involve the perimeter of the site, are connected with retention of significant vegetation within the site.

166. Where we were not persuaded that C1 a) or C1 j) directs attention to the retention of vegetation (including trees) for reasons of the residential amenity they provide or the aesthetic value they have, we do not agree that C1 e) should be read down to exclude residential amenity or aesthetic value when deciding whether vegetation or a habitat area is significant.

167. Consistent with the decisions in *Worrall SC*, *Worrall Appeal*, *Lee* and *Bailey*, whether vegetation (or a habitat area) is 'significant' is a question of fact to determine in each case. All relevant facts and circumstances, including the kind, quality, quantity and location of the vegetation in question, must be taken into account. Also, factors might cause vegetation to be significant on one site but materially similar vegetation might not be significant on another. Trees in a sufficient number, or other kinds of vegetation of a certain quantity, might be significant but not as isolated examples. Vegetation, including trees, might be significant on a site because of the important amenity they provide but the same kind of trees in a different location might not be significant.

168. C1 e) does not contain any proviso or caveat that causes it to operate only in certain circumstances or not in certain circumstances. There is no mechanism to override or excuse compliance, such as that contained in section 119(2) of the P and D Act which permits approval of a development where it is inconsistent with advice from a registered entity.

169. Approval of an estate development plan requires the proponent to demonstrate that the subdivision layout and movement networks will achieve (among other things) retention of significant vegetation. That's the deal. A proponent must assess its options accordingly when putting forward a development proposal, in

the same way that it must assess its options for meeting other mandatory obligations.

170. The substantive issue was whether a tree's classification as a regulated tree or registered tree under the Tree Act necessarily causes it to be significant vegetation for the purposes of C1 e). Village contended that this conclusion should not be drawn because C1 e) relates to a tree's ecological or environmental significance. There must be something else, beyond height, girth, canopy or (by extension) age of the tree, it said,[100] to cause it to be significant vegetation. Where there is no evidence concerning any tree's ecological or environmental significance, it said, the Tribunal could not conclude that any of the trees is significant vegetation notwithstanding them being regulated trees under the Tree Act.

171. We disagree. We have already rejected the proposition that vegetation must have ecological or environmental significance in order to be significant vegetation. A tree that is classified as a regulated tree (or a registered tree) under the Tree Act is regarded by the legislature as important. Only in certain circumstances can it be removed. It then becomes problematic, if not impossible, to distinguish an important tree from a significant tree in circumstances where the relevant ordinary meaning of significant is "important; of consequence".[101]

172. We then took into account that under the Tree Act not all regulated trees (meaning, for the purposes of the analysis, important or significant trees) need to be retained. Approval for removal of a regulated tree can be obtained if a factor or feature listed in paragraphs (1) or (2) of Schedule 1 to the *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (**the Tree Protection Determination**) is met.

173. Most of the factors in paragraph (1) of the Tree Protection Determination concern an adverse effect that a tree is having on something else, rather than a feature of the tree itself. The exception is paragraph (1)(a), namely that the tree "is in decline and its life expectancy is short". Paragraph (2) also concerns a possible

[100] These are factors that cause a tree to be a regulated tree if certain dimensions are met or exceeded.

[101] See Macquarie Dictionary and paragraph 140 above.

feature of a tree, namely that it is "on a block of less than or equal to 1200m² and is a species listed in Schedule 2" which is a list of "problematic tree species".

174. As mentioned, C1 e) does not permit consideration of adverse effects that a tree will or might have on something else for the purpose of determining whether it is 'significant'. However, C1 e) does (of course) permit consideration of the tree itself. This led us to the conclusion that if a regulated tree is "in decline and its life expectancy is short" or is a "problematic tree species" of a kind listed in Schedule 2 to the Protection Determination, it is not significant vegetation unless there is some other feature quite unrelated to the Tree Act that causes it to be significant. For example, a tree in decline might still be significant because of its connection with a historically important event or a close connection to community.

175. We turn now to the evidence.

176. The Authority relied on the evidence of Dr Peter Coyne, who is a noted scientist and horticulturalist. He was an inaugural member of the Tree Advisory Panel established under the Tree Act and was (for 13 years) Chairman of the Tree Advisory Panel established under section 68 of the Tree Act. He has risk management experience in nature conservation with State and Federal governments spanning 33 years.

177. Dr Coyne provided a report dated 21 August 2020. His letter of instruction, annexed to his report, asked for his opinions about whether he considered the trees on the site to be significant vegetation for the purposes of C1 e) of the EDC. Dr Coyne first noted that the term 'significant vegetation' is undefined. He then said that in his opinion, the term 'significant vegetation':

> *…will have different meanings in different contexts. What is significant in one setting might not be in another setting. Therefore, the term in this matter should relate to the location, in this case the site and its immediate vicinity.*[102]

178. Dr Coyne also said:

[102] Witness statement of Dr Peter Coyne dated 21 August 2020 at [7], Exhibit R8

> *Criteria outside the Tree Act could also contribute to determining significance. The aesthetic value of established trees is well recognised and was an important incentive to create the Tree Act. The aesthetic significance of a particular tree will depend on its setting. In an otherwise cleared landscape a tree would be conspicuous and provide welcome visual relief. In a clump of many similar trees, the same tree (individually) might be relatively insignificant. On this site many of the individual trees have aesthetic value…*
>
> *Established trees also have well-documented value to the local environment. Trees have many known benefits, including reduction of glare and UV radiation but especially for their cooling influence in hot conditions … Active cooling is achieved through transpiration of water from leaf surfaces and the resulting transfer of latent heat … [p]assive cooling is realised by shading of surfaces and the resulting reduction of radiant heat.*[103]

179. With reference to aesthetics and environmental benefits, Dr Coyne concluded that deciduous introduced species can also be significant.

180. Dr Coyne noted that Village proposed to remove 69 regulated trees, and that the Conservator had opposed removal of 68 of those trees. Apparently, the Conservator had overlooked the 69th regulated tree. Dr Coyne said that not all of the 69 trees needed to be retained. He noted that some are dead or in decline or are poor specimens of the species. He identified, by number and photographs, 50 trees that he considered should be retained on the basis they are "significant vegetation".[104]

181. At hearing, Dr Coyne revised his opinion about which trees should be considered significant vegetation. He deleted trees 95, 97, 158 and 203, and added trees 43, 80, 176, 188, 191 and 193.[105]

182. In reply, Village relied on the evidence of Mr Michael Reeves and Mr Sam Patmore.

183. Mr Reeves is a director of dsb Landscape Architects, which provides arborist and landscape architect services. Mr Reeves has been a registered landscape architect since January 1990 and has worked in landscape construction for 36 years.

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[103] Witness statement of Dr Peter Coyne dated 21 August 2020 at [13]-[14], Exhibit R8
[104] Witness statement of Dr Peter Coyne dated 21 August 2020 at [15], [16], [66], Exhibit R8
[105] Transcript of proceedings, 28 October 2020, page 685, line 19 – page 686, line 21; Transcript of proceedings, 29 October 2020, page 812 lines 12-35

Mr Reeves commented that he has been involved in many projects with Village since 2003 when he joined dsb Landscape Architects.[106]

184. dsb Landscape Architects provided a Tree Assessment Report dated 21 August 2018 in support of Village's amended DA.[107] The report was prepared by Mr Paul Scholtens, although Mr Reeves acknowledged consultation about the content of the report and his agreement with it. Mr Reeves provided two witness statements under his own name dated 10 July 2020 and 22 September 2020.

185. All three documents gave opinion for why none of the regulated trees on the site should be retained by reference to the Tree Act or the *ACT Tree Protection (Guidelines for Tree Management Plans) Determination 2010* (**the Tree Protection Guidelines**), not upon whether the trees (or any of them) constituted 'significant vegetation' for the purposes of C1 e) of the EDC. Indeed, it appeared that Mr Reeves had not previously encountered the term. His statement dated 22 September 2020 was provided in response to Dr Coyne's statement that addressed which trees should be regarded as significant vegetation, yet concluded with the comment:

> *The new term "Significant Vegetation" is an invention of Dr Coyne and has no effect in relation to the* [Tree Act] *and its associated regulations and instruments. I am not familiar with the term Significant Vegetation in relation to administration of the* [Tree Act].[108]

186. There is no suggestion that Dr Coyne was using the term 'significant vegetation' in relation to the Tree Act, and his annexed letter of instruction asked him to comment on the term as used in C1 e) of the EDC.[109]

187. Nevertheless, where the features of a tree for the purpose of the Tree Act can be, and usually will be, relevant for the purpose of determining whether a tree is 'significant vegetation' for the purpose of C1 e), we note the evidence on which Village relied.

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[106] Transcript of proceedings, 26 October 2020, page 555, line 18
[107] T documents at pages 1425-1450, Exhibit R1
[108] Witness statement of Michael Reeves dated 22 September 2020 at [62]
[109] See witness statement of Peter Coyne dated 6 August 2020, annexure I, page 50 at [9(1)(c)]

188. We begin with Mr Scholtens' Tree Assessment Report dated 21 August 2018. Mr Scholtens noted that the purpose of his report was as follows:

> *to provide detailed information on the location and status of trees within the site referred to as Block 1 Section 82 Weston. The information will aid in the development of the site by identifying and assessing trees that are Protected and covered by the Tree Protection Act 2005. This report has been prepared in accordance with the mandatory requirements of the ACT Tree Protection (Guidelines for Tree Management Plans) Determination 2010.*

189. In his report, Mr Scholtens plotted the location of each tree on a base survey drawing of the subject site. Details for each tree included its botanical name/species, height, canopy diameter, trunk circumference and general health.

190. The Tree Protection Guidelines require a risk assessment of all protected trees "in relation to proposed development and personal safety" and classification of tree quality as Poor (P), Medium (M), High (H) or Exceptional (E) quality. Mr Scholtens' report does not classify the trees by reference to the Tree Protection Guidelines. Instead, Mr Scholtens classified the trees by reference to two separate issues – health and management status – and used different terms to classify them.

191. Regarding the health of each tree, Mr Scholtens classified the trees as - Poor (P), Fair (F), Good (G) and Excellent (E).

192. Under a heading 'Management Status', Mr Scholtens divided the trees into four categories as follows:

> *'E' Extra High – excellent trees to be retained requiring additional protection*
>
> *'H' High – represents the existing trees that are to be retained and protected*
>
> *'M' Medium – tree/groups of trees which would be desirable to retain but would not warrant design expenditure to retain*
>
> *'P' Poor – specimens of poor quality or of no landscape significance.*

193. As best we could tell, Mr Scholtens' management status classification was not done by reference to the Tree Act or the Tree Protection Guidelines. Rather, it is his opinion about whether the trees are sufficiently important to retain, including

(for category M – Medium) that they are desirable, but their importance does not justify the "design expenditure" to retain them.

194. Mr Scholtens stated that no trees on the site were assessed as Management Status "E" or "H" and that 68 trees were assessed as Management Status "M" and are in "good health".[110] After conducting a cross-match, we were satisfied that all the 50 trees that Dr Coyne identified as significant vegetation are among the 68 trees that Mr Scholtens assessed as Management Status "M".

195. Village provided a photograph of the site taken prior to the construction of the College, which showed (broadly) an absence of trees.[111] This meant, and we accept, that the regulated trees now growing across the site were planted (primarily) in the 1980s. Mr Reeves agreed that the majority of the regulated trees were approximately 40 years old.

196. On 28 April 2020 and 3 July 2020, Mr Reeves, or someone else from dsb Landscape Architects, conducted a further inspection of the 68 trees and found that in the 14-18 months subsequent to provision of Mr Scholtens' report dated 21 August 2018, 14 of the 68 trees with Management Status 'M' had deteriorated and were now classified as "DEAD" or "IN DECLINE". Mr Reeves provided an updated report in the form of a witness statement dated 10 July 2020 to provide this new information including the identification numbers of the 14 trees.[112]

197. Trees 97, 107, 109, 158 and 230 were among the 14 trees Mr Reeves classified as in decline and among the 50 trees that Dr Coyne originally considered to be significant vegetation. On 28 October 2020, Dr Coyne agreed that tree 97 is in decline. On 29 October 2020, during the hearing, we were told that the Conservator (and Dr Coyne) no longer opposed removal of tree 158.[113] There seemed to remain a difference of opinion regarding trees 107, 109 and 230.

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[110] T documents at page 1425 (Tree Assessment Report), Exhibit R1
[111] Witness statement of Kenneth Ineson dated 14 July 2020, attachment E, Exhibit A2
[112] Witness statement of Michael Reeves dated 10 July 2020 at [51]-[59], Exhibit A17
[113] Transcript of proceedings 29 October 20, page 812, lines 34-38

198. Mr Reeves provided two witness statements,[114] both of which responded to the question whether trees (and, if so, which trees) on the site should be retained in accordance with the Tree Act. Mr Reeves' second report responded to Dr Coyne's report and stated why, paragraph by paragraph, Mr Reeves thought it was "flawed".[115] Mr Reeves' main criticism is that Dr Coyne did not take into account (or make any mention of) the extensive evidence from the geotechnical and construction engineers about the proposed development, especially the extensive proposed 'cut and fill', and the difficulty of retaining trees in the context of the proposed development.

199. Mr Reeves accepted that all and any of the trees could be retained, but contended that their retention did not justify the necessary amendment to design, choice of construction method and cost. To quote his words:

> *MR REEVES: I'm saying that you can retain trees. I can grow a tree up a concrete wall. Anything is possible with enough money and time and intention. Yes, you can retain trees. Yes, there are methods to retaining trees. The most important question to be asking in retaining trees is why should you and what value do you place on these trees.*
>
> *COUNSEL: Certainly. So, Mr Reeves, and if the tribunal found that there were, again, a tree or trees on the site that were considered significant, and Village had the 'money, time, intention', they're your words, is there an appropriate way to retain a tree?* [116]
>
> *MR REEVES: It's entirely feasible that the technical considerations in retaining the tree can be met.*[117]

200. As to whether any of the trees constitutes 'significant vegetation', Mr Reeves contended that none of the trees on the site is 'significant' because their value does not justify the effort and cost of retaining them.[118] Mr Reeves gave several reasons for why it would not be appropriate to retain a tree or some trees, irrespective of the technical ability to do so.

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[114] Witness statement of Michael Reeves dated 10 July 2020, Exhibit A17; witness statement of Michael Reeves dated 22 September 2020, Exhibit A18

[115] Witness statement of Michael Reeves dated 22 September 2020, Exhibit A17, for example at [13], [20], [21], [24], [26], and [55]

[116] Mr Buckland objected to the question on the basis that it assumed that the Tribunal found a tree or trees to be 'significant', meaning 'significant vegetation'. Mr Reeves' answer, given on the basis of that assumption, is acknowledged.

[117] Transcript of proceedings, 26 October 2020, page 531, line 17 – page 532, line 2

[118] Transcript of proceedings, 26 October 2020, page 530, line 1 – page 531, line 11

201. For example, with reference to an earlier design iteration and the necessary re-grading and levelling of the site, block layout and road construction, Mr Reeves commented that "it would be extremely difficult to retain any trees".[119] To use his words:

> *These developments are multi-disciplinary type … developments and it's like pushing into the side of the balloon. You push one side and it stretches out in all other directions.*[120]

202. He explained:

> *The assessment of this particular option was that it was not so much the development of the architectural and the block layout; it was more the spaces between those blocks and the resultant grading that would be - that would occur that would present no opportunity for retention of trees. You would have large cut and fill batters and you would be left with areas where trees were being left on isolated islands divorced from the new landscape ...(inaudible)... [12.07.03] - [12.07.08] around each of the architectural forms.*[121]

203. Mr Reeves also spoke about ongoing risk management for buildings that would become necessary if a tree is retained, and design standards to ensure trees are separated from buildings so they "don't become a nuisance".[122]

204. Mr Reeves commented on the use of a "tree island", as a method for retaining trees:

> *So there's no guarantee that you can save a tree with the use of tree island, but it's an appropriate method?---It's a method which is undertaken to try and retain a tree under circumstances where it's actually valued as a tree, and underlying that is that tree is actually of sufficient value to warrant retention.*[123]

205. Mr Reeves' opinion, in summary, was as follows:

> *My proposition is that unless there is a significant reason for keeping a tree, you're better off resetting the clock and starting again with a new landscape and new tree planting in properly-prepared conditions which is likely to give you a better landscape outcome.*[124]

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[119] Transcript of proceedings, 26 October 2020, page 516, line 35
[120] Transcript of proceedings, 26 October 2020, page 516, lines 44-47
[121] Transcript of proceedings, 26 October 2020, page 517, lines 2-11
[122] Transcript of proceedings, 26 October 2020, page 530, lines 18-23
[123] Transcript of proceedings, 26 October 2020, page 530, lines 32-36
[124] Transcript of proceedings, 26 October 2020, page 542, lines 12-16

206. Mr Reeves' approach, in substance, was to treat the proposed development as the starting point, and from there consider two questions:

(a) whether the proposed development will permit retention of identified trees; and

(b) if so, does the cost, effort, inconvenience and practicality of retaining a tree outweigh its value.

207. According to Mr Reeves, if the answer to either question is 'no', the tree – not the development – should give way. In his view, both questions should be answered 'no' in relation to every tree on the site.

208. We refer to some of Mr Reeves' evidence, by way of example.

209. In his witness statement dated 10 July 2020, referring to the 54 remaining regulated trees after exclusion of the 14 that he characterised as dead or in decline, Mr Reeves explained why 45 of the remaining trees "are at risk" because of proposed earthworks. In his witness statement dated 22 September 2020, Mr Reeves noted the difference between the existing ground levels on which 49 numbered trees are growing and the "proposed development level" at the location of each tree. Mr Reeves then said:

> *The difference between the existing tree levels and the proposed development levels … clearly demonstrates that retention of trees on site is not a reasonable proposition.*[125]

210. To give another example, in response to Dr Coyne's statement that Trees 93 and 95 are significant trees and that "redesign of the service works is desirable to enable retention of these trees", Mr Reeves responds that "[t]his is not possible as the services connections for the proposed development are located adjacent to the trees and damage will result."[126]

211. Mr Ineson's approach was materially the same. Despite the presence of 68 mature trees on the site "assessed as Management Status 'M' and which are (or were) in good health", as we understood it Village proposed that only two of these trees be retained in the design submitted for development approval. One is in the

[125] Witness statement of Michael Reeves dated 22 September 2020 at [56], Exhibit A18
[126] Witness statement of Michael Reeves dated 22 September 2020 at [23], Exhibit A18

extreme south-west corner of the site (tree 63) and the other on the boundary near the south-east corner of the site (tree 43). At the hearing, Mr Ineson confirmed that "virtually all of the regulated trees would need to be removed if this Concept Plan is to be delivered".[127] This was modified in Village's closing submissions where it offered to retain trees 40-43 on the boundary near the south-west corner of the site.

212. Mr Patmore holds a Bachelor of Applied Science in Ecology and Environmental Science from the University of Canberra. He completed a post-graduate research project into the Green and Golden Bell Frog. He described himself as an ecologist. His curriculum vitae records that he has prepared many biodiversity assessments of the effect that a proposed development may have on fauna. Mr Patmore states that he has "a combined 15 years professional experience in the field of environmental consulting".

213. Mr Patmore' report was in the form of a reply to that of Dr Coyne, and why he disagreed with many of Dr Coyne's opinions and conclusions. With reliance on the words 'habitat areas' and 'ecological connectivity', Mr Patmore contended that the words 'significant vegetation' "could therefore be regarded as vegetation of **ecological** importance/significance".[128] On this basis, Mr Patmore said that factors related to "amenity, landscape value, streetscapes, shade/solar radiation and the like are not relevant in the consideration of whether vegetation is significant or not".[129]

214. Mr Patmore also referred to the *Nature Conservation Act 2014* (**the NC Act**) which, he said, "is important in determining the conservation status (as a possible measure of significance) of certain biodiversity features like vegetation." He noted that the NC Act establishes the listing for threatened ecological communities, and that none of the tree species recorded on the site are threatened or are of importance under the NC Act.

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[127] Witness statement of Kenneth Ineson dated 14 July 2020 at [43], Exhibit A2
[128] It is apparent that Mr Patmore believed that significant vegetation "should" be so regarded.
[129] Witness statement of Sam Patmore dated 15 September 2020 at [6(i)], Exhibit A11

215. Mr Patmore concluded that "development of the site would not result in a significant adverse environmental impact and, by default, the site (and its vegetation) should not be regarded as significant".[130]

216. Mr Patmore also referred to the definition of "significant adverse environmental impact" in section 124A of the P and D Act, the ACT Proponents Guide for Environmental Significance Opinions (2017) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which comment upon whether an impact on an environment, a threatened species or ecological communities would be significant. Mr Patmore opined that the proposed development is unlikely to result in impacts of these kinds and so vegetation on the site should not be regarded as significant. Mr Patmore returned to his view that, because the site does not play an important role in maintaining ecological connectivity or other important natural processes, the vegetation on it cannot be regarded as significant.

217. Mr Patmore considered the status of a tree as a regulated tree under the Tree Act to be irrelevant for the purposes of C1 e) because, he said, C1 e) relates "significance" to ecological values which is not a consideration for the purpose of the Tree Act.

218. Village adopted Mr Patmore's opinion that for vegetation to be 'significant' for the purposes of C1 e), it must have significance to the ecology or environment of the ACT. There being no evidence to that effect, it said, there is no significant vegetation on the site for the purposes of C1 e).

219. The Authority submitted that an assessment of whether vegetation is 'significant' requires a site-specific evaluative assessment of an indefinite number of factors including the species of vegetation, quantitative considerations, the age of the vegetation, the prevalence of the vegetation, biodiversity, ecological connectivity, habitat use, surrounding flora and fauna, shade and cooling, aesthetic considerations, erosion prevention and the health and ability of the vegetation to withstand varying levels of surrounding development. The Authority relied on the evidence of Dr Coyne that factors of this kind can cause

[130] Witness statement of Sam Patmore dated 15 September 2020 at [6(iv)], Exhibit A11

vegetation to be significant, and submitted that the 50 trees identified by Dr Coyne are significant vegetation.

220. In our view, trees that can be fairly characterised as significant vegetation must be retained. C1 e) does not permit a balancing exercise between keeping a tree and enabling a development to occur. A tree constitutes significant vegetation, or it does not, depending on its features. It does not cease to be significant if its retention is problematic. Accordingly, Mr Reeves' criticisms of Dr Coyne's analysis are understandable, from a construction viewpoint, but are 'flawed' for the purposes of C1 e) which is concerned solely with the character of the tree.

221. As Village properly acknowledged, in contrast with section 119(2) of the P and D Act, C1 e) does not contemplate "any assessment of things like alternatives or the context of the site itself. There's nothing in the text of [C1 e)] that says retention of significant vegetation [should occur] where ... on balance it would be reasonable to retain it or something of that kind".[131]

222. Any difficulty in retaining a tree in the context of proposed works on the land where it grows is not relevant to the character of the tree.

223. To comply with C1 e), significant vegetation must be retained – there are no 'ifs or buts'. How that is done is a matter for the proponent. In most cases, as Mr Reeves and those who gave engineering or construction evidence acknowledged, there are construction techniques that enable that to be done: it is a matter of additional work and cost. If retention of a tree requires the absence of development on or near its location, then so be it.

224. This result is not obtuse or illogical. It needs to be remembered that the obligations under C1 e) – and other paragraphs of C1 – arise in the context of subdividing land and designing movement networks for the purpose of creating an estate. An estate cannot be designed on a 'blank canvas'. It requires consideration of the legal, natural and physical constraints and opportunities that 'run with the land'. We see no difference in principle between an obligation to design movement networks that permit access for garbage trucks and an

[131] Transcript of proceedings, 9 December 2020, page 865, lines 43-46

obligation to retain trees that constitute significant vegetation. This is not a new concept. Developers frequently encounter a feature or features of land that need to be retained, for legal or practical reasons, and take the feature or features into account when formulating a design.

225. If a proponent regards the cost of retaining a tree as prohibitive or the prospects of successfully retaining it to be so low that it could not be sensibly attempted, the result is not to develop the area where the tree is sited.

226. For these reasons, much of the debate about the 'pros and cons' of retaining trees was of limited relevance. Nevertheless, we should note the substance of it.

227. Mr Reeves and Village promoted that the better option is to clear the site and then replant with more trees than are presently on the site in better soil and in better locations.[132] dsb Landscape Architect's Tree Management Plan is a submission as to why, from a construction viewpoint, trees cannot be retained if the proposed project is to be delivered. It makes no attempt to explore options for tree retention.

228. Mr Anderson from the Community Council questioned why any sensible occupant of one of the proposed townhouses would want (what would become) a large tree growing in their small and only private open space of approximately 16m². If planted, he doubted they would survive and if they did not survive he doubted they would be replaced.[133] Village submitted that that was a concern for the body corporate that would be established under the *Community Title Act 2001*.[134]

229. Dr Coyne expressed the view that the proposed new trees "are planned for areas which are unlikely to be closely managed and mortality between now and 2060,

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[132] It was difficult to quantify this claim. Mr Ineson said that Village planned "to plant three trees for every tree that is removed" – see witness statement of Kenneth Ineson dated 14 July 2020 at [47], Exhibit A2. Dr Coyne noted that Village proposed to remove 68 mature trees and replant 73 trees. See witness statement of Peter Coyne dated 21 August 2020 at [58]-[60], Exhibit R8

[133] Transcript of proceedings, 9 December 2020, page 924, lines 39-40

[134] *Community Title Act 2001*, sections 30 and 35

for a diversity of reasons, is likely to be considerable".[135] He said that planting 73 small trees on the site "falls far short of offsetting removal of 69 mature trees".[136]

230. Village included in its DA application a document prepared by the Authority in 2019 that consolidated comments from different entities and Village's response to them given on 17 September 2019. The comment from the office of the Conservator was as follows:

> *From the Estate Plans presented, it appears that possibly only one mature tree (178 or 179?) is to be retained from the existing trees on the lease. Further work should be undertaken to improve the tree retention on site. It also appears that trees 186 to 189 are to be retained but they have been omitted from the DSB report.*
>
> *The Tree Assessment report from DSB appears to only classify trees to a [M]edium level. With the paucity of trees now on site (and within the adjoining new suburbs) the Tree Protection Unit disagrees with this Management Status listing presented and suggests that many [trees] are actually of High quality.*
>
> *Substantial trees are important for connectivity through the suburbs. Hollows can take over 100 years to form so while the trees on site may not contain hollows at the moment it is important to retain trees that are present before development to avoid lengthening the time before hollows become available. It is becoming more and more evident that it is essential to retain remnants and large trees in the urban area as many species of birds, bats, insects and small mammals are dependent for food, shelter and breeding.*
>
> *Please note the 'loss of mature native trees (including hollow bearing trees) and a lack of recruitment' has been listed as* [a] *Key Threatening Process under the provisions of the Nature Conservation Act 2014 in recognition of the importance of these trees and the need to make an effort to enable their retention.*
>
> *The Eucalyptus sideroxylon, E. mannifera and Casuarina cunninghamiana (rated Medium), are valuable trees which the* [Tree Protection Unit] *assess as High and more should be retained within this estate development.*
>
> *The remaining trees assessed as Medium Quality do not meet criteria for removal under the Tree Protection Act 2005.*
>
> *Please review and adjust as appropriate. The Tree Protection Unit at TCCS can be contacted to review tree management plans and for site inspections.*[137]

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[135] Witness statement of Peter Coyne dated 21 August 2020 at [60], Exhibit R8
[136] Witness statement of Peter Coyne dated 21 August 2020 at [65], Exhibit R8
[137] T documents at pages 470-471

231. Village held firm, as it still does, regarding the need to remove all the trees – save now for trees 40-43 in the extreme south-west corner of the site. Its responses were as follows, which remain operative:

> *The provision of 3 linear parks north/south allows for increased park access and address for the community. The linear nature of the parks spaces allows for the creation of vegetation corridors which extends to include a well vegetated arrangement at both entry areas north and south.*
>
> *Refer to the Assessment of Proposed Removal of Trees and…* [capture-recapture] *management Plan provided by DSB Landscape Architects included in this submission which explains how options for retention of trees were explored for the proposal.*
>
> *The amendment proposal includes significant plantings of large native trees in Featherston Gardens and the Unwin Street floodway. These are more appropriate locations for large native trees than close to medium density housing. Three trees will be planted for every tree that is removed.*[138]

232. The three "linear parks" are, to use Village's term, more in the nature of corridors, 17m wide, separating a bank of townhouses on each side. The landscape plan[139] depicts concrete footpaths down each side of each linear park alongside the townhouses, turfed areas, tables and benches. It would seem these linear parks are for access and amenity, not replacement of biodiversity. Also, as the Community Council pointed out, there is no open space for children to play.[140]

233. Village referred to its offer to plant what would become large native trees across the road, on someone else's land, as a response to the Conservator's concern about the importance of retaining existing large mature trees in urban areas.

234. It was not necessary for us to enter this debate because the legislature has already determined that retention of significant vegetation must be 'achieved'. Whatever opinions may be held about the benefits or disadvantages of retaining trees, or planting new trees, those opinions are beside the point. The legislature has already determined that the "subdivision layout and movement networks" must achieve retention of significant vegetation. Where we are satisfied that the trees referred

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[138] T documents at page 471
[139] Applicant's closing submissions in chief dated 24 November 2020, annexure B at page 65
[140] Transcript of proceedings, 9 December 2020, page 923, line 23

to in paragraphs 180-181 above are significant vegetation, they must be retained. The development proposes to the contrary.

235. Mr Patmore did not enter the debate about the merits of retaining the existing trees. His report went only to his view about how C1 e) should be construed and therefore, by reference to his construction, why none of the trees on the site is significant vegetation.

236. We reject Mr Patmore's opinion that vegetation must have ecological importance in order to be 'significant' for the purposes of C1 e). As discussed above, 'ecological connectivity' is no more than a factor to be considered when determining whether vegetation and/or habitat areas are significant.

237. Mr Patmore's reliance on other legislation and why vegetation might be 'significant' for the purposes of that other legislation is misconceived. The word is no more than an adjective that adds meaning to the noun to which it refers. Whether an 'impact' or an 'effect' is 'significant' for the purpose of other legislation has no bearing upon whether vegetation is 'significant' for the purposes of C1 e).

238. For these reasons, we concluded that the amended DA, and the amended plans put forward at the hearing for approval, do not comply with C1 e) of the EDC.

The Estate Development Code – criterion 50

239. Element 8 of the EDC sets out requirements regarding block layout and orientation for estates in residential and CZ5 zones. It is comprised of rules and criteria 47–56. In this case, only rules and criteria 47-51 are relevant.

240. Compliance with R47 requires standard blocks in an estate to:

    (a) comply with the block compliance tables in appendix A to the EDC; and

    (b) comply with the stated minimum block depths and block widths. The minimums vary according to whether a block is a compact block, a mid-size block or a large block.

241. Rule 47 concludes:

This rule does not apply to standard blocks within an integrated housing development parcel.

242. 'Standard block' is defined in the Definitions part of the Territory Plan as follows:

***Standard block** means a block with one of the following characteristics:*

a) originally leased or used for the purpose of one or two dwellings except where the original lease explicitly permits two dwellings

b) created by a consolidation of blocks, at least one of which is covered by a)

243. Referring to R47, an 'integrated housing development parcel' is defined in the Definitions part of the Territory Plan as follows:

***Integrated housing development parcel** means a parcel of land intended to be*

a) subdivided into two or more standard blocks, and

b) used for an integrated housing development.

244. An 'integrated housing development' is defined in the Definitions part of the Territory Plan as follows:

***Integrated housing development** means development where the developer:*

a) is responsible for the planning, design and building of all the housing and associated facilities; or

b) undertakes the site planning and development of infrastructure as well as establishing general requirements for building design without actually constructing the dwellings.

245. The Tribunal enquired about which blocks on Village's Planning Controls Plan are standard blocks, and why. In answer, both parties focused upon the future use of the proposed blocks. They agreed that all blocks "that include residential or single dwelling use will be standard blocks as per the definition. Communal blocks intended to operate as roads and parks are not standard blocks per the definition."[141] [142] We agree.

246. We were, at first, troubled by the words "originally leased", given that the site has been previously leased to the College and then NEB Holdings Pty Ltd, suggesting that reference should be made to the terms of the original lease. That

[141] Applicant's closing submissions in chief dated 24 November 2020 at [353]

[142] Outline of closing submissions on behalf of respondent dated 4 December 2020, annexure A at [8(a)]

construction should not be preferred. Reading the definition as a whole, it refers to "a block", meaning a block to be created under the proposed EDP, and therefore the use in the first or 'original' lease to be drawn for the purpose of leasing that block.

247. Village's most recent version of its Block Compliance Plan proposes 258 residential (i.e. standard) blocks.[143] Village initially contended, referring to that Plan, that the 198 blocks within the IHDP do need not comply with R47 because they would be within an IHDP. It accepted[144] that 196 of the 198 blocks that would constitute the IHDP would not comply with R47. Non-compliance was primarily because the blocks would be less than the minimum width of 6m.

248. In its closing submissions, Village changed its position to contend that the whole site[145] is an IHDP. It did so with reliance on the definition of an IHDP. It submitted that the words "a parcel of land" in the definition of an IHDP refers to "the parent parcel" of the proposed blocks, and not a parcel or parcels giving rise to the proposed blocks themselves.[146] In this case therefore, it said, the whole site is an IHDP with the result that none of the proposed standard blocks on the site needed to comply with R47 or (corresponding C47).

249. The Authority disagreed. It noted (with reference to the definition of an IHDP) that "a parcel of land" is not defined, and that it is not clear whether it should be construed as a reference to a block of land "identified in the ACT planning system" or "any identifiable area of land which is intended to be subdivided into two or more standard blocks and used for an [IHDP]".[147] It submitted that the second construction should be preferred because the definition of an IHDP refers to a parcel "intended to be subdivided into two or more standard blocks", not a subdivision for other purposes.[148] In this case, therefore, by reference to the current version of the Block Compliance Plan, there will be several parcels of

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143 Applicant's closing submissions in chief dated 24 November 2020, annexure B at page 3
144 Applicant's closing submissions in chief dated 24 November 2020 at [354]–[355]. The Tribunal recalls Mr van der Walt confirming, in oral evidence, that none of the blocks that would form part of an IHDP comply with R47, save now for amalgam blocks jp and jq
145 Applicant's closing submissions in reply dated 8 December 2020 at [68]
146 Applicant's closing submissions in chief dated 24 November 2020 at [270]
147 Outline of closing submissions on behalf of respondent dated 4 December 2020 at [126]
148 Outline of closing submissions on behalf of respondent dated 4 December 2020 at [126]-[127]

land, each to be subdivided into two or more standard blocks. "It is each of these individual "parcels", it said, which is intended to be "subdivided into two or more standard blocks" and "used for integrated housing development" and to which the definition therefore applies.[149]

250. The Authority's submission relied on the current version of Village's Block Compliance Plan, which proposes 13 areas of land on the site separated by access roads or common areas. Each of those 13 areas is to be divided into adjoining single dwelling residential blocks.

251. Village submitted in reply that the Authority's approach is "rather tortured" and "entirely artificial" because the whole estate would never be first divided into these 13 separate parcels before being further subdivided into the proposed single dwelling blocks. It said that because the suggested parcels would be "completely fictional", no such intention could arise. Village pointed out that, legally, the site would be converted directly to a Community Title scheme with the proposed single dwelling blocks and community title blocks, without the suggested intermediary fictional parcels.

252. Village also pointed out that the Authority's approach could lead to "orphan" blocks if a subdivision of an existing block (for example, the site in this case) included creation of a single block separated from other blocks by a road or park. Such an orphan block, it said (on the Authority's approach), could never be, or be part of, an IHDP.

253. 'Parcel of land' is not defined in the Territory Plan, but is a term often used when valuing land for tax or assessment purposes.[150] In *Christies Sands Pty Ltd v City of Tea Tree Gully*,[151] the Supreme Court of South Australia, per Wells J, said:

> [A parcel of land] *means, in my opinion, a specified and reasonably well defined area of land. That area may be defined by general description, by reference to a map or plan, by clearly established usage, or by a combination of all three (or one or two of them) with landmarks, fences, walls, tracks, watercourses or natural boundaries or signs on or in the land*

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[149] Outline of closing submissions on behalf of respondent dated 4 December 2020 at [128]

[150] See generally Alan Hyam, *The Law Affecting Valuation of Land in Australia* (The Federation Press, 6th edition, 2020) pages 25-27

[151] [1975] 11 SASR 255

> *of any kind whatever. It is essential to the creation of a parcel, in this sense, that its limits should be ascertainable with reasonable precision.*[152]

254. In *Colonial Sugar Refining Co Ltd v Valuer-General,* the New South Wales Land and Valuation Court, per Roper J, said:

> [W]*hether land is "one or more parcels… is a question of fact. Unity of title and the purpose for which the land is held, are elements to be considered; but the principal consideration is, I think, the degree of separation effected by the owner in using the land.*[153]

255. The words 'a parcel of land' refer to an identifiable area of land.[154] A parcel is not restricted to surveyed parcels or subdivisions[155] and can include part of the land identified in a certificate of title.[156] Conversely, the absence of separation by physical severance, use or occupation indicate that adjoining legally separate portions of land are one parcel.[157]

256. Applying these principles to this case, in our view there will be 13 parcels of land comprised of single dwelling blocks with each parcel divided by a road or a park. For these reasons, we rejected Village's revised submission and proceeded by reference to its original submission that the IHDP is comprised of the 198 blocks shown to make up the IHDP – or more accurately the 13 IHDP's – depicted on the Block Compliance Plan.

257. We accept (by reason of the statement at the end of R47) that R47 (and therefore corresponding C47) does not (in terms) apply to the 198 non-compliant blocks. The question was whether C50 of the EDC applies to them. C50 states:

> *In an estate, the proportion of standard blocks that comply with R47 is maximised.*

258. Village submitted that C50 does not apply because R47 does not apply to standard blocks in an IHDP. Where R47 does not apply, it said, there is nothing to "maximise". Village submitted that where C50 'picks up' R47, it 'picks up' the whole rule including the exclusion - not just the requirements in paragraphs a)-c)

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[152] *Christies Sands Pty Ltd v City of Tea Tree Gully* [1975] 11 SASR 255, 266
[153] *Colonial Sugar Refining Co Ltd v Valuer-General* (1939) 5 The Valuer 472, 473
[154] *Weston v Snowy River Shire Council* (1980) 41 LGRA 1
[155] *Russia Lutvey & Sons Pty Ltd v Valuer-General* (1980) 7 QLCR 1
[156] *Triguboff v Valuer-General* [2009] NSWLEC 9 at [23]–[24]
[157] *Triguboff v Valuer-General* [2009] NSWLEC 9 at [23]–[24]

of R47. In support of this interpretation, Village relied on the Macquarie Dictionary definition of 'comply', meaning "to act in accordance with". It said that to act in accordance with the rule or requirement could only apply if the rule applies. From there it submitted that R47 does not apply because it is stated not to apply to standard blocks in an IHDP.

259. Village submitted that its interpretation was also consistent with the policy considerations underpinning R/C47 – R/C51. It said, in summary, that a developer is presented with a choice when it chooses to subdivide. It can develop a site by creating compliant standard blocks or it can develop the site (wholly or in part) as an IHDP. If it decides to develop an estate as an IHDP, then (per the definition of an IHDP) it must:

    (a) take responsibility for planning, designing and building all housing and associated facilities that make up the IHDP; or

    (b) undertake the site planning and development infrastructure as well as establishing requirements for building design, even if it does not actually construct the dwellings.

260. If a developer decides to develop an estate as an IHDP, Village submitted, it is excused from compliance with R/C47 and C50, "and the greater flexibility of [C51] is available".[158]

261. The Authority submitted that despite R47 stating that blocks in an IHDP did not have to comply with R47[159] or corresponding C47, C50 nevertheless required the number of blocks that do comply with R47 to be "maximised". This obligation, it said, is apparent from C50's opening words "In an estate", meaning C50 applies to estates and estate development generally. If the legislature had intended C50 not to apply to blocks that form part of an IHDP, it would have said so.

262. The Authority relied on a surprising result that would occur if C50 did not apply to standard blocks that form part of an IHDP, namely all dwellings on blocks forming part of an IHDP could be built without any obligation to provide solar

[158] Applicant's closing submissions in chief dated 24 November 2020 at [277(b)]
[159] Outline of closing submissions on behalf of respondent dated 4 December 2020 at [117]

access to living areas in the dwellings. It noted that C51, which lists requirements for each standard block within an IHDP, does not impose that requirement. The Authority submitted that C50 operates as a "qualitative restriction" on the extent to which IHDP "could be utilised to avoid the requirements of R47".[160]

263. When working out the meaning of a statutory provision, the provision and other related statutory provisions must be read as a whole.[161] In this case, having read R/C47-C51 as a whole, we have concluded that C50 applies to standard blocks in an IHDP.

264. We began with the question: what is "an estate"? As the parties noted, the word is not anywhere defined – even though it is italicised in many rules and criteria of the EDC to indicate that it is (or should be) defined.[162] To this extent, the statement in the EDC, page 3, that "defined terms, references to legislation and documents are italicised" is incorrect.

265. However, referring to the introduction to the EDC,[163] an 'estate' appears to cover all blocks of land where there is a proposal for subdivision of a block that requires preparation of an estate development plan. That includes an IHDP. If C50 was not intended to apply to an estate or a portion of an estate that is an IHDP, a reader would have expected a statement of that kind as appears in R47.

266. Nevertheless, we reviewed R/C47-51 as a whole to determine whether the legislature intended, or not, that C50 applies to an IHDP.

267. As the Authority noted, in relation to residential use, until 2013, subdivision involved creation of two kinds of land parcels: standard blocks and multi-unit blocks. In 2013, the *Planning and Development (Plan Variation No 6) Notice 2013*[164] introduced a third kind of parcel: the integrated housing development parcel. A person applying for subdivision approval could choose which kind or

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[160] Outline of closing submissions on behalf of respondent dated 4 December 2020 at [135]
[161] *Legislation Act 2001*, section 140; Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Buttersworth, 9th edition, 2019) paragraph 2.11
[162] C4 a), R18, R24 a), R24 b), R34, R38, R39, R40
[163] See page 1 of the EDC under the heading "Application".
[164] NI 2013-93

kinds of blocks to create, and each of the three kinds brought its own set of planning obligations.

268. R47, which applies to standard blocks, by implication does not apply to multi-unit blocks. It is stated also not to apply to standard blocks in an IHDP.

269. R48, R49 and C50 then constrain the extent to which an applicant seeking approval for a subdivision to create separate standard blocks can avoid R47 by relying instead on C47. Village chose to "pass by"[165] R48 and R49 in its submissions, but in our view they have a material bearing upon the proper construction of C50.

270. R48 states:

> *Not less than 95% of standard blocks contained in an estate development plan comply with R47 or are contained within an integrated housing development parcel (refer C50).*

271. The words "(refer C50)" in R48, immediately following "integrated housing development parcel", signal that in relation to standard blocks in an IHDP, the applicant does not need to meet the quantified minimum of blocks that comply with R47 (ie 95%) but the number that do comply needs to be "maximised". The proportion that comply with R47, in order for the number to be "maximised", will depend on the facts and circumstances in each case – hence the legislature's use of a criterion (ie C50) rather than a rule.

272. R49 states:

> *Standard blocks that do not comply with R47 and are not contained in an integrated housing development parcel (refer C50)* [per] *the previous rule are identified in the estate development plan as 'limited development potential blocks'.*

273. R49 builds on R48 by requiring blocks that do not comply with R47 and are not in an IHDP, "[per] the previous rule" be identified as limited development

[165] Transcript of proceedings, 9 December 2020, page 902, line 27

potential blocks.[166] Again, the words "(refer C50)" after "integrated housing development parcel" signal that for blocks in an IHDP, C50 applies.

274. C50 is then expressed in relation to "an estate" and requires the proportion of "standard blocks", meaning standard blocks generally, to be maximised. Compliance with C50 contemplates different scenarios.

275. For an estate of intended standard blocks, none of which is in an IHDP, R48 sets a minimum compliance with R47 of 95%, meaning a developer can rely on compliance with C47 as an alternative to compliance with R47 for only up to 5% of the blocks, but C50 still requires compliance to be maximised. This might be more than 95%, depending on the facts.

276. For an estate involving a mixture of intended standard blocks, some of which are in an IHDP and some are not, 95% of those blocks not in an IHDP must comply with R47 (per R48) and the proportion of all standard blocks (regardless of whether they are in or out of an IHDP) must be maximised.

277. For an estate made up entirely of standard blocks in an IHDP, there is no quantified minimum of blocks that must comply with R47 but those that do comply must be maximised. This is consistent with the statement in the Explanatory Note to Draft Variation No 306,[167] which states:

> *Under element 8 an integrated housing development parcel is subject to the block compliance tables in the same way as a single dwelling block, but the subsequent single dwelling blocks would not* ***necessarily*** *need to comply.* [emphasis added]

278. This statement would be nonsensical if standard blocks in an IHDP did not have to comply with the block compliance tables at all.

279. We reject Village's submission that C50 does not apply to standard blocks in an IHDP because C50 'picks up' the whole of R47 including the exclusion. Such a

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[166] We disagree with Village's submission in its statement of facts and contentions dated 16 July 2020 at [194], that R49 is "rendered meaningless" because of an apparent missing word before "previous rule". We think it reasonably clear that the word "per" or "see" was inadvertently omitted before "previous rule" and can be inferred.

[167] The land parcel category of "integrated housing development parcel" was introduced by Draft Variation No 306

construction contradicts the plain words of C50 and ignores the references to C50 in R48 and R49.

280. We also reject Village's secondary submission that Element 8 to the EDC (comprising R/C47-56) contemplates that a developer is excused from complying with the general controls under R/C47, and obtains (instead) the "greater flexibility of criterion 51"[168] if it chooses to undertake an integrated housing development.

281. R47 and C51 are not alternatives, in the sense that C51 sets up a set of requirements for standard blocks in an IHDP to be met instead of the requirements under R/C47 for blocks not in an IHDP. As the Authority noted, if R/C47 does not apply to standard blocks in an IHDP, an applicant would have no obligation to ensure that the intended standard blocks are "sized and oriented" to allow the erection of a house that complies with the rules under the Single Dwelling Code regarding solar access to a habitable area in the dwelling.

282. It would seem that Village is alive to the fact that it seeks approval of an EDP containing standard blocks on which it might not be possible to erect a house that complies with the solar access requirements under R7A of the Single Dwelling Code, hence its proposed amendment to the Weston Precinct Code to state that Rule 7A of the Single Dwelling Code does not apply to standard blocks in its proposed IHDP's.

283. The fact that Mr Millman is "proud to say" that every proposed dwelling would achieve 100% solar compliance under the Multi-Unit Code, and that this is "an exemplar result for medium density housing" [169] is not to the point: the Multi-Unit Code does not apply.

284. In our view, C51 sets up additional, not alternative, requirements if a developer chooses to undertake an integrated housing development. Some of these are to balance the relief from compliance with some provisions of the Single Dwelling Code which do not apply to blocks in an integrated housing development.

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[168] Applicant's closing submissions in chief dated 24 November 2020 at [277(b)]
[169] Witness statement of Chris Millman dated 14 July 2020 at [7], Exhibit A5

285. For example, under the Single Dwelling Code, R12 requires a building to be setback from the side and rear boundaries by the distances stated in Table 5. However, R12 does not apply to standard blocks in an IHDP unless they are joined residential blocks that are not part of the IHDP. The freedom not to comply with R12 enables Village to construct the rows of proposed townhouses with common 'party walls' on standard blocks, but that freedom brings with it the obligations under C51 c) and d) to address questions of amenity that would ordinarily not arise if minimum side and rear setbacks requirements applied.

286. Having determined that C50 applies to standard blocks in an IHDP, the remaining question is whether the proportion of the standard blocks that do comply with R47 has been maximised.

287. Village submitted that if we concluded that C50 applies, the development proposal satisfies the criterion, "once consideration is given to the site characteristics, solar access, and overall residential amenity of the subject proposal".[170] Village contended that C50 should be read "purposively", in the sense of achieving good outcomes regarding solar access and residential amenity without "slavishly" following the rules in R47. A prime consideration, it said, is whether a proposal has achieved "the intent" of R47 and is "otherwise an efficient and worthwhile design".[171] Village submitted that consideration of "maximising" compliance requires consideration of "what is possible on the site" as well as the resulting residential amenity of dwellings built on blocks which do not comply with R47 a) – c).

288. Having considered the proposed Block Compliance Plan, this was a difficult submission to entertain. The design is simple, by any measure, comprising seven banks of standard blocks in the middle of the site, ringed by six further banks of standard blocks facing the site's four boundaries. Only 20% of the proposed blocks would comply with R47. Only two of the 198 blocks that form the IHDP (or IHDP's) comply with R47. What has been maximised is the number of blocks, not the number that comply with R47.

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[170] Applicant's closing submissions in chief dated 24 November 2020 at [296]
[171] Applicant's closing submissions in chief dated 24 November 2020 at [293]

289. Nor is there anything about the features of the site or the design that precludes the non-complying blocks from complying with R47 c), at least. The dimensions of each rectangular bank of standard blocks, meaning each IHDP, can remain the same. Where non-compliance arises from the width of the blocks, not their length,[172] all Village need do to enable each standard block in an IHDP to comply with R47 c) is have fewer standard blocks in each bank. We express no view about whether the blocks would comply with R47 a).

290. For these reasons, we find that C50 applies and is not met.

The Estate Development Code – criterion 51

291. As mentioned above, the standard blocks in each of the 13 proposed IHDP's must also comply with C51 which states:

> *Each standard block within an integrated housing development parcel enables a house to be designed which achieves all of the following:*
>
> *a) consistency with the desired character*
>
> *b) solar access to nominated principal private open space comparable with the relevant provisions of the Single Dwelling Housing Development Code*
>
> *c) reasonable levels of privacy for other dwellings and their associated principal private open space within the integrated housing development parcel comparable with the relevant provisions of the Single Dwelling Housing Development Code*
>
> *d) where the proposed house is part of a building containing two or more houses, the outlook from an unscreened element is not unreasonably impeded by external walls on the same or adjoining blocks*
>
> ***Note 1**: Compliance with this criterion will be established though an assessment of an integrated housing development plan submitted with the estate development plan for each integrated housing development parcel.*
>
> ***Note 2**: The location, type and profile of mandatory boundary walls identified in the relevant integrated housing development plan and approved as part of the estate development plan will be incorporated into the Territory Plan under section 96(2) of the Planning and Development Act 2007.*
>
> ***Note 3**: Integrated housing development parcels must comply with the boundary setback and building envelope provisions under the Single Dwelling Housing Development Code.*

[172] The exception is the 12 blocks stated on the Block Compliance Plan (applicant's closing submissions in chief dated 24 November 2020, annexure B) as non-compliant

292. Regarding C51 a), the need for consistency with 'desired character' materially replicates the second factor in C1 a) although only in relation to "standard blocks" in an IHDP. The words "of the relevant land use zone" in C1 a) are not replicated in C51 a), but (in our view) this does not vary the requirement because the definition of 'desired character' picks up the need for consistency with the "relevant" zone objectives. Those objectives could only be those stated for the relevant land use zone. Mr van der Walt, the director of CTP, also considered that the meaning of "desired character" in C1 a) and C51 a) and concluded that they are the same.[173] We agree. Where we have concluded that the second factor in C1 a) is not met, we have (for the same reasons) concluded that C51 a) is not met.

293. Regarding C51 b) requiring solar access to nominated principal private open space, the relevant provisions of the Single Dwelling Code are R/C41 of that Code.

294. R41 begins with the statement "At least one area of *principal private open space* on the block complies with all of the following:" It then lists six requirements in paragraphs R41 a) – f) as follows:

> *(a) minimum area and dimensions specified in table 8.*
>
> *(b) at ground level*
>
> *(c) directly accessible from, and adjacent to, a habitable room other than a bedroom*
>
> *(d) screened from adjoining public streets and public open space*
>
> *(e) located behind the building line, except where enclosed by a courtyard wall*
>
> *(f) is not located to the south, south-east or south-west of the dwelling, unless it achieves not less than 3 hours direct sunlight onto 50% of the minimum principal private open space area between the hours of 9am and 3pm on the winter solstice (21 June).*

295. Corresponding C41 of the Single Dwelling Code would require (instead) that the principal private open space achieves all of the following:

> *(a) is proportionate to the size of the dwelling*
>
> *(b)* [is] *capable of enabling an extension of the function of the dwelling for relaxation, dining, entertainment, recreation, and it is directly accessible from the dwelling*

[173] Witness statement of Petrus van der Walt dated 16 July 2020 at [108(a)], Exhibit A21

(c) accommodates service functions such as clothes drying and domestic storage

(d) is screened from public streets and public open space with pedestrian or cycle paths

(e) reasonable access to sunlight to enable year round use

296. Regarding compliance with C51 b), Mr van der Walt said that in his opinion, the term 'comparable' means solar access performance that achieves a similar standard of residential amenity to that required under the relevant provisions of the Single Dwelling Code. It does not require, he said, the same level of performance. He said that an outcome that provides lesser solar performance may be "deemed approvable".[174]

297. Mr Chris Millman is the architect for the proposed development. Regarding solar access, Mr Millman noted that "the development offers dwellings in both a North/South orientation and East/West orientation … a mix of orientations with the East/West orientated (sic) dwellings carefully considered to allow for sun to penetrate in the morning and also in the afternoon".[175] By this, we understood Mr Millman to be saying that none of the standard blocks with an east/west orientation would receive northern sun (save for a block at the northernmost end of an IHDP) and that the blocks would instead receive sun from the east in the morning and from the west in the afternoon. Approximately 151 of the proposed 258 blocks have an east-west orientation.

298. Mr Dale Billing is a senior assessing officer with the Authority. In his view, the proposed development "failed to demonstrate that solar access to PPOS has been provided in a manner comparable" with the Single Dwelling Code "as all IHDP blocks are proposing a concession on the minimum area required and in some cases have proposed the PPOS in locations to the south or on the upper floor levels".[176] The solar diagrams provided with the DA, he said, "do not adequately demonstrate that reasonable solar access is achieved".[177]

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[174] Witness statement of Petrus van der Walt dated 16 July 2020 at [108(b)], Exhibit A21
[175] Witness statement of Chris Millman dated 14 July 2020 at [7], Exhibit A5
[176] Witness statement of Dale Billing dated 25 August 2020 at [110] (Exhibit R11), with reference to T documents at page 498 (the Planning Controls Plan), Exhibit R1
[177] Witness statement of Dale Billing dated 25 August 2020 at [110], Exhibit R11

299. In reply, Mr Millman contended that "most" dwellings comply with R41 and that the rest comply with C41. Mr Millman noted for the 54 dwellings facing Heysen Street, and therefore with south facing ground floor courtyards, the proposal is for "the primary PPOS [will be] on the upper level adjoining internal living spaces, facing north."[178]

300. Village began with a submission regarding C51 b) that "solar access is rule compliant for all blocks in [IHDP's]. The evidence of Mr Millman establishes this fact."[179] It later submitted that "the level of solar access provided for all proposed blocks is "high, and is not only comparable to, but meets" that required under R/C41 of the Single Dwelling Code.[180] Village submitted "that the indicative dwellings will achieve excellent solar access",[181] and that "most dwellings comply with [R41 of the Single Dwelling Code]" with the balance "compl[ying] with [C41]".[182]

301. The Authority said that C51 b) is not met because, in the case of "a significant number of blocks" neither R41 nor C41 is met. It referred, by way of example, to blocks 'bp' – 'co' facing Heysen Street where the proposed PPOS is less than the minimum dimension stated in R41, "on the first floor and… in some cases… on the south side of the proposed dwelling".[183]

302. We began with the meaning of C51 b) before turning to whether the evidence establishes compliance with it. In this respect, in our view:

    (a) the word 'nominated' contemplates that there might be more than one area of PPOS on a standard block, but that at least one – i.e. the 'nominated' one – will be able to obtain solar access in a manner comparable with that required under the Single Dwelling Code;

    (b) the italicising of the words *principal private open space* picks up the definition of PPOS in the Definitions part of the Territory Plan, namely

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178 Witness statement of Chris Millman dated 22 September 2020 at [6], Exhibit A6
179 Applicant's statement of facts and contentions dated 16 July 2020, at [196(b)]
180 Applicant's statement of facts and contentions in reply dated 24 September 2020, attached table entitled "Weston – T documents - Entity Advice and Territories (sic) reasons", page 47
181 Applicant's closing submissions in reply dated 8 December 2020 at [98]
182 Witness statement of Chris Millman dated 22 September 2020 at [6], Exhibit A6
183 Outline of closing submissions on behalf of respondent dated 4 December 2020 at [142(a)(iv)]

"private open space that is directly accessible from a habitable room other than a bedroom";

(c) the word 'comparable', meaning "1. capable of being compared. 2. worthy of comparison" requires consideration of the ordinary meanings of 'compare' and 'comparison'. 'Compare' relevantly means "1. to represent as similar or analogous. 2. to note the similarities and differences of". 'Comparison' relevantly means "1. the act of comparing. 2. the state of being compared. 3. a likening; an illustration by similitude; a comparative estimate or statement".[184] We draw from the word "comparable" in C51 that compliance with the solar access requirements in R/C41 of the Single Dwelling Code is not necessary, but there needs to be a "worthy" similarity or likeness between what can be achieved on each standard block and what would be required to comply with R/C41 of the Single Dwelling Code. We agree with Mr van der Walt that "something less" than compliance can be "comparable" in this sense; and

(d) the "relevant provisions" of the Single Dwelling Code are R/C41.

303. The Authority's reliance on blocks bp – co is misplaced because C51 applies only to standard blocks within an IHDP: blocks bp – co are not in an IHDP. However, many other similar blocks facing Heysen Street are in an IHDP and so the submission remains valid in relation to those other blocks.

304. In our view, R/C41 of the Single Dwelling Code is relevant only in part. Those provisions concern many necessary features of a dwelling's PPOS, whereas C51 b) is concerned only with "solar access" to the PPOS. The solar access need only be 'comparable' with what would be required under the Single Dwelling Code. For this reason, only R41 f) or, in the alternative, C41 e) of the Single Dwelling Code is relevant.

305. Where C51 b) is not concerned with the dimensions or location of the PPOS, and where C41 e) of the Single Dwelling Code requires only "reasonable access to sunlight to enable year round use", we were satisfied that C51 b) is met.

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[184] Macquarie Dictionary (Macquarie Dictionary Publishers Pty Ltd, 7th edition, 2017)

306. We found an assessment of what is necessary to comply with C51 c) to be problematic because we could not find a provision of the Single Dwelling Code that deal with reasonable levels of privacy for other dwellings and their associated PPOS. It would appear that provisions of that kind are not considered necessary in the Single Dwelling Code because the issue is dealt with by mandating minimum front, side and rear setbacks per R/C11 and R/C12 of the Single Dwelling Code. However, as previously mentioned, the rules regarding side and rear setbacks do not apply (with one irrelevant exception) to standard blocks in an IHDP. This can be contrasted with R/C59 and R/C60 in the Multi-Unit Code which provides for privacy between dwellings and for the privacy of the PPOS in a dwelling, respectively.

307. We were left to conclude that although a risk of overlooking from the PPOS of dwellings on Heysen Street, where the PPOS would be on the northern upper level of those dwellings facing other dwellings further north (including the PPOS of those dwellings), nothing in the Single Dwelling Code addresses that scenario.

308. We also note, apparently in relation to those areas of a dwelling's PPOS at the ground level, Mr Millman's statement that the "proposed terrace-style typology performs inherently well with regards to privacy. Unlike other medium-density housing typologies such as apartments, all the terrace dwellings look directly out and down to their own private courtyard. Never is there a situation where a dwelling is over-looked from a unit directly above".[185]

309. Where there are no provisions in the Single Dwelling Code that provide for "reasonable levels of privacy for other dwellings and their associated PPOS", save for setback requirements that do not apply to an IHDP, we concluded that there is nothing to be achieved under C51 c).[186] If we are correct in our analysis, C51 c) presents an anomaly that might require legislative change.

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[185] Witness statement of Chris Millman dated 14 July 2020 at [8], Exhibit A5

[186] We considered Note 3 to C51, which states that integrated housing development parcels must comply with the boundary setback and building envelope provisions under the Single Dwelling Code, that is a comment about a "parcel" not a standard block within the parcel. For standard blocks on the boundary of the parcel, side and rear set back provisions apply. Otherwise, the rear and side setback provisions do not apply to a standard block within the parcel.

310. Regarding C51 d), the issue is outlook not overlooking. Mr Billing expressed concern that if Village attempted to address overlooking and privacy concerns by including screening and the use of fin walls, those additions might result in an impediment on outlook. Mr Millman countered by stating that any screening/fin walls have already been included in the latest solar analysis. Where we could not find any provision of Single Dwelling Code that addresses overlooking or privacy to other dwellings that is 'picked up' by C51, Mr Billing's concern about future screening or fin walls lost substance. We concluded that the outlook from an unscreened element will not be unreasonably impeded by external walls on the same or adjoining blocks.

311. For these reasons, we have concluded that the amended DA does not comply with C51 a), complies with C51 b) and d) and that compliance with C51 c) is anomalous.

The North Weston Concept Plan

312. On 21 August 2008, the Minister for Planning approved Variation 281 to the Territory Plan.[187] Section 3.1 of Variation 281 provided for a variation to the Territory Plan map which included zoning the site as RZ4. Variation 281 also included, as appendices 2, 3 and 4, concept plans for North Weston, Coombs and Wright, respectively. The Explanatory Statement states that the concept plans "will become precinct codes" under the P and D Act. Village and the Authority accepted, as do we, that at least part of the North Weston Concept Plan (**the Plan**) is a precinct code insofar as it sets out requirements that apply to stated areas or places and guides the preparation and assessment development in future urban areas to which it relates.[188] [189]

313. Relevant for present purposes, the North Weston Concept Plan states that Block 1 Section 82 Weston (being the site) is intended to become residential; that medium density housing between Unwin Place and Heysen Street is to be a

[187] Planning and Development (Plan Variation No 281) Notice 2008 NI2008-352
[188] See *Planning and Development Act 2007*, sections 55(3), 93(b)
[189] Applicant's closing submissions in chief dated 24 November 2020 at [27]; outline of closing submissions on behalf of respondent dated 4 December 2020, annexure A, page 44 at [15]

maximum of three storeys; and that residential development "adjacent to" Heysen Street is to be a maximum of two storeys.

314. The Community Council noted that the proposed townhouses facing Heysen Street are two storeys to the front of the proposed blocks addressing the street but three storeys to the rear of the proposed blocks. The Community Council queried whether the words 'adjacent to' applied to all development on blocks adjacent to Heysen Street or only to a development insofar as it was adjacent to or faced the street. Village and the Authority submitted the latter. Noting the ordinary meaning of the word 'adjacent"', is "lying near, close, or continuous; adjoining; neighbouring".[190] 'Adjacent' is defined in the Definitions part of the Territory Plan to mean "contiguous with the subject location", with an additional meaning that is not relevant for present purposes. By reason of those definitions, we were persuaded that the approach taken by Village and the Authority should be preferred.

315. A query arose about the current status of the North Weston Concept Plan. We were provided with a different, and apparently later, version of the Plan stated to be effective "18 December 2015". The text of the later version is unchanged from the earlier version, but the map attached to it depicts only a small portion (to the north) of the area depicted in the previous map. That area does not include the site. This mystery was not explained. Nevertheless, where the text of the later version of the Plan remained unchanged and where the storey limitations remain stated by reference to named streets (including streets adjoining the site) and not by reference to a map, we proceeded on the basis that the later version of the Plan remains applicable.

Weston Precinct Map and Code

316. The Weston Precinct Code (**the WP Code**), forming part of the Weston Precinct Map and Code, contains "additional rules and/or criteria for particular blocks or parcels" within an area bounded by Cotter Road, Tuggeranong Parkway, Hindmarsh Drive and Streeton Drive as depicted on the Western Precinct Map

[190] Macquarie Dictionary, (Macquarie Dictionary Publishers, 7th edition, 2017)

(**the WP Map**). The area on the map includes the site, however no rule or criterion within the WP Code applies to the site.

317. Village sought, as part of its application in this proceeding,[191] that a stated list of rules and criteria be added to the WP Code that would apply to "blocks or parcels in locations identified in Figure 1 as integrated housing development parcels". The intention was that "Figure 1" would be the site, and would be an area depicted on the WP Map.[192]

318. The rules and criteria that Village proposed be added to the WP Code address principal private open space, solar access, solar envelope, front and side boundary setbacks, building envelopes, building depths, garage widths, vehicle access, fences, courtyard walls and maximum storeys.

319. The stated purpose of the proposed rules and criteria was to:

> *facilitate the development of the site and the proponent's development intentions.*

and to allow the:

> *intended built form designs the opportunity to be progressed as exempt development.*[193]

320. We give some examples.

321. R7A of the Single Dwelling Code sets out provisions governing the solar building envelope for blocks "approved under an *estate development plan* on or after 5 July 2013" – as blocks on the site would be.[194] As mentioned above, it would seem that compliance with R7A would not be achievable on many of the proposed blocks in the IHDP's. To overcome this difficulty, Village proposed a rule be added to the WP Code stating that R7A would not apply to blocks or parcels "identified in Figure 1 as integrated housing development parcels", meaning the blocks in IHDP's on the site.

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[191] Applicant's closing submissions in chief dated 24 November 2020, annexure B at pages 13-15
[192] Applicant's closing submissions in chief dated 24 November 2020 at [362]
[193] Applicant's closing submissions in chief dated 24 November 2020 at [366]
[194] We do not share Mr van der Walt's opinion that R7A "is not intended to apply to integrated housing development parcels".

322. R11 c) and table 4 of the Single Dwelling Code states that the minimum front boundary setbacks at all levels for compact blocks in subdivisions approved on or after 31 March 2008 is 3m. Village's Planning Controls Plans put forward for approval depict,[195] for many proposed blocks, "0m" or "1m" setbacks on the front boundary of the block. To overcome the non-compliance with R11 c), Village proposed a rule be added to the WP Code stating, for blocks or parcels "identified in Figure 1 as integrated housing development parcels", meaning the blocks in an IHDP on the site, "minimum front boundary setbacks for lower and upper levels are nominated". The intention is that the levels "nominated" will be those depicted on the Planning Controls Plans.

323. R37A of the Single Dwelling Code "applies to blocks approved under an *estate development plan* or after 5 July 2013" for new dwellings or additions and alterations if the additional or alteration affects a daytime living area. R37A requires "a minimum of 4 m^2" of transparent vertical glazing, compliance with stated features regarding its orientation and the absence of overshadowing of the glazing at noon on the winter solstice. To avoid the need to comply with R37A, Village proposed the addition of a rule to the WP code regarding solar access that would require only that "the floor or internal wall of a daytime living area of a dwelling is exposed to not less than three hours direct sunlight between the hours of 9am and 3pm on the winter solstice" or, as an alternative criterion that, one or more daytime living areas is provided with reasonable access to direct sunlight between the hours of 9am and 3pm on the winter solstice (21 June).

324. R41 of the Single Dwelling Code requires the PPOS on a single dwelling block to meet minimum stated area and dimensions and to be at ground level.[196] Village proposed the addition of a rule to the WP code that would permit the PPOS for townhouses on the site to meet "nominated" minimum dimensions and to be at "upper building levels". Again, the intention is that the "nominated" minimums will be those depicted on the proposed Planning Controls Plans.

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[195] Applicant's closing submissions in chief dated 24 November 2020, annexure B, pages 4-12
[196] Single Dwelling Housing Development Code, R41 a) and b)

325. If the proposed rules and criteria were added to the WP Code, they would prevail over rules and criteria in other codes (including the Single Dwelling Code) to the extent of any inconsistency.[197]

326. Why Village should be excused from compliance with such fundamental provisions of the Single Dwelling Code was perplexing, but before considering the merits of the proposed rules and criteria we enquired as to where the Tribunal obtained power to vary the WP Code by adding them. Village relied on sections 96(2)(b)(ii) and 96(2)(c)(ii) of the P and D Act which state:

> *(2) The planning and land authority must, within a reasonable time after the approval of the estate development plan, vary the territory plan under section 89 (Making technical amendments) to—*
>
> *(a) if the land is in a future urban area— …; and*
>
> *(b) incorporate any ongoing provision that—*
>
> *(i) was included in the estate development plan under section 94 (3) (g); and*
>
> *(ii) the planning and land authority determined should be incorporated in the territory plan; and*
>
> *(c) incorporate any ongoing provision that—*
>
> *(i) was not included in the estate development plan under section 94 (3) (g); and*
>
> *(ii) the planning and land authority determined should be incorporated in the territory plan.*

327. Village submitted that these provisions empower the Authority, and now the Tribunal on review, "to determine at the time of approving the proposal whether certain provisions should be incorporated into the Territory Plan or not".[198] Village submitted that "[t]he tense of those subsections indicates that the time for determination of such incorporation [is] at the time of assessment of the development proposal".[199] Village submitted that "whether the precinct code should be amended in the manner proposed … is thus part of the decision [under review] on the application".[200]

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[197] *Planning and Development Act 2007*, section 115. See also the introduction to the Weston Precinct Map and Code

[198] Applicant's closing submissions in chief dated 24 November 2020 at [363]

[199] Applicant's closing submissions in chief dated 24 November 2020 at [363]

[200] Applicant's closing submissions in chief dated 24 November 2020 at [364]

328. The Authority agreed, save to submit that for "practical and legal reasons" any determination by the Authority, and now the Tribunal on review, should be an "in principle" determination only because the action of varying the Territory Plan (by a technical amendment) is one which takes place at a later time, via a separate process. The Authority drew on the requirement under section 96(2) to vary the Territory Plan "within a reasonable time **after** the approval of the estate development plan" (emphasis added) in support.

329. We did not need to consider the merits of the proposed rules or when to add them because, in our view, we do not have power to add them to the WP Code.

330. Section 96(1) of the P and D Act states:

> *This section applies to an area dealt with by an estate development plan if the plan is approved under a development application.*

331. In other words, the powers under section 96(2) are exercisable only where section 96(1) applies and the condition in section 96(1) is met. Two difficulties arose.

332. First, section 94(1)(b) of the P and D Act provides:

> ***94 What is an estate development plan?***
>
> *(1) An estate development plan, for an estate, sets out the proposed development of the estate, and the creation of blocks in the estate, in a way that is consistent with—*
>
> *(a) if the estate is in a future urban area—the concept plan for the area where the estate is; and*
>
> *(b) any other code that applies to the estate.*

333. The proposed estate development plan under consideration in this case is (in our view) inconsistent with the EDC for the reasons given, meaning it is not an "estate development plan" for the purposes of section 94(1) and, by extension, for the purposes of section 96(1). Where section 96(1) does not apply, so the powers under section 96(2) are not available.

334. Second, assuming the estate development plan could be made consistent with the EDC and the Tribunal on review approved it under the amended DA, sections 96(2)(b)(ii) and 96(2)(c)(ii) only empower the incorporation of any "ongoing provision" that the Authority (or the Tribunal on review) determined should be

incorporated. An 'ongoing provision' is defined in section 94(3)(g) of the P and D Act as follows:

> *(g) a provision, which is consistent with the territory plan, that is proposed to apply to the ongoing development of a block in the estate (an **ongoing provision**) that—*
>
> *(i) relates to the subject matter addressed by an existing mandatory rule or criteria applying to the block; and*
>
> *(ii) does not permit the development of the block in a way that would not be permitted by the existing mandatory rule or criteria.*

335. The rules and criteria that Village want added to the WP Code are not "ongoing provisions". Leaving aside subjective questions about whether they would be consistent with the Territory Plan (for example, whether they would produce a subdivision layout that would be consistent with the desired character), they plainly relate to the subject matter addressed by existing mandatory rules or criteria (for example, the above-mentioned rules and criteria of the Single Dwelling Code) and are intended to permit the development of the block "in a way that would not be permitted by the existing mandatory rule or criteria". Indeed, that is their stated purpose.

336. As section 96(2) states, a variation to the Territory Plan (in particular, the WP Code) would be "under section 89" which deals with making technical amendments. Section 87 describes what are technical amendments. The additional rules and criteria that Village want added to the WP Code bear no resemblance to the kinds of amendments described in section 87.

337. These difficulties highlight the faulty reasoning that underpins Village's request. Section 96 of the P and D Act contemplates the Authority making "technical amendments" within the framework of an EDP that is already consistent with any code that applies to the proposed estate. For example, it might mandate or prohibit stated finishes, designs or colours of proposed buildings or structures, or prohibit stated activities in an estate (for example, the keeping of unenclosed cats) within the framework of an EDP that is already consistent with the Territory Plan and would not create inconsistency with the Territory Plan. Referring to Village's request, section 96 does not permit amendments to the Territory Plan (via

additions to a precinct code or otherwise) to overcome a proposal's inconsistency with the Territory Plan.

***Planning and Development Act 2007*, section 119(2)**

338. On 16 October 2019, pursuant to section 148(1) of the P and D Act, the Authority sent an email to the office of the Conservator requesting the Conservator's advice about the DA. The Authority stated, in accordance with section 150 of the P and D Act, that if the advice was not received within "the prescribed time it will be taken that you have supported the application".[201] Pursuant to section 149(2) of the P and D Act, the "prescribed time" is (and was) 15 working days after the day the Authority gave the application to the Conservator.

339. On 4 November 2019, within the prescribed time, Ms Watts[202] gave advice on behalf of the Conservator that the Conservator did not support the removal of 68 trees, identified by number, on the basis that they are "medium quality, regulated trees and do not meet [the] criteria, for [their] removal", under the Tree Act. Ms Watts said that the advice was given "in accordance with section 82" of the Tree Act.[203]

340. On 19 December 2019, the Authority sent the amended DA to the office of the Conservator and requested written advice about it not later than 15 working days after the date of the notice.[204]

341. On 10 January 2020, within the prescribed period, Ms Watts sent an email confirming that the Conservator did not support the removal of the same 68 trees, identified by number, on the basis that they are "medium quality, regulated trees and do not meet [the] criteria, for [their] removal" under the Tree Act. Ms Watts again said that the advice was given "in accordance with section 82" of the Tree Act.[205]

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[201] T documents at page 441, Exhibit R1

[202] We agree with the respondent's observation that the author was Ms Watts, notwithstanding her use of Mr Lewis-Hughes' signature block – see outline of closing submissions on behalf of respondent dated 4 December 2020 at [112(b)].

[203] T documents at page 399, Exhibit R1

[204] T documents at page 150, Exhibit R1

[205] T documents at page 116. Exhibit R1

342. Village wishes to remove the trees, notwithstanding that their removal would be inconsistent with the Conservator's advice. Section 119(2) of the P and D Act governs the ability of the Authority and the Tribunal on review to approve the amended DA in these circumstances. Section 119(2) states:

> *(2) Also, development approval must not be given for a development proposal in the merit track if approval would be inconsistent with any advice given by an entity to which the application was referred under section 148 (Some development applications to be referred) unless the person deciding the application is satisfied that—*
>
> *(a) the following have been considered:*
>
> *(i) any applicable guidelines;*
>
> *(ii) any realistic alternative to the proposed development, or relevant aspects of it; and*
>
> *(b) the decision is consistent with the objects of the territory plan*

343. The Tribunal has already concluded that those regulated trees on the site that are not dead or in decline and are not "problematic species" must be retained under C1 e) of the EDC. Accordingly, it is not necessary to determine whether these regulated trees could be removed (or must be retained) pursuant to section 119(2) of the P and D Act. Nevertheless, in deference to the lengthy submissions and evidence provided, we will deal with the issue.

344. Village began with a submission that no valid advice from or on behalf of the Conservator was given. There being no valid advice, it said, section 119(2) was not engaged. The submission drew on the interaction between sections 148 and 149 of the P and D Act and sections 82-83 of the Tree Act.

345. Section 148(1) of the P and D Act states:

> *The planning and land authority must refer a development application prescribed by regulation to an entity prescribed by regulation.*

346. Sections 149(1) and (2) of the P and D Act state:

> *(1) This section applies if a development application, including an amended application, is referred to an entity under section 147A or section 148.*
>
> *(2) The entity must give the planning and land authority the entity's advice in relation to the development application not later than 15 working days after the day the authority gives the application to*

the entity or, if a shorter period is prescribed by regulation, not later than the end of the shorter period.

347. Part 11 of the Tree Act, comprising sections 80-83, states:

Part 11 Land development applications

80 Meaning of development—pt 11

In this part:

development *means a proposed development to which an application for development approval under the Planning and Development Act 2007, chapter 7 applies.*

81 Simplified outline

The following notes provide a simplified outline of this part and the Planning and Development Act 2007, chapter 7 (Development approvals):

Note 1 Conservator to be given copy of development application

The planning and land authority may be required to give the conservator a copy of each development application for a development proposal in the merit or impact track (see Planning and Development Act 2007, s 148). This requirement would not apply to a development application for a development proposal in the code track (see Planning and Development Act 2007, s 117 (c)).

Note 2 Conservator to give advice on application

The conservator gives advice to the planning and land authority in relation to tree protection and the development (see s 82 and s 83) (see also Planning and Development Act 2007, s 149, s 150 and s 151).

Note 3 Conservator's advice to be considered

The conservator's advice is to be considered by the planning and land authority (or the Minister) in approving or refusing to approve a development application (see Planning and Development Act 2007, s 119 (2), s 120 (d), s 128 (2) and s 129 (e)).

Note 4 Approvals

A development approval that is inconsistent with the conservator's advice in relation to a registered tree must not be given. A development approval that is inconsistent with the conservator's advice in relation to a regulated tree may be given only in the circumstances prescribed in the Planning and Development Act 2007, s 119 (2) and s 128 (1) (b) (iii).

82 Advice about tree protection on land subject to development

(1) This section applies if the conservator is satisfied, on reasonable grounds, that a development involves, or is likely to involve, an activity that would or may—

(a) damage a protected tree; or

(b) be prohibited groundwork in—

(i) the protection zone for a protected tree; or

(ii) a declared site.

(2) The conservator may give the planning and land authority written advice in accordance with section 83 about the development.

Note If the planning and land authority refers a development application to the conservator under the Planning and Development Act 2007, s 148, the conservator must, not later than 15 working days after being given the application, give the planning and land authority its advice in relation to the development application (see Planning and Development Act 2007, s 149).

83 Requirements for conservator's advice about tree protection

(1) This section applies if the conservator gives advice—

(a) under section 82 in relation to a development; or

(b) under the Planning and Development Act 2007, section 149 in relation to a development application.

(2) The advice must include advice about tree protection requirements for each protected tree with a protection zone on, or partly on, the land subject to the development.

(3) Without limiting subsection (2), the advice may—

(a) include information about the trees on the land; and

(b) set out the changes (if any) the conservator considers should be made to any tree management plan or proposed tree management plan that relates to the development application, having regard to—

(i) the guidelines approved under section 31; and

(ii) the advice (if any) of the advisory panel; and

(iii) anything else the conservator considers relevant.

348. Village submitted, and we accept, that the Conservator and the Tree Protection Unit (**the TPU**) and the officers within it (whom we presume include Ms Watts) are separate entities. We accept too that for the purposes of section 148(1) of the P and D Act, the Conservator (and not the TPU) is "an entity prescribed by regulation".[206]

[206] *Planning and Development Regulation 2008*, section 26(2)

349. Noting that advice had been requested (twice) under section 148 of the P and D Act, Village then referred to section 149 of the P and D Act which, it said, requires "the entity" to give "the entity's advice" in relation to the development application. Village stated that it had reviewed the delegations given under the P and D Act and under the Tree Act and could not "find any delegation of the function under [section] 149". We accept that no such delegation exists.

350. Village stated that it had also reviewed the delegations given under the Tree Act and found delegations given for decisions made under section 82 of the Tree Act but "no delegation under [section] 83".[207] We accept that no delegation under section 83 exists.

351. Village drew on sections 83(1)(a) and (b) to submit that there is "no doubt in the mind of the drafter" that advice given under section 82 of the Tree Act is not the same as advice given section 149 of the P and D Act. This conclusion, Village said, flows "inexorably" from the word "or" that separates section 83(1)(a) from section 83(1)(b). Village also relied on section 83(1)(a)'s reference to a "development" in contradistinction to section 83(1)(b)'s reference to a "development application".

352. Village submitted that a referral to an entity under section 148 of the P and D Act "leads to advice" under section 149 of the P and D Act, "whereas advice under [section] 82 is not as a result of a referral".[208]

353. Drawing on that statutory construction, Village submitted that neither the Conservator, nor a person holding a delegation from the Conservator to do so (there being no such person), had given advice under section 149 of the P and D Act. There being no advice, it said, section 119(2) was not engaged.

354. Village submitted that, for the same reason, section 120(f) of the P and D Act was also not engaged. That section states:

> *In deciding a development application for a development proposal in the merit track, the decision-maker must consider the following:*
>
> ...

[207] Applicant's statement of facts and contentions dated 16 July 2020 at [159]
[208] Applicant's statement of facts and contentions dated 16 July 2020 at [176]

> *(f) if an entity gave advice on the application in accordance with section 149 (Requirement to give advice in relation to development applications)—the entity's advice;*
>
> *Note Advice on an application is given in accordance with section 149 if the advice is given by an entity not later than 15 working days (or shorter prescribed period) after the day the application is given to the entity. If the entity gives no response, the entity is taken to have given advice that supported the application (see s 150).*

355. In reply, the Authority began by noting that advice was sent in response to the Authority's request regarding the DA and the amended DA within the 15 day statutory period.[209] In each case, the person giving the advice (Ms Watts) held a delegation from the Conservator to give advice on behalf of the Conservator pursuant to section 82 of the Tree Act[210] and the advice was said to be the "Conservator's advice in accordance with section 82" of the Tree Act. The Authority noted that section 119(2) of the P and D Act refers to "advice given by an entity to which the application was referred under section 148", without any reference or requirement that the advice be provided under section 149 or any other section.

356. There is no suggestion that advice was given under section 149 of the P and D Act or that anyone holds a delegation from the Conservator to give advice under that section. Everything turns, therefore, on whether section 83 of the Tree Act contemplates two different sections under which advice can be given, and that the Conservator's advice could and should have been given under section 149 of the P and D Act, not section 82 of the Tree Act.

357. We do not accept that the Conservator's advice could or should have been given under section 149 of the P and D Act, or that that section empowers the Conservator, or any other entity to whom or which a development application is referred, to give advice.

358. Part 11 of the Tree Act is headed "land development *applications*" (emphasis added). The heading forms part of the Tree Act.[211] When sections 80-83 (that comprise Part 11) are read as a whole, it becomes clear that section 82 provides

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[209] T documents at pages 116 and 399, Exhibit R1
[210] Witness statement of Michaela Watts dated 19 August 2020, Exhibit R6
[211] *Legislation Act 2001*, section 126

the substantive power to give advice about damage to a protected tree,[212] among other things, including advice in response to a request under section 148 of the P and D Act.

359. We refer in particular to section 81 of the Tree Act, to which Village did not refer. It is an unusual mechanism for providing a "simplified outline" about the operation of other legislative provisions, especially where notes in an Act ordinarily do not form part of the Act,[213] but – pursuant to section 81 – the notes must be given force and effect.

360. Notes 1 and 2, read together, contradict Village's submission that the drafter had in mind two kinds of advice: one under section 82 of the Tree Act and one under section 149 of the P and D Act. Notes 1 and 2 state, in effect, that when the Authority requests advice under section 148 of the P and D Act, the Conservator gives the advice under sections 82 and 83 of the Tree Act. The statement in note 2 about the additional need to "see also" sections 149, 150 and 151 of the P and D Act takes the reader to the consequence of not giving advice within 15 working days of the Authority giving the application to an entity (per sections 149 and 150) and the obligation on the entity giving the advice not to act "inconsistently with the advice" (per section 151) subject to some exceptions.

361. The note under section 120(f) of the P and D Act stating what is necessary to give advice "in accordance with" section 149 is to the same effect.

362. To accept Village's submission that advice requested under section 148 leads to advice given under section 149 requires a conclusion that the information in notes 1 and 2 under section 82 is incorrect. We were not prepared to draw that conclusion where it would be contrary to section 81.

363. Section 83 does not empower the Conservator to give advice or contemplate two kinds of advices. As stated in section 82(2), section 83 only deals with what the advice must and may include. The reference in section 83(1)(b) to section 149 of the P and D Act picks up the timeframe under section 149 within which the advice

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[212] Per section 8 of the Tree Act, a protected tree is a regulated tree and/or a registered tree.
[213] *Legislation Act 2001*, section 127(1)

must be given. It does not contemplate a separate provision under which the advice is given.

364. The words 'development' and 'development application' in section 83(1)(a) and section 83(1)(b), respectively, confirm this legislative intent. Section 83(1)(a) picks up that the advice under section 82 is given in response to the proposed 'development', whereas section 83(1)(b) picks up that the (prescribed) period under section 149 within which the advice needs to be given is set by reference to when the 'application' is received.

365. Where we were satisfied that advice in response to a request under section 148 of the P and D Act is given under section 82 of the Tree Act, and where there was no dispute that Ms Watts held a delegation from the Conservator to give the advice given in this case, it follows that the advice was validly given. Section 119(2) of the P and D Act was therefore engaged.

366. Section 119(2) of the P and D Act permits development approval, notwithstanding inconsistency with advice given by an entity, if the person deciding the application (being, in this case, the Tribunal on review) "is satisfied" that the matters stated in section 119(2)(a)(i) and (ii) "have been considered" and (per section 119(2)(b)) that the decision is (or would be) consistent with the objects of the Territory Plan.

367. In our view, contrary to the submissions of Village and the Authority, it is not necessary that the decision-maker, personally, has considered the matters stated in section 119(2)(a)(i) and (ii). We draw on the contrast in language between the obligation on the decision-maker (under section 119(2)) to be satisfied that "the following have been considered" (written in the past and passive tenses), and the obligation on the decision-maker under section 120 of the P and D Act to "consider" the matters then stated (written in the active and future tenses).

368. The means by which the decision-maker satisfies himself or herself that the matters stated in section 119(2)(a)(i) and (ii) have been considered will be for the decision-maker in each case. One option is to do so personally. Another is to rely (wholly or in part) on reports from others, including from the applicant seeking approval notwithstanding the inconsistency. Whatever means is or are chosen, it

remains for the decision-maker to be "satisfied" that the matters "have been considered".

369. Referring to the submissions of Village and the Authority, we agree that section 119(2) requires positive engagement by the decision-maker on the question.

370. The word 'considered' begs the question of what needs to be done. Again, we drew on the ordinary dictionary, namely "1. to contemplate mentally; … reflect on. 3. to think; suppose. 4. to make allowance for 5. to pay attention to; regard 6. to regard with consideration or respect; 7. to think about (a position, purchase, etc) with a view to accepting or buying. 8. to view attentively, or scrutinise. 9. to think carefully; reflect."[214]

371. Consideration of "any applicable guidelines", per section 119(2)(a)(i), did not arise in this case because there are no such guidelines. The question was whether "any realistic alternative to the proposed development, or relevant aspects of it" has been considered. As the parties noted, an obligation (only) to "consider" any realistic alternative carries with it the implication that the presence or absence of any realistic alternative does not dictate the outcome.

372. In *Baptist Care*, the Court of Appeal considered competing submissions about what a decision-making could do after 'considering' the matters set out in section 120. The Court concluded:

> [Section 120 should be] *interpreted, according to its terms, as giving a discretion to approve or reject a proposal that is code-compliant (and therefore not required to be rejected under s 119)*[215] *such discretion being exercisable only after consideration of the matters set out in paragraphs 120(a) – (f) to the extent that they are relevant to a particular proposal).*[216]

373. In our view, that interpretation should be adopted and applied also to section 119(2). However, it would be unusual for a decision-maker to approve a development that is inconsistent with entity advice if there is a realistic alternative to the proposed development, or relevant aspects of it, that would overcome the

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[214] Macquarie Dictionary (Macquarie Dictionary Publishers, 7th edition, 2017)

[215] It is apparent from the judgment as a whole that this is, more specifically, a reference to section 119(1).

[216] *Baptist Community Services v ACTPLA and Ors* [2015] ACTCA 3 at [59]

inconsistency. To do so would require sound explanation. Village does not contend for such an approach.

374. We accept Village's submission that section 119(2) does not place an onus on anybody to show that "any realistic alternative" has been considered. In *Oberoi v ACT Planning and Land Authority*[217] (***Oberoi***), the Tribunal similarly rejected the submission that an applicant for development approval has such an onus. However, if a person is seeking development approval where approval would be inconsistent with advice given by an entity, it would seem to be in their interests to demonstrate that there is no realistic alternative. It needs to be remembered that such an applicant, and Village in this case, seeks to be excused from the obligation under section 119(1) to refuse the proposed development that would ordinarily apply. We reject the proposition put by Village that it "has no way of addressing alternatives.[218] It owns the site.

375. Where section 119(2)(a)(ii) requires the person charged with making the decision to be 'satisfied' that 'any' realistic alternative has been considered, it is incumbent on the decision-maker to 'ask the question' about apparent or possible realistic alternatives until 'satisfied' that 'any' realistic alternative "[has] been considered".

376. We refer, by way of example to *Amarso Pty Ltd v ACT Planning and Land Authority*,[219] where the tribunal reviewed a decision to approve construction of eight buildings containing 322 residential units adjacent to the Jamison Centre carpark. The proposed development entailed removal of regulated trees contrary to the advice of the Conservator. The question was whether there was any realistic alternative to the proposed development that would enable retention of the trees. The Authority concluded by reference to three different design options put forward, and the Tribunal agreed, that there was no realistic alternative. In each option, retention of the trees in question would have resulted in a poor or reduced commercial frontage to the Jamison Centre, compromised internal commercial spaces, a poor response to a major street intersection, poor interaction between

[217] [2015] ACAT 65 at [79]
[218] Applicant's closing submissions in reply dated 8 December 2020 at [53]
[219] [2012] ACAT 9

the tree bases at ground level and the creation of 'tree islands' that could not be integrated into recreational use of the consolidated blocks.

377. 'Realistic' is relevantly defined in the Macquarie Dictionary to mean "1. interested in or concerned with what is real or practical". An alternative that is 'realistic' will depend very much on the facts and circumstances in each case. Whether alternatives to a proposed extension to a community hall, a heritage-listed building or a suburban shopping centre are 'realistic' will involve very different considerations. Cost will often, but not always, be a relevant consideration. Considerations will also differ according to the entity giving the inconsistent advice, and the reasons for it.

378. In this respect, we draw on the Tribunal's decision in *Oberoi* where the Tribunal said that the word 'realistic' "takes its general meaning as having a sensible and practical idea of what can be achieved. …[P]ersonal circumstances which necessitate features of the proposed development (e.g. size, dimension, function) are legitimate concerns for consideration by the decision maker, together with more objective factors."[220]

379. 'Alternative' is relevantly defined in the Macquarie Dictionary to mean "1. A possibility of one out of two (or, less strictly, more) things: 2. one of the things thus possible 3. a remaining course or choice: *we had no alternative but to move* 4. affording a choice between two things, or a possibility of one thing out of two".[221]

380. We turn to the three questions that arise:

    (a) whether there is any alternative to the proposed development, or relevant aspects of it that would overcome the reason/s for the inconsistent advice;

    (b) if so, whether the alternative/s is or are 'realistic'; and

    (c) if so, whether it – or they – 'have been considered'.

[220] *Oberoi v ACT Planning and Land Authority* [2015] ACAT 65 at [81]
[221] Macquarie Dictionary (Macquarie Dictionary Publishers, 7th edition, 2017)

381. Village submitted that there is no 'realistic alternative' that would permit retention of the regulated trees, save for trees 40-43. Mr Ineson said[222] that the site "needs to be" regraded to restore it to close to original levels to facilitate medium density residential development; that the existing uncontrolled fill "needs to be" removed and re-compacted "to permit the construction of roads, underground services and buildings"; and that the regulated trees planted in uncontrolled fill "need to be" removed if a medium density development is to be delivered. Village also relied on the adverse effects that trees can have on structures and the difficulties of installing underground service lines close to tree roots.

382. Regarding uncontrolled fill, Village relied on the evidence of Mr Jones, a geotechnical engineer, who conducted test drilling across the whole site to record the presence and depth of uncontrolled fill. Fifty-nine test pits were dug spaced at intervals of between 50m and 75m. Uncontrolled fill was found in most pits at depths varying from 0.35m to 3m. Variable mixtures of sand, silt, clay and rock were found elsewhere at depths up to 3.1m.[223]

383. The locations of the test pits were marked on a plan of the site.[224] The depth of uncontrolled fill encountered was entered on the plan for each test pit.

384. The plan records the depth of uncontrolled fill in the vicinity of the 68 above-mentioned regulated trees on the site. In many cases, the fill was 300-400mm deep.

385. Mr Chris Buchanan is a structural engineer with Sellick Consultants. Mr Buchanan gave evidence about construction of buildings (and the proposed townhouses in this case) on uncontrolled fill. He said that to build on uncontrolled fill is more difficult and more expensive, but there are structural engineering solutions that enable it to be done. He commented that a structural engineer, when doing so, would choose from different design responses according to the topography, the kind and depth of uncontrolled fill and the kind of dwelling to be

[222] Witness statement of Kenneth Ineson dated 14 July 2020 at [44]-[46], Exhibit A2
[223] Witness statement of Michael Jones dated 9 July 2020 at [14]-[19], Exhibit A7
[224] Spiire drawing 307413CX055

built. He said that building on uncontrolled fill using specific engineering solutions, rather than remediating the site, can increase the cost by "perhaps in the order of 30-40% once construction timeframes and potential for the delays are considered".[225]

386. Mr Buchanan also referred to AS 2870-2011, the Australian Standard for Residential slabs and footings, which "sets out the criteria for the classification of the site in the design and construction of a footing system for a single dwelling townhouse, townhouse or similar structure".[226] Section 2 deals with site classification, meaning "the expected ground surface movement and the depths to which this movement extends". Clause 2.1.2 (in Section 2) deals with site classification based on soil reactivity by reference to degrees of ground movement from moisture changes. Clause 2.1.3 states:

> *Sites with inadequate bearing strength or where ground movement may be significantly affected by factors other than reactive soil movements*[227] *due to normal moisture conditions shall be classified as Class P.*

387. Clause 2.1.3 states that Class P sites include:

> *soft or unstable foundations such as soft clay or silt or loose sands, landslip, mine subsidence, collapsing soils and soil subject to erosion, reactive sites subject to abnormal moisture conditions and sites that cannot be classified in accordance with Clause 2.1.2.*

388. Clause 2.1.3 goes on to state that a site shall be classified as Class P if, among other characteristics:

> *(d) the site contains uncontrolled or controlled fill as identified in Clause 2.5.3*

389. Clause 2.5.3 commences by distinguishing between controlled fill and uncontrolled fill. Controlled fill is "fill that is in accordance with the technical and control requirements specified in AS 3798 for structural fill for residential applications". Clause 2.5.3 states that "other fill is uncontrolled fill for the purposes of this Standard".

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[225] Witness statement of Chris Buchanan dated 15 July 2021 at [3(f)], Exhibit A13
[226] AS 2870-2011, section 1.1
[227] We infer this to include the influence of trees.

390. Regarding uncontrolled fill, Clause 2.5.3 distinguishes between shallow fill and deep fill. Regarding shallow fill, Clause 2.5.3 states that uncontrolled fill not more than 0.8m deep for sand and not more than 0.4m deep for material other than sand "shall be Class P, unless all footings… are founded on natural soil through the filling." Regarding deep fill, Clause 2.5.3 states uncontrolled fill deeper than the previously mentioned depths "shall be Class P".

391. Mr Buchanan explained by reference to AS 2870 that for these reasons uncontrolled fill that is not more than 0.4m deep is inconsequential for construction purposes because the footings would be dug through the fill in any event. Clause 2.5.3 suggests that in areas on the site where the test pits found a mixture of sand and silt, a depth of up to 0.8m of uncontrolled fill might be acceptable. Mr Buchanan stressed, however, that the soil still needs to be classified under Clause 2.1.2 according to the likely degree of ground movement from moisture changes. That is the task of a geotechnical engineer.

392. Mr Jones gave consistent evidence. He stated:

> *Some parts of the site, in its current state would likely to be classified as S or M.*[228] *These areas would be restricted to where uncontrolled fill is present to less than 0.4m depth and outside the influence distance of trees.*[229]

393. Mr Jones estimated that these conventional classifications of S or M could apply to "around 20-30%"[230] of the site although, for a conventional classification to apply, the whole of each future standard block would need to be free of constraints.

394. The engineering evidence regarding the depth at which uncontrolled fill becomes a consideration from a construction viewpoint prompted us to note that Spiire Drawing 307413CX055 produced for Village shows that trees numbered 148, 149, 152, 156, 161, 172, 174, 205, 208, 214, 230 and 234 that Dr Coyne believes should be retained and that Village wishes to remove are growing on uncontrolled

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[228] Under clause 2.1.2, these classifications entail an assessment of slightly reactive clay sites, which may experience "only slight ground movement from moisture changes", and moderately reactive clay or silt sites which may experience "moderate ground movement from moisture changes", respectively.

[229] Witness statement of Michael Jones dated 9 July 2020 at [33], Exhibit A7

[230] Witness statement of Michael Jones dated 9 July 2020 at [33], Exhibit A7

fill that has a depth of .4m or less. The depth of uncontrolled fill under Trees 31, 93, 109 and 163 has a depth of .49m or less.

395. Depending on the depth at which the uncontrolled fill is encountered, and for the remaining trees that Dr Coyne thinks should be retained that are growing in uncontrolled fill deeper than .4m, the evidence is that there are engineering solutions to permit construction in (or through) the fill. The places where Village would (or may) need to use a different engineering solution to construct in fill deeper than .4m because of the proximity of one of these trees are comparatively few, having regard to the size of the site. Elsewhere, Village can remove uncontrolled fill as it chooses.

396. In all the circumstances, we were not satisfied that Village "needs to" remove uncontrolled fill under or near the trees in question in order to construct a medium density development on the site. We believe that if Village asked its engineers for an alternative engineering solution to permit a medium density development that would not require removal of uncontrolled fill where it is under or near these trees, the engineers could produce such a solution.

397. Mr Reeves noted that the removal of the College buildings had diverted underground water flows to the detriment of the trees. Mr Reeves contended that removal of the uncontrolled fill would compound the problem. This suggests that for the purposes of tree retention, the better option is to leave the uncontrolled fill in place.[231]

398. Regarding the need to re-grade the site, Village relied on the evidence of Mr Raymond Cargill, an engineering consultant, and Mr Buchanan, who both spoke about the "benching" or tiers left by the College's previous use of the land. These are predominately in the eastern quarter (or so) of the site. The benching needs to be removed, they said, so that roads, utility services and residential dwellings could be constructed with structurally sound foundations and compliant gradients. Village referred, by way of example, to the difficulties if not impossibility of accessing a level garage from a road on a slope with the present

[231] We acknowledge Mr Reeves' opinion (from a construction viewpoint) that it would be preferable to remove all the trees and all the uncontrolled fill.

gradients. It said that the site therefore needed to be re-graded. Village contended that it was not possible to conduct this necessary re-grading work and still retain the trees.

399. These claims were unconvincing.

400. We accept that the 2-3m concrete "cliffs"[232] left in place after demolition of the College buildings will need to be removed and the ground then regraded. However, we were not taken to any evidence showing the proximity of these cliffs to trees that Dr Coyne considers should be kept or showing that the trees are so proximate to the cliffs that they could not be retained if the cliffs were removed.

401. Likewise, there was no evidence about the proximity of the 'benching' left after demolition of the College's buildings to trees that Dr Coyne believes should be kept, or why the trees are so proximate to the benching that re-grading this area would necessarily require removal of these trees.

402. As for the slope generally, there are innumerable residential areas around the foothills of the hills and 'mountains' in Canberra on slopes that are as steep or steeper than the slope of the site. As for the "impossibility" of accessing a garage from a road with the existing slope, the real issue appears not to be the gradient, which is common to the adjacent residential dwellings and blocks to the south of the site that have garages. It is the density of the proposed development, and Village's wish to construct extremely narrow roads[233] (causing extremely tight turning circles) to maximise the portion of the site given over to dwellings. A less dense design with wider roads and more generous turning circles might be an alternative that would alleviate the concern.

403. Regarding the "influence distance" of trees, Mr Buchanan explained that a tree, and its drawing of water for survival, will have the effect of "increasing the differential of extreme seasonal changes with respect to moisture in the founding soils. In general terms, this will result in an increase to the shrink/swell behaviour

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[232] This being the term Mr Erskine SC repeatedly used to describe the portions of concrete retaining walls that remain on the site following demolition of the College's buildings.

[233] The drawings suggest internal roads that will, in many places, be 5m wide – see Planning Controls Plans, applicant's outline of closing submissions dated 24 November 2020, annexure B at pages 4-12.

of [the] clay type founding soil owing to the clay's response to wet and dry conditions."[234] Mr Buchanan added that trees can also lead to foundation damage arising from tree root ingress during tree growth.[235]

404. Mr Jones said that to avoid a Class P classification, simply put, a structure should be setback from the influence distance of a tree. He explained that the distance depends on the height of the tree and whether it is a single tree or a group or line of trees. He said that the influence distance varies "from 1 to 2 times the height of the tree(s)".

405. We did not understand Mr Jones or Mr Buchanan to be saying that a structure cannot be built within the influence distance of trees. This often occurs. It is a question of choosing a design response and/or a method of construction that mitigates the influence.

406. We refer, by way of example, to the Tribunal's decision in *Deakin Residents Association Inc v ACT Planning and Land Authority & Anor*[236] where it varied planning approval for seven townhouses on Gawler Crescent, Deakin to require retention of a regulated tree, a *Eucalyptus bicostata*, notwithstanding the opinion of the Authority that "there is no realistic alternative [to] removal of the tree because construction of the courtyard wall of Unit 4 and possibly Unit 5 and the services and paving are important for the amenity and efficient use of the space and depend on removal of the tree." The Tribunal disagreed, noting that no sufficient, if any, consideration had been given to modifying the design of the front areas of the units so that the tree "could be adequately protected during construction and form part of the completed design".[237] The development was approved, and proceeded on that basis. Whilst there is no evidence regarding that development in this case, it is uncontroversial to note that the development is now complete, and the tree continues to grow in a healthy state.

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[234] Witness statement of Chris Buchanan dated 15 July 2020 at [4(a)], Exhibit A13
[235] Witness statement of Chris Buchanan dated 15 July 2020 at [4(a)], Exhibit A13
[236] [2015] ACAT 37
[237] *Deakin Residents Association Inc v ACT Planning and Land Authority & Anor* [2015] ACAT 37 at [90]

407. We are satisfied that proximity to a tree is a feature to take into account when designing or choosing an appropriate structural engineering design, but is not a feature that prohibits construction. It is not a feature that prevents a medium density development on this site.

408. We acknowledge the consensus among the engineers that, from a structural engineering prospective, it would be highly preferable to remove all the trees, remove all the uncontrolled fill, replace the uncontrolled fill with controlled fill and remediate the site (where appropriate) because these actions "lowers the risk for the builder with respect to ongoing performance and maintenance".[238] We accept their evidence. However, the question is whether there is any alternative to the proposed development that would permit retention of the trees. The consensus among the engineers is that there are alternatives. Mr Ineson's claims about what "needs to be" done are overstated.

409. As Village accepted in the final stages of the hearing, retention of trees is a matter of judgement, not impossibility. In closing submissions, the following exchange occurred:

> *MR BUCKLAND:*[239] *We say that, as a matter of judgment, those trees need to be retained,*[240] *but in terms of anything that would mandate certain trees not being retained, it's - I accept that there's nothing necessarily which says that a tree absolutely has to be removed, but the question is - -*
>
> *PRESIDENTIAL MEMBER McCARTHY: Or can't be retained.*
>
> *MR BUCKLAND: Yes, sorry, or can't be retained is probably the better way of putting it. But the question is, what are the knock-on effects; what's required to in fact retain the tree.*
>
> *PRESIDENTIAL MEMBER McCARTHY: Hence you're quoting, I think, in your submissions of Mr Reeves' evidence about if you had to you could get a tree to grow up a wall.*
>
> *MR BUCKLAND: And I think that's a fair comment to make about all the engineering evidence, with infinite resources and infinite goodwill, anything is possible.*

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[238] Witness statement of Chris Buchanan dated 15 July 2021 at [3(e)], Exhibit A13

[239] Mr Buckland was junior counsel for Village in this proceeding.

[240] It is apparent that the word 'retained' was inadvertent, and that Mr Buckland intended 'removed'.

> *PRESIDENTIAL MEMBER McCARTHY: Yes.*
>
> *MR BUCKLAND: But the question is, we're not dealing in a world of infinites. We are dealing in a world of realistic and whether, as a matter of judgment, the steps which are proposed or which are required to retain a particular tree should be undertaken is, as you said, a matter of judgment.*[241]

410. Despite this acknowledgement, appropriately made, we were inclined to accept that delivery of the proposed development, by reason of its intensity, is unrealistic if the trees in question are retained.

411. In its closing submissions in reply, Village provided "a summary explanation of the need to remove every tree" identified in the Authority's[242] or the Community Council's submissions.[243] The summary is in the form of a table that identifies the location and identification (by number) of each tree and the adverse impact that its retention would have on the proposed development referenced to a set of drawings prepared by Spiire.

412. In a column of the table entitled "Impact of Retention", Village explains (in the case of each tree) the adverse impacts on the proposed development that retention of the tree would cause. In many cases, Village states by reference to the applicable Spiire drawing that retention of a named tree would prevent construction of an identified proposed road and/or proposed service lines for water, electricity, communications and gas.

413. In nearly all cases, save for trees 40-43, Village referred to the opinions of Mr Jones and Mr Buchanan that uncontrolled fill beneath each tree should be removed "to facilitate the subdivision works" and to "lower the risk with respect to ongoing performance and maintenance".

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[241] Transcript of proceedings 9 December 2020, page 896, line 46 page 897, line 24

[242] The summary, in the form of a table, does not respond to every tree that Dr Coyne believed should be retained. In his evidence on 28 October 2020, Dr Coyne revised his opinions to add trees 43, 80, 176, 188 and 191 and to delete trees 95, 97, 158 and 203. See transcript of proceedings 28 October 2020, page 685, line 19 – page 686, line 20 and transcript of proceedings 29 October 2020, page 812, lines 11-36. We regard these differences as an unintentional oversight on the part of the person who prepared the summary.

[243] Applicant's closing submissions in reply dated 8 December 2020, annexure A

414. Village's approach does not respond to the words in section 119(2)(a)(ii) of the P and D Act. The question is not whether there is any realistic alternative to removal of the trees (or a tree) in order to carry out the proposed development. The question is whether there is "any" realistic alternative *to* the proposed development, or relevant aspects of *it*" (emphasis added) that (implicitly) would overcome the need to remove the trees. We are not satisfied that there is no realistic alternative to the proposed design or the proposed methods of construction that would enable retention of the trees or most of them.

415. For example, the evidence demonstrates that removal of uncontrolled fill is desirable but not necessary. Where retention of uncontrolled fill is necessary to enable retention of a tree, alternative methods of construction can be used. The real problem is the extent of 'cut and fill' that Village wishes to conduct, and the difference between existing levels where trees are located and the proposed development levels.

416. To illustrate, the uncontrolled fill under numbered trees 152 and 156 that Dr Coyne believes should be kept, and Village wishes to remove, has inconsequential depths of .167m and .11m, respectively, but Village wants to conduct cuts in the location of these trees of 1.308m and 1.4m, respectively, that would necessitate removal of the trees. We are not satisfied that there is no realistic alternative design (although perhaps a less dense design) that would avoid the need for the cuts.

417. We make a similar observation about trees growing near the Heysen Street boundary in the south-east corner of the site. Village submitted that these trees cannot be kept because it proposes to make a 'cut' of more than 4m in depth where these trees are located to accommodate construction of townhouses, and that to retain the trees but not build the townhouses would require the construction (instead) of unsightly 4m high retaining walls. Such walls are not necessary. They would be made necessary by reason of the cuts that Village wants to make.

418. We accept that retention of trees would limit the extent to which Village can remove uncontrolled fill and/or regrade the site. In these places, construction would be more difficult and involve more time and cost or necessitate a less dense

design. However, where the site is extremely large, the regulated trees that the Conservator advises should be kept are comparatively few and the projected profit margin ($21 million)[244] is substantial, we were not satisfied that alternative engineering solutions and alternative designs are not realistic.

419. We make a similar observation about the need to remove trees because of the proposed locations of underground service lines. These problems arise because of the design that Village has chosen. We were not satisfied that there is no realistic alternative design or alternative construction methods that would facilitate retention of the trees. Indeed, the evidence is to the contrary albeit that alternatives would involve greater time and greater cost.

420. We make a similar observation about the need to remove trees because of the location of proposed roads. In its table, Village relied on the Spiire drawings showing the location of numbered proposed roads to make the uncontentious submission that retention of trees currently growing on the location of a proposed road would "prohibit" its construction. That is easily said, but the question is whether there is any realistic alternative to construction of the road on the proposed location. For example, Village proposes to construct entry road 03 from a location on Unwin Street that would, we accept, require the removal of trees 96, 97, 98 and 99. However, the land on either side of those trees is clear of trees which begs the question why the entry road could not be slightly relocated to the east or west of the proposed location in order to retain trees 98 and 99.[245] We note that in this area, Village proposes not to cut and to place only minor fill.[246]

421. Village, in its closing submissions, accepted a scenario of this kind as being a realistic alternative. By way of hypothetical, it suggested that if an application proposed construction of a development "right on top of [a] tree" and that it was possible to relocate the development "a couple of metres in one direction … it's

[244] Transcript of proceedings 20 October 2020, page 255, lines 33-44
[245] Tree 96 is not a regulated tree, and the Conservator does not oppose removal of tree 97.
[246] Spiire Drawing 305522CX218 located in Exhibit A19, bundle of A3 Spiire drawings attached to witness statement of Michael Reeves dated 22 September

a realistic alternative to move this development because it's just blindingly obvious."[247]

422. We understand that Village wishes to allocate the land to the east and west of entry road 03 for construction of townhouses, and that construction (instead) of the entry road would preclude that use. With an alternative road location, Village would be unable to use the land where the trees are growing and be obliged to allocate land for the road where it had intended to construct (say) two townhouses.[248] This raised the question whether the loss of two townhouse sites is a realistic alternative to the current proposal. Taking into account the scale of this project, we were not satisfied that the loss of two townhouse sites in order to retain trees 98 and 99 is unrealistic.

423. We accept too that Village would not be able to build directly on land where a tree is growing. However, that difficulty would preclude comparatively few sites. Many of the trees in question are on the perimeter of the site, block boundaries can be re-aligned and engineers could use realistic alternative construction methods to enable retention of these trees. Also, we do not believe that retention of trees would cause a significant loss of profit, having regard to the increased amenity that the trees would bring. Some would regard the trees as a design opportunity, not a restraint. For example, as the Community Council noted, retention of existing mature trees is a design opportunity when locating and designing a park area.[249] Indeed, Village's promotion of the many trees it intends to plant, to replace (in 40 years) what is already there, suggests Village's agreement with that viewpoint.

424. The Authority submitted that there are realistic alternatives to the proposed development, and suggested that a development with only 200 units or removal of some proposed townhouses from the Heysen Street boundary were realistic alternatives that would still result in a medium density residential development

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[247] Transcript of proceedings 9 December 2020, page 871, lines 1-10

[248] See Drawing 18065CP, applicant's outline of closing submissions dated 24 November 2020, annexure B at page 59

[249] Letter dated 30 November 2020 from the Weston Creek Community Council to the Tribunal, page 8

and would enable the retention of trees.[250] It suggested, for example, that the frontage along Heysen Street, or parts of it, could become instead a landscaped garden entrance, and the trees along there could be retained.

425. Village countered that these alternatives ignore key elements of the site, including its dimensions, topography and soil conditions. It described them as "alternatives in theory" cast with a level of generality that cannot assist resolution of the matter, and that the Authority "has neither adduced evidence demonstrating th[e]se alternatives nor engaged with the evidence which might suggest that these alternatives were unrealistic".[251] Mr Ineson nevertheless agreed that a landscaped garden along Heysen Street is possible, but contended that it was "unlikely a developer would... proceed" with a development involving land use of that kind.[252] Village described the option of reducing the development to 200 blocks as "an amorphous, late-breaking submission"[253] that should not be accepted in light of Village not having an opportunity to meet it.

426. Village questioned the value of such speculative suggestions where no assessment had been done about their feasibility. The Authority replied that the absence of a feasibility assessment does not render an alternative "unrealistic".

427. We acknowledge that Village might well be able to explain why these many possible or apparent alternatives are not realistic, and that it has not had the opportunity to do so. That does not mean these alternatives should, at this stage, be put aside. Section 119(2)(a)(ii) requires the Tribunal (on review) to be satisfied that "any" realistic alternative has "been" considered. In our view, there is a reasonable basis to conclude that apparently realistic and financially viable alternatives to the proposed development are yet to be considered. That is enough to conclude that section 119(2)(a)(ii) is not met. We are confident that if Village asked its designers and engineers to produce such an alternative design that would enable retention of the trees in question, they could do so.

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[250] Outline of closing submissions on behalf of respondent dated 4 December 2020 at [103]–[106]
[251] Applicant's closing submissions in reply dated 8 December 2020 at [55]-[58]
[252] Transcript of proceedings 20 October 2020, page 269, line 37
[253] Applicant's closing submissions in reply dated 8 December 2020 at [63]

428. We appreciate that Village prepared several "concept plans" prior to settling on the plan provided as part of its DA. Mr Ineson provided an early concept plan that, he said, "attempted to work with the existing platforms and embankments to maximise retention of existing trees".[254] He said that the resulting "road gradients were far too steep and driveway access to many dwellings was impossible". He said that 3m–4m high retaining walls would be necessary to stabilise the three existing embankments. He said that foundations for roads and buildings would require excavation of uncontrolled fill which would result in "the removal of virtually all trees". The plan was abandoned at an early stage.

429. Mr Ineson provided another "concept plan"[255] that was presented as part of Village's community consultation. This plan too was abandoned because it involved dead end roads, inadequate turnaround heads for garbage trucks, 4.5m–5.5m high retaining walls and road gradients that would be too steep to access garages in many locations. Mr Millman and Mr van der Walt mentioned that other concept plans were considered but not progressed because of construction and design difficulties.

430. These plans did not satisfy us that there is no realistic alternative to the proposed development. The two concept plans presented in evidence were rudimentary at best. They are simple sketches constituting nothing more than preliminary designs which were found unworkable, not because of trees, but because they depicted a layout that would not be permitted. Village did not provide any evidence of studies or examinations of alternative layouts that address the physical conditions and design opportunities of the site that would enable trees to be retained.

431. To approve the amended DA, notwithstanding inconsistency with the Conservator's advice, the Tribunal (on review) must also be satisfied (under section 119(2)(b)) that the decision (implicitly) to approve the proposed development notwithstanding this inconsistency is (or would be) consistent with

[254] Witness statement of Kenneth Ineson dated 14 July 2020 at [38], attachment L, Exhibit A2
[255] Witness statement of Kenneth Ineson dated 14 July 2020 at [39], attachment M, Exhibit A2

the "objects of the territory plan". The "objects", or more accurately the object, is stated in section 48 of the P and D Act as follows:

> *The object of the territory plan is to ensure, in a manner not inconsistent with the national capital plan, the planning and development of the ACT provide the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation.*

432. Village submitted, somewhat understandably, that it is "mystifying" as to how a particular project can be or should be assessed against a Territory-wide object and that as a result there is "not much substance" that you can give to the object for the purposes of an individual project.[256]

433. In the context of a proposal to remove almost all of the regulated trees on the site, contrary to the advice of the Conservator, the only issue that appears to arise regarding consistency with the object of the Territory Plan is whether the proposed development (involving removal of the trees) is (or would be) consistent with the object of providing an attractive environment in which the people of the ACT (which we are prepared to construe as the proposed residents of, and visitors to, the proposed townhouses) can live and have their recreation.

434. Views will invariably differ, according to the value placed on mature trees. Some would say that their loss is inconsistent with an attractive environment for persons to live and have their recreation. Others might disagree, contending that the benefits of their retention are inconsequential the compared with the new houses, new roads and park areas that Village proposes to construct.

435. We agree with Village that consistency with the object of the Territory Plan is "mystifying". A regulator, and the Tribunal on review, should not be required to decide consistency with the object of the Territory Plan by reference to such a generalised and subjective test. In this case, where it was not necessary to do so, we express no further view on the subject.

Conclusion

436. For the reasons given, the amended DA does not comply with C1 a), C1 e), C50 or C51 of the Estate Development Code.

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[256] Transcript of proceedings 9 December 2020, page 868, line 30 – page 869, line 4

437. Also, for the reasons given, development approval cannot be given because approval would be inconsistent with advice of the Conservator and any realistic alternative to the proposed development has not been substantially considered.

438. Accordingly, the decision to refuse approval of the amended DA will be confirmed.

……..
Presidential Member G McCarthy
For and on behalf of the Tribunal

Date(s) of hearing:	16 October 2020
	19 October 2020
	20 October 2020
	21 October 2020
	22 October 2020
	26 October 2020
	27 October 2020
	28 October 2020
	29 October 2020
	9 December 2020
	10 December 2020
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	Mr S Onitiri
Solicitors for the Respondent:	ACT Government Solicitor
Party Joined:	Mr T Anderson, authorised representative
	Ms P McGinn, authorised representative