ACT CIVIL & ADMINISTRATIVE TRIBUNAL

ALLEN AND ORS v ACT PLANNING AND LAND AUTHORITY & ORS (Administrative Review) [2021] ACAT 88

AT 44/2021
AT 45/2021
AT 46/2021

Catchwords: **ADMINISTRATIVE REVIEW** – merits review of decision to approve application for development approval for 10-unit *supportive housing* development on block zoned CFZ and lease variation to permit block to be used for *supportive housing* – whether proposed lease variation may affect concessional status of Crown lease – whether intended use is for *special dwelling* – whether parking requirements for *supportive housing* in R1(c) of CFZDC are met – whether front boundary setbacks to Bill Pye Park and proposed 'courtyard walls' are consistent with desired character, where block zoned CFZ is *adjacent* to land zoned PRZ1 and RZ1 – whether solar access requirements for internal living spaces in R57 of MUHDC are met – whether shading from trees should be considered in assessing solar access – interpretation of requirements for principal private open space in R61/C61 of MUHDC where dwellings are in a *supportive housing* development on land zoned CFZ – whether principal private open space is proportionate to size of dwellings and achieves reasonable privacy and solar access – where approval inconsistent with advice of Conservator of Flora and Fauna, whether realistic alternatives to the development or parts of it have been considered – decision under review set aside and approval refused

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 22P, 68
Common Boundaries Act 1981 ss 23, 25
Land (Planning and Environment) Act 1991 (repealed)
Legislation Act 2001 part 14.2
Planning and Development Act 2007 ss 119, 120, 235A, 235B, 253A, 258, 261, 265, 340, 407, 408A, Sch 1
Planning and Development (Community Concessional Leases) Amendment Act 2019 (repealed)
Tree Protection Act 2005 s 10

Subordinate Legislation cited:
Apartment Design Guide (NSW)
Access and General Mobility Code, R12
CFZ – Community Facility Zone Objectives

Community Facilities Zone Development Code, R1(c)
Community and Recreational Facilities Location Guidelines Code
Crime Prevention through Environmental Design General Code
Lease Variation General Code, C1, C3
Multi Unit Housing Development Code, R25, R29/C29, R41/C41, R42A/C42A, R54, R57, R61/C61, C72, C77, R79/C79
Parking and Vehicular Access General Code
Planning and Development Regulation 2008 s 5
PRZ1 – Urban Open Space Zone Objectives
Residential Boundary Fences General Code
Residential Flat Design Code (NSW) (repealed)
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (NSW)
State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development (NSW) (repealed)
RZ1 – Suburban Zone Objectives
Territory Plan, 13-Definitions

Cases cited:

4THD Planning & Design Pty Ltd ACN 154 870 078 v ACT Planning and Land Authority & Ors [2021] ACAT 59
Benevolent Society v Waverley Council [2010] NSWLEC 1082
Costin & Pyke v ACT Planning and Land Authority & Anor [2018] ACAT 129
Deakin Residents Association Inc v ACT Planning and Land Authority & Anor [2015] ACAT 37
GPT Re Limited v Belmorgan Property Development Pty Ltd [2008] NSWCA 256
Hamilton v ACT Planning and Land Authority & Ors [2018] ACAT 121
Javelin Projects Pty Ltd v ACT Planning and Land Authority & Anor [2017] ACAT 87
Johnson and Xu v ACT Planning and Land Authority & Ors [2012] ACAT 53
Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23
Lourandos and Anor v ACT Planning and Land Authority [2011] ACAT 25
Maurer & Ellis v ACT Planning and Land Authority & Ors [2016] ACAT 83
McGrath and Anor v ACT Planning and Land Authority & Anor [2018] ACAT 100
Miosge & Anor v ACT Planning and Land Authority [2020] ACAT 65
Peraic & Anor v ACT Planning and Land Authority & Anor [2019] ACAT 118
Scott v Wollongong City Council (1992) 75 LGRA 112
Village No 22 Pty Ltd ACN 620 656 260 v ACT Planning and Land Authority [2021] ACAT 43

Texts cited:	Macquarie Dictionary (8th ed, 2020)
Papers cited:	P. Balakrishnan and J. Alstan Jakubiec, 'Measuring Light Through Trees for Daylight Simulations: A Photographic and Photometric Method' (2016) Roseth SC, **'**Planning Principles and Consistency of Decisions' (February 2005) Roseth SC, 'Developing Planning Principles' (July 2005) Moore SC, 'The Relevance of the Court's Planning Principles to the DA Process' (May 2009) Moore SC 'The Future of Planning Principles in the Court' (October 2013)
Tribunal:	Senior Member M Orlov (Presiding) Senior Member G Trickett

Date of Orders:	6 September 2021
Date of Reasons for Decision:	23 September 2021

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 44/2021
AT 45/2021
AT 46/2021

BETWEEN:

JEREMY ALLEN
Applicant (AT 44/20210

IAN HUBBARD
Applicant (AT 45/2021)

NORRIS LEONARD MITCHELL
Applicant (AT 46/2021)

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

AND:

YWCA CANBERRA ABN 48 009 398
Party Joined (AT 44, 45 & 46/2021)

MARION WATSON
Party Joined (AT 44/2021)

ANTHONY ADAMS
Party Joined (AT 44 & 46/2021)

TRIBUNAL: Senior Member M Orlov (Presiding)
Senior Member G Trickett

DATE: 6 September 2021

ORDER

The Tribunal orders that:

1. The decision under review is set aside and substituted by a decision to not approve application for development approval DA2020037848 / S144C.

The Tribunal notes:

(a) The Tribunal finds that the DA does not comply with R1(c) of the *Community and Facility Zone Development Code* and R41/C41, R42A/C42A, R61/C61(a),

(e) and (f) of the *Multi Unit Housing Development Code*.

(b) The Tribunal is not satisfied that the DA complies with R29/C29(a) and (b) and R57 of the *Multi Unit Housing Development Code*.

(c) Where approval of the DA would be inconsistent with the advice given by the Conservator of Flora and Fauna, the Tribunal is not satisfied that realistic alternatives to the proposed development, or relevant aspects of it, have been considered.

(d) The Tribunal will publish its reasons on a later date.

……*Signed*……..
Senior Member M Orlov
for and on behalf of the Tribunal

Contents

ACRONYMS /ABBREVIATIONS

ACTPLA	ACT Planning and Land Authority
AGMC	*Access and General Mobility Code*
AMC	AMC Architecture
AS/NZS	Australian Standard / New Zealand Standard
AS2890.6	AS/NZS 2890.6-2009 Off-street parking for people with disabilities
AS4299	AS 4299-1995 Adaptable housing
C	code criterion (followed by a number – e.g. C1 is criterion 1)
CFZ	Community Facility Zone
CFZDC	*Community Facilities Zone Development Code*
Conservator	Conservator of Flora and Fauna
CPTEDGC	*Crime Prevention Through Environmental Design General Code*
CRFL Guidelines	*Community and Recreational Facilities Location Guidelines General Code*
DA	application for development approval
DSB	dsb Landscape Architects
FFL	finished floor level
LVGC	*Lease Variation General Code*
MUHDC	*Multi Unit Housing Development Code*
NGL	natural ground level
NOD	Notice of Decision
PPOS	principal private open space
PVAGC	*Parking and Vehicular Access General Code*
Planning Act	*Planning and Development Act 2007*
PRZ1	PRZ1 – Urban Open Space
R	code rule (followed by a number – e.g. R1 is rule 1)
RBFGC	*Residential Boundary Fences General Code*
RZ1	RZ1 – Suburban Zone
TCCS	Transport Canberra and City Services
Tree Act	*Tree Protection Act 2005*
TPZ	tree protection zone
YWCA	YWCA Canberra

REASONS FOR DECISION

Introduction

1. By separate applications filed on 10, 12 and 13 May 2021, each of the three applicants seeks a merits review of a decision by the respondent (**ACTPLA**) to approve, subject to conditions, an application for development approval (**DA**) for a supportive housing development on Block 1 Section 87 Ainslie (**the block**) located in Rutherford Crescent (**the decision under review**). The first party joined is the Crown lessee of the land (**YWCA**). The three applicants and the second party joined (to AT 44/2021 only) live in Rutherford Crescent and oppose the development. The third party joined (to AT 44 and 46/2021) lives nearby and supports the development. [1]

2. Pursuant to section 68(3) of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) the tribunal must, by order confirm, vary, or set aside the decision under review and, if the decision is set aside, make a substitute decision, or remit the matter to the original decision maker for reconsideration in accordance with any direction or recommendation the tribunal may make.

3. Pursuant to section 22P(2) of the ACAT Act the tribunal must decide the application within 120 days after the day the application is made. The 120-day period for AT 44/2021 expires on 7 September 2021 and for the others on 9 and 10 September 2021 respectively. As the three applications raise common issues and were heard together over five days, on 23 to 26 August and 3 September, practically speaking the Tribunal must decide the applications by 7 September 2021. Although there is scope for the president to extend the 120-day period if it is in the interests of justice to do so, the parties have not sought an extension and nor is the Tribunal aware of any grounds that would justify extending the period within which the Tribunal must decide the applications.

4. Accordingly, on 6 September 2021 the Tribunal ordered that the decision under review be set aside and substituted by a decision to not approve the DA. The

[1] Each of the applicants and the second and third party joined made representations in relation to the DA and therefore have standing to seek a merits review of the approval decision under the *Planning and Development Act 2007* sections 407, 408A and Item 4 of Schedule 1.

Tribunal found that the DA does not comply with R1(c) of the *Community and Facility Zone Development Code* (**CFZDC**) and R41/C41, R42A/C42A and R61/C61(a), (e) and (f) of the *Multi Unit Housing Development Code* (**MUHDC**) and was not satisfied that the DA complies with R29/C29(a) and (b) and R57 of the MUHDC. The Tribunal noted that where approval of the DA would be inconsistent with the advice of the Conservator of Flora and Fauna (**Conservator**), the Tribunal was not satisfied that realistic alternatives to the proposed development, or relevant aspects of it, had been considered as section 119(2) of the *Planning and Development Act 2007* (**Planning Act**) requires.

5. The Tribunal informed the parties that it would publish its reasons on a later date. These are our reasons.

6. To assist readers we have provided a detailed table of contents and included a list of acronyms used in alphabetical order.

Background

7. The block is zoned community facility zone (**CFZ**). The permitted use under the Crown lease purpose clause is as a childcare centre and community activity centre under the auspices of the YWCA.

8. The block has an area of 1828m^2 and is in the shape of a quadrant with a curved front boundary facing south-west to south-east towards Rutherford Crescent and a front boundary to the north-east and north-west to Bill Pye Park. The block contains three single-storey buildings – a timber building with a pitched metal roof known as 'YWCA Community House', a demountable building, and a small timber shed. There is a low wire fence set back about 1m inside the north-west and north-east boundary with a dense planting of shrubs beside the fence (on the park side) which screens the block and buildings from Bill Pye Park.[2]

[2] The location of the fence and perimeter shrub planting can be seen on the Detail Survey plan at T Docs page 1186

9. The block is surrounded by large deciduous trees in the park close to the boundary and there are some large trees on the block.[3] The park trees that are presently relevant include a large elm tree (**tree 1**) towards the south-west corner of the block, which the Conservator has classed as 'exceptional', a stand of oak trees (**tree 8**, **tree 9**, **tree 10**) adjacent to the northern corner and a large oak tree (**tree 32**) to the north-east of the block. Trees on the block that are presently relevant include an oak tree (**tree 31**) on the north-east boundary near tree 32, a large eucalypt (**tree 29**) near the north-east corner carrying a lot of dead wood, which the Conservator has classed as a 'habitat tree', a large oak tree (**tree 28**) close to the front boundary to Rutherford Crescent, which the Conservator has classed as 'exceptional', and a smaller oak tree (**tree 16**) to the south-west of tree 28. All the above-mentioned trees are regulated trees under the *Tree Protection Act 2005* (**Tree Act**).[4] There are several street trees on the verge next to Rutherford Crescent. Of these only one, which is affected by the location of the new driveway, is presently relevant (**tree 22**).

10. Bill Pye Park is on land zoned PRZ1. The properties on Rutherford Crescent facing the park are on land zoned RZ1. The area comprises primarily low-density, single-storey, single-dwelling homes with some dual-occupancy developments and one two-storey home on the corner of Rutherford Crescent and Lang Street.

11. On 16 April 2021, ACTPLA approved, subject to conditions, a development proposal by AMC Architecture (**AMC**) on behalf of the YWCA for the demolition of two of the three existing buildings and removal of 15 trees, including six regulated trees, and the construction of two single-storey buildings with 10 dwelling units for use as supportive housing, comprised of eight studios and two 2-bedroom dwellings, new landscaping, a new verge crossing, parking, and associated works and a variation of the Crown lease purpose clause to permit supportive housing under the auspices of the YWCA limited to a maximum of 10 dwellings.

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[3] The location of the trees is shown on Detail Survey plan at T Docs page 1186
[4] 'Regulated tree' is defined in section 10(1) of the Tree Act

12. The YWCA is a registered community housing provider and is the contracted tenancy support service provider for the Territory of an 8-studio room facility share home known as Betty Searle House. It also owns a purpose built 5-studio room facility share home, known as Lady Haydon House. The proposed development is intended to operate in a similar way and will provide supportive housing to single women aged 55 and over and single women with children who may have experienced domestic and family violence and are on modest incomes.

13. 'Supportive housing' is defined in the Territory Plan to mean:

> *…the use of land for residential accommodation for persons in need of support, which is managed by a Territory approved organisation that provides a range of support services such as counselling, domestic assistance and personal care for residents as required. Although such services must be able to be delivered on-site, management and preparation may be carried out on site or elsewhere. Housing may be provided in the form of self-contained dwellings. The term does not include a retirement village or student accommodation.*

14. 'Supportive housing' is a development listed in the *CFZ Community Facility Zone Development Table* of the Territory Plan as a development requiring a development application and assessment in the merit track unless specified in schedule 4 of the Planning Act (as impact track) or specified as a prohibited development in a precinct map. Neither exception applies in this case.

15. AMC lodged the DA in the merit track on 10 November 2020. ACTPLA referred the DA to relevant government entities for comment on 12 November 2020. Only the advice received from TCCS and the Conservator is presently relevant. TCCS gave conditional support subject to the proposed verge crossing from Rutherford Crescent being widened and submission of a revised waste management plan providing for commercial waste collection by the YWCA rather than a residential kerbside service by the Territory. The Conservator advised that it did not support the DA in its current form and suggested that further enquiries should be made to TCCS Tree Protection regarding the potential effect of the development on park trees.

16. The DA was publicly notified between 19 November 2020 and 9 December 2020. The DA received 151 representations, of which 25 supported the proposal and the

rest opposed it. The grounds of opposition varied and are summarised in ACTPLA's assessment report completed as part of its evaluation of the DA. It is not necessary to refer to them here.

17. On 15 January 2021, ACTPLA requested AMC to provide further information in relation to the DA pursuant to section 141 of the Planning Act, incorporating comments received from TCCS and the Conservator. AMC responded on 19 February 2021 and on 22 February 2021 submitted a request to amend the DA. ACTPLA did not refuse to amend the DA within five working days of the request and accordingly, is deemed to have amended the DA.[5]

18. The amended DA was referred to TCCS Tree Protection for consideration but not to the Conservator.[6] TCCS Tree Protection did not provide any comments. The amended DA was also referred to TCCS,[7] which confirmed on 29 March 2021 that its support for the DA was conditional, among other things, upon the verge crossing being widened to 5.5m to the west, necessitating the removal and replacement of an unregulated street tree, and that the development was not eligible for kerbside waste collection, necessitating the submission of a revised waste management plan providing for commercial waste collection by the YWCA.

19. On 17 March 2021, a meeting of ACTPLA's Assessment Advisory Panel was convened to consider the amended DA, comprising senior staff of the planning authority, and including the decision-maker. The Conservator apparently was invited to attend but did not do so for reasons that are not apparent. Minutes of the meeting record that "Discussion primarily surrounded the proposal's impact

[5] Planning Act, subsections 144(3) and (4)

[6] T Docs page 216. This appears to have been the result of a mistaken belief that referral to TCCS Tree Protection Unit was equivalent to a referral to the Conservator, and/or that the amended DA would come to the attention of the Conservator because 'numerous' officers of TCCS Tree Protection are also delegates of the Conservator: see witness statement of Richard Davies dated 10 August2021 at [88]. The tribunal in *Village No 22 Pty Ltd ACN 620 656 260 v ACT Planning and Land Authority* [2021] ACAT 43 held at [348] that the Conservator and Tree Protection Unit and officers within it are separate entities.

[7] T Docs page 215

to regulated trees, including advice provided by the Tree Protection Unit, and the width of the driveway crossover".[8]

20. On 14 April 2021, a delegate of ACTPLA approved the amended DA subject to conditions under part 7 of the Planning Act (**the decision under review**) and issued a Notice of Decision.[9]

The decision under review

Part A - Conditions

21. The conditions of approval are in Part A of the Notice of Decision (**NOD**), of which only some are relevant. Condition 3, headed "Further Information", states:

> *Within 28 days from the date of this decision, or within such further time as may be approved in writing by the…authority, the applicant shall lodge with the…authority for approval:*
>
> *(a) revised plans and architectural drawings, based on the relevant drawings submitted as part of the application, showing:*
>
> *i. further articulation of the northern frontage of the development to the satisfaction of the…authority…;*
>
> *ii. the proposed driveway verge crossing redesigned to ensure a minimum width of 5.5m whilst maintaining a 4m clearance to the existing verge tree, consistent with TCCS Condition 5(a);*
>
> *iii. an updated landscape plan, showing mass plantings of colourful native shrubs in sunny locations to support local birdlife, and deep shade tolerant species replacing weeds under the oaks, consistent with advice received from the Conservator…;*
>
> *iv. an updated landscape plan further limiting pedestrian access to the drip zone of Tree 29. Alternative fencing of the PPOS*[10] *from the NE dwelling preventing access to Tree 29 area is considered required for this condition. (Mulch, not generally suitable for general pedestrian use, is also required in the drip zone for this tree).* [footnote added]
>
> *(b) a revised waste management plan demonstrating a commercial waste collection service managed by the business owner, consistent with TCCS condition 5(r) and (s);*

[8] T Docs pages 196-200
[9] T Docs page 119 and following
[10] Principal private open space

(c) *further evidence of compliance with Rule/Criterion 3 of the Waterways: Water Sensitive Urban Design General Code, or justification against associated criteria.*

Note: The proposal currently has a shortfall of 3.4kL of on-site stormwater detention after utilizing 50% of the on-site stormwater retention. In its assessment, the…authority is satisfied that compliance with Rule or Criteria 3 is achievable.

Information to satisfy the above conditions shall be submitted as a S165 application to the Authority via the redevelopment portal.

22. Condition 4, headed "Tree Management Plan", states:

(a) *The development shall proceed with the approved plans and supporting documentation of 'Landscape Management Plan & Tree Management Plan, Drg. No. 3760-G2 E, dated 10/02/2021' and 'Response to comments from EPSDD by DSB Landscape Architects, Project No. 3760, dated 10/02/2021.' Or as otherwise agreed to in writing by the…authority.*

(b) *All excavation works within the tree protection zone of trees to be retained shall be supervised by a suitably qualified Arborist to ensure the development proceeds consistent with the low impact work principles as detailed in 'Landscape Management Plan & Tree Management Plan, Drg. No. 3760-G2 E dated 10/02/2021'.*

23. The TCCS conditions include:

(a) *The proposed 3.0 metre single width verge crossing is not supported. A minimum 5.5 m double width industrial strength (HD2) verge crossing must be designed and constructed to allow two (2) vehicles to pass one another on the verge. The minimum clearance (4.0 metre) to the existing verge tree west of the proposed verge crossing should be maintained.*

…

(n) *all trees/shrubs proposed within the lease boundary are to be set back adequately and planted so that they don't encroach beyond the property boundary into Unleased Territory Land.*

…

(r) *The proposed kerbside waste collection is not supported, as this project is considered as commercial operation arrangement. Hence, this project is not entitled to receive a residential waste collection service.*

(s) *Only the on-site commercial waste collection service managed by the business owner is supported. The proponent must resubmit the waste management plan (including collection vehicle turning templates) in accordance with the latest ACT Waste and Recycling Management Code (2019).*

Part B – Reasons for decision

24. The reasons for decision are in Part B of the NOD, of which only some are relevant. The reasons state:

> *The Conservator of Flora and Fauna did not support the proposal, citing its main concerns with:*
>
> - *Tree 28, noted as an exceptional tree, and "all efforts should be made to exclude building and landscape activities from within the tree protection zone. The tree protection zone should be maintained as natural surface to aid in the trees health and vigour and in the trees maintenance."*
> - *Tree 29, noted for its high habitat value, should be excluded from high pedestrian areas.*
> - *Tree 16, noted for retention, but a poor to medium tree, suggested that "the landscape treatment within the tree protection zone should be lessened".*
>
> *The Conservator of Flora and Fauna noted that although trees 1, 8, 9, and 32, are located on unleased Territory land and not covered by the Tree Protection Act 2005, that the four trees would be considered to be high or exceptional in terms of the landscape value, and that groundwork impacts may affect the trees health.*
>
> *The Conservator of Flora and Fauna furthermore noted that "if a derivation of the project is supported mass plantings of colourful native shrubs should be used in sunny locations to support local bird life. Deep shade tolerant species should replace the weeds under the oaks. (TCCS) Urban Treescapes needs to be consulted in regard to the impact the development may have on the exceptional quality trees on unleased territory land".*

25. Later, they say:

> *In considering the advice from the Conservator of Flora and Fauna, the assessment undertaken found that, with the exception of the conditions imposed, there are limited alternative options for the proposed development that will result in a viable outcome – warranting a departure from some aspects of the advice received from the Conservator.*

26. In relation to the discretionary considerations under section 120 of the Planning Act, the reasons state:

> *In deciding to approve the application with conditions, each of the matters or issues set out in section 120 of the Planning and Development Act 2007 have been considered.*

> *In relation to section 120(a), the assessment established that the proposed development meets all relevant objectives of the CFZ Community Facilities Zone; having considered objectives (a), (b), (c), (e) and (f) as most relevant.*
>
> *In relation to section 120(b), it was established that the subject land is suitable for the proposed development, provided the conditions imposed as part of this decision to approve the application are met, and subject to any additional requirements that might be imposed by entities.*
>
> *…*
>
> *In relation to section 120(f), advice from the relevant entities were considered and where necessary conditions or advice have been included pursuant to section 162(1)(b) of the Act that reflect that advice.*
>
> *…*
>
> *The application was approved because it was found to meet the relevant rules and criteria of the Territory Plan and section 120 of the Planning and Development Act 2007.*

The issues

27. The applicants submit that the correct or preferable decision is that the decision under review should be set aside and substituted by a decision that the DA is not approved. ACTPLA and YWCA submit that the DA should be approved subject to varying the conditions of approval.

28. The issues the Tribunal must decide are narrower than those the applicants raised initially, largely due to commendable cooperation between counsel for the parties. Some code compliance issues were abandoned, some were agreed could be dealt with by a condition if the Tribunal considered the DA should be approved, and others of lesser importance were left to the Tribunal to decide on the papers. The remaining issues were:

    (a) parking;

    (b) TCCS requirements;

    (c) fences/courtyard walls and front setbacks to the north-east and north-west boundaries;

    (d) principal private open space;

    (e) solar access; and

    (f) the external width of the carport.

29. Where approval of the development would be inconsistent with the Conservator's advice, under section 119(2) of the Planning Act the Tribunal must be satisfied that any realistic alternative to the proposed development, or relevant aspects of it, have been considered and that the decision is consistent with the objects of the Territory Plan.

30. Depending on how those issues are decided, the Tribunal must decide whether the proposed lease variation complies with the *Lease Variation General Code*.

31. If the Tribunal finds that the proposal is consistent with all relevant codes and approval is not precluded by section 119(2), the Tribunal must have regard to the discretionary considerations in section 120, of which subsections (a), (b) and (f) are most likely to be relevant.

The evidence

32. By prior arrangement with the parties and with the assistance of an agreed itinerary, the Tribunal conducted a view of the block, Bill Pye Park, and the houses on Rutherford Crescent, noting the matters to which the parties wished to draw attention. In assessing issues of 'desired character' the Tribunal has relied mainly on its own observations rather than on the opinions of others.

Applicants' evidence

33. Jeremy Allen, the applicant in AT 44/2021, gave a statement [**exhibit A**] in which he provided a detailed analysis of the development in support of his opinion that the DA does not comply with the CFZ zone objectives and relevant rules and criteria of the CFZDC, MUHDC and PVAGC. The Tribunal views much of his statement as submissions rather than evidence. Mr Allen gave oral evidence and was cross-examined.

34. Mr Allen's statement annexed a Tree Impact Assessment Summary Report by an arborist, Martin Jones, dated July 2021 [**exhibit B**]. As Mr Jones was not available for cross-examination, the Tribunal has disregarded his report.

35. Ian Hubbard, the applicant in AT 45/2021, gave a statement [**exhibit C**] in which he argued, among other things, that the delegate of the authority gave insufficient

attention to sections 119 and 120 of the Planning Act and that alternative community uses for the land should have been considered. He also commented on residential density and impact of the development on trees. The Tribunal views much of his statement as submissions rather than evidence. Mr Hubbard gave oral evidence and was cross-examined.

36. Hillary Middleton, an experienced urban planner, provided a statement (**exhibit D**) in which she opined that the proposal is for a *special dwelling* rather than *supportive housing* and must be lodged in the impact track, and that the proposal does not comply with R1(a), C10, C11, C13 and R25 of the CFZDC, R29/C29, R48/C48, R49/C49, R77/C77 of the MUHDC, and is out of character and inconsistent with comparable densities permitted in nearby residential areas. She gave oral evidence concurrently with other planning experts and was cross-examined.

37. Susan Conroy, a social and cultural planner, provided a statement (**exhibit E**) comprising a social impact assessment of the proposal focusing on safety considerations under the CPTEDGC, personal amenity and open space requirements of residents. She identified the design of the metal palisade fence bordering the park as a cause for concern, particularly its scalability and visual permeability into the PPOS of each dwelling. She considered the park, which contains a mix of trees and shrubs and negligible lighting at night, would provide opportunities for a person to observe a resident within their own private space without being seen and that the proposed fencing did not provide an effective barrier against opportunistic or intentional antisocial or criminal behaviour. Ms Conroy gave oral evidence concurrently with other planning experts and was cross-examined.

38. The applicants tendered short statements by Jade and Lien Ly (**exhibit F**) and Alastair Sands (**exhibit G**), who live in Rutherford Crescent, describing renovations to their Tocumwal weatherboard homes. The Tribunal considers the evidence lacks relevance and has given it no weight.

39. Norris Mitchell, the applicant in AT 46/2021, provided a statement (**exhibit H**) in which he argued that the site is too small for the proposed number of units and the design is not in keeping with the area, criticised the traffic and parking assessment and expressed views on tree protection and light pollution issues. The Tribunal views much of his statement as submissions rather than evidence. Mr Mitchell gave oral evidence and was cross-examined.

ACTPLA's evidence

40. Richard Davies, a Senior Assessment Officer in the Statutory Planning area of the Environment, Planning and Sustainable Development Directorate, provided a statement (**exhibit 1**) supporting approval of the DA with some changes to the conditions of approval. Mr Davies was not the primary assessment officer for the DA but had some involvement in the approval process, including taking part in the meeting of the Assessment Advisory Panel on 17 March 2021 where the DA was discussed. Although Mr Davies provided his witness statement as an in-house expert in planning matters, his involvement in the decision-making process means that he is not strictly speaking an independent expert. However, the Tribunal acknowledges that in giving evidence Mr Davies was conscious of his paramount duty to assist the Tribunal impartially on matters within his expertise and that he did so. He gave oral evidence concurrently with other planning experts and was cross-examined.

41. Dr Peter Coyne, a highly regarded expert in conservation management, provided an expert report on mitigation of potentially tree damaging activities (**exhibit 2**). He provided a supplementary report (**exhibit 3**) responding to a proposal to remove and replace tree 16 and remove and relocate three paved parking areas within the TPZ of tree 28, and further written comments on a proposal to elevate the buildings on piers (**exhibit 4**). Dr Coyne gave oral evidence concurrently with other landscaping experts and was cross-examined.

42. The Authority tendered the Tribunal documents (**T Docs**) and two supplementary bundles of documents (**exhibits 5, 6 and 7**). Mr Davies provided some marked-up site plans (Drg A171) showing dimensions relevant to whether the carport complies with R79/C79 of the MUHDC. These were given a provisional marking

of MFI-1 and MFI-2 and tendered later (**exhibit 24**).

YWCA's evidence

43. Frances Crimmins, the Chief Executive Officer of YWCA Canberra, provided a statement (**exhibit 8**) explaining the YWCA's role in providing supportive housing to women in the ACT and detailing matters relevant to parking requirements, unit size and features and support services YWCA intends to provide to occupants of the development. Ms Crimmins gave oral evidence and was cross-examined.

44. Dr Tulika Sazena, a domestic and family violence specialist, gave a statement (**exhibit 9**) directed primarily at refuting concerns raised by Ms Conroy in relation to the safety of women and children in the proposed development. Dr Sazena was not required for cross-examination.

45. Petrus van der Walt, an experienced town planner, gave a statement in support of approval of the DA subject to conditions and responding to town planning issues raised by the applicants (**exhibit 10**). Mr van der Walt is a part owner and director of Canberra Town Planning Pty Ltd (**CTP**). CTP prepared the Statement Against Rules and Criteria lodged with the DA.[11] Whether Mr van der Walt was involved personally is unclear. However, the involvement of CTP in the DA process means that he cannot be regarded as an independent expert. He gave oral evidence concurrently with other planning experts and was cross-examined.

46. Paul Shoulton, an arborist employed by dsb Landscape Architects (**DSB**), gave a statement dated 24 August 2021 (**exhibit 11**). DSB was retained to provide landscape architecture and arborist services in relation to the DA. Mr Shoulton was involved in providing the services, including preparing responses to the Conservator's comments and therefore is not an independent expert. He gave oral evidence concurrently with Dr Coyne and a director of DSB to whom we refer next, and was cross-examined.

47. David Pearce, a director of DSB, gave a statement about some of the landscaping

[11] T Docs page 1007

and tree protection issues (**exhibit 12**). The extent of his personal involvement in preparing the DA is unclear. However, DSB's involvement in the DA process means that he cannot be regarded as an independent expert. Mr Pearce gave oral evidence concurrently with Dr Coyne and Mr Shoulton, and was cross-examined.

48. Alastair MacCallum, an experienced architect and the principal of AMC Architecture (**AMC**), gave a statement (**exhibit 13**) explaining the design brief and the key features of the proposed development from a design perspective. Mr MacCallum gave oral evidence and was cross-examined about planning and detailed design issues that arose during the hearing.

49. Alex McLennan, a Senior Civil Engineer employed by Sellick Consultants Pty Ltd (**Sellick**) who supervised the preparation of Sellick's plans lodged with the DA, gave a statement (**exhibit 14**) addressing verge crossing and parking design issues. He explained that the parking requirements had been assessed originally for a *special dwelling* in accordance with clause 3.6.5 of the PVAGC but was told later that the development should be assessed as *supportive housing*. In preparing his statement he used residential parking rates because the PVAGC does not include parking provision rates for 'supportive housing'. He considered that a reasonable parking allocation against the residential code would be 10 spaces of which one should be a disabled parking space as required by clause 2.2.4 of the PVAGC. He noted that the residential parking rates require three visitor parking spaces, which could be provided on-site or off-site within 100m.[12] Having read what Ms Crimmins said about the utilisation rate of parking spaces by residents of Betty Searle House and Lady Haydon House, he concluded that 10 on-site parking spaces was sufficient to accommodate resident and visitor parking. Mr McLennan's involvement in the preparation of the DA means that he cannot be regarded as an independent expert. He gave oral evidence and was cross-examined.

50. Brendan Hogan, a traffic engineer with Calibre Group, gave a statement (**exhibit 15**) dealing with traffic and parking issues. He explained that the

[12] Exhibit 14 at [13]-[19]

PVAGC has a performance-based approach and sets out objectives relating to the provision of parking, but permits departure from the specified rates if the broader objectives can be achieved, appropriate to the site circumstances. He noted that the code does not cover all types of land uses and that it is common practice to use professional judgement and empirical data to provide more realistic projections of expected future parking demand. He opined that the most applicable use for *supportive housing* is residential. To comply with the PVAGC, the development would require 11 on-site spaces for residents and three on-site or off-site visitor parking spaces (within 100m). However, based on his reading of Ms Crimmins' statement (exhibit 8) he considered that the estimated utilisation rate could be assessed conservatively at 60%, leaving four spare on-site parking spaces for use by visitors. Mr Hogan gave oral evidence and was cross-examined.

51. The YWCA also tendered the following plans and documents:

(a) A3 coloured set of Sellick drawing annexed to Mr McLennan's statement (**exhibit 14A**);

(b) A3 coloured set of DA plans included in the T Docs prepared by AMC (**exhibit 16A**), dsb Landscape Architects (**exhibit 16B**), Sellick (**exhibit 16C**), Accor Rudds Consultants Pty Ltd (**exhibit 16D**) and an index cross-referenced to the T Docs (**exhibit 16E**);

(c) a bundle of documents relating to support services provided by the YWCA (**exhibit 20**);

(d) vehicle turning paths sketch plan prepared by Sellick, dated 25 August 2021 (Drg 2203 Rev. A) (**exhibit 21**);

(e) amended shadow diagrams for the principal private open space of units 5, 7, 8 and 10, dated 25 August 2021 (Drg A1002 Rev 1, A1003 Rev 1) (**exhibit 22**);

(f) amended landscape plan, dated 25 August 2021 (Drg 3760-F201 D) (**exhibit 23**);

(g) Sellick general arrangement plan marked up by Mr McLennan to show dimensions of parking spaces and aisle width, dated 26 August 2021 (Drg 0101 Rev C) (**exhibit 25**);

(h) amended landscape details and landscape plan, dated 26 August 2021 (Drg 3760-F3030 D, 3760-F201 F) (**exhibit 26**);

(i) amended shadow diagrams for the living area and principal private open space of units 1, 7, 8 and 10, dated 26 August 2021 (Drg A1004 Rev 1, A1005 Rev 1, A1006 Rev 1, A1007 Rev 1) (**exhibit 27**);

(j) a corrected version of exhibit 27 (**exhibit 28**).

Second party joined

52. Marion Watson, the second party joined, is a registered psychiatric nurse with experience of working in the non-government sector with women affected by homelessness, violence, drug and alcohol issues and poverty. She is a resident of Rutherford Crescent and gave a statement (**exhibit I**) opposing approval of the DA and explaining her view that the housing project, although well intentioned, is not designed for victims of domestic violence and will not adequately serve their needs. Ms Watson gave oral evidence and was cross-examined.

Third party joined

53. Anthony Adams, the third party joined, is an experienced town planner. He lives in a nearby street and made representations supporting the development. He gave a statement (**exhibit 17**) critiquing the statements of Ms Middleton (exhibit D), Ms Conroy (exhibit E), Mr Hubbard (exhibit C), Mr Allen (exhibit A) and Mr Mitchell (exhibit H). Mr Adams' statement comprises a blend of commentary, submissions, lay opinion, and expert opinion. Although styled as an independent expert report, Mr Adams makes no secret of the fact that as a resident of the area he considers that the development is commendable and should be supported and, as a party joined, clearly is invested in the outcome. The Tribunal does not doubt that Mr Adams has relevant expertise in town planning and accordingly was permitted to give oral evidence concurrently with other planning experts. However, the Tribunal does not regard him as an independent expert.

54. Mr Adams tendered some aerial photographs downloaded from a website showing tree coverage on and adjacent to the site in January, July, and September 2018 (**exhibit 18**). At the Tribunal's request, Mr Adams downloaded and tendered all the photographs (21 in number) showing tree coverage on various dates between 6 January 2018 and 10 July 2021 (**exhibit 19**).

Whether the proposed lease variation may affect the concessional status of the lease

55. YWCA stated in a project information sheet given to residents of Ainslie in the pre-DA community consultation phase, that "YWCA purchased this site at market rates in 1992 with the vision for the site as a 'women's place'".[13] ACTPLA approved the DA, including the application to vary the lease purpose clause, on the assumption that the Crown lease is a 'market value lease'[14] although some of the representations made to the authority suggested that it may be a 'concessional lease'. [15]

56. At the start of the hearing the Tribunal queried whether this assumption was correct. The Tribunal was concerned that if the lease is in truth a 'community concessional lease'[16] there may be a question whether the Tribunal could decide a development application to vary the lease to permit a use that is not a 'community concessional lease use'[17] – namely *supportive housing* – if the effect of approving the application would be to remove the concessional status of the lease as a matter of substance, rather than of form. Under section 261(1) of the Planning Act, an application to remove the concessional status of a lease must not be decided unless the Minister has decided that it is in the public interest to consider the application, taking into account the considerations in section 261(2), and has given notice of the decision to ACTPLA under section 261(3).[18] This had

[13] T Docs page 1111
[14] *Market value lease* is defined in section 235B of the Planning Act
[15] *Concessional lease* is defined in section 235 A of the Planning Act
[16] *Community concessional lease* is defined in section 253A of the Planning Act
[17] *Community concessional lease use* is defined in section 253B(1) of the Planning Act. 'Supportive housing' is not mentioned in section 253B(1) and is not a community use prescribed by regulation for the purposes of section 253A(1)(k).
[18] Section 260A of the Planning Act states that the concessional status of a lease may be removed only by a variation of the lease.

not happened.

57. ACTPLA responded to the question from the Tribunal by initiating an inquiry under section 258 of the Planning Act to determine whether the lease is a 'concessional lease'.

58. On the fourth day of the hearing, YWCA made a formal admission to the Tribunal that the lease was granted to it for less than full market value and falls into the category of a lease granted to a community organization under section 163 of the *Land (Planning and Environment) Act 1991* (repealed). Following the repeal and replacement of that legislation by the Planning Act, the lease is taken to be a 'concessional lease' granted under the Planning Act.

59. On 2 September 2021, ACTPLA issued a formal decision that the lease to the YWCA is a concessional lease.

60. ACTPLA submitted that the concept of a 'community concessional lease' was introduced by the *Planning and Development (Community Concessional Leases) Amendment Act 2019*, which inserted a new part 9.2A into the Planning Act. The amendments did not convert an existing concessional lease granted to a community organisation into a 'community concessional lease' which, under the new scheme, could be granted prospectively only. The only means by which a concessional lease may be deconcessionalised is in accordance with division 9.4.2 of the Planning Act. As the YWCA had not initiated that process, there was no impediment for the Tribunal to grant the application to vary the permitted use under the lease.

61. The YWCA also relied on division 9.4.2 of the Planning Act in submitting that a concessional lease retains its status as a concessional lease regardless of how else the lease may be varied if, as a matter of form, the application does not seek removal of its concessional status. Thus, unless and until the concessional status of a lease is removed under division 9.4.2, the ability of the Crown lessee to deal with the lease is restricted by section 265, which requires the written consent of the Authority to any dealing.

62. These submissions appear to be correct. However, as the Tribunal has decided that approval should be refused on other grounds, it is neither necessary nor appropriate for the Tribunal to decide the issue.

Whether the DA should be in the merit track or impact track

63. The applicants claimed initially that the development would be used as a *special dwelling* rather than as *supportive housing*. The Territory Plan defines *special dwelling* to mean "a dwelling used or to be used by a government agency or community organisation receiving government funding or housing assistance, to provide shelter and support for persons with special accommodation needs". *Special dwelling* is a prohibited development on land zoned CFZ and may be approved only following assessment in the impact track.[19]

64. The proposed variation of the lease limits the use to the provision of *supportive housing* under the auspices of the YWCA. The Tribunal considers that there is a material difference between providing "residential accommodation for persons in need of support" (i.e. *supportive housing*) and providing "shelter and support for persons with special accommodation needs" (i.e. *special dwelling*), although Ms Middleton suggested otherwise in her statement. The fact that an impermissible use is possible is immaterial in the Tribunal's opinion, absent cogent evidence that the proponent intends to use the development impermissibly and is merely saying otherwise to secure planning approval.[20]

65. It appears that the applicants were under the impression that the YWCA intended to use the development as a refuge or halfway house for women experiencing homelessness due to domestic violence and therefore potentially at imminent risk to their safety. The evidence of Ms Crimmins and Dr Saxena satisfies us that this is not the case. The YWCA does not provide domestic violence services of that kind. Just because the intended occupants are women who have experienced domestic violence in the past and to whom the YWCA intends to provide support of various kinds, does not mean the premises will operate as a "shelter" for

[19] CFZ zone objectives and development table, pages 2-3

[20] *Costin & Pyke v ACT Planning Authority & Anor* [2018] ACAT 129 at [13]-[14] citing *Lourandos and Anor v ACT Planning and Land Authority* [2011] ACAT 25

women with "special accommodation needs".

66. If in the future the YWCA fails to comply with a provision of the Crown lease (as varied) limiting the permitted use to *supportive housing*, it would be open to any person to complain to the Authority under section 340 of the Planning Act and apply for a controlled activity order under part 11.3.

67. This ground of opposition to the DA was misconceived.

Whether the Community and Recreational Facilities Location Guidelines General Code applies

68. The applicants contended initially that the DA should be considered against the *Community and Recreation Facilities Location Guidelines General Code* (**CRFL Guidelines**) relying on Ms Middleton's opinion that the proposed development satisfied the definition of a *special dwelling* to which the CRFL Guidelines apply. However, we have explained earlier that we do not accept this characterisation of the development. The CRFL Guidelines do not mention *supportive housing* and therefore do not apply to the proposed development.

Section 119(1) considerations – code compliance

69. Section 119(1) provides that development approval must not be given for a development proposal in the merit track unless the proposal is consistent with all relevant codes.[21]

70. The Territory Plan includes a definition section. We have used italics to show where we use words that have a defined meaning in the Territory Plan in that sense.

71. *Supportive housing* is a permitted use on land zoned CFZ. The zone objectives include, relevantly:

> *(e) To encourage adaptable and affordable housing for persons in need of residential support or care.*

[21] *Relevant code* is defined in the Dictionary to the Planning Act as a code that the relevant development table applies to the development proposal.

(f) To safeguard the amenity of surrounding residential areas against unacceptable adverse impacts including from traffic, parking, noise or loss of privacy.

72. The development proposal must be assessed under the *Community Facility Zone Development Code* (**CFZDC**) and the *Multi Unit Housing Development Code* (**MUHDC**), which applies by virtue of Table A1 of the CFZDC because the development is for multi-unit housing. Parts of the MUHDC that are specific to RZ1, RZ2, RZ3, RZ4 or RZ5 and commercial zones do not apply.

73. Relevant general codes that apply include the *Access and Mobility General Code* (**AMGC**), *Crime Prevention through Environmental Design General Code* (**CPTEDGC**) and the *Parking and Vehicular Access General Code* (**PVAGC**).

74. Where more than one type of code applies to a development proposal the order of precedence, if there is an inconsistency between provisions of different codes is: precinct code, development code, and general code.

75. The Territory Plan and the codes that form part of it are statutory instruments. The meaning of a statutory instrument is a question of law and must be worked out in accordance with the principles of interpretation in part 14.2 of the *Legislation Act 2001*. Expert evidence and evidence about how rules are interpreted and applied in practice by ACTPLA and other industry players has no part to play in that exercise.

76. Whether a rule or criterion of a code is satisfied is a mixed question of law and fact. The meaning of a rule or criterion is a question of law. Whether the preconditions for a rule or criterion to be satisfied are met is a question of fact. Not every question of fact is an appropriate matter for expert evidence.

77. While the tribunal need not comply with the rules of evidence[22] and generally takes a liberal approach to allowing experts to express opinions on issues relating to code compliance without restricting their evidence to matters that are properly the subject of expert evidence, it must be kept firmly in mind that the ultimate issue – i.e. whether a development complies with a relevant rule or criterion – is

[22] ACAT Act, section 8

a matter the tribunal must decide for itself. Even where expert evidence is relevant to a matter in issue and is given in proper form – i.e. where the opinion is wholly or substantially based on the expert's specialised knowledge and the assumptions and reasoning on which the opinion is based are disclosed sufficiently – an expert's opinion is not determinative of the ultimate issue.

78. It is relevant for the tribunal to understand why an expert considers a particular code applies or does not apply, or what an expert thinks a rule or criterion means, only insofar as it is necessary for the tribunal to understand the basis for the expert's opinion on a matter within the expert's field of expertise on a question of disputed fact that the tribunal must decide for itself.

79. The relevance of these observations will become apparent later.

Parking

80. We commence our consideration of code compliance issues with the parking requirements for the proposed development. Adequate parking must be available for residents, visitors and for operational purposes. Mr McLennan and Mr Hogan gave evidence about the parking requirements, which we summarised earlier. Mr Davies also gave evidence on the topic.

81. The DA provides for 10 on-site parking spaces. Seven spaces are in a row under a carport. Three spaces are in a separate row within the TPZ of tree 28. The spaces are 5.4m x 2.6m with the rows separated by a 5.8m aisle.[23] One space in each row is designated for disabled parking.

82. The applicants submitted that all resident and visitor parking should be on-site and that a minimum of 12 spaces was required, which the site could not accommodate. ACTPLA's final position was that nine on-site spaces would suffice, with some rearrangement of the parking to remove the three spaces currently sited in the TPZ of tree 28 and relocating them closer to tree 16. YWCA's final position was that seven on-site spaces would be sufficient with additional visitor parking available within 100m on Rutherford Crescent, relying

[23] Exhibit 25

on Mr McLennan's and Mr Hogan's changed opinion after hearing Ms Crimmins' evidence, although it was never explained to the Tribunal which particular part of her evidence prompted their change of mind.

Resident parking

83. We consider the requirements for resident parking first.

84. R1 of the CFZDC includes four requirements with which a development for *supportive housing* must comply. R1 is a mandatory requirement. There is no applicable criterion. R1(c) requires that "all dwellings comply with Class 'C' of *Australian Standard AS4299 – Adaptable Housing*".

85. The word 'dwellings' appears twice in R1. R1(a) refers to the "occupation of individual *dwellings*". In R1(c) 'dwellings' is not italicised. Whether this is deliberate or the product of error is unclear. The answer may not matter as we explain.

86. The introduction to the CFZDC states that defined terms are italicised. The Territory Plan gives *dwelling* the same meaning as in the *Planning and Development Regulation 2008*. Section 5 of the regulation defines *dwelling* to mean a class 1 building or a self-contained part of a class 2 building[24] (with certain inclusions and features that need not be mentioned here) and includes any ancillary parts of the building and any class 10a buildings[25] associated with the building.

87. The development comprises two class 2 buildings with a carport, which is a class 10a structure. Each building is a *dwelling*. As the definition of *building* in the Territory Plan includes a part of a *building*, each sole-occupancy unit in a class 2 building is a *dwelling* also.

88. Thus if R1(c) should be understood as if it said "all *dwellings* comply with" AS4299 (Class C), 'all *dwellings*' would refer collectively to all sole-occupancy

[24] Under the *Building Codes of Australia* (**BCA**), a *class 2* building is a building containing two or more sole-occupancy units, each being a separate dwelling.

[25] Under the BCA, a class 10a building is a non-habitable building or structure that may be a private garage, carport, shed or the like.

units contained in each class 2 building and the carport associated with the buildings.

89. On the other hand, if R1(c) should be understood as it is written, the meaning of 'all dwellings' is not derived from the Territory Plan definition. The Tribunal considers that AS4299 provides the context in which the meaning of 'all dwellings' in R1(c) must be worked out. AS4299 does not use the term 'dwellings'. Instead it refers to 'housing units' and 'adaptable housing units'. As the following analysis shows, we consider that 'dwellings' in R1(c) has the same meaning as 'housing units' in AS4299.

90. Clause 1.2 of AS4299 states in part:

> *It is intended that housing units that comply with the range of essential features listed in Appendix A be certified as adaptable housing units by an independent, suitably qualified person as follows:*
>
> *(a)* ***Adaptable house class A*** *All essential and desirable features incorporated.*
>
> *(b)* ***Adaptable house class B*** *All essential, and minimum 50% of desirable features incorporated, including all those notated 'first priority'.*
>
> *(c)* ***Adaptable house class C*** *All essential features.* [original emphasis]

91. AS4299 defines an adaptable housing unit as a "housing unit which is designed and constructed to meet the performance requirements stated in Clause 2.2 and to include the essential features listed in Appendix A".[26] A 'housing unit' is defined as a single residence or a part of a residence, containing living area and sleeping space, kitchen, toilet and bath or shower room. The term includes bed-sitter flats, detached and semi-detached houses, villa homes, townhouses, and apartments in multi-storey blocks.[27]

92. Clause 2.2 requires adaptable housing units to be designed and constructed to meet specified requirements for visitability, avoidance of level changes, manoeuvrability, ease of adaptation, ease of reach and future laundry facilities.

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[26] AS4299, clause 1.4.3
[27] AS4299, clause 1.4.6

93. Clause 3.7 relates to car parking and states (omitting notes):

> ***3.7.1 General*** *Private car parking spaces shall be large enough to enable a person with a wheelchair to get in and out both the car in the parking space. A car parking space width of 3.8 m minimum is necessary to enable a driver to alight, open the passenger side door, and assist a person with a disability into a wheelchair, or for a side-loading ramp. A 3.8 m minimum width is also required for a driver with a disability to unload a wheelchair and to alight. A roof to the car parking space is desirable.*
>
> ***3.7.2 Garages and carports*** *Garages and carports shall have minimum internal dimensions of 6.0 m x 3.8 m. A 2.5 m internal vertical clearance is desirable…*
>
> ***3.7.3 Residential estate developments*** *One car parking space shall have minimum dimensions specified in Clause 3.7.2 and should otherwise comply with the requirements of AS 2890.1 four parking for people with disabilities.*
>
> *Surface car parking spaces should be convenient to the front door of the housing unit, rather than in a separate car park and should be covered. Access to the adaptable housing unit should also be covered…*

94. Appendix A is a list of essential features to be incorporated into a housing unit for it to be termed an 'Adaptable House'. The provision of a car parking space or garage with a minimum area of 6.0m x 3.8m is an essential requirement cross-referenced to clause 3.7.2 (item 14). The provision of a roof to the car parking space is a first priority desirable requirement cross-referenced to clause 3.7.1 (item 15) but is not essential. The provision of a minimum 2.5m internal vertical clearance of a garage or carport is a desirable requirement cross-referenced to clause 3.7.2 (item 16) but also is not essential.

95. To meet the definition of an 'Adaptable House Class C' a housing unit must, among other things, include a car parking space or garage with a minimum area of 6.0m x 3.8m.

96. The YWCA submitted that this was incorrect because the concept of 'dwelling' is narrower than the concept of 'development'. Whereas 'development' encompasses the associated parking requirements, 'dwelling' does not. If R1(c) was intended to govern parking one would expect the rule to say "the development must comply" with AS4299 (Class C). The correct interpretation of R1(c) is that only the 'dwelling' – in the sense of the part of the building occupied

for living and not the car parking spaces – must comply with AS4299 (Class C). We disagree for the reasons stated earlier.

97. 'Dwelling', in the narrower sense submitted by the YWCA, necessarily must refer to a 'housing unit'. We have referred to the definition of 'housing unit' earlier. It follows from the requirement in R1(c) that all 'dwellings' in a development for *supportive housing* must comply with Class C of AS4299, that every housing unit in the development must be designed and constructed to meet the performance requirements stated in Clause 2.2 "and to include" the essential features listed in Appendix A. Relevantly this means that a parking space with a minimum area of 6.0m x 3.8m must be included for every housing unit (or dwelling) in a *supportive housing* development.

98. The same result obtains whether 'dwelling' in R1(c) derives its meaning from the Territory Plan definition or, as we consider is the correct approach, from AS4299.

99. ACTPLA conceded that this is the literal meaning of R1(c) but submitted that it produced an absurd result when read with R12 of the AMGC, such that it was necessary to interpret the rule as applying only to adaptable dwellings in a development comprising mainly non-adaptable multi-unit dwellings. The submission remained undeveloped and ultimately ACTPLA accepted that the standard is unambiguous in its requirement for parking spaces of a particular area.

100. The Tribunal notes that Eric Martin & Associates certified that the original design for 10 spaces met the requirements of AS4299 in a report dated 7 October 2020 submitted with the DA.[28] It appears that Mr Martin assessed the parking requirements against R12 of the AGMC, which requires that a "minimum of one accessible car parking space for each adaptable dwelling is designed in accordance with AS2890.6". His report states:

> *All units have a car parking space and two include parking to AS2890.6 which is better than AS4299. The use of the units by YWCA is highly likely to include women without cars. For a normal unit development 10% or one unit would need to be adaptable and a car parking space provided. It is*

[28] T Docs page 1117

> *considered reasonable and suitable to only have 2 designate*[d] *spaces which can be allocated on a needs basis and will be managed.*[29]

101. It appears that Mr Martin may have had R54 of the MUHDC in mind, which applies to a multi-unit housing development comprising 10 or more dwellings. The rule, read with table A8, requires that for a 10-unit development only one dwelling "must be designed" to meet AS4299 (Class C).

102. However, R1(c) of the CFZDC requires that every dwelling in a development for *supportive housing* "must comply" with AS4299 (Class C), meaning that a parking space with minimum dimensions of 6.0m x 3.8m must be provided for each dwelling. As clause 3.7.1 of AS4299 makes clear, the reason for this is to make the space accessible to a person in a wheelchair. AS4299 does not require each parking space to be designated a disabled parking space. As the 3.8m minimum width is adequate for wheelchair access we do not think the requirement in R12 of the AMGC for accessible parking to be "designed in accordance with AS2890.6" applies to a development for *supportive housing*. AS2890.6 requires each accessible car space to be a minimum of 2.4m wide with an adjacent shared area also 2.4m wide. Two accessible car spaces located either side of a shared area will fit into a space that is 7.2m wide, which is less than the 7.6m combined width of two adjacent spaces that comply with AS4299 (Class C).

103. The current proposal for 10 parking spaces does not comply with R1(c) because the spaces do not comply with the minimum area required by AS4299 and there is insufficient room to provide a larger carparking area to accommodate 10 spaces of the required dimensions. Nor was there a document before us to show how the rule could be met through adaptation.

104. The Tribunal accepts that only five or six spaces may be utilised by residents at any given time[30] and it is unlikely that all residents will be wheelchair bound. However, that does not change the result. Although in some circumstances a reduced number of resident parking spaces may be justified under C77 of the

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[29] T Docs page 1116

[30] Based on YWCA's experience at Betty Searle House and Lady Hogan House as described by Ms Crimmins (exhibit 8 at [12]-[16]) and as assessed by Mr Hogan (exhibit 15 at [15]-[16]).

MUHDC where the reasonable requirements for residents are met, there is no scope under R1(c) of the CFZDC to reduce the number of resident parking spaces to less than 10.

105. There is scope for the exercise of professional judgement in assessing the parking requirements under the PVAGC for a multi unit *supportive housing* development only in relation to visitor and operational parking requirements, which we consider next. The parties and all the experts overlooked this.

106. The Tribunal finds that the DA does not comply with R1(c) of the CFZDC. As this is a mandatory rule, section 119(1)(a) of the Planning Act requires that the DA must not be approved.

Visitor and operational parking

107. Although the CFZDC does not specify visitor car parking requirements, the lack of code requirements does not remove the need for a parking assessment as part of the general site and development considerations under section 120 of the Act. Both Mr Hogan and Mr McLennan assessed the need for visitor car parking under the PVAGC on that basis.

108. We consider that adequate visitor car parking must be provided on-site and that the location of the proposed development on a blind curve of a narrow street, which is proposed to be further narrowed to improve site lines for vehicles exiting the driveway, makes it inappropriate to allow for visitor car parking to be provided off-site. We do not accept Mr Hogan's opinion that provision of parking off-site within 100m is appropriate, noting that he also recommended that there should be localised widening of Rutherford Crescent in the location of the intended parking area to minimise impacts on through traffic movement. Accepting that the PVAGC allows visitor and operational parking to be provided off-site within 100m where appropriate, we are satisfied that it is not appropriate to do so in this case. It is reasonable to expect that visitors will park as close as possible to the nearest access point (be it via the footpath or driveway) if on-site parking is not available, which would result in cars being parked on the curve. In the Tribunal's opinion, the location of the block and the narrowness of Rutherford

Crescent means that provision of adequate on-site visitor parking is an essential requirement for any future development of the site.

109. We accept Mr Hogan's evidence that it is appropriate to adopt 60% as a conservative assessment of the utilisation rate of parking spaces by residents at any given time, leaving four on-site spaces available for visitor parking.[31]

110. Ms Crimmins gave oral evidence expanding on the services that may be delivered to residents on-site, which may require YWCA employees and other service providers to visit the site. Accepting that not all services will be provided to every individual, the number of tenants living there means that the potential for several service providers, as well as casual visitors, to be visiting the site at any given time is real. Although Ms Crimmins said the new facility would operate similarly to Betty Searle House and Lady Haydon House, the YWCA did not provide any empirical data about the utilisation rate of parking spaces for visitors and operational requirements at those facilities. The extent to which demands may be placed on visitor parking is difficult to gauge from Ms Crimmins' evidence. However, we are not persuaded that anything in her evidence justifies reducing the number of on-site parking spaces below 10, even if it was permissible to do so under R1(c) of the CFZDC. We do not accept Mr Hogan's and Mr McLennan's assertion to the contrary.

111. We consider that the provision of a parking area large enough to accommodate 10 on-site resident parking spaces complying with R1(c) would be adequate, without the need to provide additional on-site parking for visitors and to meet operational requirements or to rely on off-street visitor parking. We accept Dr Coyne's evidence that the three spaces located within the TPZ of tree 28 must be removed.[32] Thus even if our interpretation of R1(c) of the CFZDC is found later to be wrong, we find that neither YWCA's proposed reduction of the number of car spaces to seven, nor ACTPLA's proposed reduction to nine car spaces,

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[31] Exhibit 15 at [15]

[32] The relationship of the three parking spaces to the TPZ of tree 28 is shown in the Landscape Plan (Drg. No. 3760-F201 F) (exhibit 26)

complies with the PVAGC.

TCCS requirements

112. We have referred to the TCCS conditions included in the conditions of approval earlier.[33] In summary, YWCA was required to redesign the proposed verge crossing to achieve compliance with C72 of the MUHDC[34] and provide a waste management plan acceptable to TCCS to comply with R25 of the CFZDC.

113. The YWCA redesigned the verge crossing to be 5.5m wide at the boundary and approximately 10m wide at the kerb.[35] Although there was no evidence that TCCS had endorsed the design, all parties accepted that this had happened.

114. We were informed that YWCA had not reached agreement with TCCS about the waste management plan but that the parties were continuing to negotiate. Although the DA currently does not comply with R25, it would be appropriate to impose a condition making approval of the DA conditional on satisfaction of this requirement, which is mandatory. However, as the DA fails on other grounds it is not appropriate to do so here.

Fences/courtyard walls and front setbacks to NE and NW boundaries

Overview

115. The block and existing buildings are screened from Bill Pye Park, including the nearby playground area, by a dense perimeter of large shrubs on or next to the north-east and north-west boundary adjacent to a low wire fence set back approximately 1m inside the boundary and, as we observed earlier, the block is surrounded by large deciduous trees, several of which are near the boundary particularly along the north-western side of the block.[36]

116. The building setback is 3m to the north-east and north-west boundary to Bill Pye Park. Unit 1 is sited under the canopy of tree 8 and 9 (both large oaks) and will receive increased shade from tree 10 as it grows (an oak that is likely to grow into

[33] At paragraph 24
[34] C72 provides that the driveway verge crossing must be endorsed by TCCS
[35] The redesigned verge crossing can be seen in exhibit 25
[36] The location of the fence, shrubbery and trees is shown on Detail Survey plan at T Docs page 1186

a large tree). Unit 2 and unit 3 also are likely to receive increased shade from tree 10 as it grows. Unit 7 is sited under the canopy of tree 31 (also an oak that is likely to grow into a large tree, but which the YWCA wants to cut back hard to allow construction) and encroaches on the TPZ of tree 28 (a large oak rated 'exceptional' by the Conservator). Unit 8 is shaded by trees 8 and 9 and is sited adjacent to trees 2, 3 and 4 (all small oaks which are approved for removal). Unit 9 encroaches into the TPZ of tree 1 (an elm rated 'exceptional' by the Conservator). Unit 10 is located under the canopy of tree 1.[37]

117. The PPOS of each dwelling is located within the setback and is defined by a 1.8m metal palisade fence supported on a 500mm wide low gabion wall extending the length of the north-east and north-west boundary and partly forward of the *building line*[38] in the *front zone*[39] of the block on Rutherford Crescent, and by white Colourbond dividing walls perpendicular to the fence and building. The palisade fencing has an opacity of 20%, giving a largely unobstructed view into the PPOS of each dwelling when viewed from various points in the park perpendicular to the fence line. Landscape plans show that shrubs will be planted inside the fence line, which will eventually provide some screening[40] but also reduce the useable PPOS for each dwelling. A person standing on the gabion wall would be able to look over the top of the fence directly into the PPOS and living area of a dwelling.[41] TCCS requires that landscaping for the new development

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[37] The relationship of the new development to existing trees and perimeter shrubbery is shown in the Cover (Drg. No. 3760-F101 C) of the DA landscape documentation (exhibit 16B) and on Landscape Plan (Drg No 3760-F201 F) (exhibit 26). See also Dr Coyne's report (exhibit 2) figures 1-4. The extent of shading caused by trees near the boundary at different times of the year over the 3-year period from January 2018 to July 2021 is shown in aerial photographs (exhibit 19).

[38] The Territory Plan definition of *building line* is a line drawn parallel to the front boundary along the front face of a building of through a point on a building closest to the front boundary.

[39] The Territory Plan definition of *front zone* is the area of a block between the front boundary and the building line or at the minimum front setback of the lower floor level for the block whichever is greater.

[40] Although where the perimeter planting will be in deep shade, Mr Shoulton said in relation to the proposed use of shade tolerant species that "the shade…would have a limiting effect or impact on the shrub. I think they'd survive, but there would be a tendency for them to grow in a way which is commonly referred to as legging [sic – *leggy*]. So an elongation of the stems and the woodiness component of the shrub" – transcript of proceedings on 25 August 2021 at page 305 lines 36-42

[41] Exhibit 26

should be set back adequately and planted so as not to encroach into the park.[42] Screen planting in front of the fence is not an option.

R29/C29 of the MUHDC

118. The Territory Plan definition of *front boundary* is any boundary of a block adjacent to a public road, public reserve, or public pedestrian way. The block therefore has three front boundaries, two to Bill Pye Park and one to Rutherford Crescent.

119. ACTPLA agreed that none of the front boundary setbacks comply with R29 and Table A5 in the MUHDC but said they comply with C29.

120. To comply with C29, front boundary setback must achieve: (a) consistency with the *desired character*; (b) reasonable amenity for residents; and (c) sufficient space for street trees to grow to maturity.

121. We agree that the 5m setback to unit 7 at both front corners and the 4.5m setback to the corner of the carport roof to Rutherford Crescent complies with C29. The issue is whether the setback to Bill Pye Park satisfies the criteria, of which only C29(a) and (b) apply.

122. Ms Middleton said the required setback to the park is 4m as set out in Table A5 of the MUHDC. She said the proposed 3m setback would not provide reasonable privacy for residents and that a 4m setback was likely to improve the life/sustainability of the trees given the buildings are located within the drip lines of large trees.[43]

123. Mr Davies said the setback needs to be measured from the decks, which further depart from the rule. He noted that the definition of *setback* also requires walls and posts to be considered. He said the decks were mostly set back 1.3m from the boundary, which is a 67.5% departure. A short length outside unit 1 has a setback of 0.5m, which is an 87.5% rule departure. The northern building (**Building 1**)[44]

[42] See condition (n) reproduced in paragraph 24
[43] Statement of Hillary Middleton (exhibit D) at [56a], [56c]
[44] i.e., the building fronting the north-east boundary

is just under 40m long, which represent approximately 83% of the frontage. Mr Davies said the combined length of buildings fronting the western boundary[45] is just over 30m, and represent 62% of the frontage. He assessed the setbacks against C29. Given the significant departure from the setback rule is in relation to the park, he assessed it against the PRZ1 zone objectives. He considered the rule departure would have limited impact on the park and zone objectives and that the conditions in the NOD appear to recognise this by requiring greater articulation of the building facade. He said the decks will provide greater use of the courtyard areas.[46]

124. The YWCA relied on a schedule annexed to their Statement of Facts and Contentions, which said the development complies with C29 as the setback encroaches on the park only to a small extent (3m as against the required 4m). YWCA also relied on the evidence of Mr van der Walt and Mr MacCallum.

125. The DA included a Statement Against Rules and Criteria (**SARC**) prepared by Canberra Town Planning. The assessment against R29 states that the setbacks nominated in Table 5 are 6m to the primary frontage and 3m to the secondary street frontage. The planning response assessed the street frontage non-compliant setbacks only and concluded that the setbacks to the park at 3m were rule compliant. The amenity of residents external to the block was assessed with respect to the street frontage only. The assessment against R30 states that the site is a corner site with primary and secondary street frontages.[47] In our view, the assessment is incorrect.

126. Mr van der Walt said the setbacks to the park had to be 4m. He assessed the setbacks against compliance with the *desired character* and said the location of the building was informed by a detailed site and contextual analysis. He considered the proposed 3m setback provides a comfortable relationship with the public realm and provides for the protection and retention of existing trees. He said the 3m setback provides reasonable amenity for residents, as dwellings are

[45] i.e., the north-western boundary
[46] Witness statement of Richard Davies dated 10 August 2021 (exhibit 1) at [99]-[109]
[47] T Docs pages 1055-1056

orientated north-east and north-west to promote solar access and have aspects overlooking the park.[48]

127. In a lengthy written response to a request for information by ACTPLA relating to AMC's application to amend the DA, Mr MacCallum said, "The proposal comprises two modest buildings, both of which are single storey and meet the minimum rear setback requirement of 3m as defined in the Multi Unit Housing Development Code".[49] In our view, the response is incorrect.

128. Mr MacCallum described the development as an unambiguous response to the park, providing an understated edge treatment while presenting as a calm, natural and welcoming building to the street.[50]

129. We agree with Mr Davies' evidence that the significant departure from the setback rule is in relation to the park. Mr Davies said the different landscaping choices to the north (northeast) of the other units in Building 1 do not involve encroachments. We disagree. The raised terraces should be considered because they are part of a *building*.[51] Mr MacCallum said the paving to the raised terraces would be constructed on a compacted fill and/or sand base. This will require retaining walls to the sides of the terrace. The setback should be measured to the external face of the northeast wall of the terraces. The finished floor level (**FFL**) to unit 2 is 595.000. The step down to the unit 2 terrace is 80mm and the natural ground level (**NGL**) outside the unit is shown as 594.500 on the survey drawing,[52] meaning the terrace is 420mm above the NGL. The FFL to units 3 to 6 is 595.280. The step down to the unit 4 terrace is 80mm and the NGL outside the unit is shown as 594.820, meaning the terrace is 380mm above the NGL. The unit 3 terrace is slightly higher and the terraces to units 5 and 6 are slightly lower.

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[48] Witness statement of Petrus Johannes van der Walt (exhibit 10) at [33], [36]
[49] T Docs page 225 (6th unnumbered page of the letter)
[50] Witness statement of Alastair MacCallum (exhibit 13) at [26]
[51] The Territory Plan defines *building* to include a *structure* attached to a *building* and a part of a *building*. *Structure* includes, among other things, a fence, mast, antenna, aerial road, footpath, driveway, carpark, culvert or service conduit or cable. *Setback* means the horizontal distance between a *block* boundary on the outside face of any *building* or *structure* on the block including a *building* wall, a post that supports a roof, a *balcony*, deck, or verandah.
[52] T Docs page 1186

130. We find that the setbacks at units 1 to 6 are a nominal 1.3m.

131. We also find that Building 1, which is 39.9m long, extends 1m into the rule compliant setbacks at both ends of the north-east façade. The north-east boundary is 47.89m long. The rule compliant building footprint length is 37.89m.[53] Building 1 is longer by about 2m than permitted by the rule. Practically speaking Building 1 is forward of the required minimum 4m setback to the park for its entire length, as only the eastern corner of unit 7 has a 4m setback to the park boundary.

132. There is a real issue whether the setback to the park achieves reasonable amenity for the residents of units 1, 2, 3, 4, 5, 6, 8 and 9. Each living room has glazing to one wall facing the public open space. It is the means of direct natural light and ventilation to each living room. Any transparent fencing and limited screening up to a maximum height of 1.8m and located less than 3m from the glazing in our view will not mitigate the loss of amenity due to noise and lack of visual privacy. The transparent nature of the fence will provide little if any privacy while the raised floor levels to some units will contribute to the already relatively unobstructed view into living rooms, even if the fence is replaced by screening with greater opacity. Common sense suggests that where the park is unlit at night and the gabion wall supporting the palisade fencing/metal screens provides easy access for a person to look directly into the private open space and internal living space of a dwelling, there is cause for genuine concern for the security and privacy of occupants, most of whom will be single women aged 55 and over who have been victims of domestic violence in the past. The concerns should not be dismissed lightly. While this can be managed to some extent by using curtains and blinds, we consider it would be at the expense of reasonable amenity for residents.

133. The deck detail showing the relationship of the building and PPOS to the fence shown on landscape drawing F303D is potentially misleading.[54] Taking the

[53] The length of the boundary (47.89m) less the front setback to the Rutherford Crescent (6m) less the front setback to the park (4m).
[54] Exhibit 26

proportion of the 1.8m high fence and relating it to the front setback, it depicts an approximate 4.2m setback, instead of 3m that applies to all but two units.

134. The reduced setback constrains the useable area available for the PPOS of the dwellings and affects solar access to the daytime living area and PPOS. As we explain later, we are not satisfied that all dwellings complies with R57 (solar access to daytime living areas) and find that the PPOS of dwellings does not comply with C61, in that the area is not proportionate to the size of the dwelling, lacks privacy and in some cases lacks reasonable solar access. We consider this significantly detracts from the amenity of the daytime living areas and PPOSs.

135. We find that a 1.3m setback for more than 50% of the length of the boundary to the park does not satisfy C29(a) and (b). Even if the terrace setback is ignored, we find that a 3m setback for 105.3% of the rule compliant length of the building (described by Mr MacCallum as an edge treatment) does not satisfy C29(a) and (b). We consider other issues relevant to *desired character* when we address criteria relevant to the fence/proposed courtyard wall facing Bill Pye Park.

R41/C41 of the MUHDC

136. R41 of the MUHDC permits a fence on the front boundary only where it is: (a) a gate to a maximum height of 1.8m and 1m wide in an established hedge; (b) exempt under the Planning Act; or (c) permitted under the *Common Boundaries Act 1981*. Section 23 of the Planning Act allows ACTPLA to issue a notice to the lessee of a parcel of leased land, where the parcel has a common boundary with an area of unleased Territory land, requiring the lessee to erect a fence on the boundary or any part of it. A notice must specify the fence to be erected and the part of the boundary where it is to be erected.[55]

137. R41(a) and (b) do not apply. R41(c) also does not apply because ACTPLA has not given a section 23 notice to the YWCA.

138. A fence may be permitted under C41 where the proposal meets the requirements of the *Residential Boundary Fences General Code* (**RBFGC**). However, the code

[55] See section 25 of the *Common Boundaries Act*

applies only to boundary fences in RZ1, RZ2, RZ3, RZ4 and RZ5. Although the block is *adjacent* to land zoned RZ1, it does not have a boundary to RZ1 land, which means that the RBFGC does not apply.

139. We find that the fence does not comply with either R41 or C41 of the MUHDC.

140. The YWCA proposed the Tribunal should include a condition of approval that YWCA obtain from ACTPLA a notice under section 23 of the *Common Boundaries Act 1981* requiring it to build a fence on the boundary with the park.

141. It is, of course, a matter for ACTPLA whether it wishes to issue such a notice. However, for the Tribunal to include a condition of that kind we would need to be satisfied that a fence (or 'courtyard wall') on the boundary with Bill Pye Park would be consistent with the *desired character*. We consider that issue next.

R42A/C42A of the MUHDC

142. Mr Davies agreed that it would be a "fruitless exercise" to explore whether the fence could be justified under C41 because it did not comply with the Territory Plan's privacy requirements. The fence could be justified only if it was treated as a courtyard wall.[56] That would require the FT1 palisade fencing[57] to be replaced by a metal screen providing 75% opacity. Mr Davies considered this change would mean the 'courtyard walls' still would not comply with R42A, but would comply with C42A. To achieve compliance he suggested the following condition be added:

> *Revised detail for FT1 providing details for the base and upper panel detail providing 75% obscured / 25% transparent finish to the satisfaction of the planning and land authority. The use of panels for the upper elements of the wall shall be demonstrated in the detail.*

143. R42A permits courtyard walls forward of the building line where they comply with all the following:

> *a) maximum height of 1.8m above datum ground level*
>
> *b) a minimum setback to the front boundary complying with the following:*

[56] Transcript of proceedings on 24 August 2021, page 182 line 9 to page 183 line 39
[57] FT1 is the relevant fence detail shown on the architectural plans

i) *where the wall encloses the principal private open space at ground floor level that is located to the west, north-west, north, north-east or east of the dwelling – 0.7m*

ii) *in all other cases – half the front boundary setback nominated elsewhere in this code*

c) *trees and/or shrubs between the wall and the front boundary, in accordance with an approved landscape plan*

d) *a variety of materials or indentations not less than an 15m apart where the indents are not less than 1m in depth and 4m in length*

e) *constructed of brick, block or stonework, any of which may be combined with timber or metal panels that include openings not less than 25% of the surface area of the panel*

f) *do not obstruct sight lines for vehicles and pedestrians on public path is or driveways in accordance with Australian Standard AS2890.1 – Off-Street Parking*

144. C42A permits courtyard walls if they achieve all the following:

a) *consistent with the desired character*

b) *the dominance of the building's façade in the streetscape taking all of the following aspects of the proposed courtyard wall into account:*

i) *height*

ii) *relationship to verge footpath*

iii) *total proportion relative to the building*

iv) *width*

v) *colour and design features*

vi) *transparency*

vii) *articulation*

viii) *protection of existing desirable landscape features*

ix) *tree and shrub planting forward of the wall*

c) *do not obstruct sight lines for vehicles and pedestrians on public path is or driveways in accordance with Australian Standard AS2890.1 – Off-street Parking*

145. The threshold for Mr Davies' proposal to be considered under C42A is that the Tribunal must be satisfied that increasing the opacity of the screening is sufficient to make what is now a fence into a 'courtyard wall'. We find that the structure amended in the way Mr Davies suggests, lacks any of the features that could be considered to differentiate a 'courtyard wall' from a fence on the boundary. The

'wall' has no setback to the front boundary. It provides no tree or shrub planting forward of the 'wall'. It lacks any articulation and extends the full length of both buildings. In short, we see no difference between what Mr Davies says can be 'treated' as a courtyard wall, and a fence which is not permitted under R41/C41 unless required by a notice under section 23 of the *Common Boundaries Act 1981*. Acceptance of Mr Davies' argument that a boundary fence can be 'treated' as a courtyard wall for the purpose of assessing compliance with the Territory Plan, means giving the terms an interchangeable meaning and dismissing any perceived differences as a matter of semantics. We disagree. R42A represents the 'minimum ideal' for a courtyard wall. While departures from the 'minimum ideal' are permissible, as C42A provides, the present example represents a complete departure from the 'minimum ideal'. It is a 'courtyard wall' in name only. In truth it remains a fence on the boundary that does not comply with R41/C41. Calling it a 'courtyard wall' cannot change the result.

146. However, in case we are wrong, we consider next whether 'courtyard walls' as proposed by Mr Davies are consistent with the *desired character*.

Desired character

147. The Territory Plan defines *desired character* as:

> *…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.*

148. *Streetscape* includes:

> *…the visible components within a street (or part of a street) including the private land between facing buildings, including the form of the buildings, treatment of setbacks, fencing, existing trees, landscaping, driveway and street layout and surfaces, utility services and street furniture such as lighting, signs, barriers and bus shelters.*

149. The north-east boundary of the block is exposed to view along most of its length from most points on Rutherford Crescent in an arc from north-east to north-west of the block, except where the view is obscured by tree 32 and, to a lesser extent, tree 31. The north-west boundary is exposed to view for most of its length from most points on Rutherford Crescent west of the block. Both boundaries form part

of the streetscape.

150. We agree with and adopt the tribunal's statement in *Village No 22 Pty Ltd ACN 620 656 260 v ACT Planning and Land Authority*[58] (***Village No 22***) at [126]-[127] that:

> *The definition of 'desired character' permits consideration of whether the manner or style of arranging and coordinating the component parts…will have a "pleasing or effective result" regarding siting, building bulk and scale and resulting streetscape.*
>
> *A 'pleasing or effective result' is not to be judged at large. It must be assessed by reference to relevant zone objectives.*

151. As the block is zoned CFZ and is *adjacent*[59] to land zoned PRZ1 and RZ1, the zone objectives for CFZ, PRZ1 and RZ1 must be considered to identify which are relevant.

152. The CFZ zone objectives include in (e) "to encourage adaptable and affordable housing for persons in need of residential support or care". This says little if anything about *desired character*. None of the other objectives appear relevant.

153. We consider PRZ1 zone objectives (b) and (e) are relevant:

> *b) Establish a variety of settings that will support a range of recreational and leisure activities as well as protect flora and fauna habitats and corridors, natural and cultural features and landscape character.*
>
> *…*
>
> *e) Ensure that development does not unacceptably affect the landscape or scenic quality of the area, adequacy of open space for other purposes, or users, access to open space, or amenity of adjoining residents.*

154. We consider RZ1 zone objective (d) is relevant also:

> *d) Ensure development respects valued features of the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties.*

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[58] [2021] ACAT 43

[59] The Territory Plan defines *adjacent* to mean either being contiguous with the subject location; or, if separated only by a road, where the front boundary faces the section of the road which separates it from the subject location.

155. The existing perimeter shrubbery and trees surrounding the block are host to native birds and animals.[60] The existing landscape setting integrates the block and the park, provides a pleasant outlook for residents of Rutherford Crescent and provides screening and privacy for residents and other park users.

156. The development proposal requires all perimeter shrubbery to be removed. In its place will be a 1.8m gabion wall and metal screen structure with no external landscaping and nothing to add visual interest to a relatively bland building façade, which already requires revision to provide further articulation. While the conditions of approval include provision of an updated landscape plan "showing mass plantings of colourful native shrubs in sunny locations to support local birdlife",[61] such planting can happen only behind the wall and therefore will contribute nothing to amenity for residents of Rutherford Crescent and park users, nor to the landscape character of the park and its immediate surrounds. Further, the reduced building setback, inadequate size of the PPOS areas and the proximity of the useable part of the PPOS areas to any 'colourful native shrubs' planted inside the fence line makes it doubtful that the result will make any meaningful contribution to supporting local birdlife and replacing lost habitat.

157. We are satisfied that the reduced building setback, the proximity of the PPOS areas to the boundary and the finished level of outdoor terraces and decks, will result in overlooking of the playground and parts of the park that are important to the local community, with a consequent loss of privacy and amenity for park users and residents of the development.

158. We accept Mr Hubbard's evidence about how the park is used:[62]

> *The Park is heavily used by local residents with its seating, playground and mature plantings...In Spring, Summer and Autumn it is often used for family gatherings, kids parties and picnics…Picnic blankets and portable tables are often placed under the oaks around the western and northern boundaries of the site.*

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[60] Statement of Jeremy Allen (exhibit A), page 38 at [76.1]-[76.4]; Statement of Norris Leonard Mitchell (exhibit H), page 2 under 'Environmental impact'

[61] Condition (a)(iii)

[62] Statement of Ian Hubbard (exhibit C), page 18

159. We agree with his comment that:[63]

> *The interface between the development and the Park is important… The proximity of the units to the boundaries, the decking and the gates directly into the Park will impact on how the Park is used…There will be uncomfortable situations where a resident on their deck will be sitting a couple of metres from people using the Park and playground. Or a resident coming out of the gate into the Park and bumping into a group of people.*

160. Considering Dr Coyne's evidence, we find that the non-compliant setback to park boundaries creates an unacceptable risk of damage to trees that contribute significantly to the landscape character of the park. Tree 31 is proposed to be cut back severely to allow construction, which will be detrimental to the tree's health and, as Dr Coyne foresees, is likely to come under pressure to be removed as it grows into a large tree. Tree 10 eventually may suffer the same fate because of the interference it will cause to solar access for units 1 to 3. Of great concern is the risk to tree 1, a large elm considered by the Conservator to be 'exceptional'. Even if all the proposed tree protection measures are followed to the letter, Dr Coyne was not confident that the tree would survive. The loss of tree 1 would detract significantly from the landscape character of the park.

161. While achieving consistency with the *desired character* does not require existing features of the surrounding area to be replicated slavishly and recognising that it is expected that the *desired character* of an area will change incrementally as new and different developments are approved, the Tribunal considers that the development proposal provides for change of a different order in terms of its immediate and potential long term negative effects on the landscape character of the park, flora and fauna habitats, streetscape and amenity for residents and other park users. The contrast with what is there now could not be more striking.

162. The Tribunal is not satisfied that the proposed 'courtyard walls' considered with the non-compliant building setbacks achieve compliance with the *desired character* because the result is not consistent with:

    (a) PRZ1 zone objective (b), in that it fails to establish a setting that supports the present (intensive) use of parts of Bill Pye Park for a range of

[63] Statement of Ian Hubbard (exhibit C), page 18

recreational and leisure activities; it fails to protect (or suitably replace) flora and fauna habitats that will be lost as a result of the development; and it will detrimentally affect the landscape character of the park;

(b) PRZ1 zone objective (e), in that the development will unacceptably affect the landscape quality of Bill Pye Park;

(c) RZ1 zone objective (d), in that the development does not respect valued features of the immediate neighbourhood on Rutherford Crescent and will detract significantly from the landscape character of the area.

163. For these reasons we find that the DA does not comply with C29(a) and C42A(a).

Solar access – R57

164. R57 of the MUHDC requires that "the floor or internal wall of a daytime living area of a dwelling is exposed to not less than 3 hours of direct sunlight between the hours of 9am and 3pm on the winter solstice (21 June)". R57 is a mandatory requirement. There is no applicable criterion.

165. Mr McCallum claimed that a key feature of the proposed redevelopment included that it maximised northern solar aspect to all dwellings and their private open space areas.[64]

166. Shadow diagrams provided with the DA show that Mr McCallum's claim that solar access is maximised depends on disregarding shade cast by large trees, particularly trees surrounding the northern corner and along the north-west boundary, which affect solar access to units 1, 2, 8, 9 and 10, and tree 31 which affects solar access to unit 7.[65]

167. The site plan shows tree 10 incorrectly opposite the dividing wall between units 2 and 3, instead of opposite the dividing wall between units 1 and 2.[66] Aerial photographs[67] show that trees 8, 9 and 10 form a dense canopy that shades units 1 and 2 and part of unit 8. The canopy of tree 1 is less dense and shades unit 10 and

[64] Witness statement of Alastair MacCallum (exhibit 13) at [16(b)]
[65] Exhibit 16A, Drg. No. A180
[66] Exhibit 16A, Drg. No. A190
[67] Exhibit 19

part of unit 9. Tree 31 has a dense canopy that shades unit 7.

168. Dr Coyne visited the site on 3 August 2021. He noted that although most deciduous trees lose their leaves in May, oak trees hold their leaves much longer. He observed that the oak trees still had leaves on 3 August 2021.[68] His observations are confirmed by aerial photographs taken about a month each side of the winter solstice between 2018 and 2021.[69] Dr Coyne said that tree 1, an English Elm, overhangs most of the windows of unit 10 (unit 1 by his numbering) and half the windows of unit 9 (his unit 2) but that the tree should be leafless from May to late August. Tree 8, a Gall Oak, overhangs most of unit 1 (his unit 4) including the windows and is likely to retain its leaves until July and be in full leaf again in September, reducing winter sun. Tree 9, a Gall Oak, slightly overhangs unit 1 (his unit 4). Tree 10, a Gall Oak, will shade the north facing windows of units 1 and 2 (his units 4 and 5), both of which would have significantly reduced winter sunshine. Tree 31, also a Gall Oak, will overhang the windows of unit 7 (his unit 10) and will substantially shade the windows for almost all year, being leafless for only about six weeks.

169. The YWCA produced shadow diagrams (**exhibit 28**) for the daytime living areas and the PPOS areas of units 1, 7, 8 and 10 between 9am and 3pm on the winter solstice, which it submitted demonstrated compliance with R57 and C61(f).[70] YWCA said these were the most 'difficult' cases and submitted that if the Tribunal was satisfied that those units complied with R57 and C61(f), the Tribunal should infer that the other units complied also.

170. The applicants were critical of the shadow diagrams because they show palisade fencing, which is permeable to sunlight, rather than the more opaque screening that Mr Davies proposed. However, we are satisfied that the edge of the shadow line from the top of the fence is depicted accurately and that the effect on shading of the more solid fence structure can be inferred easily.

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[68] Dr Coyne's report (exhibit 2) at [5], [8] and Attachment 1

[69] Exhibit 19, pages 5 (18 July 2018), 10 (17 May 2019), 11 (2 July 2019), 16 (4 June 2020), 21 (18 May 2021), 22 (10 July 2021).

[70] Exhibit 28 supersedes earlier versions of the shadow diagrams (exhibits 22 and 27)

171. Exhibit 28 does not show the effect of shading by trees but shows the direction of sunlight at relevant times of the day. We have used exhibit 28, aerial photographs in exhibit 19, Dr Coyne's photographs and observations, and architectural and landscape plans to assess the likely effect of shading by trees on solar access to the daytime living areas and PPOS areas of units 1, 7, 8 and 10 at relevant times on the winter solstice.

172. The floor of the daytime living area of unit 1 appears to be exposed to direct sunlight from 9am to 2pm and only slightly so at 3pm. Parts of the PPOS appear to have varying degrees of exposure to direct sunlight between 11am and 3pm. However, if shading by trees 8, 9 and 10 is factored in, it is unlikely that the daytime living area and PPOS of unit 1 will receive any direct sunlight on the winter solstice.

173. The north-western wall and floor of the daytime living area of unit 7 appears to be exposed to direct sunlight between 9am and about 2pm but not at 3pm. Parts of the PPOS appear to have varying degrees of exposure to direct sunlight between 9am and 3pm. However, if shading by tree 31 is factored in, it is unlikely that the daytime living living area and PPOS of unit 7 will receive any direct sunlight on the winter solstice.

174. The floor of the daytime living area of unit 8 appears to be exposed to direct sunlight between about 12pm and 3pm from the north-west facing windows. Most or all of the PPOS appears to be exposed to direct sunlight from 9am until about 1pm, reducing by 2pm and only slightly exposed at 3pm. This shadow diagram is inconsistent with the shadows depicted on drawing A180, which incorporates the shadows from building 1 at 9am and shows that the deck is in full shadow. Further, if shading by tree 8 is factored in, it is unlikely the daytime living area and PPOS of unit 8 will receive any direct sunlight on the winter solstice.

175. Although at first sight Unit 10 appears to receive less direct sunlight than units 1, 7 and 8, in fact it receives more. The floor of the internal living area appears to be slightly exposed to direct sunlight between 12pm and 1pm, with improved exposure between about 1pm and 3pm. The PPOS appears to have varying

degrees of exposure to direct sunlight between about 10am and 2pm. Unit 10 is shaded by tree 1, but as Dr Coyne's photograph taken on 3 August 2021[71] and aerial photographs taken on 18 May 2021 and 10 July 2021[72] show, the tree is bare of leaves and allows good solar penetration, suggesting that exhibit 28 is likely to be a reasonable indication of solar access to the internal living area and PPOS of unit 10. Dr Coyne thought that on average, once the trees had lost their leaves, they would allow about 80% of sunlight to penetrate the canopy.[73] Where the basis for Dr Coyne's estimate was not explained, we have relied primarily on our own observations and the aerial photographs.[74]

176. We are satisfied from this analysis that units 1, 7 and 8 do not comply with R57. Unit 10 appears to comply but is at best marginal. We are unable to determine whether unit 9 complies because of its greater proximity to tree 8 and possible afternoon shading from a large tree located due west of tree 8. We think units 2 and 3 are unlikely to comply for the same reason as unit 1, but cannot be certain. Units 4, 5 and 6 appear likely to comply.

177. ACTPLA and YWCA submitted that it is neither practicable, nor required as a matter of law, for potential overshadowing by trees to be considered in assessing compliance with R57, relying on what was said in *Hamilton v ACT Planning and Land Authority & Ors*[75] (***Hamilton***).

178. In *Hamilton*, the tribunal was asked to decide whether the effect of shade trees should be considered when assessing shadowing and solar access in a development. There was evidence before the tribunal that it was industry practice to exclude the influence of trees in shadow diagrams relied upon to demonstrate compliance with solar access requirements. (Mr Davies gave evidence to the same effect in this case). Reference was made to NSW authority that landscape features are not considered "due to the potential for seasonal variation, health and potential

[71] Exhibit 2, Attachment 1 (photo and description of tree 1)
[72] Exhibit 19, pages 21 and 22
[73] Transcript of proceedings on 25 August 2021, page 314 lines 32-39
[74] We refer later to the availability of relatively simple photographic methods for measuring solar penetration through trees.
[75] [2018] ACAT 121

future removal of trees".[76] The tribunal heard submissions that taking trees into account would "necessarily motivate the removal of those trees in order to achieve rule compliance, unlikely to be supported by the Conservator, and lead to approvals inconsistent with entity advice".[77] The tribunal said at [115]:

> *It seems that on either option, whether one considers or does not consider the effect of shade trees, there is the potential to produce an absurd outcome. On the respondent's argument, the decision-maker is asked to ignore the reality of existing trees, which in this case, on any view of the evidence, cast substantial shadows that were not included in the original shadow diagrams, and may not be accurately included in the revised ones. The objectors' position, however, would require that the developers submit shadow diagrams based on variables that cannot be calculated, prophesise what may or may not happen in the future, and adopt a practice that may result in trees being removed contrary to good public policy.*

179. The tribunal in *Hamilton* found it unnecessary to choose between "these two unconvincing options" because of the plain effect of R57, about which the tribunal said at [117]:

> *The purpose of R57 is clearly to ensure an amount of direct sunlight reaches the living areas of units. However, R57, as written, does not provide any criteria or guidance as to the extent or area of the direct sunlight that is required – it simply states that "the floor or internal wall" must be "exposed to not less than three hours of direct sunlight between 9am – 3pm on the winter solstice". On a plain reading, this appears to mean the requirement is met by any amount of direct sunlight falling on the floor or internal wall during the relevant period. Hence, in Johnson & Xu v ACT Planning and Land Authority the tribunal was satisfied that a "tiny amount of sunlight" on a window was sufficient to meet the test.*

180. In *Johnson & Xu v ACT Planning and Land Authority & Ors*[78] (***Johnson***) the tribunal considered that R86 (the equivalent of R57 in the current version of the MUHDC) "is expressed in clear and precise quantitative terms" and "there is no role for an opinion". The tribunal also accepted the interpretation of expert witnesses that the requirement expressed in terms of direct sunlight onto the floor

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[76] [2018] ACAT 121 at [111]. Authority for this proposition was said to be found in *Benevolent Society v Waverley Council* [2010] NSWLEC 1082 at [137]-[144]. The decision does have something to say about disregarding vegetation (which we discuss later) but we were unable to see anything in the decision to support what *Hamilton* appears to suggest is the rationale for the NSW approach.

[77] *Hamilton* at [114]

[78] [2012] ACAT 53 [75]-[76]

or internal wall of the main daytime living area meant sunlight on the window of these areas.[79]

181. We were invited to follow *Hamilton* and *Johnson*, which ACTPLA and the YWCA submitted correctly stated the meaning and effect of R57.

182. The practice of ignoring interference with solar access by trees, which we understand is how ACTPLA assesses compliance with R57, does not affect the meaning of R57 which, as we said earlier, is a question of law which must be worked out applying the principles of interpretation in part 14.2 of the *Legislation Act 2001*.

183. The Tribunal, standing in the original decision maker's shoes, must be satisfied (and find as a fact) that the floor or internal wall of a daytime living area of a dwelling is exposed to not less than three hours of direct sunlight between the hours of 9am and 3pm on the winter solstice. The evident purpose of R57 is to ensure that every dwelling receives at least a minimum amount of direct sunlight to provide reasonable amenity for residents. R57 does not refer to obstructions to solar access. The language of the rule does not permit compliance to be assessed considering shading by buildings and other structures, but disregarding shading by hedges and trees. R57 is not met if for any reason the floor or wall of the daytime living area of a dwelling does not **in fact** receive the required amount of direct sunlight between 9am and 3pm on the winter solstice. We discuss later whether "a tiny amount of sunshine" on a window is sufficient to comply with R57, as *Hamilton* and *Johnson* decided.

184. The perceived practical difficulties in assessing the effect of shade trees on solar access, we think, reflects uncritical reliance on computer models to generate shadow diagrams and the difficulty of modelling trees other than as a solid structure. Shadow diagrams have their place and are an important tool, but they are not determinative. Where it is necessary to consider shading from trees on the winter solstice, the following considerations are relevant:

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[79] [2012] ACAT 53 at [77]

(a) the species of tree;

(b) the size, spread, density of foliage, age, condition and likely future growth of the tree;

(c) if the tree is deciduous, the time when it is likely to be bare of leaves and the level of solar penetration this will allow; and

(d) the proximity of the tree to the daytime living areas and its relationship to the angle and position of the sun between the hours of 9am and 3pm on the winter solstice.

185. A site inspection and information gleaned from aerial and ground-based photographs is likely to be relevant. The size of the shadow at different times of the day can be calculated using basic trigonometry. When used in conjunction with computer generated shadow diagrams, we consider this would allow compliance with R57 to be assessed, much as we have done here. Where the results of this approach appear equivocal, photographic and photometric methods of measuring light transmission through trees can be used. These methods are used widely in forestry and agriculture and are easily adapted for use in the planning and design of buildings. A useful discussion of the subject appears in a paper by P. Balakrishnan and J. Alstan Jakubiec, given in September 2016 at a conference at the Singapore University of Technology and Design, titled 'Measuring Light Through Trees for Daylight Simulations: A Photographic and Photometric Method'.

186. We think the perceived risk that considering the effect of shade trees at the planning approval stage will likely motivate the removal of trees to achieve rule compliance, is overstated. The current approach, which permits buildings to be sited inappropriately in relation to shade trees, inevitably puts the trees at risk once the development is completed. As Dr Coyne said:

> *Placing a residential unit where the tree will cause substantial winter shade is likely to result in pressure to remove the tree. The fact that the tree was there first provides no protection for the tree. Problems inevitably arise when a building is constructed inappropriately in respect trees. The trees almost invariably pay the price of such deliberate construction.*

187. We consider the following are important planning issues that should be addressed at the approval stage and not left until later as happens now: first, whether approval should be refused for a development or part of a development to be sited inappropriately in relation to a shade tree that is likely to cause unacceptable interference with solar access; second, whether the development or part of it should be modified to avoid a shade tree causing unacceptable interference with solar access; third, whether the tree should be cut back or removed to allow the development to be approved as is, without any design modifications to achieve acceptable solar access.

188. In support of the proposition that shade trees should be disregarded when assessing solar access, submissions to the tribunal in *Hamilton* referred to *Benevolent Society v Waverley Council*[80] (***Benevolent Society***) in which Senior Commissioner Moore set out the NSW Land and Environment Court's consolidated and revised planning principles on solar access applicable to apartment developments under *State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development* (**SEPP 65**) and the *Residential Flat Design Code*. The code required living rooms and private open spaces for at least 70% of apartments in a development to receive a minimum of three hours direct sunlight between 9am and 3pm in midwinter. In dense urban areas a minimum of two hours of direct sunlight was considered acceptable. [81]

189. Before we discuss the planning principles, it is necessary to understand what they are. The NSW Land and Environment Court website explains:

> *A planning principle is a statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.*
>
> *While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.*
>
> *Planning principles assist when making a planning decision, including:*
>
> - *where there is a void in policy*

[80] [2010] NSWLEC 1082 at [137]-[144]
[81] *Residential Flat Design Code* (NSW) pages 83-84

- *where policies expressed in qualitative terms allow for more than one interpretation*
- *where policies lack clarity.*

190. The role of planning principles in achieving consistency of decisions by planning authorities and the Court, the process of internal consultation by which the Court develops planning principles, the relevance of planning principles to the DA process, and their likely future use is discussed in a series of papers published on the NSW Land and Environment Court website, which make useful reading.[82]

191. Since *Benevolent Society* was decided, SEPP 65 has been amended and renamed *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* and the *Residential Flat Design Code* has been replaced by the *Apartment Design Guide*. Part 4 of SEPP 65 requires development applications to be determined taking the design guide into account. The introduction to the *Apartment Design Guide* explains its statutory relationship with SEPP 65:

> *SEPP 65 sets a consistent policy direction for residential apartment development in NSW and provides a uniform state-wide framework for more detailed planning guidance. It has a statutory effect on development and as a consequence may modify or supplement the provisions of state environmental planning policies, local environmental plans (LEP) and development control plans (DCP).*
>
> *Although this document is a guide, SEPP 65 refers to some parts of the Apartment Design Guide that must be applied when assessing development applications. Objectives, design criteria and design guide in Parts 3 and 4 set out objectives, design criteria and design guidance for the siting, design and amenity of residential apartment development.*
>
> *...*
>
> *SEPP 65 establishes nine design quality principles to be applied in the design and assessment of residential apartment development. This Apartment Design Guide provides greater detail on how residential development housing can meet these principles through good design and planning practice.*

192. Part 4A of the *Apartment Design Guide* includes design objectives and numerical

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[82] John Roseth (Senior Commissioner), *Planning Principles and Consistency of Decisions* (February 2005); *Developing Planning Principles* (July 2005); Tim Moore (Senior Commissioner), *The Relevance of the Court's Planning Principles to the DA Process* (May 2009); Tim Moore (Senior Commissioner), *The Future of Planning Principles in the Court* (October 2013)

and qualitative design guidelines for solar and daylight access. It is sufficient for present purposes to refer to objective 4A-1 which is "to optimise the number of apartments receiving sunlight to habitable rooms, primary windows and private open space". The related design criteria state:

> 1. *Living rooms and private open spaces of at least 70% of apartments in a building receive a minimum of 2 hours direct sunlight between 9 am and 3 pm at mid winter in the Sydney Metropolitan Area and in the Newcastle and Wollongong local government areas.*
> 2. *In all other areas, living rooms and private open spaces of at least 70% of apartments in a building receive a minimum of 3 hours direct sunlight between 9 am and 3 pm at mid winter.*
> 3. *A maximum of 15% of apartments in a building receive no direct sunlight between 9 am and 3 pm at mid winter.*

193. The planning principles on solar access published in *Benevolent Society* continue to apply to development applications under SEPP 65. The planning principles refer to overshadowing of neighbouring properties and solar access to apartments in the proposed development. The latter are relevant to this discussion: [83]

> *Where guidelines dealing with the hours of sunlight on a window or open space leave open the question what proportion of the window or open space should be in sunlight, and whether the sunlight should be measured at floor, table or a standing person's eye level, assessment of the adequacy of solar access should be undertaken with the following principles in mind, where relevant:*
>
> - *...*
> - *For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area.*
> - *For private open space to be assessed as receiving adequate sunlight, regard should be had of the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of requiring sunlight for it to have adequate solar amenity. A usable strip adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on*

[83] *Benevolent Society* at [144]

private open space should ordinarily be measured at ground level but regard should be had to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate.

- *Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.*

194. Notably, while overshadowing by vegetation generally is ignored, it nevertheless may be relevant to a qualitative assessment of whether an area receives adequate sunlight, particularly where solar access may be affected by dense vegetation. This approach is understandable where block sizes generally are smaller, and the density of development in metropolitan areas of NSW generally greater than in Canberra. It is not at all clear that the same considerations should apply here. Canberra is known as the 'bush capital' and from the beginning was planned as a garden city. A notable feature of the urban landscape and streetscape throughout Canberra, except perhaps in some of the newer suburbs, is that it is dominated by large trees. It is one of the things that differentiates Canberra from other cities. Living with trees is what Canberrans do. We are strongly of the view that how a development proposal responds to site constraints arising from the presence of trees that are considered worth preserving, is an essential consideration at the DA approval stage. We see no reason why this should be limited to approval conditions intended to minimise the risk of damage to trees during construction. It should include, among other things, that the siting and design of a development in relation to one or more shade trees considered worth preserving must ensure that the daytime living areas and PPOS receives adequate direct sunlight, regardless of whether the trees are on the block, the street, neighbouring blocks or adjacent public open space. Siting the daytime living area or PPOS of a dwelling where a tree must inevitably cause substantial winter shade is poor design and should not be approved. The situation described by Dr Coyne, where after the development is completed a tree that was there from the start is approved for removal to overcome a problem created by the deliberate decision to position the development inappropriately in relation to the tree, should not be permitted.

195. We turn now to consider whether any amount of sunlight on the floor or wall of daytime living area, however small, is enough to satisfy R57.

196. The minimum period of exposure to direct sunlight is three hours between 9am and 3pm on the winter solstice. Sunlight must penetrate a glazed area (whether a window or glass door) and reach a wall or floor of the living area. Sunlight striking a window at an acute angle may illuminate the window but not necessarily penetrate the living area. But assuming sunlight does penetrate the living area, how much of the floor or wall must be "exposed to direct sunlight" to achieve compliance with R57. Is it enough for a tiny spot of sunlight to be observable on the wall or floor for a continuous period of three hours? If not, where does one draw the line?

197. It is important not to lose sight of the fact that the evident purpose of R57 is to ensure that a dwelling receives at least a minimum amount of sunlight to provide reasonable amenity for residents. In working out the meaning of the rule, section 139(1) of the *Legislation Act 2001* requires the Tribunal to adopt an interpretation that would best achieve the purpose of the rule, in preference to any other interpretation.

198. We consider that an interpretation that would allow any amount of sunlight, however tiny, to meet the requirements of R57 is inconsistent with the approach required by section 139(1) and should not be preferred. Where *Hamilton* and *Johnson* say otherwise, we respectfully disagree.

199. The YWCA submitted that whether a wall or floor of an internal living area is "exposed" to direct sunlight is a question of fact. YWCA accepted that an amount of sunlight that is *de minimis* – i.e. so minor as to be disregarded – would not satisfy the rule but said that it is impermissible to read into R57 a requirement that the amount of sunlight must be reasonable.

200. The fact that R57 speaks of a floor or wall being "exposed" to direct sunlight suggests to us that something more than a sliver of sunlight is necessary. The Macquarie Dictionary gives two meanings for 'exposed': "1. left or being without shelter or protection; vulnerable; open to attack. 2. laid open to view;

unconcealed".[84] We think that whether something is 'exposed' to something else – e.g. danger, public view, the weather, or as in this case, direct sunlight – is a question of fact and degree. This necessarily requires a qualitative, rather than quantitative, assessment of the amount of sunlight that an internal living area will receive between the hours of 9am and 3pm on the winter solstice.

201. It is relevant in that context to consider how the planning principles on solar access published in *Benevolent Society*, and which remain applicable in NSW, deal with the issue. The design criteria for solar access in the *Apartment Design Guide* have in common with R57 of the MUHDC that they prescribe the hours of sunlight that a living space must receive in mid-winter but leave open the question what proportion of a window (in an assessment against the *Apartment Design Guide*), or a floor or wall (in an assessment against R57 of the MUHDC) should be in sunlight.

202. We have reproduced the relevant part of the planning principles earlier. We are of the view that the same considerations should inform future assessments of compliance with R57 of the MUHDC. However, the issue was not raised with the parties and a decision of that kind should not be taken without the benefit of full argument. No doubt there will be opportunities to do so in future merits reviews.

203. Our decision in this application need not go so far. The earlier analysis of the evidence shows that daytime living areas of three units are unlikely to receive any direct sunlight between 9am and 3pm on the winter solstice. For that reason we find that the DA does not comply with R57.

Principal private open space – R61/C61

204. R61 of the MUHDC requires each dwelling to have at least one area of PPOS that:

(a) is located on the site;

(b) has minimum area and dimensions specified in table A9;

(c) is screened from adjoining public streets and public open space;

[84] *Macquarie Dictionary* (8th ed. 2020)

(d) is directly accessible from, and adjacent to a habitable room other than a bedroom; and

(e) is not located to the south, south-east or south-west of the dwelling, unless it achieves stated solar access requirements that need not be mentioned here.

205. The DA complies with R61(a). R61(b) does not apply because table A9 applies to residential and commercial zones only. The palisade fencing does not comply with R61(c). The Type 2A layout of some units on drawing A351 provides for the PPOS to be accessible from a bedroom rather than the living area and therefore does not comply with R61(d).

206. C61 requires the PPOS for each dwelling to achieve all the following:

(a) an area proportionate to the size of the dwelling;

(b) an extension of the function of the dwelling for relaxation, dining, entertainment, and recreation;

(c) directly accessible from the dwelling;

(d) service functions such as clothes drying and mechanical services;

(e) reasonable privacy; and

(f) reasonable solar access.

207. There is no need to revisit the discussion about privacy issues and loss of amenity for residents related to reduced setbacks to the park. The proposal to address the privacy issue by replacing the palisade fencing with metal screening goes some way towards addressing the privacy issues but is not code compliant. For these reasons we are satisfied the DA does not comply with C61(e).

208. Our discussion of solar access issues shows that the PPOS of at least three units receives no direct sunlight on the winter solstice and others are likely to be affected similarly. For that reason we are satisfied the DA does not comply with C61(f).

209. The YWCA submitted that an assessment against C61(a) – i.e. whether the PPOS

is proportionate to the size of the dwelling – should not consider table A9. We disagree. R55 specifies a minimum floor area of 40m^2 for a studio dwelling, 50m^2 for a one-bedroom dwelling and 70m^2 for a two-bedroom dwelling. Table A9 specifies the minimum area of PPOS for a one-bedroom dwelling in RZ1 and RZ2, where the dwelling is wholly or partially at a lower floor level, as 28m^2 with a minimum dimension of 5m and, for a two-bedroom dwelling as 36m^2 with a minimum dimension of 6m. This is the 'minimum ideal' which establishes the point of departure against which compliance with the criterion should be assessed, reflecting the assessment approach the tribunal has applied consistently in previous decisions.[85] The degree of divergence from a rule is only ever a guide for the tribunal to assess compliance with the applicable criterion. We see no reason why table A9 should not be used for that purpose here. The fact that the relevant part of the table applies to RZ1 and RZ2 does not make it less useful to inform the Tribunal's assessment of a multi-unit residential development on land zoned CFZ which is *adjacent* to land zoned RZ1.

210. The studio dwellings are approximately 50m^2 and have a PPOS that is approximately 14m^2, of which only about 9m^2 is useable when the steps are excluded. The departure from the minimum ideal of 28m^2 is substantial and, in our view, makes the area too small to achieve requirements in C61(b) and (d).

211. The YWCA argued that there was no need for external drying space because the units would have dryers. Not everyone likes to use dryers in preference to drying clothes in sunlight and dryers do not always work. We find that argument unpersuasive. Although not put so bluntly, it seemed to us that the thrust of YWCA's case (which we accept we may have misunderstood) was that tenants, coming from a background of severe disadvantage and who otherwise may be at risk of homelessness, would be happy with the small size of the units and

[85] *4THD Planning & Design Pty Ltd ACN 154 870 078 v ACT Planning And Land Authority & Ors* [2021] ACAT 59 at [27]; *Miosge & Anor v ACT Planning and Land Authority* [2020] ACAT 65 at [79]; *Peraic & Anor v ACT Planning and Land Authority & Anor* [2019] ACAT 118 at [81]-[83]; *Hamilton v ACT Planning and Land Authority & Ors* [2018] ACAT 121 at [24]; *McGrath and Anor v ACT Planning and Land Authority & Anor* [2018] ACAT 100 at [15]-[18]; *Javelin Projects Pty Ltd v ACT Planning and Land Authority & Anor* [2017] ACAT 87 at [73]; *Maurer & Ellis v ACT Planning and Land Authority & Ors* [2016] ACAT 83 at [144]; *Deakin Residents Association Inc v ACT Planning and Land Authority & Anor* [2015] ACAT 37 at [35]

associated private open spaces given their circumstances and the limited alternatives open to them. If we have understood YWCA's position correctly, we do not accept this justifies providing the dwellings with PPOS areas that are small, narrow, lacking in privacy and, in many cases, likely to be in deep shadow for most of the year. The concept of the PPOS areas as a suitable extension of the dwellings for relaxation, dining, entertainment, and recreation in our view exists in the architectural renderings only. We think the reality of the built space is likely to be quite different.

212. We find that the DA does not comply with R61, or C61(a), (e) and (f).

External width of carport – R79/C79

213. R79 provides that the maximum total width of carports facing a street, where there are more than three dwellings, must not be greater than 50% of the total length of the building façade facing the street.

214. We agree with Mr Davies' assessment that the carport does not comply with R79.

215. The question whether the carport satisfies C79 received some attention at the hearing. C79 requires car parking structures to be consistent with the *desired character*. Mr Davies, Mr van der Walt and Mr Adams said the front of the carport is located sufficiently distant from Rutherford Crescent that, when screening from tree 16 and 28, existing street trees, the proposed landscape treatment of the boundary with Rutherford Crescent and obstruction by the pavilion is considered, the carport complies with C79.

216. We are inclined to agree. However, this is a peripheral issue. Considering our findings on other issues we need not come to a final decision.

Section 119(2) considerations – approval inconsistent with Conservator's advice

217. R21 of the CFZDC provides that where the development requires groundwork within the tree protection zone of a protected tree, or is likely to cause damage to or removal of any protected trees, the authority is required to refer the DA to the Conservator. R21 is a mandatory requirement. There is no applicable criterion.

218. Through oversight the amended DA was not referred to the Conservator.[86] However, both the Conservator and TCCS have provided input since then and we have the benefit of Dr Coyne's evidence.

219. We have reproduced the approval conditions relating to tree management and the summary of the Conservator's advice in the NOD earlier in these reasons. In approving the DA the original decision-maker was satisfied that "with the exception of the conditions imposed, there are limited alternative options for the proposed development that will result in a viable outcome – warranting a departure from some aspects of the advice received from the Conservator".[87]

220. It will be apparent from our earlier findings that we think the block is too small for a 10-unit supportive housing development considering the parking, front boundary setback, solar access and PPOS requirements that must be met for the development to be code compliant. Trees 1, 8, 9, 10, 28 and 31 constrain the density of development of the site and, in our view require any building and structures forming part of a building to have not less than the minimum front boundary setback to the park and not encroach into the TPZ of tree 1 and tree 28, both of which are considered 'exceptional' trees. Although tree 1 is on unleased Territory land, it is no less worthy of protection than tree 28.

221. We agree with and adopt the statement by the tribunal in *Village No 22* at [374]-[375] that:

> *…section 119(2) does not place an onus on anybody to show that "any realistic alternative" has been considered. … 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 the interests to demonstrate that there is no realistic alternative. It needs to be remembered that such an applicant…seeks to be excused from the obligation under section 119(1) to refuse the proposed development that would ordinarily apply…*

222. The YWCA believes that the development is not viable with less than 10 units. However, whether the belief is justified by the facts was not be tested because the YWCA made a forensic decision not to provide evidence of those facts. In those

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[86] See paragraph 19 above
[87] See paragraph 26 above

circumstances, we cannot be satisfied that a development for supportive housing with fewer units is not a realistic alternative to the proposed development.

223. The issue remains whether any realistic alternatives have been considered to those parts of the development that require ground disturbing activities within the TPZ of trees 1, 8, 9, 10, 28, 29 and 31, risking damage to the trees.

224. Based on the evidence at the hearing, the YWCA and ACTPLA submitted there should be additional conditions relating to tree management.

225. YWCA proposed adding:

(a) after condition 3(a)(vi) – "(v) an updated landscape plan detailing organic mulch instead of stone underneath Trees 28 and 29, and showing the removal of Tree 22 and location of a new replacement street tree of the species *Pistacia chinensis.*"

(b) after condition 3(c) – "(d) a revised tree management plan which addresses the conditions proposed by Dr Peter Coyne at [85]-[91] in his witness statement of 6 August 2021";

(c) after condition 4(b) – "(c) the applicant shall not permit any excavation for the construction of Unit 7 to be carried out within the tree protection zones of Trees 28 and 31, save for hand excavation necessary to sink screw or pier footings to support the construction of that Unit, to the effect that the construction of Unit 7 will be at or above natural ground level".

(d) after the new condition 4(c) – "(d) the parts of the development that fall within the tree protection zones of Trees 1, 8, 9, 28, 29, and 31 be built on screw or pier footings with the excavation of those footings carried out by hand in a manner approved by a suitably qualified arborist".

226. ACTPLA proposed adding:

(a) to condition 3(a):

> *Additional tree protection measures as follows:*
>
> *Dwellings located within the Tree Protection Zone (TPZ) are to be construction* [sic] *on piers (e.g. screw piers) with limited soil*

disturbance under each dwelling. This shall include the amendment from slab on ground to pier and beam flooring construction methods. Suitable details on additional and/or revised section plans and any impacted plans by this change are to be submitted to the planning and land authority.

Dwelling PPOS landscaping with pavers within the TPZ are to be timber decking with suitable spacings for rainwater to reach the ground below.

Further landscaping amendments reducing the TPZ impacts. This shall include updated tree protection fencing and use of non-excavated garden beds. (as per para 33 of witness statement of Dr Peter Coyne)

(b) to condition 4 (additional information to be provided in an updated Tree Management Plan for the trees in Bill Pye Park):

a. There must be no revised ground levels within the canopy of these parkland trees.

b. Low impact footings (pier type footing) need to be constructed within the tree protection zone of these trees.

c. No tree roots greater than 30 mm in diameter are to be removed.

d. Compaction control measures need to be installed between the boundary and the proposed footprint of the buildings. For example 10 – 15 cm of mulch must be spread out with rumble boards over the top or similar load spreading boards to prevent compaction of the soil. These measures must be demonstrated on a Land Management and Protection Plan (LMPP) to ensure the existing trees in the park remain viable. The LMPP must be endorsed prior to the commencement of works on the site.

e. Tree protection fencing must also be shown on the LMPP.

f. No wash down of tools, concrete, solvents or chemicals is to occur within the tree protection zone.

g. Any pruning required, final cuts must be carried out in accordance with Australian Standard 4373 - Pruning of amenity trees.

h. Where pruning is needed, only the minimum required to be removed.

i. No parking or storage of materials within the tree protection zone of the trees in the park.

(c) a new condition:

> *Prior to commencement of construction work on-site (except for demolition and bulk earth works) the Bill Pye Park trees with Tree Protection Zones be provided with organic mulch under the tree canopy to the satisfaction of TCCS.*

227. Although we have found that the DA is not code compliant and therefore cannot be approved under section 119(1), it is nevertheless appropriate to explain why we would refuse to approve the DA (subject to additional conditions of the kind proposed by YWCA and ACTPLA) under section 119(2), as it may provide useful guidance for any future development proposal for the block.

228. First, it is necessary to refer to some of Dr Coyne's evidence at the hearing.

(a) In relation to the risk to tree 1, he said:

> *Tree 1 is a bit problematic. I think it's possible that even with my recommendations, it might not survive in the long-term. But that's very difficult to be confident about, one way or the other.*[88]

(b) In relation to his assumptions about the type of footings that would be used, he said:

> *The roots of the trees are predominantly shallow, especially the feeding roots. So any footing that involved excavation within the root zone would kill or destroy roots. So, I was concerned that either footing trenches or even concrete laid on the ground with a minimal excavation just to achieve a level surface would cause significant damage to tree roots. I understood that the buildings were instead going to be on screw piers, raised above the ground. That would certainly be my preferred means of construction, and underlaying* [sic] *I would have thought.*[89]

(c) In relation to parking spaces located within the TPZ of tree 28, he said:

> *Well tree 28 is recognised as exceptional…*
>
> *I was very concerned that that would have a significant impact on tree 28 due to any possible excavation to get the paving to the correct level for the adjoining sealed parking and driving area.*
>
> *And also, below the paving was shown as being permeable, vehicles moving and remaining on it would cause significant soil compaction, and that would be very detrimental to the tree. So, with the parking area under tree 28 in particular was of quite significant concern to me. And the suggestion that maybe the parking area could be moved*

[88] Transcript of proceedings on 25 August 2021, page 300 lines 28-30
[89] Transcript of proceedings on 25 August 2021, page 302 lines 4-11

> *to where tree 16 is would improve the prospects for tree 28 at the cost of losing tree 16. I think it is a compromise that is worth considering because tree 28 is much the better tree and is a tree that deserves to be protected at almost any cost.*[90]

(d) In relation to building 1 being at ground level rather than raised on piers, he said:

> *If that is the condition then it's contrary to what I've understood, and it would certainly change my view.*[91]

and,

> *If the new building is to be at ground level – of the floor level of the new building is at ground level – it will have a significant impact on any tree roots within the footprint of the building. Including the roots, to whatever extent they are, of tree 28.*[92]

(e) In relation to whether tree 31 should be removed, he said:

> *I wasn't recommending it, but I would expect that if tree 31 remains, the shading it causes will induce quite a lot of pressure to have it removed. The shading is valuable in summer, but detrimental in winter, and because that species of tree retains its leaves so long, it's going to cause quite a lot of winter shading.*[93]

229. By way of background, Dr Coyne said in his report that he was advised during a site visit that buildings would be raised on screw piers to avoid the need for excavation for footings and to achieve required levels. He clearly assumed this meant the buildings would be raised off the ground, like the existing demountable building. He considered that if this was done, construction should not seriously impact tree 28.

230. The architectural plans do not show the buildings raised above ground level. The applicants' cross examination of Mr MacCallum established that if levels were adjusted to some extent to meet the Conservator's original objection, the adjustments were insufficient to eliminate the need for potentially significant excavation within the TPZ of tree 31 and tree 28. Mr MacCallum confirmed that

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[90] Transcript of proceedings on 25 August 2021, page 302 lines 21-41
[91] Transcript of proceedings on 25 August 2021, page 303 lines 20-21
[92] Transcript of proceedings on 25 August 2021, page 303 lines 27-30
[93] Transcript of proceedings on 25 August 2021, page 312 lines 4-8

the buildings would be on a waffle pod concrete slab on screw piers.[94] Mr MacCallum was vague about details such as the depth of beams because the structural design had not been done.[95] This cast doubt on the reliability of his evidence that the extent of excavation needed to achieve required levels would be minimised, bearing in mind that any change in finished floor levels may affect compliance with accessibility requirements where all of the dwellings must be designed and constructed as adaptable dwellings.

231. Waffle pod construction is an on-ground method of constructing a concrete slab using polystyrene blocks laid out in a grid pattern on levelled natural ground or on a raised compacted base, with spaces left between pods. Steel reinforcing is placed within these spaces and around the edges and top of the pods. The result is a slab supported by a two-way grid pattern of internal beams and edge beams sitting on the ground. A waffle slab on a site with moderately or highly reactive soil may be supported on piers.[96] The result is not a regular suspended slab.

232. We are satisfied that this is not what Dr Coyne had in mind when he originally expressed qualified support for the development. ACTPLA accepted that Dr Coyne's evidence did not support an on-ground construction method for concrete slabs. ACTPLA's proposed conditions requiring the buildings to be designed and constructed using a pier and beam system – i.e. with a fully suspended slab – and restricting ground levelling is intended to give effect to what Dr Coyne thought would happen.

233. Mr MacCallum was vague also about the proposed footing system for the decks along the north-west boundary, and the Colourbond walls dividing the PPOS areas of the dwellings, again because the structural design had not been done.[97] He said on the fourth day of the hearing that he discussed the issue for the first time with the structural engineer for the project on the previous evening.[98]

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[94] Transcript of proceedings on 26 August 2021, page 430 lines 1-45
[95] Transcript of proceedings on 26 August 2021, page 432 line 43-page 433 line11; page 433 line 44-page 434 line 11; page 434 line 42-page 435 line17
[96] Clause 3.4.5 of AS 2870-2011 – Residential slabs and footings
[97] Transcript of proceedings 26 August 2021, page 436 line 35-page 438 line 11
[98] Transcript of proceedings 26 August 2021 page 364 line 35

234. Essentially, Mr MacCallum's position was that all these issues could be addressed at the detail design stage. ACTPLA's proposed conditions would require this.

235. There are several problems with this approach.

236. The structural design of the footing system for the buildings and decks is not a planning issue. The Tribunal cannot require the buildings to be designed and constructed on fully suspended slabs. The engineering solution to the tree management issues is a matter for the proponent to resolve considering, among other things, the practicality and additional cost of any proposed solution.

237. Further, while discussion at the hearing centred mainly on the type of footings, significant ground disturbance activities within the TPZ of trees may include excavation of services trenches for stormwater drainage and to connect dwellings to the sewer, water, electricity, and telecommunication services. This issue received no attention.

238. The onus at all times was on the YWCA to provide a sufficiently developed structural design solution to satisfy the Tribunal that, if implemented, the tree management issues would be resolved in a way that ensures the trees would not be damaged. Measures intended to 'minimise' the risk of damage, such as undertaking ground clearing work and excavation under the supervision of an arborist, provide no meaningful assurance that the desired outcome – i.e. effective protection of the trees – will be achieved. The concept of 'minimising' damage is inherently elastic. Leaving real-time decisions to the discretion of others, where such decisions may profoundly affect the outcome, is not an appropriate solution.

239. Constructing the buildings on suspended slabs with minimal excavation, as ACTPLA proposes, must inevitably affect finished floor levels, making it essential to revisit whether the development still complies with access requirements for accessible dwellings, possibly leading to further redesign and other code compliance issues.

240. There may be other implications, but these sufficiently make our point.

241. The applicants submitted that the Tribunal must come to a final decision on the

DA, which requires the Tribunal to be satisfied that compliance with the proposed approval conditions will result in a code compliant development. It was submitted also that the Tribunal cannot in effect delegate to ACTPLA decisions on matters that may produce an outcome that the Tribunal did not envisage. In support of this the applicants referred us to the decision of the NSW Court of Appeal in *Scott v Wollongong City Council*[99] (***Scott***) where Samuels AP (Meagher and Handley JJA agreeing) said at 118-119:

> *… The principle of 'finality' is intended to protect both the developer and those in the neighbourhood who may be affected by a proposal, against the consent authority's reservation of power to alter the character of the development in some significant respect, thereby changing the expectations settled by the consent already granted. That consent may, of course, be subject to conditions; and those conditions are subject to the principle.*
>
> *However, it is common to find that development consent is subject to conditions which provide for some aspects of the matter stipulated to be left for later and final decision by the consent authority or by some delegate or officer to whose satisfaction, for example, specified work is to be performed. Such provisions are inevitable since it cannot be supposed that a development application can contain ultimate detail or that a consent can finally resolve all aspects of the proposal with absolute precision.*
>
> *…*
>
> *However, what distinguishes them is that the exercise of the decision-making power they each contemplate will certainly not alter the development "in a fundamental respect", nor will the development be "significantly different" from that which the application for consent contemplated. They are all conditions which may be described as ancillary to the core purpose of the application…*

242. Also relevant is *Kindimindi Investments Pty Ltd v Lane Cove Council*[100], (***Kindimindi***) which involved an appeal in relation to the validity of conditions of a development consent, where Basten JA (Handley JA and Hunt AJA, agreeing) said at [28]:

> *Although different language is used in relation to the separate categories of invalidity, it would seem that the test of uncertainty or lack of finality, being determined by reference to an important aspect of the development, requires that what is left uncertain must be the possibility that the development as approved may be significantly different from the development the subject of the application. Thus, the result should not be*

[99] (1992) 75 LGRA 112
[100] [2006] NSWCA 23

> *different depending upon which approach is adopted: a consent will only fail for uncertainty where it leaves open the possibility of a significantly different development. On* [the] *other hand, a consent may fail, within the first category, where a condition of great precision and certainty of operation results in a significantly different development. Whichever category is preferred in the case of a consent which lacks certainty or finality, it is helpful to bear in mind the relationship between the two tests.*

243. In *GPT Re Limited v Belmorgan Property Development Pty Ltd*[101] (***GPT***), Basten JA (Bell JA and Young CJ in Eq, agreeing) said at [48]:

> *Questions of finality and uncertainty will often be related, but are likely to bear upon the same question as that addressed in the first category discussed in Mison* [*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734]. *In each respect the question must be whether a consent has been given to the development which was the subject of the application. Where conditions give rise to uncertainty, the fact that it is not possible to know whether the satisfaction of the conditions will give rise to a significantly different development may demonstrate that the consent is not a final and valid consent to the development as proposed. A degree of "practical flexibility" is likely to be necessary, especially in respect of complex developments… Where a condition requires variations which can be checked and approved by a council officer, by reference to prescribed criteria, it may readily be said that the consent is sufficiently final and certain. Where the criteria for future assessment are imprecise or unspecified, there may be an effective delegation of authority to the officer to exercise his or her judgement: if the delegation is not in itself a valid means of disposing of the application, the result will be invalid. On the other hand, if the delegation is valid, it may suggest that the consent purportedly given by the Council is not itself a valid consent.*

244. We consider conditions of the kind proposed by the YWCA and ACTPLA would result in a development that lacks certainty of outcome in important respects and potentially may result in a significantly different development with respect to its impact on trees. We consider a decision by the Tribunal to confirm the decision under review subject to additional conditions of the kind proposed by the YWCA and ACTPLA would offend the principle of 'finality' discussed in *Scott*, *Kindimindi* and *GPT* and would result in an invalid exercise of the Tribunal's jurisdiction.

Lease variation

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[101] [2008] NSWCA 256

245. C1 of the *Lease Variation General Code* permits a lease to be varied only where:

(a) the varied lease is consistent with the Territory Plan including all relevant codes; and

(b) the land to which the lease applies is suitable for the development or use authorised by the varied lease.

246. The proposed variation to the Crown lease purpose clause is to permit supportive housing limited to a maximum of 10 dwellings.

247. We are satisfied that the proposed variation complies with C1(a). However, we are not satisfied that it complies with C1(b). Specifically, while the block may be suitable for a development for supportive housing, as we have explained earlier we are not satisfied that it is suitable for a development of up to 10 dwellings as currently proposed.

Correct or preferable decision

248. Where we find that the application for development approval does not comply with all relevant codes as section 119(1) of the Planning Act requires, we do not need to consider whether the discretion under section 120 should be exercised. The correct decision is to order that the decision under review is set aside and substituted by a decision to not approve application for development approval DA2020037848 / S144C.

……..
Senior Member M Orlov
for and on behalf of the Tribunal

Date(s) of hearing	23, 24, 25 and 26 August 2021, 3 September 2021
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Solicitors for the Applicant:	O'Connor Harris & Co Solicitors
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Counsel for the First Party Joined	Mr B Buckland
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Second Party joined	In person
Third Party Joined	In person