

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

NOAH'S ARK RESOURCE CENTRE INCORPORATED v ACT PLANNING AND LAND AUTHORITY & ORS (Administrative Review) [2018] ACAT 95

AT 10/2017

Catchwords: **ADMINISTRATIVE REVIEW** – planning and land development – development approval for a childcare centre – subject site approximately 100 metres from applicant's childcare centre – application for review of development approval decision – whether and how proposed development would adversely affect the applicant's operations and its capacity to fund community programs – whether applicant is an 'eligible entity' with standing to bring application – whether applicant is likely to suffer 'material detriment' because of the decision to approve the development application – whether application should be approved with revised or additional conditions – whether application should be approved having regard to matters listed in section 120 of *Planning and Development Act 2007*

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 7, 9, 10, 22P, 84
Planning and Development Act 2007 ss 119, 120, 121, 141, 156, 162, 407, 408A, 419, Schedule 1
Associations Incorporation Act 1991
Land (Planning and Environment) Act 1991

Subordinate

Legislation cited: Community Facility Zone Development Code
Crime Prevention Through Environmental Design General Code
Parking and Vehicular Access General Code
Territory Plan

Cases cited: *Baptist Community Services v ACT Planning and Land Authority & Ors* [2015] ACTCA 3
Canberra Cruises and Tours Pty Ltd v Minister for Urban Services [1999] ACTAAT 14
Cartier Holdings Pty Ltd v Newcastle City Council [2001] NSWLEC 170
Ergas & Bird v ACT Planning and Land Authority [2004] ACTAAT 18
Fabcot v Hawkesbury City Council [1997] NSWLEC 27

Glass v ACT Planning and Land Authority & Anor [2016] ACAT 21

Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 CLR 675

Kippax Task Force v ACT Planning & Land Authority & Ors [2004] ACTAAT 11

Land Architecture Australia v ACT Planning and Land Authority & Ors [2008] ACTAAT 33

McKenzie v ACT Planning and Land Authority & Ors [2004] ACTSC 80

Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor [2017] ACAT 44

Sladic & Anor v ACT Planning and Land Authority; Charter Hall Retail Reit & Ors v ACT Planning and Land Authority [2018] ACAT 38

Walkington & Ors v ACT Planning and Land Authority [2010] ACAT 81

List of

Texts/Papers cited: Macquarie Dictionary 7th Edition

Tribunal: President G Neate AM
Senior Member G Trickett

Date of Orders: 28 September 2018

Date of Reasons for Decision: 28 September 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 10/2017

BETWEEN:

NOAH'S ARK RESOURCE CENTRE INCORPORATED
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

FEDEM PTY LTD
First Party Joined

NIKDIA HUME PTY LTD
Second Party Joined

TRIBUNAL: President G Neate AM
Senior Member G Trickett

DATE: 28 September 2018

ORDER

The Tribunal orders that:

1. Being satisfied that Noah's Ark Resource Centre Incorporated has standing to bring the application for review of the decision to approve with conditions Development Application 201629784, the Tribunal confirms the decision to approve the Development Application but varies the conditions of approval in the terms set out at Attachment A to these reasons for decision.

.....
President G Neate AM
Delivered for and on behalf of the Tribunal

TABLE OF CONTENTS

REASONS FOR DECISION	4
Introduction.....	4
Key issues	6
A preliminary issue: the operation of section 121 of the P&D Act.....	6
Submissions	8
Consideration and conclusion	11
The subject site and the proposed development on it	12
Some possible implications of the proposed development for Noah’s Ark and its programs	13
Parking arrangements for the proposed development	17
Proposed parking arrangements: an overview	19
On-site parking at the proposed childcare centre.....	22
Neighbourhood Oval car park.....	26
Off-site parking options: implications of the Nikdia Hume childcare centre car parking requirements.....	29
Off-site parking options: Neighbourhood Centre car park	31
Off-site parking options: Noah’s Ark Centre Rivett car park	35
Noah’s Ark’s submissions	38
Nikdia Hume’s submissions	40
Fedem’s submissions	41
The Authority’s submissions	43
Consideration and conclusion about parking arrangements	44
Does Noah’s Ark have standing to bring the application?	50
Noah’s Ark’s submissions	52
Fedem’s submissions	56
The Authority’s submissions	58
Consideration and conclusion	61
Compliance with relevant codes and conditions on development approval – an overview ...	65
Conditions on development approval	66
Nikdia Hume’s submissions	68
Noah’s Ark’s submissions	68
Fedem’s submissions	68
The Authority’s submissions	69
Consideration and conclusion	70
Pedestrian pathway between proposed childcare centre and Neighbourhood Oval car park .	71
Noah’s Ark’s submissions	77
Nikdia Hume’s submissions	77

Fedem's submissions	78
The Authority's submissions	79
Consideration and conclusion	80
Operation of section 120 of the <i>Planning and Development Act 2007</i>	82
Submissions in relation to section 120(a)	83
Submissions in relation to section 120(b)	89
Submissions in relation to section 120(g)	90
Consideration and conclusion	95
Conclusion and orders	100
ATTACHMENT A	102

REASONS FOR DECISION

Introduction

1. On 20 February 2017, the ACT Planning and Land Authority (**Authority**) decided to approve with conditions under the *Planning and Development Act 2007* (**P&D Act**) Development Application 201629784. That Development Application (**DA**) was made by Fedem Pty Ltd (**Fedem**). It proposed the construction of a childcare centre for 110 children on Block 22 Section 28 at Rivett, Australian Capital Territory (**the subject site**).
2. Noah's Ark Resource Centre Inc (**Noah's Ark**) operates a childcare centre near the subject site. It applied to the ACT Civil and Administrative Tribunal (**Tribunal**) under the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) for a review of the Authority's decision. Noah's Ark submitted that the correct or preferable decision is to set aside the Authority's decision to approve DA 201629784 and to substitute a decision refusing DA 201629784.
3. In support of that outcome, Noah's Ark submitted that:
 - (a) the development on the subject site would reduce the occupancy level of the Noah's Ark Resource and Child Care Centre (**Noah's Ark Centre Rivett**), thereby reducing and probably eliminating the level of surplus derived from that centre's operations so that Noah's Ark would not be able to maintain its community programs and meet the cost of supporting children with special needs enrolled in the day care centre, and cessation of the community programs and support the children with special needs in the day care centre would mean the loss of services and benefits presently enjoyed by the community, which loss would not be made good by the operations of the proposed new long day care centre on the subject site; and
 - (b) because the development proposal does not comply with the Parking and Vehicular Access General Code (in that it will not make adequate provision for parking), part of the parking demand generated by the proposal will result in overflow parking in the Noah's Ark car park as well as in adjacent streets.
4. Evidence was given in relation to each of those submissions.

5. Fedem, as the Crown lessee of the subject site, submitted that:
 - (a) the application by Noah's Ark should be dismissed because Noah's Ark does not have standing to bring the application; or
 - (b) if Noah's Ark has standing, the decision to approve DA 201629784 subject to conditions should be varied to include further conditions at A2 of the decision as proposed by the Authority and amended during the hearing.¹
6. Nikdia Hume Pty Ltd (**Nikdia Hume**) is the owner of Block 2 Section 28, Rivett which is approximately 60 metres from the subject site. Nikdia Hume has development approval for the construction of a childcare centre on that land. It is also a party joined to these proceedings. It submitted that DA 201629784 fails to comply with a number of relevant codes, and even if compliance were achieved, the circumstances are unique and raise critical discretionary considerations for the Tribunal which should lead the Tribunal to refuse DA 201629784.
7. The Authority submitted that the application by Noah's Ark be dismissed because Noah's Ark does not have standing to bring the application or, in the alternative that the decision under review should be affirmed.²
8. Most of the parties and issues in this case are the same as, or similar to, those in a previous application to the Tribunal for a review of the Authority's decision to approve the DA for Block 2 Section 28 at Rivett. The previous application was the subject of a decision by the Tribunal as presently constituted in *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor*³ (**the previous Noah's Ark case**). Where appropriate, including to avoid unnecessary repetition, reference will be made to parts of the reasons for decision in that case.
9. In final submissions, however, counsel for Noah's Ark noted that there are different issues in the present case. He submitted that, as a consequence, the rulings

¹ Exhibit 12. Transcript of proceedings, 1 November 2017, page 4

² Respondent's statement of facts and contentions pages 4-5

³ *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor* [2017] ACAT 44

in the previous Noah's Ark case (particularly in relation to the issue of Noah's Ark's standing to bring the application) would not apply in the present case.⁴

Key issues

10. The present application gives rise to the following main issues:
 - (a) Whether and how the proposed development on the subject site will adversely affect Noah's Ark.
 - (b) Whether Noah's Ark has standing to bring the application.
 - (c) Whether the proposed development complies with relevant codes under the Territory Plan and, if not, whether the non-compliance can be overcome by the imposition of conditions on development approval.
 - (d) Whether any other matters are relevant to the Tribunal's decision.
11. Although the second issue can be characterised as the threshold issue, it can only be determined in light of the evidence about whether and how the proposed development would adversely affect a particular aspect or aspects of the operations of Noah's Ark. Consequently, it is necessary to consider the evidence and make findings in relation to the first issue before deciding the other issues. That involves considering the nature of the proposed development, the extent of any financial implications for Noah's Ark of the proposed development, and the parking implications of the proposed development particularly (if at all) for the operations of the Noah's Ark Centre Rivett.
12. If Noah's Ark has standing, it will be necessary to consider how the Tribunal's power should be exercised.

A preliminary issue: the operation of section 121 of the P&D Act

13. After the conclusion of the hearing of the present application, but before the reasons for decision were completed, a differently constituted Tribunal released its

⁴ Transcript of proceedings, 1 November 2017, pages 41-42

decision in *Sladic & Anor v ACT Planning and Land Authority; Charter Hall Retail Reit & Ors v ACT Planning and Land Authority*⁵ (*Sladic*).

14. In *Sladic* that Tribunal adopted an approach to the interpretation and operation of section 121 of the P&D Act which was different from that adopted by the Tribunal as presently constituted in the previous Noah's Ark decision,⁶ and from some other decisions of differently constituted Tribunals.
15. At the request of the first party joined and with the agreement of the other parties, the Tribunal convened an additional hearing for the purpose of receiving submissions in relation only to the interpretation of section 121 in light of the decision in *Sladic*. Each party provided a written outline of their submissions and spoke to those submissions.
16. The written and oral submissions highlighted the different approaches taken by differently constituted Tribunals, and outlined the options for this Tribunal when deciding the present application.
17. Section 121(2) of the P&D Act states:
 - (2) *If there is a right of review under chapter 13 in relation to a decision to approve an application for development approval for a development proposal in the merit track, the right of review is **only** in relation to the decision, or part of the decision, to the extent that-*
 - (a) *the development proposal is subject to a **rule** and does not comply with the rule; or*
 - (b) *no **rule** applies to the development proposal.* (Emphasis added)
18. In summary, the Tribunal in *Sladic* stated that it had “gone back to the ordinary meaning of the words used, their intended purpose and other principles of statutory interpretation.”⁷ That Tribunal proceeded on the basis that although the word ‘criteria’ does not appear in section 121(2) it is within what is described by paragraphs (a) and (b) of that subsection.⁸ If the starting point of interpretation is the words themselves, then those words provide for code compliance of a

⁵ *Sladic & Anor v ACT Planning and Land Authority; Charter Hall Retail Reit & Ors v ACT Planning and Land Authority* [2018] ACAT 38

⁶ The previous Noah's Ark case at [192]-[236]

⁷ The previous Noah's Ark case at [69]

⁸ *Sladic* at [71]

development proposal to be reviewed by the Tribunal. That is, the Tribunal may consider whether the requirements of subsection 119(1)(a) are met.⁹

19. The Tribunal in *Sladic* was satisfied that the intention of the P&D Act, and the review provisions in particular, was to place limitations on the scope of review by the Tribunal. This was to be achieved by placing constraints on which third parties would be able to apply to the Tribunal for review, and by limiting the kind and extent of the decisions which could be reviewed by the Tribunal.¹⁰ That Tribunal decided that interpretation of the section 121 words as meaning ‘code compliance’ will achieve that outcome. As a consequence, if an application in the merit track is code compliant and is approved, the Authority’s exercise of the discretion to approve is not reviewable but the findings as to code compliance are reviewable. In other words, if the ‘rules’ (in a more colloquial sense of the word) are met, the development application cannot be refused approval on review by the Tribunal.¹¹
20. That Tribunal concluded that the Tribunal’s task in conducting review in that matter was “to consider only whether the proposed development meets the requirements of applicable codes.”¹²

Submissions

21. Counsel for Fedem submitted that the operation of section 121(2) and the Tribunal’s scope of the review was correctly decided in *Sladic*, and urged this Tribunal to apply that approach in the present proceedings. In Fedem’s submission, the jurisdiction of the Tribunal to review the decision to approve DA 201629784 is limited by section 121(2). Where a development in the merit track has been approved, the jurisdiction of the Tribunal is confined to a ‘code compliance’ exercise. Consequently, the Tribunal may set aside or vary the decision under review only if it is not satisfied that the development complies with the rules and criteria in the Territory Plan. It is not open to the Tribunal to consider the discretionary matters set out in section 120 with a view to refusing the development application. That discretion rests with the Authority.

⁹ *Sladic* at [72]

¹⁰ *Sladic* at [93]

¹¹ *Sladic* at [100]

¹² *Sladic* at [103]

22. In summary, Fedem submitted that the correct approach to the scope of the Tribunal's review and jurisdiction is:
- (a) the limitation conferred by section 121(2) of the P&D Act is concerned with whether a development proposal achieves code compliance;
 - (b) the Tribunal may review whether a rule is met or not;
 - (c) it does not enable the Tribunal to consider the 'discretionary' aspects set out in section 120 of the P&D Act; and
 - (d) whether the requirements of section 119(2) are met is not reviewable by the Tribunal.
23. Fedem submitted that, in this case, the Authority approved DA 201629784 because it was code compliant and the requirements of section 119(2) had been met. The only basis upon which the development might be refused is if code compliance has not been, or cannot be, achieved. Accordingly, Noah's Ark and Nikdia Hume are only entitled to seek review of matters identified under the Parking and Vehicular Access General Code (**PVAGC**), Crime Prevention Through Environmental Design General Code (**CPTEDGC**) and the Community Facility Zone Development Code (**CFZDC**). In Fedem's submission, the development achieves the requisite code compliance.
24. Counsel for the Authority agreed with most of Fedem's submissions, and submitted that if the Tribunal rules that Noah's Ark has standing the decision in *Sladic* should be followed. If *Sladic* is applied, the Tribunal has no jurisdiction to consider issues arising under section 120 of the P&D Act.
25. Counsel for Noah's Ark submitted that the Tribunal should not follow the construction of section 121 adopted in *Sladic*. Noah's Ark advanced a detailed critique of that decision. In summary, it submitted, the Tribunal in *Sladic* sought to construe section 121 by implying words (especially 'criteria') into the text and focussed on 'criteria' as being the extremity of discretionary consideration open to the Tribunal (assuming that all other discretionary considerations were closed to the Tribunal). Specifically, it was submitted, the Tribunal in *Sladic* assumed that:

- (a) if a rule was not complied with, its corresponding criterion could not be considered;
 - (b) if there was ‘no rule’ then the corresponding criterion could be considered; and
 - (c) section 120 considerations were also closed to the Tribunal.
26. Noah’s Ark submitted that the Tribunal in *Sladic* failed to note that general codes are not required to, and often do not, contain rules and criteria. Yet section 119 does not allow a development approval to be given for a development which does not comply with ‘the relevant code.’ The effect of that Tribunal’s construction would be to preclude, for example, the PVAGC from the Tribunal’s consideration, even though the PVAGC meets the definition of ‘relevant code.’
27. Counsel for Noah’s Ark also submitted that the approach taken by the Tribunal in the previous Noah’s Ark case suffers from the same flaws and should not be followed.
28. Senior counsel for Nikdia Hume articulated clearly the dilemma facing the present Tribunal. He contended that there is now a state of flux after 9 years of decisions from *Mason v ACT Planning and Land Authority & Ors*¹³ to *Sladic*, with 3 recent and different decisions by Presidential Members of the Tribunal in *Glass v ACT Planning and Land Authority & Anor*,¹⁴ the previous Noah’s Ark case and *Sladic*. The situation cannot be resolved by a single Tribunal but, he submitted, could only be resolved by the ACT Supreme Court (and no one has asked for a referral of the issue under section 84 of the ACAT Act) or by legislation.
29. The dilemma so clearly enunciated by senior counsel for Nikdia Hume was expressed by the Tribunal in *Sladic* in the following statement:¹⁵

It is on any view an entirely unsatisfactory state of affairs that is, more than a decade after the Planning Act was enacted, there is no certainty as to what is involved in review by the Tribunal of decisions on merit track applications. Review of this aspect of the Planning Act should be given the highest priority.

¹³ *Mason v ACT Planning and Land Authority & Ors* [2009] ACAT 7

¹⁴ *Glass v ACT Planning and Land Authority & Anor* [2016] ACAT 21

¹⁵ *Sladic* at [68]

30. In the meantime in the present case, senior counsel submitted, the only fair thing to do under section 7 of the ACAT Act is to apply the decision in the previous Noah's Ark case because that was the state of affairs at the start of the hearing of this case. He quoted the following passage at [230] of the previous Noah's Ark decision:

If an eligible entity can demonstrate that the requirement of section 121(2)(a) or section 121(2)(b) is met, the role of the Tribunal is to conduct a merit review of the Authority's decision to approve the DA. At that point, the Tribunal is the decision-maker. It would be inconsistent with this scheme of decision-making to conclude that, at that point, the Tribunal cannot consider the matters listed in section 120 in the way that the Authority, as the original decision-maker, was required to do.

31. Senior counsel noted that he had prepared for this case on that basis. For reasons of fairness and consistency of decision-making (at least in relation to the Noah's Ark cases), as well as because the decision in the previous Noah's Ark case provided the most generous review rights under the P&D Act, he urged this Tribunal to apply the same interpretation of section 121 to this case.

Consideration and conclusion

32. The issue has come before this Tribunal in unusual circumstances. This is not an appeal from the decision in *Sladic* or any other decision of a differently constituted Tribunal. Unlike a judgment of a superior court delivered at this stage in the proceedings, the decision in *Sladic* is not binding on this Tribunal. Hence the issue is not whether the decision in *Sladic* is correct or binding, but whether the present Tribunal should adopt interpretation of section 121 set out in that case or restate and follow the interpretation set out in the reasons for decision in the previous Noah's Ark case.
33. Having carefully considered the decision in *Sladic* (which is on appeal to the Supreme Court, though apparently not on this issue), the parties' submissions, and the stage in the proceedings at which the issue arose, and having reconsidered the approach taken in the previous Noah's Ark case, we have decided to proceed on the basis set out in the decision in the previous Noah's Ark case.
34. Accordingly, will consider the issues specific to this case in the order outlined in [10] above.

The subject site and the proposed development on it

35. The subject site is at 9 Rivett Place, Rivett, and has an area of 1,944 square metres. It is vacant and, except for a concrete path that extends across most of the southern side, is undeveloped. The land slopes down to the east with an overall fall of approximately 2.5 metres.
36. It is directly to the east of the car park for the Rivett Local Neighbourhood Centre (**Neighbourhood Centre**). To the north and northwest of the subject site is the Salvation Army Burrangiri Centre, an aged care facility (Block 9 Section 28). Directly to the east of the subject site is the Rivett Neighbourhood Oval (Block 4 Section 27), with an associated amenities block. Slightly to the north of the subject site is Block 1 Section 60 (**the Neighbourhood Oval car park**), which is in the shape of an arc and consists of 1 central aisle with 90 degree parking to either side. To the south of the subject site is a narrow block zoned Community Facilities (Block 21 Section 28). The community facilities in the immediate locality of the subject site include the Noah's Ark Centre Rivett (Block 7 Section 29).
37. The subject site is located in a Community Facility Zone (**CFZ**) under the Territory Plan. The CFZ objectives and development table in the Territory Plan, as well as the Rivett Precinct Map, apply to the subject site. Consequently the Community Facility Zone Development Code (**CFZDC**) applies. The CFZ is surrounded by land to the west zoned CZ4 – Local Centre Zone, and to the east by PRZ1 - Urban Open Space.
38. The purpose clause of the current Crown Lease of the subject site¹⁶ states that the land may be used for a number of purposes, including “child care centre”. The Crown Lease contains no gross floor area limitation for the proposed use.
39. Fedem proposes to operate a 110 place childcare centre on the subject site if DA 201629784 proceeds. The CFZ – Community Facilities Zone Development Table prescribes the merit track for the proposed kind of development, “child care centre.”

¹⁶ Volume 2232 Folio 77, issued on 18 July 2016

40. The architect who designed the proposed childcare centre, Hugh Gordon, described how the design complied with a particular Rule and relevant Criteria in the CFZDC, specifically:
- (a) C11 – by using high quality materials (timber cladding, face brickwork, render and stone to be located as shown on a plan¹⁷) to create a façade with visually interesting architectural treatments, and a dramatic entry with high glass and high ceilings and a secondary awing to provide an entry porch at the front of the building;
 - (b) C13 – by providing elements of the development (particularly the glass) that interface with a street to promote an active streetscape;
 - (c) C18 – by underground piping of natural stormwater; and
 - (d) R8 C8 – by installing external lighting that would be shrouded soft lighting so that direct light will not be visible from the adjoining property.¹⁸

Some possible implications of the proposed development for Noah’s Ark and its programs

41. As noted earlier, Noah’s Ark submitted that the proposed development on the subject site would have significant adverse financial implications for Noah’s Ark and would inhibit or prevent it from maintaining its community programs.
42. Much of the evidence in respect of this part of Noah’s Ark’s case was given orally and/or in written statements by Dr Brenda Abbey¹⁹ (an expert in early childhood education and the principal of Childcare by Design), Donald McMichael²⁰ (the Chief Executive Officer and Business Manager of Noah’s Ark), Janice Brennan²¹ (the Manager, Early Childhood Program based at the Noah’s Ark Centre Rivett) and Anthony Wilson²² (a chartered accountant who has prepared annual accounts, and has been auditor, for Noah’s Ark). That evidence largely replicated evidence given by them in the previous Noah’s Ark case. Additional evidence was given by

¹⁷ See T-documents, pages 416, 422-424

¹⁸ Transcript of proceedings, 19 October 2017, pages 11-13, 23-24

¹⁹ Exhibit 2

²⁰ Exhibit 1

²¹ Exhibit 15

²² Exhibit 18

them in the previous Noah's Ark case in relation to the purpose, programs and financial operations of Noah's Ark.

43. In the reasons for decision in the previous Noah's Ark case, the Tribunal set out in some detail the evidence about the nature of the operations conducted by Noah's Ark at Rivett and the likely impact of Nikdia Hume's development on its childcare business and its potential to deliver a wider range of community services.²³ For present purposes, it is sufficient to repeat in summary the main evidence and findings in that case.
44. Noah's Ark is a not-for-profit entity incorporated under the *Associations Incorporation Act 1991*.²⁴ Its objects are:
- (a) To support the cognitive, emotional, experiential, physical and social development of children and their families.
 - (b) To support the therapeutic and educational value of play and its role in the development of children through provision of resources, professional support and advice.
 - (c) To encourage and foster the inclusion of children with special needs into all services and activities of the Association.
 - (d) To encourage and foster skills and knowledge of those involved in parenting and providing care for children.
 - (e) To work with all individuals and organisations to further the objectives of the Association.
 - (f) To seek government and non-government involvement to achieve the above objectives.
45. The operating philosophy pursued by Noah's Ark has been to meet the needs of families in relation to early childhood education and care which are not otherwise met by the government or private sector.²⁵

²³ See the previous Noah's Ark case at [32]-[55], [61]-[63]

²⁴ The previous Noah's Ark case at [32]

²⁵ The previous Noah's Ark case at [33]

46. Since 1973, Noah's Ark has conducted early learning community programs in furtherance of its objects at various locations in the ACT and Queanbeyan. The only long day care centre operated by Noah's Ark is the Noah's Ark Centre Rivett at 79 Bangalay Crescent.²⁶
47. According to Noah's Ark:
- (a) Those community programs enable families, who would otherwise have difficulty in doing so, to give their children an early learning experience to assist them in later education and development and to obtain support and information generally. The programs provide benefits to participants which are not provided by a long day care program, and, to the extent that some benefits may also be provided by a long day care program, enable families for whom long day care is not suitable to have access to those benefits.²⁷
 - (b) Noah's Ark promotes its operations, including day care, as having a special needs focus. To that end it is prepared to take on children of any level of need.²⁸
 - (c) The community programs are of benefit to members of the community who participate in them and to the community generally.²⁹
48. Ms Brennan gave evidence in the present proceedings that Noah's Ark provides services to an average of 400 families each week.³⁰
49. Noah's Ark has been operating at 79 Bangalay Crescent, on the site of the former Rivett Primary School, since 1998 under a license agreement with the Australian Capital Territory. The licence to occupy the premises was initially on a month-to-month basis. It was extended to a 12 month term from May 1998, and was monthly thereafter. During the term of its licence, Noah's Ark's operations have been relocated to a different part of the school premises, but the change of location was not reflected in the licence.³¹ The licence provides less security than a licence for

²⁶ The previous Noah's Ark case at [34]

²⁷ The previous Noah's Ark case at [43]

²⁸ The previous Noah's Ark case at [49]

²⁹ The previous Noah's Ark case at [45]

³⁰ Transcript of proceedings 20 October 2017, page 46

³¹ The previous Noah's Ark case at [46]

a longer term or a lease of the premises used as the Noah's Ark Centre Rivett would offer.³² However, there was no evidence that the licence will not continue to be renewed, as has been the case for about 19 years. Nor is there any evidence to suggest that the ACT Government intends to reopen the Rivett school, rezone the land or sell it. Consequently, we do not consider that the apparent insecurity of the legal basis for Noah's Ark's continuing to use those premises constitutes a significant impediment to its use and enjoyment of the land.³³

50. In 2009, Noah's Ark commenced to operate a long day care centre there. Initially the day care centre was licensed for 15 places per day for children between 12 months and 5 years of age. Since 2010 it has been licensed for 89 places, 81 of which are of practical utility. Accordingly, the Noah's Ark Centre Rivett offers a maximum of 81 places.³⁴
51. In the previous Noah's Ark case the Tribunal noted that:

*Noah's Ark commenced to operate the long day care centre in Rivett in 2009, predominantly to provide a continuing source of income so that it could maintain its community programs to provide care for children with disabilities whose family could not otherwise afford it or whose children would not be accepted in other day care centres because of their disability. The income generated by the day care centre operations which is surplus to needs in respect of maintaining the operations of the day care centre is used to subsidise the cost of the community programs. By that means Noah's Ark is able to keep those programs operating, and also meet the cost of supporting children with special needs enrolled in the day care centre.*³⁵

52. According to the Tribunal in that case:

There was no dispute, and we find, that Noah's Ark finances and provides (in collaboration with other organisations) a distinctive range of community programs that would not otherwise be available. Those programs are valued by disadvantaged, vulnerable and isolated families and their children in the ACT and Queanbeyan. For that reason, the programs provide a benefit to the community and not just the direct participants. We also find that:

³² Clause 6(a) of the licence expressly states that nothing in the licence shall create or be construed as creating any tenancy or shall be construed as conferring upon the licensee any estate or interest in the premises or any part thereof

³³ The previous Noah's Ark case at [126]

³⁴ The previous Noah's Ark case at [48]

³⁵ The previous Noah's Ark case at [53]

- (a) *most of those programs receive little or no financial support from governments; and*
- (b) *the financial and other support provided by Noah's Ark for those programs is critical, if not essential, for their continuation.*³⁶

53. The Tribunal also found that:³⁷

- (a) *the financial support that Noah's Ark provides to community programs is derived from the income (though not always surplus to expenses) received by the Noah's Ark Centre Rivett;*
- (b) *to attain and sustain a level of surplus to provide that financial support, the Noah's Ark Centre Rivett would need an occupancy rate at or above 90%, a rate which it has not sustained in recent years; and*
- (c) *any reduction in enrolments as a consequence of the proposed development reaching fruition would reduce Noah's Ark's income and hence the potential for surplus funds and, although not necessarily threatening the viability of the Noah's Ark Centre Rivett, would reduce further and perhaps eliminate its capacity to support the community programs from its surplus funds.*

54. During the hearing of the present case, Mr McMichael gave evidence that Noah's Ark recorded financial losses in 8 of the past 12 years because the vacancy rates have been too high and Noah's Ark has paid for most of the expenses of external programs from the income derived from the Noah's Ark Centre Rivett.³⁸

55. The implications of the proposed development on the subject site for the operation of the Noah's Ark Centre Rivett, and hence for Noah's Ark's other programs, are considered later in these reasons for decision.

Parking arrangements for the proposed development

56. The other main issue raised by Noah's Ark's application is whether sufficient parking spaces would be available on-site and off-site if the proposed development on the subject site were to proceed. For present purposes, there are 3 specific parking issues:

³⁶ The previous Noah's Ark case at [127]

³⁷ The previous Noah's Ark case at [129]

³⁸ Noah's Ark receives a grant which covers some of the costs of running the toy library and it charges people who use some programs "minimal costs" which did not cover the full costs of those programs. (Transcript of proceedings 17 October 2017, pages 27-28, 32)

- (a) Are there sufficient parking spaces on or proximate to the subject site to satisfy the requirements for specific types of parking for a childcare centre of the size proposed?
- (b) Does the plan for on-site parking meet the required dimensions for each allocated parking space and, if not, what adjustments would need to be made (on-site and/or off-site) to satisfy those requirements?
- (c) Is there evidence that people seeking to use either of the new and proposed childcare centres are likely to use the car park area of the Noah's Ark Centre Rivett with adverse impact on Noah's Ark's use of the land for that Centre?
57. The starting point for answering some of those questions is the PVAGC. It adopts a performance-based approach in setting out the provisions for vehicle access and parking which the development proposal is required to meet. It defines the 'minimum parking provision requirements' for permitted development for each zone. These rates are based on empirical evidence, and interstate codes and guidelines.³⁹
58. The PVAGC takes account of factors such as availability of public parking and potential shared parking with neighbouring developments. It permits that, where demonstrated by the proponent, the objectives can be met by utilising spare capacity in publicly available on-street or off-street parking. The use of spare capacity is at the discretion of the Authority with regard to the potential for nearby lessees to seek to expand and lay claim to some of the available capacity in these public parking areas.
59. The PVAGC sets out in section 3.6.5 the following requirements for the numbers and types of parking spaces to be provided for a childcare centre in the CFZ:

1 space/centre plus 2 spaces per 15 child care places for employee parking plus visitor parking as follows:

2 spaces: < 30 child care spaces

3 spaces: 30-59 child care spaces

4 spaces: 60-90 child care spaces

plus

1 pick-up/set-down bay per 10 child care places

³⁹ See PVAGC section 1.3

60. The locational requirements set out in section 3.6.4 of the PVAGC for this type of development are:
- (a) long stay parking – within 200 metres of the development;
 - (b) short stay parking – on-site or within 100 metres of the development;
 - (c) operational parking – on-site; and
 - (d) visitor parking – on-site or within 100 metres of the development.
61. At section 1.5, the PVAGC defines ‘long stay parking’ as parking provision for generally longer than 4 hours duration, and ‘short stay parking’ as parking provisions for generally up to 4 hours duration.
62. At section 2.2, the PVAGC mandates compliance with the AS/NZ 2890.6:2009 *Parking Facilities – Part 6: Off-street parking for people with disabilities*.
63. Consistently with the requirements of the PVAGC, the following 33 parking spaces need to be provided for the proposed childcare centre on the subject land:
- (a) 17 spaces for employee parking (long stay).
 - (b) 5 spaces for visitor parking.
 - (c) 11 spaces for pick-up/set-down (short stay).

Proposed parking arrangements: an overview

64. There was evidence before the Tribunal that:
- (a) the proposed development would provide 11 on-site parking spaces, 2 of which are designated as parking spaces for people with disabilities;
 - (b) the 11 spaces are allocated to the pick-up/set-down needs;⁴⁰
 - (c) the 17 employee parking spaces would be provided off-site directly to the north of the subject site utilising the parking spaces on the Neighbourhood Oval car park;⁴¹

⁴⁰ See T-documents, page 194; Exhibit 5 pages 5, 7

⁴¹ See Exhibit 5 pages 5, 7

- (d) DA 201629784 would require the removal of 2 existing parking spaces from the southeast corner of the existing Neighbourhood Centre car park to facilitate the proposed new driveway on the subject site;
- (e) other off-site parking would be provided on the Neighbourhood Centre car park.
65. Noah's Ark called no witnesses in relation to the parking issue.
66. The Authority relied on the oral and written evidence of Dominic Riches⁴² who is a Development Assessment Officer with the Authority. His assessment of the parking was that there are enough parking spaces in the vicinity of the subject site to support existing and future uses.
67. Mr Riches noted in his witness statement that DA 201629784 was referred to the Transport Planning Section of the Environment, Planning and Sustainable Development Directorate (**EPSDD**). That section supported the application with the recommendation that inconsistencies with documentation be rectified. Further information was submitted under section 141 of the P&D Act to rectify those inconsistencies.⁴³ The Transport Planning Section also observed that "a significant number of required car parks are located off-site."
68. We observe that the decision to approve the DA included an advisory note from the EPSDD⁴⁴ that the applicant consider providing a pedestrian pathway from the Neighbourhood Oval car park to the subject site. The proposal has to comply with the Crime Prevention Through Environmental Design General Code (**CPTEDGC**) requirements which are considered later in these reasons for decision.
69. Transport Canberra and City Services (**TCCS**) did not raise any issues.⁴⁵
70. In one respect Mr Riches' statement varied from the DA as proposed. He stated that the 11 on-site spaces were allocated to staff parking, and that the remaining staff parking spaces as well as the 11 pick-up/set-down spaces could be located in

⁴² Exhibit 11

⁴³ See T-documents, pages 180ff, especially page 183, Transcript of proceedings, 20 October 2017 pages 7-8

⁴⁴ See T-documents, pages 36, 211-214

⁴⁵ See Exhibit 11, paragraph 57

the Neighbourhood Centre car park. Although the location of the further 5 visitor spaces was not addressed in his statement, Mr Riches identified that the Neighbourhood Oval car park would also be relied on by the proponent for parking.

71. Fedem relied on the evidence of Mr Graeme Shoobridge who is a Registered Civil Engineer with experience in traffic engineering and is a Fellow of the Institution of Engineers Australia. Mr Shoobridge provided a report for the DA 201629784 application⁴⁶ and a witness statement in these proceedings dated 26 September 2017.⁴⁷ He also prepared 2 reports for the DA for the 91 place childcare centre which is under construction for Nikdia Hume on Block 2 Section 28 Rivett.⁴⁸
72. In preparation for these proceedings, Noahs Ark, the Authority and Fedem carried out site visits to assess the extent of parking spaces and parking usage of the Neighbourhood Centre car park and the Neighbourhood Oval car park. Their findings with reference to the current usage of the car parks were similar.
73. The evidence from Mr Shoobridge was that:
 - (a) there are 50 parking spaces in the Neighbourhood Centre main parking area, with an additional 7 spaces to the south of the shop loading area, north of Block 11 Section 28;
 - (b) there are 55 parking spaces in the Neighbourhood Oval car park;
 - (c) there is further parking space available along Bangalay Crescent.
74. In Mr Riches' opinion, sufficient parking space is available within 100 metres of the subject site to support 22 off-site spaces for the proposed childcare centre.
75. Mr Riches identified that the new childcare centre being developed by Nikdia Hume on Block 2 Section 28 required 29 parking spaces and that all of these would be located off-site. The combined off-site childcare centre car parking requirements around the Neighbourhood Centre totalled 51 spaces.

⁴⁶ See T-documents pages 408-413

⁴⁷ Exhibit 5

⁴⁸ Exhibits 6, 7

76. Mr Shoobridge observed the use of the Neighbourhood Centre parking in 2015, 2016 and 2017. He concluded that some 25 to 30 vacant car spaces in that car park are available during childcare centre peak activity times. The Neighbourhood Oval car park usage is very low until 4:30pm, starting from 30 spaces and increasing to 50 spaces used by 6:00pm.
77. Mr Shoobridge informed the Tribunal that:
- (a) the relevant authorities had concluded that pick-up and drop-off parking along Bangalay Crescent was not supported;⁴⁹
 - (b) the car parking locations were not at present finalised for the off-site parking for the Nikdia Hume childcare development on Block 2 Section 28 and, in particular, that the proposed recessed parking spaces in Rivett Place for that development may or may not be constructed;
 - (c) it was proposed by the authorities that an additional 5 spaces be utilised from within the existing Neighbourhood Centre parking adjacent to Block 8 Section 28 for the development on Block 2 Section 28.
78. The potential demands on the Neighbourhood Centre car park from the proposed childcare centre need to be considered in light of the demands of others (for example, from shoppers and business owners and employees) and identified demands from the Nikdia Hume childcare centre development. Those demands, the proposed use of the Neighbourhood Oval car park, and the possible consequences for the Noah's Ark Centre Rivett car park are discussed later in these reasons for decision. Before considering those matters it is appropriate to consider whether the requisite number of pick-up/set-down spaces can be provided on the subject site.

On-site parking at the proposed childcare centre

79. As noted earlier, the proposed development would provide 11 on-site parking spaces for pick-up/set-down needs, and 2 of the spaces are designated for people with disabilities.

⁴⁹ See Exhibit 7

80. In addition to the PVAGC requirements already quoted, there was expert evidence that pick-up/set-down places should be near the entrance of a childcare centre. Dr Abbey, an expert in early childhood education, stated that “universally” the parking area adjacent to a child-care centre is for parents dropping-off and picking-up children so that they are safe and the parents can carry things for the children.⁵⁰ Mr Shoobridge made a general assertion that it is “much more important” that the pick-up and set-down places be in close proximity to the entrance of the childcare centre,⁵¹ and stated that the intention is that short stay parking demand is likely to be wholly contained within the subject site.⁵² However, Mr Shoobridge also stated that set-down and pick-up need not be on the site but could be in the public area at 7 spaces along the frontage to the block.⁵³
81. An analysis of the plan for 11 on-site parking spaces raises questions about whether:
- (a) adequate dimensions have been provided for each car;
 - (b) 2 spaces for people with disabilities are necessary;
 - (c) a reconfiguration of the on-site parking might require a reduction in playground area (and potentially the number of child places at the proposed centre) or the relocation of 1 or more car parking spaces to the Neighbourhood Centre car park.
82. In relation to the proposed development on the subject site, Mr Shoobridge confirmed at the end of his oral evidence that:
- (a) the on-site parking provided in DA 201629784 was for pick-up/set-down parking and was therefore defined in the PVAGC as short stay parking;
 - (b) the physical characteristics as set out in the PVAGC in Table 2 *Classification of off-street car parking facilities* would be for user class 3A requiring full opening of all doors;

⁵⁰ Transcript of proceedings, 17 October 2017, page 68

⁵¹ Transcript of proceedings, 19 October 2017, page 33

⁵² Transcript of proceedings, 19 October 2017, page 56

⁵³ Transcript of proceedings, 19 October 2017, page 52

- (c) the configuration of the on-site parking spaces should comply with Figure 2.2 *Layout of angle parking spaces* in the PVAGC and that the diagram and table at d) should be applied;
 - (d) although the on-site parking as proposed in the DA conformed with the PVAGC with respect to the aisle width dimension (6.2 metres) and the parking space depth (5.5 metres), all but 1 of the spaces did not have a complying width of 2.7 metres (as the spaces are documented as either 2.47 metres or 2.5 metres wide); and
 - (e) 2 spaces were made available for people with a disability (potentially 1 for an employee and 1 for other people), although the minimum requirement was for 1 space.
83. It was apparent to Mr Shoobridge that there would not be 11 on-site spaces that comply with the PVAGC that would provide pick-up and set-down or visitor parking. Even if 1 of the 2 spaces for disabled parking is used by other people (because the disabled status is not enforced), the number of spaces available for short stay parking is reduced. If the spaces were redrawn with the required dimensions for class 3A, fewer spaces would be available on site. Mr Shoobridge accepted that the places on the plan are too narrow and that the parking plan could be reworked with the possible loss of 2 spaces. Consequently, up to 4 spaces could be lost to short stay parking (the 2 disabled spaces and the other 2 as a result of increasing the size of individual parking spaces).⁵⁴
84. On that analysis, Mr Shoobridge understood that rather than 11 complying spaces for pick-up and set-down, there might be 7 or 8 places. Consequently, all the required short-term parking would not be provided on-site. There would be either no visitor parking or at least none which does not overlap with pick-up and set-down uses.⁵⁵ It followed that the plan needed to be adjusted to allow for possibly 4 additional parking spaces in the area of the Neighbourhood Centre car park.

⁵⁴ Transcript of proceedings, 19 October 2017, pages 95, 102-104

⁵⁵ Transcript of proceedings, 19 October 2017, page 105

85. In his oral evidence, Mr Riches also concluded that the proposed development does not meet the PVAGC.⁵⁶ He referred to the drawing showing the car space widths⁵⁷ and said that they were not wide enough to allow car doors to be opened fully so that children could get out of the cars.⁵⁸ Mr Riches did not comment on Mr Shoobridge's suggestion that 1 of the disabled spaces be dispensed with, other than to agree in cross-examination that it might be a solution. It would be necessary to justify the removal of another on-site car parking space, which would need to be relocated within 100 metres of the subject site.⁵⁹
86. But Mr Riches suggested that another way of dealing with the issue could be to extend the car park to the northeast into an area marked for a playground. He noted that a childcare centre with 110 places would be required to provide 7 square metres for each child. On his calculations, the play area on the plan is 772 square metres. He agreed that it would be difficult to extend the car park into the play area to meet parking specifications while retaining the required play area.⁶⁰ On the basis that the design of other aspects of the childcare centre were also at the limit of what is required, he suggested that the car park problem could be resolved by reducing the number of places at the centre from 110 to 105, and hence reduce the required area of playground by 35 square metres. That reduction would also affect the number of off-site parking spaces for employees. He had not discussed that option with the project proponent.⁶¹
87. Mr Riches also suggested that, in order to reconfigure the car park spaces so that they are the requisite size, it might be possible to expand the length of the driveway by about 3 metres toward a tree which is just outside the boundary, and which might require tree protection measures. Despite these notional options, it remained possible that at least 1 and possibly another 2 or 3 car park spaces would need to be found off-site.⁶²

⁵⁶ Transcript of proceedings, 20 October 2017, page 3

⁵⁷ Exhibit 4 Drawing DA -03.7

⁵⁸ Transcript of proceedings, 20 October 2017, page 8

⁵⁹ Transcript of proceedings, 20 October 2017, page 18

⁶⁰ Transcript of proceedings, 20 October 2017, pages 9-10, 18

⁶¹ Transcript of proceedings, 20 October 2017, page 11

⁶² Transcript of proceedings, 20 October 2017, pages 68-69

88. Mr Riches said that, although 2 spaces had been provided for people with a disability⁶³ and he would like to see 2 spaces, 1 would be acceptable to the Authority given that the Code requires 3 per cent of the 33 car parking spaces.⁶⁴
89. Another component of Mr Shoobridge's evidence was his focus on the temporal aspect of parking. He noted, for example, that the demand for short-stay parking is greatest in the early morning and late afternoon periods when children are being dropped at or collected from a childcare centre, and he contended that longer stay visitors will require parking in the time between those periods. Similarly, the peak demand for employee parking would be between 9:00am and 4:00pm.
90. Mr Shoobridge suggested that the 11 spaces on the subject site would meet the pick-up and set-down requirements and be available for time constrained parking between 9:00am and 4:00pm on weekdays. He recommended that the spaces be marked 15 minutes parking only between 7:30am and 9:00am and 4:00pm and 6:00pm, and be marked for 2 hour parking between 9:00am and 4:00pm. In doing so, he made a temporal distinction between visitor parking and pick-up/set-down parking based on his observations and conversations with childcare operators.⁶⁵ He suggested that visitors to the childcare centre do not usually remain at the centre during pick-up and drop-off-of times.⁶⁶

Neighbourhood Oval car park

91. Both Mr Shoobridge and Mr Riches gave evidence about the number of car parking spaces in the Neighbourhood Oval car park, the numbers of vehicles that are parked there during weekdays, the times of greatest use, and the potential of the car park to accommodate the vehicles of employees at the proposed childcare centre.
92. Mr Shoobridge estimated that the car park can hold 2 rows of vehicles parked nose to curb at 90 degrees. There are approximately 55 car park spaces – 26 spaces on

⁶³ See T-documents page 381 (report of Eric Martin & Associates, Architects) and page 418 (plan)

⁶⁴ Transcript of proceedings, 20 October 2017, pages 72-75

⁶⁵ Transcript of proceedings, 19 October 2017, pages 33, 50-51

⁶⁶ Transcript of proceedings, 19 October 2017, page 54

the inner frontage (about 66 metres in length) and 29 spaces on the other frontage (approximately 73 metres in length).⁶⁷

93. In his opinion, the Neighbourhood Oval car park would not be suitable for employees or people associated with the Nikdia Hume childcare centre, or staff of the Neighbourhood Centre shops. However, because of its proximity to the subject site, it would be suitable for staff of the proposed childcare centre.
94. In his written evidence,⁶⁸ Mr Shoobridge stated that he had observed that there were generally no vehicles parked there during the day. On occasions, when some groups appeared to be attending training for football or cricket on the Rivett Neighbourhood Oval, there were fewer than 10 cars parked before 5:00pm and that number increased to a maximum of 30 at 5:45pm and 50 at 6:00pm.
95. Mr Shoobridge noted that the late afternoon demand for parking related to sporting activities increases at the time when childcare staff requirements for parking would be decreasing.⁶⁹ He considered that most activity at the Rivett Neighbourhood Oval occurs after 6:00pm and on weekends. The largest number of vehicles he has observed there for cricket matches or practice is 15.⁷⁰ Mr Shoobridge was not aware of any other regular demand for parking at the Neighbourhood Oval car park (for example, from the adjoining aged care facility) and described any other demand (for example, from tradesmen's vehicles) as "very low."⁷¹ The net result is that "there is always adequate parking available for the demand from the proposed development."⁷²
96. Based on his observations, Mr Shoobridge concluded that "there appears to be a more than adequate vacancy of unoccupied spaces" between 7:30am and 6:00pm when employees of the childcare centre would also require parking spaces (with their peak demand between 9:00am and 4:00pm).⁷³ The likely variability in staff demand was confirmed by Dr Abbey's evidence that childcare centres are likely

⁶⁷ Transcript of proceedings, 19 October 2017, page 32, see also Exhibit 5

⁶⁸ Exhibit 5

⁶⁹ Transcript of proceedings, 19 October 2017, page 35

⁷⁰ Transcript of proceedings, 19 October 2017, page 49

⁷¹ Transcript of proceedings, 19 October 2017, page 37

⁷² Transcript of proceedings, 19 October 2017, page 35

⁷³ Transcript of proceedings, 19 October 2017, pages 34-35

to operate until 6:00pm and that some staff would leave earlier (possibly each half-hour) as the number of children present at a centre decreases, leaving possibly 2 or 3 staff at the end of the day.⁷⁴

97. Mr Riches gave evidence to similar effect. According to him, there are approximate 50 car parking spaces in the Neighbourhood Oval car park. A table recording observations made on behalf of Noah's Ark at specified times after 4:00pm on 3 afternoons in August 2017⁷⁵ shows the following numbers of spaces occupied on these days, (and the number of vacant spaces if the total number of available spaces is 50).

Tuesday 1 August 2017		
Time	Occupied	Vacant
4:00pm	3	(47)
4:35pm	7	(43)
5:20pm	29	(21)
5:45pm	29	(21)

Thursday 3 August 2017		
Time	Occupied	Vacant
4:00pm	1	(49)
4:40pm	18	(32)
5:10pm	23	(27)
5:50pm	41	(9)

Thursday 10 August 2017		
Time	Occupied	Vacant
5:50pm	48	(2)

98. The number of potential parking spaces cannot be stated with certainty. As was observed during the hearing, there are no line markings on the Neighbourhood Oval car park and some people might decide to park parallel to the kerb rather than nose in, thus reducing the number of car park places. In addition, if people do not park their vehicles close to others' vehicles nose to the curb at 90 degrees then there will be fewer than 55 (or 50) spaces available from time to time.
99. However, the Tribunal is satisfied that, having regard to its physical dimensions and the history of the times and extent of its use to date, the Neighbourhood Oval

⁷⁴ Transcript of proceedings, 17 October 2017, pages 39, 41, 58, 66, 67

⁷⁵ As set out in Exhibits 11 and 17

car park would provide sufficient parking spaces for employees of the proposed childcare centre at the times and on the weekdays that they require.

Off-site parking options: implications of the Nikdia Hume childcare centre car parking requirements

100. In addition to the potential demand for off-site parking generated by the proposed childcare centre on the subject land, the nearby Nikdia Hume childcare centre will generate an even greater demand. Evidence given in relation to the parking requirements associated with that development during the hearing of the present application quantifies the nature and extent of that demand, although there was some variation in the figures cited and estimates given.
101. Mr Shoobridge's written evidence dated November 2015⁷⁶ was that the PVAGC parking requirements for a childcare centre with 91 childcare places were 26 spaces comprising:
- (a) 13 spaces for employees on-site or within 200 metres of it;
 - (b) 4 spaces for short-stay visitors on-site or within 100 metres of it; and
 - (c) 9 pick-up/set-down spaces on-site or immediately adjacent to it.
102. There is no provision for on-site car parking for the Nikdia Hume childcare centre on Block 2 Section 28.
103. It would appear that the conditions about car parking that were thought to be attached to the approval of that development might not be implemented because they do not comply with the relevant Australian standards.⁷⁷ Consequently, at the time of the hearing of the present case, it was not clear where employees and parents or visitors would park. Although Mr Shoobridge expressed a strong preference for people to park on Bangalay Crescent,⁷⁸ he gave evidence about discussions concerning 4 parallel parking places along Rivett Place for set-down and pick-up, and another 5 places in Rivett Place car park for that purpose. He also referred to the possible use of other car parking places in Rivett Place, including 7

⁷⁶ Exhibit 6

⁷⁷ Transcript of proceedings 19 October 2017, pages 89-90

⁷⁸ He seemed to accept that nearby Cordia Place is narrow and not particularly welcoming for on-street parking. Transcript of proceedings, 19 October 2017, page 82

places adjacent to the loading area, for the 13 employees of that childcare centre.⁷⁹ According to Mr Shoobridge, the TCCS does not propose to allow any changes to signage to provide time restriction in the Neighbourhood Centre car park of Rivett Place for the use of people associated with the Nikdia Hume development.⁸⁰

104. In his report, Mr Shoobridge estimated that the 91 place childcare centre would generate in the order of 450 to 500 vehicle movements per day and approximately 110 to 120 vehicles per hour during peak activity times. He suggested that the additional vehicle trips each day would be expected to act as a stimulus for local businesses at the Neighbourhood Centre. He also expressed the opinion that the surplus spaces in the Neighbourhood Centre car park would be sufficient to accommodate the additional activity even if all the commercial tenancies are filled⁸¹ because the peak activity times for the shops were not expected to coincide with the peak activity times for the Nikdia Hume childcare centre.
105. Mr Shoobridge acknowledged that people at both new childcare centres would be entitled to use Rivett Place for parking,⁸² and agreed that drivers will prefer to park in the closest available free parking space to their intended destination, adding “People are good that way.”⁸³
106. Mr Riches’ evidence (despite some variation in the numbers used) was to the same effect. His written evidence⁸⁴ was that the Nikdia Hume development required 29 spaces, all of them off site, comprising:
- (a) 14 spaces for employees;
 - (b) 5 spaces for visitor parking; and
 - (c) 10 spaces for pick-up/set-down.
107. In his oral evidence, Mr Riches agreed that the car park spaces needed for the approved Nikdia Hume development for employees and for short-stay visitors)

⁷⁹ Transcript of proceedings, 19 October 2017, pages 56-58, 66

⁸⁰ Transcript of proceedings, 19 October 2017, page 100

⁸¹ At the time of the hearing all the commercial spaces were tenanted and were trading or would commence trading in the near future

⁸² Transcript of proceedings, 19 October 2017, pages 56-58, 65-66

⁸³ Transcript of proceedings, 19 October 2017, page 42

⁸⁴ Exhibit 11

might be in the Neighbourhood Centre car park, leaving 39 for the customers and employees of local stores.⁸⁵

Off-site parking options: Neighbourhood Centre car park

108. As will be apparent from the preceding discussion, much emphasis was given to using spaces at the Neighbourhood Centre car park to meet the parking requirements associated with both the Nikdia Hume childcare centre and the proposed childcare centre on the subject site. There were questions about whether that area has capacity to meet those demands (in addition to regular use by shoppers and others who work at or visit the Centre and possibly people associated with the Burrangiri aged care facility).
109. Mr Shoobridge acknowledged that, on the basis that there should be 6 car park spaces for every 100 square metres of gross floor area of shops, there should be 60 spaces in the Neighbourhood Centre car park. There are currently 57 car park spaces. The intention was that parking in the vicinity of the Neighbourhood Centre would accommodate the parking demands generated by that centre.⁸⁶ In his opinion, the car park is underutilised and does not appear to be generating a demand at the rate anticipated by the PVAGC minimum provisions.⁸⁷
110. In his written evidence,⁸⁸ Mr Shoobridge referred to the 57 car parking spaces as comprising 50 in the main car park and 7 on the southern side of the centre along Rivett Place. During 2015, 2016 and 2017 he observed:
- (a) between 6 and 27 cars parked there in the period 8:30am to 9:30am (the morning peak activity time);
 - (b) between 11 and 30 cars parked there in the period 5:00pm to 6:00pm (the afternoon peak activity time); and
 - (c) that the occupancy rates dropped after 9:15am and after 5:15pm.

⁸⁵ Transcript of proceedings, 20 October 2018, pages 69-70

⁸⁶ Transcript of proceedings, 19 October 2017, pages 44-45

⁸⁷ Transcript of proceedings, 19 October 2017, pages 98-99

⁸⁸ Exhibit 5

Based on his observations, there are not fewer than 25 to 30 of the 57 vacant car park spaces available during childcare peak activity times of 7:30am to 9:00am and 4:00pm to 6:00pm on weekdays.

111. Mr Riches provided written evidence⁸⁹ of his inspection on 11 September 2017 of the existing parking arrangements of the Neighbourhood Centre (57 spaces) and Oval car park (50 spaces). As noted earlier:

- (a) the proposed childcare centre on the subject site would require 22 off-site parking spaces; and
- (b) given that there are no on-site parking spaces for the Nikdia Hume development, 29 off-site parking spaces would be required.

In his opinion, there are enough parking spaces in both those parking areas to support the 51 additional parking spaces required by those 2 childcare centres. He also noted that DA 201629784 was referred to TCCS, which did not raise any issues about parking.⁹⁰

112. Mr Riches seemed to accept that the Neighbourhood Centre car park might accommodate the car parking spaces required for the Nikdia Hume development, as well as some spaces for people visiting the proposed childcare centre on the subject site and possibly some employees of that childcare centre. Those uses of Neighbourhood Centre car park spaces might be moderated, or some people (including shop employees) might park elsewhere, if TCCS were to regulate parking times for some spaces.⁹¹

113. A table recording observations made on behalf of Noah's Ark at specified times after 4:00pm on 3 afternoons in August 2017⁹² shows the following numbers of spaces occupied on those days (and the numbers of vacant spaces).

Tuesday 1 August 2017		
Time	Occupied	Vacant
4:00pm	19	(38)
4:35pm	21	(36)

⁸⁹ Exhibit 11

⁹⁰ Transcript of proceedings, 20 October 2017, page 8. See T-documents pages 213-214, Exhibit 11

⁹¹ Transcript of proceedings, 20 October 2017, page 71

⁹² As set out in Exhibits 11 and 17

5:20pm	14	(43)
5:45pm	17	(40)

Thursday 3 August 2017

Time	Occupied	Vacant
4:00pm	13	(44)
4:40pm	15	(42)
5:10pm	15	(42)
5:50pm	8	(49)

Thursday 10 August 2017

Time	Occupied	Vacant
5:50pm	21	(36)

114. Two of the 57 spaces would be removed to accommodate the driveway to the proposed childcare centre. As noted earlier, possibly 17 or 19 of the remaining 55 spaces would be used by employees and others associated with the Nikdia Hume development. It is also possible that, at some times of the year (particularly in winter months), some employees at the proposed childcare centre would park in the Neighbourhood Centre car park rather than walk to the car spaces next to the oval in darkness (see [278]). On that basis, the number of spaces available to people who attend exclusively for the purpose of shopping at the neighbourhood centre would be reduced to about 35 for at least part of each day.
115. Mr Shoobridge observed that such calculations proceeded on a cumulative basis, and contended that they should be considered by reference to a temporal component. For example, when school finishes and the demand for shops increases, some of the shoppers might be people picking up children from the childcare centre. Such visitors are multipurpose users of car parking spaces. Also, the current level of occupancy of shops and use of car park facilities for those shops is much less than the spaces available in the Neighbourhood Centre car park.⁹³
116. In his opinion, the provision of 11 pick-up and set-down spaces on the subject site (even with the loss of 2 parking spaces from the Neighbourhood Centre car park

⁹³ Transcript of proceedings, 19 October 2017, page 71

for driveway access to the subject site) would mean there would not be a shortfall of supply over demand for parking.⁹⁴

117. Mr Shoobridge stated that additional pick-up and set-down spaces are available for the proposed development along the frontage of the subject site, and these could be marked with 15 minute parking restrictions during the periods from 8:00am to 9:00am and 4:00pm to 6:00pm. Additionally they could be marked with 2 hour parking limits between 9:00am and 4:00pm on weekdays for the number of visitor spaces required by the Code.
118. Mr Shoobridge gave opinion evidence that if all 3 childcare centres were operating, he would not anticipate that there would be parking pressure on the Neighbourhood Centre car park. He conceded that, under the scenario put by counsel for Noah's Ark,⁹⁵ "it looks very tight and that there would need to be some extra effort to manage long stay and short stay parking within the local centre to prevent intrusion into the aged care place or church car park or, in fact, Noah's Ark car park." However, he believed that there is "still enough to go around" and no need to contemplate parking on Bangalay Crescent. In other words, the need for additional car park spaces for the childcare centre would not "tip the balance of supply versus demand for parking" within the Neighbourhood Centre car park. Based on the current parking demand for commercial space, there was in his opinion "absolutely plenty" of parking to accommodate the additional requirements for the childcare centre.⁹⁶
119. Furthermore, he suggested that the increased level of activity from people visiting the childcare centres might increase patronage of the shops there.⁹⁷ He contended that the local community has not provided overwhelming support for the commercial development there, and "another magnet" to the Neighbourhood Centre could help the commercial tenancies.⁹⁸

⁹⁴ Transcript of proceedings, 19 October 2017, page 39

⁹⁵ See [140] to [144] below

⁹⁶ Transcript of proceedings, 19 October 2017, page 109

⁹⁷ Transcript of proceedings, 19 October 2017, page 38

⁹⁸ Transcript of proceedings, 19 October 2017, page 97

120. Mr Shoobridge referred to the need to consider temporal issues involving short-stay and long-stay parking.⁹⁹ He suggested that even if there was a problem, that could be resolved by putting time-limited parking restrictions (say for 30 minutes) on spaces closest to the shops between 8:30am and 5:00pm Monday to Friday. Longer parking places (including for the use of shop employees) could be placed further to the perimeter of the car park (and potentially including Bangalay Crescent) if there was a demand from shopkeepers.¹⁰⁰ Such measures would guarantee that the objectives of the PVAGC would be met.¹⁰¹
121. Mr Shoobridge stated that although Bangalay Crescent is within 200 metres of the subject site and has potential for long-stay parking, he had chosen not to include it because he was comfortable that there was “a fairly high supply of under-utilised off-street car parking.”¹⁰²

Off-site parking options: Noah’s Ark Centre Rivett car park

122. Donald McMichael (the Chief Executive Officer and Business Manager of Noah’s Ark) gave evidence that there are car park areas next to the buildings used for the Noah’s Ark Centre Rivett. One part is paved with asphalt and the other part is gravel. Both parts are used by staff of the Centre and by parents who drop-off children there. He did not say that the car park is covered by the month-to-month agreement, nor that Noah’s Ark has exclusive use of it.¹⁰³
123. In evidence was a copy of a licence agreement between the ACT and Noah’s Ark Toy Library dated 1 May 1998.¹⁰⁴ It was described as “the most recent executed agreement by the tenant.” Under that agreement, the ACT appeared to grant the licencees the right to occupy 364 square metres by arrangement with the school at Rivett Primary School. The area covered by the agreement was apparently shown on a sketch plan annexed to the agreement. That plan could not be located and was not in evidence before this Tribunal.

⁹⁹ Transcript of proceedings, 19 October 2017, page 45

¹⁰⁰ Transcript of proceedings, 19 October 2017, pages 100-101

¹⁰¹ Transcript of proceedings, 19 October 2017, page 39

¹⁰² Transcript of proceedings, 19 October 2017, pages 99-100

¹⁰³ Transcript of proceedings, 17 October 2017, page 31

¹⁰⁴ Exhibit 13

124. The licence agreement was for twelve months from 1 May 1998 until 30 April 1999, and monthly thereafter.
125. An email dated 19 October 2017 from the Manager of the Portfolio Management Team of the ACT Property Group stated that:
- (a) the car park on Block 7 Section 29 is ACT Government owned land and not public land;
 - (b) to the best of the writer's knowledge, there is no arrangement in place for the Noah's Ark Centre Rivett to have exclusive use of all or part of the car park.¹⁰⁵
126. The Authority's position is that Noah's Ark has a right of occupancy in relation to rooms in the building but no licence arrangement in relation to the adjacent car park area.¹⁰⁶
127. The Tribunal proceeds on the basis that:
- (a) the Noah's Ark Centre Rivett comprises premises at the former Rivett Primary School which is subject to an ongoing monthly licence agreement with the ACT;
 - (b) Noah's Ark has no licence agreement in relation to the adjoining car park;
 - (c) with the knowledge and acquiescence of the ACT, employees of Noah's Ark and people who use or visit the Noah's Ark Centre Rivett use the car park.
128. Mr McMichael described the convenience of the car park in allowing parents to drop off children "in a safe and secure manner" directly in front of the building. That avoids the need to cross any main roads. He expressed the view that "dropping off children in a safe environment is an extremely important part of it." If shoppers were parking there, he would enquire whether he could put up a "Noah's Ark only" sign.¹⁰⁷

¹⁰⁵ Exhibit 13

¹⁰⁶ Transcript of proceedings, 20 October 2018, pages 15-16

¹⁰⁷ Transcript of proceedings, 17 October 2017, page 32

129. In his evidence about policy requirements for childcare centres, Mr Shoobridge stated that:

*for a child care centre it's much more important that the pick-up and set-down spaces be placed in close proximity to the main entrance to the child care centre to minimise the inconvenience for others, particularly mothers with another sibling child or pram or something like that where they can get conveniently from their parked car, take their child, escort it to the child care centre, without having to cross roads or other impediments like that...*¹⁰⁸

130. Mr Shoobridge gave evidence that, in preparing his assessments and reports regarding the availability of parking in the area, he took into account the bitumen and gravel parking areas within the block where the Noah's Ark Centre Rivett is located. His "simplistic" assessment was that a total of about 26 car parking spaces are needed for employees and visitors (including pick-up and set-down bays). He estimated there were 19 spaces on the bitumen and 16 on the gravel. That total of 35 spaces is "far in excess" of what might be required for the Noah's Ark Centre Rivett,¹⁰⁹ and all the parking demands can be accommodated there.¹¹⁰ He described the site has "wholly contained, both long and short stay parking on the site."¹¹¹

131. Mr Shoobridge speculated that it would be unlikely that someone not associated with Noah's Ark and coming to the Neighbourhood Centre for the purpose of shopping would park in the Noah's Ark Centre car park and walk to the shops. Nor would there be such a shortfall of supply of car park spaces that someone would need to do that.¹¹²

132. The Noah's Ark car park is within 100 metres of the Nikdia Hume childcare centre.¹¹³ As noted elsewhere in these reasons, Mr Shoobridge agreed that drivers will prefer to park in the closest available free parking space to their intended destination.¹¹⁴

¹⁰⁸ Transcript of proceedings, 19 October 2017, page 34

¹⁰⁹ Transcript of proceedings, 19 October 2017, pages 36, 92

¹¹⁰ Transcript of proceedings, 19 October 2017, page 37

¹¹¹ Transcript of proceedings, 19 October 2017, page 55

¹¹² Transcript of proceedings, 19 October 2017, page 40

¹¹³ Transcript of proceedings, 19 October 2017, page 91, Exhibit 9

¹¹⁴ Transcript of proceedings, 19 October 2017, page 42

133. Counsel for Noah's Ark suggested that employees at the nearby Nikdia Hume childcare centre might seek to park in the Noah's Ark car park rather than the Neighbourhood Oval car park or the Neighbourhood Centre car park. Mr Shoobridge suggested that as Bangalay Crescent is closer to that childcare centre employees might park there.¹¹⁵
134. The Noah's Ark car park is within 200 metres of the subject site, but Mr Shoobridge said that he did not take the capacity of the Noah's Ark car park into account when considering available long-stay places for the proposed childcare centre, apparently because he did not consider it to be a public car park.¹¹⁶
135. Mr Shoobridge agreed that, if the Noah's Ark car park land is accessible to the public, it would be appropriate to consider it as providing spaces available for people using the Nikdia Hume childcare centre.¹¹⁷

Noah's Ark's submissions

136. Noah's Ark's noted that the current Neighbourhood Centre car park of 57 spaces would be reduced to 55 spaces to accommodate the driveway for the development on the subject site, and that the development would generate the need for 33 parking spaces with only 11 provided on site.
137. Noah's Ark submitted that the development does not comply with the PVAGC as it does not make adequate provision for parking having regard to the retail spaces requiring 60 car parking spaces, the Burrangiri aged care facility needing approximately 10 spaces, the Nikdia Hume development on Block 2 Section 28 needing 22 spaces, and the use of the Neighbourhood Oval car park after 4:30pm on several weekdays. As a result, it was submitted, existing uses already meet or exceed the current supply of public parking, and the demand generated by the proposed development will result in overflow parking in adjacent streets and the car park used by Noah's Ark.

¹¹⁵ Transcript of proceedings, 19 October 2017, pages 78, 80, see photograph Attachment A to Mr Riches report

¹¹⁶ Transcript of proceedings, 19 October 2017, page 92

¹¹⁷ Transcript of proceedings, 19 October 2017, page 92

138. Noah's Ark noted that the car park adjacent to the Noah's Ark Centre Rivett, which is used by its families and staff, is within the requisite distance from the subject site set out in the locational guidelines for parking and would be available for that purpose. The likelihood, possibility or probability that there would be parking overspilling into its car park area was canvassed during the hearing. There is a risk that Noah's Ark might find that it is without parking spaces for its families. That would cause it material detriment.
139. In addition, Noah's Ark's families and staff would also use stores in the Neighbourhood Centre. To the extent that parking in the Neighbourhood Centre car park is restricted as a result of the proposed childcare centre, that would have an impact on Noah's Ark's enterprise.
140. Noah's Ark submitted that applying the schedules in the PVAGC to the shops as well as the 2 proposed childcare facilities resulted in a need for 112 car parking spaces. This was 2 parking spaces more than the 110 available in the 2 car parks.
141. Noah's Ark's calculations were premised on there being a reduction in the number of on-site car parking spaces from 11 to 9 or possibly fewer, depending on a number of things which remained 'up in the air' at the end of the hearing. For the purpose of these submissions, counsel allowed 7 on-site spaces from the 33 spaces required for the proposed development, leaving 26 places to be provided off-site.
142. To that were added 22 spaces for the Nikdia Hume development (26 less 4 places to be provided elsewhere) and 60 for the Neighbourhood Centre stores (as calculated by reference to the gross floor area of those stores) – which he calculated as a total of 112¹¹⁸ spaces.
143. The 110 available off-site parking spaces comprise 55¹¹⁹ for the Neighbourhood Oval car park and 55 for the Neighbourhood Centre car park (being the 57 current spaces less to for the proposed driveway to the subject site).

¹¹⁸ On those calculations the total is 108, 2 fewer rather than 2 more than the number of available spaces

¹¹⁹ The number calculated by Mr Shoobridge. Mr Riches stated that there were 50 spaces.

144. By those calculations, there would be a net shortage of 2 car park spaces to meet the notional demand. Counsel further submitted that, even if 40 employees (17 from the proposed childcare centre, 13 from the Nikdia Hume childcare centre and 10 from the Neighbourhood Centre stores) were to park at the Neighbourhood Oval car park (alongside others who use the Oval) there would be up to 80 people competing for 55 spaces on the Neighbourhood Centre car park.
145. Noah's Ark also submitted that the lessee of the subject site would have to demonstrate that the proposed childcare centre does not need to provide for all its parking needs on-site because other spaces are available. Under the PVAGC, something more than speculation is required before an applicant will be permitted to use public parking rather than provide sufficient parking spaces on-site. In this case there were assurances that the additional cars could be accommodated, but no demonstration of how that would occur. Consequently, Fedem has not demonstrated that it is not in breach of the PVAGC.
146. Rather, Noah's Ark submitted, car parking spaces were provided from the outset to meet the need generated by the level of development currently at and adjoining the Neighbourhood Centre. The nearby lessees occupy existing buildings, including the shops at the Neighbourhood Centre where there is no capacity for on-site parking. Therefore, it was submitted, if any parking is to be found to meet the needs of other lessees (such as for the proposed childcare centre) it has to be found elsewhere than in the Neighbourhood Centre car park.
147. On that basis, it was not open to the Authority, and is not open to the Tribunal, to accept that the additional use of 26 spaces of public car park would not cause a problem in the future.

Nikdia Hume's submissions

148. Nikdia Hume submitted that, in order to answer questions about the applicable codes, the Tribunal has to look at Rivett as it is likely to appear with both the Nikdia Hume and Fedem developments in place. That future would include the

additional staff of the 3 childcare centres, the people picking-up and setting-down children, and a potentially revitalised Neighbourhood Centre.¹²⁰

149. Second, it submitted that parking and safety issues are entwined. The number of off-site parking spaces that are required affects how many of those might be found on the Neighbourhood Oval car park. The number of spaces there raises issues about the preferred route of access to the subject land. By offering to provide the pedestrian pathway between the proposed childcare centre and the Neighbourhood Oval car park, Fedem had in effect raised safety issues to which the Crime Prevention Through Environmental Design General Code applied (a matter dealt with later in these reasons for decision).¹²¹
150. Nikdia Hume also cautioned against relying on the vague and contradictory opinion evidence of Mr Shoobridge which expressed what he, as an expert, might like to happen but about which he could give no assurance that it would happen. Indeed, the authorities had declined to adopt some of his suggestions. In those circumstances, Nikdia Hume submitted (adopting the submission by Noah's Ark), the Tribunal might have difficulty being satisfied that Fedem had demonstrated what was necessary to satisfy the PVAGC.¹²²
151. Nikdia Hume supported Noah's Ark's contentions that the proposed development does not comply with the PVAGC due to the uncertainty of the availability of spaces at the Neighbourhood Oval car park during sporting events and training sessions.

Fedem's submissions

152. Fedem made submissions in relation to the provision of limited on-site parking, the availability of requisite off-site parking, and whether the proposed development on the subject land might affect the use of the car park adjoining the Noah's Ark Centre Rivett.
153. First, Fedem seemed to accept (in light of Mr Shoobridge's evidence about how the type 3A parking spaces could be achieved on the subject site) that 2 of the car

¹²⁰ Transcript of proceedings, 1 November 2017, page 25

¹²¹ Transcript of proceedings, 1 November 2017, page 26, 36

¹²² Transcript of proceedings, 1 November 2017, page 26

parking spaces provided for in the plans could not be fitted on-site and space for them would have to be found off-site. Counsel noted that, in Mr Shoobridge's opinion, there was enough parking space for that purpose.

154. Second, Fedem submitted that, although the PVAGC states that on-site parking is desirable, it allows account to be taken of the reality of needs and invites some flexibility in its application on a case-by-case basis. In counsel's submission, this is not a "pure mathematical exercise." Rather, the PVAGC invites "a more human look at the parking situation and whether objectives are demonstrated."¹²³

155. In counsel's submission, and in reliance on Mr Shoobridge's evidence:

- (a) Fedem has attempted to achieve on-site parking to the best of its ability;
- (b) there is an abundance of off-site parking in underutilised areas that are not nearing a situation where it is fully utilised;
- (c) if more people are parking in the area with the addition of 2 developments, that is not necessarily a bad thing;
- (d) it is necessary to look at varying peaks in demands (for example, from different people at different times for different purposes in the Neighbourhood Oval car park); and
- (e) the submissions made by Noah's Ark gloss over the transactional nature of, and variations in, parking demands.

156. Third, Fedem submitted that there would be no impact, adverse or otherwise, on Noah's Ark's use and enjoyment of land because of the parking requirements generated by Fedem's development. Putting to one side the question whether Noah's Ark has an exclusive claim to use the car parks adjacent to its childcare centre, Fedem's development does not depend on those car parks. Fedem's development does not create a situation where Noah's Ark will lose available car parking spaces adjacent to its childcare centre. Further, it was submitted, Noah's Ark does not depend on the Neighbourhood Centre car park, Bangalay Crescent or the Neighbourhood Oval car park (which areas are part of the parking stock

¹²³ Transcript of proceedings, 1 November 2017, pages 59-60

which might be made available for the purposes of the Nikdia Hume and Fedem developments). To the extent that Noah's Ark expects to continue to enjoy a perceived exclusive use of the 2 car parks, that falls short of demonstrating that it will suffer any adverse impact.¹²⁴

The Authority's submissions

157. The Authority submitted that, for the reasons given by Mr Riches and Mr Shoobridge, the proposal complies with the PVAGC subject only to the suggested modifications to achieve the correct width of the on-site parking spaces.¹²⁵
158. In relation to the on-site parking, the Authority submitted that¹²⁶ the extent of any code non-compliance can be rectified by modifications to the proposal in accordance with conditions imposed on the development. The Tribunal could adopt Mr Riches' suggestion to vary the approval from 110 child places to 105, with the consequence that 2 fewer employee parking spaces would be required and the on-site parking could be extended to enable the spaces currently proposed to be the correct width. In particular, counsel referred to draft condition A2(a)(i) in Exhibit 12 which provides for Fedem to provide a revised site plan showing 'the on-site carpark with dimensions for each car parking space in accordance with the Parking and Vehicular Access General Code.' Counsel acknowledged, however, that Fedem would submit that the number of on-site spaces could be reduced to 9 so that the correct width would be obtained for the on-site spaces, preserving the 110 childcare places.
159. The Authority agreed with Fedem's submission that the PVAGC does not require a literal application of the parking provision numbers where it can be demonstrated that the objectives are met.¹²⁷ In this case, the relevant objective would be the amenity of the area. The issue is whether the proposed development would generate a demand for too much parking and whether sufficient car parking space is available.

¹²⁴ Transcript of proceedings, 1 November 2017, pages 48-49

¹²⁵ See Exhibit 4 drawing DA03.7

¹²⁶ Transcript of proceedings, 1 November 2017, pages 69-70

¹²⁷ Transcript of proceedings, 1 November 2017, page 74

160. Counsel submitted that if (as Noah's Ark contended) the Neighbourhood Centre had used all 57 spaces allocated to it, there would have been no further development (including the aged care centre) in Rivett since 1975 when the Neighbourhood Centre was built, and no further development generating parking demand could be approved for the Neighbourhood Centre.
161. The Authority:
- (a) relied on Mr Shoobridge's observations between 2015 and 2017 that the Neighbourhood Centre car park is underutilised; and
 - (b) adopted Mr Shoobridge's opinion that the additional development in the area would assist the vibrancy of viability of the Neighbourhood Centre.¹²⁸
162. Counsel for the Authority sought to refute the submission by Noah's Ark that there might be up to 80 people competing for 55 car park spaces at the Neighbourhood Oval car park. He referred to Mr Shoobridge's suggestion that some people, including employees, could park on Bangalay Crescent (where he estimated there are up to 50 car parking spaces) rather than having to use the Neighbourhood Oval car park. Counsel for the Authority suggested the people who might go to the Noah's Ark car park would most likely be employees of Nikdia Hume because they would be the closest. Those employees should not be included in the number of potential uses of the Neighbourhood Oval car park.
163. In his submission, the availability of public parking in the Noah's Ark car park (on average, 20 vacant spaces according to Mr Shoobridge) and in Bangalay Crescent should also be taken into account, at least when considering the adequacy of long-stay parking provision.¹²⁹

Consideration and conclusion

164. As noted earlier and as is apparent from the summary of the evidence in this case, there are 3 issues in relation to the parking needs and regulatory requirements for the proposed childcare centre development on the subject land.

¹²⁸ Transcript of proceedings, 1 November 2017, page 76

¹²⁹ Written submission, paragraph 23

- (a) Does the plan for on-site parking meet the required dimensions for each allocated parking space and, if not, what adjustments would need to be made (on-site and/or on-site) to satisfy those requirements?
 - (b) Are there sufficient parking spaces on or proximate to the subject site to satisfy the requirements for types of parking for a childcare centre of the size proposed?
 - (c) Is there evidence that people seeking to use either of the new and proposed childcare centres are likely to use the car park area adjoining the Noah's Ark Centre Rivett with adverse impact on Noah's Ark's use of the land for that Centre?
165. It is appropriate to consider those issues in that order. Before doing so, and to put our analysis in context, we note that some of the figures quoted in evidence and submissions in this case suggest a degree of precision and certainty which, in our view, should be treated with caution. We make the following general observations about the car park space figures relied on by the parties.
166. First, although the numbers of spaces required for particular purposes were calculated by reference to the PVAGC and were said to be the 'minimum parking provision requirements,' they are predictive figures and in this case should not be applied mechanistically without regard to empirical evidence of actual use. The PVAGC expressly contemplates that spaces provided for one purpose may be used for additional or alternative purposes where a proponent can demonstrate that the objectives can be met by utilising spare capacity in publicly available off-street parking. The use of spare capacity is at the discretion of the Authority.
167. Second, the overall number of off-site places cannot be stated with precision. Witnesses referred to space for 55 or 50 vehicles to park in the unmarked Neighbourhood Oval car park, and the capacity of the unmarked car parks next to Noah's Ark Centre Rivett were estimates.
168. Third, there is some merit in Mr Shoobridge's focus on the fluctuating temporal demands for parking for particular purposes. The statistics quoted earlier demonstrate that at different times of day demand for car parking is generated for different purposes (such as shopping, sporting activities at the Rivett

Neighbourhood Oval, and picking-up/setting-down children at childcare centres). Accordingly, in circumstances such as were described in this case, the prescribed figures should not be regarded as indicating that every space will be required for a single purpose throughout every weekday.

169. Fourth, the predictions of the nature and duration of car park usage at particular times of day can only be treated as indicative best estimates, albeit by people with relevant qualifications to provide such estimates.
170. Turning to the provision of on-site parking, the plans show that 11 pick-up/set-down car parking spaces are to be located on the subject site, including 2 bays for people with a disability. The aisle is to be as documented at 6.2 metres wide with the bay depth as documented being 5.5 metres. The eastern end turning recess is to be included. Each bay other than the bay(s) for people with a disability is to be 2.7 metres wide in compliance with the PVAGC. The western end bay is to be 2.9 metres wide to permit all doors to fully open adjacent to the waste enclosure structure.
171. As noted earlier, if each car parking space is redrawn with the correct width, the total area of the subject site currently allocated for car parking purposes would not be large enough to accommodate all 11 spaces. Various options were suggested. The Tribunal proceeds on the basis that:
 - (a) the developer intends to provide 2 car parking spaces for people with disabilities;
 - (b) the dimensions of each car park will meet the regulatory requirements.
172. The developer might prefer not to use for car parking purposes any part of the site already designated for other purposes (such as a playground) if that would mean that fewer than 110 child places would be permitted at the proposed childcare centre. If so, whatever reconfiguration of the car park is adopted, at least 2 short-term car park spaces would need to be provided off-site close to the driveway entrance to the proposed childcare centre. If 9 short stay pick-up/set-down spaces were to be provided on the subject site and 17 spaces for employees are provided at the Neighbourhood Oval car park, 7 additional short-term parking spaces would

need to be provided in the Neighbourhood Centre car park. Given that 2 of Neighbourhood Centre spaces would be removed for the purpose of the driveway, this recast design would require 9 spaces from that car park (perhaps more, if the required dimensions for the 2 short-stay spaces take more than 2 existing car parking spaces there).

173. If short stay visitor parking spaces are located off-site, the parking spaces would have to be designed as short stay spaces with a width of 2.7 metres and a depth complying with the PVAGC. The visitor parking would need to be marked with 15 minute parking restrictions during the peak use periods of 8:00am to 9:00am and 4:00pm to 6:00pm. Additionally they should be marked with 2 hour parking limits between 9:00am and 4:00pm on weekdays. We do not consider that to be the appropriate solution for the on-site parking issue.
174. We have concluded that the peak use of the Neighbourhood Oval car park is after 4:30pm, and staff parking could be accommodated in that car park because staff would arrive before this time. Therefore the 17 parking spaces would be available to accommodate their parking in all but exceptional circumstances. A proportion of the staff would finish work and leave the car park by 4:30pm and others would leave at other times until 6:00pm. Therefore some of the 17 spaces would be available for use during the sports activities.
175. The PVAGC requires that 11 car parking spaces for pick-up/set-down be provided for the development on the subject land. Those spaces must have the prescribed widths so that vehicle doors can be opened fully. At least 1 of the spaces should be dedicated for people with a disability.
176. The plans for the proposed development on the subject land do not allow sufficient space for 11 car parking spaces to comply with those PVAGC requirements.
177. Although it might notionally be possible to locate 1 or more of the required spaces in the Neighbourhood Centre car park, it would not be possible for the developer to determine the dimensions of each car parking space, or determine where the space or spaces would be located (and, in particular, that it or they be immediately adjoining the entrance driveway), or to regulate (by way of signs) time limits for people using the space or spaces.

178. Accordingly, it is a condition of approval that the plans for on-site parking be redrawn to allow for 11 car parking spaces with dimensions in accordance with the PVACG.
179. We note that, even if the redesigned car park area results in some reduction in the areas available for other purposes (and hence a reduction in the number of children who might be enrolled at the proposed childcare centre) it will still be necessary to provide 11 car parking spaces.
180. It is necessary now to consider whether the remaining 22 required spaces can be provided off-site but within the prescribed distance of the subject land, having regard to the types of parking (short-stay and long-stay) required.
181. We have already concluded that all 17 staff parking spaces could be accommodated on the Neighbourhood Oval car park.
182. The next issue is whether there is sufficient space in the Neighbourhood Centre car park for the additional childcare centre spaces as well as all the current and proposed uses.
183. The Tribunal observed on the site visit during the hearing that almost all the commercial outlets in the Neighbourhood Centre were in use, and one was in the process of being fitted out. Based on the PVAGC schedules, which are stated to be minimum requirements, the Neighbourhood Centre requires all the car parking that is available to accommodate the shops, aged care facility and the Nikdia Hume childcare centre being constructed on Block 2 Section 28. This excludes any sporting activities. There would be a shortfall in parking if the 2 childcare centres were to be constructed as proposed. The genesis of the shortfall is primarily a result of the development on Block 2 Section 28. Approval was given to that development by the Authority with no on-site parking. On the basis that the authorities did not support Mr Shoobridge's assessment that parking is available along Bangalay Crescent, the Tribunal has not included any potential use of Bangalay Crescent for present purposes.
184. Counsel for Noah's Ark made submissions based on numbers that, he said, demonstrated a prospective demand that would exceed the number of available

parking spaces at the Neighbourhood Centre car parking and the Neighbourhood Oval car park. Even allowing some latitude for imprecision in relation to the number of available spaces and the extent of projected demand, we are not satisfied that there will be an ongoing critical excess of demand over supply.

185. The calculations advanced by Noah's Ark were static figures based primarily on the Code requirements for parking spaces for particular purposes.¹³⁰ They seemed to be aggregated on the basis that all the places would be required by specified categories of people throughout each week day. However, the observations recorded in the evidence summarised earlier show that those 2 car parks are underutilised and that use fluctuates during each day. Further, it can be reasonably expected that individual uses and total demand will continue to fluctuate if the proposed development on the subject land proceeds. At different times of the day, car parking will be required by people who are setting down or picking up children at each childcare centre, employed at each childcare centre, shopping at the Neighbourhood Centre stores (some of whom might also be associated with a childcare centre), associated with the aged care facility or using the sporting facilities at the Neighbourhood Oval, as well as employees and employers at the stores, trades persons and others.
186. The PVAGC sets out that the use of spare capacity is at the discretion of the Authority with regard of the potential for nearby lessees to seek to expand and lay claim to some of the available capacity in these public parking areas. The need for existing lessees to expand cannot be disregarded. The aerial photographs relied on in the hearing show that it might be difficult for the present lessees to expand and provide additional parking facilities within their property boundaries.
187. As summarised earlier, references were made at the hearing to the prescribed parking requirements for the Neighbourhood Centre and the extent to which the businesses at the Neighbourhood Centre and the operators and users of the nearby aged care facility might be adversely affected if the proposed development were to proceed. However, there was no evidence that any of the businesses at the

¹³⁰ He allowed 60 spaces for existing shops, 22 spaces for Block 2 Section 28, and 26 spaces for the subject site, but did not include the approximately 10 spaces as suggested in the statement of facts and contentions for the Burrangiri aged care facility.

Neighbourhood Centre or the owners or operators of the aged care facility made any submissions to the Authority in relation to DA 201629784.¹³¹ Nor was there any evidence from them about:

- (d) the extent to which they or their clients and employees use car parking spaces in that area; or
- (e) the extent to which they considered the additional use of nearby car parking spaces by people visiting or working at the subject site might affect the use of their land or their businesses.

188. In light of the evidence before the Tribunal in this case, and bearing in mind the observations made at [166] to [169], we are satisfied that most of the off-site parking requirements for the proposed development on the subject site could be met on the Neighbourhood Oval car park, with the remaining requirements being met in the Neighbourhood Centre car park.

189. We note that, in order to facilitate the optimum use of spaces during each weekday for each type of person using the Neighbourhood Centre car park (including but not limited to people associated with the proposed childcare centre), it might be useful to have parking signs with different time limits in different parts of that car park, along the lines suggested by Mr Shoobridge. We do not suggest that such signage should be a condition of approving DA 201629784. The numbers and locations of spaces to be designated for particular times is something best worked out in consultation with the tenants of the Neighbourhood Centre, the operators of the neighbouring childcare centres, and the operators of the neighbouring aged care facility. Careful planning in that respect might facilitate smooth and safe movement of vehicles and people at times of peak demand.

Does Noah's Ark have standing to bring the application?

190. The question whether Noah's Ark has standing to bring the application is to be resolved by reference to the scheme in sections 407, 408A and 419 and Schedule 1 of the P&D Act. In summary, section 408A allows an 'eligible entity' for a

¹³¹ In his witness statement, Mr Riches noted that 2 written representations were received during the public notification period, of which one was from Noah's Ark (Exhibit 11 paragraph 15)

‘reviewable decision’ to apply to the Tribunal for a review of the decision. Section 407 defines:

- (a) ‘reviewable decision’ to mean a decision mentioned in Schedule 1 column 2 made by a decision-maker; and
- (b) ‘eligible entity’ for a reviewable decision to mean an entity mentioned in Schedule 1 column 3 for the decision.

191. Item 4 of Schedule 1 lists as a ‘reviewable decision’ a decision under section 162 to approve a development application in the merit track, whether subject to a condition or otherwise. An entity is an ‘eligible entity’ in relation to such a decision if:

- (a) the entity made a representation under section 156 about the development proposal or had a reasonable excuse for not making a representation; and
- (b) the approval of the development application may cause the entity to suffer ‘material detriment’.

192. Section 419 sets out the scope of, and limits to, the expression ‘material detriment’.

419 *Meaning of material detriment*

(1) *In this Act:*

material detriment, in relation to land—an entity suffers **material detriment** in relation to land because of a decision if—

- (a) *the decision has, or is likely to have, an adverse impact on the entity’s use or enjoyment of the land; or*
- (b) *for an entity that has objects or purposes—the decision relates to a matter included in the entity’s objects or purposes.*

(2) *However, an entity does not suffer material detriment in relation to land because of a decision only because the decision increases, or is likely to increase, direct or indirect competition with a business of the entity or an associate of the entity.*

Note **Material detriment** is used in sch 1.

(3) *In this section:*

associate, of a person, means—

- (a) *the person's business partner; or*
- (b) *a close friend of the person; or*
- (c) *a family member of the person.*

193. In summary, for Noah's Ark to have standing to bring this application for review:

- (a) it must be an entity;
- (b) it must have made a representation under section 156 about the development proposal; and
- (c) the approval of the development application may cause Noah's Ark to suffer 'material detriment'.

194. Noah's Ark is an entity and it made a representation under section 156 in relation to DA 201629784 within the notification period.¹³²

195. Consequently, for section 419 to apply in this case, Noah's Ark would have to establish that it would suffer 'material detriment' (as that expression is defined) in relation to land because the decision to approve DA 201629784:

- (a) is likely to have an adverse impact on Noah's Ark's use or enjoyment of the land at 79 Bangalay Crescent; or
- (b) relates to a matter included in Noah's Ark's objects or purposes.

196. However, Noah's Ark would not suffer 'material detriment' as defined if it would suffer material detriment by reason only that the decision increases, or is likely to increase, direct or indirect competition with a business of Noah's Ark or an associate of Noah's Ark.

Noah's Ark's submissions

197. As noted earlier, there are 2 components of the submissions by Noah's Ark. Each of them relates to the standing issue. In summary, Noah's Ark submitted that:

- (a) first, the development on the subject site would reduce the occupancy level of the Noah's Ark Centre Rivett, thereby reducing and probably eliminating

¹³² See, for example, Exhibit 11, paragraph 15

the level of surplus derived from that centre's operations, such that Noah's Ark would not be able to maintain its community programs and meet the cost of supporting children with special needs enrolled in the day care centre, and cessation of the community programs and support the children with special needs in the day care centre would mean the loss of services and benefits presently enjoyed by the community, which loss would not be made good by the operations of the proposed new long day care centre on the subject site; and

- (b) second, because the development proposal does not comply with the PVACG in that it will not make adequate provision for parking, part of the parking demand generated by the proposal will result in overflow parking in the Noah's Ark car park as well as adjacent streets.

198. On the first point, counsel for Noah's Ark pointed to the evidence of Dr Abbey about the value of the services provided by Noah's Ark to children and their families, particularly those with special needs, which cannot be met through mainstream services. Dr Abbey referred to the importance of early childhood learning and described the circumstances of disadvantaged, socially isolated and vulnerable families who use (or could use) the services provided by Noah's Ark. Counsel also relied on her evidence about the impact on Noah's Ark if both the Nikdia Hume and Fedem developments proceed. Dr Abbey gave evidence that the current childcare centres in the district are meeting the current demand. Counsel highlighted Dr Abbey's conclusion that the proposed development is likely to attract mainstream enrolments without increasing the capacity for children and families with additional needs, while simultaneously affecting the capacity of the Noah's Ark Centre Rivett to provide services for those families. Indeed, Dr Abbey concluded that the introduction of 1,000 new places each week would severely compromise the current and future enrolments of Noah's Ark long day care to such an extent that its financial viability would be threatened, let alone its capacity to continue to fund the community programs.

199. In the previous Noah's Ark case, the Tribunal considered and rejected a similar submission. The summary of that submission and the reasons for the Tribunal's conclusions are set out at paragraphs [158] to [173] of the decision in that case.

200. In the present proceedings, counsel for Noah's Ark referred to the Tribunal's conclusions against his client in the previous case (at [166] and [170]) and sought to refine or reinforce the argument put previously. He submitted that Noah's Ark constitutes a single enterprise which provides early learning services across the board. It serves a particular clientele comprising:
- (a) people who are able to, and do have, access to mainstream long day care services; and
 - (b) people who need non-mainstream services but are not able to access those services.
201. In Noah's Ark's submission, it is a distinct business from the business conducted by Fedem and Nikdia Hume. The economic competition faced by it becomes a planning consideration (within the scope of judicial decisions such as *Kentucky Fried Chicken v Gantidis*¹³³) because:
- (a) the business conducted by Noah's Ark provides a level of facility or a particular service which would not be provided by the new business; and
 - (b) as a result of the competition from the new service provider (Fedem), the business of Noah's Ark would become unviable and would cease.
202. The analogy invoked in support of the submission was the comparison between a corner store which provides services to a local clientele (including people who are elderly, immobile or do not have a car) and a supermarket that commences trading 2 kilometres distant from the corner store. The supermarket would draw to it those customers who have means of transport, but disadvantaged people would no longer be able to obtain readily their daily necessities. The latter class would lose out when the corner store ceases to exist. The proprietor of the corner store could choose to diversify the business by becoming a newsagent, dry cleaner and post office. But, diversified or not the facility that was previously available to the community would cease to be available because of the supermarket.

¹³³ *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675

203. In Noah's Ark's submission, that situation has long been recognised as a proper planning consideration. However, if the reasoning adopted by the Tribunal in the previous Noah's Ark decision in relation to section 419(2) of the P&D Act is followed, nobody would be able to prevent the corner store closing.
204. Noah's Ark submitted that, on the evidence in the present case, Noah's Ark provides the complete package of early learning services (both mainstream and non-mainstream) to the whole community. If the proposed development on the subject site proceeds, Noah's Ark will go out of business or, in order to stay viable to some extent, will have to cease providing services that do not fund themselves. The facilities previously enjoyed by the community would no longer be provided. In that respect, the consequences for Noah's Ark from the proposed development are said to be more severe than in the previous case, but there is no difference in principle.
205. In relation to the second point, Noah's Ark noted that the car park used by its families and staff is within the requisite distance from the subject site for the locational guidelines for parking and would be available for that purpose. The likelihood, possibility or probability that there would be parking overspilling into its area was canvassed during the hearing. There is a risk that Noah's Ark might find that it is without parking space for its families. That would cause Noah's Ark material detriment.
206. Noah's Ark also referred¹³⁴ to the evidence of Mr Shoobridge to the effect that employees of Nikdia Hume would park on the Noah's Ark car park. That evidence demonstrates that Noah's Ark would be affected in the useful enjoyment of the land, irrespective of whether Noah's Ark has exclusive possession of it.
207. In addition Noah's Ark's families and staff would also use the Neighbourhood Centre stores. To the extent that parking in the Neighbourhood Centre car park is restricted as a result of the proposed childcare centre, that would have an impact on Noah's Ark's enterprise.

¹³⁴ Transcript of proceedings, 1 November 2017, pages 87-88

208. As noted earlier, Noah's Ark submitted, more specifically, that the development proposal does not comply with the PVAGC. In Noah's Ark's submission, the development proposal will not make adequate provision for parking having regard to the fact that the existing demand for parking within 100 metres of the subject site (being development approved for retail purposes – approximately 60 spaces; the Burrangiri aged care facility – approximately 10 spaces; the new Kids Club operation – 18 spaces; and football and cricket matches and training sessions occurring between 4:00pm and 6:00pm on several weekdays) already meets or exceeds the current supply of public parking. It follows that any additional parking demand generated by the proposed development on the subject site will result in overflow parking in adjacent streets and in the Noah's Ark car park.
209. For those reasons, Noah's Ark submitted that it will suffer 'material detriment' of the type referred to in section 419(2) of the P&D Act and, consequently, it had standing to bring the application to review the Authority's decision to approve DA 201629784.

Fedem's submissions

210. Fedem submitted that Noah's Ark did not have standing to bring the application. Consequently, there is no application for the Tribunal to review and that is the end of the matter. The decision to approve DA 201629784 stands (whatever shortcomings have been identified in the course of these proceedings). There were 2 limbs to Fedem's submissions.¹³⁵
211. First, Fedem submitted that, in light of the findings of fact in the previous Noah's Ark case and the Tribunal's reasons for decision in that case, there is an "insurmountable problem" for Noah's Ark. The diminished profitability argument advanced by Noah's Ark was dealt with to finality in the previous proceedings. The evidence in relation to that issue remained largely the same in these proceedings, with some adjustment for the prospect of 3 childcare centres coexisting reasonably proximate to each other. The fact that the additional competition might make circumstances worse for Noah's Ark is a question of degree, and the evidence in respect of that involves a degree of speculation and

¹³⁵ Transcript of proceedings, 1 November 2017, pages 54-55

uncertainty. Consequently, Fedem submitted, for Noah's Ark to have standing it must establish that it suffers material detriment not only because the approval of DA 201629784 increases or is likely to increase direct or indirect competition but for some other reason.

212. Fedem also referred to the insecure nature of Noah's Ark's tenure at the Rivett school site, then submitted that Noah's Ark's licence could be revoked or it could be required to move irrespective of whether Fedem proposes to develop a child-care centre nearby.
213. Fedem submitted that there is no requirement for Noah's Ark provide the additional services for people who need non-mainstream services. That is the business decision. It is part of the way in which Noah's Ark operates by choice, providing those services and electing to apply profits¹³⁶ to that enterprise.
214. Fedem also submitted that it is not part of the Tribunal's role to consider the economics of the supply of childcare places in the area. Irrespective of whether the proposed development (together with the Nikdia and Noah's Ark centres) might provide "child care heaven" for parents, the Tribunal's role is to focus on whether the proposed development is a permitted use for the subject site and whether consistency with the Territory Plan is achieved by the proposed development.
215. Second, in relation to the parking issue, Fedem submitted that:¹³⁷
- (a) there is a real issue whether Noah's Ark has any exclusive claim to the use of the car park adjacent to the site where it operates;
 - (b) despite that lack of exclusivity, Noah's Ark is wholly self-contained in its parking requirements, and does not depend on places beyond that area;
 - (c) the proposed development would use a mix of on-site parking and nearby car park spaces (for example, near the Rivett Neighbourhood Oval and the Neighbourhood Centre) and does not depend on car parks on the site where

¹³⁶ As Noah's Ark is a not-for-profit body the term 'profits' refers to its surplus income from the childcare centre.

¹³⁷ Transcript of proceedings, 1 November 2017, pages 48-50

Noah's Ark operates, nor will the development create a situation where Noah's Ark will lose the availability of car spaces adjacent to its site;

- (d) Noah's Ark will not experience any impact (adverse or otherwise) on its use and enjoyment of its land from Fedem's development of the subject site;
- (e) Noah's Ark does not depend on the Neighbourhood Centre car park, or on any of the on-street parking at Bangalay Crescent or Neighbourhood Oval car park – all of which are part of the present available parking stock, and all of which may be made available for the purposes of accommodating the developments by Nikdia Hume and Fedem.

216. In summary, Fedem submitted that it is too remote to suggest that Noah's Ark would suffer an adverse impact on its use and enjoyment in circumstances where it has no exclusive rights to the car park land and it has not shown that it will reach a point where there is no or little parking available to it. Consequently, Noah's Ark will not suffer material detriment as a result of the proposed development on the subject site.

217. Counsel for Fedem noted, however, that the Nikdia Hume development will depend wholly on off-site parking. In her submission, whatever arrangements there are about lay by spaces created by indents on existing roads is not relevant to this case.

The Authority's submissions

218. The Authority also submitted that Noah's Ark had no standing and hence the decision must remain unchanged (despite the submissions made in the alternative by the Authority in relation to the merits of the matter).

219. First, the Authority agreed with Fedem that the position of Noah's Ark on the increased competition point had not been taken any further than in the previous Noah's Ark case.¹³⁸ On this occasion, Noah's Ark submitted that competition will possibly have the effect of causing the whole operation to become not viable. Although that submission was slightly higher than was put by Noah's Ark in the

¹³⁸ Transcript of proceedings, 1 November 2017, page 67

previous case, it is not a relevant difference but only anticipates a greater degree of competition.

220. Counsel for the Authority also noted that Noah's Ark is, on its own evidence, somewhat vulnerable to competition because it operates from an ageing building which it does not own and cannot improve because their tenure is a periodic licence.
221. The Authority also sought to rebut the supermarket and corner store analogy advanced in Noah's Ark's submissions, by distinguishing the Noah's Ark situation from the facts on which the leading cases were decided. The cases¹³⁹ show that economic impacts on particular businesses are outside the scope of impacts to be considered, while the impacts on the viability of a whole centre can be considered.
222. The Authority submitted that this is not such a case. Noah's Ark does not claim that the Neighbourhood Centre will close or that the Noah's Ark Centre Rivett will close, but only that its surplus funds to subsidise discounted services to disadvantaged persons will be reduced, with consequential effects on the programs for disabled or disadvantaged families. The direct economic effect is on the profitability of an individual trader who currently enjoys a monopoly in the locality.
223. Further, counsel for the Authority suggested¹⁴⁰ that the argument put by Noah's Ark might be that the social service objectives of some of its programs are under threat and will be lost if the proposed development proceeds. The legal basis for such a submission might be found in the definition of 'environment' in the P&D Act which refers to the 'social, aesthetic, cultural and economic characteristics' that affect, or are affected by, matters mentioned in paragraphs (a) to (f) of that definition. However, even if that could provide a basis for such a submission, counsel for the Authority submitted that:

¹³⁹ For example *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675; *Cartier Holdings Pty Ltd v Newcastle City Council* [2001] NSWLEC 170 at [27]-[34], quoting *Fabcot v Hawkesbury City Council* [1997] NSWLEC 27, 93 LGERA 373, 378

¹⁴⁰ Transcript of proceedings, 1 November 2017, pages 80-81

- (a) there is nothing to suggest or establish that neither of the new childcare centres will not provide services to disadvantaged people or groups in the community;
 - (b) Noah's Ark has no proprietary ownership of those kinds of services; and
 - (c) the P&D Act (whether under section 120(a) or (g) or otherwise) is not a mechanism via which provision of social services is funded.
224. He further submitted that, if Noah's Ark seeks to preserve its monopoly on childcare services in Rivett and the revenue from its childcare centre in order to maintain funding of its other programs (precipitated by the withdrawal in 2009 of government funding of those programs), then that is not a planning development issue. Indeed, it is inconsistent with section 120(a) to refuse, on this ground, an application for a use that meets the CFZ objectives (a) and (c).
225. Counsel referred to, and relied on, the evidence of Mr Riches (see [361] to [363]) that the Authority does not look at the economics of a proposed development when making a planning decision about it, unless the Territory Plan or the P&D Act authorises or requires it to do so. In the present case there is no express provision, and the Tribunal should not venture into the field of assessing the commercial viability of a childcare centre.
226. Second, in relation to the overflow parking issue (which was not alleged in the previous Noah's Ark case), the Authority submitted¹⁴¹ that for Noah's Ark to succeed in terms of section 419 of the P&D Act there has to be evidence about:
- (a) more than a remote or fanciful likelihood of an impact; and
 - (b) the adversity or quantum of that impact showing that the overflow parking would interfere with the use or enjoyment of that land by Noah's Ark.
227. The Authority submitted that Noah's Ark provided no evidence of either of those things. The only relevant evidence came from Mr Shoobridge who thought that

¹⁴¹ Transcript of proceedings, 1 November 2017, pages 67-69

overflow from the proposed development would not be likely. Employees at the childcare centre are more likely to park nearer to their work.

228. Counsel for the Authority referred to the evidence of Mr Shoobridge that the car park used by Noah's Ark and families at its centre has 35 spaces and its typical occupancy was 15. On that basis, the Authority submitted that an overflow (if any) would have to exceed 20 before it would interfere with the typical usage by Noah's Ark of that car park. There was no evidence of any quantum of overflow into the car park. In the absence of any evidence about quantum or likelihood, the material detriment to Noah's Ark cannot be established.
229. Counsel for the Authority acknowledged that if there was overflow parking into the Noah's Ark's car park, one could readily see how that might affect their use of their land even if the car park is not exclusively Noah's Ark's land.¹⁴² In his submission, the availability of public parking in the Noah's Ark car park (and in Bangalay Crescent) should also be taken into account, at least when considering the adequacy of long-stay parking provision.
230. In the Authority's submission, neither of the arguments advanced by Noah's Ark should succeed. If Noah's Ark has no standing to bring the application, then the action must be dismissed. The other parties have no entitlement to continue the matter.¹⁴³
231. However, counsel for the Authority invited the Tribunal to rule on all the points raised in these proceedings. The other parties appeared to proceed on the basis that the Tribunal would do so, as was done in the previous Noah's Ark case.¹⁴⁴

Consideration and conclusion

232. The question whether Noah's Ark has standing to bring the present application can be answered briefly.
233. We have concluded that there is evidence that if the proposed childcare centre is constructed on the subject site in accordance with the approved development, the

¹⁴² Transcript of proceedings, 1 November 2017, page 68

¹⁴³ Transcript of proceedings, 1 November 2017, page 69; see *Kippax Task Force v ACT Planning and Land Authority & Ors* [2004] ACTAAT 11

¹⁴⁴ Transcript of proceedings, 1 November 2017, pages 85-86

need for car parking will extend well beyond the places identified on DA 201629784. In reaching that conclusion, we have had regard not only to that DA and various plans and other evidence (including that of Mr Shoobridge) in relation to the proposed development on the subject site. The Tribunal has also had regard to the prospective impact of the Nikdia Hume development which was well advanced at the time of the hearing and, as noted earlier, has no on-site parking. As counsel agreed, the Tribunal needs to assess the combined operation of 3 childcare centres in close proximity to each other having regard (in the case of Noah's Ark) to current operations and (in the case of Nikdia Hume and Fedem) the likely impact of fully functioning childcare centres on their respective sites as indicated by the applicable approvals for those developments.

234. Having viewed the neighbouring streets, the Neighbourhood Centre and other places in the vicinity of the subject site during the course of the hearing, we are satisfied that the effect of the demand for off-site parking in relation to the proposed development on the subject site, together with the off-site short-term and long-term parking requirements in relation to the Nikdia Hume development, is likely to result in some additional people using the car park spaces adjacent to the Noah's Ark Centre Rivett. Although the evidence would not suggest that the people using that centre would be prevented from accessing it for pick-up/set-down or other purposes, the presence of additional parked cars and traffic in that unmarked and largely unformed parking area is likely to interfere with the ready and safe access of some people to the centre. We are satisfied that the use of that car park area by people other than people using the Noah's Ark Centre Rivett is a likely consequence (albeit an indirect one) of the development on the subject site. The pressure on the Neighbourhood Centre car park from the proposed development is likely to influence some people associated with the Nikdia Hume childcare centre to seek parking closer to the Nikdia Hume site. The prospect of some of those people parking next to the Noah's Ark Centre Rivett is more than a remote or fanciful likelihood.
235. For that reason approval of the development may cause Noah's Ark to suffer 'material detriment' because (using the words of section 419(1)(a) of the P&D Act), the decision is likely to have an adverse impact on Noah's Ark's use or

enjoyment of the land that it uses for the Noah's Ark Centre Rivett. Consequently, Noah's Ark has standing to bring the present application.

236. It is, therefore, unnecessary to consider and rule in relation to the first limb of Noah's Ark's submissions in relation to standing. As noted earlier, the present Tribunal considered essentially the same submission in the previous Noah's Ark case at [158] to [173] and decided that:

- (a) a childcare centre on the neighbouring Nikdia Hume site would attract some people who currently use, or in the future would otherwise have used, the Noah's Ark Centre Rivett;
- (b) as a consequence of the reduction in numbers of children at the Noah's Ark Centre Rivett there would be some loss of revenue to Noah's Ark; and
- (c) although the reduced income of the Noah's Ark Centre Rivett would not necessarily threaten its viability, it would reduce further and perhaps eliminate the capacity of Noah's Ark to support community programs from its surplus funds.¹⁴⁵

237. The Tribunal continued:

[169] Accordingly, we accept that the approval of the DA "may cause" Noah's Ark to suffer detriment in the sense that the decision is likely to have an adverse impact on its use of the land at 79 Bangalow Crescent to operate the Noah's Ark Centre Rivett as profitably as it has done in some previous years. Arguably, the approval of the DA also relates (albeit indirectly) to a matter in Noah's Ark's objects, in the sense that Noah's Ark could have less capacity to subsidise community activities consistently with its objects.

[170] We are not persuaded to adopt Noah's Ark's submission about the limited operation of 'only' in section 419(2). As we understand the submission, the interpretation would mean that if the party objecting to development approval in favour of a competitor could show some other collateral or consequential implications for the objector of the decision (for example, because the objector would not have sufficient profits to engage in some community-oriented activities other than its business) it is not prevented from seeking a review by the Tribunal of the decision. It is difficult to see how the use or uses to which an entity puts its profits or surplus can determine whether that entity is immune from exclusion to challenge the decision to approve a development that would increase competition with that entity's business. Section 419(2) refers to the effect of the decision on

¹⁴⁵ The previous Noah's Ark case at [169]

competition with a business of an entity, not the use to which the profits of that business are put.

[171] We conclude that Noah's Ark will not suffer material detriment for some reason other than because the decision increases, or is likely to increase, direct or indirect competition with Noah's Ark's business at the Noah's Ark Centre Rivett. In the words of section 419(2), it will 'only' suffer material detriment for that reason.

238. Consequently, the Tribunal held that the exception to or qualification of the definition of 'material detriment' contained in section 419(2) of the P&D Act applied in the circumstances of that case. It followed that Noah's Ark was not eligible to apply to the Tribunal for a review of the decision by the Authority to approve DA 201528713.

239. The submission in the present proceedings sought to establish that if the Noah's Ark Centre Rivet ceased to operate (or at least ceased to generate a financial surplus) the community would be deprived of the programs and services it provides.

240. In the reasons for decision in relation to the previous Noah's Ark case, the Tribunal made the following findings:

Noah's Ark commenced to operate the long day care centre in Rivett in 2009, predominantly to provide a continuing source of income so that it could maintain its community programs to provide care for children with disabilities whose family could not otherwise afford it or whose children would not be accepted in other day care centres because of their disability. The income generated by the day care centre operations which is surplus to needs in respect of maintaining the operations of the day care centre is used to subsidise the cost of the community programs. By that means Noah's Ark is able to keep those programs operating, and also meet the cost of supporting children with special needs enrolled in the day care centre.¹⁴⁶

241. The conclusions reached in the previous Noah's Ark case were reinforced by the evidence in the present case. Indeed, it is reasonable to conclude (as the parties all seem to agree) that the likely consequence of the proposed development on the subject site would be increased pressure on the already vulnerable financial viability of the operations at the Noah's Ark Centre Rivett, and hence would have

¹⁴⁶ The previous Noah's Ark case at [53]

a significant adverse effect on the capacity of Noah's Ark to subsidise all provide its other programs for the benefit of participants and the community generally.

242. Even if the argument were sound in law, the evidence given in the previous Noah's Ark case demonstrated that Noah's Ark would not be the sole provider of non-mainstream services in the Rivett locality. As the Tribunal found in that case, the Kids Club development on the nearby Nikidia Hume parcel:

*... would provide not only general child care facilities and services but would also provide care for children with a range of conditions, physical disabilities, and additional needs. Having considered that evidence alongside the evidence provided for Noah's Ark (including its special needs focus), we find that the proposed development would be in direct competition with the Noah's Ark Centre Rivett in terms of the range of children it would seek to attract.*¹⁴⁷

Compliance with relevant codes and conditions on development approval – an overview

243. The parties raised various matters in relation to the possible non-compliance of the proposed development with particular provisions of relevant codes.
244. Those matters were confined to whether the proposed development complies in specific respects with:
- (a) the PVAGC, in particular the provision of on-site parking;
 - (b) the CPTEDGC, in particular the provision of an adequately lit footpath from the subject site to the Neighbourhood Oval car park; and
 - (c) the CFZ Code, in particular C11 and C13 (concerning the quality of materials and the street interface) and C18 (the natural stormwater path).
245. The issue is whether those matters could be remedied by the imposition of conditions on the approval of the proposed development.
246. Each party made submissions about the general issue of whether the imposition of conditions could remedy the non-compliance with relevant codes, and about aspects of particular conditions.

¹⁴⁷ The previous Noah's Ark case at [123], also [289], [292]

Conditions on development approval

247. DA 201629784 was approved subject to specified conditions being satisfied. In summary the conditions were grouped as:

- (a) administrative/process conditions, including that the development must comply with all relevant entity advice and the provision of drawings to reflect the latest amendments to the proposal;
- (b) conditions prior to construction, including any tree protection fencing, a verge management plan, and a temporary traffic management plan;
- (c) conditions during construction, including in relation to sediment and erosion control, tree protection, verge management, traffic management and waste management.

248. The approval included the following in relation to advisory notes:

This application is approved with the following advisory notes. It is recommended that careful consideration be given to advisory notes prior to commencing work.

E1. Advice from EPSDD - Major Projects and transport

The applicant is advised to consider the possibility of providing increased number of bicycle parking rails and possibility of providing a pedestrian path connecting the car park within the subject block and the car park on adjacent Block 1 Section 60 Rivett.

249. In his witness statement,¹⁴⁸ Mr Riches suggested the following additional specific conditions of approval:

- (a) a requirement that the plans state that the development will be constructed in accordance with relevant Australian Standards as referred throughout the report;
- (b) a condition that the development provide a safe/well-lit pedestrian connection with the Neighbourhood Oval car park for employee parking with adequate sight lines;

¹⁴⁸ Exhibit 11

- (c) a condition to ensure that lighting is installed in accordance with *AS1680 – Interior Lighting*;
- (d) a condition to ensure that doorways and doors are constructed in accordance with *AS1428.1 – Design for Access and Mobility*;
- (e) a condition to ensure lighting is installed in accordance with *AS4282 – The Control of Obtrusive Effects of Outdoor Lighting, in the case of security lighting* (to minimise light spill);
- (f) a condition to ensure that directional signage is constructed in accordance with *AS1742.10 (1991) Manual of Uniform Traffic Control Devices – Pedestrian Control and protection*;
- (g) expanded conditions to clearly delineate the advice provided by each entity, addressing each issue raised by the relevant entity (to assist Fedem and contractors in interpreting matters raised).¹⁴⁹

250. During the hearing, a revised set of draft conditions of approval was tendered.¹⁵⁰ Mr Riches described them as “suggested conditions just to assist the tribunal.”¹⁵¹

251. Consistently with the recommendations made by Mr Riches, that document included most of the conditions included in the decision to approve DA 201629784, 3 amended conditions, and 4 additional conditions. None of the original conditions were deleted.

252. One of the additional draft conditions related to the on-site parking issue explored during the hearing. Condition A2(a)(i) would require Fedem to provide revised plans and drawings showing:

the on-site carpark with dimensions for each car parking space in accordance with the Parking and Vehicular Access General Code.

253. Although the advisory notes were unaltered, a new draft condition A2(a)(vi) was included which would require Fedem to provide revised plans and drawings showing:

¹⁴⁹ Exhibit 11 paragraphs 32, 37, 62, 64, 68, 72, 77-79

¹⁵⁰ Exhibit 12

¹⁵¹ Transcript of proceedings, 20 October 2017, page 6

- (vi) *a pedestrian connection from the site to the Rivett oval (1/60 Rivett) with adequate lighting, access and sightlines.*

Nikdia Hume's submissions

254. In Nikdia Hume's submission, conditions are useful tools to deal with relatively minor matters. They can provide for an adjustment that is necessary but which has no great consequence (in the sense that the applicant developer would otherwise have to resubmit the application for the entire development approval process). If there is a reasonably simple way of dealing with a particular small issue, a condition or conditions would be sensible. Whether conditions are appropriate in a particular case is a question of degree.
255. In this case, however, Nikdia Hume submitted that the proposed conditions cross over the line in terms of degree. There is considerable uncertainty about whether some of them could be complied with. They require action to be taken on land off-site and some would have flow-on effects. These conditions are too large and too indeterminate for them to be appropriate in this case.¹⁵²

Noah's Ark's submissions

256. Counsel for Noah's Ark was content to adopt the submissions put on behalf of Nikdia Hume.¹⁵³

Fedem's submissions

257. Counsel for Fedem sought to refute the suggestion that the proposed development should not be approved because of the extent of the required conditions, a suggestion which she described as a distraction from the real issue before the Tribunal.
258. Fedem referred to the evidence of Mr Gordon that the proposed development complies with CFZDC criteria 11, 13 and 18 (see [40]) and documents in evidence that demonstrate how the design provides for visual interest, articulation, attractive interfaces and variation in materials. In her submission, if the Tribunal accepts

¹⁵² Transcript of proceedings, 1 November 2017, pages 39-40

¹⁵³ Transcript of proceedings, 1 November 2017, page 40

Mr Gordon's evidence in relation to issues raised by the CFZDC, then those issues have evaporated.¹⁵⁴

259. Only 2 of the proposed conditions deal directly with the substantive issues before the Tribunal, namely, parking and the pedestrian pathway between the proposed childcare centre and the Neighbourhood Oval car park (each of those issues is considered separately in these reasons for decision). Other matters (consistency with information provided under section 141, and conditions relating to trees) were not raised at the hearing.¹⁵⁵
260. In Fedem's submission, the conditions relevant to these proceedings can be characterised properly as "tweaking". The fact that a condition has a flow-on effect for another aspect of the design which requires a change, or there are numerous changes to an aspect of the design, need not affect the viability of the proposal. Neither the extent of the conditions nor their details should be used to conclude that the development ought to be refused.¹⁵⁶
261. Rather, Fedem submitted, when a condition is appropriate and achievable by one method or several, and in the absence of it being frustrated or futile, it is appropriate to include it.¹⁵⁷ This is not a case where the lack of compliance is such that it cannot be remedied by conditions and there is no reason for the Tribunal to refuse to approve the proposed development.¹⁵⁸

The Authority's submissions

262. The Authority submitted that, to the extent that there are code non-compliances in the proposed development, they can all be rectified by relatively minor modifications to the proposal in the form of conditions:
- (a) requiring a minor modifications to the proposal (to which Fedem, through its counsel, has indicated consent); and

¹⁵⁴ Transcript of proceedings, 1 November 2017, pages 55-56

¹⁵⁵ Transcript of proceedings, 1 November 2017, page 43

¹⁵⁶ Transcript of proceedings, 1 November 2017, page 43

¹⁵⁷ Transcript of proceedings, 1 November 2017, page 44

¹⁵⁸ Transcript of proceedings, 1 November 2017, page 45

- (b) of a procedural or technical nature, such as those to require compliance with relevant Australian Standards.
263. The Authority submitted that the suggested conditions are ordinary, in the sense that they are typical of the sorts of conditions made by the Tribunal as a result of suggestions and evidence made to it in the course of a hearing.
264. The proposed revisions of conditions could have been done by the original decision-maker and so can be done by the Tribunal. They are not such as to change the nature of the proposal,¹⁵⁹ or to offend the principle referred to in *Land Architecture Australia v ACT Planning and the Land Authority*,¹⁶⁰ in that the conditions might require uncertain consequential alterations.
265. The Authority submitted that C11 and C13 of the CFZ Code were adequately addressed in Fedem's architect's statement dated 25 September 2017¹⁶¹ and C18 was dealt with by condition A1 which requires the proposal to comply with the entity required condition. Mr Riches drafted a new more specific condition, and no issue was pressed or question asked about this at the hearing.
266. The Authority made specific submissions in relation to how compliance with the PVAGC and the CPTEDGC could be achieved. Those submissions are considered separately in those parts of these reasons the decision relation to parking issues and the proposed pedestrian pathway between the subject site and the Neighbourhood Oval car park.

Consideration and conclusion

267. We are satisfied that, to the extent that aspects of the proposed development do not comply with aspects of the relevant codes or clarification is appropriate in relation to which Australian Standards apply, those remaining matters can be dealt with by suitable conditions. We do not consider that, individually or collectively, the conditions suggested by the Authority or in their revised and expanded form by Mr Riches, extend beyond the types of conditions that are from time to time

¹⁵⁹ See *McKenzie v ACT Planning and Land Authority & Ors* [2004] ACTSC 80 at [18]-[19] per Crispin J; *Walkington & Ors v ACT Planning and Land Authority* [2010] ACAT 81

¹⁶⁰ *Land Architecture Australia v ACT Planning and Land Authority & Ors* [2008] ACTAAT 33 at [75]-[77]

¹⁶¹ Exhibit 4

applied to developments such as the proposed development on the subject site. Nor would compliance with those conditions substantially change the development.

268. In particular, we have concluded that:

- (a) as discussed earlier (at [175] to [178]), it is appropriate to impose a condition requiring the plans to be redrawn to provide for on-site parking which has the required dimensions;
- (b) suitable conditions can and should be applied to ensure that the proposed pedestrian pathway between the Neighbourhood Oval car park and the development on the subject site complies with the CTEDGC and provides adequate lighting (see [309] to [312] below); and
- (c) other conditions can be imposed in relation to the remaining issues which were the subject of little (if any) comment, evidence or submissions during the hearing of the present application.

Pedestrian pathway between proposed childcare centre and Neighbourhood Oval car park

269. As noted earlier, it is expected that employees of the proposed childcare centre will park their vehicles in the Neighbourhood Oval car park. Any employee doing so would have to traverse an area of land between the northern corner of the subject site and the car park.

270. Mr Shoobridge calculated that if all 17 car park spaces needed by childcare centre staff were nearest the subject site on both sides of the car park area, the maximum walking distance from the childcare centre to the cars would be about 35 to 40 metres.¹⁶²

271. As also noted earlier, approval of DA 201629784 included:

This application is approved with the following advisory notes. It is recommended that careful consideration be given to advisory notes prior to commencing work.

E1. Advice from EPSDD - Major Projects and transport

The applicant is advised to consider the possibility of providing increased number of bicycle parking rails and possibility of providing a pedestrian path connecting the car park within the

¹⁶² Transcript of proceedings, 19 October 2017, page 110

subject block and the car park on adjacent Block 1 Section 60 Rivett.

272. In response to Advisory Note E1, Mr Gordon designed a proposed pedestrian path from the Neighbourhood Oval car park to the subject site, through a secured gate, and then along a gentle incline by the northern side of the site to enter the building at a rear access door for staff only. There will be pool type secure fencing around the perimeter of the subject site, and that fencing will support the secure gate, which will be the same height and material as the fencing.¹⁶³
273. Mr Gordon prepared drawings in relation to the proposed pedestrian pathway¹⁶⁴ and provided a revised drawing in response to certain concerns about aspects of the design raised by the Tribunal during the course of the hearing.¹⁶⁵
274. There was much discussion during the hearing about what type of pedestrian connection would be sufficient for that purpose, and the extent to which the developer could provide such things as illumination of the pathway and of the part of the Neighbourhood Oval car park closest to the subject land. For that purpose reference was made to certain requirements of the CFZDC and the CPTEDGC.
275. First, in his written evidence,¹⁶⁶ Mr Riches referred to Criterion 12 (C12) of the CFZDC which states (in the absence of an applicable rule):

3.2 Interface

C12 Where appropriate, compatible uses of any existing buildings are integrated with new development and provide physical connections and linkages between buildings, and between buildings and public spaces.

276. In Mr Riches' opinion, the proposed pathway is consistent with the relevant rules and criteria. In particular, the proposal meets C12 because appropriate connections have been provided to the street. However, as the development is relying on spaces at the Neighbourhood Oval car park, the development should provide a safe/well-

¹⁶³ Transcript of proceedings, 19 October 2017, pages 8-9, 14

¹⁶⁴ See Exhibit 4

¹⁶⁵ Exhibit 21

¹⁶⁶ Exhibit 11

lit pedestrian connection for employee parking. That could be addressed as a condition of approval.¹⁶⁷

277. Mr Riches agreed that the proposed pathway would provide the shortest, most direct form of access to that car park from the rear of the proposed building on the subject site, and that it is one solution.¹⁶⁸

278. Mr Shoobridge noted that the Neighbourhood Oval car park is unlit, which raises safety issues. Although he made suggestions about options for providing adequate lighting of the car park and the area between the car park and the subject site,¹⁶⁹ he noted that only some staff of the proposed childcare centre would be there after daylight hours (e.g. after 5:00pm in winter months) and they would be likely to use the Neighbourhood Centre car park, at least at those times of the year.¹⁷⁰

279. In his oral evidence, Mr Riches observed that, in concept, Mr Shoobridge's suggestion that the end of the Neighbourhood Oval car park nearest the subject land be floodlit is a good idea. However, although that would improve the lighting of that area:

- (a) the lessee would control the lighting and there would be questions about how the lighting would be set to operate after the childcare centre ceased after 6:00pm each day;
- (b) the lighting would have to meet the relevant Australian Standard so that it was not obtrusive; and
- (c) the lighting would have to be at an angle that would not blind someone walking toward the building.¹⁷¹

280. The draft condition that Mr Riches suggested¹⁷² would leave it to the project proponent to provide a solution to the lighting problem.¹⁷³

¹⁶⁷ Exhibit 11, paragraphs [34] – [37]

¹⁶⁸ Transcript of proceedings, 20 October 2017, page 19

¹⁶⁹ Transcript of proceedings, 19 October 2017 pages 85, 111

¹⁷⁰ Transcript of proceedings, 19 October 2017, pages 84-88

¹⁷¹ Transcript of proceedings, 20 October 2017, pages 11-12

¹⁷² A plan showing “a pedestrian connection from the site to the Rivett oval (1/60 Rivett Place) with adequate lighting, access and sightliness” (Exhibit 12)

¹⁷³ Transcript of proceedings, 20 October 2017, pages 11, 13

281. Second, the CPTEDGC applies to most developments across all zones in the ACT. It outlines specific requirements which particular type of development, such as childcare centres, are required to meet.¹⁷⁴ Its purpose is to provide more explicit direction than is otherwise available in Development Codes to ensure that issues of community safety are adequately addressed in decision-making for land use and development activities.

282. One of the 4 key principles of crime prevention through environmental design is ‘natural surveillance.’ This is intended to limit the opportunity for crime by designing spaces and buildings that foster human activity and interaction as well as overlooking of the environment. Included in the designs are such features as:

- (b) clear, direct paths that encourage pedestrian movement through spaces; and
- (c) obvious building entry points, clearly visible from the street and/or pedestrian spaces.

283. In the absence of applicable rules, 3 criteria apply to pedestrian routes, bicycle paths and lanes:

C23 Pedestrian Routes, Bicycle Paths and Lanes are designed to maximise opportunities for natural surveillance by:

- a) maintaining sightlines¹⁷⁵ along paths between destination points*
- b) allowing overlooking from adjacent areas*

C24 Provide direct access routes to buildings streets, car parks and public transport. Signs should be used to assist pedestrians where it is not possible to establish clear sightlines between destinations.

C25 Security of pedestrian routes, bicycle paths and lanes are provided by:

- a) selecting and lighting ‘safe routes’ to the standard required for pedestrian areas so that these become the focus of legitimate movement after dark;*
- b) ensuring that laneways have more than one entrance to avoid ‘dead ends’ and entrapment spots, where possible.*

284. Mr Gordon gave evidence in relation to those 3 criteria:

¹⁷⁴ See CPTEDGC Table 1

¹⁷⁵ “Sightlines” are defined as “lines of clear physical uninterrupted sight”

- (a) C23 – the plan provided for ‘natural surveillance’ including by sightlines because the view of the pathway will be unobstructed by buildings or vegetation and there will be good surveillance from the Neighbourhood Oval car park and from the childcare centre;
- (b) C24 – the path will be clearly signposted and marked as site access for staff only to the childcare centre;
- (c) C25 – lights will be provided for the full length of the path within the subject site and, if possible, an additional light will be placed at the end of the footpath to illuminate that part of the path and some of the Neighbourhood Oval car park without glare to surrounding properties. So far as Mr Gordon was aware, there would be no ‘dead ends’ or entrapment spots on the pathway.¹⁷⁶

285. Mr Riches’ written evidence was that the proposed development is consistent with the relevant rules and criteria in the CPTEDGC. However, he referred to some criteria and one rule which, he suggested, might be satisfied by the imposition of conditions on the approval of the proposed development.

286. Criterion 10 (C10) states that a schedule of lighting be provided showing that lighting complies with each of the specified Australian Standards including AS 4282 – *The Control of Obtrusive Effects of Outdoor Lighting*, in the case of security lighting. According to Mr Riches, C10 applies to public pedestrian paths to the Neighbourhood Oval car park and how the car park is lit, as well as areas inside the boundaries of the subject site such as all outdoor areas and a building where the public visits.¹⁷⁷ In relation to C10, Mr Riches suggested that there be a condition to ensure that lighting is installed in accordance with AS 4282.¹⁷⁸

287. Criterion 11 (C11) states that legitimate users and activities at night are encouraged by lighting that is spaced evenly and consistently, reduces the casting of shadows that could hide intruders, lights building entries and exterior to interior spaces to allow for surveillance. Mr Riches suggested that, if formal access is to be provided

¹⁷⁶ Transcript of proceedings, 19 October 2017, pages 10-11, 14-15, 20,21, 25

¹⁷⁷ Transcript of proceedings, 20 October 2017, pages 22-23

¹⁷⁸ Exhibit 11, paragraph 68

to the Neighbourhood Oval car park, additional on-site lighting should be provided.¹⁷⁹ He also agreed that if employees are encouraged to use the Neighbourhood Oval car park, some of that car park will need to be lit.¹⁸⁰

288. Mr Gordon stated that the proponent would need to discuss with TCCS (formerly TAMS) whether lighting as proposed could be placed on Territory land. He confirmed that any lighting in the Neighbourhood Oval car park would have to comply with the relevant Australian Standards listed in C10, and agreed that it is possible that TCCS would require more lighting for that area than is shown in the plan, while ensuring that the lighting does not cause adverse effects to the nearby aged care facility.¹⁸¹

289. Mr Riches also referred to Rule 14, a mandatory requirement that all directional signage will comply with the requirements of AS 1742.10 (1991) *Manual of Uniform Traffic Control Devices – Pedestrian Control and Protection*. He suggested that a condition could ensure that directional signage is constructed accordingly.¹⁸²

290. Mr Riches noted that criteria C17 to C21 require a passive interface between buildings and the public realm to ensure natural surveillance, safe access and sightlines are provided. He suggested that the fact that the proposal is relying on the Neighbourhood Oval car park for employees reiterates the benefits of a connection to ensure that the best interface is provided.¹⁸³

291. Mr Riches gave oral evidence that the section of the pathway over public land meets the terms of C23 (including sightlines and overlooking from the proposed building) and that, for the purpose of meeting C25, the security and safety of that part of the pathway is achieved through lighting.¹⁸⁴

292. Mr Riches agreed that the proposed lighting at the corner and along the side of the proposed building to the point where the proposed footpath enters the building, as

¹⁷⁹ Exhibit 11, paragraph 70

¹⁸⁰ Transcript of proceedings, 20 October 2017, page 23

¹⁸¹ Transcript of proceedings, 19 October 2017, page 21-...25

¹⁸² Exhibit 11, paragraph 71

¹⁸³ Exhibit 11, paragraphs 73, 74

¹⁸⁴ Transcript of proceedings, 20 October 2017, page 20

well as lights along the fence, with additional lighting (for example from the corner of the building directed to the car park or a light at the car park end of the footpath) together constituted one option that might meet his proposed condition, as long as it complied with the relevant Australian Standard.¹⁸⁵

293. Mr Riches suggested that the effect of deciduous trees on the efficiency of the lighting proposed by Mr Shoobridge would depend on the location of the light, for example on a pole inside the fence on the north corner of the subject site.¹⁸⁶
294. As noted earlier, the Tribunal raised some code compliance issues about sightlines and other safety matters in the area of the security gate, given the elevation of the site at that point and a proposed wall.¹⁸⁷ In response, additional drawings were prepared and considered.¹⁸⁸

Noah's Ark's submissions

295. The submissions of Noah's Ark¹⁸⁹ concentrated on the number and location of off-site car park spaces that might be required if the proposed development were to proceed. As noted earlier, the submission was that the potential demand for parking on the Neighbourhood Oval car park might far exceed the notional (or actual) number of spaces in that car park.

Nikdia Hume's submissions

296. Rather than make detailed submissions in relation to the design features of the proposed pedestrian pathway, Nikdia Hume referred to broader aspects and implications of this component of the proposed project.¹⁹⁰ First, there are questions about the number and location of the required off-site car parking spaces. The answers are indeterminate and the issues are not easily dealt with by conditions because the intersection and interaction of matters means they have flow-on effects elsewhere. Nikdia Hume submitted that the questions of parking and community safety are entwined. The proposal that employees of the childcare centre park at

¹⁸⁵ Transcript of proceedings, 20 October 2017, page 21

¹⁸⁶ Transcript of proceedings, 20 October 2017, page 68

¹⁸⁷ Transcript of proceedings, 20 October 2017, page 76-80. See T-documents, page 422

¹⁸⁸ Exhibit 21

¹⁸⁹ Transcript of proceedings, 1 November 2017, pages 16-24

¹⁹⁰ Transcript of proceedings, 1 November 2017, pages 26, 36

the Neighbourhood Oval car park gives rise to the suggested pathway. The suggested pathway raises safety issues.

297. Second, Nikdia Hume criticised the plan of the proposed pedestrian pathway provided at the end of the hearing¹⁹¹ for not having the effect of exposing someone hiding in the shadows.
298. However, senior counsel for Nikdia Hume submitted that the Tribunal could impose conditions on the approval of the proposed development that required Fedem to do things outside the boundaries of the subject site so long as the conditions have a rational connection to the proposed development. However, if the developer was unable to satisfy a condition (for example, because TCCS would not erect the required parking signs stipulating time limits) then the development could not go ahead. Consequently, he submitted, if the evidence is that an authority such as TCCS is not interested in doing what might be required, the Tribunal would be effectively refusing the proposed development if it imposed such a condition.¹⁹²

Fedem's submissions

299. Counsel for Fedem observed that in the initial decision there was no condition, only an advisory note, in relation to providing a pedestrian path connecting between the subject site and the Neighbourhood Oval car park.
300. Counsel for Fedem submitted that the drawing in relation to the pedestrian pathway, provided by Mr Gordon and submitted on the final day of hearing¹⁹³ addresses the relevant proposed condition or at least shows that a solution is available.¹⁹⁴
301. The drawing shows an angling away of the retaining wall so that a much larger space than previously is provided, to give a greater range of visibility through that area. In Fedem's submission, the design provides no entrapment areas, there are no impeded sightlines, natural surveillance is achieved, and there is entry to the subject site via a locked gate. The developer has proposed additional lighting to

¹⁹¹ Exhibit 21

¹⁹² Transcript of proceedings, 1 November 2017, pages 38-39

¹⁹³ Exhibit 21

¹⁹⁴ Transcript of proceedings, 1 November 2017, pages 2, 3, 43, 56-57

the extent that it can on the subject site. In particular, some lighting on the corner of the subject site could project towards the Neighbourhood Oval car park, and would be sufficient for the pathway even if the developer could not put a light on Territory land.

302. Fedem submitted that the drawing demonstrates one way in which the concerns about aspects of the pathway can be ameliorated, and would satisfy a condition of the type proposed by the Authority that Fedem provide a plan showing “a pedestrian connection from the site to the Rivett Oval... with adequate lighting, access and sightlines.”
303. There might be a question about the extent, if any, to which there should be a condition requiring Fedem to direct lighting on Territory land, in particular near the end of the Neighbourhood Oval car park closest to the subject site. Criteria C10 and C11 of the CPTEDGC, summarised above, are relevant here.¹⁹⁵
304. Fedem contended that any inconsistency between DA 201629784 and the CPTEDGC could be address by the following condition at A2 of the Development Approval:

(b) Drawings/plans reflecting the provision of a pedestrian path connecting the subject site and the car park on the adjacent Block 1 Section 60 Rivett with appropriate lighting and security shown.

The Authority’s submissions

305. The Authority submitted that the proposed condition about the lighting of the rear entrance to the proposed childcare centre and for the provision of sightlines could be addressed by the plans provided by Mr Gordon to the Tribunal.¹⁹⁶ As Mr Shoobridge suggested, lighting could illuminate the path and throw light on to the part of the Neighbourhood Oval car park nearest to the subject land.
306. The Authority submitted that the suggestion that the proposed additional lighting could interfere with the aged care facility has no substance. There was no evidence about the nature or time of use of any part of that facility. In any event, Mr Riches’

¹⁹⁵ Transcript of proceedings, 1 November 2017, pages 58-59

¹⁹⁶ Transcript of proceedings, 1 November 2017, pages 71-72; Exhibit 21

conditions would require the lighting to comply with the relevant Australian Standard (AS 4282 – *The Control of Obtrusive Effect of Outdoor Lighting*).

307. With respect to C10 of the CPTEDGC, the Authority submitted that the standards do not necessarily relate only to the public realm. In particular:
- (a) there might be works on the site of a development which require the application of those standards (for example, the standard for lighting of pedestrian areas and roads on the development site); and
 - (b) the requirement that lighting not have an obtrusive effect going out into the public realm could apply to lighting on site.
308. There might also be requirements for lighting to be placed on public land, and to relocate a path onto public land (as in this case). Such works would be subject to approval by the TCCS, which would insist on the standards being complied with for those works in any event.

Consideration and conclusion

309. The possibility and desirability of a pedestrian path from the subject site to the Neighbourhood Oval car park was identified relatively late in the development application process by way of an advisory note on the decision to approve DA 201629784. In response, Fedem's architect prepared detailed plans for a practical solution which is the shortest and potentially most secure route between the 2 locations, and one which has good sightlines and the potential for adequate illumination.¹⁹⁷
310. The parties and the Tribunal accept that the design needs to comply with relevant provisions of the CFZDC and the CTEDGC.
311. The draft condition proposed by Mr Riches, that Fedem provide revised plans and drawings showing "a pedestrian connection from the site to the Rivett oval (1/60 Rivett) with adequate lighting, access and sightlines" is appropriate for this purpose. We note that the developer might need to provide some lighting on or immediately adjacent to the Neighbourhood Oval car park. That lighting and other

¹⁹⁷ Exhibit 4

lighting associated with the pedestrian pathway would need to meet Australian Standards. In making those observations, we do not have any concerns that the condition would be onerous or that it might operate as a de facto barrier to the proposed development on the subject land going ahead.

312. The refinements to the initial design, made to meet concerns raised by the Tribunal during the hearing,¹⁹⁸ demonstrate that Fedem can satisfy that condition. That design might need some minor refinement, and an assessment will need to be made of whether the lighting meets the relevant Australian Standard. However, the Tribunal is satisfied, having regard to the design work undertaken to date and the few issues that remain, that the condition will be met.
313. The Tribunal also notes that, although the provision of a pedestrian pathway is a significant improvement to the overall design of the proposed development on the subject land, those who scrutinise the revised plans and drawings should bear in mind that:
- (a) the pathway will be used by relatively few people on few occasions each weekday;
 - (b) not all of those people will be using the pathway in late afternoon or early evening;
 - (c) the pathway will need illumination for those few users for a few hours during a few months each year.
314. Consequently, while the designs might need some refinement to comply with the condition, the resources devoted to this part of the project and the assessment of it should be proportionate to its potential use and significance to the overall development.

¹⁹⁸ Exhibit 21

Operation of section 120 of the *Planning and Development Act 2007*

315. Another issue in this case was the extent to which section 120 of the P&D Act has implications for the Tribunal’s decision whether to approve the proposed development.¹⁹⁹

316. Section 120 provides:

120 Merit track—considerations when deciding development approval

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

- (a) *the objectives for the zone in which the development is proposed to take place;*
- (b) *the suitability of the land where the development is proposed to take place for a development of the kind proposed;*
- (c) *if an environmental significance opinion is in force for the development proposal—the environmental significance opinion;*

Note **Environmental significance opinion**—see s 138AA.

Environmental significance opinions expire 18 months after they are notified (see s 138AD).

- (d) *each representation received by the authority in relation to the application that has not been withdrawn;*
- (e) *if an entity gave advice on the application in accordance with section 149 (Requirement to give advice in relation to development applications)—the entity’s advice;*

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

- (f) *if the proposed development relates to land that is public land—the public land management plan for the land;*
- (g) *the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.*

317. The significance of the statement in the opening of section 120 that the decision-maker (the Authority and now the Tribunal) ‘must consider’ specified things, including the objectives for the relevant zone, was considered by the ACT Court of Appeal in *Baptist Community Services v ACT Planning and Land Authority and*

¹⁹⁹ See also discussion of the operation of section 121 of the P&D Act at [13]-[34]

*Ors*²⁰⁰ (*Baptist Community Services*). The Court of Appeal rejected²⁰¹ the arguments that:

- (a) if a development proposal in the merit track complies with the applicable code (as interpreted by reference to zone objectives), then it must be approved;²⁰² and
- (b) inconsistency with the zone objectives requires refusal of development approval.²⁰³

318. The Court concluded that the only meaningful way to interpret section 120 is to do so according to its terms, so that it gives a discretion to approve or reject a proposal that is code compliant. Such discretion is exercisable only after considering the matters set out in section 120, to the extent that they are relevant.²⁰⁴

319. In this case, the parties' submissions focussed on section 120(a), (b) and (g).

Submissions in relation to section 120(a)

320. For the purpose of section 120(a), the relevant objectives of the CFZ are:

- (a) *To facilitate social sustainability and inclusion through providing accessible sites for key government and non-government facilities and services for individuals, families and communities.*
- (b) *To provide accessible sites for civic life and allow community organisations to meet the needs of the Territory's various forms of community.*
- (c) *To protect these social and community uses from competition from other uses.*

321. The issue here is whether the operation of a commercial childcare centre on the subject site would be consistent with these zone objectives.

322. Focussing on section 120(a) of the P&D Act, Nikdia Hume submitted that, because this is a matter of discretionary judgment, there will be cases in which, despite failure to meet zone objectives, a proposed development will be approved. In other cases, failure to meet the zone objectives will be a reason to refuse a development.

²⁰⁰ *Baptist Community Services v ACT Planning and Land Authority and Ors* [2015] ACTCA 3

²⁰¹ *Baptist Community Services* at [58] per Refshauge and Penfold JJ, [79] Burns J

²⁰² *Baptist Community Services* at [21]-[36] per Refshauge and Penfold JJ, [79] Burns J

²⁰³ *Baptist Community Services* at [37]-[57] per Refshauge and Penfold JJ, [79] Burns J

²⁰⁴ *Baptist Community Services* at [59] per Refshauge and Penfold JJ, [79] Burns J

Each case will turn on its facts, including the wording of the relevant zone objective. Some zone objectives are put at a high level of generality, while others are more specific.²⁰⁵ But the zone objectives should be considered in each case, and in some cases lack of compliance with them could be used as a reason for refusing a DA.²⁰⁶

323. On the basis that the Tribunal must have regard to the zone objectives, Nikdia Hume submitted in respect of the CFZ objectives:

- (a) a relatively small part of the urban area of the ACT is within the CFZ and few, if any, remaining areas are available in the areas of Canberra, and only a few (about 6) across the Weston Creek area (see areas marked in yellow on maps in Exhibit 14);²⁰⁷
- (b) against that backdrop, the Tribunal needs to look at how zone objective (c) is applied in this case, particularly in light of zone objective (b);
- (c) although child care is a permitted use in CFZ land, the proposed development is for a commercial childcare centre and not of the same type as a community organisation meeting the need of the Territory's various forms of community;
- (d) zone objective (c) is to protect use by community organisations against competition from other uses; and
- (e) in this case, organisations are being protected against commercial operations²⁰⁸ and the limited supply of land is being protected against other uses that might impinge on the available supply over time.²⁰⁹

324. Nikdia Hume made very specific submissions about the meaning and application of objectives (a) to (c) in this case. Starting with objective (c):

- (c) *To protect **these** social and community uses from competition from other uses (emphasis added)*

²⁰⁵ Transcript of proceedings, 1 November 2018, page 30

²⁰⁶ Transcript of proceedings, 1 November 2018, pages 31-32

²⁰⁷ Transcript of proceedings, 1 November 2018, page 32

²⁰⁸ Transcript of proceedings, 1 November 2017, page 32

²⁰⁹ Transcript of proceedings, 1 November 2017, page 34

senior counsel submitted that, ‘these’ is the plural of ‘this’, and ‘this’ means (among other things) a thought or idea that has just been mentioned. Accordingly, the reference in objective (c) to ‘these...uses’ is a reference to the social and community uses mentioned in objective (b), which states:

(b) To provide accessible sites for civic life and allow community organisations to meet the needs of the Territory’s various forms of community.

He submitted that allowing community organisations to meet the needs of the Territory’s community is among the social and community uses referred to in (c).

325. Senior counsel for Nikdia Hume noted, in respect of objective (c), that although ‘community use’ is defined, ‘social’ is not. Objective (c) seems to be protecting ‘these’ uses from competition from other uses. In that context, ‘these...uses’ are the ones referred to in objective (a) and objective (b), which refers to community organisations.²¹⁰

326. Objective (c) also refers to the more general statement in the first objective:

(a) To facilitate social sustainability and inclusion through providing accessible sites for key government and non-government facilities and services for individuals, families and communities.

327. Senior counsel for Nikdia Hume observed that childcare centres are also permitted in other zones. Although the demand for child care has increased in recent years, that demand can be met elsewhere. Hence commercial developers do not need CFZ land in order to operate. He urged the Tribunal to consider whether it is desirable to have 3 childcare centres within 100 metres of each other where the third of them (the proposed development) would take up valuable CFZ land that might, in due course, be necessary for other important uses from community organisations.²¹¹

328. That submission was not predicated on there being another currently competing use for the subject site. Rather, it was put on the basis that the Tribunal should consider whether other uses might be identified in the future. More specifically, in 5 or 10 years’ time, there might be other community organisations that need land

²¹⁰ Transcript of proceedings, 1 November 2017, pages 88-89

²¹¹ Transcript of proceedings, 1 November 2017, page 33

for their operations. This is an exercise that senior counsel described as involving “a certain amount of crystal ball gazing.”²¹²

329. Noah’s Ark also submitted that the word ‘competition’ used in objective (c) refers to competition from other uses. In this case, objective (c) aims to protect the ability of community organisations to meet the needs of the Territory’s various forms of community from other uses to which the land might be put. In other words, the objective suggests some form of quarantining or protection of land that would be suitable for other things from being available for those other uses. It follows that the ‘competition’ referred to in objective (c) need not be competition in commercial terms.
330. The Authority referred to the of oral evidence of Mr Riches, who agreed that a childcare centre is a non-government facility providing services for individuals and families of a type referred to in objective (a).²¹³ He described objective (a) as providing sites that are accessible to people who use them (for example, because they have a physical disability) rather than ensuring that what is brought into existence remains nurtured and is able to continue to do that job.²¹⁴
331. Mr Riches expressed the view that objective (c) refers to other uses taking up land, not competition from one business to another.²¹⁵ He interpreted the ‘other uses’ objective as meaning that these sorts of uses do not start to take over valuable community facility land.²¹⁶ Where a community use is proposed for community facility land, and it complies with the Territory Plan, the Authority would approve it.²¹⁷ The Authority does not have preferences for particular uses of such land but would have to consider the zone objective if 2 uses of the same land were proposed.

²¹² Transcript of proceedings, 1 November 2017, page 34

²¹³ Transcript of proceedings, 20 October 2017, page 81

²¹⁴ Transcript of proceedings, 20 October 2017, page 67

²¹⁵ Transcript of proceedings, 20 October 2017, page 31

²¹⁶ Transcript of proceedings, 20 October 2017, page 32

²¹⁷ Transcript of proceedings, 20 October 2017, pages 37, 50

332. Counsel for the Authority submitted that the proposed development satisfies section 120(a) because it promotes the objectives of the CFZ. He noted that ‘community use’ is defined in the Plan to include ‘child care centre.’
333. The Authority also submitted that when objective (c) refers to competition from ‘other uses,’ those other uses must be uses other than social uses and community uses, such as childcare centres. Protection is provided against uses such as commercial use which might otherwise be the higher and better use of the land. The proposed development is for a community use which is protected by the objective.²¹⁸ Section 120 does not authorise the protection of a monopoly or duopoly on long-stay childcare in the Rivett locality, in order to maintain the profitability of that part of its business operation.
334. The Authority submitted that (contrary to the argument advanced by Nikdia Hume) the Tribunal should not reject the proposed development in order to keep the subject site vacant for some future use because the community might run out of community land.²¹⁹
335. The CFZ provides the land for community facilities across Canberra, but the Territory Plan does not require that each locality must have every kind of community facility. Considered as a zone, there is no planning reason why one locality might not have a cluster of one kind of community use (such as childcare centres), and the next locality might have another (such as sporting clubs). The zones across the ACT (which are determined at a policy planning level anterior to individual DA decisions) provide the mechanism to ensure sufficient community facility land and others owned land is available for the needs of the ACT. Each DA is assessed accordingly. However, each particular DA cannot be expected to address the question how many childcare centres (or other community facilities) are appropriate for a particular locality. Once the land is developed, it is fixed in that use until the development reaches the end of its economic life or other changes cause the land to be redeveloped. The Territory Plan must have contemplated that outcome.

²¹⁸ Transcript of proceedings, 1 November 2017, pages 77-78

²¹⁹ Transcript of proceedings, 1 November 2017, page 82

336. In the Authority's submission, it cannot be supposed that the Territory Plan intended that each locality would retain indefinitely some unused vacant CFZ land. It would be extraordinary if an application for a community use which is to be protected and meets objectives (a) to (c) would be refused in order to preserve the land for some unspecified future use.
337. The Authority noted that, in the present case, the subject site has been vacant for about 45 years since the development of Rivett in the early 1970s. In any event, there will remain some unused CFZ land if the proposed development of the subject site proceeds.²²⁰
338. Fedem submitted²²¹ that section 120 requires a balancing exercise to be undertaken. No one consideration listed in section 120 prevails over another. There might also be circumstances where no particular zone objective prevails over another. Zone objectives apply to all sites with that zoning and might point in different directions in the case of a particular development. In that context, the Tribunal needs to look at the full picture. All zone objectives are relevant.
339. On that basis, Fedem submitted that it is difficult to reconcile why one zone objective should be applied to a site or exclusively in relation to the present submission.
340. The zone objective offers protection to which Fedem's DA must adhere. The retention of the CFZ sites for social and community uses is paramount. Where, as in this case, approval is sought for a development that is a community use, objective (c) is satisfied. The approved development operates as a protection against pressure to use CFZ sites for 'other uses.'
341. Zone objective (c) is not to protect the CFZ sites from other enterprises or from other guaranteed income from other enterprises. The proposed childcare centre on the subject land will not deprive the Neighbourhood Centre of a particular service. It just means that there is more variety in relation to a particular service.

²²⁰ For example, Block 11 Section 28, part of Block 8 Section 29 Rivett

²²¹ Transcript of proceedings, 1 November 2017, page 62-64

342. The proposed use is for a purpose that is consistent with the zoning and consistent with the Crown lease purpose clause. Within those parameters, and in the knowledge that there are other similar commercial enterprises nearby, the Crown lessee should be entitled to decide the use to which it puts its own site.
343. Fedem submitted that this is not a case about who has a better claim to develop a childcare centre in the area, and there is no basis to reject it under any of the criteria or considerations in section 120.
344. The issue is not whether the subject site should be preserved for some other use (as Nikdia Hume submitted) because there does not need to be a childcare centre there. The point is that the subject site can be used for that purpose. The Crown lease sets out the purposes to which the site might be put, and the Crown lessee can elect to which of those their land is put.

Submissions in relation to section 120(b)

345. Although Nikdia Hume's submissions were made by reference to section 120(a) (zone objectives), senior counsel for Nikdia Hume observed that they would also be advanced in relation to section 120(b) (whether the subject site is suitable for a development of the type proposed). He acknowledged that the subject site is suitable in the sense that a development that complies with the development code can be put there. However, he questioned whether it is suitable given that:
- (a) such a development could go on a variety of blocks, other than CFZ land, across Canberra; and
 - (b) it would accommodate a third childcare centre within 100 metres of 2 others near the Neighbourhood Centre.²²²
346. In addition, he stated the submissions could be made by reference to section 120(g) (the probable impact of the proposed development).
347. Whichever paragraph or paragraphs of section 120 apply, they are matters which the Tribunal must consider.²²³

²²² Transcript of proceedings, 1 November 2017, page 35

²²³ Transcript of proceedings, 1 November 2017, page 35

Submissions in relation to section 120(g)

348. Counsel for Noah's Ark focussed his submissions on section 120(g).²²⁴ He urged a construction of that section that had regard to Part A3 (principally sections 9.1, 9.2 and 9.3) of the Territory Plan 2002 which preceded the current Territory Plan. In those previous sections, he submitted, were the echo of section 120 which starts with the objectives, moves to the suitability of the site and concludes with probable impact of the proposed development. He noted that the *Land (Planning and Environment) Act 1991* which preceded the P&D Act, did not have an equivalent of section 120. Section 9.2 of the Territory Plan 2002 performed the function of requiring the Authority to take those matters into account.
349. Counsel submitted that the difference between section 120 and the expanded version in the previous Territory Plan is the reference in section 120(g) to the "probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts." Counsel conceded that, although the definition of 'environment' includes references to social and economic effects, the definition does so in a way which does not identify social and economic effects as matters to be taken into account in their own right but only in the context of the environment.
350. However, he submitted that the drafter of section 120 sought to recognise a range of impacts, without spelling them all out in the detail included in the previous Territory Plan. The notion that the Territory would have deliberately intended to significantly truncate the range of impacts from what was listed previously is not sensible. By comparison, legislation in other jurisdictions makes it explicit that social and economic impacts are to be taken into account. On the basis that social and economic effects are explicit in the expression 'probable impact' in section 120(g), he submitted that they must be taken into account.
351. Accordingly, Noah's Ark submitted, it is appropriate for the Tribunal to take into account the fact that what is being provided by the proposed development is an increase in the choice available to those who are seeking to look to find childcare places to the point where areas "an absolute super abundance of choice" from 3

²²⁴ Transcript of proceedings, 1 November 2017, page 13-16

childcare centres in the same location. Although that might be considered “child care parents’ heaven,” there is a loss of the services that are provided to the non-mainstream section of the community. Those 2 things need to be weighed.

352. Counsel for Noah’s Ark noted the decision of the Tribunal in the previous Noah’s Ark case but submitted that in this case the balance is “significantly changed.” On the previous occasion, the Tribunal was looking at a slight oversupply of childcare services to which there would be added more childcare services, increasing the oversupply and the choice. In the present case, the Tribunal is looking at a “massive increase in supply” which can be described as “an absurd situation.” In his submission, such an increase in choice cannot be said to be of any real benefit to the community, particularly when regard is had to the “now certain loss of the non-mainstream services provided to the community.” In his submission, the balance is “radically different” and the effect would be a “very significant loss to the community.”

353. Counsel for Noah’s Ark referred to the decision in *Canberra Cruises and Tours Pty Ltd v Minister for Urban Services (Canberra Cruises)*²²⁵ in which the ACT Administrative Appeals Tribunal stated that the fact that a proposed development complies with all relevant code requirements does not mean that the DA must succeed. The Tribunal illustrated that proposition as follows:²²⁶

The planning authorities must, in dealing with applications of this kind, have regard to all appropriate planning principles. For example, the relevant planning instruments may provide that a church is a permitted use of land within a specified area (along with other categories of land use) but this does not mean every development application for a church within that area must be allowed. To do so may mean that the area would consist of nothing but churches when the applicable planning instruments contemplated a variety of land uses taking place within the area.

354. He submitted that the point being made in the *Canberra Cruises* case was not that there were too many churches but that the number of churches would start to eat into the objective of the Territory Plan to provide for a variety of uses. He submitted that, consistently with the proposition in that case, “you can have too much of a good thing if it is causing other things that you would otherwise wish to

²²⁵ *Canberra Cruises and Tours Pty Ltd v Minister for Urban Services* [1999] ACTAAT 14

²²⁶ *Canberra Cruises and Tours Pty Ltd v Minister for Urban Services* [1999] ACTAAT 14 at [49]

preserve to be put at risk.” Noah’s Ark did not seek a monopoly, but did submit that a balancing exercise be undertaken in accordance with section 120 of the P&D Act to assess whether the community is better off by having more childcare of the mainstream variety and none of the other, non-mainstream, variety.²²⁷

355. In relation to section 120(g), the Authority also referred to the decision in *Canberra Cruises* and accepted that it is conceivable that an over proliferation of some types of development could be regarded as so undesirable in its impact as to warrant refusal of the development.
356. More generally, counsel for the Authority agreed with the submission of Nikdia Hume that in the *Baptist Community Services* case the Court of Appeal affirmed that even a code compliant development might be refused for a reason arising under section 120.
357. The Authority submitted that the only way that outcome would be reached is via section 120(g) because of the probable impact of the proposed development. But that point has not been reached in Rivett. Rather, there is a variety of appropriate facilities in the area, including a church, shops, a post office, a newsagent and an aged care facility. There are 3, and might be 3, childcare centres. The point has not been reached where there is an over proliferation of childcare centres.
358. Further, the Authority submitted, the Territory Plan does not charge the Tribunal with the task of determining how many childcare centres (or bars or restaurants) there should be.²²⁸ The only qualification on that proposition might arise in the circumstances outlined in the *Canberra Cruises* decision.
359. Section 120(g) of the P&D Act provides that, in deciding a development application for a development proposal in the merit track, the decision-maker must consider the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts. Mr Riches gave written evidence²²⁹ that:

²²⁷ Transcript of proceedings, 1 November 2017, page 88

²²⁸ See *Ergas & Bird v ACT Planning and Land Authority* [2004] ACTAAT 18

²²⁹ Exhibit 11

- (a) the proposed use of the subject site is an assessable use under the zones development table;
- (b) the proposed use is an authorised use under the Crown lease;²³⁰ and
- (c) DA 201629784 would be consistent with section 120(g) of the P&D Act as the proposal increases social opportunities for the area and does not dilute the CFZ.

360. Mr Riches also stated that, in the review of the relevant codes (including the CFZDC), economic viability or future business capabilities are not matters raised in the Territory Plan and therefore are not matters considered under section 120(g) of the P&D Act.

361. According to Mr Riches, when it is determining development applications, the Authority does not consider the specifics of each business that is a permitted use, such as the mix of specific products or services they may offer. The Territory Plan and the P&D Act do not include any provisions in relation to protection from competing businesses.²³¹

362. Mr Riches gave clear oral evidence that the Authority assesses proposed developments by reference to the relevant planning instruments but does not consider the commercial viability of the proposed development or competition between commercial entities. He said:

*That's something we leave alone as how people run their own business. We do not consider any business cases or anything as part of a development application.*²³²

He continued, “the rules relate to physical aspects of a development” and “there’s nothing in there [the Territory Plan] that talks about competition.”²³³ If the Authority assessed a proposal by reference to the codes in the Territory Plan “then we would approve it... there’s no option but to approve it.”²³⁴

²³⁰ The Crown lease permits uses for one or more specified purposes including “childcare centre” provided that these uses may only be conducted by a not-for-profit organisation

²³¹ Exhibit 11, paragraph 80

²³² Transcript of proceedings, 20 October 2017, page 51

²³³ Transcript of proceedings, 20 October 2017, pages 51, 52

²³⁴ Transcript of proceedings, 20 October 2017, page 52

363. However, Mr Riches acknowledged that, in light of the Court of Appeal's decision in *Baptist Community Services*, and the operation of section 120 of the P&D Act, the fact that a proposed development is code-compliant does not guarantee that it will be approved. A development application might be refused approval after the Authority has considered the matters in section 120,²³⁵ for example, if the development did not meet the intent of the rule or criterion.²³⁶
364. In its written submissions, Fedem contended that the Tribunal should exercise some caution before refusing a development under section 120. Where the P&D Act or the Territory Plan has dealt with a subject in a limited way, those limitation should ordinarily be respected. A limitation should not be rendered ineffective by the ready application of the discretion under section 120, particularly where, as in this case, a DA does not offend any applicable code. The fact that a party does not like the Authority's decision should not result in the circumvention of the legislative scheme by the application of section 120.
365. Fedem submitted that the Tribunal's fundamental task is to determine whether a development is consistent with the requirements of the P&D Act and the Territory Plan. A development is entitled to be approved if it meets those requirements. It is not the Tribunal's task to determine whether the development might have been undertaken in another location, or might have been undertaken in a different or better way. A development that meets the planning requirements cannot be refused because somebody thinks that it might have been done better or elsewhere.
366. Further, the mere fact that a party's economic prospects may be lessened by the proposed development is not of itself a relevant planning consideration. It might be a relevant planning consideration if the introduction of one enterprise may result in the destruction of other enterprises, depriving the community of services and facilities. But the mere reduction in entrepreneurs' incomes or profitability is not a relevant planning consideration. In this case there has been no allegation or evidence upon which any rational finding could be made that Noah's

²³⁵ See also Exhibit 11, paragraph 23 ff

²³⁶ Transcript of proceedings, 20 October 2017, page 59, 60, 61

Ark will cease to operate because of DA 201629784 or that the community will be entirely deprived of a service or facility.

Consideration and conclusion

367. The focus of submissions in this case was on section 120(a) and (g), with some reference to section 120(b). They are the relevant paragraphs for the purpose of the present application.
368. Section 120(a) requires the decision-maker to consider “the objectives for the zone in which the development is proposed to take place.”
369. In *Baptist Community Services*, the Court of Appeal held that the zone objectives are relevant in interpreting a code (and thereby assessing compliance with it), and that inconsistency with a zone objective does not mandate rejection of a development proposal. The Court also considered that consistency with the zone objectives is properly considered in the exercise of the section 120 discretion to approve a development in the merit track, and that inconsistency with zone objectives may also provide a basis for discretionary rejection of a code-compliant development.²³⁷
370. In this case, the relevant zone objectives are objectives (a) to (c) of the CFZ, quoted at [320] above.
371. Objective (c) is to “protect these social and community uses from competition from other uses.” The ordinary English meaning of ‘these’ (the plural of ‘this’), as defined in the 7th edition of the *Macquarie Dictionary*, includes “used to indicate a ... thing, idea, etc., as pointed out, present, or near, as before mentioned all supposed to be understood.”
372. Starting with that definition, and on the basis that ‘these social and community uses’ in objective (c) refers to ‘social and community uses’ referred to in objectives (a) and (b), the question becomes: What is covered by that phrase?

²³⁷ *Baptist Community Services* 3 at [63] per Refshauge and Penfold JJ, [79] Burns J

373. Neither objective (a) nor objective (b) refers expressly to a use or uses. Rather they refer respectively to the provision of accessible sites:

- for key government and non-government facilities and services for individuals, families and communities;
- for civic life;
- to allow community organisations to meet the needs of the Territory's various forms of community.

374. The language used in objectives (a) and (b) provides no direct correlation between what is described there and the 'social and community uses' referred to in objective (c). Rather, objective (c) seems to proceed on the basis that objectives (a) and/or (b) contemplate the use of CFZ land for social and community uses. Accordingly, it is likely that the community uses to which land might be put include meeting the needs of one or more of the Territory's forms of community. Given that 'community use' is defined in the Territory Plan, it is appropriate to refer to that definition, which includes 'childcare centre.'

375. We have reached the following 3 other conclusions about the meaning and operation of objective (c). First, objective (c) draws a distinction between the relevant 'social and community uses' and 'other uses' in order to protect the former from competition from the latter. That distinction is between 'uses', not between categories of persons or organisations who provide the facilities and services so that the land can be put to one or more of the protected uses.

376. Second, although objective (b) refers to allowing community organisations to meet the needs of the Territory's various forms of community, that does not indicate (let alone prescribe) that only organisations of that type can provide facilities and services on CFZ land. Commercial entities or community organisations, or both, could provide non-government facilities and services for individuals and families on CFZ land. Consequently, objective (c) does not, in its terms, protect community organisations from competition from commercial operators who use (or seek development approval to use) CFZ land for a defined community use.

377. Third, objective (c) does not operate to preclude a particular form of development on CFZ land merely because there is or could be a development of the same type on differently zoned land in the district. The fact that commercial developers do not need CFZ land to operate childcare centres does not mean that they cannot use CFZ land for that purpose, particularly given that ‘child care centre’ is a specified community use. The commercial viability of doing so in an area where there is (or could be) a “super abundance” of child care spaces is not a code compliance issue.
378. Having considered the evidence in relation to the proposed development on the subject site, and the potential and expected implications of that development for the current uses of neighbouring land, we have concluded, by reference to the relevant objectives of the CFZ that:
- (a) social sustainability and inclusion would be facilitated through providing the subject site (which is readily accessible) for development as a non-government childcare centre which will provide services for individuals and families;
 - (b) the use of the subject site for a childcare centre would be to use it for a community use of a type expressly contemplated for land in this zone and would, in effect, protect that use from ‘other uses.’
379. The subject site is suitable for a development of the kind proposed, and is not rendered unsuitable merely because the proposed development might be done on another block of land that is not CFZ land or because there are 2 other childcare centres within 100 metres of the subject site.
380. If, as we have concluded, the proposed development is not inconsistent with the CFZ objectives and the subject site is suitable for development as a childcare centre, the question becomes whether the Tribunal should exercise its discretion (as described in the *Baptist Community Services* case) to disallow development approval.
381. We are not persuaded that section 120(g) provides the basis for not approving DA 201629784. In response to the submission advanced by Noah’s Ark, we note that the probable impact of the proposed development does not include environmental

impacts of the type referred to in the definition of ‘environment’ in the Dictionary of the P&D Act. Nor does it necessarily follow that section 120(g) should be read as covering the complete range of matters referred to previously under the Territory Plan 2002. There is no explicit adoption or incorporation by reference of the detail in clauses 9.1, 9.2 and 9.3 of the previous Territory Plan. However, that is not necessary for the submission by Noah’s Ark to be sustained. The expression ‘probable impact’ is broad. The reference to ‘probable environmental impacts’ is simply an illustration or example of the type of ‘probable impact’ covered by section 120(g). It does not prescribe the scope of that provision.

382. The evidence about the probable impact of the proposed development for parking and associated land use on and in the vicinity of the subject site is considered in detail earlier in these reasons for decision. As those passages show, we have concluded that the off-site impact of the development can be accommodated on nearby areas of land without substantially adversely affecting access to or usage of that other land.
383. The addition of the proposed development on the subject site might lead to “childcare parents’ heaven” for families in and beyond Rivett, and might affect the profitability or even the financial viability of one or more of the 3 childcare centres in the vicinity of each other. It might result in each childcare centre developing an emphasis or focus on particular aspects of the childcare market. But these are not matters for the Tribunal to decide. Given that economic competition factors expressly do not constitute ‘material detriment’ for the purpose of giving a person standing to seek a review of a planning decision, it is appropriate to give those economic impacts little or no weight for the purpose of section 120(g).
384. The potential, if not probable, loss of the provision of some non-mainstream services by Noah’s Ark beyond the Noah’s Ark Centre Rivett would be a consequence of Noah’s Ark choosing to subsidise those services from the business of operating a childcare centre. The viability of that business is likely to be adversely affected by the proposed development on the subject site. Although the provision of the other community programs is currently linked to the financial operation of the Noah’s Ark Centre Rivett, it need not be. In other words, the 2 are not by their nature inherently linked. The other programs could be (and have been)

financed in other ways. In 2009, Noah's Ark chose to set up the centre to finance the additional services and programs. As competition increased from other centres in Rivett and neighbouring suburbs, that centre became more financially vulnerable. But, as explained earlier, that is not a reason for refusing development approval for a competitor. Nor is the choice as stark as Noah's Ark submissions suggested. As noted elsewhere (see [242]), the situation in Rivett is not that there would be none of the non-mainstream variety of childcare.

385. The diminishing amount of CFZ land in the Weston Creek area is not a reason to refuse approval of the development in this case, given that the development is consistent with the zoning objectives and Crown lease purpose clause.
386. The provision of another child care centre would not fall within the exceptional circumstances described in the *Canberra Cruises* case.
387. The proposed development complies (or can be revised to comply) with planning rules and criteria. It is consistent with the applicable code for CFZ land and the Crown lease for the subject site. We are not persuaded that countervailing considerations should result in a discretionary refusal of development approval.
388. In summary, we are satisfied that paragraphs (a), (b) and (g) of section 120 are relevant to the Tribunal's decision about DA 201629784. Having considered them, and the evidence and submissions in relation to them, we have concluded that:
 - (a) the proposed development on the subject land is consistent with the objectives of the CFZ, being the zone in which the development is proposed to take place;
 - (b) the subject land is suitable for a development of the kind proposed;
 - (c) the probable impact of the proposed development, including in relation to the traffic flow and availability of public parking spaces within 200 metres of the subject land, is not sufficiently adverse to warrant refusal of the development approval.

Conclusion and orders

389. Section 68 of the ACAT Act empowers the Tribunal to exercise any function given to the Authority for making the decision whether to approve DA 201629784. Having reviewed the Authority's decision, the Tribunal must by order:

- (a) confirm the decision; or
- (b) vary the decision; or
- (c) set aside the decision and –
 - (i) make a substitute decision; or
 - (ii) remit the matter that is the subject of the decision for reconsideration by the Authority in accordance with any direction or recommendation of the Tribunal.

390. As will be apparent from the reasons above, the Tribunal has decided to confirm the decision approving DA 201629784 but to vary the conditions on which approval was given to accord with the draft revised conditions provided to the Tribunal during the course of the hearing, as set out in Exhibit 12. These draft conditions will be revised to:

- (a) recast the condition in relation to on-site car parking to accord with the conclusion reached in these reasons for decision;
- (b) recast the condition in relation to the pedestrian path to accord with the conclusion reached in these reasons for decision;
- (c) relocate the conditions in relation to lighting, doorways and doors, and directional signage from the conditions During Construction and/or Demolition to the Administrative/Process Conditions, as Further Information to be provided at the design stage (because these matters are relevant to the life of the project not just the construction stage); and
- (d) revise the Advisory Notes to delete the reference to the possibility of providing a pedestrian path because the provision of a pedestrian path is now a condition of approval of DA 201629784

391. On that basis, the Tribunal orders as follows:

Being satisfied that Noah's Ark Resource Centre Incorporated has standing to bring the application for review of the decision to approve with conditions Development Application 201629784, the Tribunal confirms the decision to approve the Development Application but varies the conditions of approval in the terms set out at Attachment A to these reasons for decision.

.....
President G Neate AM
Delivered for and on behalf of the Tribunal

ATTACHMENT A**DA201629784****PART 1****CONDITIONS OF APPROVAL**

This application is approved subject to the following conditions being satisfied. Some conditions of approval will require attention before the approved drawings will be released, others before work commences or before the completion of building work.

A. ADMINISTRATIVE / PROCESS CONDITIONS

A1. The development must comply with all relevant entity advice.

A2. FURTHER INFORMATION

Within 28 days from the date of this decision, or within such further time as may be approved in writing by the Planning and Land Authority, the applicant shall lodge with the Planning and Land Authority for approval:

- (a) a revised site plan, landscape plan and architectural drawings, based on the relevant drawings submitted as part of the application, showing:
 - (i) the on-site car park with provision for 11 car parking spaces with the dimensions for each car parking space in accordance with the Parking and Vehicular Access General Code, including the provisions for User Class 3A and parking for people with disabilities;
 - (ii) the development consistent with the information provided, as part of this application, under s141 of the *Planning and Development Act 2007*;
 - (iii) low impact footings/tree protection measures within the Tree Protection Zone of trees T8 and T9, consistent with Transport Canberra and City Services (TCCS) requirements;
 - (iv) the proposed connection to the water main and the proposed water meter outside of the Tree Protection Zone (canopy plus 2m) and stating that the relocation of the hydrant is to be achieved with low-pressure hydro excavation (1500psi using a fan shaped nozzle) and all exposed roots are to be cut cleanly;

- (v) the site specific measures that comprehensively show how trees will be protected during development; and
- (vi) a pedestrian path from the site to the Rivett Oval car park (Block 1 Section 60 Rivett) with adequate lighting, access and sightlines - including a site plan consistent with DA03.7 Amendment 7 dated 25/09/17 (part of Exhibit 4 in AT 10/2017) and a site plan consistent with DA15.1 dated 10/25/17 (Exhibit 21 in AT 10/2017);
- (vii) all internal lighting to be installed in accordance with *AS 1680 - Interior Lighting*, and all external lighting to be installed in accordance with *AS4282 - The Control of Obtrusive Effects of Outdoor Lighting, in the case of security lighting*;
- (viii) all doorways and doors to be constructed in accordance with *AS1428.1 – Design for Access and Mobility*; and
- (ix) all directional signage to be installed in accordance with *AS1742.10 (1991) Manual of Uniform Traffic Control Devices - Pedestrian Control and protection*.

B. PRIOR TO CONSTRUCTION AND/OR DEMOLITION

B1. DESIGN ACCEPTANCE

Prior to construction, design acceptance must be obtained from the Senior Manager, Development Review and Coordination, TCCS. Design acceptance will ensure:

1. The driveway is constructed in accordance with TCCS Design Standards.
2. Existing public footpath and stormwater swale is relocated and appropriate tree protection measures are in place to the satisfaction of TCCS.
3. All excavation required to install the overland flow path and footpath is low- pressure hydro-excavation (1500psi using a fan shaped nozzle). All exposed roots are cleanly cut by arborist tools.

4. Waste Management Plan is prepared to the satisfaction of TCCS and submitted at the Design Acceptance stage.

B2. TREE PROTECTION

Tree protection fencing must be erected prior to the commencement of any work on the site. Protective fences need to be in place for the retained trees preferably to the edge of their Tree Protection Zone (TPZ), grouped where possible, or as a minimum at the edge of the dripline.

B3. VERGE MANAGEMENT

This plan is to be approved and implemented before the commencement of any work on the site, and is to be in accordance with the *City Management Guidelines for the Protection of Public Landscape Assets Adjacent to Development Works-REF-04*.

B4. TRAFFIC MANAGEMENT

A Temporary Traffic Management (TTM) Plan shall be prepared by a suitably qualified person and approved by the Manager, Traffic Management & Safety, Roads ACT, Roads and Public Transport Division, TCCS prior to commencement of any work on the site. This plan is to address, as a minimum, measures to be employed during construction to manage all traffic, including construction traffic, in and around the site, provision of safe pedestrian movement around the site, the provision of parking for construction workers, and associated traffic control devices.

C. DURING CONSTRUCTION AND/OR DEMOLITION

C1. SEDIMENT AND EROSION CONTROL

All unsurfaced entry and exit points must be consolidated with crushed aggregate or similar extending from the road kerb to the building line.

Temporary sediment controls – comprising, as a minimum, geotextile silt fencing along the lowest points of the site and hay bale filters as required - are to be installed and maintained at least daily to prevent sediment from reaching the stormwater mains system.

C2. TREE PROTECTION

The applicant/lessee must protect and maintain all existing trees and shrubs located on the subject site, on adjoining blocks overhanging the subject site, on the verge and unleased Territory land immediately adjacent, except for those specifically identified for removal in the approved drawings and a Tree Management Plan.

C3. VERGE MANAGEMENT

During any work undertaken on the site, all existing vegetation (trees, shrubs and grass) located on the verge and unleased Territory land immediately adjacent to the development must be managed, protected and maintained in accordance with a Landscape Management Plan approved by the Manager, Asset Acceptance, Operational Support, Directorate Services, TCCS

C4. TRAFFIC MANAGEMENT

At all times, the site and surrounds must be managed in accordance with the approved TTM Plan.

C5. WASTE MANAGEMENT

All building waste is to be stored on the site in suitable receptacles and collected regularly. The lessee is to take all reasonable steps to ensure that waste, particularly wind borne litter, does not affect adjoining or adjacent properties.

D. POST CONSTRUCTION AND/OR DEMOLITION**D1. OPERATIONAL ACCEPTANCE**

At completion of works, Operational Acceptance must be obtained from the Senior Manager, Development Review and Coordination (TCCS).

E. ADVISORY NOTES

This application is approved with the following advisory notes. It is recommended that careful consideration be given to advisory notes prior to commencing work.

E1. Advice from EPSDD – Major Projects and Transport

The applicant is advised to consider the possibility of providing increased number of bicycle parking rails.

Note:

Refer to Appendix 1 for information about approvals that may be required for construction.

HEARING DETAILS

FILE NUMBER:	AT 10/2017
PARTIES, APPLICANT:	Noah's Ark Resource Centre Inc
PARTIES, RESPONDENT:	ACT Planning and Land Authority
FIRST PARTY JOINED	Fedem Pty Ltd
SECOND PARTY JOINED	Nikdia Hume Pty Ltd
COUNSEL APPEARING, APPLICANT	Mr R Arthur
COUNSEL APPEARING, RESPONDENT	Dr D Jarvis
COUNSEL APPEARING, FIRST PARTY JOINED	Ms K Katavic
COUNSEL APPEARING, SECOND PARTY JOINED	Mr C Erskine SC
SOLICITORS FOR APPLICANT	Elringtons Lawyers
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
SOLICITORS FOR FIRST PARTY JOINED	Colquhoun Murphy
SOLICITORS FOR APPLICANT SECOND PARTY JOINED	Meyer Vandenberg
TRIBUNAL MEMBERS:	President G Neate AM Senior Member G Trickett
DATES OF HEARING:	18 October 2017 19 October 2017 20 October 2017 1 November 2017 17 May 2018