ACT CIVIL & ADMINISTRATIVE TRIBUNAL

SLADIC & ANOR v ACT PLANNING AND LAND AUTHORITY; CHARTER HALL RETAIL REIT & ORS v ACT PLANNING AND LAND AUTHORITY (Administrative Review) [2018] ACAT 38

AT 43/2016

Catchwords: **ADMINISTRATIVE REVIEW –** planning – Tribunal's review limited to question of compliance with applicable codes – Dickson Library – heritage – urban design – desired character – open pedestrian access – is a safety wall a building

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 26, 68
Heritage Act 2004 s 110
Human Rights Act 2004 s 40B
Legislation Act 2001 ss 139, 140
Planning and Development Act 2007 ss 48, 50, 53, 55, 117, 119, 120, 121, 124A, 141, 148, 162, 191, 193, 407

Subordinate Legislation cited:
Access and Mobility General Code
Commercial Zones Development Code
Crime Prevention through Environmental Design Code
Dickson Precinct Map and Code
Heritage (Decision about Registration of Dickson Library, Dickson) Notice 2008 (No1): Notifiable Instrument NI 2008-481
Multi Unit Housing Development Code
Parking and Vehicular Access General Code

Cases cited:
Administrator of Norfolk Island v Jope (2006) 151 LGERA 346
Baptist Community Services v ACT Planning and Land Authority & Ors [2015] ACTCA 3
Boyce v Paddington Borough Council [1903] 1 Ch 109
Corporation of City of Enfield v Development Assessment Commission (2000) 199 CLR 135
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Glass v ACT Planning and Land Authority & Anor [2016] ACAT 21
Glass v ACT Planning and Land Authority & Anor [2016] ACAT 96

K&S Lake City Freighters Pty Ltd v Gordon & gotch Ltd (1985) 60 ALR 509
Mason v ACT Planning and Land Authority & Ors [2009] ACAT 7
Minister for Resources v Dover Fisheries Pty Ltd (1993) 116 ALR 54
Noahs Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor [2017] ACAT 44
Thomson v ACT Planning and Land Authority [2009] ACAT 38
Trajkovski v Telstra Corporation Ltd (1998) 153 ALR 248
Ward v Griffiths (1987) 9 NSWLR 458

List of Texts/Papers cited: *Conservation Management Plan for Dickson Library* prepared by Philip Leeson Architects dated June 2013

Tribunal: Presidential Member M-T Daniel
Senior Member R Pegrum

Date of Orders: 29 March 2018
Date of Reasons for Decision: 29 March 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 43/2016

BETWEEN:

JOSIP SLADIC
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

COLES GROUP PROPERTY DEVELOPMENTS LTD
Party Joined

TRIBUNAL: Presidential Member M-T Daniel
Senior Member R Pegrum

DATE: 29 March 2018

ORDER

The Tribunal orders that:

1. The decision under review is set aside and substituted with a decision to refuse to approve the development application.

……..
Presidential Member M-T Daniel
Delivered for and on behalf of the Tribunal

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 44/2016

BETWEEN:

CHARTER HALL RETAIL REIT
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

COLES GROUP PROPERTY DEVELOPMENTS LTD
First Party Joined

DOWNER COMMUNITY ASSOCIATION
Second Party Joined

NORTH CANBERRA COMMUNITY COUNCIL
Third Party Joined

TRIBUNAL: Presidential Member M-T Daniel
Senior Member R Pegrum

DATE: 29 March 2018

ORDER

The Tribunal orders that:

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REASONS FOR DECISION

1. The applicants Mr Josip Sladic (**Mr Sladic**) (AT 43/2016) and Charter Hall Retail REIT (**Charter Hall**) (AT 44/2016) have sought review of a decision by the ACT Planning and Land Authority (**the respondent** or **the Authority**) made under section 193 of the *Planning and Development Act 2007* (**the Planning Act**), being a decision on reconsideration to approve, subject to conditions, a development application for a mixed-use development at Block 21 Section 30 Dickson (**the subject site**).[1]

2. On 27 July 2016, Mr Sladic applied to the ACT Civil and Administrative Tribunal (**the Tribunal**) for review of the decision for the reasons that "the decision was not consistent with the Territory Plan 2008, the object of the Plan (section 48), the *Planning and Development Act 2007* … the development application was not processed in the impact track".

3. On 27 July 2016, Charter Hall applied to the Tribunal for review of the decision for the reasons that "the determination is inconsistent with the Territory Plan 2008, the object of the Plan (section 48 of the Act) and the Planning and Development Act 2007".

4. The development proponent Coles Group Property Development Ltd (**Coles**) was joined as a party to each proceeding. Downer Community Association (**DCA**) and North Canberra Community Council (**NCCC**) were also joined as parties.

1. Summary of Tribunal Decision

5. The Tribunal has concluded that the development application must be refused approval.

6. The Tribunal considers that its task on review of a merit track decision is to consider the questions of code compliance only (section 119(1)(a)). The Tribunal cannot review the decision in relation to other parts of section 119, the broader considerations listed in section 120, or any other matters which may have been relevant to the discretionary decision.

[1] Reference to notice of decision in Tribunal Documents (**T-Docs**) page 34

7. The Tribunal considers that the proposed development is not code compliant in multiple respects. At a minimum, Rules 7, Criterion 9, Rule 14/Criterion 14, Rule 26 and Rule 27 of the Dickson Precinct Map and Code and Rule 1 of the Commercial Zones Development code are not met.

8. The shortcomings cannot be rectified by the imposition of conditions upon a development approval. The requirements of section 119(1)(a) of the Planning Act are not met, and the development proposal cannot be approved.

9. Mr Sladic, Charter Hall, the NCCC and DCA also challenged the decision on broader discretionary grounds under section 120 of the Planning Act and other provisions relating to the approvals process, heritage impacts, planning and design of the proposed development. These matters, in one way or another, must be considered by the Authority when initially exercising its discretion whether or not to approve a development application in the merit track. Because of the limited scope of review provided in this matter by the Planning Act, the Authority's findings and decision with regard to these factors are not reviewable by the Tribunal.

10. However, for completeness the Tribunal has considered the impact of the matters here addressed on the entirety of the Authority's original decision. Having done so, it is satisfied that if the development proposal were to be considered code compliant, and if it were open to the Tribunal to review the broader discretion to approve or refuse to approve the development application, the Tribunal would refuse to approve the development application due to its undesirable impacts on heritage and design shortcomings in relation to pedestrian accessibility and traffic management.

2. The hearing

11. The matter was heard on 28, 29 and 30 November 2016 and on 1, 2, 5, 6, 7 and 8 December 2016 and on 6, 7, 20, 21, 22 and 23 March 2017. Immediately prior to the commencement of the hearing, the Tribunal together with the parties and their representatives viewed the subject site and adjacent areas and the general environment of the Dickson Group Centre.

12. The Tribunal had before it the documents provided by the Authority related to the decision under review (the T-Documents) together with statements of facts and contentions submitted by the parties and witness statements and other documents tendered in evidence during the hearing.

13. Mr Sladic appeared in person and gave evidence.

14. Evidence for Charter Hall was given by Mr Michael Harrison, an architect and urban designer; Mr Eric Martin, an architect and access consultant; Mr Brian McDonald, a town planner; Ms Hillary Claire Middleton, an urban planner; Mr John Wassermann, a noise expert; Mr Graeme Wood, a wind expert; and Mr Tim Rogers, a traffic engineer.

15. Evidence for the Authority was given by Mr Raymond Brown, a planner; and Mr Chris Coath, a traffic engineer. Evidence was also given by Mr David Flannery, the chair of the ACT Heritage Council and Mr Michael Day, from Roads ACT.

16. Expert evidence for Coles was given by Ms Natalie Coyles, a representative of the architects; Mr Neil Hobbs, a landscape architect; Mr Aaron Oshyer, a planner; Mr Graeme Shoobridge, a traffic engineer; Mr Tim Nell, a traffic consultant; Mr Brian McDonald, an urban planner; Mr Rhys Tappenden, a builder and access consultant; Dr Renzo Tonin, an acoustic consultant; Mr Tony Rofail, a wind expert; and Mr James Turnbull, a retail economist.

17. Evidence for NCCC and the DCA was given by Mr William Boak, a town planner; and Ms Jane Goffman, a town planner. Ms Goffman, Mr Rodney Brent, and other members of the NCCC and DCA spoke for the NCCC and DCA over the course of the hearing.

18. The plans lodged with the initial development application had been amended during the consultation and reconsideration process. During the hearing, a set of further amended plans were put before the Tribunal, described as plans for the development which had been amended to meet the conditions of approval, and such further issues as were identified in the hearing, as well as some technical amendments. These plans were identified as Exhibit CG17a. In addition, the civil drawings were also amended to reflect the most up to date proposed amendments and these were before the Tribunal as Exhibit CG17b.

19. The primary fact finding task for the Tribunal is therefore straightforward and, one would assume, uncontentious. What the proposed development consists of has been committed to writing. However, even with that level of detail, there remains uncertainty, not least because it is open to a developer to depart from approved plans

in some respects with the approval of the Authority. So for example in this case, in relation to a matter as significant as the basement ramp safety walls, Ms Coyles conceded in her evidence that the ultimate manner of construction of those walls could change from what was considered architecturally desirable to what was sufficiently safe.[2]

20. In the final days of the hearing, the Authority filed proposed new conditions of approval which required revised plans with significant changes such as the provision of a pedestrian safety barrier or fence near the library and removing the proposed five trees alongside the library. The issue of noise management, which the Tribunal considered significant, was proposed to be left to be managed by imposition of a condition to provide a noise management plan and accept a lease which required compliance with that plan.[3]

21. It would not be incorrect to describe the development application, and the evidence surrounding it, as a moving feast.

22. The bulk of the evidence before the Tribunal consisted of opinion evidence of persons qualified and experienced in various fields of expertise. These experts gave the Tribunal their views on matters of heritage impact; urban, landscape, and building design; traffic management and parking; pedestrian access; solar access; and wind and noise impacts. Unsurprisingly, the experts called on each topic generally expressed opinions in support of their party's position. Much of the evidence was helpfully summarised in a 76-page attachment to the written submissions filed by Coles, to which we have had regard. We have not replicated all of that material in these reasons, but have set out the conclusions we have reached on critical matters and the facts that we have relied upon in reaching those conclusions.

23. In choosing between the opinions of the experts, it was submitted on behalf of Coles that the evidence of both Mr Boak and Mr Harrison should be given less weight because their experience was predominantly in NSW, and that Ms Goffman's

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[2] Transcript of proceedings 6 March 2017 page 31 line 33ff, page 32 line 10

[3] The proposed condition to implement noise management plan through the future lease was strongly objected to by Coles.

evidence should be disregarded entirely because she had demonstrated an extreme degree of partisanship which prejudiced her independence.

24. The Tribunal is not bound by the rules of evidence and is entitled to inform itself as it sees fit, including relying on its own expertise[4]. The matters it needs to satisfy itself of in this case are not black and white, they are questions of judgment upon which experts may differ. The Tribunal has declined to take a blanket approach of ruling out Ms Goffman's evidence[5], or giving 'less weight' to some of the experts' opinions or 'choosing' one over another expert. The Tribunal has instead considered the reasons for each expert opinion in reaching its conclusion on each issue.

3. Project background

25. The subject site consists of some 7866 square metres, currently an open air carpark located in Dickson opposite Woolworths and the Dickson library. The subject site is contained within Antill Street to the north, Badham Street to the west, and on the southern and eastern boundaries by an existing unnamed road (**Road A**) which is used for access to and from the carpark and for passenger drop off at the front of the library and Woolworths.

26. In March 2014 Coles entered into a contract of sale for the subject site. A Deed of Agreement dated 4 April 2014 between the Authority (on behalf of the Territory) and Coles (**the Deed**) provides that "the site will be developed in the manner contemplated by the Deed and the Holding Lease". A Holding Lease of the same date grants the lease of the site to Coles for the purpose of "carparking, subdivision and constructing the works in accordance with the Deed".

27. The Deed and Holding Lease require that there be a minimum of two supermarkets on the site including an Aldi supermarket at ground floor level of approximately 1350 sqm. Coles is also required to construct a new Road A and intersection works at the junctions of Road A with Antill Street, Badham Street and an existing Road B to the east of the subject site.

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[4] *ACT Civil and Administrative Act 2008* (**ACAT Act**) section 26

[5] Notwithstanding what may have been the conclusion reached by the Tribunal in Goffman v ACT Planning and Land Authority, to which counsel for Coles referred, the Tribunal did not in this case form the view that Ms Goffman was unable to provide an independent expert opinion.

28. Most of the subject site is limited to development of only two storeys, but the northernmost section that runs along Antill Street is permitted to have seven storeys. The Deed provides that there may be commercial accommodation units and/or residential dwellings on the first floor level and above, the combined number of which must be no less than 100.

29. On completion of all the required works, the Authority is required to grant "relevant and specified separate leases in a form consistent with the Deed".[6]

30. A development application DA201426717 was lodged with the Authority on behalf of Coles on 12 December 2014 and was allocated to the merit track, to be assessed under Division 7.2.3 of the Planning Act. The application sought approval for a 7-storey development containing two supermarkets and other ground floor and first floor commercial tenancies, 155 residential units, two levels of basement car parking, a podium level carpark and associated works off-site.[7]

31. Public notification of the development application was conducted between 19 December 2014 and 27 January 2015 and 59 written representations were received by the Authority. Issues raised in the representations included that the development was inconsistent with the existing and desired character of the area and that the ramps to the basement carparking would adversely impact pedestrian movements.[8]

32. Following its initial assessment of the development application, the Authority sought and received further information from the proponent pursuant to section 141 of the Planning Act. Revised drawings were submitted which reduced the number of residential units to 140 and made changes to floor plans and building elevations.

33. On 20 May 2015, the Authority refused the development application and noted that "the proposal in its current form cannot be approved or conditionally approved".[9]

34. On 3 March 2016, an application was lodged for reconsideration of the refusal decision. The application was supported by a town planning report addressing the

[6] T-Docs –pages 2891-2985; 2882- 2889
[7] T-Docs pages 2200
[8] T-Docs page 173
[9] Notice of decision at T-Docs167

reasons for refusal, consultant reports on traffic and waste management and amended plans and details.

35. The application for reconsideration was publicly notified from 4 March 2016 to 1 April 2016 and 41 representations were received by the Authority. Issues raised in these further representations included inconsistency with the Territory Plan and "poor architecture…poor residential amenity…poor provision for pedestrian movement and facilities for cyclists", car parking design and impacts on the Heritage registered Dickson Library.[10]

36. On 29 June 2016, The Authority approved the amended development with conditions (**the reviewable decision**).[11]

4. The contentions of the parties

37. Evidence and argument in these proceedings centred on the Dickson Precinct Map and Code (**DPMC**), Commercial Zones Development Code (**CZDC**), Multi Unit Housing Development Code (**MUHDC**), Access and Mobility General Code (**AMGC**), and the Parking and Vehicular Access General Code (**PVAGC**). To a lesser extent, the development was also criticised for failing to meet requirements of the Crime Prevention through Environmental Design Code (**CPTEDC**), Signs General Code and Bicycle Parking General Code.

4.1. The applicant AT 43 of 2016: Josip Sladic

38. Mr Sladic lives on the north side of Antill Street directly across from the subject site. He believes there will be undesirable and avoidable exposure to noise and other adverse impacts from the loading dock area and traffic congestion and vehicular hazards affecting the overall safety and amenity of the Dickson Group Centre. Mr Sladic contends that the proposed development does not comply with the provisions of the DPMC, the objectives of the CZ1 Commercial Zone and with other development and general codes. Mr Sladic seeks to have set aside the decision to approve the development application and argues that any further development application for the same site (including land inside the heritage buffer zone) be lodged in the impact track.

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[10] Notice of decision at T-Docs pages 145-149
[11] T-Docs page 129

39. Mr Sladic also contends that the proposed development is incompatible with the desired character for the Dickson Group Centre and will bring detrimental changes to the public realm with adverse social, economic, and environmental impacts affecting the broader community, especially vulnerable and disadvantaged groups. He contends that the development will result in a poor quality pedestrian and cycling environment and a generally mediocre standard of urban design that will blight the wellbeing and functioning of the Dickson Group Centre. He contends also that there will be unacceptable erosion of the significant heritage values of the Dickson Library and its setting.[12]

4.2. the applicant AT 44 of 2016: Charter Hall Retail REIT

40. Charter Hall contends that the decision of the Authority is inconsistent with the Planning Act and the object of the Territory Plan.

41. Charter Hall submitted that the documents lodged for reconsideration failed to demonstrate an adequate response to the reasons for refusal given in the Authority's initial decision of 20 May 2015 and therefore the decision should be set aside. It argues that the revised development application and conditional approval would be inconsistent with sections 120 and 124A of the Planning Act plus the Territory Plan (including the zone objectives and provisions of the applicable codes) together with the policies and principles endorsed by the government in the Dickson Neighbourhood Plan (2003) and Dickson Master Plan (2011).

42. Charter Hall contends there is non-compliance with the principles of good urban design practice and non-compliance with the objectives of the CZ1 zone, the provisions of the DPMC, the CZDC and the MHUDC. Charter Hall contends that the proposed development will adversely impact on the amenity and safety of pedestrians and cyclists and that "vehicular access is favoured over pedestrian movement in a manner that is inconsistent with the character of the Dickson centre".

43. Issues in respect to traffic and parking are said to include a lack of suitable replacement customer parking and an unacceptable adverse impact on businesses adjacent to the site; the design of Road A which would compromise the existing

[12] Statement of facts and contentions from Mr Sladic dated 17 October 2016

pick up and set down area adjacent to Woolworths; unsatisfactory arrangements for residential deliveries and poor access to the podium car park.

44. Charter Hall submitted that the development application and any further development application for the subject site be assigned to impact track assessment unless the Heritage Council produces an environmental significance opinion that the proposal is not likely to have a significant adverse impact on the heritage listed Dickson Library.[13]

4.3. The respondent: ACT Planning and Land Authority

45. The Authority contended that its reconsideration addressed the deficiencies found by the refusal decision and that "the CZ1 Core zone objectives have been considered and satisfied…the development is now compliant or is capable of being made compliant by the imposition of conditions".[14] The Authority submitted that the applicable codes were satisfied and that, after consideration of the matters set out in section 120 of the Planning Act, the development application should be approved.

46. With respect to the DPMC the Authority contends that "previous departures…are addressed by improving public realm, addressing aesthetics of the building design and providing more clarity to the traffic and pedestrian movements".[15] The Authority contends that its decision is consistent with the object of the Territory Plan as set out in section 48 of the Planning Act and that the proposal will contribute to providing the people of the ACT with an "attractive, safe and efficient environment".

47. With respect to heritage the Authority contends that the basement exit ramp walls, while within the library buffer zone, by definition do not breach mandatory Rule 26 in the DPMC.

48. With respect to traffic and parking, the Authority relies on the report of Christopher Coath dated 21 November 2016. The Authority submits that the proposed car parking complies with the PVAGC because the Territory is prepared

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[13] Statement of facts and contentions from Charter Hall dated 17 October 2016 and statement of facts and contentions with respect to traffic and parking dated 14 November 2016

[14] Respondent's statement of facts and contentions dated 14 November 2016 at [12], [37]

[15] Reasons for decision T-Docs page 123 at [1]

to waive the requirement for 35 spaces for residential visitors due to shared peak demand for retail and residential car parking.[16]

4.4. The contentions of the first party joined: Coles Group Property Developments Limited

49. As a starting point, Coles contends that development on the subject site is constrained by specific requirements in the Deed to locate the access to the basement car parking from Road A and to maintain vehicular and waste access to the McDonalds car park. There are additional limitations imposed by the codes on the use of Antill Street or Badham Street for vehicle access to the basement.

50. Coles contends that the proposed development complies with applicable rules and/or meets applicable criteria in the DPMC. In response to the contentions of Charter Hall that the proposed development does not comply with mandatory Rule 26 of the DPMC and will adversely affect pedestrian amenity and safety, the scale and urban setting of the Dickson Library and the quality of the public domain, Coles contends that the ramp enclosure is not a building for the purpose of Rule 26 and that there is no adverse effect from the ramp enclosure on the scale and urban setting of the Library. Coles refers to the opinion of the traffic experts that the proposed ramps provide the safest outcome for pedestrians.

51. Coles contends that the development proposal is consistent with applicable rules and criteria of the CZDC. Coles contends that the proposed development is consistent with applicable rules of the MUHDC and meets all applicable criteria. With respect to the AMGC, Coles contends that the development proposal is consistent with the Code and that any departures are minor and are capable of resolution at the design development stage.

52. While Coles submitted that it was not open to the Tribunal to review discretionary aspects of the decision under section 120, Coles nonetheless contended that, upon consideration of those discretionary matters, the development application should be approved.

[16] Respondent's statement of facts and contentions: traffic and parking dated 21 November 2016

4.5. The contentions of the second and third parties joined: Downer Community Association (DCA) and North Canberra Community Council (NCCC)

53. The DCA and NCCC were objectors to both the original development application and the revised development application and were joined as parties on the grounds that the community and the community groups they represent would suffer adverse impacts and material detriment by the approval of the development.

54. The NCCC and DCA argue that approval of this development application would be inconsistent with the Territory Plan. They submit that changes to the plans and designs made after refusal of the original development application were cosmetic and did not adequately address or overcome the grounds for initial refusal.

55. The second and third parties joined note that the Deed and Holding Lease contain specific planning requirements including setbacks to Road A and continuous pedestrian access along the southern frontage of the subject site and that these are missing from the proposed development. They claim also that the proposed development would cause an unacceptable erosion of the heritage values of the Dickson Library and its setting.

56. The second and third parties joined further contend that the proposed development is non-compliant with the various development codes and general codes, in particular failing to recognise the urban design principles in the Dickson Master Plan; the incompatibility of the proposed development with the desired character of the Dickson precinct; providing a poor quality pedestrian and cycling environment and effecting detrimental changes to the public realm with adverse impacts affecting the broader community.

5. The Issues

57. There are multiple issues before the Tribunal:

    (a) Is the Tribunal able to review the entirety of the decision, or only part of it? (the section 121(2) issue)

    (b) Does the development proposal meet the requirements of subsection 119(1)(a)? Issues raised by the parties included code compliance in relation to:

(i) site planning and urban design;

(ii) heritage impacts and the Dickson Library;

(iii) desired character

(iv) traffic and parking;

(v) access and mobility; and

(vi) solar access.

(c) If code compliant, should the development application be approved given consideration of the factors set out in section 120 and any other relevant factors?

(d) Is the Tribunal able to consider other issues such as whether the development application is in the correct track, or whether advice from Heritage was correctly requested or obtained?

6. The scope of review by the Tribunal – subsection 121(2) of the Planning Act

58. The decision before the Tribunal is a reviewable decision in accordance with section 407 of the Planning Act.

59. Section 68 of the ACAT Act provides that in reviewing administrative decisions the Tribunal may exercise any function given by an Act to the entity for making the decision. The Tribunal is often said to 'stand in the shoes' of the decision-maker. Ordinarily the Tribunal is empowered to review the entirety of an administrative decision, and to that end is given the powers of the original decision-maker by section 68 of the ACAT Act. However, this provision must be read subject to the specific empowering legislation, in this case the Planning Act, which sets out the extent of the decisions which may be subject to review.

60. Section 121(2) of the Planning Act provides:

> *(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.*

61. While the application of subsection 121(2) to this matter was accepted by all parties, they differed on what the words used in subsection 121(2) (**the s.121 words**) meant.

6.1. Submissions of the parties

62. The Authority submitted that subsection 121(2) 'carves out' from the entirety of the decision consideration of the merits of a criterion where a rule has been met. The Authority submitted that subsection 121(2) applies to objector appeals, with the practical effect that if a rule/criterion is not met the development proposal must fail, but if the rule is complied with the criterion does not need to be considered. This interpretation, it was urged, is consistent with and reinforces the approach to rules and criteria taken in the codes. The Authority submitted that the remainder of the decision, and particularly the factors listed in section 120, remained open to review by the Tribunal. In other words:

(a) there is generally speaking a right to review the entire decision of the Authority to approve the development application;

(b) if the Authority found that a rule was complied with, it is open to the Tribunal to review that part of the decision;

(c) if the Authority found that a rule was not complied with but a criterion was, the finding that the criterion was complied with is open to review by the Tribunal;

(d) if there was no rule, but a criterion, and the Authority found that that criterion was met, the finding that the criterion was met was open to review by the Tribunal; and

(e) because subsection 121(2) is directed to how the Tribunal can review the Authority's decisions in relation to rules and criteria and does not exclude the remaining aspects of section 119 or 120 of the Planning Act from review, the remainder of the discretionary decision remains open to review by the Tribunal.

63. Coles submitted that the Authority's interpretation was wrong, as subsection 121(2) does not 'carve out' impermissible parts of the decision, but rather on its terms provides what the 'extent' of the reviewable decision is. Coles submitted that although subsections 121(2)(a) and (b) do not refer to the word 'criterion', the language had to be interpreted as referring to the extent to which a development complied with a criterion. Coles submitted that simply applying

what the words in subsection 121(2) say, the extent of review to be undertaken by the Tribunal was only in relation to code compliance, and that only as follows:

(a) If the Authority found that a rule was complied with, that part of the decision was not open to review by the Tribunal.

(b) If the Authority found that a rule was not complied with, but a criterion was, the finding that the criterion was met was open to review by the Tribunal.

(c) If there was no rule, but a criterion, and the Authority found that that criterion was met, the finding that the criterion was met was open to review by the Tribunal.

(d) No other part of the decision to approve the development application was open to review by the Tribunal.

64. Charter Hall, the NCCC and DCA each agreed with the interpretation put forward by the Authority, with some additional points:

(a) Notwithstanding that the Authority's decision that a rule has been met is not referenced in subsection 121(2), it is open to the Tribunal to review this aspect of the decision, because this is a jurisdictional fact[17] (Charter Hall, and also submitted by the Authority).

(b) The rules and the criteria are interrelated and to artificially separate them is to 'do a disservice to the codes as they are intended to apply' (NCCC and DCA).

(c) The right of appeal is granted to the public generally and 'should be interpreted with an expansive rather than a restrictive approach' (NCCC and DCA).

65. Mr Sladic did not make submissions on this legal issue.

66. The meaning and effect of the words used in section 121(2) is a vexed question. Counsel for Coles took the Tribunal to five previous decisions of the Tribunal on

[17] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Trajkovski v Telstra Corporation Ltd* (1998) 153 ALR 248; *Administrator of Norfolk Island v Jope* (2006) 151 LGERA 346

this point[18]. Those decisions reached slightly different conclusions on their meaning. Further, in some decisions, as pointed out by Counsel for Coles, the Tribunal's approach taken to the review was not ultimately consistent with what the Tribunal in those cases found the s.121 words meant:

> *… they have not gone back to the section, worked out what it means and then followed through step by step. A number of decisions have come close to doing so … and when you then read what they actually did in that decision, they didn't follow through what they had previously decided.*[19]

67. During the period of time this decision was reserved, the Tribunal delivered another, slightly different, decision on the meaning and effect of the s.121 words.[20] It is not necessary to set out the detail of the previous matters in this decision[21], suffice it to say that the Tribunal has in the end declined to take the approach taken in previous cases.

68. It is on any view an entirely unsatisfactory state of affairs that, 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.

69. The Tribunal has taken the approach urged by Counsel for Coles, and gone back to the ordinary meaning of the words used, their intended purpose and other principles of statutory interpretation.

70. All parties agreed that an interpretation that best achieved the purpose of the legislation was to be preferred (section 139 *Legislation Act 2001*) and, referring to the debates in the Legislative Assembly[22], that the s.121 words were intended to exclude from consideration some aspects of the decision:

> *if a design feature fully complies with the relevant rule, then it cannot be reassessed on appeal. The substance of amendment 30 was in Schedule 1 of the presentation version of the Bill. This amendment to Clause 120 of the Bill*

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[18] *Mason v ACT Planning and Land Authority & Ors* [2009] ACAT 7; *Thomson v ACT Planning and Land Authority* [2009] ACAT 38; *Rudder v ACT Planning and Land Authority & Ors* [2010] ACAT 24; *Glass v ACT Planning and Land Authority & Anor* [2016] ACAT 96; *Glass v ACT Planning and Land Authority & Anor* [2016] ACAT 21

[19] Transcript of proceedings page 522 line 25

[20] *Noahs Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor* [2017] ACAT 44

[21] A comprehensive summary is contained in *Glass v ACT Planning and Land Authority & Anor* [2016] ACAT 21

[22] ACT Legislative Assembly, *Hansard*, 23 August 2007, Mr Barr, 1990

> *[now s 121 of the Planning Act] in conjunction with amendment 139 brings the provision into the main body of the Bill to give it more prominence.*

71. All parties agreed that although the word 'criteria' does not appear in the words, it is within what is described by subsections (a) and (b).

72. If the starting point of interpretation is the words themselves, then those words provide for code compliance of a development proposal to be reviewed by the Tribunal. That is, the Tribunal may consider whether the requirements of subsection 119(1)(a) are met.

73. Although Coles argued for a smaller scope of review, the Tribunal agrees with the submissions of the Authority and Charter Hall that because it is a jurisdictional fact it is open to the Tribunal to review whether a rule said to be met is not met, despite the Authority having concluded that it is.

74. The Authority and other parties urged that review of aspects of the decision going beyond code compliance, said to be 'discretionary aspects' of the decision, was intended by the s.121 words. That meaning is also open on their ordinary meaning.

75. Is there any basis on which the Tribunal can be satisfied whether the narrow (code compliance only) or broader meaning was intended? There are a number of principles of statutory interpretation which are of assistance in deciding this question.

76. First, it is accepted that the s.121 words are to be interpreted with reference to the Planning Act as a whole.[23] Indeed Section 140 of the *Legislation Act 2001* provides:

> ***140 Legislative context***
>
> *In working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole.*

77. Secondly, words used in a statute are assumed to be used consistently – that is, they have the same meaning each time they are used.[24] Thirdly, as a general rule all words in a statute have meaning and effect.[25]

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[23] *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509
[24] *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450
[25] *Minister for State Resources & Anor v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, 63 per Gummow J

78. With these principles in mind, it is worthwhile to consider the provisions of the Planning Act in relation to decisions to approve or refuse to approve a development application. It is relevant to consider both the framework for making the initial decision and also the provisions for such decisions to be reconsidered by the Authority or to be reviewed by the Tribunal.

6.2. Consideration of the statutory context

79. Section 50 of the Planning Act provides that a Territory authority must not do any act, or approve the doing of an act, that is inconsistent with the Territory Plan. Both the Authority and the Tribunal are bound by this injunction. The Court of Appeal noted in *Baptist Community Services v ACT Planning and Land Authority & Ors* [2015] ACTCA 3 (***Baptist***) that compliance with this dictate may be difficult to establish because of the way the Territory Plan is constituted. The Plan consists of a number of elements, from the broadly phrased to the highly specific:

> *51 Contents of territory plan*
>
> *(1) The territory plan must include the following:*
>
> *(a) a statement of strategic directions;*
>
> *(b) objectives for each zone;*
>
> *(c) development tables;*
>
> *(d) codes;*
>
> *(e) a map (the* **territory plan map***).*
>
> Note *For more about development tables, see s 54. For more about codes, see s 55. For more about a territory plan map, see s 56.*
>
> …

80. Section 53 of the Planning Act states:

> *(1) The objectives for a zone set out the policy outcomes intended to be achieved by applying the applicable development table and code to the zone.*

81. Section 55 of the Act provides the ultimate detail level of the Territory Plan in the form of codes comprised of rules and/or criteria:

> *(1) A code (other than a general code or precinct code that is a concept plan) in the territory plan must contain either or both of the following:*
>
> *(a) the detailed rules that apply to development proposals the code applies to;*

(b) the criteria that apply to development proposals the code applies to, other than proposals in the code track.

(2) A code must be consistent with each objective for the zone to which the code relates.

(3) A code that sets out the requirements that apply to stated areas, or places, or states that it is a precinct code, is a precinct code.

(4) A code that sets out the requirements for types of development, or states that it is a development code, is a development code.

(5) A code that sets out requirements applicable to the Territory, the Executive, a Minister or a Territory authority is a general code.

(6) To remove any doubt, a general code may also contain—

(a) policies to be complied with; and

(b) rules and criteria applicable to development proposals the code applies to.

82. Section 162 of the Planning Act requires the Authority to approve or refuse to approve a development application. In making the decision the Authority is not at large – as with all administrative decisions the decision maker must consider all relevant considerations and disregard those that are irrelevant.[26] As a public authority, the Authority is required by the *Human Rights Act 2004* to consider any human rights engaged making the decision.[27] Further, for development applications in the merit track, Division 7.2.3 of the Planning Act and particularly sections 119 and 120 provides that certain matters must be established and/or considered:

119 Merit track—when development approval must not be given

(1) Development approval must not be given for a development proposal in the merit track unless the proposal is consistent with—

(a) the relevant code; and

(b) if the proposed development relates to land comprised in a rural lease—any land management agreement for the land; and

[26] Mr Erskine for Coles submitted that the provisions of sections 119 and 120 were so code-like that nothing falling outside those sections could be considered. The Tribunal does not consider that this interpretation is correct given the wording of the sections. Other relevant factors must be considered, although it is difficult to conceive of any factor which, being relevant, does not already fall within section 120.

[27] *Human Rights Act 2004* section 40B

(c) if the proposed development will affect a registered tree or declared site—the advice of the conservator of flora and fauna in relation to the proposal.

Chapter 1 Note 1 An application cannot be approved if it is inconsistent with the territory plan (see s 50) or the National Capital Plan (see Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth), s 11).

Chapter 2 Note 2 ***Relevant code****—see the dictionary.*

(2) Also, development approval must not be given for a development proposal in the merit track if approval would be inconsistent with any advice given by an entity to which the application was referred under section 148 (Some development applications to be referred) unless the person deciding the application is satisfied that—

(a) the following have been considered:

(i) any applicable guidelines;

(ii) any realistic alternative to the proposed development, or relevant aspects of it; and

(b) the decision is consistent with the objects of the territory plan.

(3) To remove any doubt, if a proposed development will affect a registered tree or declared site—

(a) the person deciding the development application for the proposed development must not approve the application unless the approval is consistent with the advice of the conservator of flora and fauna in relation to the proposal; and

(b) subsection (2) does not apply in relation to the conservator's advice.

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.

83. In *Baptist*[28], the Court of Appeal explained the task to be undertaken under sections 119 and 120 in determining a development application in the merit track. The Court of Appeal stated:

22. … the need to consider the zone objectives is one of the important distinctions between the processes laid down for approvals under the code track and under the merit track. Under s 116, a development application under the code track ***must*** *be approved if the proposal complies with the relevant rules, which are "the rules that apply to the proposal in each relevant code" (Dictionary to the Planning Act). A development application under the merit track* ***must not*** *be approved unless the proposal is consistent with the relevant code (s 119(1)).*
23. That is, code compliance is:
(a) both a necessary and a sufficient condition for code track approval; but
(b) only a necessary condition for merit track approval.

…

26. Thus, analysis of ss 119 and 120 suggests that:
(a) code compliance opens up the possibility of development approval being given in the merit track, but does not guarantee it;
(b) approval is discretionary after consideration of all relevant matters identified in s 120;
(c) inconsistency with zone objectives would be relevant to the exercise of the discretion, but does not activate any express obligation to refuse approval.]

…
36. Accordingly, we reject the appellant's argument that if a development proposal in the merit or impact track complies with the applicable code (as interpreted by reference to the zone objectives), then it must be approved.

…

49. ACTPLA's submission that inconsistency with zone objectives requires refusal of development approval, if accepted, would give the zone objectives some kind of self-executing status within the Territory Plan that cannot be inferred from either the Territory Plan or the Planning Act, and would produce a number of odd results.

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

…

58. We have rejected the appellant's submission that a proposal in the merit track must be approved if it is code-compliant (at [21] to [36] above), and ACTPLA's submission that a proposal in the merit track must not be approved if it is inconsistent with a "relevant" zone objective (at [37] to [57] above).
59. This in our view leaves s 120 open to being interpreted, according to its terms, as giving a discretion to approve or reject a proposal that is code-compliant (and therefore not required to be rejected under s 119), such discretion being exercisable only after consideration of the matters set out in paragraphs 120(a) to (f) (to the extent that they are relevant to a particular proposal). That is the alternative submission put by ACTPLA, and is in our view the only meaningful way in which to interpret s 120.

84. In the current case, the development application was initially refused approval under section 162 of the Planning Act. The proponent then had the option of either applying for reconsideration by the Authority (section 191), or seeking external review by the Tribunal (section 408A, Schedule 1 item 3). The option of reconsideration was taken.

85. In relation to reconsideration by the Authority, Section 193 provides:

193 Reconsideration
(1) If the planning and land authority receives a reconsideration application, the authority must—
(a) reconsider the original decision; and
(b) not later than 20 working days after the day the authority receives the application—
(i) make any decision in substitution for the original decision that the authority could have made on the original application; or
(ii) confirm the original decision.
(2) However, the planning and land authority must not take action under subsection (1) (b) if the ACAT has decided an application for review of the original decision.
(3) Also, the planning and land authority may only reconsider the original decision to the extent that the development proposal approved or refused in the original decision or part of the original decision—
(a) is subject to a rule and does not comply with the rule; or
(b) is not subject to a rule.
(4) The 20 working days mentioned in subsection (1) may be extended for a stated period by agreement between the planning and land authority and the applicant.
(5) In reconsidering the original decision, the planning and land authority—
(a) need not publicly notify the reconsideration application under division 7.3.4; but
(b) must give written notice of the reconsideration application to anyone who made a representation under section 156 about the original

application, allow the person reasonable time (that is not shorter than 2 weeks) to make a representation on the reconsideration application, and consider any representation made within the time allowed.

(6) Also, in reconsidering the original decision, the planning and land authority—

(a) must consider any information available to the authority when it made the original decision and information given in the reconsideration application; and

(b) may consider any other relevant information.

Example of other relevant information

information from representations

Note *An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).*

(7) The planning and land authority must ensure that, if the original decision is made on the authority's behalf by a person (the **original decision-maker***), the authority or someone other than the original decision-maker reconsiders the decision.*

86. The reasons for the decision on reconsideration in this case are set out at T-Docs pages 185 - 193. Those reasons make no reference to subsection 193(3) (in bold above) which uses the s.121 words apparently to limit the extent to which the original decision may be reconsidered. The reconsideration in this case seems to have proceeded on the basis that the entirety of the section 162 decision was able to be revisited.

87. Section 408A, as earlier noted, provides that an eligible entity may apply for review of a reviewable decision. Schedule 1 to the Planning Act sets out the reviewable decisions, and eligible entities.

88. In Schedule 1, items 3 and 4 refer to original decisions by the Authority under section 162 to approve or refuse development applications in the merit track. An application for review may be brought under those provisions by the development applicant, or certain third parties, respectively. Items 11, 12 and 13 refer to reconsideration decisions made under section 193, which may include decisions to approve or refuse development applications in the merit track. Again, the application for review may be brought by the development applicant or certain third parties.

89. It was submitted on behalf of the Authority that subsection 121(2) applies only to third party applications for review. That is not correct. Subsection 121(2) applies to an application for review by a development proponent who is dissatisfied with the

conditions on approval, both on its own terms and because of the description of the reviewable decision provided by Item 3 of Schedule 1:

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

90. Item 4 in Schedule 1 provides that certain entities may also apply for review of some merit track approvals, whether subject to condition or otherwise. It does not itself incorporate the s.121 words, but contains a note:

> *Note: a decision under section 162 is reviewable only to the extent that the development proposal- (a) is subject to a rule and does not comply with the rule; or (b) is not subject to a rule. (see s 121(2))*

91. While items 11, 12 and 13 of Schedule 1 do not reproduce or refer to section 121(2) when setting out the reviewable decision, it must be noted that the reconsideration decision itself was so limited by subsection 193(3). It is only open to the Tribunal to review the reviewable decision as it is defined – that is, the reconsideration decision under section 193, not the Authority's initial decision under section 162. Further, in any case where the reconsideration decision is to approve a development application in the merit track, subsection 121(2) will also apply to prescribe the part of the decision which is reviewable.

92. A consideration of these provisions of the Planning Act suggests that the task undertaken by the Authority when initially deciding whether to approve a development application in the merit track (under section 162) is not coextensive with that undertaken by the Authority when reconsidering the refusal of approval or approval with conditions (under section 193), or with that undertaken by the Tribunal when conducting review of a merit track application decision (under section 408A).

6.3. Consideration of other principles of statutory interpretation and extrinsic material

93. Coming back to the principles of statutory interpretation identified earlier, the Tribunal is satisfied from the provisions referred to above, and the extrinsic material, that the intention of the Planning 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.

94. The interpretation urged by the Authority, when applied, achieves a result in practice which is no different to full merits review. On that interpretation, the s.121 words do nothing to limit the right of review, but simply reinforce how the codes work. Is it possible that this is all that was intended?

95. On 14 December 2006, when the Bill was presented, the Planning Minister Mr Corbell said:

> *Development under the code track must comply with the stated quantifiable, numerical rules of a code. Because public consultation occurs when the codes are being established, applications in this track will not require public notification and there will be no third party appeal rights. …*
>
> *The merit track is most similar to the current system. Development proposals in the merit track will be assessed under rules requiring the exercise of judgment. Notification requirements will vary … third party appeals will be available only for those matters that are fully notified, where a representation has been made and material detriment can be demonstrated…*[29]

96. At the time, the Planning Act was being developed and presented, full merits review was available in relation to planning decisions of the Authority. So, the interpretation of the s.121 words urged by the Authority would achieve similar review rights to the past system.

97. On the other hand, if the s.121 words were intended to clarify the interaction of rules and criteria within the codes, then one would expect that they would also be used in relation to initial planning decisions under section 162. The restricted application of the s.112 words to reconsideration and review decisions suggests that they were intended to do something else.

98. It has been submitted that the s.121 words mean that where a rule is met, the discretionary or other aspects of the decision relating to that rule cannot be revisited by the Tribunal. An alternative interpretation, put on behalf of Coles, was that where a development is code compliant because it complies with a criterion, the discretionary aspects of the decision (under section 120) related to

[29] ACT Legislative Assembly, *Hansard,* 14 December 2006, Mr Corbell, pages 4141 and 4142

that criterion only are open to review by the Tribunal. Given that the rules and criteria contained in the codes have their origin in those higher level matters set out as objectives, it is a practical impossibility to excise from the discretionary decision that aspect of an objective which relates to a rule that is met, or to hive off for review those aspects of an objective which relate to a criterion that is satisfied. These approaches, while attractive in theory, are impossible to apply in practice.

99. The s.121 words do need to do something. The legislature thought that they were doing something so significant that it warranted their removal from the schedule and enactment in subsection 121(2). The s.121 words were described as achieving the outcome that "if a design feature fully complies with the relevant rule, then it cannot be reassessed on appeal."[30]

100. An interpretation of the s.121 words as meaning 'code compliance' will achieve that outcome. The consequence of that interpretation will be that 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. In other words, if the 'rules' in a more colloquial sense of the word are met, the development application cannot then be refused approval on review by the Tribunal.

101. If the 'code compliance' interpretation of the words is adopted, the reconsideration and review provisions set out earlier achieve a staggered approach to review by the Tribunal of planning decisions. It is an interpretation open on the literal meaning of the words, achieves the purpose of limiting the extent of review by the Tribunal of the Authority's exercise of discretion, gives the words some practical effect, and when adopted consistently where the words are used in the Planning Act results in a coherent and not impossible or unworkable system.

102. If rights under the *Human Rights Act 2004* are engaged by this interpretation of the provision, then adopting the reasoning set out in *Thomson*[31] the Tribunal is satisfied that the interpretation is permissible.

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[30] ACT Legislative Assembly, *Hansard*, 23 August 2007, Mr Barr, page 1990
[31] *Thomson v ACT Planning and Land Authority* [2009] ACAT 38

103. For these reasons, we are satisfied that the Tribunal's task in conducting review in this matter is to consider only whether the proposed development meets the requirements of applicable codes.[32]

7. Does this development proposal meet the requirements of subsection 119(1)(a)?

104. The applicants and second and third parties joined referred to multiple instances in which the development application was said not to meet the requirements of the applicable codes. The Authority and Coles each submitted that the code requirements were met, or could be met by conditions on approval or at the detail stage of the development.

105. It is an indication of the complexity of the Planning Act and Territory Plan that the same issue may be dealt with in multiple ways by the applicable codes, and also arise in the broader discretionary aspects of the decision. In this case, the granting of a holding lease with conditions that development comply both with the Territory Plan and other higher level planning documents, adds a further layer of intricacy and potential circularity to the decision-making process. So, for example, the question of 'desired character' arises in relation to the DPMC Criteria 9, and CZDC Criteria 45 and 46, as well as in the context of the Deed, which requires development in accordance with the DPMC, and is itself picked up by Rule 1 of the CZDC.

106. The Tribunal has not embarked upon a detailed consideration of each individual rule or criterion which it has been submitted is not met by the proposed development. Rather, we outline below our consideration of the major issues under the DPMC and CZDC. It will be seen from that consideration that we are satisfied that the proposed development does not meet code requirements in those respects and not only cannot, but should not, be approved.

7.1. site planning and urban design

107. The CZDC Rule 1 requires that the proposed development meet the intent of any approved lease and development conditions. It was submitted by the first party joined that the requirements of the Deed constitute the approved lease and

[32] We note that pursuant to section 40B of the *Human Rights Act 2004*, any human rights engaged by questions of code compliance must also be considered by the Tribunal when conducting the review.

development conditions for the purposes of this Code and the Tribunal accepts this submission.[33]

108. The Deed states that "the Authority and the developer have agreed that the site will be developed in the manner contemplated by this Deed and the Holding Lease…planning requirements are articulated in the Dickson Precinct Code…the developer must comply with the requirements of the Precinct Code at all times". The developer is also required to demonstrate "consideration of…the Dickson Centre Master Plan".[34]

109. Section 48 of the Planning Act provides that the object of the Territory Plan is to ensure "in a manner not inconsistent with the national capital plan, the planning and development of the ACT provide the people of ACT with an attractive, safe and efficient environment in which to live, work and have their recreation". The Deed for the subject site similarly requires the developer to "demonstrate that the intended development will provide an efficient, safe and attractive urban environment".[35]

110. The Deed contains specific requirements for urban design and the interface of the development with surrounding areas. The Tribunal considers here the detailed conditions in the Deed relating to site planning and urban design. The Tribunal considers separately the proposed development in relation to the Dickson Library, access and mobility and traffic and parking.

111. The Deed requires that Antill Street have "street tree planting commensurate with the 'avenue' nature of Antill Street, grassing and a concrete pathway…service areas to this frontage are to be limited and…must have acceptable screen planting or physical screening". The Badham Street frontage will have "high quality landscaping treatment and furniture". Road A is to be "a pedestrian friendly area with high quality landscaping treatments and furniture…to allow vehicular traffic but to be mostly a pedestrian priority area and to seamlessly match into the…adjacent existing public domain".[36]

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[33] Written outline of submissions of first party joined page 18
[34] Deed General Conditions at T-Docs page 2896; Deed clause A2.1.3; clause A2.1.7.1
[35] Deed clause A2.1.2; clause A2.1.3.1; clause A2.1.7.1
[36] Deed Annexure A2 clause A2.1.3.1

112. Mr Sladic and the second and third parties joined contend that the proposed development fails to meet these specific planning requirements. Mr Sladic also contends that the proposal fails to respond to key strategies in the Dickson Neighbourhood Plan. The Dickson Neighbourhood Plan is not referred to in the Deed but the Tribunal notes that planning and design principles in the Dickson Master Plan provide similar guidance in matters of urban design and emphasise accessibility, permeability, active frontages, fine grain and low scale pedestrian environments. These issues are also referenced in the concept of desired character in the DPMC.

113. The Tribunal was told by Mr Sladic that a "poor quality pedestrian and cycling environment, unsympathetic interface with surrounding uses and generally mediocre standard of urban design" would blight "the well-being and functioning of the Dickson Group Centre in the short, medium and longer terms".[37]

114. Mr Sladic said: "this is a large block. All we want is for the proposed development to be set back a couple of metres on the eastern and southern sides for sunlight and pedestrian amenity and on the northern and western sides so that real trees can be planted to mitigate the loss of amenity caused by the blank walls, loading docks and waste collection areas".[38]

115. Mr Sladic conceded that there had been "some small changes" to the original proposal "but it has just been tinkering at the edges". The proposed development "still encroaches on public space beyond the boundaries of the block by way of the land structures". As to Antill Street, Mr Sladic noted the existing public footpath had been "pushed further into the public road space with no nature strips separating pedestrians from cars".[39]

116. In the submission of Mr Sladic, the proposed development would "deeply affect" residents on Antill Street. He queried the acoustic evidence of Dr Tonin who "placed his noise measurement equipment inside the loading docks…gave no consideration to activity that occurs outside the loading dock…truck drivers, removalists and waste collectors have no qualms about parking on footpaths and nature strips". He

[37] Statement of facts and contentions from Mr Sladic dated 17 October 2016 at [13]
[38] Transcript of proceedings 22 March 2017 page 258, line 1
[39] Transcript of proceedings 22 March 2017 page 257, line 15; line 30

also expressed disappointment with the evidence of Mr Flannery as to the intent of the words 'urban setting' in the heritage listing for the Dickson Library.[40]

117. Ms Middleton gave evidence that she would have liked to have seen a "seamless integration" of the proposed development with the older parts of the shopping centre. In her opinion, the proposal would have a "low level of design consistency with the 'open' character of the existing core area which provides a continuous link of open spaces and walkway to all shopfronts". Ms Middleton suggested that the proposal to use different paving materials and colours to delineate traffic lanes from pedestrian areas and shared zones means that the "potential for confusion and poor legibility is high". As to the interface with surrounding areas, she was of the opinion that "the proposed arrangements for traffic circulation and the installation of entry and exit ramps within the road reserve of Road A is unlikely to encourage a pedestrian friendly and prioritised area in the manner envisaged by the specific planning requirements of the Deed of Agreement".[41]

118. Mr Erskine noted that almost all of the evidence before the Tribunal was expert evidence but, as noted earlier, that "the weight to be given to some of it is an issue". It was submitted that "it is not the role of the Tribunal to consider whether the proposed development could have been better designed but to determine whether the proposed development meets the requirements of the Territory Plan and the Act and should be approved".[42]

119. Mr Harrison gave evidence in which he strongly criticised the proposed development on the grounds of poor urban design and included suggestions for alternative designs. Mr Erskine recognised Mr Harrison as an expert in urban design in NSW but reminded the Tribunal that he was not familiar with ACT planning regimes. The Tribunal has refrained from detailed consideration of alternative proposals put up by Mr Harrison or any other witness. However, the Tribunal acknowledges the experience and expertise of Mr Harrison in matters of urban design.

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[40] When asked by Mr Sladic whether he had taken into consideration "what Taglietti thinks is an urban setting", Mr Flannery replied "we didn't ask Enrico Taglietti for his advice". Transcript of proceedings 22 March 2017 page 257, line 14; line 31; line 27

[41] Transcript of proceedings 1 December 2016 page 352, line 31; Middleton statement, exhibit CH3 at [31b], [33a], [52b]

[42] Final submissions of the first party joined at [6.2]

120. Mr Harrison criticised the "excessive" length of the Antill Street frontage given over to the loading dock and plant. In his opinion, the basement ramps within Road A should not be permitted for reasons of "public domain quality, pedestrian amenity and pedestrian safety'" and as being "inconsistent with the character of the Dickson Centre which generally prioritises pedestrians". Mr Harrison was also critical of the widths provided for pedestrian connections, which are "important because they connect to areas around the Dickson Centre via the street grid…and should be as pleasant and comfortable as possible". Awnings are "discontinuous or too shallow in depth" and footpaths should be wider.[43]

121. Ms Coyles gave evidence in relation to the location of the basement entry and exit ramps: "you would be in conflict with (Rule 19) to provide a basement (entry) on a primary active frontage…in my opinion putting a driveway (in an active frontage) does not meet the requirement of the Rule".[44]

122. Mr Oshyer told the Tribunal it would be a "less than desirable arrangement" for basement entry and exit driveway ramps to be located on the frontages of the building because pedestrians should have "ready access to the commercial tenancies". However, Mr Oshyer did not agree with Ms Coyles that the DPMC prohibits this arrangement. He gave evidence that the down ramp in Road A needs to be in the position shown so that a McDonald's waste collection vehicle can reverse out. He also gave evidence that TAMS/TCCS had required a public through access below the road level for drivers who chose not to enter the basement after going down the ramp.[45]

123. Mr Brown stated that in his view the development in relation to Road A would allow open and accessible pedestrian access, by adding a footpath that is not currently in existence and providing a shared zone without kerb impediments.[46]

124. Mr McDonald stated that in his view the provision of a footpath along Road A would be a significant improvement in pedestrian accessibility in the centre. Mr McDonald felt that the creation of the shared zone at the southeast corner (between the two

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[43] Harrison urban design statement, exhibit CH7 at [43], [45], [52]
[44] Transcript of proceedings page 323, line 39; Transcript of proceedings 1 December 2016 page 321, line 32
[45] Transcript of proceedings 2 December 2016 page 405-406; page 429; page 470
[46] Transcript of proceedings 5 December 2016 page 574

basement ramp structures) would significantly enhance the street space, and that it was expected that Road A would be very quiet, with a maximum of 11 vehicles per hour using the drop off or loading zones during the peak period.[47] This estimated rate of vehicle use does not sit comfortably with the Tribunal, given its observations of usage of Road A at the view, and the photographs supplied by Mr Sladic.[48]

125. Evidence for the NCCC and DCA described the "diverse and rich social mix" of the Dickson retail core which regularly hosts buskers outside Woolworths. Reference was made to the community night patrol by the St Vincent de Paul Society who park next to the main square and feed the homeless; to the Majura Men's shed and other aid and charity organisations active in the area; to the mix of cyclists, children, and the aged sometimes with mobility scooters or walking aids, and to the value to the community of the Dickson Library "which opens at 10am six days a week, is open Sunday afternoons and late on Fridays".[49] This description of users of the public realm and facilities is consistent with the observations of the Tribunal during the view, and the photographs tendered by Mr Sladic.[50]

126. The Tribunal was reminded by the second and third parties joined of the importance of the central east-west pedestrian spine from Northbourne Avenue which passes the subject site along Road A and of the emphasis in the Dickson Master Plan that "urban design principles would guide redevelopment". It was contended the most serious concerns with the proposed development relate to the desired character of Dickson; the quality of the public realm; pedestrian safety; and heritage protection of the Library.

127. The NCCC and DCA submitted that the proposed development did not demonstrate "a suitable response to its context or the site's opportunities…is not representative of or appropriate to this location (and) will rapidly erode the qualities that make Dickson's retail core a distinctive and welcoming suburban shopping centre". The Tribunal was told that "the implications of issuing an approval for a development that performs as poorly as this" are that "an important and irreplaceable gateway to

[47] Exhibit CG8 statement of Brian McDonald dated November 2016 page 9
[48] Exhibits S-5 and S-6
[49] Statement of evidence by Jane Crozier Goffman dated 17 October 2016 at [20]-[25]
[50] Exhibits S-3 and S-4

North Canberra misses out on successfully transforming into a well-designed sustainable modern urban village (and) accepts mediocre development".[51]

128. Evidence was given that the concern of the North Canberra Community Council was not with the advent of two new supermarkets in the Dickson Group Centre but with "the way that this particular development proposal gives shape and form to that requirement". The Tribunal was told that the proposed development would significantly damage "the character of the Dickson Group Centre as described in the zone objectives…the several codes that apply and the rules and criteria are designed to protect the quality of the character, the usability and the accessibility of the spaces the community uses…this is an important space in North Canberra …heavily used by an exceptionally broad range of people". It was contended that the basement ramps "completely wiped" 18 metres in each leg of Road A for pedestrians.[52]

129. The NCCC and DCA submitted the Tribunal should reject the suggestion that something outside the library site cannot impact on the heritage significance of the Dickson Library. "There is something being built in the buffer zone whether we argue about whether it's a basement or what that is extending beyond the guidelines...the connectivity, the sightlines, the wayfinding, the desire lines are all inhibited in different ways".[53]

130. The Tribunal has carefully considered the evidence and expert opinions and the submissions of the parties in connection with the site planning and urban design requirements of the Deed. On balance, the Tribunal has formed the view that the expectations of the Deed that the proposed development will provide an efficient, safe and attractive urban environment have not been satisfied and that the proposed development does not reflect planning and design principles in the Dickson Master Plan which emphasise accessibility, permeability, active frontages, fine grain and low scale pedestrian environments.

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[51] Statement of evidence by Jane Crozier Goffman dated 17 October 2016 at [47], [52]
[52] Transcript of proceedings 22 March 2017 page 267, line 30; line 35; page 272, line 11
[53] Transcript of proceedings 22 March 2017 page 272, line 30; page 275, line 12; line 41

131. The Tribunal finds that:

(a) the interface of the proposed development with the streets and surrounding areas does not provide consistency with the character of the Dickson Group Centre;

(b) the specific requirements in the Deed for 'avenue' tree planting in Antill Street and high quality landscape treatments and furniture on Badham Street and Road A has not been met;

(c) the proposed development does not satisfy the specific requirement that Road A be a pedestrian friendly area and mostly a pedestrian priority area;

(d) the ramps within Road A limit the opportunities for safe and convenient movement by pedestrians and others within the immediate area of the development and in the larger area of the Dickson Centre and their location within Road A cannot be supported.

132. For these reasons, the Tribunal finds that the proposed development is not consistent with the intent of the Deed in the area of site planning and urban design and does not meet the intent of the approved lease and development conditions as required by rule 1 of the CZDC.

7.2. The Dickson Library and the 'buffer zone' – Rule 26 DPMC

133. The Deed notes that the Dickson Library is included "as a Heritage Place in the ACT Heritage Register and is located adjacent to the development site. Works should be designed to respect the urban setting of the Dickson Library that allows clear views of the library from all four sides".[54]

134. Additionally, Rule 26 of the DPMC states:

2.11 Dickson library buffer area	
R26 No new building, except basement, is permitted within the 'library buffer area' shown in figure 3. The 'library buffer area' is defined as the area measured from any point on each boundary of block 13 section 30 Dickson for a minimum distance of 10 metres.	This is a mandatory requirement. There is no applicable criterion.

[54] Deed of Agreement Annexure A2 clause A2.5.1

135. The Tribunal had regard to whether the proposed development complies with mandatory Rule 26 in the Dickson Precinct Code and whether the proposed development also satisfies the requirement of the Deed that it "respect the urban setting of the Dickson Library that allows clear views of the library from all four sides".

7.2.1. ACT Heritage Register

136. The Dickson library was included on the ACT Heritage Register in October 2008. The entry to the Register reads as follows:

> *Statement of Heritage Significance:*
>
> *The Dickson Library is significant in being the earliest civic building to demonstrate the National Capital Development Commission's (NCDC) move to introduce modern architectural styles to Canberra. Built in the Late Twentieth-Century Organic style of architecture, its 'free' design is an important architectural style development in 1960s Canberra that contrasts with more rationalist architecture of that time. Its urban setting is distinctive of the modern style and combined with the building's external design produces a place of modern architectural integrity.*
>
> *The library is significant as an innovative and significant work by Enrico Taglietti, one of Canberra's noted architects, in his first commission from the NCDC. Its design significance is widely recognised by professional bodies and architecture critics in listings and publications on significant architecture.*
>
> *As a relatively rare and externally well-preserved example of a 1960s civic library, it continues to fulfil its original purpose, remaining sound yet innovative.*
>
> *Features intrinsic to Heritage Significance:*
>
> *The physical features of the Dickson Library that particularly reflect its heritage significance are:*
>
> *Site plan where the building is a sculptural form in an urban setting, incorporating a small piazza and courtyard walls and including the original scale, form and fabric.*
>
> *The library, specifically the angular geometry; deep horizontal fascias (but not the present green 'colorbond' replacement material); in situ board patterned off-form concrete walls, plastic covered steel glazing frames, face brickwork, courtyard stormwater treatment, what remains of the original clear timber finish internally, open planning and varied ceiling heights.*
>
> *The setting of the <u>place</u> that enables its scale and form to be appreciated including the <u>open form of the urban setting</u> from all four sides.*

Applicable Heritage Guidelines:

The Heritage Guidelines adopted under s27 of the Heritage Act 2004 are applicable to the conservation of Dickson Library, Dickson.

The guiding conservation objective is that the Dickson Library, Dickson, shall be conserved and appropriately managed in a manner respecting its heritage significance and the features intrinsic to that heritage significance, and consistent with a sympathetic and viable use or uses. A conservation management plan (CMP) would help to guide conservation and future use. Any works that have a potential impact on significant fabric (and/or other heritage values) which are necessary prior to the development of a CMP shall be guided by a professionally documented interim assessment and conservation policy relevant to that area or component (i.e. a Statement of Heritage Effects - SHE).[55]

7.2.2. The Conservation Management Plan

137. A Conservation Management Plan (**CMP**) for Dickson Library was prepared in 2013 and was subsequently endorsed by the ACT Heritage Council. The Council noted it was "satisfied that the Conservation Policies contained therein are appropriate to provide for the ongoing conservation of the heritage place". The Conservation Management Plan becomes the 'applicable heritage guidelines' for the conservation of Dickson Library.[56]

138. The CMP notes that the heritage listing provides "statutory protection for the Dickson Library…the ACT Heritage Council will assess any DA for compliance with the specific requirements of the ACT Heritage register entry and with the recommendations of this CMP". Conservation Policies in the CMP were formulated "to assist in managing the significance of the place". Policies relevant in the assessment of the impact on the Library of development on adjacent sites include Policy 18: "development on adjacent blocks should be limited to 3 stories, maintain existing block boundaries, incorporate an active pedestrian frontage and be suitably landscaped to provide a "green" outlook from within the Library"; and Policy 19: "the Library should remain a freestanding building surrounded by open space".[57]

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[55] Heritage (Decision about Registration of Dickson Library, Dickson) Notice 2008 (No1): Notifiable Instrument NI 2008-481

[56] Notice of Approval of Conservation Management Plan under section 110 of the *Heritage Act 2004* in *Conservation Management Plan for Dickson Library* prepared by Philip Leeson Architects dated June 2013

[57] Conservation Management Plan pages 7-8; pages 113

139. The Tribunal notes also that there had been for some time an expectation that the subject site would be developed and that the relationship of new development to the Library would require consideration. In that context, the Conservation Management Plan notes that "the precinct code was revised to provide a buffer area around the Dickson library where no new buildings may be developed".[58]

140. Evidence was given as to the currently proposed height, materials and construction of the walls around the basement ramps. These have varied in the past, and it was acknowledged may be open to variation in the future. The Tribunal is of the opinion that such matters of detail may be of less consequence than consideration of whether or not the land required for the ramps should be within the buffer area around the Dickson library "where no new buildings may be developed".

7.2.3. Rule 26

141. Rule 26 in the DPMC is capable of various interpretations. In this context, the Tribunal notes again that section 139 of the *Legislation Act 2001* provides that "in working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation".

142. Mr Erskine submitted that the intention behind Rule 26 is "to provide an area clear of substantial buildings so that the exterior of the library can be appreciated…the text and the purpose point to a legislative intent to keep the area clear of permanent significant structures". Mr Erskine cited the decision of Buckley LJ in *Boyce v Paddington Borough Council* as supporting the conclusion that the basement ramp walls were not a 'building': "the land is to be enjoyed in an open condition free from buildings…'buildings' there means erections which would cover some part of the ground".[59] In response, Mr Sharwood pointed the Tribunal to the case of *Ward v Griffiths* (1987) 9 NSWLR 458 in which a concrete driveway was held to be a substantial structure and thus a building.

143. The Tribunal was presented with a range of competing arguments as to the meanings of the words 'building' and 'basement' in Rule 26. The DPMC notes that words in the Code which are italicised are "defined terms" or "references to

[58] Conservation Management Plan page 103

[59] Written outline of submissions of first party joined at 12.12; *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (affirmed by the House of Lords: [1905] UKHL 565)

legislation".[60] In Rule 26 of the DPMC, the words 'building' and 'basement' are not italicised and hence would not seem to be covered by definitions in the Territory Plan. The submissions of on behalf of Charter Hall led the Tribunal to the conclusion, however, that the italicising of defined words in the codes is not always a reliable indicator of whether the definition is intended to be used.

144. In this case, whether the defined terms are used or the ordinary meaning of the words adopted, the Tribunal is satisfied that the basement ramp walls contravene Rule 26.

145. The Macquarie dictionary defines a building as "a substantial structure with a roof and walls" however the Oxford dictionary defines it as 'a permanent built structure that can be entered'. We are satisfied that on the ordinary meaning, the walls are a building. As in *Ward v Griffiths*, the ramp walls under consideration are of such a height, depth, length and constructed of such material as to be considered substantial. However, we do not consider that the ramp walls are 'basement', rather they are structures attached to the basement.

146. If the defined terms are to be used, all parties agreed that the basement ramp walls would be considered to be 'building' if structurally 'attached' to the basement. However, the meaning of the word 'attached' includes both structural and functional attachment. The Macquarie Dictionary for the word 'attach' gives multiple meanings:

> *verb (t) 1. to fasten; affix; join; connect: to attach a cable.*
>
> *2. to join in action or function.*
>
> *3. to place on duty with or in assistance to an organisation or working unit temporarily, especially a military unit.*
>
> *4. to connect as an adjunct; associate: a curse is attached to this treasure.*
>
> *5. to assign or attribute: to attach significance to a gesture.*
>
> *6. to bind by ties of affection or regard.*
>
> *7. Law to arrest (a person) or distrain (property) in payment of a debt by legal authority.*
>
> *8. Obsolete to lay hold of; seize.*
>
> *–phrase 9. attach to, to adhere or pertain to: no blame attaches to him.*

[60] Dickson Precinct Code introduction page 4

[Middle English attache(n) seize, from Old French atachier hold fast] –attachable, adjective

147. If there were any question as to whether the more inclusive meaning of 'attachment' should be adopted, the Tribunal is satisfied that an interpretation which includes 'functional' attachment should be preferred as an interpretation which would best achieve the purpose of the legislation. The purpose of Rule 26 is to exclude building from the buffer zone. An interpretation which permits the operation of that rule to be avoided by adopting a different mode of physical attachment should not be preferred. The Tribunal is satisfied that whether or not the basement ramp wall is physically connected to the basement, it is functionally required and in that sense is 'attached'.

148. It was submitted for Coles that even if the basement ramp wall was considered to be attached to the basement, and thus a building, it would be excluded from the application of Rule 26 because Rule 26 excludes basement. This is not a correct reading of the defined terms. The word 'building' is defined to include structures attached to a building. But the word 'basement' is not defined to include structures attached to a basement. The basement ramp wall is defined as building, but it is not by virtue of that definition defined as a basement. The basement ramp walls do not satisfy the definition of 'basement' as they are not a space within a building which has a finished floor level above.

149. Whether the defined terms or the ordinary meaning of the words 'building' and 'basement' are used, Rule 26 is contravened by the location of the basement ramp wall within the buffer zone.

7.2.4. The advice of the Heritage Council: the pre-application meeting

150. The Tribunal was advised that in April 2014 "representatives of Coles met with representatives of the respondent and representatives of other relevant agencies including the Heritage Council in a pre-application meeting for the purposes of the development application subsequently made. The Heritage Council representatives informed the meeting that there were no heritage issues enlivened by the proposed application".[61]

[61] Final submissions of the first party joined at page 17

151. The attendance of the Heritage Unit at the pre-application meeting was confirmed in a document "assessment against the provisions of the Dickson Precinct Code" which stated that "the matter (of the basement ramps) was discussed with representatives of the Heritage Unit at the pre-application meeting and no objections were raised to this aspect of the proposal".[62]

152. The Tribunal was provided with a copy of an undated email that makes reference to a pre-application meeting at the Authority's offices on 14 April 2014.[63] Attached to the document provided to the Tribunal are five preliminary plans and sections at A4 size titled 'request for tender 30 May 2013 Block 21 Section 30 Dickson'. The plans are difficult to read with little explanatory text. Also attached are two perspective sketches at A4 size showing street views of the proposed development. Reduced black and white copies of the email, the preliminary plans and sections and the perspective sketches are attached to a submission prepared by Jane Crozier Goffman on behalf of the second and third parties joined.[64]

153. The Tribunal has carefully considered the undated plans referred to above and is of the opinion that they do not adequately portray the location of the ramps in relation to the Library and should not have been relied upon by the representatives of the Heritage Unit in forming the opinion that there were "no objections" to the proposal.

154. The words 'buffer zone' or 'buffer area' do not appear on the drawings referred to above. One drawing marked 'basement 1' has the note in small text 'ramp up from B2 extends beyond Block 21 Section 30' but does not say that the ramp is located outside the subject site. A drawing marked 'illustrative cross section' has the note 'ramp direct to basement from lane all vehicles entering the carpark will avoid main pedestrian zones'. The plan marked 'new ground public domain plan' has arrows and the words 'vehicle entry ramp to basement car parking' and 'exist (sic) ramp from basment (sic) car parking'.

155. A night time perspective drawing marked 'new Dickson Lane artist impression' shows a car emerging from the basement alongside the Library. A low black wall surrounds the basement ramp. In the opinion of the Tribunal, this sketch is

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[62] Knight Frank: statement against relevant criteria dated 10 November 2014 at T-Docs page 2594
[63] Exhibit CH12
[64] Response in reply to materials submitted by the respondent – on behalf of the second and third parties joined dated 21 November 2016

misleading and irrelevant in that the ramp and wall are clearly drawn at an incorrect scale.

156. A three-page document headed "notes from the pre-application meeting held on 14 April 2014" was prepared by an officer from the Development Assessment Branch of the Environment and Sustainable Development Directorate and was circulated on 14 May 2014. The document records that the meeting was attended by seven representatives of ESDD, a tree protection officer, a representative of Actew Water and ten representatives of the proponent including architect Ms Natalie Coyles.[65]

157. The notes record at item 4 that "ESDD Heritage is satisfied with the proposed access to the basement with a 10m clearance from the existing Dickson Library (heritage listed) located to the east of the proposed building". The Tribunal is of the opinion that the words "with a 10m clearance from the existing Dickson Library" are an incorrect description of the proposed basement ramps.

158. The notes also include the following comment: "the indicative perspective of Dickson Place highlights the problem of cars coming up a ramp into a shared pedestrian zone and possible conflict between cars and pedestrians. While this is possibly a detail design issue, please consider how the safety of this outcome can be improved". There is no record of any response to this comment.

7.2.5. The advice of the Heritage Council: the development application

159. Development application DA201426717 was lodged with the Authority on 12 December 2014. On 17 December, the Authority forwarded the application for advice in accordance with Section 148(1) of the Planning Act with the following note "mandatory referral - reasons: there are building elements within heritage buffer zone of the Dickson Library ie awnings and ramp protection walls".[66]

160. On 5 January 2015, the Authority received the following advice signed by the 'Acting Secretary as delegate for the ACT Heritage Council':

> *There are no perceived heritage issues with this application and a detailed assessment is not required.*

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[65] Email from Ajith Buddhadasa to Rebecca Stockley dated 14 May 2014 and marked Attachment 2 in response in reply to materials submitted by the respondent – on behalf of the second and third parties joined dated 21 November 2016

[66] Email from Authority to Heritage Referrals dated 17 December 2014 at T-Docs page 1629

> *The proposed development is adjacent to Dickson Library which is included on the ACT Heritage Register. The proposed development has been designed to provide setbacks of the main building form to ensure views of the western side of the library are retained. The proposed ramps to the basement carpark should not detrimentally impact on views of the library. The part of the building that is greater than three stories in height is contained within the north part of the block that is not directly adjacent to the library (in accordance with policy 18 of the Dickson Library Conservation Management Plan of June 2013 by Philip Leeson Architects). Consequently, the Council has no objection to this development.*[67]

161. The above advice includes a statement that the proposed development provides "setbacks of the main building form to ensure views of the western side of the library are retained". The Tribunal notes that this statement does not align with the drawings that the Heritage Council had before it at that time. Plans submitted for development approval show ground floor shopfronts set back from the eastern boundary of the subject site but the floors above are built to the site boundary. The suggestion of the Heritage Council that "the main building form" had been set back "to ensure views of the western side of the library are retained" is therefore not supportable.[68]

162. Evidence to the Tribunal was given by Mr David Flannery, who was appointed as chair of the ACT Heritage Council in March 2015. Mr Flannery was not a member of the Heritage Council at the time when the development application was lodged with the Authority.

163. Mr Flannery advised that the Heritage Council provides more than 500 pieces of advice each year and has formed taskforces with "only a few Council members in each to assist with decision making and the provision of advice". He notes that the use of task forces allows members of the Council with appropriate expertise "to thoroughly consider and provide advice on a range of matters including registration decisions and development applications before they are considered by the full Council.[69]

164. Mr Flannery defended the advice of the Heritage Council to the Authority in response to this development application and gave evidence that, in his opinion, the heritage significance of the Library would not be diminished by the proposed development: "it was always seen as a non-complex referral…two people looked at

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[67] T-Docs at page 1631
[68] Ground Floor Plan DA 21.03 dated 8 October 2014 at T-Docs page 2818
[69] Statement of David Flannery dated 11 November 2016

it". Asked whether either of these was a member of the Council, Mr Flannery replied "they were both members of staff".[70]

165. Mr Flannery confirmed that the Heritage Council was involved in the preparation of the DPMC and had specifically supported the creation of the buffer zone: "the Precinct Code was revised to provide a buffer area around the Dickson Library where no new building may be developed…the Council is satisfied that the amendments proposed…will provide adequate curtilage to provide for the urban setting of Dickson Library, allowing it to be viewed from all sides".[71]

166. Mr Flannery stated "the Council maintains its position that (the) approved development within Block 21 Section 30 Dickson will not diminish the heritage significance of the Dickson Library". As to the impact of the basement ramps and balustrades, Mr Flannery said "there are still places along the length of the western elevation of the Library where you can stand opposite and not be encumbered by looking over a balustrade".[72]

167. In Mr Flannery's opinion, the heritage significance of the Library building could not be affected by building on the subject site because the proposed development did not include any work on the Library site. He was supported in this opinion by Mr McDonald. Asked whether Policy 19 in the Conservation Management Plan that "the library should remain a free-standing building surrounded by open space" might have "informed the intent of Rule 26" Mr McDonald replied "the buffer zone…does provide space so people can appreciate it and see it in the round".[73]

168. Mr Martin, a former chair of the ACT Heritage Council, offered a contrary view that the proposed development "will adversely affect the scale and urban setting which are intrinsic features of the Dickson Library".[74]

7.2.6. Dickson Library: Conclusions

169. It was submitted to the Tribunal by NCCC and DCA that "there is no compelling reason…for retaining the ramps external to the site…rather than adopting the

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[70] Transcript of proceedings 6 March 2017 page 91, line 40

[71] Transcript of proceedings 6 March 2017 page 78, line 35; Conservation Management Plan page 102

[72] Flannery statement page 6; transcript of proceedings 6 March 2017 page 78, line 37; page 81, line 29; page 83, line 8

[73] CMP page 113; transcript of proceedings 6 March 2017 page 65, line 15

[74] Expert report of Eric Martin dated 17 October 2016 page 2

standard entry/exit arrangement whereby a ramp is provided perpendicular to the boundary and access to private development is wholly contained within the site".[75]

170. However, Coles submitted that the issues in relation to traffic management and pedestrian safety, and planning constraints in relation to location of access and egress, dictated that the ramp design be employed, with the ramps located on Road A.

171. Mr Erskine submitted that the buffer zone was never envisaged as being pristine – he pointed out that cars drive down Road A, and that currently there are four poles with a shade cloth outside the library.[76] [77]

172. The Tribunal has carefully considered the evidence and has formed the view that the purpose of Rule 26 in the DPMC is to maintain the open urban setting of the Library. The Tribunal is not persuaded by Mr Flannery's narrow view that the buffer area is there only so that people can see the Library. The Tribunal prefers the evidence of Mr Martin in this respect. The Tribunal is satisfied that the 10m buffer area maintains the original setting of the Library and that this setting is an important part of its cultural significance.

173. In the opinion of the Tribunal, discussion as to the various parts of the Dickson Library visible or not visible from the other side of Road A is not determinative of this issue. The Tribunal also finds little merit in debate about the materials or construction of the ramp safety walls nor how the application of Rule 26 may be avoided by various methods of fixing the walls to the ground.

174. The Tribunal is satisfied that the proposed basement ramp wall breaches mandatory Rule 26 of the DPMC. Further, the development proposal at this fundamental design level fails to respect the urban setting of the Dickson Library, contrary to the intent of the Deed and this constitutes a further breach of CZDC rule 1.

175. Mr Sladic submitted that the Tribunal should require that any further application in relation to the site be lodged in the impact track. It was submitted on behalf of

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[75] Response in reply to materials submitted by the respondent – on behalf of the second and third parties joined dated 21 November 2016 page 9

[76] Transcript of proceedings 23 March 2017 page 330

[77] We do not know the basis on which the poles are erected, and note only that if the poles require development approval and constitute a breach of Rule 26, that is no reason to permit a further breach to occur.

Charter Hall that a similar outcome occur, unless the Heritage Council produce an environmental significance opinion that the development proposal is not likely to have a significant adverse impact on the heritage listed Dickson Library.

176. Both the Authority and Coles submitted that the Tribunal had no role in relation to issues of process such as the correct track, and should confine itself in considering heritage issues to the matters contained in sections 119 and 120.

177. Having considered the background events, and the evidence of the heritage experts, the Tribunal is of the opinion that there were shortcomings in the process of consultation with the Heritage Council for the following reasons:

(a) It seems that insufficient and inaccurate information was made available at the time of the pre-application meeting on which the representatives of the Heritage Unit to conclude that there could be "no objections" to the proposed development;

(b) advice provided by the Heritage Council in relation to the development application represented a misreading of the drawings as it related to the form of the building on the eastern boundary of the subject site and the impact that this might have on the Library;

(c) advice provided by the Heritage Council failed to address the specific requirement of the Conservation Management Plan that there be "a buffer area around the Dickson Library where no new buildings may be developed"; and

(d) the conclusion of ACT Heritage that the development application "was not complex or of major consequence in relation to the Act" was wrong and would likely have been seen to be wrong had it been reviewed by a member of the Heritage Council.

178. Ordinarily, if a Tribunal conducting merits review concludes that a necessary procedural requirement for the original decision has not been met, and the requirement cannot be addressed through the hearing process, the Tribunal will set aside the reviewable decision and remit the matter to the original decision-maker with a direction that the necessary steps be undertaken and a decision be made afresh.[78]

[78] Section 68(3)(c)(ii) ACAT Act

179. However, it follows from our interpretation of the words in section 121(2) and elsewhere that, irrespective of our concerns in relation to the heritage consultation, the Tribunal is not able to determine whether the elements of section 119 other than code compliance are met. Consequently, we decline to make the orders sought.

7.3. Other issues raised by the Dickson Precinct Map and Code (Dickson Precinct Code)

180. The Tribunal heard evidence as to the consistency or otherwise of the proposed development with the desired character of the Dickson Group Centre and with relevant rules and criteria in the DPMC.

181. In particular, the Tribunal has considered the proposed development against the statement of desired character for the Dickson Group Centre as required by Criterion 9; Rule 7 building heights (mandatory); Rule 14/Criterion 14 main pedestrian areas and routes; and R27 landscaping (mandatory).

182. The desired character of the Dickson Group Centre is as follows:

- *vibrant mixed use development*
- *solar access to active public spaces within the core area*
- *restaurant and entertainment focus on the ground floor along Woolley Street*
- *open and accessible pedestrian access through the centre*
- *high quality finishes with interesting, articulated building facades*
- *active frontages along main pedestrian routes*
- *fine grain shopfronts along main pedestrian areas*
- *generally consistent building setbacks, with small indents to provide interest and active uses*
- *the centre to retain the open character with pedestrian walkways*
- *provision of an open, permanently accessible pedestrian plaza at the corner of Badham Street and Dickson Close*
- *landscaped areas that contribute to the amenity of the centre*

183. It is not necessary that a development meet or exceed each and every one of these objectives in order to be deemed ‘consistent’, nor is a precise mathematical calculation required. The judgment is qualitative. The Tribunal has studied the plans and drawings including further revisions submitted during the conduct of the hearing. We have taken into account that the expert witnesses differed in their assessment of what amounted to ‘fine grain shopfronts’, the precise dimensions of an ‘open’ or ‘accessible’ pedestrian path, or what might be considered a ‘high quality finish’.

184. The Tribunal is satisfied that the proposed design, with basement carparking ramps with safety walls of at least 1.2 metres in height located over two 18 metre stretches in Road A, fails to achieve open and accessible pedestrian access. We note the provision of a shared zone between the ramps, which includes a loading and pickup zone, and pedestrian walkways on the perimeter of the site. However the dimensions of the spaces provided for pedestrians around the subject site are in our view insufficient for the number and kind of users expected to frequent the area.

185. The width of the footpath on the south side of the proposed development is shown on the plans as "3000 min" for a short distance from Badham Street along Road A. This reduces to 2135mm at the ramp to the basement. There is no pedestrian crossing from the subject site to the Woolworths site.

186. While part of Road A becomes designated as a shared zone with pedestrian priority, this is in our view insufficient to overcome the barrier effect of the walls. Additionally, by the conclusion of the hearing, safety concerns held by the traffic experts had led to two additional fences being proposed on either side of Road A to the west of the library. We note the proposal that the pedestrian pathway on the southern side of the site, between the colonnades, would also include bicycle parking and potentially trolley bays. The pedestrian pathway to the west, on Badham Street, as we discuss below, is of inadequate width.

187. Mr Brown in his evidence pointed out that the proposed development will provide additional footpaths that do not currently exist.[79] Mr McDonald also opined that there would be an improvement in pedestrian access as a consequence of the development. That much is true, however the test is not whether or not there are more footpaths, it is whether or not something is created which is open and accessible. We do not consider that what is proposed to be built can be described as open and accessible.

[79] The Tribunal notes that when Mr Brown gave his evidence and saw 'no impediment' to the ability of pedestrians to move from the subject block to surrounds, the proposal for the additional safety fences had not yet appeared.

188. Rule 14/Criterion 14 of the DPMC also deal with pedestrian access:

R14	C14
This rule applies to pedestrian areas, including new trans-section routes shown in figure 2. Development is to provide pedestrian areas and pedestrian trans-section routes that comply with all of the following: a) minimum unobstructed width is 4m b) for new trans–section routes – signage at each end identifying the connection provided Note: A condition of approval may be imposed regarding the tenure pedestrian routes.	The width and scale of new pedestrian trans-section routes reflect their function, and provides sufficient width for pedestrian movement.

189. It was submitted to the Tribunal that Rule 14 does not apply because the subject site is not on a trans-section route. However, the Rule is headed 'main pedestrian areas and routes' and applies to "pedestrian areas including new trans-section routes". The Tribunal notes that the proposed Road A is a central component of the only complete east-west route through the Dickson precinct from Northbourne Avenue to the swimming pool and beyond.[80]

190. Rule 14 uses the term 'pedestrian area' and refers to figure 2. Figure 2 has a heading 'Pedestrian areas and connections', under which is contained the legend for 'main pedestrian areas', 'proposed connections along road' and 'proposed trans-section connections'. From these headings, the Tribunal is satisfied that the term 'pedestrian area' refers to those areas identified in that figure 2 legend. For the current development, the Badham street frontage is a main pedestrian area, and thus a pedestrian area required to be a minimum of four metres in width.

191. It was conceded by Coles that on the most recent plans this requirement is not met. Although the pathway commences as 4.2 metres wide, it is reduced to 3.4 metres where a parallel parking space is provided, and is additionally impacted upon by planters at ground level for the six proposed trees.

192. It was submitted that where Rule 14 was not met, then Criterion 14 could be relied upon which, as it does not apply, would mean that it was met. The Tribunal does not accept that interpretation. The better interpretation of Rule 14 is that Criterion 14 may be relied upon in relation to any new pedestrian trans-section routes. We

[80] Dickson Centre Master Plan May 2011 exhibit NC11

recognise that this has the effect of making those parts of Rule 14 dealing with other pedestrian areas mandatory, however in our view this is preferable to adopting an interpretation in which compliance with the Rule in relation to pedestrian areas that are not new trans-section routes is unnecessary.

193. An alternative interpretation urged upon the Tribunal was to interpret Criterion 14 as applying to all pedestrian areas, and not just new trans-section routes. If this interpretation was adopted, in the opinion of the Tribunal it would be inadvisable to provide less than a minimum unobstructed width of four metres to the Badham Street pathway, given its connection to the traffic crossing at Antill Street, and the expected number of persons using that traffic crossing and Badham Street footpath to access areas such as the tram located to the west of the site. Reliance on Criterion 14 to claim that the footpath at the middle of this route provides "sufficient width for pedestrian movement" cannot be supported, given the significant reduction in usable space caused by the layby area and tree plantings

194. Landscaping requirements are dealt with in Rule 27 of the DPMC and also require a "quality space for pedestrians".

195. The proposed landscaping for the site evolved over the course of the hearing. Despite the views of the Conservator, nine regulated trees on the site are to be removed by the development. All of the site is to be built upon and ground level landscaping occurs offsite.

196. Initially there was a proposal for five advanced crepe myrtles to be planted on the western side of the library, and these remain depicted in the CG17b offsite works plan. However, at the conclusion of the hearing, this proposal was withdrawn.

197. Evidence was given that the proposed development satisfies the requirement of Rule 27 by the planting of 44 trees at the residential podium level; 13 trees in the Antill Street verge; six trees in the Badham Street verge; one tree outside Woolworths and two small trees in raised planter beds at the ends of the basement ramps.[81]

198. The Tribunal notes that the proposed development is built to the boundary of the subject site on Antill Street and Badham Street and has nominal setbacks only on

[81] Expert report of Neil Hobbs dated 14 November 2016, exhibit CG5

part of the south and east boundaries. No trees are planted within the site at ground level and no portion of the site is retained as public open space. Parts of Road A have red brick paving and oxide coloured concrete.

199. It was submitted on behalf of Coles that the tree plantings on Antill and Badham Streets improved the quality of the space for pedestrians. Again, this is the incorrect test. The landscaping is not required to be an improvement on the quality of the space that existed prior to the development, but must be considered to 'achieve … a quality space for pedestrians'.

200. The Tribunal has carefully considered the proposed landscape treatments and has formed a view that the proposed development fails to provide "landscaping associated with capital works and pedestrian routes" which delivers "quality space for pedestrians" as required by Rule 27 of the DPMC.

201. The DPMC also contains requirements for building heights on the subject site and setback of plant.

202. It was submitted by Coles that the height of the proposed development was not in dispute. Nonetheless, the Tribunal is concerned that on the current plans, Mandatory Rule 7 in relation to building height is not met.

203. The Tribunal refers to Guideline no.13 *Datum Ground Level*[82] issued by the Surveyor-General of the Australian Capital Territory which notes "the value of determining Datum Ground Level (**DGL**) is to ensure there is a clear and widely accepted ground level for design and compliance purposes".

204. The plans show a south elevation marked "ground level RL 576.200" and "balustrade RL 586.250". The 'ground level' marked is not the level of the ground but the level of the ground floor of the building. The mandatory requirement must be satisfied in accordance with the Guideline for Datum Ground Level.

205. The plans show roof top areas marked 'car park exhaust' and 'Coles plant' which appear not to be set back the minimum 3 metre distance from the facade below. This mandatory requirement of the DPMC is not satisfied.

[82] Exhibit CG24 dated 18 November 2013

7.3.1. DPMC – Conclusions

206. The Tribunal has carefully considered the evidence and expert opinions and the submissions of the parties in connection with the DPMC. The Tribunal has formed the view that the proposed development does not contribute appropriately or effectively to the streetscape or the pedestrian experience and to the desired characteristics for the Dickson Precinct and does not deliver quality space for pedestrians as required by the Rule 27 of the DPMC.

207. The Tribunal considers that the proposed development does not meet the expectations for the desired character because it does not contribute to the streetscape or the pedestrian experience in the following areas:

- *open and accessible pedestrian access through the centre*
- *the centre to retain the open character with pedestrian walkways*
- *landscaped areas that contribute to the amenity of the centre*

208. The Tribunal is of the opinion that these characteristics are central to the amenity of the Dickson Group Centre, and the proposed development falls so significantly short in these aspects that it cannot be considered to be consistent with the desired character. It thus fails to meet Criterion 9 of the DPMC.

209. The Tribunal is satisfied that the proposal also fails to comply with Rule 14, and cannot on its terms satisfy associated Criterion 14. Even if Criterion 14 was available, the Tribunal has concluded that given its location and anticipated use a claim that the footpath on Badham St provides "sufficient width for pedestrian movement"[83] cannot be supported.

210. The Tribunal is satisfied that the proposed basement ramp wall located in the library buffer zone contravenes mandatory Rule 26, and the development fails to respect the open urban setting of the Library as required by the Deed.

211. For these reasons, the Tribunal finds that the proposed development is not consistent with the requirements of the DPMC.

[83] Exhibit CG4, Statement of Ms Coyles dated November 2016, page 4

7.4. Traffic and Parking Issues

7.4.1. The reports of the traffic experts

212. The developer is required by the Deed to prepare and submit for approval a traffic impact assessment and "any road safety audit report required by TAMSD". A traffic impact report dated May 2014 was prepared by Mr Graeme Shoobridge at Mott MacDonald in response to this requirement.[84]

213. In September 2016 the Tribunal directed Charter Hall, the Authority and Coles to provide a joint expert report concerning traffic and parking. Reports and statements of evidence were prepared by Mr Tim Rogers for Charter Hall; by Mr Chris Coath for the Authority; and by Mr Graeme Shoobridge for Coles. Following a joint conference of the traffic experts, a document *Meeting and Joint Report of Experts* was delivered to the Tribunal on 22 November 2016. A second document *Meeting and Joint Report of Experts* was received by the Tribunal on 7 March 2017.[85]

214. The Tribunal documents include two versions of the Mott MacDonald report dated May 2014 and August 2014 respectively. The report dated August 2014 also lists eight appendices but neither of the reports provided to the Tribunal contains these appendices. The August 2014 report also includes a new Section 6 'Peer Review' which does not appear in the earlier copy of the report. Section 6 includes comments on two of the missing appendices – Road Safety Audit' and 'Comments by ACT Government Agencies'. Both copies of the Mott Macdonald report make reference to other traffic studies by SMEC and Brown Consulting but these studies were also not provided to the Tribunal.[86]

215. The Tribunal was told that Mr Rogers and Mr Coath had been given copies of the report dated 11 August 2014 but that it became apparent when the traffic experts met that the listed appendices had not been included with the Mott MacDonald

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[84] Deed clauses A2.1.2, A2.1.6; Mott MacDonald report *Traffic Impact and Parking Assessment* dated May 2014 Rev A at T-Docs pages 2381–2429

[85] ACAT Directions 21 September 2016; *Expert Report* of Tim Rogers dated 14 November 2016; *Transport Impact Evidence* by Christopher Coath of GTA Consultants dated 21 November 2016; *Statement of Evidence* of Graeme Shoobridge dated 23 November 2016; *Meeting and Joint Report of Experts* dated 1 November 2016; (second) *Meeting and Joint Report of Experts* dated 6 March 2017 at exhibit R20

[86] Mott MacDonald report *Traffic Impact and Parking Assessment* Rev. A dated May 2014 at T-Docs 2381–2429; Mott MacDonald report *Traffic Impact and Parking Assessment* Rev. D dated August 2014 at T-Docs 1211–1266

report. Mr Shoobridge confirmed that the traffic experts were subsequently given copies of the appendices.[87]

216. Mott MacDonald had been instructed to provide "traffic advice to address and resolve potential traffic issues relating to the proposed development". Mott MacDonald noted that Specific Planning Requirements in the Deed indicated a basement entry at right angles to Road A but gave the opinion that this would be "in conflict with the objectives of the Primary Active Frontage along the southern side of the development" as required by the DPMC . Mott MacDonald said that a ramp at right angles to Road A is "not preferred from a retail, planning, conflict (sic) and traffic operational viewpoint" but gave no further explanation as to how such an arrangement might adversely impact on retail, planning or traffic operations.[88]

217. Mr Rogers, Mr Coath and Mr Shoobridge were given similar instructions for the preparation of their expert reports: "to address the traffic and parking matters related to the proposed development" (Rogers); "to assess the anticipated parking, traffic and transport implications of the proposed development" including "proposed access arrangements for the site" (Coath); and "to provide an expert opinion in respect of issues raised by the applicants and parties joined concerning traffic and parking" (Shoobridge).

218. The purpose of the meeting of the experts and the preparation of the first joint report was "to review traffic and parking matters and identify which matters can be resolved…through clarification of the proposal, the provision of additional information or by conditions".[89]

219. It is notable in this case that the traffic experts reached agreement on the confined issues contained in their joint brief. Unfortunately, the Tribunal is of the view that the reports of Mr Rogers, Mr Coath and Mr Shoobridge and their joint reports do not adequately assess the operation and impacts of vehicular traffic on the Dickson Group Centre and are generally not helpful in explaining how the proposed development might address day to day service deliveries, taxis, pick-up and drop-off zones and the passage of pedestrians and cyclists into and through

[87] *Statement of Evidence* of Graeme Shoobridge at [10] and [11]
[88] Mott MacDonald report at 3.3.1
[89] Expert reports and first joint report op cit

the site. The Tribunal considers these matters to be essential for a successful resolution of the design brief.

220. The traffic experts have also not responded to the unique demographic and pedestrian environment of Dickson and the special needs of the elderly and those using mobility scooters. The Tribunal notes in particular the lack of diagrams or other graphic analysis to describe the impact of traffic movements on Road A and on the existing and future amenity of the Dickson Group Centre as a whole. None of the experts have suggested there could be alternative arrangements for access to or egress from the basement.

221. As noted previously, neither the reports of the traffic experts nor their joint reports discuss the appendices to the 2014 Mott MacDonald report including 'Appendix F – Road Safety Audit' and 'Appendix G – ACT Government Agency Comments" nor do they respond to the Peer Review of August 2014 relating to these appendices.

222. The road safety audit report at Appendix F of the Mott MacDonald report identifies eleven "road safety issues", ten of which are given a risk ranking of 'high'. The audit report includes a response by the developer's representative to each of the identified risks.[90]

223. The road safety audit report notes that the basement entry and exit ramps and associated walls "may restrict pedestrian movement across Road A within the shared zone" and warn of a "potential collision between a 'trapped' pedestrian and a through vehicle in Road A". The developer's representative has responded with the comment that "the extent of the shared zone has been reduced to remove this issue". In relation to the proposed 1.2m high wall surrounding the ramps, the auditors note the potential for pedestrians "to fall a considerable height causing serious or fatal injuries". The developer's representative replies that "the height of the wall is compliant, however will be increased to 1.4m to provide an additional level of safety".[91]

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[90] Peter Meredith Consulting report *Proposed Commercial Development and Modifications to Surrounding Road Network Dickson ACT: Stage I Feasibility Road Safety Audit* dated July 2014 at Appendix CF in Shoobridge Statement of Evidence dated 23 November 2016

[91] Meredith report op cit Table 3.1

224. Meredith Consulting also identified safety issues for motorists on account of "a high demand for vehicles exiting the underground car park to turn right into Road B to travel to destinations to the east of the development". The developer's representative has responded that "there is no reason for vehicles to be stopping at the top of the ramp as the northbound movement along Road A from the ramp has priority over all other significant traffic streams". However, some time was spent during the hearing considering the extent to which queuing on the exit ramp might occur during peak periods. The auditors also identify "potential increased pedestrian activity" at the intersection of Road A and Road B "as pedestrians cross Road A shared zone from existing car parks and library to access new shopping centre". The developer's representative has responded that "there is no identified desire line for pedestrians to walk along the eastern edge of the proposed development". This comment seems oblivious to the public's desire to attend the proposed independent retailers to be located on that frontage, or the desire of residents or their visitors to enter the accommodation units from the east.

225. Appendix G to the Mott MacDonald report is headed 'Consolidated Comments' and is a tabulation of comments received from government agencies in response to the circulation of preliminary plans for the proposed development. A column headed 'proponent's response' notes the response of the developer to each agency comment.[92]

226. The location of the basement ramps within Road A was questioned by a number of government agencies. The Development Assessment Section of the Authority commented "the Dickson Master Plan did not foresee basement access and egress from Road A but rather an arrangement where basement access is contained within the site. If this is the intended design outcome, the subject land taken up by the basement and basement ramps should be acquired under direct sale. It is not clear whether the Deed also needs to be amended in this regard. Alternatively the development should be redesigned to contain the basement and basement ramps within the block".[93]

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[92] Consolidated Comments circulation1: 12 May 2014 at Appendix CG in Shoobridge Statement of Evidence op cit

[93] as above Consolidated Comments op cit

227. The developer responded to these comments that "the proposed arrangements comply with the Dickson Precinct Code" and "traffic analysis…demonstrates that the proposed access and egress arrangements operate satisfactorily…the proponent has discussed the direct sale of land to be occupied by the basement access and egress ramps with CMTEDD. The proponent has been advised to seek a licence for the temporary occupation of this land during construction, with the direct sale to be finalised post construction. This will allow an accurate survey of the land to be acquired'.[94]

228. TAMS Asset Acceptance also objected to the proposed ramps: "TAMS requires the developer to consider an option of moving the ramps both in and out wholly within the property boundary and leaving all of Road A as a shared zone for two-way traffic...as previously advised TAMS will not support an entry ramp which forms part of a public road network. The ramps should be located fully within the property boundary". The developer responded that the development "will achieve BCA deemed to satisfy compliance" to which TAMS replied "noted and this is not applicable as TAMS will not support the current entry (and) exit arrangement".

229. A further comment from the Deed Management Section noted that "the additional land sort (sic) for basement car parking, circulation, the entry and exit ramps in the EDP is a significant departure to those arrangements in the May 2013 concept model presented to ESDD" to which the developer replied that "the proponent has engaged with CMTEDD who have recommended the direct sale of this land. While this is a departure from earlier proposals, the proposals have emerged from a more considered exploration of constraints and opportunities and are supported by analysis illustrating operational effectiveness".[95]

230. In his expert report, Mr Coath did not suggest possible locations for basement ramps other than within Road A. He responded to the submission that "perpendicular access to the site is required in accordance with initial high-level planning for the site" with the comment that he acknowledged the existence of such concepts but that he had reviewed the proposed design and considered it to be "in accordance with relevant design standards". Mr Coath gave evidence that the ramp had been designed "to address the circumstances of the site…that

[94] as above Consolidated Comments op cit
[95] as above Consolidated Comments op cit

doesn't mean that it is better or worse necessarily than an alternate (sic) option which has ramps at 90 degrees".[96]

231. Mr Rogers noted only that the proposed arrangement of the ramps removed the existing pick up and set down area outside Woolworths and that basement parking would require a ticketless control system. Mr Shoobridge did not discuss the suitability or otherwise of locating the ramps within Road A. The Joint Report said only "it was agreed that the approved site access arrangements are appropriate, providing for suitable accessibility to the site and managing traffic movements".[97]

7.4.2. Traffic requirements of the CZDC

232. The Tribunal has previously noted that the CZDC by Rule 1 requires that the proposed development meet the intent of any approved lease and development conditions and that by route of the holding lease the requirements of the Deed constitute the approved lease and development conditions for the purposes of this Code.[98]

233. The Tribunal has previously considered the requirements of the Deed that the intended development provide "an efficient, safe and attractive urban environment" and that Road A is to be "a pedestrian friendly area with high quality landscaping treatments and furniture…to allow vehicular traffic but to be mostly a pedestrian priority area and to seamlessly match into the…adjacent existing public domain".[99]

234. A number of rules and criteria in the CZDZ relate to building design and are also contentious in this case, but the Tribunal considers that issues of pedestrian amenity and a safe and attractive urban environment are of greater significance and focusses on these requirements in this matter.

235. The CZDC requires that the existing road network is able to accommodate the traffic generated by the development. Evidence was given by the traffic experts that the proposed development satisfies this requirement. The experts supplied

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[96] Coath report op cit page 44; transcript of proceeding 7 March 2017 page 231 line 7
[97] Transport Impact Evidence of Christopher Coath op cit page 44; Meeting and Joint Reports of Experts op cit page 5
[98] Written outline of submissions of first party joined page 18
[99] Deed clause A2.1.2; clause A2.1.3.1

extensive arithmetical projections of traffic flows and volumes towards and away from the subject site in support of these opinions. The Tribunal is neither inclined nor equipped to dispute the calculations of the experts in this area. We are satisfied that Antill Street in particular has capacity to deal with high traffic flows.

236. However, the Tribunal considers that unresolved traffic issues remain concerning the intersection of Road A with Antill Street; the vehicle numbers expected to use Road B to exit the site; the detail layout of public and residential parking including provisions for accessible parking and the late-emerging need for pedestrian barriers on both sides of Road A. We note the Authority's proposal that non-compliance with the Parking and Vehicular Access General Code requirement to provide residential visitor parking can be addressed through the shared use of basement parking for residential visitors, but the Tribunal does not endorse this approach.

7.4.3. Traffic and Parking – conclusions

237. The Tribunal has carefully considered the evidence and expert opinions and the submissions of the parties in the matter of traffic and parking. The Tribunal notes that the proposed development relies for its operation on the access ramps for basement car parking being located outside the subject site. The Tribunal notes that the use of public land for access to the subject site is not predicted or allowed for in the Deed or in the Holding Lease and that several ACT Government agencies have advised they will not support such an arrangement. No evidence was given to the Tribunal that the developer has investigated any other arrangement for vehicular access to the basement.

238. In relation to the Deed, the Tribunal has considered plans for the proposed development and the evidence of the traffic experts and other witnesses and is not convinced that the development will provide the efficient, safe and attractive urban environment expected by the Deed or that Road A will be a pedestrian friendly area with high quality landscaping treatments. The Tribunal was particularly concerned to note that the suggested solution to perceived risks to pedestrians in Road A was to reduce the extent of the shared zone.

239. As to the evidence of the traffic experts, the Tribunal is of the opinion that the traffic experts have neglected to recognise the impact on the pedestrian

environment of the considerable traffic movements flowing from the proposed development and in particular have paid only token attention to the normal movement and operational requirements for existing and proposed commercial activities and community services within the Dickson Group Centre.

240. The Tribunal has formed the view that it would not be possible by the imposition of conditions to mitigate the negative impact of the basement ramps at ground level in order to achieve satisfactory planning of a safe and attractive shared zone while the entry and exit ramps to basement parking remain within the future Road A.

241. The Tribunal finds that the proposed development is not consistent with the requirements of the CZDC in the areas of vehicle access and landscaping and the interface of the development with the Dickson Group Centre.

242. For these reasons, the Tribunal finds that the proposed development is not consistent with the intent of the Deed and the CZDC in the areas of traffic and safety.

8. Conclusion

243. As to the Deed for development of the site, the Tribunal finds that the proposed development is not consistent with the requirements of the Deed and the approved Lease and Development Conditions in the areas of site planning and urban design and does not satisfy the expectations to provide an efficient, safe and attractive urban environment. It does not meet the intent in relation to traffic and pedestrian safety, nor does it respect the urban setting of the heritage registered Library. In these respects the proposed development falls so far short of the intent of the Deed that the Tribunal is satisfied that Rule 1 of the CZDC is not met.

244. As to the DPMC, the Tribunal finds that the proposed development is not consistent with the desired character for the Dickson Group Centre and does not comply with rules or criteria relating to pedestrian routes and accessibility, landscaping, building height and the Dickson Library.

245. As to traffic and parking, the Tribunal finds that the proposed development does not provide a safe and attractive shared zone. It falls short of the intent of the Deed, and thus rule 1 of the CZDC.

246. The proposed development's compliance with other aspects of the DPMC and CZDC, such as requirements in relation to frontages and finishes, are also of concern to the Tribunal. Additionally, requirements of the MUHDC in relation to solar access and ventilation are potentially not met. Given the extensive non-compliance of the proposed development with the requirements discussed above, however, the Tribunal has not set out in these reasons those additional concerns.

247. The Tribunal has concluded that the proposed development is not code compliant in multiple respects. The areas of non-compliance cannot be dealt with by the imposition of conditions. It follows that the development application cannot be approved.

248. For completeness, the Tribunal adds that if the development proposal were found to meet the requirements of the codes, nonetheless the significant issues with traffic and pedestrian interaction, encroachment into the Library and inadequate landscaping would lead the Tribunal to refuse to exercise the discretion to approve the development.

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Presidential Member M-T Daniel
Delivered for and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	AT 43 & 44/2016
PARTIES, APPLICANT:	Josip Sladic (AT 43/2016)
PARTIES, APPLICANT:	Charter Hall Retail REIT (AT 44/2016
PARTIES, RESPONDENT:	ACT Planning and Land Authority
COUNSEL APPEARING, APPLICANT	Self-represented (AT 43/2016) Wayne Sharwood (AT 44/2016)
COUNSEL APPEARING, RESPONDENT	Phillip Walker SC Kristy Katavic
COUNSEL APPEARING, COLES GROUP PROPERTY DEVELOPMENTS	Chris Erskine SC Mr Arthur
COUNSEL APPEARING, NORTH CANBERRA COMMUNITY COUNCIL, DOWNER COMMUNITY COUNCIL	Self-represented
SOLICITORS FOR APPLICANT	Self-represented (AT 43/2016) Bradley Allen Love (AT 44/2016
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
SOLICITOR FOR NORTH CANBERRA COMMUNITY COUNCIL, DOWNER COMMUNITY COUNCIL	Self-represented
TRIBUNAL MEMBERS:	Presidential Member M-T Daniel Senior Member R Pegrum
DATES OF HEARING:	28-30 November 2016, 1 ,2, 5, 6, 7, 8 December 2016, 20-23 March 2017