

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BAPTIST COMMUNITY SERVICES PTY LTD – NSW & ACT v ACT PLANNING AND LAND AUTHORITY & ORS (Administrative Review) [2016] ACAT 150

AT 5/2012

Catchwords: **ADMINISTRATIVE REVIEW** – planning – Territory Plan - RZI zone objectives – low density residential environment – retirement village – parking and traffic

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 9, 23, 26, 52, 68
Acts Interpretation Act 1901 s 8
Legislation Act 2001 ss 4, 6, 13, 84
Planning and Development Act 2007 ss 50, 51, 53, 55, 162, 119, 120, 121, 144, 146, 148, 165, 407, 408A, sch 1 (item 3)

Subordinate Legislation: Access and Mobility Code General Code c 12
Court Procedure Rules 2006 r 5052
Multi Unit Housing Development Code r 7, 8, 9, 18, 76; c 37, 76
Parking and Vehicular Access General Code ss 3.1.1, 3.1.5
Territory Plan

Cases cited: *Baptist Community Services v ACT Planning and Land Authority* [2013] ACTSC 103
Baptist Community Services - NSW and ACT and ACT Planning and Land Authority & Ors [2012] ACAT 58
Baptist Community Services v ACT Planning and Land Authority [2015] ACTCA 3
Baptist Community Services Pty Ltd – NSW & ACT v ACT Planning and Land Authority [2015] ACAT 67
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409
Esber v Commonwealth (1992) 174 CLR 430
Minister for Immigration and Multicultural Affairs v Wang (2003) 215 CLR 518

Tribunal: Presidential Member M-T Daniel
Senior Member R Orr QC

Date of Orders: 19 December 2016

Date of Reasons for Decision: 19 December 2016

BETWEEN:

**BAPTIST COMMUNITY
SERVICES - NSW & ACT**
Applicant

**AND: ACT PLANNING AND
LAND AUTHORITY**
Respondent

**AND: ANTHONY PHILLIP
GAY**
Party Joined (1)

**AND: GAVIN ALEXANDER
BACK**
Party Joined (2)

AND: MELISSA BENNETT
Party Joined (3)

AND: JOHN COPLAND
Party Joined (4)

AND: ROHAN PITCHFORD
Party Joined (5)

TRIBUNAL: Presidential Member M-T Daniel
Senior Member R Orr QC

DATE: 19 December 2016

ORDER

The Tribunal orders that:

1. The decision under review is set aside and a substitute decision is made to approve the development application in accordance with exhibit AG in these proceedings, entitled ‘Amended DA set showing compliance with new 2016 territory plan requirements’ and dated 19 April 2016, subject to the conditions specified in attachment 1 to the Respondent’s Outline of Argument dated 13 May 2016 in these proceedings, as amended by the orders set out below.

2. Condition A6 is amended to replace “within Supply Place” with “from Supply Place”.

3. Condition A7 is amended to provide as follows:

Pursuant to sub paragraph 165(3)(n)(ii) of the *Planning and Development Act 2007*, at the lessee’s expense and before completion of the building work, the existing fences

(i) on the north and south sides shall be replaced with up to 1.8m high timber lapped and capped fences, or to another standard acceptable to relevant adjoining lessees;

(ii) on the western side shall be replaced with up to 2.1m high timber lapped and capped or metal fences, or to another standard acceptable to relevant adjoining lessees.

The lessee of the subject block must take all reasonable steps to obtain the written agreement of the respective adjoining lessees before the erection of any new fencing. New fencing shall not extend further forward than the existing building lines.

4. Condition A9A is inserted:

The proposed rail between the driveway to Supply Place and the adjacent Block 35 be built to a standard agreed in writing between the lessee and the adjoining lessee of Block 35, or in the absence of agreement, as determined in writing by the Authority.

.....
Senior Member R Orr QC
delivered for and on behalf of the Tribunal

REASONS FOR DECISION

1. Baptist Community Services – NSW & ACT (**Baptist Community Services**) applied for approval of a development application which proposed demolition of a nursing home and construction of a retirement village on land at Block 65 Section 8 Red Hill (**subject land**). This land is in the RZ1 zone for planning purposes.

2. The original development application for a retirement village of 114 units was rejected by the ACT Planning and Land Authority, now the Environment and Sustainable Development Directorate (**Authority**),¹ and an amended application for a village of 107 units was also rejected on reconsideration.² This reconsideration decision was the subject of an application to the tribunal. In those proceedings a further amended application for a village of 100 units was proposed (**further amended proposal** or **proposed development**), and this was no longer opposed in principle by the Authority, but was opposed by some local residents who were parties to the proceedings (**Parties Joined**). The tribunal rejected this further amended proposal, principally on the basis that the scale and density of the proposed development was inconsistent with RZ1 zone objective (a) (**earlier tribunal decision**).³ An appeal by Baptist Community Services to the Supreme Court was dismissed (**Supreme Court decision**),⁴ but an appeal to the Court of Appeal of the Supreme Court was upheld in part (**Court of Appeal decision**).⁵ The matter was remitted to the tribunal by the Court of Appeal for further hearing.

3. This decision concerns the further hearing by the tribunal. In this hearing the Authority took the position that the proposed development application was in all respects compliant with the *Planning and Development Act 2007* (ACT) (**Planning Act**) and the Territory Plan if approved with specified conditions.⁶ The Parties Joined continued to oppose the development application, principally

¹ T documents, notice of decision of DA number 201018564 dated 30 June 2011

² T documents, notice of decision on reconsideration of DA number 201018564 dated 20 December 2011

³ *Baptist Community Services - NSW and ACT and ACT Planning and Land Authority* [2012] ACAT 58 (22 August 2012)

⁴ *Baptist Community Services v ACT Planning and Land Authority* [2013] ACTSC 103 (5 June 2013)

⁵ *Baptist Community Services v ACT Planning and Land Authority* [2015] ACTCA 3 (3 March 2015)

⁶ Respondent's outline, paragraph 2

on the basis of the scale and density of the proposed development and parking and traffic issues. The proceedings principally considered the further amended proposal, though plans with some further minor amendments dated 19 April 2016 (exhibit AG) were provided by Baptist Community Services (**April 2016 plans**) during the hearing.

A. Summary of Tribunal decision

4. The Tribunal considered the further amended proposal, including as amended by the April 2016 plans, under both the earlier and current RZ1 zone objectives. The earlier RZ1 zone objectives stated in part:
 - (a) *Create a wide range of affordable and sustainable housing choices within a low density residential environment to accommodate population growth and meet changing household and community needs*
 - (b) *Ensure development respects and contributes to the neighbourhood and landscape character of residential areas*
 - ...
5. A key issue in the proceedings was whether the further amended proposal would maintain a “low density residential environment” as referred to in paragraph (a). Importantly, the Tribunal is required to implement the Court of Appeal decision that RZ1 zone objective (a) should be read as describing the effect of the development on the residential environment, not just on the subject land.
6. The Tribunal considered:
 - (a) the nature of the zone objectives, and their role and interpretation;
 - (b) other aspects of the zone objectives, namely to create a wide range of affordable and sustainable housing choices to accommodate population growth and meet changing household and community needs in the area, with which the further amended proposal complies;
 - (c) relevant code provisions, with which the further amended proposal complies;

- (d) the expert opinions before the Tribunal, and the expert opinions before the earlier tribunal, including the opinion of the Authority, all of which are that the development will not change the character of the residential environment and will comply with the RZ1 zone objectives;
 - (e) the views of the Parties Joined that the proposal is too dense and does not comply with the RZ1 zone objectives;
 - (f) the various measures of density; and
 - (g) the current nursing home on the land, and a range of factors in relation to the proposed development which will address its bulk.
7. This consideration leads the Tribunal to find that the further amended proposal complies with the earlier RZ1 zone objectives, will keep the area a low density residential environment and will respect and contribute to the neighbourhood and landscape character of the residential area. The Tribunal also considers the further amended proposal will reflect the neighbourhood plan, as required by the earlier code, and will comply with the current RZ1 zone objectives.
8. The Tribunal is of the view that the proposed parking arrangements will comply with the relevant code provisions and not have unreasonably negative impacts on neighbouring properties. The position in relation to the effect of the proposed development on traffic in the area is unclear and was contested. The Tribunal is of the view that overall traffic will either decrease from when Morling Lodge was in operation, or any traffic increase is likely to be moderate. It seems likely traffic to Supply Place will decrease from when Morling Lodge operated. Even if there is an increase of traffic, the existing road network can accommodate the amount of traffic that is likely to be generated, and is unlikely to have unreasonable negative impacts on neighbouring properties. The proposal in relation to the driveway to Supply Place will appropriately address safety concerns. The Tribunal does not believe that these issues provide grounds for rejecting the development application, and no other possible grounds for rejection have been identified.

9. The Tribunal therefore decides that the further amended development application, as amended by the April 2016 plans, should be approved, subject to the conditions proposed by the Authority, with some amendments.

B. Subject land

10. The subject land is Block 65 Section 8 Red Hill and is a generally rectangular block of 22,683 m² area with its long axis oriented generally east-west.
 - (a) To the east, it has a 98m frontage to Hicks Street which runs generally north-south and provides the main access to the subject land.
 - (b) Its northern boundary is 241m long and abuts the rear of a number of properties fronting Pelsart Street, Sirius Place and Supply Place.
 - (c) An appended narrow extension from its north-west corner provides access to Supply Place.
 - (d) Its western boundary is about 99m long and abuts the rear of four properties fronting Golden Grove.
 - (e) Its southern boundary abuts St Bede's Primary School.⁷
11. The land is held by the applicant, Baptist Community Services, under a Crown lease issued on 24 February 2011. This lease replaced the original lease which was granted in 1966 under the *Leases (Special Purposes) Ordinance 1925* and pre-dated ACT self-government and the preparation of the Territory Plan.⁸
12. The subject land was developed in the 1960s as Morling Lodge, which comprised 18 independent living units (**ILUs** or **units**) and a hostel/nursing home for 105 residents. There is also a small administration building adjacent to the nursing home. These buildings are still on the land but are currently vacant. Baptist Community Services has built a new nursing home in Griffith.⁹

⁷ Earlier tribunal decision, [2012] ACAT 58 at [13]

⁸ Earlier tribunal decision at [14]

⁹ Earlier tribunal decision at [15]-[16]

C. History of the proceedings

13. Baptist Community Services initially applied to the Authority for approval of development application No. 201018564 which proposed demolition of Morling Lodge and construction of a retirement village comprising a complex of two-storey buildings containing 114 units and five common rooms, and with parking for 145 vehicles, mostly in basement car parks, to be known as Gracewood, Red Hill. This development application was refused.¹⁰
14. Baptist Community Services then applied to the Authority for reconsideration of this refusal, with amended plans reducing the number of units to 107 and parking spaces to 136. Upon reconsideration by the Authority, the amended development application was again refused. This is the decision which is the subject of the application to the tribunal. The basis for this decision was the bulk and scale of the development in relation to the surrounding area; poor amenity for some of the units; the driveway from Supply Place raised pedestrian safety issues; issues in relation to emergency service vehicle access were unresolved; as were parking and traffic issues.¹¹
15. Baptist Community Services then instituted proceedings for review in the tribunal. In the course of those proceedings, the plans were further amended to reduce the number of units to 100, the common rooms to two, and the car parking spaces to 130, and provide for the deletion of all attics, the lowering of roof pitch, the reduction of eaves, the splitting into two of the Montague and Nadgee buildings and improvement to the landscaping.¹² The proposed development involved a range of separate buildings on the subject land, in summary Brindabella North and South on the eastern side of the block facing Hicks Street; then moving westward Bomaderry West and East and Morton; then moving further west Nadgee North and South; and then Montague North and South on the western side of the block. The Authority indicated to the

¹⁰ The summary set out here and in the following paragraphs is primarily taken from *Baptist Community Services v ACT Planning and Land Authority* [2015] ACTCA 3 at [4], which was in turn taken from *Baptist Community Services v ACT Planning and Land Authority* [2013] ACTSC 103; T documents, notice of decision of DA number 201018564 dated 30 June 2011

¹¹ T documents, notice of decision on reconsideration of DA number 201018564, 20 December 2011

¹² The changes in the further amended proposal (exhibit 2 in the earlier proceedings) are set out in a document provided by the Authority (exhibit 8 in the earlier proceedings).

tribunal that it was no longer opposed in principle to the development application following the reductions, although some issues remained to be resolved. However, the Parties Joined to the proceedings, Mr Anthony Gay, Mr Gavin Back, Ms Melissa Bennett, Mr John Copland and Professor Rohan Pitchford, who are local residents, remained opposed to the proposed redevelopment. The tribunal confirmed the decision under review, and the further amended development application was refused for the reasons set out in the earlier tribunal decision.¹³ The terms of this decision are discussed further below.

16. An appeal by Baptist Community Services to the Supreme Court was heard by Master Harper and dismissed for the reasons set out in the Supreme Court decision.¹⁴ A further appeal by Baptist Community Services to the Court of the Appeal was upheld in part for the reasons set out in the Court of Appeal decision.¹⁵ In summary, a number of matters raised in the appeal were the subject of agreement between the parties, so the Court of Appeal did not need to determine them (at [7]-[8], [72]-[76]). The Court of Appeal did consider two substantive issues. First, the Court of Appeal rejected the argument of Baptist Community Services that the relevant proposal must be approved if it complies with the applicable code in the Territory Plan (at [36], [58]), and the Authority's argument that the relevant proposal must be rejected if it is inconsistent with a relevant zone objective (at [57], [58]). The Court of Appeal held that section 120 of the Planning Act gave a discretion to approve or reject a proposal that is compliant with the applicable code on the basis of the considerations there set out, including the objectives for the zone (at [59], [63]). Second, the Court of Appeal held that the then relevant RZ1 zone objective (a), including the reference to a "low density residential environment," should be read as describing the outcome of a development; the objective does not contemplate a development that would change the character of the residential environment;

¹³ *Baptist Community Services - NSW and ACT and ACT Planning and Land Authority* [2012] ACAT 58 (22 August 2012)

¹⁴ *Baptist Community Services v ACT Planning and Land Authority* [2013] ACTSC 103 (5 June 2013)

¹⁵ *Baptist Community Services v ACT Planning and Land Authority* [2015] ACTCA 3 (3 March 2015), Refshauge, Penfold and Burns JJ

under section 120, such a development could, but need not, be refused approval (at [69]-[71]).

17. The Court of Appeal ordered that:

(a) the appeal is allowed;

(b) the decision of the Tribunal is set aside;

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

(d) costs are reserved.

The matter therefore needs to be considered by the Tribunal again.

D. Preliminary questions

18. Two preliminary issues were raised in relation to these new proceedings and considered by the tribunal (**preliminary questions decision**).¹⁶ The position with regard to these two issues is briefly noted here.

Which version of the Territory Plan is relevant?

19. As noted, one substantive issue considered by the Court of Appeal was the operation of RZ1 zone objective (a). This RZ1 zone objective was amended by Plan Variation No 306, and the relevant Commencement Notice CN 2013—07 provided that this commenced for a development that was the subject of an application lodged prior to 18 June 2013, on 5 July 2014, and for all other developments, on 5 July 2013. For this development the amendment commenced therefore on 5 July 2014. There were no transitional provisions.

20. Generally, the Authority, and the tribunal on review, apply the law, including the Territory Plan, as it exists from time to time. However, that position is subject to relevant statutory provisions. Section 84(1) of the *Legislation Act 2001* (ACT) (**Legislation Act**) provides in part:

(1) The repeal or amendment of a law does not—

¹⁶ *Baptist Community Services Pty Ltd – NSW & ACT v ACT Planning and Land Authority* [2015] ACAT 67 (7 October 2015)

...

(c) *affect an existing right, privilege or liability acquired, accrued or incurred under the law.*

21. The Territory Plan, including the RZ1 zone objectives, is a law for these purposes.¹⁷ In provisions of this kind, ‘right’ is generally given a broad, not confined or narrow, meaning. In this case ‘right’ is also specifically and broadly defined to include ‘capacity, interest, status and title’.¹⁸ It is still necessary for an amendment to ‘affect’ such an ‘accrued right’ in order for section 84(1)(c) to operate. Further this section is a ‘determinative provision’ under the Legislation Act, that is, it must be applied unless displaced expressly or by a manifest contrary intention¹⁹, but not by just a contrary intention.²⁰ In *Esber v Commonwealth* (1992) 174 CLR 430 (**Esber**), the High Court held that where Mr Esber had lodged an application to the Commonwealth Administrative Appeals Tribunal and the law then changed, “he had a right to have the decision of the delegate reconsidered and determined by the Tribunal” under the old law because of section 8 of the *Acts Interpretation Act 1901* (Cth), the equivalent of section 84(1)(c) of the Legislation Act (at 440).
22. The parties were in dispute as to the application of section 84(1)(c) of the Legislation Act in these proceedings and asked for this issue to be determined on a preliminary basis.
23. But at the hearing of the preliminary questions, counsel for both Baptist Community Services and the Authority changed their earlier position and argued that this matter should not be determined as a preliminary question, on a number of bases, set out in the decision.
24. The tribunal agreed that the Territory Plan question should be dealt with, if necessary, in the context of the full hearing; and that if so, the Tribunal should record its findings under both versions of the Territory Plan, so as to allow for the efficient management of the effect of any further appeals. The Tribunal therefore determines this matter on the two bases.

¹⁷ Sections 4 and 13 of the Legislation Act

¹⁸ Section 84(6) of the Legislation Act

¹⁹ Sections 6(1) and (2) of the Legislation Act

²⁰ Section 6(3) of the Legislation Act

25. That is, first, on the basis of the Territory Plan as it was at the time of the earlier decision, namely republication 94, effective 10 August 2012 to 11 September 2012 (**earlier Territory Plan**, which includes **earlier RZ1 zone objectives and codes**).
26. And second, on the basis of the Territory Plan in April 2016, namely republication 168, effective from 26 February 2016 (**current Territory Plan**, which includes **current RZ1 zone objectives and codes**).²¹
27. As discussed below, the Tribunal reaches the same conclusion on both bases, so it is not necessary to determine which applies.
28. Specific differences in the Territory Plan and relevant codes are noted below, in particular to the objectives of the RZ1 suburban zone. The Authority summarised the other major relevant changes as the introduction of a new Residential Zones Development Code which requires 100% of the units in a retirement village to be adaptable as opposed to 10% in the earlier version; references to neighbourhood plans have been deleted; a range of setbacks have been reduced; and there has been a reduction in the percentage of apartments required to achieve a specified amount of sunlight on the winter solstice.²²
29. A further relevant complication has been that in these proceedings Baptist Community Services has proposed amending the further amended application as set out in the April 2016 plans to comply with the current Territory Plan. As discussed below the Tribunal is of the view that these are the plans which should be considered for approval. The amendments involved in the April 2016 plans are discussed below; they are not significant in relation to the principal issues raised in these proceedings, and do not affect the consideration of these issues in this decision. Therefore, the consideration of these principal issues in this decision still focusses on the further amended application (rather than the April 2016 plans) and considers this both under the earlier Territory Plan and the current Territory Plan. Because the changes made in the April 2016 plans

²¹ Transcript of proceedings 8 April 2016, page 504; exhibit AE, statement of Ms Jamaly, at [27]-[28]

²² Exhibit AE, statement of Ms Jamaly, at [28]

are not relevant to these issues, the conclusions about the further amended application apply equally to the April 2016 plans.

Evidence

30. The second preliminary issue concerned the evidence that would be considered in this hearing. The tribunal decided in summary that:
- (a) it would admit as evidence in the new hearing the evidence gathered in the earlier tribunal hearing;
 - (b) new evidence could be proposed by a party in relation the operation of section 120 of the Planning Act, as interpreted by the Court of Appeal decision, and the RZ1 zone objectives in their original form, as interpreted by the Court of Appeal decision, and in their amended, current form, to the development application;
 - (c) new evidence could also be proposed by a party in relation to other issues which go to what is the correct or preferable decision in relation to the development application at the time of the new hearing; and
 - (d) this will not prevent any other party objecting to this evidence at the hearing.

The hearing was conducted on this basis.

E. Hearing

31. The rehearing of this matter took place on 5, 6, 7 and 8 April and 16 May 2016.

Evidence from the earlier hearing

32. As discussed above, the Tribunal accepted as evidence in this rehearing the evidence in the earlier hearing. The earlier tribunal had regard to the T documents in relation to the original decision and the reconsideration by the Authority, as did this Tribunal.²³
33. **Exhibit 1** in the earlier proceedings was a bundle of plans for the development which were headed 'Baptist Community Services - Development Application Issue,' and annotated revised development application issued 16 March 2012.

²³ Transcript of proceedings 5 April 2016, pages 35-38

34. **Exhibit 2** was another bundle of plans headed 'Amended ACAT Drawings Gracewood Red Hill' dated 19 March 2012, which constituted the further amended proposal .
35. The following statements were accepted as evidence for the applicant Baptist Community Services:
- (a) Statements of Douglas Melloh of Stanton Dahl Architects dated 23 November 2011 (**exhibit 3**), 16 March 2012 (**exhibit 4**) and statement of Hyun Kim in the absence of Douglas Melloh dated 20 April 2012 (**exhibit 5**).
 - (b) Statement of Deb Matthews of Scenic Landscape Architecture dated 16 March 2012 (**exhibit 6**).
 - (c) Statement of Annette Hili of Baptist Community Services dated 13 March 2012 (**exhibit 7**).
 - (d) Mediation report of David Field of Northrop Consulting Engineers Pty Ltd dated March 2012 (**exhibit 15**), statement of David Field (**exhibit 16**) and response by Northrop Consulting Engineers dated April 2012 (**exhibit 17**).
 - (e) Statement of Paul Cohen of Campbell Dion Pty Ltd, town planners and landscape architects, dated 15 March 2012 (**exhibit 23**).
 - (f) Statement of Rebecca Stockley of CB Richard Ellis Pty Ltd, which provides property agency and professional advisory services, dated 16 March 2012 (**exhibit 26**).
 - (g) Statement of Christine Purdon, urban planner, of Purdon Associates Pty Ltd dated 19 March 2012 (**exhibit 27**).
 - (h) Statement of Deborah Barnes of the Town Planning section of CBRE(V) Pty Ltd dated 15 March 2012 (**exhibit 28**).
36. The following statements were accepted for the respondent Authority:

- (a) Statement of Paul Isaks, transport specialist, dated 10 April 2012 (**exhibit 21**).
37. The following statements were accepted for the Parties Joined:
- (a) Statements of Robert Nairn, traffic and transport engineer, dated 19 April 2014 (**exhibit 12**) and further statement (**exhibit 13**).
- (b) Facts and contentions of Anthony Gay dated 10 April 2012 (**exhibit 25**).
- (c) Statement of concerns and contentions of Rohan Pitchford (**exhibit 29**) and submission (**exhibit 30**).
- (d) Statement of facts and contentions of Gavin Back (**exhibit 31**).
- (e) Statement of facts and contentions of Melissa Bennett (**exhibit 32**).
38. A range of other documents were also tendered as evidence. At the rehearing the exhibit numbering for this evidence continued to be used, and these reasons will do the same. The transcript of the original hearing was also treated as evidence in the rehearing (and is **exhibit Q** in these proceedings). Regard was also had to the submissions in the earlier proceedings.

Evidence in this hearing

39. In this hearing the Tribunal undertook a view of the subject site. Baptist Community Services provided a statement of facts and contentions dated 16 December 2015. The following statements were accepted as evidence for Baptist Community Services as applicant:
- (a) Statement of Michael Furner of Baptist Care (**exhibit A**). This added to the evidence of Ms Hili in the earlier proceedings (exhibit 7). Further oral evidence was given by Mr Furner in these proceedings.
- (b) Statement of Douglas Melloh of Stanton Dahl Architects dated 22 December 2015 (**exhibit C**). Mr Melloh gave evidence in the earlier proceedings (exhibits 3, 4, and 5). Further oral evidence was given by Mr Melloh.

- (c) Statements of Paul Cohen, of Campbell Dion Pty Ltd, town planners and landscape architects, undated (**exhibit D**), dated 17 March 2016 (**exhibit E**) and dated 4 September 2015 (**exhibit F**). Mr Dion gave evidence in the earlier proceedings (exhibit 23). Further oral evidence was given by Mr Cohen.
 - (d) Report of David Field, Northrop Consulting Engineers dated December 2015 (**exhibit G**) and report dated 16 March 2006 (**exhibit H**). Mr Field gave evidence in the earlier proceedings (exhibits 15, 16 and 17). Further oral evidence was given by Mr Field.
 - (e) Statement of Aaron Oshyer of Knight Frank Town Planning dated 22 December 2015 (**exhibit I**). This added to the evidence of Ms Stockley in the earlier proceedings (exhibit 26).
40. The Authority provided a statement of facts and contentions. It relied on a:
- (a) statement of Rumana Jamaly dated 28 January 2016 (**exhibit AE**). Further oral evidence was given by Ms Jamaly.
41. The Parties Joined also provided a range of materials.
- (a) Joint statement of Gavin Back and Rohan Pitchford (**exhibit J**) and additional statement of facts and contentions by Rohan Pitchford (**exhibit L**). Professor Pitchford gave further oral evidence.
 - (b) Parties Joined statement of facts and contentions dated 4 March 2016 (**exhibit M**).
 - (c) Statements of Anthony Gay dated 4 March 2016 (**exhibit S**) and supplementary statement together with closing statement (**exhibit P**). Mr Gay and Ms Bennett gave further oral evidence.
42. Other documents were also tendered. Towards the end of these proceedings the April 2016 plans, described as an amended DA set showing compliance with new Territory Plan requirements and dated 19 April 2016, were admitted as evidence and became **exhibit AG**. As discussed below, they addressed the

current requirements in the current Territory Plan, principally the increased requirements for adaptability of units. The Tribunal notes that in effect this is an amendment of the development application under section 144 of the Planning Act. This amendment was accepted by the parties. The Tribunal confirms that for the purposes of section 144 of the Planning Act, the amendment in the April 2016 plans will be substantially the same as the further amended proposal and the assessment track will not change. Further under section 146 of the Planning Act the Tribunal confirms that the Tribunal waives the requirement to publicly notify the changes since no-one other than Baptist Community Services will be adversely affected by the amendments and the amendment will do no more than minimally increase the environmental impact of the development.

43. Baptist Community Services provided applicant's submissions dated 22 April 2016 and submissions of applicant in reply filed on 16 May 2016. The Authority provided a respondent's outline of argument dated 13 May 2016. Mr Gay provided a closing submission dated 29 April 2016, and Professor Pitchford provided a submission and a corrected submission.

F. Relevance of earlier tribunal decision

44. There is an issue as to the relevance of the earlier tribunal decision to this hearing and decision. The Court of Appeal set aside the earlier tribunal's decision under rule 5052(1)(d)(i) of the *Court Procedure Rules 2006*. This tribunal decision therefore no longer has substantive legal effect. It remitted the 'matter' to the Tribunal to deal with the 'development proposal' in accordance with the Planning Act and the Territory Plan, having regard to the views expressed by the Court about section 120 of the Planning Act and the RZ1 objective (a).
45. The Tribunal clearly needs to implement the decision of the Court of Appeal. In areas which were not subject to the Court of Appeal decision, counsel for Baptist Community Services argued that the earlier tribunal decision is at the very least persuasive, in the same way as other tribunal decisions are, especially since the previous tribunal was confronted with the same facts and the same parties, while recognising that ultimately this Tribunal has to exercise its review

powers and discretion again.²⁴ Counsel for the Authority appeared to agree and argued that this Tribunal should show due respect to the earlier tribunal decision and take it into account.²⁵

46. The Tribunal agrees with this approach. Most of the earlier decision was unchallenged in the Supreme Court and Court of Appeal, and not overturned in the Court of Appeal. While this Tribunal needs to consider the decision of the Authority again, and stand in the shoes of the original decision-maker, it seems appropriate for it to have regard to those aspects of the earlier tribunal decision which were neither challenged nor overturned, and are unchanged. That the Tribunal is required to operate efficiently, and may decide its own procedure in relation to a matter,²⁶ supports this approach.
47. Of course new evidence and new arguments will also need to be considered. In *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, at [7] Gleeson CJ said that the consequence of an order of the Federal Court that a decision of the Refugee Review Tribunal be set aside, and the matter remitted to be determined in accordance law, was that the Tribunal “would be obliged to determine, in light of the circumstances existing at the date of such new determination, and of the information before ... [it] at that time, all questions of fact and law relevant to the respondent’s claim to refugee status.”²⁷ But the earlier tribunal’s decision can be relevant to this process.

G. Legislative framework

48. The decision under review was to refuse the development application on reconsideration under sections 162(1)(c) and 193 of the Planning Act.²⁸ This decision was subject to statutory requirements in sections 50 (effect of Territory Plan), 119 (merit track – when development approval must not be given) and 120 (merit track - considerations when deciding development approval).

²⁴ Transcript of proceedings 12 May 2016, pages 88-93

²⁵ Transcript of proceedings 12 May 2015, page 114

²⁶ Section 23 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT), see also section 26

²⁷ See also Gleeson CJ at [16]-[18]; Gummow and Hayne JJ at [68]-[79]

²⁸ T documents, notice of decision on reconsideration of DA number 201018564 dated 20 December 2011

49. A decision under section 162 to refuse a development application is reviewable by the Tribunal under sections 407, 408A and Schedule 1, item 3 of the Planning Act.²⁹ This review is limited by section 121(2) of the Planning Act, but this section does not apply here since there is no “decision to approve”. There is, what appears to be a related but unclear limitation in item 3 of Schedule 1, but there was no submission that this prevented the Tribunal reviewing the issues raised in these proceedings. Under section 68 of the *ACT Civil and Administrative Tribunal Act 2008 (ACAT Act)* the Tribunal may exercise any relevant function given by an Act to the Authority, and must confirm the decision, or vary the decision, or set aside the decision and make a substitute decision, or remit the matter for reconsideration.

50. This development is on the merit track for the purposes of the Planning Act and the Territory Plan. Section 119(1) of the Planning Act provides in part:

(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

...

The other paragraphs are not directly relevant here. Subsection (2) deals with 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. The parties did not suggest that this was relevant here.

51. Section 51(1)(d) provides that the Territory Plan must include codes. Section 55 provides that a code, other than a general code or precinct code that is a concept plan, must contain either or both of the following:

(a) the detailed rules that apply to the 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.

²⁹ See also section 9 of the *ACT Civil and Administrative Tribunal Act 2008*

52. Importantly, a code must be consistent with each objective of the zone to which the code relates.³⁰
53. On the basis of these provisions and the Court of Appeal decision discussed above the position is that:
- (a) compliance with the relevant codes is a necessary condition for approval;
 - (b) compliance with the relevant codes is not sufficient; regard also needs to be had to the other matters, including the zone objectives; and
 - (c) the zone objectives are relevant to interpreting the relevant codes.
54. It was generally accepted that the proposal is for the development of a what is now called a ‘retirement village’ which is assessed on the ‘merit track’ under the RZ1 – Suburban Zone Development Table under the Residential Zones – Multi Unit Housing Development Code (**MUHD Code**). It is also subject to other general codes, in particular the Community and Recreation Facilities Location Guidelines General Code, the Parking and Vehicular Access General Code and the Access and Mobility General Code. The relevant provisions of these codes are therefore considered below.
55. Section 120 of the Planning Act provides as follows:

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;

...

(d) each representation received by the authority in relation to the application that has not been withdrawn;

...

56. The key provision in this case is section 120(a) which specifically makes the objectives for the zone a relevant consideration. The other paragraphs not quoted are not directly relevant here.

³⁰ Section 55(2) of the Planning Act

57. Section 51(1)(b) of the Planning Act provides that the Territory Plan must include objectives for each zone. Section 53 then provides:

53 Objectives for zones

- (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.*
- (2) *Each objective for a zone must be consistent with the statement of strategic directions.*
58. On the basis of these provisions and the Court of Appeal decision discussed above:
- (a) the zone objectives are relevant to the approval;
 - (b) inconsistency with a zone objective does not mandate rejection of a proposal; but
 - (c) it may provide a basis for discretionary rejection of a proposal, even a code-compliant proposal.
59. Within this legislative context it is necessary to consider the density and traffic issues raised in these proceedings.

H. Density issue - earlier zone objectives

60. A principal issue in the earlier tribunal hearing, which remained a principal issue in these proceedings, was whether the scale of the proposed development is consistent with the objectives of an RZ1 zone. As discussed above, the Tribunal considers this issue under the earlier zone objectives, and then under the current zone objectives.
61. The land is in the RZ1 – Suburban zone. The relevant earlier zone objectives at the time of the original decision were as follows:
- (a) *Create a wide range of affordable and sustainable housing choices within a low density residential environment to accommodate population growth and meet changing household and community needs*
 - (b) *Ensure development respects and contributes to the neighbourhood and landscape character of residential areas*

...

62. The key issue for the earlier tribunal was the “low density residential environment” aspect of zone objective (a), in particular in light of the bulk or density of the development. The tribunal stated:

- 108. The main concern with the proposal in relation to the first objective is whether it maintains the “low density residential environment” envisaged for the zone and in relation to the second objective, whether it can be said to “respect and contribute to the neighbourhood and landscape character of the residential area”? We do not think so. We agree with the parties joined that site coverage alone is not an adequate measure of density. The Tribunal considers that viewed overall, this development will be considerably denser than the adjacent development and could not be considered to be low density, nor to respect and contribute to the neighbourhood character of the residential area.*
- 109. The subject land is zoned as RZ1. What is being proposed is significantly greater in density, by any reasonable measure, than the neighbourhood in which it is to be located.*
- 110. A Retirement Village is an assessable development in an RZ1 zone. Ms Bennett suggested that, as compared with the applicant’s proposal, a complex of 50 to 70 units would allow for higher quality buildings in a low density environment, with less impact on neighbouring properties, an increase in green space, better amenity and access for residents and reduction in traffic. While we do not accept all of Ms Bennett’s criticisms, we agree that it is the scale of the proposed development that makes it inappropriate. A smaller scale facility may have raised no more objection from the community than Morling Lodge has done over the last 40 years or so. As it is, the level of community concern about this proposal had been unusually great and generally sustained over a number of years.*

63. It is this aspect of the tribunal decision which the Court of Appeal decision found to be in error. The Court of Appeal held that objective (a) does not require the development concerned to be low density, and that low density describes the environment of the zone concerned (at [69]). The objective should be read as describing, as the outcome of a development, “affordable and sustainable housing within a low-density residential environment.” A development will be consistent with the objective if it creates the composite concept, particular housing choices within a particular environment. The Court

of Appeal accepted the Authority's submission that objective (a) does not contemplate a development that would change the character of the environment so that it was no longer a low-density residential environment.³¹

Evidence concerning earlier zone objectives

64. Baptist Community Services and the Authority argued that the expert and other evidence before the earlier tribunal and this Tribunal supported a finding that the development as set out in the further amended proposal would not change the character of the environment so that it was no longer a low-density residential environment.

Evidence of Mr Cohen

65. The evidence of Mr Cohen before the earlier tribunal included a statement dated 15 March 2012 (exhibit 23 in the earlier proceedings). He is a qualified urban and regional planner and has worked in the field for over 30 years, is a past president of the Planning Institute of Australia (ACT), a former councillor of the National Trust of Australia (ACT), a Fellow of the Planning Institute of Australia and a Certified Practising Planner; he has extensive relevant experience, most of it in Canberra.³²
66. Mr Cohen's evidence in the earlier proceedings is summarised at [81] to [89] of the earlier tribunal decision. We do not set this out again here, but note several points.
- (a) Mr Cohen contended that the proper approach to density was to consider the proposed development in relation to the pattern of adjacent development, and he nominated a precinct for this purpose (at [83] in the earlier tribunal decision).
 - (b) Mr Cohen acknowledged that dwellings per hectare was a basic measure of density.
 - (c) This Tribunal also notes that in his statement Mr Cohen had earlier noted that the net residential population of Red Hill in 2010 was 19.4 persons/hectare, and that the projected population of the

³¹ At [70]

³² Exhibit 23 in the earlier proceedings, statement of Mr Cohen, paragraph 3 with a full cv at attachment A

proposed development, with an occupancy rate of 1.6 persons per dwelling, is 70 persons per hectare.³³

- (d) Mr Cohen preferred to use the percentage of the area covered by buildings, that is site coverage, as a measure of density. In his nominated precinct site coverage ranged from 15% to 45% with a median of 24%³⁴ and a mode of 23%. The proposed development is at 31%.³⁵ 13% of buildings in his chosen precinct had a higher site coverage than the proposed development will have.
- (e) Mr Cohen thought that the proposed development reflected adjacent residential development and provided a transition from the open space/institutional character of Blocks 66 (Catholic Care) and 69 (the school) to the residential character of the areas to the north, east and west of the subject land.
- (f) Given the nature of the facility he thought that the occupants' requirements for recreation facilities would be met within the complex, rather than increasing traffic and the demand for parking, and passive recreation and community facilities in the area.
67. Something of a lightning rod in the dispute were the earlier comments of Mr Cohen as follows:³⁶

12. Were the buildings to be surrounded by the low density precincts of Red Hill a view could be formed that the complex does not respect the character of the adjacent development. In my opinion the situation here is quite different.

13. Approaching Block 65 [the subject land] from the south, the knoll is dominated by Block 66 (Catholic Care) and Block 69 (St Bede's School). Neither development is residential in either form or function. The buildings on Block 65 represent a transition from institutional style buildings to residential buildings. In this respect the proposed development performs an important design function in changing scale, site coverage and building style to match that of the buildings that border it.

14. The function of acting as a transition zone is one that is ignored in crude density measurements. ...

³³ Exhibit 23 in the earlier proceedings, statement of Mr Cohen at [52]

³⁴ This is the corrected figure; see transcript of proceedings 8 April 2016, page 405

³⁵ This is the corrected figure; see transcript of proceedings dated 8 April 2016, page 410

³⁶ Exhibit 23 in the earlier proceedings, statement of Mr Cohen

68. The earlier tribunal summarised Mr Cohen's evidence as follows:

89. *...Mr Cohen submitted that compatibility is determined by the quantitative and qualitative balance of the design and the impact of the resulting buildings and their occupants on the surrounding area, their demand for services and their impact on existing traffic routes. His analysis of the proposed development in terms of its architectural design, its relationship with surrounding development, its contribution to the streetscape and its impact on traffic in the area led him to conclude that it would be compatible with the existing development in the area to an extent that satisfied the requirements of the Plan.*

69. Mr Cohen also gave evidence in these proceedings. Mr Cohen provided a further statement dated 17 March 2016 (exhibit E). He also stated that the views expressed in his earlier statement are consistent with both the current codes and objectives and with the codes and objectives as they stood in 2012 (exhibit D).

70. He confirmed that the proposed residential development would have a maximum of two storeys, and a plot ratio of 64%. Plot ratio measures the ratio of the permissible floor area to the total block area. He noted that under the current MUHD Code developments in RZ1 zones are permitted to be a maximum plot ratio of 65% under rule 9, subject to some exceptions. He stated that the MUHD Code provides a measure of bulk and mass that would be consistent with the RZ1 objective (a).³⁷

71. Mr Cohen also noted that the proposed development had a site coverage of about 31%, and he indicated, as he had done in the earlier proceedings, that this provided a better measure for assessing density character. He noted that the median for the precinct is 24%. Overall he stated that the development provides good levels of spatial separation between buildings and potential for creating open spaces with high levels of residential amenity.³⁸ Later in his statement Mr Cohen referred the drawings for the proposal, in particular sk29-a, which illustrate the massing and siting of the proposed complex laid over the existing complex, and which demonstrate, in his opinion, "that the redevelopment of the

³⁷ Exhibit E, statement of Mr Cohen at [5]-[7]

³⁸ Exhibit E, statement of Mr Cohen at [7]-[8]

site does not change the long standing character of the land or its relationship to the surrounding single housing blocks.”³⁹

72. In evidence at the hearing Mr Cohen said he considered that “density is found through looking at a number of parts of the Territory Plan which provides rules and criteria in relation to matters such as plot ratio, site coverage, set backs from side, rear and front boundaries, the vertical building envelope for a particular block of land, the amount of car parking that is required for multi unit housing.”⁴⁰
73. He was asked about whether the high level of community concern in relation to the development was relevant to the objectives. He thought that community concern ensured that the community understood what was proposed, and often brought to the attention of planners things that they had overlooked. These proceedings have evidenced this. But he went on to state that “if the community concern is really that we have a settled environment and a settled amenity and we don’t want to see that change, then that has to be weighed against other factors that have to be taken into consideration.”⁴¹

Evidence of Ms Purdon

74. Ms Purdon also gave evidence at the earlier hearing including in a statement dated 19 March 2012 (exhibit 27 in the earlier proceedings) and this is summarised at [90] to [91] of the earlier tribunal decision, though at [147] it is noted that she was not called to give oral evidence. Ms Purdon is a qualified urban planner, has worked as such since 1986 for Purdon and Associates Pty Ltd and before that for Collie Planning and Development and the National Capital Development Commission.⁴²
75. She indicated that the proposed development will increase the housing choice for older people. The population aged 65 plus years is the fastest growing cohort in Canberra and Australia, and Canberra has among the highest rates of population increase in this age group. She suggested that based on her

³⁹ Exhibit E, statement of Mr Cohen at [13], referring to exhibit 2 in the earlier proceedings

⁴⁰ Transcript of proceedings 7 April 2016, page 376

⁴¹ Transcript of proceedings 8 April 2016, pages 451-2

⁴² Exhibit 27, statement of Ms Purdon in the earlier proceedings at [1]

experience a large proportion of residents of the proposed development will have some connection with Red Hill. She thought that the proposed development exceeds the minimum accessibility requirements, includes a mix of units and is consistent with objective (a).⁴³ As the previous tribunal stated Ms Purdon thought that the proposed development would complement and be compatible with the character of the surrounding area.⁴⁴

76. Ms Purdon used dwellings per hectare as one measure of density, and found that on her approach there are nine dwellings per hectare in the surrounding area, and in comparison the proposed development will have 44 units per hectare. She also considered population density. By her calculation the average occupancy rate of separate detached dwellings in Red Hill was 2.78 or 26 persons per hectare. Assuming the living units have an average occupancy rate of 1.34 persons, the equivalent population density for the proposed development would be 59 people per hectare.⁴⁵
77. Ms Purdon suggested that the site coverage of the existing building on the subject land is 27%. The site coverage for the proposed development will be about 33%.⁴⁶ The average site coverage of the adjoining area is 25% and ranges from less than 20% to over 40%. Site coverage of 13% of dwellings exceeds that of the proposed development, and the site coverage of about one third of dwellings exceeds the site coverage of the existing building. Ms Purdon stated that in summary, the site coverage of the proposed development will only increase slightly compared with the existing development on the subject site, and that this measure of density suggests that there is little difference between the intensity of the proposed development and that of the adjoining area.⁴⁷
78. Ms Purdon stated that while the site and population density of the proposed development would be higher than the adjoining area, it would be a density that was compatible with the adjoining area and would fit in with the low density residential environment. Further, the development is consistent with the built

⁴³ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [59]-[71]

⁴⁴ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [98]

⁴⁵ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [112]

⁴⁶ As noted at paragraph 66 above, it seems this should be 31%

⁴⁷ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [113]-[118]

form controls applying to the site that are intended to control development intensity and by default, density.⁴⁸

Evidence of Mr Melloh

79. Mr Melloh the architect of the proposed development gave a statement in the previous proceedings dated 23 November 2011 (exhibit 3 in the earlier proceedings). Mr Melloh is a senior associate with Stanton Dahl Architects, and they and Mr Melloh have significant experience in the planning and design of facilities within the aged care sector. Mr Melloh stated that the proposal will allow aging residents to remain within their existing community that at present has limited aged care accommodation, notwithstanding that the trend in the suburb is an aging population. He stated that the building scale of the proposed development is mostly two storey in accordance with the planning requirements and in keeping with the surrounding residential character. The buildings have large setbacks and screen planting with additional significant landscaped areas that will protect and respect the amenity of adjacent properties. The development will be broken up into a number of separate residential buildings to create spatial separation between the blocks, reduce the scale of the building and retain a residential character.⁴⁹ Mr Melloh also gave evidence in these proceedings in a statement dated 22 December 2015 (exhibit C). He noted there that he is also a disability access consultant. That statement deals principally with adaptable housing units and car parking and is noted below.

Evidence of Ms Hili

80. Ms Hili was General Manager of Baptist Community Services NSW & ACT and gave a statement dated 13 March 2012 in the previous proceedings (exhibit 7 in the previous proceedings). She stated that at that time Baptist Community Services provided 21 residential aged care facilities, 12 retirement living villages (independent living units), and 25 care centres providing in-home community care to the elderly, people living with disabilities and their carers, and it had been providing aged care services since 1944. Their delivery model is based on the “aging in place” philosophy which links care and support services

⁴⁸ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [123], quoted in part in the earlier tribunal decision at [91]

⁴⁹ Exhibit 3 in the earlier proceedings, statement of Mr Melloh at [5] and [7]

to the places where older people prefer to live. The proposed development will cater for this need by offering independent living units providing a comprehensive range of services, which will operate within a framework in which Baptist Community Services will also provide support services to residents within the Gracewood Retirement Village and the broader community, and residential aged care within the Griffith residential aged care facility. She stated that an analysis of the entry age of residents to their retirement villages in the last 5 years indicated an average age of 73. Ms Hili also gave evidence that the development will be best practice in energy efficiency and sustainable design.⁵⁰

Evidence of Mr Furner

81. Mr Furner gave evidence in these proceedings that research by Baptist Community Services showed that demand for the proposal was strong from the 70 plus age group; that Red Hill has an aging population with an increase in numbers of people who are that age; and that the current supply of retirement village accommodation in this geographic area is low.⁵¹

Evidence of Ms Stockley

82. Ms Stockley provided a statement in the earlier proceedings dated 16 March 2012 (exhibit 26 in the earlier proceedings). She was a senior consultant employed by CB Richard Ellis Pty Ltd and had worked as a professional town planner for government agencies in New Zealand, the United Kingdom and Australia, and was a member of the Planning Institute of Australia.⁵²
83. In relation to objective (a) Ms Stockley noted that Red Hill is characterized by a significant proportion of large family detached dwellings on substantial blocks, a significant proportion of which are under-occupied, with limited flats and apartments to meet the requirements of older persons who wish to benefit from age and ability appropriate support and facilities while maintaining their own home. However the population of Red Hill is she noted dominated by older

⁵⁰ Exhibit 7 in the earlier proceedings, statement of Ms Hili at [8], [9], [10], [25] and [30]

⁵¹ Transcript of proceedings 6 April 2016, page 203

⁵² Exhibit 26 in the earlier proceedings, paragraph 2 with a full cv at annexure A

persons, and the population of Canberra is expected to age significantly in coming years. Within this context she thought the proposal will provide significant diversity to the local residential market meeting emerging community requirements, and meets zone objective (a).⁵³

84. As to objective (b), she stated that the development can comply with all relevant controls of the Territory Plan and the scale, form and appearance contributes to the neighbourhood and landscape character of the area. She referred to other expert evidence on this issue.⁵⁴

Evidence of Ms Jamaly

85. Ms Jamaly of the Authority also gave evidence in these proceedings in a statement dated 28 January 2016 (exhibit AE). Ms Jamaly is employed as Technical Co-ordinator – Merit Assessment South within the Development Assessment Section in the Planning Delivery Division of the Environment and Planning Directorate. She has degrees in Architecture and Urban Planning and 15 years experience as a town planner.⁵⁵
86. She noted that a number of changes have been made to the proposal to address concerns, and in particular the grounds for refusal of the reconsideration. The attics have been deleted, so that the proposal is now two storeys and consistent with the earlier rule R5 of the MUHD Code (now rule R18).⁵⁶
87. The proposal has been reduced to 100 units (from 114 and then 107), and the plot ratio to about 64% (from 81% and then 73%). Ms Jamaly noted that gross floor area used in this calculation includes areas within the basement that do not add any bulk to the built form above natural ground level. She also noted that there is no plot ratio control for a retirement village in the RZ1 Zone in either the earlier or the new version of the Territory Plan, rather the scale of the

⁵³ Exhibit 26 in the earlier proceedings at [89]-[94]

⁵⁴ Exhibit 26 in the earlier proceedings at [95]

⁵⁵ Exhibit AE, statement of Ms Jamaly at [1] and [2] and attachment A

⁵⁶ Exhibit AE, statement of Ms Jamaly at [39]-[41]; see also generally exhibit 8 in the earlier tribunal proceedings

development is controlled by relevant rules in relation to building height, building envelope, setbacks, private open space, on site parking etc.⁵⁷

88. Ms Jamaly also noted that due to the topography of the site, all buildings on the site collectively are not visible from any single adjoining block; where possible the buildings are cut into the site to reduce visual bulk; the ridgelines generally reflect those of adjacent buildings; the facades and roof form are well articulated and broken down into elements that reflect residential dwellings; as noted attics have been deleted; and the Montague and Nadgee Buildings have been split into two allowing spatial separation.⁵⁸
89. In particular the proposed setbacks on the northern and western boundaries, which are adjacent to residential buildings, are significantly greater than required by the MUHD Code. There is no significant overshadowing of adjacent blocks. A reasonable level of privacy is required and achieved by these setbacks, spatial separation, existing vegetation and proposed revised plantings. Ms Jamaly noted that the reconsideration identified that the northern and western setbacks do not provide for adequate evergreen planting. But she has examined the statement from the landscape architect and associated drawings and noted that advanced stock conifer trees are proposed for the rear boundary, that these can grow up to five metres, and that these will prevent overlooking. There are also hedges along this boundary. She noted that there is a gap in the hedge adjacent to Block 63, where ground cover is proposed adjacent to the fence with eucalypt planting. She recommended that the hedge be continued along the boundary and the eucalypts replaced by deciduous trees to ensure adequate solar access. She also recommended that the existing boundary fencing particularly along the northern and western boundaries be upgraded to further enhance privacy; it was agreed that the residents should have some choice in this regard.⁵⁹ Both these matters have been dealt with in the recommended condition of approval A6 attached to the respondent's outline of argument, and a further amendment to the condition concerning fencing has been suggested by the Tribunal to address the particular position of those on the western boundary.

⁵⁷ Exhibit AE, statement of Ms Jamaly at [42]-[55]

⁵⁸ Exhibit AE, statement of Ms Jamaly at [42]-[55]

⁵⁹ Exhibit AE, statement of Ms Jamaly at [56]-[61]

90. In her statement she noted:⁶⁰

Due to the large size of the block ... and the building's purpose, the built form is larger than surrounding dwellings. However, the scale of the built form as revised is sympathetic to the existing garden suburb neighbourhood character. Proposed built form provides a transition between the adjoining institutional school buildings and existing dwellings by adopting a domestic character.

91. As noted below, the Parties Joined challenged whether this concept of a 'transition' was appropriate. But as Ms Jamaly also noted, the building setbacks and spatial separation between buildings for the proposed development are significantly greater than that of dwellings in the surrounding RZ1 zone. In particular where single dwelling blocks have been redeveloped in the vicinity of the subject site, as in Sirius Place, new dwellings are substantially larger than the original dwellings in terms of height, footprint and façade lengths, with reduced setbacks to side boundaries; for the proposed building setbacks and spatial separation between buildings are significantly greater than that of dwellings in the surrounding RZ1 area.⁶¹

92. In summary Ms Jamaly stated that:⁶²

The revised proposal meets all relevant mandatory rules of both the old and current versions of the Territory Plan provided the applicant can demonstrate compliance with R86 and R90 ... [discussed below]. Where other rules are not met, the relevant criteria are met (old and current versions). In particular, it complies with requirements for building height, building envelope, setbacks and total area of private open space which protects the amenity of the adjoining blocks and the neighbourhood.

93. In addressing in particular zone objective (a), Ms Jamaly noted that the proposed development would provide housing choices for elderly or retired people to meet their changing household and personal needs, through a mix of units in terms of size, orientation and outlook, that are easily adapted. Further, unlike standard dwellings, these units are supported by extensive on site facilities. The proposed village would allow for an efficient use of the site and existing infrastructure, solar access and energy efficiency, and water sensitive

⁶⁰ Exhibit AE, statement of Ms Jamaly at [52]

⁶¹ Exhibit AE, statement of Ms Jamaly at [51] and [53]

⁶² Exhibit AE, statement of Ms Jamaly at [67]

urban design requirements. They would be more affordable than a comparable dwelling on a standard residential block in the neighbourhood. She thought the development consistent with objective (a).⁶³

94. Ms Jamaly noted in relation to zone objective (b) that the proposed development contributes positively to the existing garden suburb by maintaining the existing landscaped verges, retention of street trees, ensuring the built form does not dominate the streetscape, providing generous front, side and rear setbacks and spatial separation between the buildings both within the block and adjacent to it to allow for well landscaped areas, and generally achieving good amenity for residents and adjoining areas. Proposed new plantings and retained existing vegetation will provide a landscape setting consistent with objective (b).⁶⁴

Evidence of Parties Joined

95. The earlier decision of the tribunal summarised the concerns of the Parties Joined as follows:

80. *Ms Bennett's particular concern was with the density of the proposed development. While acknowledging that the Plan did not define "low, medium or high density housing" she contended that the proposal could not, on any reasonable interpretation, be seen as consistent with the "low density" objective of the RZ1 zone in which it is to be built. Objective (a), by inclusion of the phrase "within a low density residential environment" which is not included in either the RZ2 or RZ3 objectives, confirms that RZ1 residential zones are a 'low density environment'. Ms Bennett submits that high density development within a low density environment by its very nature irreversibly changes the character of the low density environment.*

96. The Parties Joined continued to argue in these proceedings that the proposal was for a multi unit complex of two storey buildings with basement car parking to replace a single storey nursing home and 18 small single storey independent living units, and that this would not be consistent with the zone objectives or respond to key strategies of the Red Hill Neighbourhood Plan. There is, they argued, a significant difference between the old complex and the proposed development "that no expert opinion can disguise."⁶⁵

⁶³ Exhibit AE, statement of Ms Jamaly at [92]-[95]

⁶⁴ Exhibit AE, statement of Ms Jamaly at [96]-[98]

⁶⁵ Exhibit M, statement of facts and contentions of the Parties Joined at [21(b)] and [21(k)]

97. In particular it was said that the proposed development is surrounded by the low density precincts of Red Hill to the east, north and west, and to the south it adjoins a small community facility, St Bede's Primary School. It was submitted that the proposed development is out of step with the less intrusive character of the adjoining suburban area and the resulting intensification and high impact of the proposed development would cause the nature of the surrounding low density residential environment to change, irreversibly. The area would reflect the residential environment of a higher zoned residential area.⁶⁶
98. The Parties Joined took issue in the previous proceedings, and these, with some of the approaches of the experts for Baptist Community Services. Mr Gay was critical of Mr Cohen's analysis, observing that his chosen precinct included an RZ2 zone. Mr Gay instead selected a smaller sample which indicated that a greater percentage (88%) of the blocks had a site coverage less than that proposed for Gracewood, compared with Mr Cohen's calculation (82%), and that the average site coverage (24.29%) was a little less than Mr Cohen's (25.03%).⁶⁷
99. Mr Gay also rejected Mr Cohen's and Ms Jamaly's 'transition' or 'buffer zone' hypothesis because instead of a progression from small to large site coverage, his analysis showed that the blocks to the south had site coverage of 20.49%, whereas Gracewood had 31.3% and the other blocks to the north and west averaged 26.54%, which indicated, he argued, that Gracewood, instead of being a transition, was an aberration.⁶⁸
100. It was said that it distorts the characterisation of the RZ1 area to describe the school and the proposed development as a 'buffer zone'. Rather it is the school that provides the buffer between RZ1 and RZ2 residential zones, not the proposed development which is clearly in the RZ1 zone. The development, it was argued, should only be assessed against the RZ1 zone.⁶⁹

⁶⁶ Exhibit M, statement of facts and contentions of the Parties Joined at [21(i)]-[21(l)]

⁶⁷ Earlier tribunal decision at [92]

⁶⁸ Earlier tribunal decision at [93]

⁶⁹ Exhibit M, statement of facts and contentions of the Parties Joined at [21(n)]

101. Mr Back and Professor Pitchford also contended that the density of the proposed development was too high. Although they recognized that there was no set test for density in the Territory Plan, they relied on a range of figures for the proposed development compared with those of the surrounding area. They submitted that although the applicant had chosen site coverage as the appropriate test for density, they considered that this measure had a serious drawback because it did not distinguish between single storey and multi-storey buildings. They preferred the tests of:

- (a) plot ratio: not greater than 35% for comparison blocks compared to 64.3% for the proposed development;
- (b) dwelling density: nine dwellings per hectare for comparison blocks, compared to 44 dwellings per hectare for the proposed development;
- (c) net residential density: 19.4 residents per hectare for comparison blocks compared to 70 residents per hectare for the proposed development; and
- (d) site coverage: 25% for comparison blocks compared to 31.3% in the revised plan.⁷⁰

102. The Parties Joined continued to agree that no plot ratio is specified for the block. But then noted that the proposed ratio for the proposal is substantially higher than the maximum 50% plot ratio allowed for the surrounding single dwelling blocks and significantly higher than the actual plot ratio of those blocks, being on average 25.4%.

103. There was particular concern in relation to the proposed development when viewed from the west looking towards Montague North and South, and then Nadgee North and South. Although now split, these are still large buildings. And the houses to the west look up a hill to them. The development close to the neighbouring buildings will not be cut into the hill; further back they will. Mr Cohen conceded that for these western neighbours the development “probably looks quite large”.⁷¹ Baptist Community Services did in this respect refer to the significant setbacks of the buildings from the western border, the

⁷⁰ Earlier tribunal decision at [94]-[96]

⁷¹ Transcript of proceedings 8 April 2016, page 435

articulation of these buildings, and the proposed plantings in this area.⁷² Mr Gay, who is one of those western neighbours, asked that if the proposal proceeded, that a condition be imposed that his fence be able to be higher than the draft conditions proposed, to 2.1 metres, and that he be able to have it made of metal rather than wood. The Tribunal will impose such a condition.

104. It was submitted that the multi unit blocks proposed pretend to have a domestic character, but that they are too up-scaled, too bulky, too closely aligned and contain too many units in each block in a tightly framed set back setting to have that character in real terms. They are multi unit blocks bordered by single dwellings, not single dwellings on their own blocks.⁷³ It was suggested that the proposition that the proposal will be “less institutional and more residential” than the existing buildings did not make sense; rather the new buildings will be two storeys with a basement and cover the block more densely.⁷⁴
105. The Parties Joined noted the amendments made to address concerns, but argued that these demonstrated recognition of the over scaled character of the design and were only a minor revision of the original; “none of the revisions adequately address fundamental issues with its over scaled character and its consistency with the neighbourhood and landscape character.”⁷⁵
106. In summary, the Parties Joined argued that the adverse impact of the development would be reduced only if the current proposed unit blocks were to be differently designed to reduce that impact or scaled back, so that they more closely resembled the established single dwellings in the neighbourhood. A complex of 50 to 70 units would allow for higher quality buildings in a low density environment.⁷⁶ This was a view with which the earlier tribunal agreed.⁷⁷

⁷² Transcript of proceedings 16 May 2016, pages 561-564

⁷³ Exhibit M, statement of facts and contentions of the Parties Joined at [21(l)]

⁷⁴ Transcript of proceedings 16 May 2016, page 602

⁷⁵ Exhibit M, statement of facts and contentions of the Parties Joined at [21(o)]

⁷⁶ Exhibit M, statement of facts and contentions of the Parties Joined at [21(o)]

⁷⁷ At [110], [116]

Consideration of earlier zone objectives

Role and nature of zone objectives

107. It is important to consider this issue with an understanding of the role of the zone objectives. As noted above, the zone objectives are relevant to an approval, but inconsistency with a zone objective does not mandate rejection of a proposal, though it may provide a basis for discretionary rejection. In contrast, compliance with a relevant code is a necessary condition for approval. The code must be consistent with each objective of the zone to which the code relates⁷⁸, and the objectives are relevant to interpreting the code. Section 53 provides expressly that 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. This structure directs primary focus to the terms of the code.
108. An additional reason for focussing on the code is that the zone objectives are, in light of their role, general and aspirational in nature. They set out the objectives for the regulatory scheme, not its particular requirements. Given this generality, it can be difficult to assess whether a specific proposal complies with a zone objective. Further, as with many regulatory purposes, the objectives are pulling in different directions. They reflect the tension between the interests of owners of land, of the local neighbourhood and of the broader community, and between current residents and future residents. In particular there is a tension between protection of the current environment, on the one hand, and allowing for future development to meet future needs, on the other. The earlier RZ1 zone objectives (a) and (b) reflect this in the tension between creating a wide range of affordable and sustainable housing choices to accommodate population growth and meet changing household and community needs, which looks to allowing development for the future, but within a low density residential environment with development which respects and contributes to the neighbourhood and landscape character of residential areas, which looks to preserving what is there at present. In the Tribunal's view this tension is resolved principally in the specific code requirements.

⁷⁸ Section 55(2) of the Planning Act

Proposed development complies with the relevant codes

109. The Tribunal is of the view that the proposed development does comply with the earlier MUHD Code in relation to density issues. Rule R5 requires that buildings are not to exceed two storeys; the proposal complies. Rule R7 requires that buildings are sited wholly within the building envelope; the proposal complies. Rules R8 and R9 deal specifically with plot ratio but do not apply to this development.
110. Although not directly relevant in this context, as noted below, the current MUHD Code now provides that for blocks other than single dwelling blocks in the RZ1 zone the maximum plot ratio, subject to some exceptions, is 65%. The subject block falls within the exceptions, but at any rate the evidence before the Tribunal was that the plot ratio is 64%, under the limit if current rule R9 applied (see further below at 150 and 159).
111. In relation to other rules or criteria which relate indirectly to density, the proposed development also complies. As Ms Jamaly discussed, the proposal complies with requirements for setbacks and total area of private open space which protects the amenity of the adjoining blocks and the neighbourhood.⁷⁹ The Parties Joined did not point to any rules or criteria in the relevant codes which related, directly or indirectly, to density, with which the proposal will not comply. This is an important consideration, though it is not determinative of these proceedings. In the earlier proceedings the Parties Joined argued that this was essentially because of ‘loopholes’ in the regulatory scheme. The Tribunal does not agree with this characterisation of the position, but does agree that compliance with the relevant codes is relevant and essential to density issues, but not the end of the consideration.

Proposed development complies with future aspects of zone objectives

112. Moving to the zone objectives, in objective (a) the future aspect is articulated by the reference to “a wide range of affordable and sustainable housing choice” “to accommodate population growth and meet changing household and community needs.” Ms Purdon and Ms Stockley noted that Red Hill has limited flats and apartments to meet the requirements of older persons who wish to benefit from

⁷⁹ Exhibit AE, statement of Ms Jamaly at [67]

age and ability appropriate support and facilities, while the population of Red Hill has a significant number of older persons, and the population of Red Hill and Canberra is expected to age significantly in coming years (see paragraphs 75 and 83 above). The Tribunal is of the view that the proposal will create a wider range of affordable and sustainable housing choices to meet changing household and community needs as referred to in objective (a), namely the needs of older persons, of whom there are many in the area. Within this context the proposal will provide significant diversity to the local residential market meeting emerging community requirements, and meets these aspects of zone objective (a). This is consistent with the decision of the earlier tribunal. The issue is whether it will do so within a “low density residential environment”.

Expert evidence supports compliance

113. There was significant evidence from people with expertise in town planning and architecture before this Tribunal and the previous tribunal, all of which found that the proposed development did comply with the zone objectives, including that the proposal will maintain a low density residential environment. This included the evidence of Mr Cohen, Ms Purdon, Ms Stockley, Mr Melloh and Ms Jamaly noted above. Mr Melloh is the architect for the proposal, and therefore is not independent of Baptist Community Services. Ms Jamaly is an employee of the Authority. The Tribunal is of the view that the other witnesses gave evidence in accordance with the relevant obligations of expert witnesses.⁸⁰ The Tribunal thinks it is relevant that all the experts agreed that the proposal complied with the RZ1 zone objectives, and provided reasons for their views. This is not determinative of the issue, and this is not to suggest that the views of the Parties Joined as local residents are not also relevant; but the consensus views of all persons with expertise in relevant disciplines that the proposal complies with the objectives should be given significant weight.
114. These proceedings are a challenge to the decision of the Authority not to approve the development. The fact that the Authority is now of the view that the proposed development not only complies with the relevant codes, but also complies with the RZ1 zone objectives, and should be approved subject to

⁸⁰ ACT Civil and Administrative (Expert Witness Code of Conduct) Procedural Directions 2009 (No.1)

conditions, is relevant. The changes in the further amended proposal (exhibit 2 in the earlier proceedings) are set out in a document provided by the Authority (exhibit 8 in the earlier proceedings). It includes changes relevant to density including reduction in the number of units, the deletion of all attics, the lowering of roof pitch, reduction of eaves, the splitting into two of the Montague and Nadgee buildings and improvement of landscaping. The Tribunal is not bound to follow this view of the Authority, especially given that the Parties Joined still object, but the opinions expressed by Ms Jamaly as an expert, and as a representative of the Authority as the primary decision-maker, must also be given some weight.

Views of Parties Joined and other local residents

115. The Parties Joined are local residents who have expressed strong views that the proposed development is too dense. Ms Bennett stated that she had consulted far more widely on this issue than the official consultation opportunities provided by Baptist Community Services, and that she has not found a single resident (particularly those directly affected by the development) who supports this application in its current form. She stated that there was a record number of objections to the development. Her position in these proceedings was the same as it had been in the earlier, namely that the development should be reduced to between 50–70 units, which allows for higher quality buildings in a low density environment, less impact on neighbouring properties, an increase in green space, better amenity and access for residents, and reduction in traffic.⁸¹
116. The process for such a development application provides for the notification of local residents and gives them an opportunity to provide comments. These comments are a relevant consideration under the Planning Act (section 120(d)). However they are not decisive. They need to be weighed against the other evidence considered in the context of the assessment of the range of factors which make up the legal tests in sections 119 and 120 of the Planning Act.

⁸¹ Final submission of Melissa Bennett in the earlier proceedings at [2], [5] and [25]; transcript of proceedings 5 April 2016, pages 126-127

Views of previous tribunal

117. The previous tribunal agreed with the Parties Joined and their concerns in relation to the density of the proposed development. As noted above it found that the proposed development will be considerably denser than the adjacent development and could not be considered to be low density, nor to respect and contribute to the neighbourhood character of the residential area; it is the scale of the proposed development that makes it inappropriate; a smaller scale facility may have raised no more objection from the community than Morling Lodge has done over the last 40 years or so; as it is, the level of community concern about this proposal had been unusually great and generally sustained over a number of years.⁸² The earlier tribunal also noted the changes made to the proposal, that this caused the Authority to change its position, that these changes “have gone some way towards reducing the bulk and scale of what was originally proposed”, but they did “not think that the changes made are sufficient to achieve the level of compatibility with the adjacent residential development that is an objective of the RZ1 Zone”.⁸³ These views need to be considered in light of the decision of the Court of Appeal which in effect overturned this finding and remitted this issue for reconsideration.

Measures of density

118. There are a range of measures of density which have been considered in these proceedings. These include the following:

(a) Mr Cohen thought that the net residential population of Red Hill is about 19.4 persons/hectare, and the projected population of the proposed development is about 70 persons per hectare.⁸⁴ The Parties Joined relied on similar figures. Ms Purdon suggested 26 persons per hectare in the surrounding area and 59 people per hectare in the proposed development.⁸⁵ The Tribunal notes that Morling Lodge would have had when in operation a similar number of persons living and working on the

⁸² Earlier tribunal decision, [2012] ACAT 58 at [108] – [110]

⁸³ Earlier tribunal decision at [114]-[116]

⁸⁴ Exhibit 23 in the earlier proceedings, statement of Mr Cohen at[52]

⁸⁵ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [112]

subject land as the further amended proposal will have when it is in operation.

- (b) Ms Purdon suggested that there were nine dwellings per hectare in the surrounding area, and in comparison the proposed development will have 44 units per hectare.⁸⁶ The Parties Joined relied on similar figures. Using this measure it is difficult sensibly to compare the proposal with Morling Lodge, which had 18 ILUs and then a large nursing home for 105 residents, and a small administration building.
- (c) Mr Cohen thought that site coverage for the area ranged from 15% to 45% with a median of 24% and a mode of 23%. The proposal was at 31%. 13% of buildings in his chosen precinct had a higher site coverage, and therefore 87% had less (see paragraph 66 above). Mr Gay selected a smaller sample which indicated that a slightly greater percentage (88%) of the blocks had a site coverage less than that proposed for Gracewood. His average site coverage for the area was similar to Mr Cohen's (see paragraphs 98 and 101 above). The Tribunal also notes in this regard Ms Jamaly's evidence that where single dwelling blocks have been redeveloped in the vicinity of the subject land, new dwellings are substantially larger than the original, and that this type of development is likely to continue (see paragraph 91 above). Ms Purdon suggested that the site coverage of the existing buildings on the subject land is 27% (see paragraph 77 above).
- (d) The proposed residential development will have a maximum of two storeys, and a plot ratio of 64%. The earlier tribunal put this at not greater than 35% for the surrounding area.⁸⁷ Again, relevantly, Ms Jamaly noted that where single dwelling blocks have been redeveloped in the vicinity of the subject site new dwellings are substantially larger than the original dwellings, including in terms of height. Under the current MUHD Code, rule 9, with some exceptions developments in RZ1 zones on blocks other than single dwelling blocks are permitted to be a maximum plot ratio

⁸⁶ Exhibit 27, statement of Ms Purdon in the earlier proceedings at [111]

⁸⁷ Earlier tribunal decision at [94]

65%. There was limited evidence about the plot ratio for Morling Lodge, though it is noted that it is made up of only one storey buildings.

119. On these measures, the density of the proposed development will be greater than in the surrounding area. But by some measures it is only moderately greater. Further, in most cases it will be similar to or only moderately greater than the density for Morling Lodge when it was operating. The plot ratio will be significant and we return to this below.

Outcome of the proposed development on the residential environment

120. Importantly, the Court of Appeal decision made it clear that that the relevant RZ1 zone objective (a) should be read as describing the outcome of a particular development; the objective does not contemplate a development that would change the character of the residential environment, not the subject land.⁸⁸

121. This residential environment includes the existing Morling Lodge. As counsel for the Authority stated:

you cannot judge this area without recognising that there's been an institution on this block for 50 years and when you look at the question of the extent to which the environment is changed the planning authority's submission is you are going to have to look at that change, not against a block as if this was virgin and upon which single houses might be put on it but the extent of the change by comparison with a neighbourhood on which there has been an institution ... for 50 years.⁸⁹

122. The Tribunal is of the view based on the significant evidence before it that the character of the residential environment for the area after the development will not be significantly different to the character now.
123. The number of persons living or working in Morling Lodge will be similar to the number of persons living or working on the subject land under the proposed development; the attributes of those persons will change but it is hard to see that this of itself will cause the area to be no longer be a low density residential environment.

⁸⁸ At [69]-[71]

⁸⁹ Transcript of proceedings 5 April 2016, page 118

124. At present the site coverage for the area is at an average of about 24%, with some blocks at or near 45%, and with Morling Lodge at 27%; under the proposed development the subject site will move to a site coverage of 31%. The Tribunal does not think that this change on one, admittedly large, block in the area will cause the area to no longer be a low density residential environment.
125. The proposed development will cause the subject site to have a plot ratio of 64%. This is a significant number. The Tribunal agrees with Mr Cohen and Ms Jamaly that this needs to be understood in the context of it being one, and perhaps not the best, measure of density for these purposes. It is a relevant measure, but even so, the Tribunal does not think that this plot ratio on the block will of itself cause the area to be no longer a low density residential environment. Future proposed developments in the area may do so.

Factors which limit the relevance of plot ratio

126. As noted, the plot ratio for the proposed development will be significant, but a number of factors limit the effect of this. First, the Tribunal agrees with Mr Cohen and Ms Jamaly that plot ratio is one measure of density, not the only measure, and in this situation site density is probably a better measure. The high plot ratio for the proposal comes from the fact that the development has basements and a second storey, as allowed by the code. Second, the proposal has a range of features which address its density, and in particular its high plot ratio. As noted these include that all buildings on the site collectively are not visible from any single adjoining block; there is spatial separation between the buildings; where possible the buildings are in cut into the site to reduce visual bulk; the ridgelines generally reflect those of adjacent buildings; the facades and roof form are well articulated and broken down into elements that reflect residential dwellings; attics have been deleted; the proposed setbacks on the northern and western boundaries, which are adjacent to residential buildings, are significantly greater than required by the MUHD Code; there is no significant overshadowing of adjacent blocks; some existing vegetation will be maintained and there is significant proposed new plantings. These factors suggest that the proposal is seeking to respect and contribute to the neighbourhood and landscape character of the surrounding residential area.

127. Third, the Tribunal is of the view that it is relevant that there has been a large institutional nursing home on the site for many years. The Tribunal does not think that this building was of itself a low density residential building; it was and still is a significant part of the local environment, but it did not prevent the area being a low density residential environment. Similarly, while the proposed development will change the use of the land from a large institutional nursing home to a large number of retirement village units, the Tribunal does not think that this change of itself will prevent the area continuing to be a low density residential environment. Fourth, the density is proposed in pursuit of other RZ1 zone objectives, namely a wider range of affordable and sustainable housing choices to accommodate changing household and community needs, that is the needs of older persons.

Conclusion on earlier zone objectives

128. The Tribunal has considered:

- (a) the nature of the zone objectives, and their role and interpretation;
- (b) relevant code provisions, with which the proposed development complies;
- (c) the fact that the proposal will create a wider range of affordable and sustainable housing choices to accommodate population growth and meet changing household and community needs in the area, elements of the zone objectives, in particular the needs of older persons;
- (d) the expert opinion before this Tribunal, and the expert opinion before the earlier tribunal, including the opinion of the Authority, all of which was that the development would not change the character of the residential environment and would comply with the RZ1 zone objectives;
- (e) the various measures of density; and
- (f) the current nursing home on the land, and a range of factors in relation to the proposed development which will address its bulk.

This leads the Tribunal to find that the proposed development complies with the earlier zone objectives. The Tribunal has taken into account the strongly

expressed views of the Parties Joined, and the earlier tribunal decision. But the evidence and analysis set out above leads the Tribunal to the view that the proposal will keep the area a low density residential environment and will respect and contribute to the neighbourhood and landscape character of the residential areas.

129. For these reasons the Tribunal is of the view that the proposed development complies with earlier zone objectives (a) and (b) of the earlier code.

I. Density - earlier criterion C87

130. Criterion C87 of the earlier MUHD Code provided as follows:

Where a Neighbourhood Plan exists, development demonstrates a response to the key strategies of the relevant Neighbourhood Plan.

131. There was a Red Hill Neighbourhood Plan, and that its ‘Key Strategies for Residential Areas’ (**key strategies**) were:⁹⁰

- *Provide a diversity of housing choices for single, couples and families of different sizes and ages in appropriate locations.*
- *Promote high-quality residential development that is sympathetic to the existing garden suburb neighbourhood character in terms of scale, form and landscape setting.*

132. The earlier tribunal found that the development addressed the first strategy, but not the second. Referring to its discussion in relation to the earlier zone objective (a), the tribunal stated that it considered “the proposed development is not ‘sympathetic’ in terms of scale with the existing neighbourhood character.”⁹¹

133. This finding was challenged in the appeal to the Supreme Court⁹² and then the Court of Appeal. In the Court of Appeal, the matters raised concerning criterion 87 were the subject of agreement between the parties.⁹³ There was some discussion in the hearing as to the effect of the Court of Appeal decision. The

⁹⁰ Earlier tribunal decision, [2012] ACAT 58 at [78]

⁹¹ Earlier tribunal decision at [112]

⁹² Supreme Court decision, [2013] ACTSC 103 at [34]; Court of Appeal decision, [2015] ACTCA 3 at [7]

⁹³ Court of Appeal decision at [8]

Authority argued that the Court of Appeal must have concluded that the criterion was met because had there been justification for but one finding that the development was inconsistent with the Territory Plan, and in particular criterion C87, the Court could not have allowed the appeal.⁹⁴ There is some merit in this. However the Tribunal noted that at [72] of its decision the Court of Appeal stated that for completeness the Court set out the issues on which the parties reached agreement, but that “in doing so, we should not be taken to have endorsed any of those arguments.” The Court noted the agreement of the parties that “if criterion 87 was ‘meaningful and valid’”, a matter which had been put in issue in the appeals, criterion C87 did not require any particular response; there were in fact multiple responses provided in the development application; and therefore the only finding available in relation to criterion C87 was that the proposed development met it.⁹⁵ In light of these comments the Tribunal does not think that there was an authoritative positive finding by the Court of Appeal that criterion C87 had been met. Rather the Tribunal is of the view that this issue has been remitted to the Tribunal, to be determined in light of the Court of Appeal’s decision.

134. Like the zone objectives the key strategies are generally expressed. As Baptist Community Services pointed out they apply to all residential development in Red Hill, not just that in the RZ1 zone.⁹⁶ Further to some extent the key strategies look to future development of the suburb generally; a single development cannot itself provide diversity, but it can add to diversity. The Tribunal does not agree that any “response to the key strategies” as referred to in criterion C87 is permissible, including that the strategies would not be met. In our view a response needs to be an attempt to comply with the strategies, and be compatible with them. But the nature of the key strategies suggests that there can be a range of ways to do so.
135. Unlike the objectives, the requirement in criterion C87 is in the MUHD Code. Therefore under section 119(1)(a) of the Planning Act development approval must not be given unless the proposal is consistent with it.

⁹⁴ Transcript of proceedings 5 April 2014, pages 114-117

⁹⁵ Court of Appeal decision at [76]

⁹⁶ Applicants submissions at [13]

136. Baptist Community Services and the Authority argued that this criterion was met, and relied on much of the same evidence as set out above in relation to the earlier zone objectives.
137. The Parties Joined argued that the Court of Appeal decision did not alter the material findings of the earlier tribunal that the proposed development does not respond to the key strategies for all residential areas set out in the plan. The proposed development would not be sympathetic to the existing garden neighbourhood character in terms of scale, form and landscape setting.⁹⁷
138. In relation to the garden neighbourhood or landscape setting, Ms Bennett particularly focused on the reduction in dry grass areas, what she described as “wide open green spaces”,⁹⁸ on the subject land under the proposal. She suggested that the amount of grassed areas would reduce to about 5-6%, and produced diagrams which she said supported this.⁹⁹
139. Baptist Community Services argued that this was much too narrow an approach. The landscape plans for the proposal, tendered in the earlier proceedings, showed proposed landscaped areas. Ms Matthews, a landscape architect, described the landscape plans, and the proposal to retain some existing features, in particular trees, and add a range of others.¹⁰⁰ They also tendered further documents which showed the building footprint left white, and then areas of grass, planted gardens, new screen plantings and new and existing trees.¹⁰¹ Baptist Community Services argued that references in the Neighbourhood Plan to “existing garden suburb neighbourhood character” and “landscape setting” means landscaping in the broad sense and certainly including trees and shrubs.¹⁰² In the Tribunal’s view this is correct. Further, the Tribunal is of the view that the proposal does include significant areas of natural landscaping.

⁹⁷ Exhibit M, Statements of facts and contentions of the Parties Joined at [21(t)]

⁹⁸ Transcript of proceedings 8 April 2016, page 413

⁹⁹ Transcript of proceedings 8 April 2016, page 419 and see generally pages 406-420 and 487-494; exhibits AB and AC

¹⁰⁰ Exhibit 6 in the earlier proceedings

¹⁰¹ Exhibit AF

¹⁰² Transcript of proceedings 8 April 2016, page 416

140. For reasons similar to those given above at paragraphs 107 to 127 in relation to the earlier zone objectives (a) and (b), the Tribunal is of the view that the proposed development complies also with the earlier criterion C87:

- (a) The Tribunal is of the view that the proposed development does comply with the earlier code in relation to “scale, form and landscape setting.”
- (b) In relation to other code rules and criteria which relate indirectly to these issues, the proposal also complies.
- (c) The proposal complies with Neighbourhood Plan’s strategy of providing a diversity of housing choices for singles, couples and families of different sizes and ages in appropriate locations, in particular for the growing aging population of the area for whom there is at present limited accommodation. This needs to be balanced against changes this will bring to the existing character.
- (d) There was significant expert evidence before this Tribunal and the previous tribunal which suggested that the proposal did comply with the Neighbourhood Plan’s key strategies. The Authority is of the view that the proposal not only complies with the code, but also complies with the Neighbourhood Plan’s key strategies, in particular because changes to the proposal have gone some way towards reducing the bulk and scale.
- (e) The density of the proposal will be greater than in the surrounding area. But by some measures it is only moderately greater. Further, in some cases it will be similar to or only moderately greater than the density for Morling Lodge when it was operating.
- (f) The proposal will be a high-quality residential development. A range of features will seek to make it sympathetic to the existing garden suburb neighbourhood character. The Tribunal is of the view that the large institutional nursing home which has been on the subject land has been consistent with the key strategies, and that the proposed development will be in a similar position.

141. The proposed development provides one of a range of possible responses to the key strategies. The Tribunal agrees with Ms Jamaly that while due to the large size of the block and the building's purpose, the built form is larger than surrounding buildings, the scale of the built form as revised is sympathetic to the existing garden suburb neighbourhood character (see paragraph 90 above). The proposal will contain significant landscaping. Importantly, it will provide a diversity of housing choices for the aging population of the area.

J. Density - current zone objectives

142. The current RZ1 zone objectives provide in part:

- a) *Provide for the establishment and maintenance of residential areas where the housing is low rise and predominantly single dwelling and low density in character*
- b) *Protect the character of established single dwelling housing areas by limiting the extent of change that can occur particularly with regard to the original pattern of subdivision and the density of dwellings*
- c) *Provide for a wide range of affordable and sustainable housing choices that meet changing household and community needs*
- d) *Ensure development respects valued features of the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties*

...

Evidence concerning current zone objectives

Evidence of Mr Cohen

143. In his evidence for these proceedings Mr Cohen addressed these new objectives. He stated that Red Hill is predominantly low rise and low density and that the land topographically related to the knoll on which the subject land is located and has overwhelmingly the character of a low density low rise residential area.¹⁰³ He thought that the proposed development will replace a group of large buildings of singular design that form part of the longstanding character of the area with something that “has been specifically designed to fit into the low-rise

¹⁰³ Exhibit E, statement of Mr Cohen at [9]

surround” with “cut and fill proposed to ensure that building heights do not exceed that of adjacent development”.¹⁰⁴

144. As to paragraph (b) of the new zone objectives, he noted that the function of the place remains the same, the pattern of subdivision remains unchanged, and whilst acknowledging that there would be changes relating to bulking and massing, the density of development properly measured will not be high.¹⁰⁵
145. As to paragraph (c), Mr Cohen noted that the proposed development will increase the supply of housing for older members of the ACT community, which is overstretched.
146. In relation to paragraph (d), Mr Cohen acknowledged that the proposed development will result in levels of activity on the subject land that are different from those that previously existed, such as increased traffic movements and possibly differences in ambient noise. There will be issues in the construction phase, and there will inevitably be changes in the vegetation on the site. But in his view there are no consequences for the landscaping on adjacent land, the residential development to the north cannot be affected by overshadowing, and the interface distances, the proposed finished ground levels and topography protect dwellings to the west from overshadowing.¹⁰⁶

Evidence of Mr Oshyer

147. Mr Oshyer gave evidence for Baptist Community Services and provided a statement dated 22 December 2015 (exhibit T). Mr Oshyer is a town planner, the Manager ACT of Knight Frank Town Planning, and was previously senior manager of Development Assessment with the Authority. He has a degree in landscape architecture and is a member of the Planning Institute of Australia.
148. He stated that the development for aged persons will continue to maintain the residential area. The proposal does not change the original subdivision, and the change in the density of dwellings on the land is within the maximum plot ratio permitted for other than single dwelling blocks in an RZ1 zone. He thought that

¹⁰⁴ Exhibit E, statement of Mr Cohen at [9]

¹⁰⁵ Exhibit E, statement of Mr Cohen at [9]

¹⁰⁶ Exhibit E, statement of Mr Cohen at [9]

the development provides for a range of affordable and sustainable housing choices that meet changing household and community needs. He also thought that the architecture and landscape of the proposed development respect valued features of the neighbourhood and the landscape character of the area, and does not have unreasonable negative impacts on the neighbouring properties.¹⁰⁷

Evidence of Ms Jamaly

149. In relation to the new zone objective (a) Ms Jamaly stated that “low rise and low density” describe the environment of the RZ1 zone; the proposed development is of two storeys similar to that permitted on single dwelling blocks and the area would remain predominantly a single dwelling area.¹⁰⁸
150. As to (b), Ms Jamaly noted that no subdivision or consolidation is proposed. There will be ILUs but occupation of these is limited to elderly or retired people and cannot be unit titled and sold separately. The site has been used for years as a home for aged persons. The development meets all the specific controls which protect the character of the area, in particular as to building height, building envelope, setbacks, plot ratio and open space requirement. Ms Jamaly noted that rule R9(a) in the current MUHD Code does not apply to the site because it is a block in an RZ1 area approved before 5 July 2013. But she noted that otherwise this rule applies to “blocks other than single dwelling blocks in RZ1” and requires that the maximum plot ratio is 65%. The proposed development would meet this requirement even if it applied.¹⁰⁹
151. Ms Jamaly also stated that in her opinion objective (c), which is similar to objective (a) in the earlier objectives, and objective (d) were met.

Evidence of Parties Joined

152. The Parties Joined argued that objectives (a), (b), (c) and (d) of the current RZ1 zone objectives are not met. For reasons similar to those in relation to the earlier objectives, they argued that the proposed multi block complex of 100 units with basement parking replacing a single storey nursing home and 18 small single storey independent living units offends objective (a), since the area would no

¹⁰⁷ Exhibit I, statement of Mr Oshyer, report at [5.1]

¹⁰⁸ Exhibit AE, statement of Ms Jamaly at [106]

¹⁰⁹ Exhibit AE, statement of Ms Jamaly at [107]-[113]

longer be a residential area where the housing is low rise and predominantly single dwelling and low density in character.¹¹⁰

153. Maintenance of the existing low density character calls for consistency in the plot ratio to be kept in line with the ratio required for single dwelling blocks, that is no more than 50%, especially in light of the fact that the surrounding residences have an average plot ratio of about 24%.¹¹¹
154. As to objective (b) it was argued that the proposal does not protect the character of the established single dwelling housing area, rather it will amount to a significant change, irrevocably altering the original pattern of density of dwellings and out of step with the less intensive character of the established adjoining suburban housing.¹¹²
155. The Parties Joined agreed that criteria (c) is similar to criteria (a) in the earlier objectives, and argued that the proposal does not meet criteria (c) for the same reasons that it did into meet criteria (a).
156. As to criteria (d), the Parties Joined argued that the proposal would not respect the valued features of the neighbourhood and landscape character of the area and would have unreasonable impacts on neighbouring properties. The development would in particular have an impact on properties to the north and west, and form a wall of development and excessive bulk by its two storey building mass on the boundaries of these properties. They argued that the minor revisions proposed do not address this, and the green infrastructure would likely be compromised by the over proportioned built footprint. Again it was argued that a complex of 50 to 70 units would allow for higher quality buildings in a low density environment with less impact on neighbouring properties and an increase in green space.¹¹³

¹¹⁰ Exhibit M, statement of facts and contentions of the Parties Joined at [22(b)-(c)]

¹¹¹ Exhibit M, statement of facts and contentions of the Parties Joined at [22(f)]

¹¹² Exhibit M, statement of facts and contentions of the Parties Joined at [22(i)]

¹¹³ Exhibit M, statement of facts and contentions of the Parties Joined at [22(m)-(o)]

Consideration of current zone objectives

157. For reasons similar to those given above at paragraphs 107 to 127 in relation to the earlier zone objectives, the Tribunal is of the view that the proposed development complies also with current zone objectives.
158. As discussed above in relation to the role and nature of the earlier RZ1 zone objectives, the Tribunal is of the view that compliance with the MUHD Code is an important factor in assessing compliance with the objectives. The Tribunal is of the view that the proposal does comply with the current Code in relation to density issues.
159. Rule R9 applies to “blocks other than single dwelling blocks in RZ1, RZ2, RZ3 and RZ4”. For the RZ1 zone it provides that the maximum plot ratio is 65%. But it then states that the rule does not apply to “blocks in RZ1 approved before 5 July 2013”. This block, as distinct from the development proposed for it, was approved before that date. At any rate the evidence before the Tribunal was that the plot ratio will be 64%, under the limit if rule R9 applied in its terms. The finding that rule R9 would be complied with if it applied is a significant consideration.
160. In relation to other rules and criteria which relate indirectly to density, the proposal also complies.
161. For the reasons given in relation to the earlier zone objectives, the proposal does provide for a wider range of affordable and sustainable housing choices that meet changing household and community needs, in particular the aging population (current zone objective (c)).
162. There was significant expert evidence before this Tribunal all of which suggested that the proposal did comply with the current zone objectives. The proposal is low rise, that is limited to two storeys. The reference to “predominantly single dwelling” in objective (a) and “limiting the extent of change” in objective (b) recognises that some developments may not be single dwelling and may involve some change. It is relevant that here the change is in pursuit of objective (c), in particular in relation to older people.

163. The Authority is of the view that the proposal not only complies with the MUHD Code, but also complies with new zone objectives, in particular because changes to the proposal have gone some way towards reducing the bulk and scale.
164. The density of the proposal will be greater than in the surrounding area. But by some measures it is only moderately greater. Further, in most cases it will be similar to or only moderately greater than the density for Morling Lodge when it was operating. The issue of plot ratio is discussed below.
165. The Supreme Court decision made it clear that the earlier RZ1 zone objectives should be read as describing the outcome of a development; the objectives do not contemplate a development that would change the character of the residential environment.¹¹⁴ This is also true for the current zone objectives. This residential environment includes Morling Lodge. The Tribunal is of the view based on the significant evidence before it that the character of the residential environment for the area after the development will not be significantly different to the character now.
166. As with the consideration of the earlier zone objectives, it is true that the proposed development will cause the subject site to have a plot ratio of 64%, and that this is a significant number. The Tribunal agrees with Mr Cohen and Ms Jamaly that this needs to be understood in the context of it being one, and perhaps not the best, measure of density for these purposes. Further, a range of factors limit the relevance of the significant density, and in particular the plot ratio. As noted these include that all buildings on the site collectively are not visible from any single adjoining block; there is spatial separation between the buildings; where possible the buildings are cut into the site to reduce visual bulk; the ridgelines generally reflect those of adjacent buildings; the facades and roof form are well articulated and broken down into elements that reflect residential dwellings; attics have been deleted; the proposed setbacks on the northern and western boundaries, which are adjacent to residential buildings, are significantly greater than required by the current MUHD Code; there is no significant overshadowing of adjacent blocks; some existing vegetation will be

¹¹⁴ At [69]-[71]

maintained and there is significant proposed revised plantings. These factors suggest that the proposal is seeking to respect the features of the neighbourhood and landscape character of the area and to limit the negative impacts on neighbouring properties. Also, the Tribunal is of the view that it is relevant that there has been a large institutional nursing home on the site for many years. This did, and the proposed development will, accommodate community needs, that is the needs of older persons.

167. The Tribunal is of the view that these factors outweigh the views of the local residents, strongly and intelligently expressed by the Parties Joined in these proceedings. For these reasons the Tribunal is of the view that the proposed development complies with the current RZ1 zone objectives (a), (b), (c) and (d).

K. Parking and traffic issues

168. A key issue in the earlier proceedings concerned the effect of the development on traffic in the area. Similar issues were raised in these proceedings. The earlier tribunal considered these issues under five questions, namely:

- (a) Have the traffic movements generated by the proposed development been correctly calculated?
- (b) Have the interests of St Bede's school been adequately considered in relation to traffic in Hicks Street and safety of school children?
- (c) Will the traffic movements generated by the proposed development adversely affect the safety of residents of Supply Place?
- (d) Will the parking arrangements for the Montague units lead to unacceptable levels of visitor parking in Supply Place?
- (e) Will the proposed re-development of the Supply Place driveway be effective in ensuring safety of pedestrians using that entrance and reducing the speed of vehicles exiting via that driveway?¹¹⁵

169. This Tribunal groups them under three questions :

- (a) Whether the development will result in increased parking in the area?

¹¹⁵ Earlier tribunal decision at [128]

- (b) Whether the development will result in increased traffic in the area?
- (c) Whether the driveway from the subject site to Supply Place will be safe?

Before considering these we note a few preliminary matters.

Residents

170. When Morling Lodge was in use it compromised 18 independent living units (ILUs) and a nursing home for 105 residents. Access was from Hicks Street and Supply Place. Using an average of 1.3 people per unit this will be about 128 people living on the site, using 1.5 this will be 132. There were also about 80 staff who accessed the facility mainly through Supply Place.¹¹⁶ In terms of traffic movements there would have also been service providers and visitors.
171. Under the proposed development there will be 100 ILUs. Using an average of 1.3 people per unit this will be 130 people living on the site, using 1.5, 160. There will be only three or four full-time staff.¹¹⁷ In terms of traffic movements there will also be service providers and visitors.
172. These figures suggest that the number of people on the site when Morling Lodge was in operation, and when Gracewood is in operation, will be similar, though they will have different characteristics, the previous facility having more nursing home residents and staff, the proposed facility having more residents of ILUs.
173. Mr Furner gave evidence that Baptist Care manages nine retirement villages with a total of 488 units and 571 residents. The average resident age is 79.5 years; with an average length of stay of nine years; 93% of residents are aged 65 and older; 64% are 75 and older. In 2015 the average entry age was 77 years and the average age on exit was 85 years. He stated that in his experience there is a strong demand for parking spaces when a development is new, but that as residents age in place over time the take-up of car spaces diminishes.¹¹⁸ In the

¹¹⁶ Earlier tribunal decision at [15] and [145]

¹¹⁷ Exhibit I, statement of Mr Oshyer, report page 45

¹¹⁸ Exhibit A, statement of Mr Furner at [4]-[6]

earlier proceedings in 2012, Ms Hili had indicated that the average entry age was 73.¹¹⁹

174. The Parties Joined suggested that the occupants may in fact be younger and more active. This is possible, but the Tribunal regards the past experience of Baptist Care as a likely indicator of the position in the proposed development.

L. Parking

175. Criterion C38 of the earlier MUHD Code required provision for parking to comply with the Parking and Vehicular Access General Code, and AS 2890.1 – the Australian Standard for Off-Street Parking. There was no applicable rule. The Parking and Vehicular Access General Code (**PVAG Code**) provides at Part 3.1.5, in both its earlier and current form, that the parking provision rates for residential zones are as follows:

Retirement village

1 space/self-care unit

Plus

0.5 spaces/hostel or nursing home unit or bed

Plus

1 space/staff residential unit

Plus

0.5 spaces/non-resident peak shift employee

Note: above rates for retirement village include visitor car parking requirements

As Ms Jamaly notes, the parking requirement for the proposed development is therefore 104 car parking spaces, which includes residents, staff and visitor parking.¹²⁰

176. Some elements of the zone objectives go to parking and traffic issues, such as the reference in new zone objective (d) to ensuring that development does not have unreasonable negative impacts on neighbouring properties.

177. Mr Nairn and the Parties Joined referred also to section 3.1.1 of the PVAG Code. This provides that the objectives for the provision of parking and

¹¹⁹ Exhibit 7 in the earlier proceedings, statement of Ms Hili at [30]; transcript of proceedings 6 April 2016, page 153

¹²⁰ Exhibit AE, statement of Ms Jamaly at [77]

vehicular access in residential areas are to ensure, in relation to catering for community based residential uses (such as retirement complex, residential care accommodation, special dwelling):

- (i) adequate parking and access is provided on-site for community residential uses for the residents, visitors, workers and carers and for operational and commercial vehicles servicing the facilities;*
- (ii) parking provided on-site is consistent with the likely demand generated by the residents of the community residential uses, particularly the residents of special dwellings;*
- (iii) adequate access for emergency vehicles is provided for health and aged care facilities;*

This statement of objectives is not a requirement in itself. It informs the specific requirements set out in paragraph 175 above.

178. Mr Melloh noted that the proposal provides for a total of 136 parking spaces made up of:

- (a) 100 resident spaces and 5 resident accessible spaces, and that resident spaces when not utilised could be additional visitor spaces;
- (b) 25 visitor spaces and 2 visitor accessible spaces;
- (c) 4 staff spaces; and
- (d) 27 of these are accessed from Supply Place, and the remainder from Hicks Street.¹²¹

179. As Ms Jamaly noted this indicates that there would be a surplus of 32 car spaces and that the requirements of the PVAG Code would be met. Ms Jamaly indicated that revised plans have not been provided to show the revised car parking and suggested that if the Tribunal approved the proposed development a condition should be imposed requiring revised plans to be lodged.¹²² The April 2016 plans (exhibit AG) now address this.

¹²¹ Exhibit C, statement of Mr Melloh at [5]; transcript of proceedings 6 April 2016, page 217

¹²² Exhibit AE, statement of Ms Jamaly at [78] and [83]

180. Ms Jamaly also considered that the proposed development complies with criterion C12 of both the earlier and current Access and Mobility General Code in relation to parking.¹²³
181. Baptist Community Services also provided evidence of parking arrangements at other facilities. At their retirement villages at Gracewood Kellyville, there are 73 units, 110 residents and 73 car spaces provided; at Aminya in Baulkham Hills there are 92 units, 102 residents and 70 car spaces provided; at Watermark at Wagga there are 56 units, 76 residents and 56 car spaces.¹²⁴ The car spaces proposed to be provided here are comparable.
182. The evidence of Mr Field and Ms Hili in the previous proceedings is set out at [165]-[168] of the earlier tribunal decision.
183. The Parties Joined did not dispute that the proposal will meet the relevant code requirements. They did suggest that these requirements were unsatisfactory and that a major gap in the code is that it implicitly excludes the case, or perhaps more accurately does not deal with the case, where all of the parking spaces are private; it is said that this situation completely eliminates visitor parking. Such private spaces, it was argued, reduce the amount of parking available to visitors. It was suggested that the terms of the code assume full public access to spaces, and not mostly proprietary parking as here, where many of the spaces are underground within the buildings. It was submitted that this would have an impact on parking in surrounding areas, in particular in Supply Place, and that the position with regard to parking elsewhere in similar facilities is irrelevant.¹²⁵
184. The previous tribunal, on the basis of similar evidence and submissions, found that notwithstanding the possibility that on occasions there may be overflow parking from the proposed development into Supply Place, it did not consider that the proposed development should be rejected on that ground and that it complied with the code. It accepted that there may be a need to review the code

¹²³ Exhibit AE, statement of Ms Jamaly at [79]-[82]

¹²⁴ Exhibit G, statement of Mr Field, Traffic Supplementary Report, page 24

¹²⁵ Exhibit M, statement of facts and contentions of the Parties Joined at [30]-[33]

to ensure it reflects current data and trends; this Tribunal agrees with this comment.¹²⁶

185. In the Tribunal's view the proposed development complies with the relevant code. Indeed it exceeds the requirements of the code by a significant amount. There are 27 visitor spaces outside the buildings. The number of spaces to be provided is also comparable to elsewhere; the Tribunal does not agree that this evidence should be ignored; there may be some differences between the ACT and NSW, but the position in NSW is clearly a reasonable comparator. The Tribunal does not think that the development will have an unreasonable negative impact on parking for neighbouring properties; it may have some impact but street parking in the area is a general resource available to all who reside in and visit the area. The Tribunal does not think that the proposed development should be rejected on the basis of parking issues.

M. Traffic

186. The earlier tribunal found as follows:

129. *The MUHD Code in Part B, General Development Controls, Element 4, Parking and Site Access, at Criterion C37 specifies "The existing road network can accommodate the amount of traffic that is likely to be generated by the development". There is no relevant Rule.*
130. *There was much conflicting evidence about the number of traffic movements likely to be generated by the proposed development. ...*
151. *The Tribunal is unable to arrive at any useful conclusion on this issue, beyond being satisfied that if Gracewood Red Hill were to operate as Ms Hili has suggested, then the adjacent roads would have the capacity to cope with any additional traffic generated and that Criterion C37 would be satisfied. However, uncertainty about the age of potential residents and their level of car ownership and usage make it difficult to be confident that Ms Hili's evidence will necessarily reflect the reality of the currently proposed development, if it proceeds.*

187. As noted, the relevant criterion C37 in the earlier MUHD Code stated:

C37

The existing road network can accommodate the amount of traffic that is likely to be generated by the traffic.

¹²⁶ Earlier tribunal decision, [2012] ACAT 58 at [170]

188. There does not appear to be a relevant specific requirement in the current MUHD Code. Some elements of the zone objectives go to traffic issues, such as the reference in current RZ1 zone objective (d) to ensuring that development does not have unreasonable negative impacts on neighbouring properties.

Evidence concerning increased traffic

189. Considering and assessing the evidence about increased traffic as a result of the proposed development was difficult for the earlier tribunal and is difficult for this Tribunal for a range of reasons. In part this is because there is difficulty in predicting the future. In part this is because there are so many variables involved: usage by residents of cars depends on their age, mobility, car ownership, habits, availability of other transport, like the facility bus or public transport, and availability of services on the site. Predicting use by staff, service providers and visitors is also difficult. Also in part this is because the statistical evidence available is collected on a range of bases and in a range of contexts. At best all the Tribunal can do is assess the likelihood of increased traffic as a result of the proposed development and whether this is relevant to the Territory Plan requirements.
190. The Tribunal focuses on vehicle per day movements by residents and staff. This is because some evidence of these is available, both for Morling Lodge and the proposed Gracewood, and it is these which are likely to change. There is less evidence of movements by visitors and service providers, but it seems unlikely that the change from Morling Lodge, essentially a nursing home, to Gracewood, a retirement village, would significantly increase the number of visitors or service providers. However it was not always clear what the figures proposed by the parties included.

Evidence of Ms Hili

191. The evidence of Ms Hili in the earlier proceedings is summarised at [145]-[148] of the earlier tribunal decision. In further summary, Ms Hili stated that the proposed 100 units were likely to have between 120 and 150 residents; that car ownership was likely to be between 40% and 60% of units; that the experience of Baptist Community Services is that a number of clients enter such villages with a motor vehicle but subsequently decide to sell it, and some have already

done so; this occurs often because it is anticipated that many of the daily needs of the residents would be met within the development. For comparably sized Baptist Community Services retirement villages the number of units occupied by couples was 8 to 14%, and the number of car spaces about 50% of units. A private mini bus is expected to operate at the proposed development seven days a week, including a scheduled service for shopping trips daily Monday to Friday. She expected the traffic impact of the new development to be significantly less than the then current situation with Morling Lodge.¹²⁷

Evidence of Mr Field

192. In the T documents, Northrop Consulting indicated that:

- *Hicks Street is an access street type B with maximum traffic volume of up to 1,000 vehicles per day (vpd) (400 vehicles per hour (vph))*
- *Supply Place is an access street with a maximum daily traffic capacity of 300 vpd (125 vph).*¹²⁸

193. The evidence of Mr Field of Northrop is summarised in the decision of the earlier tribunal at [131]-[137]. As set out there Mr Field relied on the October 2002 version, based on 1981 studies, of the NSW Roads and Traffic Authority's *Guide to Traffic Generating Developments (GTGD)* which recommended trip rates for housing for aged and disabled persons and was said to be widely accepted by ACT authorities. This suggested daily traffic at between 106 and 212 vpd for the proposed development. This document contained a statement that it had been collected from various locations in Sydney and should be applied only in the Sydney metropolitan area. Mr Field indicated that if he were the author and concerned about people applying the data, this might be a reasonable paragraph to include.¹²⁹

194. Mr Field also suggested that there were between 218 and 236 vpd for the then current facility Morling Lodge. Exhibit 15 in the earlier proceedings, a report prepared by Northrop Consulting, including Mr Field, dated March 2012 for a mediation provides more details in relation to the calculation of traffic in

¹²⁷ Earlier tribunal decision, [2012] ACAT 58 at [145]-[146]; exhibit 7 in the earlier proceedings, statement of Ms Hili at [31]-[36]

¹²⁸ T documents, pages T154 and T164

¹²⁹ Transcript of proceedings 7 April 2016, page 329

relation to the then current facility. This used the GTGD to assess 1-2 vpd for the 18 self-care units, 30 vpd for the 105 high-care facility units, and 162 for the about 81 staff members in three shifts, with some additions for delivery vehicles etc. This gave a total traffic generation of 232 vpd for Morling Lodge. It is stated there that currently all staff, as well as residents of nine self-care units, accessed Morling Lodge via Supply Place.¹³⁰

195. In this document there is also some discussion of public transport. This indicated that at that time there was a weekday and weekend bus route which had stops in close proximity to the subject land, namely a three and five minutes walk.¹³¹

196. Northrop Consulting arranged for their own traffic counts in the area and concluded that “when compared with the current traffic volumes, the traffic increase from the proposed development is minor, and would not have any significant impact on the traffic flow in the roads surrounding the proposed development.”¹³²

197. Baptist Community Services continued to rely on the GTGD but also on the Technical Direction TDT 2013/04a issued by the NSW Transport, Roads and Maritime Services which included information about updated traffic surveys (**Direction 2013/04a**).¹³³ Direction 2013/04a has a section on housing for seniors, and refers to ten surveys conducted in 2009, five within the Sydney urban area and five in regional NSW. It summarises the trip generation rates for housing for seniors as:

Weekday daily vehicle trips = 2.1 per dwelling
Weekday peak hour vehicle trips = 0.4 per dwelling
*(Note that morning site peak hour does not generally coincide with the network peak hour).*¹³⁴

198. The range for daily vehicle trips per unit is 1.35 – 3.10 on a weekday and 0.51 – 1.65 on weekends. Direction 2013/04a also had rates for low density residential

¹³⁰ Exhibit 15 in the earlier proceedings, page 16

¹³¹ Exhibit 15 in the earlier proceedings, pages 10-13

¹³² Earlier tribunal decision at [131]-[137]

¹³³ Exhibit O

¹³⁴ Exhibit O, Direction 2013/04a, page 2

dwelling: 10.7 daily vehicle trips in Sydney and 7.4 in regional areas; and for high density residential flat dwellings: 1.52 daily vehicle trips per unit in Sydney and 3.22 in regional areas.¹³⁵ The Tribunal notes in passing that on these figures the daily vehicle trips for low density residential dwellings in Sydney is about five times that of housing for seniors.

199. Mr Field used this figure of 2.1 vehicle trips per day per dwelling to estimate the traffic generation for Gracewood of 210 trips per day. He suggested that his more recent experience at facilities in Garran and Gordon in the ACT led him to believe that two is an “over-estimation of the number of trips for the ILU component”. However he maintained his belief that 2 to 2.1 would be an appropriate rate for Gracewood at Red Hill, with a negligible impact on Hicks Street which has significant capacity to absorb additional traffic.¹³⁶ He noted that the traffic generated from the previous development should be deducted from this to assess the increase.
200. In these proceedings Mr Field also reported on more current traffic observations and counts undertaken by Northrop Consulting in relation to the area. In summary these showed traffic trips along Hicks Street near the school from 8.00am to 5.30pm to be 274, 250 and 322 on three successive weekdays in December 2015.¹³⁷ In total five days were observed and Mr Field concluded that traffic conflict was observed to be low, traffic speeds were observed to be low, school peak am and pm periods showed some congestion typically shorter than ten minutes, traffic in Hicks Street was observed to be low at all times except for the short morning and evening peak periods, and traffic gaps for vehicles entering and exiting the driveway for Morling Lodge were observed to be plentiful with the exception of the two school peaks.¹³⁸ Mr Field concluded that observations at the subject land found that generally traffic is free flowing, low speed and low volume and that the counts at Hicks Street indicate that it has extensive capacity to absorb additional traffic.¹³⁹

¹³⁵ Exhibit O, Direction 2013, 04a, pages 1-2, Appendices C1, C2 and C3

¹³⁶ Transcript of proceedings 7 April 2016, page 312

¹³⁷ Exhibit G, statement of Mr Field, Traffic Supplementary Report, page 23

¹³⁸ Exhibit G, statement of Mr Field, Traffic Supplementary Report, pages 8-9

¹³⁹ Exhibit G, statement of Mr Field, Traffic Supplementary Report, page 29

Evidence of Mr Isaks

201. Mr Isaks gave a statement in the earlier proceedings dated 10 April 2012, exhibit 21. He indicated that parking demand associated with older people living in retirement villages is recognised as being generally much lower than for people occupying standard residential units. As discussed, Baptist Community Services here intends providing a total number of spaces well in excess of the minimum requirement.¹⁴⁰
202. Mr Isaks stated that the local road network had sufficient capacity to deal with the traffic generated by the proposed development. In all likelihood, the number of trips generated will probably be about the same as the existing development, with a little more traffic on Hicks Street and less on Supply Place. He concluded that the proposed development is unlikely to add to traffic volumes, and that these volumes will at any rate be well within those permitted by the classification in the road hierarchy of those streets (see paragraph 192 above).¹⁴¹

Evidence of Mr Furner

203. The statement of Mr Furner, exhibit A, contains details of a survey of traffic at a Baptist Care facility Gracewood at Kellyville, which has 73 units, 110 residents and 73 allocated car spaces: this showed for the period of 8.00am to 6.00pm on one day 190 trips, that is 2.6 per unit. There is also a survey for the Aminya facility at Baulkham Hills which has 92 units, 102 residents and 70 allocated car spaces: this showed for the period of 8.00am to 6.00pm on one day 287 trips, that is 3.1 per unit. Mr Furner indicated that in his view some 50 of these trips were by staff and visitors to a nursing home near the village, which would reduce the rate to 2.6 per unit.¹⁴²
204. Mr Furner indicated that generally the older the age of the resident the less likely they are to drive;¹⁴³ residents indicated they sought to avoid traffic

¹⁴⁰ Exhibit 21 in the earlier proceedings, statement of Mr Isaks, at [8]-[14]

¹⁴¹ Exhibit 21 in the earlier proceedings, statement of Mr Isaks, paragraphs 15-19; see also transcript in the earlier proceedings, pages 444-447

¹⁴² Exhibit A, statement of Mr Furner, at [8] and attachments

¹⁴³ Transcript of proceedings 4 April 2016, page 171

congestion;¹⁴⁴ residents tend to come from within a 10 to 20 kilometre radius of the facility and like to maintain their networks in the area.¹⁴⁵

Evidence of Ms Jamaly

205. The Authority argued that there is no evidence that the carrying capacity of Hicks Street is being exceeded; there is also very little upon which the Tribunal could base a finding that the development would materially worsen the traffic situation in Hicks Street; it is likely residents of Gracewood would avoid the peak times for the school; the car usage of the residents is likely to be less than the general population and will reduce as they age.¹⁴⁶
206. Ms Jamaly pointed out that the Territory and Municipal Services Directorate advice in relation to the reconsideration proposal was that there would be no significant traffic impact on the surrounding area. Due to the reduction in the number of ILUs to 100 from the reconsideration proposal the traffic generated is likely to be reduced further.¹⁴⁷

Evidence of the Parties Joined and Mr Nairn

207. The Parties Joined argued that the existing road network and on-site parking facilities cannot accommodate the amount of traffic and parking that is likely to be generated by the proposed development. As Mr Gay pointed out the proponents of the development suggested that it would provide “great new adventures”, “a lifestyle for people as they are getting older”, which would mean that there would be people coming to the village who are going to be active; “ordinary people with their busy lives.”¹⁴⁸
208. The Parties Joined relied in particular on the evidence of Mr Nairn. His evidence is summarised in the earlier decision.¹⁴⁹ Generally Mr Nairn gave evidence that in his view the traffic rates would be significantly higher than those put forward by Baptist Community Services, perhaps double.

¹⁴⁴ Transcript of proceedings 6 April 2016, page 173

¹⁴⁵ Transcript of proceedings 6 April 2016, page 179

¹⁴⁶ Respondent’s outline of arguments at [35]-[38]

¹⁴⁷ Exhibit AE, statement of Ms Jamaly at [84]

¹⁴⁸ Transcript of proceedings 5 April 2016, page 133

¹⁴⁹ Earlier tribunal decision, [2012] ACAT 58 at [139]-[141]

209. In particular Mr Nairn suggested that Canberra trip generation rates are generally substantially higher than those in Sydney, and are growing. He thought that trip generation rates in Canberra in 2012 should be at least 3.03 trips per person each day (Mr Nairn generally used trips per person, rather than per vehicle figures, and his figures included all trips by the person, not just to and from home). He used other figures to suggest that for persons over 65 in Canberra in 2012 there would be 2.63 trips per person per day, and for retired or disabled persons 3.93. His final calculation for estimated actual traffic generation was 2.63 trips per day for 173 residents (of 100 units), 14 for staff and four for others with a total of 473 trips per day.¹⁵⁰ He also provided preliminary results from a 2009 survey which suggested that personal trips rates by car for people over 65 years old was 5.590.¹⁵¹ He concluded that in his view the amenity of neighbouring residential areas will be adversely affected by the additional traffic generated by the proposed development. As noted below the Parties Joined agreed that these calculation needed to be adjusted to enable comparisons to be made; in particular these figures looked at trips per person, not per vehicle, and included trips which were not to and from residences; relevant adjustments made by Professor Pitchford are discussed below.

210. On this basis the Parties Joined were critical of reliance on the figure of 2.1 vehicle trips per day proposed by Baptist Community Services. They were critical of the factual bases of Baptist Community Services predictions, and it was argued that:

- (a) Direction 2013/04a concerned NSW retirement facilities and it was not demonstrated that NSW data matched ACT demographics, and at any rate the NSW data included both high care and low care facilities.¹⁵²
- (b) Mr Field relied too heavily on NSW vpd figures to support the figure of 2.1 vpd. In the 2012 hearing this included figures derived from an old 1981 study. If the take-up of car spaces by residents is close to 100%, it

¹⁵⁰ Exhibit 12 in the earlier proceedings, statement of Mr Nairn, report, page 11; Exhibit 13 in the earlier proceedings, further statement of Mr Nairn

¹⁵¹ Exhibit 12 in the earlier proceedings, statement of Mr Nairn, report, pages 8-10

¹⁵² Submission by Rohan Pitchford at [7(a)]

was said that “this is an expensive proposition for people who only make one trip a day.”¹⁵³

- (c) The surveys by Baptist Community Services were not designed by an expert and were not independently verifiable, and were NSW, not ACT data.¹⁵⁴
- (d) There was no hard evidence that all 80 plus employees of Morling Lodge used the Supply Place cul-de-sac.¹⁵⁵

In addition to increased traffic flow, the Parties Joined argued that the proposal would result in significant overflow parking into Supply Place.¹⁵⁶

211. In his ‘corrections to submissions’ document, Professor Pitchford suggested a calculation based on 16% of residents living with another, and an average rate of 6.8 trips per household; and 84% living alone, with an average rate of 3.4 trips per household; with 77% of these trips to and from home; giving a rate of 3.04 vpd for each unit; about 1.5 times Baptists Community Services’ preferred rate of 2.1. He noted that this figure may still have some double counting, but also some undercounting because it does not include visitors, employees and service vehicles. The Tribunal uses this figure as the primary position of the Parties Joined, discussed below.
212. Other calculations by Professor Pitchford suggested 3.5 vpd for each unit.¹⁵⁷ There is also a suggestion that the number is 5.24 vpd. This appears to be on the basis of person trips, not vehicle trips, number, uses the rate per person of retired or disabled persons with no adjustment for persons in a retirement village, uses an occupancy rate of 1.73 persons per unit, which is well above the evidence before the Tribunal, and therefore gives a figure well above all other suggested numbers, and the Tribunal thinks this unlikely for residents with an average age of about 77 and does not further consider it.
213. In the applicant’s submissions in reply they also used Mr Nairn’s and Professor Pitchford’s approach to obtain a figure of 3.04 vpd. Even using Mr Nairn’s

¹⁵³ Submission by Rohan Pitchford at [7(b)]

¹⁵⁴ Submission by Rohan Pitchford at [7(c)]

¹⁵⁵ Submission by Rohan Pitchford at [7(d)]

¹⁵⁶ Statements of facts and contentions of the Parties Joined at [30]-[33]

¹⁵⁷ Corrections to submission of Rohan Pitchford

figure of 3.93 for retired or disabled persons, they argued this should at least be discounted by 25% for retirement village residents, and further to get a more accurate car trips per unit, rather than person, per day of 2.54.¹⁵⁸

214. Professor Pitchford summarised his argument as:

Rather than point to any exact figure, the conclusion must be that the Applicant has left us without any hard guidance regarding the actual traffic and parking impact of their development due to the absence of data and flawed methodology.

The only hard data is from Mr Nairn in 1997 and the TAMS survey from 2009.

215. The Parties Joined also had concerns that the figures proposed by Baptist Community Services significantly under-reported on peak traffic flows on Hicks Street at school drop off and pick up times. The Parties Joined had conducted their own survey which suggested an am peak of 35 minutes and traffic flow of 126.4 trips, and a pm peak of 20 minutes and traffic flow of 98.8 trips. This is moderately greater than the figures proposed by Baptist Community Services, collected at the end of the school year, of a three minute peak and am traffic flow of 113.5 and pm of 82.¹⁵⁹

216. The Parties Joined also noted that while the provision of one parking space per unit complied with the code, this does not take account of the need for public parking for visitors. In effect it was argued that the limited visitor parking proposed would require many visitors to park outside the development and have a serious impact on the surrounding area.¹⁶⁰

Consideration of traffic issues

217. As before the earlier tribunal, there was therefore much conflicting evidence about traffic. However a few points are clear.

218. First the Tribunal does not think that the evidence of Ms Hili and Mr Furner as to the experience of Baptist Community Services elsewhere can be ignored. Baptist Community Services is an experienced provider of retirement villages. Their assessment as to the likely makeup of the residents and those residents'

¹⁵⁸ Submissions of applicant in reply at [5]-[8] and document headed 'Paragraph 8 expanded'

¹⁵⁹ Statements of facts and contentions of the Parties Joined at [39] to [42] and [49]

¹⁶⁰ Statements of facts and contentions of the Parties Joined at [43] to [46]

ownership and use of cars of cars is supported by this experience. The residents of the ACT may be a little different, but in the Tribunal's view they are not so exceptional that evidence from the NSW experience of Baptist Community Services should be seen as irrelevant.

219. It seems likely therefore that the average entry age to the proposed facility will be about 77 years; this is likely to be made up of some couples but mainly single people; there is likely to be strong demand for parking spaces when the development is new; but as residents age in place over time the take-up of car spaces will diminish.¹⁶¹ The number of residents' cars is likely therefore to start off high, perhaps 100%, but on the experience of Baptist Community Services will reduce. This is their experience elsewhere. In this case the availability of onsite facilities, a regular village bus, and general public transport are likely to be factors in reduced car use, at least over time.
220. Further the evidence of Mr Furner is that trip rates of about 2.6 per unit could be expected, perhaps a bit higher.¹⁶² This would give of 260 trips per day, probably reducing over time.
221. Similarly, the Tribunal thinks that the evidence of Mr Field cannot be ignored. He has significant expertise, in particular in the ACT, and has based his views on his experience and other information, in particular the GTGD and Direction 2013/04a. In the earlier proceedings he suggested daily traffic at between 106 and 212 vehicles per day for the proposed development. In these proceedings, in light of Direction 2013/04a, the figure of 2.1 trips per dwelling was suggested, that is 210 trips per day. If staff trips need to be added, this gives 218. If the number of units with cars reduces over time, this number will also reduce. Mr Field noted that to assess the increase in traffic, the figure for the previous development should be deducted; this is correct. He estimated the traffic at Morling Lodge when it was operating to be about 232 vpd. This suggests that the proposed development will in fact reduce traffic. If Mr Furner's figure of 260 trips per day for the proposal is used (see paragraph 220 above), there will be a small increase.

¹⁶¹ Exhibit A, statement of Mr Furner at [4]-[6]

¹⁶² Exhibit A, statement of Mr Furner at [8] and attachments

222. As noted, the Parties Joined contested these figures and analysis and relied on the expert opinion of Mr Nairn. Mr Nairn is an expert and regard should also be had to his opinion. It may be that Canberra has a higher level of car ownership and usage, and that this is increasing. Professor Pitchford's calculations in this hearing relying on Mr Nairn were 3.04 vpd per unit or 304 trips per day. If staff trips need to be added, the trips per day would be 312. The Tribunal notes, as did Mr Field, that to assess the increase in traffic, the figure for the previous development should be deducted. Mr Field estimated this at about 232. On this basis the proposed development will increase traffic by 80 vpd. However, if Mr Nairn and the Parties Joined are correct, the figure for the traffic when Morling Lodge was operating is also too low, since it does not take account of the special factors relevant to Canberra car usage, and the likely increase therefore less than 80.
223. As noted above, there are very significant difficulties in assessing the evidence about increased traffic as a result of the proposed development, in particular because there are so many variables involved, and the statistical evidence available is collected on a range of bases and in a range of contexts. The Tribunal has focused on vehicle per day movements by residents and staff, but it was not always clear what the figures proposed by the parties included. Notwithstanding these difficulties, it appears on the evidence that there will either be a reduction in traffic (on Mr Field's figures), or an increase of about 80 vpd (on Professor Pitchford's), as a result of the proposed development. While this possible increase is of about 34% in the amount of traffic as a result of the proposed development, if it occurs, in the Tribunal's view it is modest in the context of the existing road system, the existing usage and because it will be spread over a day and generally outside peak periods. Even on Professor Pitchford's alternative figure of 3.5 vpd per unit plus staff gives an increase of only about 54% on the Morling Lodge traffic. This traffic will be split between Hicks Street and Supply Place in some way. As 27 of the LMUs are accessible from Supply Place, this would account for 57 vpd on Mr Field's figures; 82 on Professor Pitchford's primary figure. If it is correct that all 80 staff of Morling Lodge used this driveway (160 vpd), as well as residents of nine units, on Mr Field's figures the development will result in a reduction of well over 100

trips per day through Supply Place; on Professor Pitchford's primary figure a reduction of about 100. Even if in fact only half the staff of Morling Lodge, and the residents of the nine units, used Supply Place, there will still be a reduction in the traffic using Supply Place under the proposed development from when Morling Lodge was in operation.

224. Wherever the figure sits in the range, the evidence suggests that the residents will avoid peak times, including in relation to the school, and traffic from Gracewood will decline over time as the residents age, and use the onsite facilities, regular village bus, and perhaps general public transport.
225. Wherever the figure sits in the range, the traffic created will still be well short of the capacity of Hicks Street of 1,000 vpd and Supply Place of 300 vpd. The Tribunal is of the view that the existing road network can accommodate the amount of traffic that is likely to be generated. If the Parties Joined and Mr Nairn are correct there will be a modest increase of traffic on Hicks Street, though not in Supply Place, which may have an impact on neighbouring properties and the school, but we do not see that as an unreasonable negative impact (current zone objective (d)). This is particularly so where the development will provide for a wider range of affordable and sustainable housing choices that meet changing household and community needs, and in particular an aging population (current zone objective (c)). As discussed below, the proposal will also address some issues with school traffic by providing a slip lane for 'kiss and drop' and bus parking (see paragraph 252 below). The Tribunal does not think that the proposed development should be rejected on the basis of traffic issues.

N. Driveway to Supply Place

226. The earlier tribunal found as follows in relation to issues concerning the driveway to Supply Place:

161 ... the Tribunal is satisfied that the traffic to and from the proposed development via Supply Place will cause no greater risk to Supply Place residents than that which presently exists and that Supply Place has the capacity to accommodate this anticipated traffic flow.

...

180. The Tribunal is satisfied that the driveway as now proposed will be as safe, if not safer, than what presently exists.

In these proceedings further evidence and argument was put on this issue.

227. In the earlier proceedings there was a significant issue about the location of the disabled parking space at the top of the driveway (see [180] in the earlier tribunal decision). In these proceedings a new drawing by Mr Melloh A601, a revision of drawing sk 26-a (exhibit 2), was submitted which shows the accessible parking space relocated closer to Supply Place and sight lines for a driver reversing from that space, together with sight lines for the driver of a vehicle exiting the basement and approaching the driveway (exhibit U). This has been incorporated into the April 2016 plans (exhibit AG), and if necessary the Authority has proposed a relevant condition.¹⁶³ This Tribunal is of the view that this sufficiently addresses this issue.

228. The MUHD Code at the time of the original decision provided as follows in rule R76:

In relation to driveways and access/internal roads:

(a) shared driveways and access/internal roads are separated from the side boundary and building frontages by an area of planting that is a minimum width of 1.5 m

...

(e) where more than 10 car spaces are served and the driveway or access/internal road connects to a public road, entrance to be at least 5m wide to allow vehicles to pass each other.

229. Although not always clear, it appeared to be agreed that this rule was not met because of the requirement in paragraph (a).¹⁶⁴ As to paragraph (b), the

¹⁶³ Respondent's outline of argument, attachment 1, proposed condition A6(c)

¹⁶⁴ Exhibit N, statement of Mr Gay at [19]; exhibit 26 in the earlier proceedings, statement of Ms Stockley, attachment B, page 29

driveway appears to be at least five metres wide, though the Parties Joined disputed that this allowed vehicles to pass each other.¹⁶⁵

230. In the earlier MUHD Code, criterion C76 provided:

Driveways and access/internal roads allow safe and efficient vehicle movement and good connections to the existing street network as well as providing a high quality pedestrian priority environment.

231. Under the current Code there is no applicable rule R76. Criterion C76 now provides:

Internal driveways are designed to be safely used by both pedestrian and vehicles including emergency vehicles.

Measures to reduce vehicle speed on internal driveways will be considered when determining compliance with this criterion, including one or more of the following:

- (a) *changes in pavement materials*
- (b) *the lack of kerb and gutters*
- (c) *difference in height to adjacent streets*
- (d) *avoiding long lengths of driveway*
- (e) *suitable planting*
- (f) *signage.*

232. The Parties Joined argued that the entrance and exit to Supply Place is not appropriate for vehicle and pedestrian access to the development. It was said that this was originally a pathway, and became a *de facto* driveway. Mr Gay's statement of 4 March 2016 outlines the history, and the lack of any evidence that the development into a driveway was approved.¹⁶⁶ It is said that it is now proposed to become in substance a street servicing 25 units. Mr Melloh

¹⁶⁵ Transcript of proceedings 8 April 2016, page 497

¹⁶⁶ Exhibit N, statement of Mr Gay at [2] to [16]

acknowledged that he knew of no cases in which such a development of pathway to, in effect, a street had occurred.¹⁶⁷ Supply Place will also need to service these units, and the existing homes there.¹⁶⁸

233. Mr Gay gave evidence that in 1982 and 2013 there were incidents demonstrating the inadequateness and unsafeness of the current driveway, and there was evidence demonstrating that drivers did not slow down for the speed ramps that are currently there.¹⁶⁹ Mr Melloh also noted that he was astounded the number of parents who sped through the school zone on Hicks Street, with children in the car.¹⁷⁰
234. The Parties Joined argued that the driveway is to be only 5m wide, but needs to service two way access, which includes a dog-leg which prevents a line of sight. There will therefore be difficulties in seeing on-coming vehicles, and in adjusting to or passing them. Drivers will also have to negotiate pedestrians, perhaps with walking sticks, walkers or wheelchairs. It will therefore be unsafe on a number of counts.¹⁷¹
235. It was argued that under the earlier Code, rule R76 was clearly not met, and that criterion C76 was not either as the access could not be described as a high quality pedestrian priority environment when it is too narrow and only selective paving protects pedestrians from vehicles.¹⁷²
236. It was also argued that the current criterion C76 was not met because the proposal was not safe for pedestrians, and there is doubt about the safety for vehicles because of the narrowness of the driveway.
237. Baptist Community Services asserted that the driveway has been in existence for the duration of operations of Morling Lodge with no reported incidents,

¹⁶⁷ Transcript of proceedings 6 April 2016, page 247

¹⁶⁸ Exhibit M, statement of facts and contentions of the Parties Joined at [24] to [25]

¹⁶⁹ Exhibit N, statement of Mr Gay at [4] and [20]; exhibit S, video

¹⁷⁰ Transcript of proceedings 7 April 2016, page 287

¹⁷¹ Exhibit M, statement of facts and contentions of the Parties Joined at [27] to [28] and [47]

¹⁷² Exhibit N, statement of Mr Gay at [19]

notwithstanding that it has been used by both elderly pedestrians and vehicles.¹⁷³ The evidence of Mr Gay indicates this is not wholly correct.

238. Appropriately, Baptist Community Services intend to substantially enhance the safety of the driveway. The detail of the proposals are set out in the statement of Mr Field and plans in the earlier hearing. This will involve:

- (a) the internal driveway will be designated a shared zone;
- (b) with a speed limit of 10 km/hr;
- (c) the shared zone will include special colour pavement;
- (d) there will be a speed hump and two ramps;
- (e) through traffic to Hicks Street will not be possible. The facility manager will maintain the access restriction to the service lane;
- (f) in addition to the existing 'stop' sign, there will be new 'shared zone', 'give way to pedestrians', 'no stopping' and 'speed hump' signs;
- (g) a new 'Armco rail' will be constructed on the western side of the driveway; and
- (h) possible removal of the shrub closest to Supply Place to improve sight lines.¹⁷⁴

239. As Mr Field noted, a shared zone is an area utilised by both pedestrian and vehicular traffic in which vehicles must give way to pedestrians at all times, and where the street environment has been adapted for very low speed vehicles. Drivers are made aware that they are entering different driving conditions in a range of ways. Mr Field noted that there may be non-compliance by drivers, but stated that vehicles will be forced to comply with the speed limit due to the speed hump and ramps, and reminded of the shared zone by the irregular colour

¹⁷³ Applicant's submissions at [74]

¹⁷⁴ Exhibit 2 in the earlier proceedings, bundle of plans, plan sk26-a; exhibit 15 in the earlier proceedings, statement of Mr Field at [4.3] – [4.4]

of the pavement. He stated that all new residents will be made aware of the shared zone.¹⁷⁵

240. Baptist Community Services and Mr Field agreed with the notion that vehicles larger than two tonnes should not generally use the driveway, and Baptist Community Services invited the Tribunal to impose a condition to that effect. This would also be a measure which improved the safety of the driveway.¹⁷⁶ The Authority proposed such a condition, noted below.
241. Mr Field also thought that these measures would reduce the risk of minor traffic conflict where the driveway to the subject land from Supply Place comes very close to adjacent driveways.¹⁷⁷ He thought that the driveway would allow safe and efficient vehicle movement and provide a high quality pedestrian environment.¹⁷⁸ His experience in providing traffic advice for aged care facilities led him to think that shared zones are very effective in this style of environment.¹⁷⁹ Mr Field thought that all the provisions in criterion C76 were met.¹⁸⁰ In relation to the reference to “avoiding long lengths of driveway” in the current C76 Mr Field noted that in his view this came from a concern that if driveways are long then you will get higher speeds. In this case he noted that there will be speed control measures, and in this context he did not regard it as long.¹⁸¹
242. Mr Melloh gave evidence that in his experience the measures proposed would be effective in slowing traffic to an acceptable speed.¹⁸² He stated that:

*There’s nothing to tell me that what we’ve proposed is going to create an unsafe environment. It’s going to be well lit. It’s going to have varied pavings. We’re going to have changes in grade to enforce wayfinding in regard to vehicle movements. Everything that has been designed has been designed to create a nice, slow, shared environment.*¹⁸³

¹⁷⁵ Exhibit 15 in the earlier proceedings, statement of Mr Field at [4.4]

¹⁷⁶ Applicant’s submissions at [78]; exhibit H, statement of Mr Field at [4.0]

¹⁷⁷ Exhibit H, statement of Mr Field at [4.0]

¹⁷⁸ Transcript of proceedings 7 April 2016, page 296

¹⁷⁹ Transcript of proceedings 7 April 2016, page 298

¹⁸⁰ Transcript of proceedings 7 April 2016, page 306

¹⁸¹ Transcript of proceedings 7 April 2016, page 365

¹⁸² Transcript of proceedings 6 April 2016, page 211

¹⁸³ Transcript of proceedings 6 April 2016, page 231

243. Mr Melloh thought that the bad driving down to Supply Place would change significantly with the new development. The movement of a significant number of staff will be replaced by the movement of primarily elderly residents using a shared zone with significant measures to mitigate bad driving.¹⁸⁴ Mr Field suggested that the high level of familiarity of employees leads them on occasion to ignore messages and to drive in a manner which is less appropriate for the space.¹⁸⁵ Mr Melloh thought the changes would make the driveway and Supply Place “much, much safer for the residents and more appropriate in how it operates for an elderly demographic.”¹⁸⁶
244. Mr Field also noted the perceived risk of vehicles falling onto the adjacent property from the driveway. Mr Field thought that given the driveway is a low speed environment with low usage rates for larger vehicles that the risk was low, but thought that the proposed guard rail would provide for a higher level of safety.¹⁸⁷
245. Ms Jamaly indicated that in her view a shared zone is a “zone which is shared by different users, so vehicles, pedestrians, cyclists, ... motorcyclists ... it is a safe zone for which vehicles and pedestrians to negotiate, and I’m confident that ... if there’s a pedestrian coming onto that driveway, a vehicle driving at a low speed like 10 kilometres [per hour], it would definitely stop to give way to the pedestrian”. She considered that this would be a pedestrian priority environment.¹⁸⁸
246. The Authority proposed a condition on development in the following terms:
- (a) *A9.(a) That vehicles larger than 2 tonnes shall not use the proposed driveway off Supply Place both during construction and post development.*
 - (b) *Appropriate signage shall be provided at the entry to the subject site from Supply Place indicating the restriction at Condition A9(a).*

¹⁸⁴ Transcript of proceedings 7 April 2016, pages 286-289

¹⁸⁵ Transcript of proceedings 7 April 2016, pages 304-305

¹⁸⁶ Transcript of proceedings 7 April 2016, page 289

¹⁸⁷ Exhibit H, statement of Mr Field at [4.0]

¹⁸⁸ Transcript of proceedings 8 April 2016, page 509

247. The Authority also proposed condition A.6 which included that Baptist Community Services lodge:

(c) Revised drawings to relocate the accessible parking space (adjacent Montague) closer to the northern boundary and extend the shared zone within Supply Place (sic) across the driveway to the Montague basement or provide a dedicated pathway from the accessible car parking space to the proposed pedestrian path along the rear boundary to ensure safe access for peoples with disabilities.

Subject to amending “within Supply Place” to “from Supply Place”, this seems an appropriate condition.

248. As discussed above, on any view it is likely that traffic numbers using Supply Place will be less under the proposed development than under the previous Morling Lodge.
249. On the basis of the proposals for the driveway the Tribunal is of the view that for the purposes of the earlier criterion C76 the driveway will allow safe and efficient vehicle movement and good connections to the existing street network as well as providing a high quality pedestrian priority environment. The Tribunal acknowledges that all roads are dangerous places, that the driveway is no exception, and that there are some aspects of it which give rise to specific potential dangers, such as its place in a retirement village, narrow construction and reduced line of sight. However the Tribunal is satisfied that the proposals outlined above will make it reasonably safe, and significantly safer than it was with Morling Lodge. This is the view of Mr Field, who has significant expertise, Baptist Community Services, the Authority, Territory and Municipal Services Directorate and the previous tribunal. As proposed by Baptists Community Services and the Authority, the Tribunal will impose conditions that vehicles larger than two tonnes should not use the driveway. It will also impose a condition in relation to a guard rail. These will provide additional safety measures.
250. The Tribunal is also of the view that for the purposes of the current criterion C76 the driveway is designed to be safely used by both pedestrian and vehicles including emergency vehicles, and that there are measures to reduce vehicle speed including changes in pavement materials, the lack of kerb and gutters,

suitable planting and signage, as well as a speed hump and two ramps. As noted the Tribunal will also impose conditions that vehicles larger than two tonnes should not use the driveway and in relation to a guard rail as added safety measures. The Tribunal does not think that the proposed development should be rejected on the basis of the proposed driveway from Supply Place.

O. Position of the school

251. The views of the school, in particular in relation to traffic issues, was an issue in the previous proceedings. In these proceedings Baptist Community Services provided a letter from John Barker of Catholic Education dated 14 December 2015 which stated that subject to Baptist Community Services delivering the agreements and conditions discussed at a meeting in December 2015, “in particular the slip lane for ‘kiss and drop’ and bus parking at the front of St Bede’s Primary School, Catholic Education ... supports your proposed development”.¹⁸⁹ A concept drawing of the slip lane was provided to the Tribunal.¹⁹⁰ This letter also referred to meeting minutes. Those minutes stated on page 2 that “trucks were to use the driveway that is located at the west end of the current site away from the school.”¹⁹¹ This was inconsistent with the position at the previous hearing, and this, that the laneway from Supply Place would not be used for large vehicles. To clarify the position, confirmation was sought from Catholic Education that it did not require Baptist Care to use Supply Place during construction, and that it was agreed that all truck construction access is to be through the Hicks Street boundary and must access the site from the north and exit towards the north, thus avoiding the school. Catholic Education stated in an email of 7 April 2016 that it had no objection to this access proposal.¹⁹²
252. The recommended conditions of approval proposed by the Authority provide in condition A8 that prior to the issue of a Certificate of Occupancy for the proposed buildings, “a bus lay by for the St Bede’s School shall be built by the

¹⁸⁹ Exhibit B

¹⁹⁰ Exhibit T

¹⁹¹ Exhibit B

¹⁹² Exhibit AA

lessee of the subject block at its own cost in accordance with plans and specifications previously approved in writing by the Territory.”¹⁹³

P. Other issues raised by the Authority in its reconsideration

253. There were other issues which the Authority raised in the reconsideration decision, which is the subject of this application to the Tribunal. The Authority indicated that these issues were now addressed and that the Authority was of the view that the further amended proposal, as amended by the April 2016 plans, complied with both the earlier Territory Plan and the current Territory Plan in this respect.¹⁹⁴ The Tribunal accepts this position.

Q. Adaptable units

254. One particular issue considered in the hearing was that the current Territory Plan has increased requirements for adaptability of units. The Residential Zones Development Code now requires in rule R4 that all dwellings for the purposes of supportive housing or retirement village meet the Australian Standard AS4299 Adaptable Housing (Class (C) and the Access and Mobility General Code. This is a mandatory requirement and there is no applicable criterion. The architect, Mr Melloh stated that the proposed development meets AS4299, the accessible standard, for all items except one. He stated that the dimensions of the main bedrooms would need to be altered to achieve the accessible standard by relocation of walls. He provided drawings which show how this can be achieved. In a number of cases relocation of an external wall would be required adding overall a total of 40m² of gross floor area. This will increase the plot ratio to 64.5%. There may also need to be some minor adjustment of the parking layout.¹⁹⁵

255. Counsel for Baptist Community Service indicated that there were a number of ways the Tribunal could deal with this issue, implied that his client preferred assessment under the 2012 Territory Plan, but overall did not care much.¹⁹⁶ The Tribunal thinks it appropriate to require compliance with the later more onerous

¹⁹³ Respondent’s outline of argument, attachment 1

¹⁹⁴ Exhibit AE, statement of Ms Jamaly at [38]-[68]

¹⁹⁵ Exhibit C, statement of Mr Melloh; see also exhibits U, V and W which are better copies of the plans; transcript of proceedings 5 April 2016, page 106

¹⁹⁶ Transcript of proceedings 5 April 2016, pages 105-107

standards. If the current Territory Plan applies here, failure to do so may mean the proposal could not be approved. The Parties Joined did not oppose this change. The cost of making the change is, in context, minimal.¹⁹⁷ The Tribunal intends to approve the April 2016 plans (exhibit AG), which are the further amended plans (exhibit 2 in the earlier proceedings) as amended by the plans attached to the statement of Mr Melloh (exhibit C). It indicates that if it is necessary to decide this matter according to the earlier 2012 version of the Territory Plan it would have approved the plans as so amended under those provisions as well.

R. Conclusion

256. Therefore the Tribunal believes that the decision under review should be set aside and a substitute decision made to approve the development application in accordance with further amended application, as amended in these proceedings and set out in exhibit AG, subject to the conditions specified in attachment 1 to the respondent's outline of argument dated 13 May 2016 in these proceedings, with some other amendments.
257. The Tribunal has considered the proposed development under both the earlier and current Territory Plan.
258. It has done so on the basis that under section 119 of the Planning Act compliance with the relevant codes is a necessary condition for approval. It has found that the proposed development complies, or by imposition of conditions can comply, with the earlier and current relevant codes, in particular the earlier and current MUHD Code, in relation to density issues, parking and traffic issues, and no other bases of possible non-compliance have been identified.
259. It has also done so on the basis that under section 120 of the Planning Act compliance with the relevant codes is not sufficient; regard also needs to be had to other matters, including the zone objectives. Inconsistency with a zone objective does not mandate rejection of a proposed development, but it may provide a basis for discretionary rejection of a proposal, even one which is code-compliant. The Tribunal has found that the proposed development is

¹⁹⁷ Transcript of proceedings 7 April 2016, page 268

consistent with the earlier and current RZ1 zone objectives, in particular objectives (a) and (b) in the earlier Territory Plan, and objectives (a), (b), (c) and (d) in the current Plan, in relation to density issues and parking and traffic issues. No other bases of possible inconsistency with the zone objectives have been identified. The Tribunal is satisfied that overall the development application as further amended should be approved, subject to the specified conditions.

.....
Senior Member R Orr QC
delivered for and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	AT 5/2012
PARTIES, APPLICANT:	Baptist Community Services – NSW & ACT
PARTIES, RESPONDENT:	ACT Planning and Land Authority
PARTIES JOINED	Anthony Phillip Gay, Gavin Alexander Back, Melissa Bennett, John Copland, Rohan Pitchford
COUNSEL APPEARING, APPLICANT	Mr Erskine SC, Mr Arthur
COUNSEL APPEARING, RESPONDENT	Mr Walker SC
COUNSEL APPEARING, PARTIES JOINED	N/A
SOLICITORS FOR APPLICANT	Nelson & Co Solicitors
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
SOLICITORS FOR PARTIES JOINED	N/A
TRIBUNAL MEMBERS:	Presidential Member M-T Daniel, Senior Member R Orr QC
DATES OF HEARING:	7 & 8 April, 16 May 2016