Resource Management and Planning Appeal Tribunal of Tasmania

AAD Nominees Pty Ltd v. Kingborough Council [2011] TASRMPAT 6 (24 January 2011)

Last Updated: 27 January 2011

CITATION: AAD Nominees Pty Ltd v. Kingborough Council [2011] TASRMPAT 006

PARTIES: Appellant – AAD Nominees Pty Ltd

Respondents – Kingborough Council

ADDRESS: 163, 167, 191 and 203 Channel Highway, Kingston

TITLE OF TRIBUNAL: Resource Management and Planning Appeal Tribunal

JURISDICTION: Planning Appeal

FILE NO/S: 186/10 P

DELIVERED ON: 24th January 2011

DELIVERED AT: Hobart

HEARING DATE: 15th November to 18th November 2010 and

29th November 2010

DECISION OF: SJ Cooper, Chairman

F Healy, Member

ME Ball, Member

REPRESENTATION:

Counsel:

Appellant: SB McElwaine of Counsel

Respondent: DR Armstrong of Counsel

Party Joined Behrakis: SP Estcourt QC and C Tsamassiros of Counsel

Party Joined Hayes: Mr J Hayes

Solicitors:

Appellant: Shaun McElwaine and Associates

Respondent: Don Armstrong

Party Joined Behrakis: Butler, McIntyre and Butler

Party Joined Hayes:

CATCHWORDS:

Planning Appeal – Commercial development – supermarket – discount department store – specialty shops – take-away food restaurant – fitness centre – petrol station – signage – associated infrastructure- Business and Civic Use – Business and Civic Zone – Statement of Desired Future Character

Kingborough Planning Scheme 2000

REASONS FOR DECISION

Introduction

1. AAD Nominees Pty Ltd made an application to the Kingborough Council (the 'Council') for a planning permit for a large retail commercial development on a property – 'Spring Farm' – on Channel Highway, Kingston very near the Australian Antarctic Division Headquarters. The subject site is roughly 5.7 hectares in size. It consists of four titles. Two houses and some sheds and hothouses are presently on the site but are to be demolished as part of the proposal. The permit sought would allow for the development of the site as a supermarket, a discount department store, various speciality shops, a take-away fast food-type restaurant, a fitness centre and a petrol station. Associated with all this, of course, was signage and a large car park. Aside from the buildings mentioned above the rest of the land is vacant. On its southern boundary is the Australian Antarctic Division headquarters. Its western boundary fronts Channel Highway. Approximately 100 or so metres north is the commencement of an industrial estate that contains a hardware store, carpet shop, gardening supply shops and the like. A residential subdivision is gradually being developed immediately to the east of the site.

2. The application to the Council was very comprehensive. The Council dealt with the matter apparently in accordance with the requirements of the *Land Use Planning and Approvals Act 1993* (the '*Land Use Act*') and in the event made a decision to refuse the proposal for various reasons. Unhappy with that decision AAD Nominees Pty Ltd appealed to the Resource Management and Planning Appeal Tribunal (the '*Appeal Tribunal*'). Two parties were joined to the appeal; P, V, D and M Behrakis and Mr J Hayes. The parties joined opposed the grant of a permit, broadly supported the Council's case and took an active part in the Appeal.

The issues at appeal

3. In their final form the Council's grounds of refusal were in the following terms:

> "FURTHER AND BETTER PARTICULARS OF THE GROUNDS OF REFUSAL
>
> 1. The proposal is contrary to the objectives in clause 2.2.1 (vi) (e), (f) and (g) of the Kingborough Planning Scheme 2000 ("the

Planning Scheme") in that it does not enhance and integrate with existing public transport or provide for urban consolidation, is not located in the most accessible location for multiple modes of transport, is reliant on the use of private vehicles and is not easily accessible for pedestrian and public transport.

2. The proposal is contrary to the objectives of the Business and Civic Zone in clause 6.1.2(b) of the Planning Scheme in that its location will affect the viability and operation of existing business and civic uses.

3. The proposal is inconsistent with clause 6.2.1(a) DFCS 1 and S1 of the Planning Scheme in that it is a major expansion of commercial activities especially retail development that is not located within a concentrated area, namely within the preferred Kingston Central area.

4. The proposal is inconsistent with clause 6.2.1(b) of the Planning Scheme in that it has not demonstrated that there is community benefit, that it would not jeopardise or undermine Council investment in Central Kingston including road infrastructure or that it can be accessed by an equivalent level of public transport as Central Kingston.

5. The proposal is contrary to clause 6.2.1(m) DFCS 1 and S1 of the Planning Scheme in that it does not constitute and in fact precludes further development of the precinct as a science/technical park for scientific and/or other research and associated complementary purposes, the proposed buildings and layout are not complementary to the Australian Antarctic Division Headquarters, the carparking areas are not screened from the Channel Highway behind new buildings and the provisions for drainage into Coffee Creek are inadequate.

6. The proposal is contrary to clause 6.4.4.1 of the Planning Scheme in that it comprises retail commercial development that is not facing onto or directly accessible to pedestrians from Channel Highway and is not directly accessible from a mall or arcade.

7. The proposal is inconsistent with clause 6.4.4.5 in that carparking is located forward of the building line, the large carparking area has not been designed and located to ensure that it does not adversely affect the streetscape. Despite the buildings proposed to be located alongside the Channel Highway, the majority of the carparking area is forward of the main retail area.

8. The proposal is contrary to Schedule 1, clauses 1.2.5.2 and 1.2.6.1 of the Planning Scheme in that it has not been demonstrated that environmental nuisance or environmental harm would not be caused by stormwater discharge and discharges have not been reduced to the maximum extent that is reasonable and practical.

9. The proposal is contrary to the objectives of Schedule 3, clause 3.1.1 of the Planning Scheme in that it will not ensure that the road network operates with the maximum degree of efficiency and safety.

10. The proposal is inconsistent with Schedule 3, clause 3.2.6.4 of the Planning Scheme in that carparking associated with the main shopping centre is located in front of those buildings.

11. The proposal is contrary to Schedule 3, clause 3.2.6.2 of the Planning Scheme in that the carparking areas are not designed to facilitate stormwater infiltration into surrounding unpaved and landscaped areas within the boundaries of the development site. **[this ground was however abandoned]**

12. The proposal is contrary to Schedule 3, clause 3.2.7.1 and does not meet Alternative Solutions (a) to (e) of the Planning Scheme in that the proposal is a major traffic generating development that is not located within Central Kingston and the Location Decision Report does not adequately address each of the features contemplated by such a report including those specifically set out in the definition of that term and it relies upon unsubstantiated assumptions including assumptions as to future settlement growth and location patterns. Further, it has not been demonstrated that the proposal can meet the transport strategies in Part 2 of the Planning Scheme, the proposal will have significant environmental impacts and a significant adverse impact on existing infrastructure investments within Central Kingston and on likely future private sector investment needed to safeguard the vitality and viability of Central Kingston and it has not been demonstrated that significant through traffic will not be generated through adjacent residential areas.

13. The proposal is contrary to Schedule 5, clause 5.2.2.1 Alternative Solution of the Planning Scheme in that the proposal has not demonstrated that increased sediment flows will not be prevented and that biological diversity will be maintained.

14. The proposal is contrary to Schedule 10, clause 10.2.1.1 of the Planning Scheme in that it will result in significant disturbance/clearance of high priority vegetation and cannot meet the Alternative Solution as the proposal cannot be demonstrated to be consistent with and in fact is inconsistent with, the relevant zoning objectives of the Planning Scheme and it has not been documented that there is sufficient vegetation of the same species present and effectively managed and protected on adjoining or nearby lands or that a strategy for conserving the more intact areas of the vegetation community can be implemented on the subject land.

15. The proposal is contrary to Schedule 14, clause 14.2.1 and does not comply with clause 14.2.3 of the Planning Scheme in that it does not further and cannot demonstrate consistency with the Desired Future Character Statement for Kingston which requires that significant commercial development should be located within the Kingston Central area."

4. These were the issues then with which the parties and the Tribunal were concerned at the appeal. A significant amount of evidence was called in relation to each of the grounds.

The Tribunal's role – The Law

5. Section 23 of the *Resource Management and Planning Appeal Tribunal Act 1993* (the '*Appeal Tribunal Act*') relevantly provides:

> **"23. Determination of appeal**
>
> **(1)** For the purpose of determining an appeal, the Appeal Tribunal may exercise all the powers that are conferred by the relevant legislation on the person who made the decision that gave rise to the appeal.
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> **(2)** The Appeal Tribunal must make a decision in writing –
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> **(a)** affirming the decision appealed against; or
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> **(b)** varying the decision appealed against; or
>
> **(c)** setting aside the decision appealed against and –
>
> **(i)** making a decision in substitution for the decision appealed against; or
>
> **(ii)** remitting the matter for reconsideration in accordance with any directions or recommendations of the Appeal Tribunal."

6. The Tribunal is required to hear and determine matters afresh. Its function in an appeal such as this is exactly the same as that of the planning authority which first considered the issue (see *Krushka v. Peacock and Ors TASSC 92/1997*).

The Planning Scheme and its interpretation

7. In performing its role the Tribunal is required to apply the applicable planning instrument. In this case since the subject site is within the municipal area of the Council it is subject to control of the Kingborough Planning Scheme 2000 (the 'Scheme'). It must be said that this Planning Scheme is a difficult document to construe and apply. In fact much of the areas of dispute that occupied the resources of the parties (and the Tribunal) was directly attributable to the complexity, and at times impenetrability, of the Scheme. More will be said about this later. The Tribunal's role however is clear – it is obliged to endeavour to make sense of the Scheme and apply it to the assessment of this proposal.

8. The Scheme divides its area of operation into six zones. The subject site is located within an area zoned Business and Civic. The Scheme divides activities into seven use classes. Clause 3.1.4 defines Business and Civic Use Class as "Use of land for business, professional, commercial, civic and cultural functions". The Scheme then has a column in the Use Classes entitled "Include but not limited to following". A compendious list then follows of "shops, takeaway food shops, restaurants, licensed establishments, motels, offices, consulting rooms, veterinary establishments, amusement centres, show rooms, sale yards, plant sales and hire yards, banks, garden centres, service stations, domestic businesses, holiday flats, caravan parks, indoor sporting facilities, churches, museums, art galleries, libraries, educational establishments, hospitals, fire, ambulance and emergency service stations and child care centres". Plainly what is proposed here fits several of those labels. The Tribunal is of the view (and this was not contested) that the only use class which could conceivably apply to this proposal is 'Business and Civic'.

9. The proper interpretation of the Scheme, and in particular how the assessment of a discretionary application is to be undertaken, was the subject of careful argument and a resultant *ex tempore* ruling as to the admissibility of various pieces of evidence (on grounds of relevance) during the course of the hearing. It is necessary to look very carefully at that issue because the Appellant submits that the Tribunal's ruling was wrong and asks that it be reconsidered. Such a course is quite appropriate: the Tribunal is in no sense 'bound' by a ruling given during the course of a hearing particularly if, after further consideration, it is persuaded that that an earlier *ex tempore* ruling is incorrect. To adhere to such a ruling in such circumstances would mean that the Tribunal has failed to carry out its obligations and

will have almost certainly committed legal error. Thus it should be looked at again. But the task that confronts the Tribunal (or indeed anyone endeavouring to construe the Scheme) is not made easy by the manner in which the Scheme has been drafted.

10. The starting point is Part 3.1.5 of the scheme which provides:

> "3.1.5 If a use or development falls within a Use Class that can occur within a zone and which is not prohibited or exempt, an application for use or development must also show that it can perform in relation to the Scheme standards."

11. What this clause means by the use of the word 'perform' is not readily apparent but it seems to be the case that the Scheme requires all applications for discretionary permits under Section 57 of the *Land Use Act* to demonstrate compliance with 'Scheme standards' and '***applicable*** desired future character statements and strategies'. This requirement appears to add a most unfortunate (and seemingly unnecessary) layer of complexity to the assessment of applications for planning permits under the Scheme since not only does each zone have its own Desired Future Character Statement (DFCS) (as do smaller areas/precincts within each zone) but a whole schedule (Schedule 14) contains yet more Desired Future Character Statements which, if applicable, on their face are matters to which that regard must be had.

12. So far as the approach to assessing an application for a planning permit is concerned the next part of the Scheme which must be considered is Part 3.1.6 which provides:

> "3.1.6 Within each zone, each Use Class is designated as either:

(a) Planning permit required

(i) Use or development which meets all relevant Acceptable Solutions for the specified zone and schedules is to be assessed in accordance with S58 of the Act and will be taken to be in compliance with the zone objectives, desired future character statements and accompanying strategies and must be approved with or without conditions.

(ii) Use or development which does not meet all Acceptable Solutions for the specified zone and schedules is to be assessed in accordance with S57 of the Act and will be assessed to determine compliance with the zone objectives, desired future character statements and accompanying strategies.

Council may approve with or without conditions or refuse an application subject to S57 of the Act.

..."

The first difficulty that arises with this part of the Scheme is that what are often in other schemes called permitted as of right uses or developments must satisfy 'all relevant Acceptable Solutions' when in fact in many instances there are ***no*** Acceptable Solutions at all and thus recourse must be had directly to the Alternative Solution – see for example 7.4.1.2 and 8.4.1.4 amongst many. It is worth noting that there does not appear to be a single example in the Scheme where the converse situation exists viz. ***only*** Acceptable Solutions with no Alternative Solution available. It may well be that the consequence of this is that, unless relevant and applicable Acceptable Solutions are met then any use or development (unless expressly prohibited) is discretionary.

13. The Scheme then requires a consideration of Clause 3.2 which provides:

> "3.2.1 Scheme standards are derived from the objectives identified in the Scheme and are the means by which the desired use or development outcomes are to be achieved. These come in the form of zone standards and schedule standards.

3.2.2 Scheme standards are of two types:

(a) Acceptable Solution (Deemed to Comply)

Those matters set out in a zone or schedule which are objective (generally measurable) criteria designated as an acceptable means of meeting the corresponding principle. Use or development that complies with all relevant Acceptable Solutions must be approved with or without conditions.

(b) Alternative Solution (Requires Justification)

Those matters set out in a zone or schedule which are generally subjective to assess performance against the corresponding principle. Use or development that applies Alternative Solutions may be approved or refused by Council."

Finally also relevant is Part 3.5.1 of the Scheme which provides:

"3.5.1 Council must consider an application for a proposed use or development under the relevant provisions of the Scheme namely:

• The objectives of the zone, Desired Future Character Statements and accompanying Strategies;

• The applicable planning standards and principles;

• The provision of Part 2 of the Scheme;

• Any relevant requirements contained in the Act; and

• Any other applicable legislation."

14. It is also important to recognise that each zone, as has already been noted, has its own set of objectives that is also relevant to a determination of the application and the appeal. In this instance the relevant objectives are those for the Business and Civic Zone which are found in 6.1.2. They are as follows:

"6.1.2 The objectives for the Business and Civic Zone are to:

(a) provide for a range of business and civic uses in concentrated areas;

(b) allow a range of other uses in ways and locations that do not affect the viability and operation of existing business and civic uses;

(c) provide a focus for commercial, tourism and public investment;

(d) allow mixed use development, including residential above ground floor business and civic uses, to encourage and revitalise commercial precincts and encourage new investment; and*

(e) allow other use or development that is compatible with these values."

15. Part 6.3 of the Scheme deals with what is permitted and what is prohibited within the Business and Civic Zone. The only use class prohibited is Primary Industries; everything else by Part 6.3.1 is something for which a planning permit may be issued.

16. Part 6.4 deals with standards for use or development in the Business and Civic Zone. Relevantly that part is in the following terms:

6.4 **Standards for Use or Development in the Business and Civic Zone**

6.4.1 Standards for Use or Development in the Business and Civic Zone.

ISSUE 1: Controls applying to Use or Development that are Permissible	**PRINCPLE:** To ensure that all permissible use or development is compatible with the objectives of the Business and Civic Zone
Acceptable Solution (Deemed to Comply)	**Alternative Solution (Requires Justification)**
6.4.1.1 **Use or Development in the Business and Civic Use Class:** all applications for use or development must meet all relevant Acceptable Solutions	6.4.1.1:Council may approve an application for use or development not meeting the Acceptable Solution provided all relevant provisions of the Scheme are met.
6.4.3.1 **Loading/Unloading:** The following standards are to be met. (a) **on road**: in accordance with the Guide to Traffic Engineering Practice, Part 11 NAASRA (1988); (b) **off road:** in accordance with AS 2890.2 (1989)	6.4.3.1 Where delivery of goods is required arrangements for parking, manoeuvring, loading and unloading of delivery vehicles is not to interfere with pedestrian or vehicle movements on roads, nor be completely reliant on kerbside parking
...	
6.4.4.5 **Carparking Location:** Carparking will (a) not be located forward of the building line; and (b) be located a minimum of 1.5m from side and rear boundaries to allow for screen planting and noise attenuation except where the property abuts a lot within the Residential Zone in which case the minimum separation is 5m.	6.4.4.5 Carparking must be designed and located to ensure that it does not adversely affect the streetscape or visual or acoustic privacy of adjacent residential sites. In determining whether to approve carparking forward of the building line Council will require a landscaping plan which documents and demonstrates the specific design solutions proposed for the site

17. And finally, in addition Part 6.5.1 of the Scheme provides that ***all*** of the 15 schedules of the Planning Scheme apply with respect to use or development in the Business and Civic Zone.

18. The issue in this case is to what extent are the broad statements in various zone objectives, DFCSs and strategies able to be used in the assessment of this application. The orthodox and settled position is to be found in a passage of the judgment of Wright J in *Richard von Witt v Hobart City Council* (1995) 86 LGERA 134 in which his Honour said:

> "The Scheme must be read as a whole and the generalised statements of principles, objectives and desired future character cannot be relied upon to the exclusion of subsequent specific provisions contained in any Schedule except where this is provided for by the Scheme itself. For example, paragraph 3 of the "Principles of Development Control" says:
>
> Notwithstanding the provisions of any Part or Schedule of this Planning Scheme, the Corporation may use its discretion to permit an existing use to change to any use more in conformity with the Desired Future Character of the relevant Precinct.
>
> As I read the Scheme this is the only provision which vests a power in the Council to override the controlling provisions of the Parts and Schedules."

Now whilst it was the case that His Honour was there concerned with a different planning scheme it cannot be doubted that the principle articulated is of general applicability and has been applied subsequently in many other cases (see for example *Re Arkless* [2003] TASSC 93, *Nettlefold v Hobart City Council* [2001] TASSC 10).

19. In construing the relevance of the various provisions of the Kingborough Planning Scheme in accordance with *von Witt* (*supra*), the provisions of Parts 3.1.5, 3.1.6 and 3.5.1 of the Scheme are dispositive.

20. Part 3.1.6 sets out how various use classes are to be dealt with. First it operates such that a use or development meeting all relevant Acceptable Solutions is deemed to be in the nature of a permitted use within the meaning of section 58 of the *Land Use Planning and Approvals Act 1993* (*the 'Land Use Act"*) (see cl.3.1.6(a)(i)). Such a matter is "taken to be in compliance" with zone objectives as well as the desired future character statements and accompanying strategies; and cannot be refused (or in terms of the scheme "must be approved with or without conditions"). In such circumstances the objectives, character statements and strategies need not be assessed. This construction is typical of most Tasmanian planning schemes and the methodology is consistent with Wright J's statement in *von Witt* that "...generalised statements of principles, objectives and desired future character cannot be relied upon to the exclusion of subsequent specific provisions...".

21. But if all relevant Acceptable Solutions are not able to be met in respect of an application recourse is to be had to Clause 3.1.6 (a) (ii). That clause operates so that such an application is deemed to be discretionary in terms of section 57 of the *Land Use Act*. In direct contrast with what might be described as a "permitted" use or development of the kind described above, clause 3.1.6 (a) (ii) requires a "discretionary" proposal to be assessed to determine compliance with zone objectives, desired future character statements and accompanying strategies; and may be refused or approved: cl.3.1.6(a(ii). Again it seems to the Tribunal that this requirement is broadly consistent (or at least not inconsistent) with Wright J's qualification *von Witt* (*supra*) that generalised statements of objectives and the like may not be relied upon (where there are relevant specific provisions) "...except where this is provided for by the Scheme itself...". In this circumstance, at least some of the objectives, character statements and strategies are in the nature of specific standalone provisions vesting a power in the Council (and Tribunal on appeal) to approve or refuse such an application. This is not to say that the assessment of a discretionary application must ***only*** address cl. 3.1.6(a)(ii). Clause 3.1.5 operates such that the "scheme standards" are always relevant to a discretionary proposal as a differently constituted Tribunal concluded in *Rockfam Pty Ltd v Kingborough Council* (2010) TASRMPAT 228.

22. It is apparent, then, that the zone objectives, desired future character statements and accompanying strategies have 'more work to do' in this scheme than in other Tasmanian planning schemes. In the appropriate circumstances these matters assume a force equivalent to the mandatory zone standards (see clause 6.4 of the Scheme and clauses 3.1.5 and 3.5.1).

23. Clause 3.5.1 is as follows:

> "3.5.1 Council must consider an application for a proposed use or development under the relevant provisions of the Scheme namely:
>
> • The objectives of the zone, Desired Future Character Statements and accompanying Strategies;
>
> • The applicable planning standards and principles;
>
> • The provision of Part 2 of the Scheme;
>
> • Any relevant requirements contained in the Act; and
>
> • Any other applicable legislation."

The zone objectives, desired future character statements and accompanying strategies are separately listed as a head of consideration in this provision. That they may or may not be applicable according to the status of a use or development (i.e. per cl. 3.1.6(a)) appears to be recognised in this provision by the use of the word "relevant". They will never fall for specific consideration in the case of a proposal for a use or development meeting all relevant Acceptable Solutions since, as has already been noted, clause 3.1.6 (a) (i) operates so that compliance is deemed to have been demonstrated with such objectives.

24. Clause 3.1.5 has already been discussed above. It requires the consideration of Scheme standards for all planning applications, and the consideration of "applicable desired future character statements and strategies...." When read together with 3.1.6 (as must be done), the relevant matters for consideration in a discretionary proposal must therefore include the Scheme standards, the zone objectives and the desired future character statements and strategies.

25. Such an approach to construction finds significant support when the Scheme is read as a whole. Unusually this Scheme contains only five zones. The Business and Civic Zone allows for developments ranging from major CBD-level activities to a home business. The usual method of establishing the planning aims or hierarchies for different areas (with regard to the specific type or intensity of development) is by the erection of differing sub zones; a CBD location is given a different sub zone from a neighbourhood business location and the range and intensity of developments encouraged, tolerated or completely prohibited in each location significantly may vary (the *City of Hobart Planning Scheme 1982* is as good an example as any of this approach). But in this Scheme there are no sub zones, and the relative commercial hierarchies of different areas ("precincts" such as those established by 6.2.1 (m) and (n) of the Scheme)) are gleaned only from the desired future character statements specific to those different locations.

26. The alternative approach would result in the absurd position that every area within a Business and Civic zone anywhere within the Municipality of Kingborough is appropriate for the high level commercial activities found in the Kingston CBD. For example the alternative approach could result in a major CBD type activity being a permitted development at the Margate Train site. This would make nonsense of the Scheme as a whole.

27. If it is accepted that the desired future character statements for the Business and Civic zone have the purpose of guiding appropriate forms of development in different locations (or "precincts" per cl. 6.2.1) within the Municipality, it is axiomatic that the approval of a development contrary to these statements would derogate from the intent and format of the Scheme.

28. Turning to the circumstances of this case it is the Tribunal’s view that for the reasons set out above regard must be had to the desired future character statement for the Australian Antarctic Division Headquarters Precinct as set out in DFCS1 of clause 6.2.1 (m) of the Scheme. It may not be ignored. To do so would not be in accordance with text and intent of the Scheme. To do so is entirely consistent with the principle articulated in *von Witt* (*supra*). When this is done it is immediately clear that the proposal is simply nothing in the nature of a ‘science/technical park’. There is nothing about it, even on the most

generous view of the proposal, which might be properly described as a scientific or "other research and complementary purpose".

29. Accordingly, the Tribunal's view is that the proposal, being distinctly and markedly contrary to the desired future character statement set out for the Australian Antarctic Division Precinct in cl. 6.2.1(m), must be refused pursuant to cl. 3.1.5 and 3.1.6(a)(ii) of the Scheme.

Ground 1 – Transportation

30. From the above it follows that this Ground is not, and cannot, be made out as the general objectives (as opposed to the zone objectives) of the Scheme called upon do not provide a standalone basis for refusal. The Ground raises for consideration Clause 2.2.1(vi)(e), (f) and (g) of the Scheme. Those clauses relevantly provide:

> "2.2.1 To achieve sustainable use and development of resources in the planning scheme area, the following objectives apply:
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> ...
>
> (vi) To achieve better integration of land use and transport strategies by ensuring
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> ...
>
> (e) new use or development enhances and is integrated with public transport including promotion of urban consolidation principles for residential development;
>
> (f) major traffic generating development is located in the most accessible locations for multiple modes of transport,
>
> (g) public transport and other means of movement beyond private cars are given greater consideration in decision making"

31. But even if the Tribunal is incorrect about that, it prefers the evidence of Mr Midson about this issue. He expressly addressed the Ground and the specific clauses of the Scheme referred to therein. His evidence was comprehensive in relation to this issue and was not contradicted by Mr Higgs the other equally impressive traffic engineer who gave evidence before the Tribunal. Mr Midson explained how the proposal would meet the objectives of Clause 2.2.1(vi)(e), (f) and (g). The Tribunal accepts his evidence about the issue and is satisfied, as a matter of fact, that if specific compliance with this part of the Scheme needs to be demonstrated then it has been.

Ground 2 – Viability of existing business and civic uses

32. The ground relies upon 6.1.2(b) of the Planning Scheme which has already been set out above. The ground may be disposed of shortly. Simply put, the ground is not, and cannot, be made out. Clause 6.1.2 (b) is concerned with ***other*** uses, ie, uses that are not business and civic uses (which this is). Those types of uses, ie, business and civic uses, are dealt with in Clause 6.1.2(a). Clause 6.1.2(b) is of no applicability to the circumstances of this case. Ground 2 cannot succeed.

Grounds 3 and 4 – Central Kingston

33. These grounds cannot succeed. The DFCS relied upon in 6.2.1(a) is concerned with the 'Kingston central area'. Curiously the Scheme uses the expression 'Kingston central area' in that clause but earlier in the Scheme (Clause 1.3) it defines the expression 'Central Kingston' by reference to a map. Although it is possible that 'Central Kingston' is not the same area as 'Kingston central area' (and such a conclusion must surely be open since the drafter has chosen to use different expressions which, of course, ordinarily will be taken to mean different things: *Craig Williamson Pty Ltd v Barrowcliffe* [1915]

VicLawRp 66; [1915] VLR 450) contextually it is reasonably clear that whatever the 'Kingston central area' is (at least in terms of 6.2.1(a) of the Scheme) the subject site is not in it. Similarly the DFCS relied upon in 6.2.1(d) relates to the Kingston Town Shopping Centre. Once again the proposal is not located within that area. Neither desired future character statement is applicable to this site. It follows that Grounds 3 and 4 simply cannot succeed.

Ground 5 – The Australian Antarctic Division Headquarters Precinct

34. Ground 5 relies upon 6.2.1(m) of the Scheme. Relevantly that part of the Scheme is in the following terms:

Desired Future Character Statement	**Strategy**
DFCS1:The Australian Antarctic Division Headquarters and surrounds are to be developed as a science/technical park precinct for scientific and or other research and associated complementary purposes	S1: Further development of the precinct will involve the following: (a) formalisation and construction of an internal access road serving the precinct between 203 Channel Highway and 167 Channel Highway; (b) progressive closure of all other existing access points onto Channel Highway; (c) construction of new buildings reflecting clean modern design, complementary to the design of the Australian Antarctic Division Headquarters complex; (d) provision of appropriate carparking areas, preferably screened from Channel Highway and behind new buildings and well signposted; (e) provision of corporate directory board signage at the entrance to the precinct; (f) comprehensive attention to landscape treatment consistent with the precinct developing a clear

	corporate image as an integrated technical park/science precinct; (g) drainage solutions for the discharge of ponded runoff within the lower land on 167 channel Highway into coffee Creek.

35. The first question is whether the subject site is within the Australian Antarctic Division Headquarters Precinct since if it is not then the clause called up for scrutiny by Ground 5 will have no applicability. Again the terms of the Scheme do not make this an easy question to answer. It is unfortunate that nowhere in the Scheme is there any definition of the expression "Precinct". Nor does the Scheme by the simple expedient of a map, chart or diagram (such as is used to define 'Central Kingston' in Clause 1.3) define what such a precinct is and in particular the extent of the Australian Antarctic Division Headquarters Precinct.

36. It was common ground at the hearing that Part 6.2.1(m) was inserted into the Scheme by amendment in 2005 at a time apparently when the subject site (and the Antarctic Division Headquarters) was 'rezoned' from Residential to Business and Civic.

37. The DFCS seems to distinguish between the Australian Antarctic Division Headquarters (AADHQ) and its surrounds. The sites are different, in different ownership and used for quite different purposes. All this tends to support the proposition that the subject site may not be within the AADHQ precinct. But there is a compelling reason which militates against reaching this conclusion. It is axiomatic that a planning scheme must be read as a whole. When that is done and regard is had to the zoning maps that are part of that Scheme it is clear that the other precincts in the Business and Civic Zones (Opal Drive and Margate Marina) contain an entire area zoned Business and Civic. Neither exclude a part of an area, zoned Business and Civic from the Precinct. Thus to exclude the subject site from the AADHQ precinct would be, in the Tribunal's view, an artificial approach inconsistent with the broad intention of the Scheme. The Tribunal is satisfied that the subject site is within that Precinct.

38. That however is not the end of the matter. In the Tribunal's view that, for the reasons set out earlier, regard must be had to the desired future character statement for the Australian Antarctic Division Headquarters Precinct as set out in DFCS1 of clause 6.2.1 (m) of the Scheme. It may not be ignored. To do so would not be in accordance with text and intent of the Scheme. To do so is entirely consistent with the principle articulated in *von Witt* (*supra*). When this is done it is immediately clear that the proposal is simply nothing in the nature of a 'science/technical park'. There is nothing about it which, even on the most generous view of the proposal, which might be properly described as a scientific or "other research and complementary purpose". Mr Read quite properly conceded that this was so.

39. Accordingly, the Tribunal's view is that the proposal, being distinctly and markedly contrary to the desired future character statement set out for the Australian Antarctic Division Precinct in clause 6.2.1 (m), must be refused pursuant to clauses 3.1.5 and 3.1.6(a)(ii) of the Scheme This is so even in the light of the uncontradicted evidence that never has there been a single proposal for any development of such a nature for the site. This is even so when the proposal is able to demonstrate a level of compliance with other relevant parts of the Scheme. It is so because that is what the scheme provides.

Ground 6 – The proposal's orientation to the street

40. That this issue arises for consideration at all is due entirely to more unfortunate drafting. The principle that 6.4.4.1 is said to address is "to ensure development enhances the streetscape and provides for high quality civic spaces". Needless to say ‘civic space’ is not defined but two of the planners that gave evidence, Mr Boardman and Mr Negri, accepted in cross-examination that nothing in the form of a civic space was here proposed, a view which the Tribunal accepts. It follows that the focus of attention must be "to ensure development enhances the streetscape" and in determining whether that be so it is necessary to look first at the Acceptable Solution provided for in 6.4.4.1. As a broad proposition it is patently obvious to the Tribunal that the premises, if constructed, will have no adverse impact whatsoever upon the streetscape of the site and surrounds, although that is not the test imposed by the Scheme. The applicable Acceptable Solution itself seems to require retail commercial premises to "face on to" the road on which they are sited. Apart from the fact that "face on to" is not defined the clause itself seems to be somewhat at odds with 6.4.4.5 a matter which it is not necessary to resolve now, at least in the context of this appeal. This is so because as a matter of fact the Tribunal has concluded that at least some (but not all) of the retail commercial premises will ‘face on to’ the road (i.e. Channel Highway) and will be directly accessible to pedestrians from a road on which they are sited. That pedestrians may have to walk through a car park is not to the point. The Scheme does not forbid such an arrangement. Indeed as the Appellant correctly submits it is impossible to envisage a proposal of this type that does not have car parking in front of it. The Tribunal is quite satisfied that as a matter of fact the Acceptable Solution in 6.4.4.1 is met.

Ground 7 – Car parking

41. The Tribunal accepts the evidence of Mr Read in relation to this matter. His evidence was that there was possibly one car parking space forward of the building line. As a consequence Clause 6.4.4.5(a) cannot be technically satisfied and thus recourse to the Alternative Solution must be had. The situation is quite clear: on no view of it would the car parking adversely affect the streetscape or visual or acoustic privacy of adjacent residential sites. The Tribunal is satisfied that the Alternative Solution is satisfied.

Ground 8 – Stormwater discharge

42. The only evidence about this issue (relevant under Schedule 1 of the Scheme) came from Dr Terry. His evidence persuades the Tribunal that the Acceptable Solution at Clause 1.2.5.2 is met as is the Alternative Solution for Clause 1.2.6.1.

"1.2.5.2 **Stormwater discharge:** Stormwater must be discharged by either:

(a) a connection to a reticulated stormwater system; or

(b) where a reticulated system is not available it must be demonstrated by a suitably qualified person that any discharge will not be an environmental nuisance or cause environmental harm under the provisions of EMPCA"

"Alternative Solution (Requires Justification)

1.2.6.1 Council may approve new point source discharges only where appropriate methods of treatment or management are to be implemented to ensure that new point sources of discharge:

(a) do not prejudice the achievement of water quality objectives;

(b) do not give rise to pollution within the terms of the *Water Management Act 1999*, beyond the boundary of any attenuation zone set in accordance with clause 25 of the State Policy on Water Quality Management; and

(c) are reduced to the maximum extent that is reasonable and practical having regard to best practice environmental management using accepted modern technologies;

(d) meet emission limit guidelines published by the Board of Environmental Management in accordance with Clause 18 of the State Policy on Water Quality Management 1997; or where emission limit guidelines have not been published, as set by the Board of Environmental Management in accordance with Clause 19 of the State Policy on Water Quality Management 1997."

43. Dr Terry's evidence about this issue was comprehensive, uncontradicted and articulated by express reference to the relevant parts of the Planning Scheme. His evidence amply shows that any stormwater discharge from the development will 'not be an environmental nuisance' and neither will it cause 'environmental harm under the provisions' of the *Environmental Management and Pollution Control Act 1993*. In addition he expressed the view (one that he is well qualified to express) that the inevitable discharges have been 'reduced to the maximum extent that it is reasonable and practical' in accordance with industry best practice. This ground cannot succeed.

Ground 9 – Road Asset Schedule

44. This ground raises for consideration the objectives of Schedule 3 – The Road Asset and Access Schedule. The objectives of that Schedule are found in Clause 3.1.1 of the Schedule. Relevantly they provide:

> "3.1.1 The purpose of this schedule is to:
>
> (a) ensure that use or development of land not on a road does not adversely effect the efficiency and safety of that part of the Tasmanian road system as lies within the planning scheme area; and
> (b) ensure that the road network operates with the maximum degree of efficiency and safety for both road users and adjoining landowners by managing the interaction between roads and adjoining use and development; and
> (c) assist the planning, construction, maintenance and management of roads by identifying the function and performance expected of each road within the planning scheme area; and
> (d) specify the standards for traffic circulation and movement within a site; and
>
> (e) identify specific requirements for use or development which has major traffic generating qualities."

45. The only objective which is asserted to be relevant here is 3.1.1(b). Consistent with what has been said earlier in this decision (and with the decision of a differently constituted Tribunal in *Rockfam Investments Pty Ltd v Kingborough Council* (2010) TASRMPAT 228) these objectives do not form a standalone basis to refuse this proposal; at best they are matters that need to be considered and where appropriate regard had to them.

46. Even if the Tribunal is wrong as to that conclusion there is ample evidence from Mr Midson that allows of the conclusion that the proposal will not have the result complained of. Mr Midson's evidence, which the Tribunal accepts, was that in fact there was much about the development which would "have a positive impact on road safety for the surrounding road network". He identified how it was that the proposal would improve transport efficiency and safety outcomes. Specifically he identified that there would be:

> • Less reliance on Kingston View Drive/Summerleas Road intersection for school and other traffic; and
>
> • Less reliance on the Summerleas/Channel Highway roundabout, an intersection that has a relatively high crash rate."

47. Mr Midson identified that the proposed new roundabout would provide direct access to Hungtingfield, the Algona Road region and to the Channel Highway. Self evidently such improved

access will have the affect, in the Tribunal's view, of ensuring "that the road network operates for the maximum degree of efficiency and safety for both road users and adjoining landowners". The proposal will in fact, in the Tribunal's view, more than adequately "manage the interaction between roads and adjoining use and development".

48. Thus it follows that even if Objective 3.1.1(b) provides a standalone basis for refusal (which it does not) then the evidence in this case satisfies the Tribunal that the proposal in fact meets that objective. The ground is not made out.

Ground 10 – Car parking

49. This ground raises for consideration another aspect of the Road Asset Schedule. Specifically it requires consideration of the following parts of the Scheme:

"3.2.6.4. **Parking spaces behind building line:** Parking spaces are not to be located between the building line of a building and the front boundary of a lot.

> 3.2.6.4 Car parking spaces may be located forward of the building line of a building provided it can be demonstrated that they are visually compatible with the development and do not create security difficulties.

Whether or not compliance with the acceptable solution (the first of the two identically numbered parts of the Scheme set out immediately above – even the scheme's numbering creates difficulty) is demonstrated is a question of objective fact. The Tribunal in dealing with Ground 7 has already indicated that it accepts Mr Read's evidence about this issue and, *a fortiori*, it follows that the Acceptable Solution is met. And even if there was parking forward of the building line then the Alternative Solution must surely be met. The montages demonstrate beyond doubt, in the Tribunal's view, that what is proposed is clearly visually compatible with the proposal. Indeed, as has already been observed, it is difficult to think of a single similar development anywhere with a materially different car park layout. Moreover it was not, and could not have been, seriously suggested that the proposed car park layout would create any security difficulties at all. In fact it seems to the Tribunal that the proposed layout addresses and minimises any security issues which might arise from car parking, such as may occur if the car parking where located east of (or behind if you will) the proposed major structures. The ground cannot succeed.

Ground 12 – Major traffic generating development

50. This ground raises for consideration Clause 3.2.7.1 of Schedule 3. Relevantly that provides:

Acceptable Solution (Deemed to Comply)	Alternative Solution (Requires Jurisdiction)
3.2.7.1 **Location of development:** MTGD may locate within Central Kingston as defined in Part 1 of the Scheme	3.2.7.1 Council may permit a MTGD in any location where: (a) a Location Decision Report has been prepared; and (b) it is demonstrated that the proposed use or development meets the transport strategies identified in Part 2 of the Scheme; and (c) no significant or ongoing environmental impacts will result; and (d) no significant adverse impact on existing infrastructure investments by the public will be jeopardised or undervalued as a result f the proposed use or development proceeding; and (e) it is demonstrated that no significant through traffic will be generated through any adjacent residential area; (f) at the Margate marina Park precinct a MTGD may be allowed only if it is consistent with the Desired Future Character Statements and

	Strategies set out in Clause 6.2.1 (n).*

51. It was common ground that in terms of the Scheme the proposal is a major traffic generating development. The Acceptable Solution is plainly not met since the proposal is not proposed to be located within Central Kingston as that expression is defined in Part 1 of the Scheme. Thus a consideration of the Alternative Solution is required. Clearly 3.2.7.1(e) and (f) are irrelevant in the circumstances of this case. The balance needs to be carefully looked at.

52. In the Tribunal's view Alternative Solution 3.2.7.1(a) is satisfied. A location decision report is required to have been prepared, and it was. The location decision report, dated May 2010, was before the Council and, more to the point, the Tribunal. The Tribunal is well satisfied that that document is what it purports to be. What a location decision report must contain is defined in Part 1.3 of the Scheme. Relevantly that Part provides:

> "**location decision report (LDR)** means a report which incorporates (amongst other matters) the following:
>
> • an accessibility profile of the proposed development site;
>
> • a mobility profile of the proposed business;
>
> • an assessment of the likely impact on existing or planned infrastructure within Central Kingston, particular [sic] where considerable public investment has or is planned to occur;
>
> • the likely effect on future private sector investment needed to safeguard the vitality and viability of that centre [sic]
>
> • an assessment of alternative sites and why the preferred site was selected."

53. Like much of the Scheme this definition is not without difficulty. For example, the third dot point refers to 'Central Kingston' and the fourth speaks of "that centre". It is difficult to discern whether the fourth dot point is referring to 'Central Kingston' or not. Had the drafter intended that to be so then consistent with an orthodox approach to legal drafting the same word or words should have been used to convey that information. Difficulty also arises with expressions such as "considerable public investment" and the requirement for an examination of private economic interests by requiring a consideration of "the likely effect on future private sector investment needed to safeguard the vitality and viability of that centre" (assuming for the moment that that centre refers to Central Kingston). These criticisms aside, the Tribunal is satisfied having considered the LDR in detail that that the document meets the requirements imposed by Clause 1.3. For example, there is an 'Accessibility and Mobility Profile' of the proposed development commencing at page 6 of the LDR (which clearly satisfies the requirements of the first two dot points in the definition). In addition, both Mr Read and Mr Midson, who both gave evidence expressly by reference to the applicable Scheme requirements) analysed the accessibility and mobility profile. The Tribunal accepts their analyses.

54. Returning to the definition and content of the LDR, it is clear that the May 2010 document also contains an assessment of the likely impact on existing or planned infrastructure within central Kingston commencing at page 25 (Part 4 of the LDR). It contains an analysis of infrastructure expenditure which was broadly consistent with the only other evidence in relation to levels of public investment from Mr Ferrier. Mr Ferrier's evidence leads to the conclusion that in relative terms the Council has only spent small amounts of money in central Kingston since 2003. Mr Ferrier quite properly accepted in cross-examination that the amounts were insignificant when compared to the money expended with respect to

the Kingston Bypass. Particularly important was his quite appropriate concession that all the expenditure that he identified as having been incurred with respect to central Kingston was nothing other than the ordinary infrastructure-type development that any Council in Tasmania would be expected to spend on an area such as central Kingston so as to provide facilities and services for the residents of their community. It follows, in the Tribunal's view, that the third dot point in the requirement imposed by Clause 1.3 dealing with the Location Decision Report simply does not arise for consideration in the circumstances of this case since it is simply not open to conclude that "considerable public investment has or is planned to occur" within central Kingston.

55. Similarly there is a comprehensive assessment of alternative sites contained in the LDR (commencing at page 33). Again this is thoroughly analysed by Mr Frazer Read, an analysis which the Tribunal accepts. Whilst it may be that there are alternative sites and certainly if the proposal were to be disaggregated it could be accommodated in penny packets elsewhere within the Kingston area, that is not the proposal and it is clear on all of the evidence that presently no alternative site exists with the appropriate zoning and of sufficient size. That the Kingston High School site ***may*** become available at some stage in the future (leaving aside the zoning issues associated with it) is not, in the Tribunal's view, to the point. There was no evidence that it is presently available and only speculation as to when it might be.

56. The issue of transport strategies (which arises by reason of Alternative Solution 3.2.7.1 (b)) is perhaps a little more problematic. It is sufficient, in the Tribunal's view, to say that it accepts the evidence of Mr Midson (commencing at Part 4.3.2 of his proof) as establishing that the proposal is broadly consistent with the integrated transport strategy apparently adopted by the Council in May 2010. It was perhaps a little unfortunate that the existence of that document did not emerge until the hearing had commenced, but that is as may be; the issue that needs to be determined is whether in fact there is consistency with that strategy and the Tribunal is satisfied that there is.

57. It follows that Alternative Solution 3.2.7.1(a) and (b) are amply met in the circumstances of this case.

"Significant or ongoing environmental impacts"

58. Alternative Solution 3.2.7.1(c) raises for consideration the question whether 'significant or ongoing environmental impacts' will result from the proposal. Again this part of the Scheme is not without difficulty: the word 'or' is, of course, normally disjunctive although in this case it is difficult to make sense of the clause if 'or' is read disjunctively (or indeed read at all). Given the subject which the clause addresses it seems to make sense only if it is read as meaning that if there are to be any significant, ongoing environmental impacts (presumably adverse environmental impacts although the Scheme does not say so) then a proposal should not be approved.

59. There was evidence directed to this issue essentially from Mr Higgs, the Traffic Engineer. He calculated that were the facilities proposed to be included in the Spring Farm development sited in Central Kingston there would be a reduction of around 11,500 vehicle kilometres per day. Mr Midson did not address this issue at all and thus the Tribunal is left with Mr Higgs' uncontradicted analysis. The LDR is, unsurprisingly, silent about the issue since no part of its definition requires a consideration of this issue. The question though is will the suggested increased vehicle movements amount to a significant, ongoing adverse environmental impact? The Tribunal is not persuaded that this is so. There was considerable evidence about likely growth areas – south of Huntingfield, Margate – as well as changes to the road network – the Kingston By-Pass – which in the reasonably near future will, in the Tribunal's view, significantly alter the geographic area such that the initial undoubted increase in vehicle movements will be able to be properly regarded as 'ongoing', in the sense that they will continue to be attributable to this proposal.

Private Economic considerations

60. The issue of a consideration of private economic issues arises because of the fourth dot point in the Location Decision Report definition. In the Tribunal's view which had the benefit of extensive economic evidence from Mr Malkiewicz and Mr Lee, the reality was when that evidence was analysed carefully

that there is very little difference between the experts; aside from a relatively small difference with respect to methodology. The most important piece of material in relation to economics was the so-called Collie analysis undertaken in 2008. The importance of that analysis was twofold:

- It was undertaken at the behest of the Council; and
- It was undertaken by reference to no specific development proposal.

The report concluded that Kingston and surrounds "is significantly underprovided with retail floor space having regard to the size of the population and the opportunities for local retail provision". The Tribunal did not understand either Mr Lee or Mr Malkiewicz to disagree with this proposition. It accepts that analysis. Both agreed (even using different figures and different methodology) that there is (or will be) significant new demand from 2010 to 2016 and then well beyond. This conclusion coupled with the fact that Mr McGrath conceded, quite properly, that a principal concern of at least one of the parties joined was competition (which is a perfectly legitimate commercial concern) leads to the conclusion that there will be no appreciable likely effect on future private sector investment and there will be no impact upon the vitality and viability of central Kingston. Mr Lee did not suggest that the approval of this proposal would result in the loss or significant diminution of any future private sector investment in central Kingston. Mr Malkiewicz's evidence is, in the Tribunal's view, to be preferred. He opined (and importantly by specific reference to the relevant parts of the Planning Scheme) that this development would only have minor impacts on any nearby activity centres and would not threaten their viability. The Tribunal accepts this evidence.

61. The conclusion from all this is that the Tribunal is satisfied that compliance is demonstrated with the relevant standards imposed by 3.2.7.1 of the Road Asset and Access Schedule of the Scheme.

Ground 13 – Biological diversity issues

62. This Ground raised for consideration Clause 5.2.2.1 of Schedule 5 which provides:

Acceptable Solution (Deemed to Comply)	**Alternative Solution (Requires Justification)**
5.2.2.1 **Vegetation removal:** No vegetation other than environmental weeds are to be removed within the following distances of waterways or the coastal area: Class 1 or the coastal area 40m Class 2 30m Class 3 20m Class 4 10m	5.2.2.1 Council may approve an application for use or development not meeting the Acceptable Solution provided that it can be demonstrated through a plan of management how: (a) the filtering of nutrients and soluble pollutants will be maintained; and (b) increased sediment flows are prevented; and (c) biological diversity is maintained

The only evidence about the issue came from Dr Terry. Dr Terry's evidence, which was not challenged and in respect of which there was no evidence at all to the contrary, was that the proposal would in fact 'exceed criteria for sediment and nutrient treatment'. He expressed the view that there would be a positive environmental result from the development as a result of a modest increase in stream flows

which, in turn, would be expected to confer a ‘benefit...[upon]...the aquatic ecology" The ground is not made out.

Ground 14 – High priority vegetation

63. This issue arises for consideration as a consequence of the operation of Schedule 10 of the Scheme. That Schedule is the Protected Vegetation Schedule and according to the Objectives [sic] of the Schedule (of which there is only one) the purpose of the Schedule is to "ensure that vegetation identified as having conservation value is protected as far as practicable". As the Appellant, in the Tribunal’s view, correctly identifies, the obligation imposed by the Schedule is far from absolute in its terms. The purpose of the Schedule is to provide such protection to vegetation identified as having "conservation value" (whatever that might mean) as far as is practicable. There is no Acceptable Solution and thus recourse in terms of the Schedule must be had to the Alternative Solution. That provides:

Acceptable Solution (Deemed to Comply	Alternative Solution (Requires Justification)
10.2.1.1**Clearance/disturbance of "high priority" vegetation identified in Table S10.2:** All applications for development must be considered under the Alternative Solution	10.2.1.1Council may consider an application that would result in significant disturbance/clearance of vegetation where: (a) it is demonstrated that the proposal is consistent with the zoning objectives; and (b) Either (i) it is documented by a suitably qualified person that there is sufficient vegetation of the same species present and effectively managed/protected on adjoining/nearby lands; or (ii) a strategy for conserving the more intact areas of the vegetation community can be implemented on the subject land.
102.1.2**Clearance/disturbance of "moderate priority" vegetation identified**	10.2.1.2Council may consider an application that would result in significant

in Table S10.2: All applications for development must be considered under the Alternative Solution	disturbance/clearance of vegetation where: (a) it is demonstrated that the proposal is consistent with the zoning objectives; and (b) a strategy for conserving the more intact areas of the vegetation community is demonstrated by a suitably qualified person to be impractical.

64. The Alternative Solution 10.2.1.1(a) plainly is satisfied. It is, one might think, a self-evident proposition that a business and civic use as is proposed here is obviously consistent with the zoning objective of the Business and Civic Use Zone. Thus the focus of attention must be on 10.2.1.1(b) and more to the point 10.2.1.1(b)(i), that is to say, whether the Tribunal is satisfied "it is documented by a suitably qualified person that there is sufficient vegetation of the same species present and effectively managed/protected on adjoining/nearby lands". There can be no doubt that Mr Andrew North is a "suitably qualified person" and the Tribunal did not understand there to be any challenge to that proposition.

65. There can also be little doubt, and again the Tribunal understood there to be no challenge to this proposition either, that the site contains *Eucalyptus ovata.* Mr Wapstra's assessment (which was before the Tribunal) says so and even the most cursory examination of the site reveals that is so. All witnesses who gave evidence in relation to the matter agreed that it was present. The Scheme says that *Eucalyptus ovata/e.viminalis* woodland and forest is a high priority vegetation type.

66. The Scheme requires a consideration of whether there is "sufficient vegetation" present on nearby or adjoining land. Mr North addressed this issue. He was of the view that at least some of the vegetation was DOV (i.e. *eucalyptus ovata* woodland or forest) which means that it is a community. And even though the most cursory examination reveals that a good deal of the site is dominated by exotic vegetation and weeds, that does not detract from the conclusion that at least some vegetation of a type expressly protected by schedule 10 of the Scheme is present. Drs Barnes and McCoull expressed a similar view to Mr North and where the experts disagreed was really a matter of degree: Drs Barnes and McCoull took the view that the area of DOV on site was worth saving whilst Mr North took the view that better conservation outcomes could be achieved through the application of something in the nature of an offset. On balance the Tribunal prefers Mr North's approach and would have approached this issue on the basis of a condition requiring something in the nature of an offset, at another site, protected by a Nature Conservation Covenant (or similar), ensuring continuity with other native vegetation in an area already in good condition or which has the ability to be rehabilitated to a good condition. But in light of the Tribunal's ultimate conclusion it is probably unnecessary to say anymore than that additional submissions about such a condition or conditions would have been invited from the parties.

Ground 15 – Desired Future Character Statement for Kingston

67. The final ground of refusal raises for consideration Schedule 14 of the Scheme. It is difficult to identify a single part of the Scheme which makes this clause relevant to a consideration of whether this proposal for a business and civic use in an area zoned business and civic should be approved pursuant to Section 57 of the *Land Use Act*. Assuming for a moment that it is something to which the Tribunal

should properly have regard then the following observations are apposite:

> • The DFCS is for 'Kingston' a place not defined (other than by what it is not i.e. Kingston Beach);
>
> • The DFCS refers to a place – 'Kingston central area' which is not defined (although as we have pointed out earlier 'Central Kingston' is); and
>
> • The DFCS, if relevant at all, merely provides that 'significant commercial...development ***should*** [not ***must***] be located within the Kingston central area.

Arguably the proposal is within the 'Kingston central area' (although it is clearly not within 'central [sic] Kingston') and thus there is a demonstrated consistency with the DFCS. Even if Spring Farm is not within the 'Kingston central area' the Tribunal is satisfied that whilst it might be preferred that the proposal be sited in that area the reality is that a compelling case has been made that this proposal on this site complies with the Scheme in every respect. Part of that analysis involved a careful consideration of the availability of alterative sites (LDR). The case was well made that there are none; at least that are capable of accommodating this proposal. Thus, whilst the Scheme may be capable of being interpreted as expressing a preference for a development of this type to be located in a place other than Spring Farm it is not capable of being read as containing a complete prohibition on this development on this site, particularly when suitable alternative sites are lacking. The Ground is not made out.

Conclusion

68. Although the proposal demonstrates a high level of compliance with most of the applicable scheme requirements because of the conclusion that the Tribunal has reached as to the operation of clause 6.2.1 (m) and the inability of the proposal to demonstrate compliance with Desired Future Character Statement for the Australian Antarctic Division Headquarters Precinct it follows that the appeal cannot succeed. The decision of the Tribunal must be one affirming the decision appealed against.

69. The Tribunal will entertain any application for an order for costs in this appeal, if made to the Tribunal in writing with supporting submissions within the next fourteen days. If requested the Tribunal will reconvene to hear any evidence in respect of any matter bearing on an order for costs.

70. In the absence of any such application for an order for costs the order of the Tribunal is that each party bear its own costs.

Dated this 24th day of January 2011

F Healy	**SJ Cooper**	**ME Ball**
Member	**Chairman**	**Member**
