

[2011] TASFC 5

COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal* [2011] TASFC 5

PARTIES: AAD NOMINEES PTY LTD
v
RESOURCE MANAGEMENT AND PLANNING
APPEAL TRIBUNAL
and
KINGBOROUGH COUNCIL
and
BEHRAKIS, Peter
BEHRAKIS, Victoria Ann
BEHRAKIS, Dennis
BEHRAKIS, Maria
and
HAYES, John

FILE NO/S: 278/2011

**JUDGMENT
APPEALED FROM:** *AAD Nominees Pty Ltd v Resource Management &
Planning Appeal Tribunal* [2011] TASSC 16

DELIVERED ON: 5 September 2011

DELIVERED AT: Hobart

HEARING DATE: 26 May 2011

JUDGMENT OF: Evans, Blow and Tennent JJ

CATCHWORDS:

Environment and Planning – Environmental planning – Planning schemes and instruments – Development control – Consents, approvals and permits – Interpretation and construction – Generally – Construction of Kingborough Planning Scheme 2000 - Whether reference to all relevant provisions of the scheme includes desired future character statements.

Land Use Planning and Approvals Act 1993 (Tas), s57.

James Douglas v Hobart City Council [1996] TASSC 49, referred to.

Aust Dig Environment and Planning [212]

REPRESENTATION:

Counsel:

Appellant:

Respondent:

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Solicitors:

Appellant:

Respondent:

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Number of paragraphs:

61

Serial No 5/2011
File No 278/2011

**AAD NOMINEES PTY LTD v RESOURCE MANAGEMENT AND PLANNING
APPEAL TRIBUNAL and KINGBOROUGH COUNCIL and PETER BEHRAKIS,
VICTORIA ANN BEHRAKIS, DENNIS BEHRAKIS, MARIA BEHRAKIS and
JOHN HAYES**

REASONS FOR JUDGMENT

**FULL COURT
EVANS J
BLOW J
TENNENT J
5 September 2011**

Order of the Court

Appeal dismissed.

**AAD NOMINEES PTY LTD v RESOURCE MANAGEMENT AND PLANNING
APPEAL TRIBUNAL and KINGBOROUGH COUNCIL and PETER BEHRAKIS,
VICTORIA ANN BEHRAKIS, DENNIS BEHRAKIS, MARIA BEHRAKIS and
JOHN HAYES**

REASONS FOR JUDGMENT

**FULL COURT
EVANS J
5 September 2011**

1 I agree with the reasons of Tennent J and would also dismiss the appeal.

**AAD NOMINEES PTY LTD v RESOURCE MANAGEMENT AND PLANNING
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JOHN HAYES**

REASONS FOR JUDGMENT

**FULL COURT
BLOW J
5 September 2011**

2 I have read the reasons for judgment of Tennent J in draft form, and agree that this appeal should be dismissed, for the reasons stated by her. I would like to add some comments, mainly concerning the Kingborough Planning Scheme 2000. The full text of each of the relevant mind-numbing clauses is set out in her Honour's reasons for judgment, and I am very grateful for that.

3 The planning scheme is very complex, and exceedingly and unnecessarily difficult to comprehend or interpret. Most ordinary people would not have a chance. Most sensible people, or people with a life, would not attempt the task unless they had absolutely no choice. In order to determine how the scheme operates in relation to the appellant's proposed development, it is practically essential to have a law degree, decades of experience in interpreting legal documents, a talent for understanding gobbledegook and misused words, a lot of time, and a very strong capacity for perseverance.

4 The appellant is proposing a large retail business development. The proposed site of that development is in the "Business and Civic" zone. One might think that the council would therefore have a discretion to permit the development. But it is not as simple as that.

5 The site of the proposed development is in the "Australian Antarctic Division Headquarters Precinct". According to cl 6.2.1(m) of the planning scheme, the desired future character of that precinct involves its development "as a science/technical park precinct for scientific and or other research and associated complementary purposes". The proposed development has nothing to do with science, research, or associated complementary purposes. One might think that the scheme would say that the council would therefore either be obliged to refuse it, or else have a discretion to permit or refuse it after taking the desired future character of the precinct into account. But it is not as simple as that.

6 Every application for a planning permit in the area to which the scheme applies needs to be evaluated according to various criteria that are set out in clauses in the planning scheme. Not all clauses contain such criteria, but dozens of them do. Not all clauses apply to a particular development. Some apply only to particular zones. Some apply only to particular uses. Some apply only to particular uses in particular zones. Some apply, regardless of zones or use classes, to particular features of proposed developments. In order to determine whether a particular development is one which the council must permit, one which the council must refuse, or one which the council has a discretion either to refuse or to permit, it is necessary to consider the applicable criteria in the clauses relevant to the proposed development.

7 But it is not as simple as that. Each clause that contains relevant criteria has them arranged in two columns -- a left column and a right column. The scheme operates in the following way:

- If, in respect of each relevant clause, the proposed development satisfies the criteria in the left column, the council must permit the development: cls 3.1.6(a)(i), 3.2.1.1(a). However the council may impose conditions: *Land Use Planning and Approvals Act 1993*, s58.

- If in respect of any relevant clause, the proposed development does not satisfy either the criteria in the left column or the criteria in the right column, the council is obliged to refuse it: cls 3.1.6(b), 3.2.2(c).
- If the proposed development does not satisfy the criteria in the left column of every relevant clause but, in respect of each relevant clause, satisfies either the criteria in the left column or the criteria in the right column, the council has a discretion to permit it or refuse it: cls 3.1.6(a)(ii), 3.2.1.1(b).

8 The appellant's proposed development falls within the last of these categories. It is one that the council had a discretion to permit or refuse. But it is not as simple as that. The planning scheme does not spell out whether, in deciding whether to permit or refuse the development, the council must, or must not, or may, take into account the fact that this development is incompatible with the statement of desired future character for the Australian Antarctic Division Headquarters Precinct. That is what this case is about.

9 The council, the Resource Management and Planning Appeal Tribunal, and the learned primary judge all took the view that that was a relevant consideration. But the appellant contends that the only relevant considerations were those relevant to the clauses where the proposed development did not satisfy the criteria in the left hand column.

10 In order to resolve that controversy, it is necessary to apply the ordinary rules relating to the interpretation of legislation. However, as counsel for the appellant pointed out with apparent glee, one of those rules does not apply. The *Acts Interpretation Act* 1931, s8A, which requires a purposive approach to legislation, does not apply to planning schemes. Some planning schemes contain clauses that make that section applicable, but this planning scheme does not.

11 A planning scheme is a piece of legislation. As a general rule, the words of a piece of legislation should be given their ordinary meaning: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 26 CLR 129 at 161 – 162; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at par[78]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at par[47]. In my view the critical question concerns the meaning of some words in cl 3.1.5, which say that "an application for use or development must also show that it can perform in relation to ... applicable desired future character statements".

12 Of course those words are expressed in jargon that does not have any literal meaning. The ordinary jargon meaning of the words I have quoted is that an application in respect of a proposed development must satisfy the applicable statements of desired future character. The appellant's application did not do that. There is no reason to give the clause a more limited meaning or a modified meaning. Tennent J has explained why that is so.

13 I agree that the appeal should be dismissed.

**AAD NOMINEES PTY LTD v RESOURCE MANAGEMENT AND PLANNING
APPEAL TRIBUNAL and KINGBOROUGH COUNCIL and PETER BEHRAKIS,
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REASONS FOR JUDGMENT

**FULL COURT
TENNENT J
5 September 2011**

14 The appellant sought a planning permit from the Kingborough Council ("the Council") to develop a site known as "Spring Farm" at Channel Highway, Kingston ("the land"). The land comprised an area of a little under six hectares. There were some buildings on the site which it was proposed would be demolished. The appellant sought to build a large retail development which included a supermarket, a discount department store, various specialty shops, a restaurant, a fitness centre and a petrol station. The land faces onto the highway. It is about 100 metres south of an existing industrial estate. On its southern boundary stands the Antarctic Division headquarters. A residential development is emerging to the east of the site.

15 The Council refused to grant the permit sought, and identified 15 grounds for that refusal based on provisions in the Kingborough Planning Scheme 2000 ("the Scheme"). The appellant appealed the Council's refusal to the Resource Management and Planning Appeal Tribunal ("the Tribunal"). When the Tribunal dealt with the matter, it did so by reference to 14 of those grounds, ground 11 having been abandoned. In respect of the various grounds, the Tribunal found some parts of the Scheme referred to simply did not apply, and that others did not provide a stand alone basis for refusal. It also found in respect of some grounds that, contrary to the Council's view, the proposal met the relevant Acceptable Solution. As to other grounds, the Tribunal found that Alternative Solutions were satisfied.

16 Ground 5 related to the refusal of the permit by reference to cl 6.2.1(m) of the Scheme. At par[39] of its reasons, the Tribunal said in relation to this:

"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."

The Tribunal's decision in respect of this clause gave rise to an appeal to a single judge of this Court. On 19 April 2011, the learned Chief Justice published reasons and dismissed the appeal from the Tribunal's decision. These reasons relate to an appeal from that last decision.

Grounds of appeal

17 The two grounds of appeal both asserted that the learned Chief Justice erred in law in the following manner, that is:

"(a) in his construction of the provisions of the Kingborough Planning Scheme 2000 as conferring a discretion to refuse the development application the subject of the appeal to the first respondent as being contrary to clause 6.2.1(m) of the planning scheme; and

- (b) in his determination that clauses 6.4.1.1 and/or 3.5.1 of the planning scheme conferred a discretion to refuse the application by reference to clause 6.2.1(m)."

The Scheme

18 Central to this appeal is the interpretation of certain provisions of the Scheme. It is necessary in the circumstances to look at the structure of the Scheme and some of its provisions. The Scheme itself came into force on 1 July 2004. The land was, when the Scheme was introduced, zoned residential. On 3 March 2005, the Scheme was amended in two relevant ways. The zoning of the land was changed to Business and Civic, and cl 6.2.1(m) was inserted.

19 The Scheme area is divided into zones defined on the basis of broadly similar sets of natural, economic and community values (cl 3.1.1). There are six zones, Residential, Business and Civic, Industrial, Primary Industries, Recreation and Environmental Management (cl 3.1.2). There are seven Use Classes designated for use in the Scheme. These are Residential, Business and Civic, Utilities, Industrial, Primary Industries, Recreation and Environmental Protection (cl 3.1.3). The Use Classes are each defined in cl 3.1.4.

20 Clause 3.1.5 then provides:

"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 and applicable desired future character statements and strategies."

21 Clause 3.1.6 then 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. (*Am.A35 g. 7/3/05)

(b) Prohibited:

Use or development that is deemed to be not in accordance with the objectives of the zone, desired future character statements and accompanying strategies and therefore must be refused."

22 Clause 3.2 then deals with "Scheme Standards". It provides:

"3.2 Scheme Standards

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.

3.2.1.1 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.

3.2.2 Application compliance with the scheme standards is to be determined as follows:

- (a) Where an Acceptable Solution is not provided for in any relevant zone or schedule provision, all use or development must comply with the Alternative Solution.
- (b) Where an Alternative Solution is not provided for in any relevant zone or schedule provision, all use and development must comply with the Acceptable Solution.
- (c) Where a use or development does not comply with either a relevant Acceptable Solution (if any) or the corresponding Alternative Solution (if any), the use or development is prohibited and any permit application must be refused."

23 Clause 3.5 is entitled "Issuing Approval or Refusal of an Application". Clause 3.5.1 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 provisions of Part 2 of the Scheme;
- any relevant requirements contained in the Act; and
- any other applicable legislation."

24 The Scheme then deals separately with each of the six zones. In respect of each, it provides for objectives, desired future character statements and strategies (by reference to a number of geographical areas in the municipality), what are planning permit required Use Classes in the zone, and what are prohibited ones, and standards for use or development within the zone.

25 Clause 6 is that which deals with the "Business and Civic Zone". The objectives for that zone are contained in cl 6.1.2. They are:

"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 revitalize commercial precincts and encourage new investment; and* (*Am.A32 g.29/6/05

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

26 Clause 6.2 deals with the desired future character statements and strategies for the zone. Clause 6.2.1 provides:

"The values associated with this zone and the accompanying strategies are described below:"

There are then a number of subparagraphs named by reference to areas or precincts in which properties might fall within the Business and Civic zone. Sub-clause (m) deals with one of those areas, the "Australian Antarctic Division Headquarters Precinct". That area is not defined anywhere in the Scheme. The Tribunal concluded the land fell within the precinct. Clause 6.2.1(m) provides as follows:

"(m) AUSTRALIAN ANTARCTIC DIVISION HEADQUARTERS PRECINCT*
(*Am.A1 g. 3/3/05)

Desired Future Character Statement	Strategy
<p>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.</p>	<p>S1: Further development of the precinct will involve the following:</p> <ul style="list-style-type: none"> (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 car parking 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"

27 Clause 6.3 then identifies what are "Planning permit required Use Classes" in the Business and Civic zone and what are "prohibited Use Classes". In the former category, the Use Classes are business and civic, residential, utilities, recreation, environmental protection and industrial. In the latter category is the primary industries Use Class.

28 Clause 6.4 is entitled "Standards for Use or Development in the Business and Civic Zone". Clause 6.4.1 then identifies five issues. Accompanying each issue is a Principle. The first issue identified in cl 6.4.1 is "Controls applying to Use or Development that are permissible". The accompanying principle is "To ensure that all permissible use or development is compatible with the objectives of the Business and Civic Zone". What follows under this issue heading are six subclauses, each of which deals with one of the six permitted Use Classes within the Business and Civic Zone, the first being the business and civic Use Class (cl 6.4.1.1). The same pattern appears in the sections of the Scheme dealing with other zones in that the first issue is the same and the first subclause deals with the use most identified with that zone (eg residential use in the residential zone in cl 5.4.1.1).

29 Returning to cl 6.4.1, after the issue and corresponding principle are identified, the subclauses dealing with each use are divided into two columns, one of which is entitled "Acceptable Solution (Deemed to Comply)" and the other, "Alternative Solution (Requires justification)". Clause 6.4.1.1 relevantly provides:

"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."

Clause 5.4.1.1 (cl 5 is that which deals with the Residential zone generally) deals with the residential use in the Residential zone. The wording of the Acceptable Solution and the Alternative Solution in that clause is identical to that in cl 6.4.1.1.

30 Clauses 6.4.1.2 - 6 each deal with one of the other permitted uses in the Business and Civic zone by reference to this first issue. Clause 6.4.1.2 deals with the residential Use Class. The Acceptable Solution in respect of such a use in the Business and Civic zone is that "All applications for use or development must be considered under the Alternative Solutions." The Alternative Solution column begins with the words "Council may approve an application for use or development not meeting the Acceptable Solution where it can be demonstrated that:". A list of matters to be considered follows. The first is that:

"the application will not prejudice the zone objectives or applicable desired future character statements;"

This same pattern appears in cl 5.4.1.2. This is the second subclause under issue one, and it deals with the business and civic use in the Residential zone. The wording of the Acceptable Solution is the same as in cl 6.4.1.2, as is the wording of the heading and the first matter to which regard is to be had under the Alternative Solution heading.

31 Clause 6.4.2 then deals with the second identified issue, "Subdivision and Utility Provision". Clause 6.4.3 deals with a third, namely "Delivery of Goods", cl 6.4.4, a fourth, namely "Building appearance and street character", and cl 6.4.5, a fifth, namely "Landscaping". In respect of each of these issues, there is a corresponding principle and then columns with an Acceptable Solution and an Alternative Solution.

Issue arising on appeal

32 Counsel for the appellant identified the key issue on this appeal as which, if any, clause in the Scheme triggered, as a relevant consideration in the exercise of the discretion to grant or refuse the permit applied for, the consideration of the desired future character statement identified in cl 6.2.1(m).

He submitted that none did. The learned Chief Justice, however, identified cl 6.4.1.1 and cl 3.1.5 as being the triggers, while the Tribunal relied on a combination of cls 3.1.5 and 3.1.6(a)(ii).

- 33 Counsel for the appellant conceded that no aspect of the development and use proposal rejected by the Council and the Tribunal complied with either the desired future character statement or strategy outlined in cl 6.2.1(m). He accepted that it must follow that, if there is a provision in the Scheme which makes that clause relevant to the exercise of a discretion pursuant to *Land Use Planning and Approvals Act 1993* ("LUPA"), s57, then the appeal should be dismissed.

Error in reasons of the learned Chief Justice

- 34 One argument mounted by counsel for the appellant related to what is accepted was an error appearing in par[24] of the reasons of the Chief Justice. This should be dealt with at the outset. The error was that in par[24], the word "Alternative" appeared when it should have been "Acceptable". Having regard to the judgment as a whole, I am not persuaded this was any more than a clerical error or that his Honour's reasoning demonstrates he relied in any way on that error.

Clause 3.1.5 and clause 3.1.6

- 35 Counsel for the appellant began the development of his arguments by reference to cl 3.1.5 (set out in par[20]). On its face, that clause would suggest this appeal should fail. The proposed use was within a Use Class (business and civic) which could occur in the Business and Civic zone. It was not prohibited or exempt. Therefore, it had to show it could perform "in relation to Scheme standards and applicable desired future character statements and strategies". The Tribunal found, and it was not the subject of challenge before his Honour, that the land fell within the Australian Antarctic Division Headquarters precinct, and that the proposed development was not one which complied with the desired future character statement described in cl 6.2.1(m). It would seem to follow that the proposed development could not perform in relation to the desired future character statements for that precinct and that, as a consequence, the Council could in the exercise of its discretion under s57, refuse the permit applied for.

- 36 Counsel for the appellant submitted however that the Scheme and LUPA, s57, properly interpreted, and with words imported into certain clauses in the Scheme as he suggested should be the case, did not give the Council a discretion to grant or refuse a permit by reference to the desired future character statement in cl 6.2.1(m).

- 37 Firstly, counsel submitted that, in respect of cl 3.1.5, it was necessary to read the words "where relevant" into the clause after the word "strategies" at the end of the clause. Without those words, he submitted, the clause was inconsistent with the clause which followed, namely cl 3.1.6(a)(i). Clause 3.1.6(a)(i) is a deeming provision. It provides that where a proposed use or development meets all relevant Acceptable Solutions for a particular zone and schedules, it is taken to be in compliance with zone objectives, desired future character statements and accompanying strategies and has to be approved. A developer could, by designing a development which complied with all Acceptable Solutions, no matter how inconsistent it might be for example with cl 6.2.1(m), take advantage of this deeming provision. The structure of the Scheme permitted this approach. However, counsel submitted that, unless the words "where relevant" were inserted into cl 3.1.5, then even if a use or development met all Acceptable Solutions, the deeming provision could not operate, and cl 3.1.5 would require that the use or development perform in relation to any desired future character statements applicable to the area in which relevant land was situated.

- 38 Counsel for the respondent pointed out that the argument was a somewhat abstract one in that the proposed use and development did not meet all Acceptable Solutions, and therefore cl 3.1.6(a)(i) was not relevant to this matter. Counsel for the appellant however submitted that was not the point. The problem created by the inconsistencies demonstrated, he submitted, the problems with the

structure of the Scheme and how it should be considered. Counsel for the appellant also submitted, applying the same reasoning, that, without the addition of the words "where relevant", cl 3.1.5 was also inconsistent with cl 3.2.2. Clause 3.2.2 is that which defines the two types of Scheme standards, namely Acceptable Solution and Alternative Solution. It is set out at [22].

39 Counsel for the appellant also submitted that words should be imported into cl 3.6.1(a)(ii). He submitted that the word "relevant" should appear after the words "meet all" in the first line, and that the words "where relevant" should appear after the word "strategies" in the fourth line. To illustrate why he submitted those words needed to be imported, counsel took the Court to cl 6.4, that is the clause which deals with standards for use or development in the Business and Civic zone.

40 Counsel used issue 2 in cl 6.4.2 headed "Subdivision and Utility Provision" and the first sub-clause, cl 6.4.2.1, entitled "Subdivision" as his illustration. He submitted that where, by a development, a developer was not proposing a subdivision, the Acceptable Solution listed could not possibly be relevant. Hence, the need for the word "relevant" to be imported into cl 3.1.6(a)(ii) before the words "Acceptable Solutions". The words "where relevant" also needed to be imported after the word "strategies" so that only those desired future character statements and accompanying strategies which were relevant needed to be considered. The importation of those words, counsel for the appellant submitted, also made the clause consistent with cl 3.2.2(b).

LUPA, s57, discretion

41 Counsel for the appellant then moved to a consideration of LUPA, s57, and the nature of the discretion it afforded the Council in this matter.

42 LUPA, s57(1)(a), provides:

"(1) This section applies to an application for a permit in respect of a use or development which, under the provisions of a planning scheme or special planning order –

(a) is of a kind specified as being a use or development which a planning authority has a discretion to refuse or permit; or ...".

Section 57 otherwise provides a framework within which applications for discretionary permits are to be considered.

43 While cl 3.1.6(a)(ii) clearly provides that, in respect of a use or development which did not meet "all Acceptable Solutions", any application for a permit for it fell to be determined by reference to s57, counsel for the appellant submitted that the discretion afforded to the Council as a consequence was not a general discretion but a limited one. The discretion could only relate to a proposed use or development which was specified by the Scheme as being of a kind which the Council had a discretion to refuse or permit.

44 Counsel's submissions as to the confined nature of the discretion were predicated on a decision of Zeeman J in *James Douglas v Hobart City Council* [1996] TASSC 49. In that case, his Honour was considering cl 2.6.1 in the City of Hobart Planning Scheme which provided:

"6 Clause 2.6.1 of the Scheme provides as follows:-

'2.6.1 Where a proposed development is not in accordance with a Schedule but the Corporation is nevertheless satisfied that the proposed development does not conflict with the Principles and Desired Future Character of the relevant Precinct, the Corporation may entertain the application, and use its discretion to approve the development unconditionally or subject to conditions, provided that the prior written consent of the Commissioner is obtained where the proposed development is prohibited by the provisions of Schedule A.'

His Honour, at par[22], considered the meaning to be attributed to the word "specified" in s57. He said at pars[22] – [23]:

"22 As to the meaning to be attributed to the word 'specified', I would adopt what was said by Bryson J in *Ludwig v Coshott* (1994) 83 LGERA 22 at 38:

"Specify" and its derivatives are capable of referring to a wide range of degrees of specificity; the article in the Oxford English Dictionary well illustrates this, as many different degrees of specificity can be indicated by mentioning, speaking of or naming something definitely or explicitly, or setting down or stating something categorically or particularly; one can be definite without being explicit, and particular without being categorical. In applying "specified" the word should be given a reasonable construction consistent with effective operation to achieve the stated purpose of providing machinery for enabling development to be carried out in accordance with a planning instrument or a consent."

23 The concept of discretionary uses is well established and well known in the context of planning. The Scheme, by clA.7.1, specifically makes provision for what it describes as discretionary uses in respect of which the defendant may use its discretion to refuse or permit the development and use of land unconditionally or subject to conditions. Such developments fall within s57(1). Whilst cl2.6.1 may call for the exercise of a discretion, it does not fall within s57 because:

- (a) it does not specify any particular use or development in respect of which the discretion may be exercised, and
- (b) no discretion is capable of being exercised in favour of an applicant without the prior written consent of the Panel."

45 No issue is taken with his Honour's conclusion in that case nor his approach to the word "specified" where it appears in s57.

46 Having referred to that case, counsel for the appellant then posed the question, "where does this planning scheme specify a category of use or development as discretionary in accordance with s57?", that is a category of use or development the Council had the discretion to grant or refuse a permit for. He submitted that the answer to that question lay in a consideration of cl 3.1.6(a) and cl 3.2.2. Clause 3.1.6(a), he said, distinguished between developments to be considered by reference to LUPA, s58, and those to be considered by reference to s57. It did so by adopting a device, that being the difference between acceptable solutions and alternative solutions. This difference, he submitted, was re-enforced by the definitions of those terms (Scheme standards) appearing in cl 3.2.2.

47 Counsel submitted that the only discretion in the Scheme which could arise by reference to s57 was that appearing in cl 3.2.2(b) in the last sentence which provides:

"Use or development that applies Alternative Solutions may be approved or refused by Council."

The Council's discretion was confined by those words and did not extend to allowing the Council to refuse a permit based on a failure to comply with the desired future character statement appearing in cl 6.1.2(m).

Discussion

48 Counsel for the appellant went on to develop an argument by reference to cl 6.4.1.1 to the effect that that clause was neither an Acceptable Solution nor an Alternative Solution and did not provide a pathway to a consideration of the desired future character statements in cl 6.1.2(m).

49 He submitted that, in relation to the Scheme generally, where such matters were relevant (that is desired future character statements), the Scheme unambiguously said so. By way of example, counsel referred to clause 6.4.1.2 (dealing with use or development in the residential use class in the Business and Civic zone) where, under the heading "Alternative Solution", it specifically provided that a use or development might be approved where it could be demonstrated that it would not prejudice the zone objectives or applicable desired future character statements. Counsel referred to other examples within the Scheme where specific reference was made to the matters to be considered and identified a pattern of what he described as primary and secondary uses.

50 Counsel's argument relating to cl 6.4.1.1 was based on the premise that what appears there does not conform with the definition of what is an Acceptable Solution or an Alternative Solution. He submitted that a "real" Acceptable Solution, for example, was that which appeared in cl 6.4.4.1 because it required measurement by reference to objective criteria. If had, he said, all the hallmarks absent from cl 6.4.1.1, and by virtue of the approach adopted by Zeeman J in *Douglas's* case, specified a basis for refusal or permission. Clause 6.4.1.1, however, did not.

51 Many of the arguments of counsel for the appellant were couched in terms of, if the development had not had this or that proposal within it, then the development would have complied with all Acceptable Solutions and would have to have been approved by reference to cl 3.1.6(a)(i). However, the proposed development did not comply with all Acceptable Solutions and cl 3.1.6(a)(i) was therefore not relevant. It is necessary in the circumstances to look more closely at the relevant provisions.

52 Starting with cl 3.1.5, the use or development proposed fell within a Use Class which could occur within the relevant zone. Therefore, the application for a permit had to also show that it could perform in relation to the "Scheme standards and applicable desired future character statements and strategies". Clause 3.1.6(a)(i) then provided for deemed compliance with zone objectives, desired future character statements and accompanying strategies in certain circumstances which did not apply in this case. In my view, the two clauses are not necessarily incompatible and do not require the importation of words into them to make them so. The first provides that certain matters need to be considered. The second deems them to have been complied with in defined circumstances.

53 Moving to cl 3.1.6(a)(ii), this applied in cases where all Acceptable Solutions were not met. Acceptable Solutions for the zone appeared in cl 6.4. There was no dispute that this application did not meet "all Acceptable Solutions", or indeed all relevant Acceptable Solutions, as they appeared. In those circumstances, the Council was required to assess the application to determine compliance with zone objectives, desired future character statements and accompanying strategies. The zone objectives were set out in cl 6.1.2. The desired future character statements and accompanying strategies were set out in cl 6.2.1. Clause 6.2.1(m) contained the desired future character statements and accompanying strategies in relation to the Australian Antarctic Division Headquarters precinct in which the land was situated. There is no dispute that the application did not comply with the desired future character statement contained in cl 6.2.1(m).

54 Clause 6.4 provided for standards for development in the Business and Civic Zone. Counsel for the appellant treated cl 6.4.1.1 as containing a stand alone "Acceptable Solution" and stand alone "Alternative Solution" on a par with the others appearing in clause 6.4. His submission was that they could not be such because they did not comply with the definitions appearing in cl 3.2.2. If that argument is correct, it makes a nonsense of the comparable clause appearing in the Scheme in respect of each other zone. The Scheme should be read as a whole, and in a manner which produces a sensible interpretation of its provisions.

55 Clause 6.4.1.1 provides that the Acceptable Solution for use or development in the business and civic class within that zone is that "All applications for use or development must meet all relevant

Acceptable Solutions". The remainder of cl 6.4 under a number of different headings then sets out various Acceptable Solutions, not all of which were relevant in the present case. It should be noted that the Acceptable Solution in cl 6.4.1.1 requires that **all relevant** Acceptable Solutions are met. It follows that, if one of the relevant Acceptable Solutions is not met, then the Acceptable Solution for the business and civic Use Class has not been met. In that situation, regard is then to be had to the Alternative Solution (see cl 6.4.1.1).

56 The Alternative Solution in clause 6.4.1.1 provides that the Council may approve a use or development not meeting "the Acceptable Solution". "The Acceptable Solution" is that the application "must meet all relevant Acceptable Solutions". Once it is accepted that the particular use or development does not meet all relevant Acceptable Solutions, the Council then has a discretion to approve the use or development "provided all relevant provisions of the Scheme are met". It must follow it has the power to reject the application if "all relevant provisions of the Scheme" are not met. The Alternative Solution in clause 6.4.1.1 clearly invests the Council with a broad discretion. It cannot simply be ignored as the appellant's arguments would have the Court do.

57 Clause 3.5.1 of the Scheme also contained a requirement that Council consider an application for a proposed use or development "under the relevant provisions of the Scheme". Those relevant provisions are then identified. They include "objectives of the zone, Desired Future Character Statements and accompanying Strategies".

58 The learned Chief Justice referred in pars[43] and [44] of his decision to a number of authorities to which counsel had referred him and to which he had regard when interpreting the provisions in the Scheme. The same authorities were relied upon at the hearing of this appeal. I do not pause to repeat what his Honour said about the relevance of those authorities, save that I agree with the manner in which he has applied them.

59 With respect, the submissions of counsel for the appellant call for an interpretation of specific and relevant provisions of the Scheme in a manner which requires words to be imported into certain provisions of the Scheme, the actual wording of some provisions to be ignored and for the Scheme not to be read as a whole. Having regard to clauses 3.1.5, 3.1.6(a)(ii), 3.5.1 and 6.4.1.1, it is difficult to see how it could be said that a provision in the Scheme which explicitly provides for a desired future character statement relating to the precinct in which the land sits could not be a relevant provision, and one which the Council was required, in the exercise of its discretion to grant or refuse the relevant permit, to consider. One would have to ask rhetorically, why have the limitation imposed by cl 6.2.1(m) were it not to be an important consideration. Counsel for the appellant continued to emphasise that had the proposal for development met all relevant Acceptable Solutions it would have to have been approved by the Council as a consequence of cl 3.1.6(a)(i) regardless of the impact of cl 6.2.1(m). That is simply not the proposal we are dealing with. It may very well highlight deficiencies in the drafting of this Scheme but that is all. However, it does not dispose of this appeal.

Conclusion

60 For the foregoing reasons I am of the view that, in the circumstances of this case, clause 6.2.1(m) was a clause which the Council was obliged to consider in the exercise of its discretion to grant or refuse the permit sought by the appellants and the interpretation of the Scheme by the learned Chief Justice which allowed for that conclusion was correct.

61 I would dismiss the appeal.