

CITATION: *D'Rozario v Development Consent Authority NT LMT 64*

PARTIES: JUNE D'ROZARIO & ASSOCIATES ON
BEHALF OF WESTRALIA INVESTMENTS
PTY LTD ACN 009 645 121
v
DEVELOPMENT CONSENT AUTHORITY

TITLE OF COURT LANDS AND MINING TRIBUNAL

JURISDICTION: LANDS AND MINING TRIBUNAL ACT

FILE NO(s): LMT-64-2003-P (20301304)

DELIVERED ON: 28 April 2003

DELIVERED AT: DARWIN

HEARING DATE(s): Not applicable

DECISION OF: D LOADMAN, CHAIRPERSON

CATCHWORDS:

DEVELOPMENT PERMIT APPLICATION - SUBDIVISION OF LAND IN R1 ZONING – OBSERVATION OF “PROCEDURAL FAIRNESS” (NATURAL JUSTICE) IN HEARING THE APPLICATION –REASONS BY THE RESPONDENT FOR REFUSAL OF PERMIT CONSTRAIN THE PARAMETERS UPON WHICH APPEALS FROM SUCH DISPOSITION LIE – CONSENT POWER BY THE RESPONDENT TO ALLOW SUBDIVISION OF LESS THAN SPECIFIED 800 m² – QUESTION OF ONUS REQUIRING AN APPLICANT TO SHOW “SPECIAL MERIT” OR “JUSTIFICATION” AS CONDITION PRECEDENT FOR EXERCISE OF SUCH CONSENT BY THE RESPONDENT -- PARAMOUNTCY OF OBJECTIVE CRITERIA CLAUSE 16.1 OF DARWIN TOWN PLAN OVER 800 m² LIMITATION – PRECEDENT OF ALLOWING SUBDIVISIONS OF LESS THAN PRESCRIBED MINIMUM IN IMMEDIATE AREA

Lands and Mining Tribunal Act NT
Planning Act NT

REPRESENTATION:

Appellant: self
Respondent: self
Judgment category classification: B
Judgment ID number: NT LMT 64
Number of paragraphs: 94

IN THE LANDS AND MINING TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. LMT-64-2003-P (20301304)

BETWEEN:

**JUNE D'ROZARIO & ASSOCIATES on
behalf of WESTRALIA INVESTMENTS
PTY LTD ACN 009 645 121**
Appellant

AND:

**DEVELOPMENT CONSENT
AUTHORITY**
Respondent

DECISION

(Delivered 28 April 2003)

Mr David LOADMAN, CHAIRPERSON

HISTORY

1. On 24 October 2002 the Appellant applied to the Development Consent Authority ("the Respondent") for consent to sub-divide Lot 5542 (No 1) Hingston Street, Parap into three lots.
2. The hearing of the application occurred on 4 December 2002. At that hearing the Applicant corrected an erroneous designation of area in the application pertaining to lot 2 and lot 3 at 730 m². The correction was to accord with the correct position of 703 m². The Respondent failed to deal with the matter by way of grant or refusal and by letter dated 17 December 2003 "notified the Applicant" that it had resolved to determine the application subject to receipt of amended plans showing two lots, each with a minimum area of 800 m².

3. By letter dated 20 December 2002 the appellant advised the Respondent that it declined to amend the application and requested determination in accordance with the application submitted on 24 October 2002.
4. On 23 December 2002 the Respondent issued a Development Permit allowing subdivision into two lots subject to "*the amended application*" requesting such consent.
5. There was never an "amended application" such as is stated in the Development Permit.
6. The permit dated 23 December 2002 was accompanied by a schedule of conditions. It was also accompanied by a "Statement of Reasons for Determination", those "Reasons" being as follows:
 1. *The lots previously shown as 730 m² are actually intended to be 703 m² and the variation of the minimum lot size requirement to the extent requested is beyond that considered reasonable by the Authority.*
 2. *A two-lot subdivision is consistent with the objectives and requirements of the Northern Territory Planning Scheme as they relate to land zoned R1 (Residential 1) under the Darwin Town Plan 1990 (as amended).*
7. On 24 January 2003 the Appellant lodged a Notice of Appeal at the Lands and Mining Tribunal pursuant to either section 111 and 114 of the *Planning Act* ("PA"). The text of the Notice of Appeal is set out in this decision.
8. Pursuant to section 121 of the Planning Act, a mediation conference was fixed by this Tribunal to commence on 19 February 2003.
9. On 6 March 2003, a Notice under section 127 PA was received from the Appellant advising that a compromise or settlement had not been reached. Further that the Appellant wished the matter to be determined by the Tribunal. The parties were accordingly instructed

by the Tribunal to provide written submissions on or before 20 March 2003 and any submissions in reply on or before 3 April 2003.

10. On 8 April 2003 the Tribunal conducted a formal view of the proposed development. The parties and the registered objectors were invited to attend at the view. On that day and on 22 April 2003 the Respondent was requested by the Tribunal to provide additional documents and/or information and did so on or by 22 April 2003.

THE NOTICE OF APPEAL

11. The text of the Notice of Appeal is set out hereunder:

RELEVANT BACKGROUND

1. The appellant applied to the Development Consent Authority for consent to subdivide Lot 5542 (Number 1) Hingston Street, Parap.
2. The land is zoned R1 (Residential 1) under the Darwin Town Plan 1990, and has an area of 2,096.5 m². There is a detached dwelling on the site.
3. The development application, lodged on 24 October 2002, sought approval to subdivide Lot 5542 into three lots. The area of proposed Lot 1 would be 690.5 m² and proposed Lots 2 and 3 would each have an area of 703 m². The areas of proposed Lots 2 and 3 were incorrectly shown as 730 m² in the application, but this error was corrected at the hearing of the application on 4 December 2002.
4. An existing dwelling on Lot 5542 would be removed.
5. A copy of the development application is at Annexure 1.
6. The applicant was provided with copies of an Assessment Report, prepared by Development Assessment, and submissions lodged in response to the application. Copies are in Annexure 2.
7. The applicant responded to issues raised during the public exhibition in a submission dated 3 December 2002. A copy is at Annexure 3.
8. At the hearing of the application on 4 December 2002, the applicant corrected the areas of proposed Lots 2 and 3, and responded to issues raised by objectors.
9. The Authority considered the application on 4 December 2002, and by letter dated 17 December 2002, notified the applicant that it had resolved to determine the application subject to receipt of amended plans showing two lots, each with a minimum area of 800 m². A copy of the Authority's letter is at Annexure 4

10. On 20 December 2002, the applicant replied to the Authority's letter of 17 December 2002, saying that the application sought subdivision of the land into three lots and that the applicant declined to amend the application. The applicant requested determination of the application to subdivide the land into three lots. The lots sizes were confirmed in a letter to the Authority on 6 January 2003. Copies of these letters are at Annexure 5.
11. On 30 December 2002, the Authority sent the applicant a Development Permit dated 23 December 2002. The permit purports to be for an amended application, and grants consent to a subdivision of Lot 5542 into two lots. A copy of Development Permit DP02/0526 is at Annexure 6.
12. DP02/0526 contains in Condition 1 a requirement to submit a subdivision drawing showing two lots, each with a minimum size of 800 m², prior to commencement of subdivision works.

NATURE OF THE APPEAL

13. Section 111 of the Planning Act provides for an appeal against a determination of the Authority to refuse to consent to the development proposal in the application. The imposition of Condition 1 constitutes refusal of the development proposal in the application, and pursuant to section 111, the applicant appeals against the Authority's determination set out in DP02/0526.
14. Alternatively, section 114 provides for an appeal against a determination of the Authority to impose a condition on a permit, and pursuant to section 114, the applicant appeals against Condition 1 in DP02/0526.

GROUNDINGS OF THE APPEAL

15. The Authority is wrong in refusing the application on the basis that the reduction in lot size sought by the application is beyond that considered reasonable because, in the absence of any reasons given as to why the proposed lot sizes are not reasonable, the Authority's decision is arbitrary.
16. To the extent that Reason 1 of DP02/0526 intimates that there is a threshold beyond which reductions in lot size are considered not reasonable, the Authority's decision is invalid.
17. The Authority is wrong in refusing the application on the basis that the reduction in lot size sought by the application is beyond that considered reasonable because the application demonstrated that the proposed lot sizes meet the objectives of clause 16.1 of the Darwin Town Plan, and no argument or evidence was advanced to contradict this.

PRELIMINARY FINDINGS OF THE TRIBUNAL

12. This matter is vexed with somewhat unusual treatment by the Respondent. Having considered the application on 4 December 2002,

logic and good practice dictated that the Respondent should have either refused the application, but informally indicated it might accept an amended application for two lot subdivision or granted it. As is apparent, by letter of 17 December 2003 the Respondent resolved to “*determine the application subject to receipt of amended plans showing two lots ...*”.

13. Despite a letter of 20 December 2002 from the Appellants declining to amend its application and requesting determination of the application submitted, the Respondent provided a non-responsive determination. It dispatched a development permit dated 23 December 2002, purporting to have received an amended application. In the event it also purportedly granted consent of Lot 5542 into a two lot subdivision. It does not seem particularly pertinent to determine whether or not the treatment of the application by the Respondent constitutes a refusal or the imposition of a condition on a permit. Whether pursuant to section 111 PA or 114 PA it is the finding of this Tribunal that an appeal lies against what must be inferred as a refusal of the Appellant’s application for subdivision into three lots.
14. Although no express refusal of the development permit is given there is a statement for reasons for determination dated 23 December 2002 which provides 2 reasons for the inferred refusal; as set out below:-
 1. *The lots previously shown as 730 m² are actually intended to be 703 m² and the variation of the minimum lot size requirement to the extent requested is beyond that considered reasonable by the Authority.*
 2. *A two-lot subdivision is consistent with the objectives and requirements of the Northern Territory Planning Scheme as they relate to land zoned R1 (Residential 1) under the Darwin Town Plan 1990 (as amended).*
15. In relation to the first reason, whilst it is the case that there was an error by the Appellant in some of the documentation wrongly referring to the relevant areas as 730 m², it must have been apparent to any qualified person that there was an error. In any event prior to any

“determination” by the Respondent the error was pointed out on 4 December 2002 at the statutory meeting. The first “Reason” then is that the sub-divisions in question (for they are not all 703 m² in area) have been refused because the size reduction “*is beyond that considered reasonable by the Authority*”.

16. Neither the Appellant nor this Tribunal is of course aware as to what the Authority has determined to be the yardstick of reason.
17. The second “reason” in the Statement of Reasons referred to can in no way be construed as a reason supporting the refusal of the application. It is not a “reason” in any aspect of the meaning of the word.

THE SUBMISSIONS

18. On 20 March 2003 the Tribunal received the Appellant’s submissions (“the Appellant’s submissions”). The text of the Appellant’s submissions is set out below:

APPELLANT’S ARGUMENT IN RELATION TO THE GROUNDS OF APPEAL

First Ground of Appeal

17. The Authority's Reason 1 of DP02/0526 is in terms too general to amount to a substantive reason, and the Authority should specify in what ways the reduced lot size sought by the application is unreasonable.
18. In previous appeals, the Tribunal has said that the failure to particularise a ground upon which a refusal is made is a dereliction by the Authority of its obligation to supply reasoned and specific decisions. See *David v DCA* LMT 54 paragraphs 48, 61 - 63, 65 - 67.
19. In *David*, the Tribunal was inclined to refuse to uphold the reason for refusal on the basis that it contained no reasons, contained no specifics and constituted a ground so vague as to be invalid or void.
20. Despite the Tribunal's remarks in *David*, and also in *TMP Builders v DCA* (LMT 56 at paragraph 64(e)), the Authority has again refused an application on a ground devoid of any specific content as to the ways in which the application fails. As the reason for refusal is not supported by any disclosure about what it is that the Authority considers unreasonable about the lot size sought by the application, the Appellant says the decision is arbitrary.

21. The Appellant submits that, on the principles outlined by the Tribunal in *David* and *TMP Builders*, the reason for refusal should be considered void or invalid.

Second Ground of Appeal

22. The Appellant says that Reason 1 of DP02/0526 intimates that there is a threshold at which a reduced lot size is considered reasonable, because to conclude that the reduction in lot size sought is beyond that considered reasonable, the Authority must have in contemplation a reduction that it considers reasonable.
23. The Authority's approach is invalid because the adoption of a reasonable reduction in lot size amounts to adoption of an unofficial policy to reject applications which do not comply with the adopted threshold.
24. The term "unofficial policy" is used because the "policy" is known only to the Authority, is not available or disclosed to applicants or the public at large, and appears not to be set down in writing.
25. Australian appeal jurisdictions have consistently held that a planning authority cannot use codes or policies to override the statutory planning controls. See for example : *Markay Home Company Pty Ltd v City of Waverley* 22 APAD 519; *Tran v City of Springvale* 15 APAD 201; *Gerob Investments Ballina Pty Ltd v Ballina Shire Council* 40 APAD 69; *Bascombe Holdings Pty Ltd v Northern Territory Planning Authority* PAT 16/2/1998.
26. It is a fruitless exercise for the Appellant to try to discover what the Authority considers is a reasonable reduction in lot size, even with the assistance of the other cases listed at p 6 of the DAS Report (Agenda Item 12 of the Authority's meeting of 4 December 2002), and the Appellant should not be required to undertake such an exercise.
27. Even if it were possible to know what this threshold is, it is irrelevant because the entire approach is wrong. The Appellant says that the Authority is required to consider the matters set out in s 51 of the Planning Act, including the provisions of the Darwin Town Plan, and the merits of the application as they relate to those considerations.
28. Clause 16.1 provisions of the Darwin Town Plan permits subdivision for lots less than 800 m² in the R1 zone with the consent of the Authority, and sets out the objectives of the lot size provision. It is noted that the Authority does not allege that the application failed because it did not meet one or more of these objectives. Nor does the rejection rely on any matter specified in s 51 of the Planning Act. Instead, Reason 1 indicates that the application failed because it sought lot sizes that were below some "reasonable" level known only to the Authority.
29. The Appellant says that the Authority exercised its discretion invalidly by imposing an unofficial policy on lot size reduction, effectively overriding the matters in s 51.
30. Alternatively, the Authority's decision is invalid because it strongly implies that the 800 m² lot size is mandatory. Although Reason 1 implies that the Authority

considered reduced lot sizes but found their extent not reasonable, the condition actually imposed requires the applicant to submit a revised plan showing a minimum lot size of 800 m². This suggests that the Authority's real position is that, despite the discretion conferred by clause 16.1 to permit lots less than 800 m² in area, the Authority was not prepared to approve lot sizes less than 800 m². This is contrary to the established principle that, where the exercise of a discretion is called for, the Authority is required to consider the proposal from a neutral base, weigh its merits, and apply the relevant planning criteria.

31. The Appellant says that the Authority's failure to consider the application from a neutral base, to weigh the merits of the application, and to apply the criteria in s 51 and the provisions of the Darwin Town Plan renders its decision invalid.

Third Ground of Appeal

32. The application demonstrated that each of the lots subdivided from Lot 5542 would meet the objectives of clause 16.1 of the Darwin Town Plan. No evidence or submission put to the Authority contradicted this material. All the objections referred to the proposed lots being less than 800 m² in area, and the very fact of the lots being less than 800 m² formed the principal basis for the objections.

33. However, none of the objections alleged that the lots would not be of a size sufficient to enable a dwelling to be oriented appropriately for climate, or to provide suitable setbacks to adjoining dwellings, or to provide adequate private open space. These are the objectives of the lot size provision for the R1 zone, as set out in clause 16.1

34. The Applicant answered the objections in its submission to the Authority dated 3 December 2002. Other than the Applicant's materials, the only material the Authority had before it on this point was the report of Development Assessment Services (Agenda Item 12 of 4/12/02), a copy of which was provided to the Appellant pursuant to s 120 of the Planning Act.

35. The DAS report said at p 2 :

- "[t]he allotments have a north-south orientation which allow for siting of dwellings to take advantage of prevailing Dry (south easterly) and Wet Season (north westerly) breezes through the use of cross ventilation in building design";
- "The building design features include two under cover car parking spaces, building setbacks that are consistent with the NT Building Regulations and adequate outdoor open space provision" ; and
- "The buildings also demonstrate compliance with the Building Regulations with regards to site coverage"; and
- "[t]he size and shape of the proposed allotments meet the objectives of the R1 zone."

36. So, the DAS report was to the effect that the application met the objectives of clause 16.1 and the R1 zone.

37. DAS also reported on all other matters set out in s 51 of the Planning Act, and did not identify any matter under which the application should fail. Instead, the report concluded at p 5 that "the proposed subdivision is not expected to have a negative effect on the amenity of the area. The proposed allotments will have little impact on the overall allotment configuration and pattern of development in the area."
38. The report recommended approval of the application for the reasons that the application complied with the objective of the R1 zone, and the proposal was unlikely to adversely impact on the existing and future amenity of the locality.
39. Against the possibility that the Authority felt justified in overriding the recommendation of DAS because the Applicant disclosed an error in the noted lot areas of proposed Lots 2 and 3, the Appellant notes that the DAS report did not exclude proposed Lot 1 from its conclusions. Proposed Lot 1 is slightly smaller than the other two lots because of a road truncation in its south west corner.
40. In any event, the width and depth dimensions of each lot were shown on the submitted plan, and specified at p 1 of the DAS report. It is apparent that the error in the noted lot areas is a typographical mistake which does not affect the essential assessment of the proposal. The Applicant's assessment of the proposal on all material points, such as orientation, dwelling setbacks, site coverage and plot ratio, and suitability for detached dwellings, remains unchanged because these assessments were made using the area of proposed Lot 1 and on the basis that the lots were all of a similar size.
41. In these circumstances, the Appellant says that the disclosure of an error in the noted lot sizes, which was readily discoverable by examination of the submitted plan, is insufficient cause to conclude that the lots sizes moved from being reasonable to being beyond reasonable. The apparent passage of the proposal across an invisible threshold of reasonableness underlines the points made under the first two grounds of appeal.
42. As noted earlier in this submission, the Authority has advanced no reasons for its conclusion that the reduced lots sizes are not reasonable, and by the operation of s 120 of the Planning Act, it emerges that the Authority set aside not only all the material advanced in assessment of the application but also the recommendations of DAS. So, it is impossible to determine what body of information, evidence or knowledge was brought to bear on the decision
43. Whilst the Appellant does not argue that the Authority is obliged to accept without question the recommendations of its officers, it does argue that the Authority must disclose the basis on which it came to its decision. In *Robinson v DCA* (LMT 51), the Tribunal adopted the approach of the Local Government Court of Queensland in *Duncanson & Brittain (Quarries) v Brisbane City Council* (1986) 31 APAD 419 at 461. In that case, the court considered that, where the authority rejects the recommendations of its competent officers, it should give the reasons so that the applicant is able to ascertain on what facts and circumstances the application was rejected. In the absence of any reasons for the Authority rejecting its officers' recommendations, or disclosing on what other basis it came to its decision, the Appellant requests the Tribunal to reject Reason for Decision 1 in Development Permit DP02/0526.

ORDER SOUGHT BY THE APPELLANT

44. The Appellant seeks an order of the Tribunal that the Development Consent Authority issue a development permit consenting to the subdivision in accordance with Drawing No. 869/2002/S, as amended to correct the areas of proposed Lots 2 and 3, subject to the following conditions :

- Any easements or reserves required for the purposes of electricity, sewers, water supply, stormwater drainage, or for any other purpose, shall be made available free of cost to the Northern Territory of Australia, the Commonwealth of Australia and, if applicable, to the Darwin City Council.
- Engineering design and specifications for stormwater drainage shall be submitted for approval by the Technical Services Manager, Darwin City Council and all approved works shall be constructed at the developer's expense.
- Electrical reticulation to the subdivided sites shall be provided to the requirements and satisfaction of Power and Water Corporation at no cost to the Corporation.
- Water reticulation and sewage disposal for the subdivided lots shall be provided to the requirements and satisfaction of Power and Water Corporation at no cost to the Corporation.
- The developer shall contact Telstra prior to any works being carried out and negotiate the provision of telecommunication services in accordance with accepted Austel practice.
- Disused crossovers shall be removed, and public footpaths and nature strips shall be reinstated, and nature strips shall be landscaped to the requirements and satisfaction of the Technical Services Manager, Darwin City Council.

19. On 20 March the Tribunal received the Respondent's submissions ("Respondent's submissions). Those submissions are set out below:

The following comments are made by the Development Consent Authority (the Authority) with regard to the appellant's grounds of appeal specified in the Notice of Appeal (lodged pursuant to sections 111 and 114 of the *Planning Act 1999*).

Background

- On 24 October 2002 an application was received from June D'Rozario to subdivide Lot 5542 Hingston Street, Town of Darwin into three allotments with the following areas - Lot 1: 690.5m², Lot 2: 730m² and Lot 3: 730m².

- The applicant was seeking a variation to Clause 16.1 (Minimum Lot Size in Zone R1) of the Darwin Town Plan 1990 for allotments less than 800m² in area.
- The proposal was on public exhibition from 1 to 15 November 2002 and sixteen submissions in opposition to the application and one submission supporting the application were received. Darwin City Council also objected to the creation of three lots on the site.
- At the Development Consent Authority meeting on 4 December 2002 the applicant explained to the Authority that the proposed allotment sizes for Lots 2 and 3 are 703m² and not 730m² as first indicated.
- The Authority resolved to delegate to the Chairman the power to determine the application to subdivide the land to create 2 lots pending the receipt of amended plans showing a two lot subdivision with each lot having a minimum lot size of 800m². This decision was conveyed to the applicant via a letter dated 17 December 2002.
- On 20 December 2002 the Authority received a letter from the applicant clarifying the proposed lot sizes as: Lot 1: 609.5m², Lot 2: 703m² and Lot 3: 703m² and declining to amend the subdivision plan as requested by the Authority.
- On 23 December 2002 the Chairman signed Development Permit DP02/0526 which grants consent to subdivide the land to create 2 lots. Condition 1 of the permit says:

“Drawings showing two lots, each a minimum of 800m² in size, shall be submitted for approval to the Chairman, Development Consent Authority, prior to the commencement of subdivision works.”
- The applicant was provided a copy of Development Permit DP02/05542 on 30 December 2002.
- On 6 January 2003, the applicant provided advice correcting the size of the smallest proposed lot to 690.5m².

Consideration of the Application

The determination of the application is governed by the *Darwin Town Plan 1990 (as amended)*, Part II, Division 2, “Zone Objectives and Policies”, clause 15.1 and Part III, Division 1, “Minimum Allotment Sizes”. It is this last clause, in particular, that is the subject of this appeal.

DIVISION 1 – MINIMUM ALLOTMENT SIZES

16.0 DEVELOPMENT CONTROLS

16.1 Minimum Lot Size in Zone R1

The objective of this clause is to ensure that allotments created primarily for detached dwellings will be of a size capable of affording proper orientation of having regard to climatic considerations, to provide suitable setbacks to adjoining allotments and afford opportunities to create adequate private open space.

Except with the consent of the Authority, land within zone R1 shall not be subdivided into allotments having an area of less than 800 square metres.

The Authority is also informed by clause 15.0A, which specifically provides for the subdivision of lots less than 800m², although requiring integration of the estate and dwellings in terms of design. (Those design criteria are detailed elsewhere)

15.0 ZONE OBJECTIVES

15.0A ZONE R0 (RESIDENTIAL)

Objective: To accommodate detached dwellings on allotments less than 800 square metres in a new estate where the dwellings and the estate are integrated in terms of design.

Grounds for Appeal

- 1. The Authority is wrong in refusing the application on the basis that the reduction in lot size sought by the application is beyond that considered reasonable because, in the absence of any reasons given as to why the proposed lot sizes are not reasonable, the Authority's decision is arbitrary.**

The first Reason provided by the Authority for not allowing variation to Clause 16.1 was:

- 1. The lots previously shown as 730m² are actually intended to be 703m² and the variation of the minimum lot size requirement to the extent requested is beyond that considered reasonable by the Authority.*

In forming this view the Authority considered that allotments approaching this size had previously been approved in the area. The Authority was not prepared to accept that these previous subdivisions were precedents binding upon all future decisions. More importantly, the Authority noted that each application produced ever smaller allotments, even if only by a few square metres at a time. Nevertheless, the Authority noted the Objective in clause 16.1, but believes that the specific mention of an 800m² minimum lot size has a purpose. That is, to set a minimum beneath which lots should not be developed unless the proposal has particular merits, not merely because it is possible.

In this case, the applicant did not advance particular merit. After all, it is possible to demonstrate that a dwelling can be accommodated on an allotment of any useable size and comply with the objectives of providing appropriate orientation, setbacks and open space. In such circumstances the use of a minimum size within the same clause as the Objective would be meaningless.

The second reason for the Authority's decision,

- 1. A two-lot subdivision is consistent with the objectives and requirements of the Northern Territory Planning Scheme as they relate to land zoned R1 (Residential 1) under the Darwin Town Plan 1990 (as amended).*

specifically refers to the Objective in clause 16.1 and indicates that the decision was neither arbitrary nor invalid as this clause is the foundation of the decision.

- 2. To the extent that Reason 1 of DP02/0526 intimates that there is a threshold beyond which reductions in lot size are considered not reasonable, the Authority's decision is invalid.**

The Authority construes the minimum lot size as being 800m² and this may be varied such that it complies with the Objective. The Authority acknowledges and practices its discretion to vary clause 16.1, however the degree of variation cannot be solely based on the whether the proposal meets the objectives of clause 16.1 and the R1 zone. There should be some substantial argument as to why there is merit to such a variation. In the subject case, such argument is lacking.

In short, the Authority believes that clause 16.1 must be read in its entirety, and not selectively. That is, the statement of a minimum lot size has relevance.

3. The Authority is wrong in refusing the application on the basis that the reduction in lot size sought by the application is beyond that considered reasonable because the application demonstrated that the proposed lot sizes meet the objectives of clause 16.1 of the Darwin Town Plan, and no argument or evidence was advanced to contradict this.

The response to this ground has already been advanced above.

To accept the argument that variations need be solely based on the objectives of the minimum lot size provisions of the Scheme, then this would negate the need for, and declare as a nonsense, the inclusion of a minimum lot size in the plan. Indeed, the inclusion of an R0 zone would make no sense as it provides a means of developing lots smaller than 800m².

The appellant's claim as to the absence of any reasons given as to why the proposed lot sizes are not reasonable is rejected. The hearing of the Authority is to allow the applicant to put his or her case forward to the Authority, to allow people who made submissions to put their cases forward and for the Authority to ask questions of both the applicant and the submitters before considering the proposal. At the hearing the Authority gave the applicant the opportunity to provide any information it thought necessary to the Authority's attention.

It is not the purpose of the hearing to debate the reasons for and against the proposal in the presence of the applicant and the submitters. Otherwise there is no point in the Authority making a decision "in camera".

MATTERS TO BE TAKEN INTO ACCOUNT (SECTION 51 OF THE PLANNING ACT)

(a) the Planning Scheme as it applies to the land to which the application relates

LAND USE OBJECTIVES

None applicable.

DEVELOPMENT PROVISIONS

The application does not comply with clause 16.1 (Minimum Lot Size in Zone R1) of the Darwin Town Plan 1990 because all of the proposed allotments are less than 800m² in area. Lot 1: 690.5m², Lot 2: 703m² and Lot 3: 703m²

The objective of the R1 zone is:

"To accommodate primarily detached dwellings at low densities on individual allotments".

Lot 1 will have a width of 19 metres, which is truncated to 14 metres at the front boundary due to its corner location, and a depth of 37 metres. Lots 2 and 3 will have a width of 19 metres and a depth of 37 metres.

While the applicant has provided indicative dwelling designs for the proposed lots, the degree of variation cannot be solely based on whether the proposal meets the objective of clause 16.1 and the R1 zone. The application does not present any compelling justification for subdividing the land to create three lots.

INCORPORATED DOCUMENTS

None applicable.

(b) any proposed amendments to the Planning Scheme –

The Proposed Darwin Southern Suburbs Planning Concepts and Land Use Objectives 2002 were exhibited under the *Planning Act* in September and October 2002. The relevant proposed objectives are:

- 1. To maintain and enhance the residential amenity;*
- 2. To protect existing residential amenity, whilst recognising that opportunities continue to exist for the development of medium density housing on appropriately zoned land in established residential areas; and*
- 3. To optimise the use of existing services and infrastructure and to extend these networks to facilitate appropriate new development.*

The *Planning Concepts* identify the OTC site in Parap, which abuts Lot 5542, to be developed for future “low to medium-rise medium density residential accommodation”.

(c) an interim development control order in respect of the subject land

None applicable.

(d) an environment protection objective within the meaning of the Waste Management and Pollution Control Act that is relevant to the land to which the application relates

None applicable.

(e) any submissions made under section 49 in relation to the development application

Sixteen submissions from Parap residents, including the Parap Residents Association, were received at the close of public exhibition in objection to the application. Nine of these submissions were made on pro formas organised by a local resident. The submissions raise the following issues:

- the subdivision will increase the density well beyond that permitted by the current R1 zone and the minimum lot size should be preserved;

- potential adverse impacts on the amenity of the locality by increased traffic, noise and rubbish;
- the proposed lots are inappropriately orientated allotments for the hot humid climate;
- there is no foreseeable benefit to existing residents from the subdivision;
- lack of safeguards that would be expected from an integrated housing estate;
- the proposal represents “ad hoc suburban densification” which is contrary to advice from the Department of Infrastructure, Planning and Environment on the development potential for the Darwin Southern Suburbs under the current zoning;
- clarification should be sought from the Lands and Mining Appeals Tribunal on the definitions of “new development” and “subdivision” to clarify the developer’s responsibility in contributing to the upgrade of services such as power, water, sewage and stormwater drainage; and
- the subdivision goes against the “Old Darwin” feel of Parap;

Staff from Planning Branch of the Department of Infrastructure, Planning and Environment have previously commented at public meetings on the extent of undercapitalised land zoned R2, R3, R4 and I2 in the Darwin CBD, Larrakeyah and Woolner. These comments were made in the context of the future growth population potential of 30,000 to 40,000 in the Darwin Peninsula and the necessary infrastructure upgrade, and a strategic road network to address mobility issues to accommodate this growth potential. No specific reference was made in relation to the Proposed Darwin Southern Suburbs Planning Concepts and Land Use Objectives or to the existing R1 zone.

One submission was received from a local resident in support of the application for reasons of the economic advantages of using existing services on large blocks and no perceived increase in traffic since development of the Billara Apartments.

Darwin City Council requested that the Authority approve a maximum of two lots on the site because the proposed lot sizes are less than the minimum lot size under the Town Plan.

(f) a matter that the Minister has, under section 85, directed it to consider in relation to development applications generally

None applicable.

(g) any public environmental report or environmental impact statement prepared under the Environmental Assessment Act in relation to the proposed development and any assessment of the report or statement by the Minister administering that Act

None applicable.

(h) the merits of the proposed development as demonstrated in the application

The application does not demonstrate any special merit.

- (j) the capability of the land to which the proposed development relates to support the proposed development and the effect of the development on the land and on other land, the physical characteristics of which may be affected by the development**

There are no physical constraints to subdividing the land as proposed.

- (k) the public facilities or public open space available in the area in which the land is situated and the requirement, if any, for the facilities, or land suitable for public recreation, to be provided by the developer**

The land is within close proximity of a public park in Weddell Street the local Parap Shopping Centre. No land or public facilities are required to be provided by the developer for the subdivision.

- (m) the public utilities or infrastructure provided in the area in which the land is situated, the requirement for public facilities and services to be connected to the land and the requirement, if any, for those facilities, infrastructure or land to be provided by the developer for that purpose**

The proposal was circulated to Darwin City Council and PowerWater for comment.

Darwin City Council

Council does not raise any issues from a service authority viewpoint.

Power and Water

Power and Water has no objections from an electrical reticulation viewpoint.

Power and Water has no objections to the application provided the provision of sewerage reticulation to the new lots is approved by Power and Water to its standards.

- (n) the potential impact on the existing and future amenity of the area in which the land is situated**

The existing development is a pre-cyclone three bedroom elevated house sited east of the centre of the site with vehicle access from Hingston Street. The existing house is setback about 15 metres from Hingston Street and the Weddell Street road reserve. The site is atypical of densities of R1 zoned land in the vicinity. With the current development configuration the land could be subdivided to create an additional allotment of 740m² (20 metres wide and 37 metres deep) without removing the existing house.

The site is situated on the corner of Hingston Street and Weddell Street, Parap. The area is characterised by primarily large (over 1,000m² in area) allotments zoned R1 and a variety of other uses such as the OTC site to the rear (zoned SU – Specific Use No. 31) and a neighbourhood park zoned O1 (Open Space) in Weddell Street. The three storey flat development known as “Billara Apartments” is located on Mackillop Street (B4 – Peripheral Business zone) which backs onto the Parap Tavern (B2 – Local Business zone). There are several lots zoned R2 (Medium Density Residential) on Charlotte Street and Weddell Street within close proximity of Lot 5542, including Lots 4127 to 4130 which are all 758m² in area. The Kyoto Lodge (SU – Specific Use No. 40) and the Para Vista Motel (Lot 1801: R1 zone) are located on Mackillop Street. The smallest R1 zoned

lots in the area are Lots 6909 (6) Hingston Street and 6910 (11) Mackillop Street with areas of 712m² and 707m² respectively.

Given the overall character of the area in which the land is situated, the proposed subdivision is expected to have a negative effect on the amenity of the area by creating a residential allotment smaller than those in the area.

(p) the public interest

The erosion of the minimum lot size in the R1 (Residential 1) zone in Parap beyond reasonable variations is not in the public interest.

(q) in the case of a proposed subdivision of land on which a building is situated – whether the building will cease to comply with the Building Act if the proposed development were to proceed

The applicant has submitted that the existing elevated house on Lot 5542 will be removed from the site prior to the completion of subdivision.

(r) any potential impact on natural, social, cultural or heritage values

None applicable.

(s) any beneficial uses, quality standards, criteria, or objectives, that are declared under section 73 of the Water Act

None applicable.

(t) any other matter it thinks fit.

Decisions by the Authority and the Planning Appeals Tribunal on past applications are summarised below.

The Authority granted consent to subdivide former Lot 1795 (6) Hingston Street (now Lots 6909 and 6910) into two lots with areas of 712m² and 707m² through Development Permit DP98/0643 dated 23 December 1998. The lots have widths of 17 metres and 21 metres and a depth of 33 metres. The reasons for the decision were:

- 1. The proposed subdivision is considered to meet all the objectives of the R1 zone;*
- 2. The proposal is not considered likely to have an adverse impact on the present or future amenity of the surrounding area; and*
- 3. The proposed subdivision is identical to one previously approved by the Authority on the same lot.*

The Authority granted consent to subdivide Lot 1797 (9) Mackillop Street into two lots with areas of 766m² each through Development Permit DP02/0024 dated 19 February 2002. The lots have a width of 15 metres and a depth of 50 metres. There was one objection to the subdivision of Lot 1797. The reasons for the decision were:

- 1. The variation of less than 5% to the minimum lot size requirements of the Darwin Town Plan is considered to be acceptable; and*
- 2. The proposed parcels are considered capable of accommodating a detached dwelling and comply with the objective of the R1 zone, to accommodate primarily detached dwelling at low densities on individual allotments.*

The Authority granted consent to subdivide Lot 1794 (4) Hingston Street into two lots with areas of 715m² each through Development Permit DP02/0116 dated 21 May 2002. The lots have a width of 16 metres and a depth of 42 metres. There were three objections from Parap residents to the subdivision of Lot 1794. The submissions raised the issues of inappropriate lot sizes for the area and perceived negative impacts on the existing amenity of the area. The reasons for the decision were:

- 1. The size and shape of the proposed lots are considered to be suitable for residential purposes; and*
- 2. A variation to clause 16.1 (Minimum Lot Size in Zone R1) of the Darwin Town Plan 1990 is granted because the proposal is not considered likely to alter the present character of the locality, which is characterised by lawful non-conforming uses and mixed zonings of R1 (Residential 1), R2 (Residential 2) and B4 (Peripheral Business).*

The Authority refused to grant consent to subdivide Lot 1802 (2) Weddell Street into two lots with areas of 713m² each through Notice of Refusal NR99/0014 dated 28 May 1999. Lot 1802 is situated on the corner of Weddell Street and Stokes Street. There were two objections received during exhibition. The reason for the refusal was:

- 1. The proposal does not comply with the minimum lot sizes for R1 blocks.*

The Authority refused to grant consent to subdivide Lot 3913 (22) Nudl Street, Stuart Park (zoned R1) into two lots with areas of 653m² and 657m² through Notice of Refusal NR98/0022 dated 16 July 1998 for the reason of inconsistency with lot sizes in the surrounding area. The Northern Territory Planning Appeals Tribunal upheld an appeal on the basis that the application will not have a detrimental impact on the locality and that the positive attributes of the application outweigh its negative aspects.

CONCLUSION

That the Authority does not support the application by June D'Rozario to subdivide Lot 5542 (1) Hingston Street, Town of Darwin into three lots but grants consent for subdivision of the site into two lots for the following reasons:

- 1. The lots previously shown as 730m² are actually intended to be 703m² and the variation of the minimum lot size requirement to the extent requested is beyond that considered reasonable by the Authority.*
- 2. A two-lot subdivision is consistent with the objectives and requirements of the Northern Territory Planning Scheme as they relate to land zoned R1 (Residential 1) under the Darwin Town Plan 1990 (as amended).*

SUBMISSIONS IN REPLY PURSUANT TO SECTION 128(3)(PA)

20. On 3 April 2003 the Tribunal received the Appellant's submissions in reply dated 3 April 2003 ("Appellant's submissions in reply") as set out below:

LMT-64-2003-P(20301304)

SECTION 128(3) - APPELLANT'S RESPONSE TO RESPONDENT'S SUBMISSION

LOT SIZE IN THE R1 ZONE

1. The Appellant does not agree with the tenor of the Authority's position on the significance of the 800 m² lot size in the R1 zone. The Authority's approach is that consent to subdivision of lot sizes less than 800 m² should not be given unless the proposal exhibits "particular" or "special" merit. See Authority's submission at pp 2-3; p 7 under paragraph (h).
2. By contrast, the Appellant says that it is a valid approach to adopt the objectives of clause 16.1 as the most important consideration, and to regard the nominated lot size as one way, but not the only way, of satisfying the objectives of the clause. The NT Planning Appeals Committee adopted this approach in *City Developments Pty Ltd v NT Planning Authority* PAC 1 of 1993. The NT Planning Appeals Tribunal also accepted this approach in *Jarver v NT Planning Authority* PAT 27, 18 October 1999 - see especially paragraphs numbered 1, 2 and 3 at p 31.
3. There is also independent support for this type of approach in a document entitled a *Guide to Land Use Planning in the Northern Territory*, published by the then Department of Lands, Housing and Local Government in 1994. This publication, which describes the Northern Territory's planning system, reinforces the supremacy of planning objectives, which are explicitly extended to control plans that contain statements of objectives for zones and control clauses - see p 8 : "There are other levels of planning objectives. The latest Darwin, Alice Springs and Litchfield Town Plans have objectives for each zone and control clause."
4. This publication also says at p 8 : "Guidelines may be developed by Government and the Planning Authority to show how objectives, at whatever level, can be achieved. There may be other equally legitimate ways, not included in the guidelines, by which a designer or developer can demonstrate that the objectives can be satisfied. *Merit through performance (and not simply the setting of, and adherence to, rules) is the way ahead.*" (Appellant's emphasis).
5. Although some of the material in this publication has been superseded by later amendments to legislation, the Darwin Town Plan retains the format described, ie, there are stated objectives for each zone and control clause.
6. So, applying this approach to the proposal, the Appellant says that the objectives set out the desired outcomes, and the applicant demonstrated that the proposal performed against the objectives. The reference to a lot size of 800 m² in clause 16.1 is a guide, not a prescription, as to how the objectives of that clause may be achieved.

7. In support of its position, the Authority argues that because it is possible to demonstrate that a dwelling can be accommodated on an allotment of any "useable" size and comply with the objectives, "the use of a minimum size within the same clause as the Objectives would be meaningless."
8. In response to this argument, the Appellant says, first, that on this reasoning, it could equally be asserted that if mention of a lot size were to be paramount, the specification of objectives would be meaningless. When it is viewed as a guide to indicate one way of achieving the objectives of the clause, the nominated lot size is not meaningless.
9. Secondly, if the Authority thinks it is a defect of the Darwin Town Plan that it is possible to demonstrate that a dwelling can be accommodated on an allotment of any "useable" size and comply with the objectives, this is an argument for amending the Darwin Town Plan to secure whatever outcomes the Authority considers are not being delivered by the current provisions. It is not a justification for withholding consent to proposals that achieve the objectives as they stand currently.
10. The Authority also says that it is "informed" by clause 15.0A. It argues that achievement of the objectives should not form the sole basis for variations to lot size because this would negate the need for a minimum lot size in the plan, and the inclusion of the R0 zone would make no sense. See p 2, p 3. Clause 15.0A relates to the R0 zone.
11. In response to this argument, the Appellant says that the application dealt with not only the objectives of clause 16.1 but also with all matters listed in s 51 of the Planning Act. As noted in the Appellant's s 128(1) submission, the report of Development Assessment Services to the Authority's meeting on 4 December 2002 could identify no item in s 51 under which the application failed. The Authority's assessment of the application against s 51 will be dealt with later in this statement.
12. The Appellant also says that the R0 zone has no relevance to the proposal. First, the appeal site is zoned R1 and not R0. Secondly, as the Authority notes, the R0 zone applies only to new estates, whereas the appeal site is within an established area of mixed zones.
13. Finally, the fact that the R0 zone allows lots less than 800 m² does not remove or fetter the discretion to allow such lots in the R1 zone, or impose any test of "particular" or "special" merit. There has been no amendment to any of the relevant provisions of the R1 zone since the R0 zone was introduced in November 1998. So, the Appellant submits that there is no basis for the Authority to conclude that the presence of the R0 zone has altered the basis upon which lots less than 800 m² may be permitted in the R1 zone.
14. Regarding the Authority's contention that the applicant is required to demonstrate "particular" or "special" merit, or "compelling justification" (p 5 of Authority's s 128(2) submission), the Appellant says it is not open to the Authority to impose tests beyond those imposed by the Planning Act.
15. The Appellant says that the application dealt with the merits of the proposal by considering those matters set out in ss 46 and 51 of the Planning Act. The Appellant says that the word "merits" has the meaning normally ascribed to it in legislation, ie, the rights and wrongs of the case, or as defined in *Osborne's*

Concise Law Dictionary : the real matters in question as opposed to technicalities. The NT Planning Appeals Tribunal adopted a similar approach in *Jarver*, where it set out the positive and negative attributes of the proposal.

16. It is noted that the Authority's decision does not rely on any failure of the application to meet any of the matters in ss 46 or 51. The Appellant requests the Tribunal to reject the Authority's submissions that the application fails for lack of "particular" or "special" merit or "compelling justification" for both want of legal authority and failure to cite any matter in ss 46 or 51 in its reasons for decision.

SECTION 51 MATTERS

17. As noted in the Appellant's s 128(1) submission, the report from Development Assessment Services to the Authority did not identify any matter in s 51 under which the application should fail, and recommended in favour of the application. There was also no reference to any s 51 matter in the Authority's reason for decision.
18. In previous appeal decisions the Tribunal has said that the grounds of refusal constrain the decision it must make. See *Robinson v DCA*, *David v DCA*, *TMP Builders Pty Ltd v DCA*. Despite this, the Authority's s 128(2) submission raises various s 51 matters in opposition to the proposal. On the Tribunal's rulings in these decisions, matters raised in opposition to a proposal which were not part of the grounds of refusal are not to be considered.
19. The Authority's submissions under paragraphs (a) and (h) of s 51, in which it is asserted that the application does not present compelling justification or special merit, have already been answered as they are also raised in answer to the Grounds of Appeal.
20. Under paragraph (n) of s 51, the Authority asserts that the proposal will have a negative effect on the amenity of the area by creating a residential allotment smaller than those in the area. Although not required to respond to this because of its not specifically forming part of the reasons for decision, the Appellant submits that the Authority's conclusion is not credible. First, according to the Authority's information at p 9, it approved subdivision of Lot 1794 into two lots, the dimensions of which are given as 16 m by 42 m, giving site areas of 672 m².
21. The stated dimensions may be an error, but more significant are the reasons for the decision, especially the second reason. This reason states that the variation is granted because the proposal is not considered likely to alter the present character of the locality, which is characterised by lawful non-conforming uses and mixed zonings of R1, R2 and B4.
22. Lot 1794 lies opposite the appeal site, and is therefore part of the same locality. The Authority offers no explanation as to why the character of the area is favourable to subdivision of Lot 1794, but adverse to subdivision of the appeal site. It is noted that subdivision of Lot 1795, in the same locality, was also approved because it was considered unlikely to have an adverse impact on the amenity of the area.

23. In both cases, the lots were considered to meet the objectives of the R1 zone, and as noted elsewhere in the Appellant's submissions, the Authority does not dispute that the Appellant's proposal also meets these objectives.
24. Under paragraph (p) of s 51, the Authority asserts that erosion of the minimum lot size in the R1 zone in Parap "beyond reasonable variations" is not in the public interest. The Appellant does not wish to repeat its s 128(1) submissions, but notes that there is no explanation of why the proposal is not reasonable. Consequently, the Appellant says that whatever is in the mind of the Authority about what constitutes a reasonable variation cannot form the basis of refusal on public interest grounds.
25. The Applicant dealt with public interest in its response to submissions dated 3 December 2002 - see Annexure 3 of the Notice of Appeal. As stated there, the test of public interest, as articulated by the NT Planning Appeals Tribunal in *Jarver*, is that there must be evidence of actual detriment to the public interest.
26. In summary, the Appellant submits that the Authority has produced no credible argument against the proposal under any matter in s 51.

AUTHORITY'S CONSIDERATION OF THE APPLICATION

27. In the last paragraph on p 3 and at p 4 of the Authority's s 128(2) submission, the Authority rejects the Appellant's claim for reasons to be given as to why the proposed lot sizes are not reasonable. There follows a commentary about the purpose of the hearing.
28. The Appellant's claim for reasons to be given derives from the requirement in the Planning Act for the Authority to give a statement of reasons for its determination. Further, the Tribunal has said in *David v DCA* that the Authority has an obligation to supply reasoned and specific decisions. The Tribunal's criticism of the Authority's conduct on this point has not induced any improvement. Instead, the Authority appears to believe that supplying reasoned and specific decisions will somehow affect its ability to make the decision in camera.
29. The Appellant says that the obligation to supply reasons as to why the proposed lot sizes are not reasonable is unaffected by the Authority's understanding of the purpose of the hearing or how it is conducted.
30. The Appellant repeats its statement, made as the third ground of appeal, that there was no argument or evidence to contradict the proposition that the application demonstrated achievement of the objectives of clause 16.1. The Appellant's ground was not limited to argument or evidence advanced at the hearing, but extended to all material of which it was made aware up to and including the hearing.
31. The Appellants says that the Authority's s 128(2) submission indicates that it has no valid basis for refusing the application. The Authority's reason is void for lack of specificity, invalid for imposing tests not supported by the Planning Act, and invalid for lack of evidence on which the reason for refusal is based.

ORDER SOUGHT BY THE APPELLANT

32. The Appellant requests an order of the Tribunal as set out in its s 128(1) submission.

JUNE D'ROZARIO

Agent for the Appellant

21. On 3 April 2003 the Tribunal received the Respondent's submissions in reply dated 3 April 2003 ("Respondent's submissions in reply").

Those submissions are set out below:

SUBMISSION (PURSUANT TO SECTION 128(3) OF THE PLANNING ACT 1999) BY DEVELOPMENT CONSENT AUTHORITY TO LANDS AND MINING TRIBUNAL IN REPLY TO A SUBMISSION (S.128(1)) BY THE APPELLANT IN RELATION TO DEVELOPMENT PERMIT DP02/0526 DATED 23 DECEMBER 2002.

The following comments are made by the Development Consent Authority (the Authority) with regard to the with regard to the appellant's submission (lodged pursuant to section 128(1) of the *Planning Act 1999*).

- 1.1 The appellant submits (para 17) that it is the responsibility of the DCA to identify in its reasons for granting a permit varied from that applied for by the applicant, the manner in which the variation of the minimum lot size is "unreasonable".
- 1.2 In using the term "unreasonable" the DCA does not intimate "... there is a threshold at which a reduced lot size is considered reasonable..." (Para 22).
- 1.3 This argument suggests that in exercising its discretion the DCA should have a stated policy that establishes beyond doubt a minimum lot size; and it would be the applicant's subsequent contention, that such a policy be based on objective criteria.
- 1.4 To adopt a policy that specifies an ultimate minimum would in effect be an alteration of the controls that exist under the Planning Scheme as opposed to being of the nature of clarification of (say) expectations of building design. Policy cannot alter the control provisions of the Scheme as the applicant correctly points out at para 25.
- 1.5 The fact that the DCA has not adopted a policy does not of itself mean anything in favour of the applicant and does not absolve the applicant from justifying the merits of a proposed departure from a minimum lot size described in the Planning Scheme (ie 800m²). It is noted the applicant's statement in support of the application responding to sections 46(3) (d) and 51 (h) states only the land is suitable for infill development and that subsequent development could conform to the objective of clause 16.1. The applicant does not advance any reason supporting the reduced lot sizes proposed; nor did the applicant do so at the hearing.

- 1.6 In not adopting a policy that establishes a minimum lot size (other than that established by the Planning Scheme) the DCA must, as required by the Act, determine the application on its merits on the basis of the information available to it at the time.
- 1.7 The DCA relies upon the provisions of the Planning Scheme ie the Zone (R1) Objective and Clause (16.1) Objective.
- 1.8 It is the applicant's contention that, in the absence of anything to the contrary in the Planning Scheme or a policy of the DCA, all that is necessary is to demonstrate that it is possible to meet the objective for the DCA to exercise its discretion in the applicant's favour. The DCA notes that the objective is also satisfied (and more readily so) by allotments meeting the minimum size specified in the Planning Scheme "that is 800m²".
- 1.9 It is possible to distinguish this application from other approvals of lots of areas less than the specified minimum (ie 800m²) as it is possible to subdivide the subject land and create lots that meet the specified minimum; a fact the applicant consistently ignores.
- 1.10 The DCA contends there is nothing in the application that justifies a reduction in the lot size and the decision not to vary the lot size is not arbitrary, as asserted by the applicant, but merely expressing a preference for the minimum lot size specified by the Scheme.
- 1.11 Contrary to the applicant's assertions (paras 24 and 29 particularly) there is no policy and the persistent argument of the applicant based on the absence or withholding of a policy does nothing to advance the merits of the application.
- 2 At para 30 the applicant proposes that the DCA's decision is invalid "... because it strongly implies that the 800m² lot size is mandatory." The evidence for this allegation is unknown because it has never been the assertion of the DCA and is not evident in the wording of Reason 1; in fact quite the contrary. Given the very many occasions where it has exercised discretion in relation to clause 16.1; the applicant's allegation is demonstrably wrong and an apparent attempt to manufacture an argument in support of the appeal.
- 3.1 The applicant's third ground of appeal; ie that the application demonstrated the subdivision as proposed met the objective of clause 16.1 is of no consequence as it was not a basis of the reasons of decision DP02/0526. Reason 2 of the decision merely states fact – that a two lot subdivision, each lot having a minimum area of 800m² would comply with the objective.
- 3.2 It is noted the applicant asserts that it was demonstrated subsequent development for detached dwellings would conform to the objectives. That may be true of the designs indicated in the application but not necessarily true of all designs that could, without the further consent of the DCA be constructed on the lots. Although not a basis for its decision it is worth noting for the record that a detached dwelling that conforms with all the requirements of the Scheme may nonetheless achieve a variation to setbacks under the Building Regulations and by combination of poor design and/ or setback modification not achieve the objective of clause 16.1
- 3.3 At para 32 the appellant ignores the fact that the specific mention of an 800m² minimum lot size under clause 16.1 is to set a minimum beneath which lots

should not be developed unless the proposal has particular merits, not merely because it is possible. Otherwise the inclusion of an R0 zone would make no sense as it provides a means of developing lots smaller than 800m².

- 4 At para 37 and onward the appellant seeks to place some reliance of the DAS officer's report citing comments relating to amenity and the overall configuration of allotments in the area. The DCA contends that, notwithstanding the officer's report, it is unreasonable in the absence of any justification for a reduction in the minimum lot size, to grant a variation to that minimum of the nature proposed, particularly when the objective of clause 16.1 and the Zone can be achieved by subdividing with lots that conform to the lot size criteria.
5. In the appellant's submission to the Development Consent Authority addressing paragraph (n) of the matters under section 51 of the *Planning Act* 1999, the applicant states "The land adjoins the OTC site, which, according to the Proposed LUOs, is unlikely to become available for development. Consequently, the OTC site will remain its relatively open character for the foreseeable future." This statement is false as the Proposed Planning Concepts identify the OTC to be developed for future "low to medium-rise medium density residential accommodation".

JOHN PINNEY

Chairman

Development Consent Authority

THE VIEW

22. On 8 April 2003 the Tribunal conducted a formal view of the site. The Appellant, Respondent and all registered objectors were invited to attend. The following parties were present at the view:-
 - Mr Bob Elix, a member of the Darwin Division. and Mr Mark Meldrum, Manager Urban Planning, for the Respondent;
 - Ms June D'Rozario; for the Appellant;
 - Mrs Sue Dengate, a registered objector;
 - Dr Howard Dengate, a registered objector;
 - Viola Prichard, a registered objector.
23. At the view the Respondent was asked for, and did subsequently provide to the Tribunal, the following:
 - (a) a copy of the proposed Darwin Southern Suburbs Planning

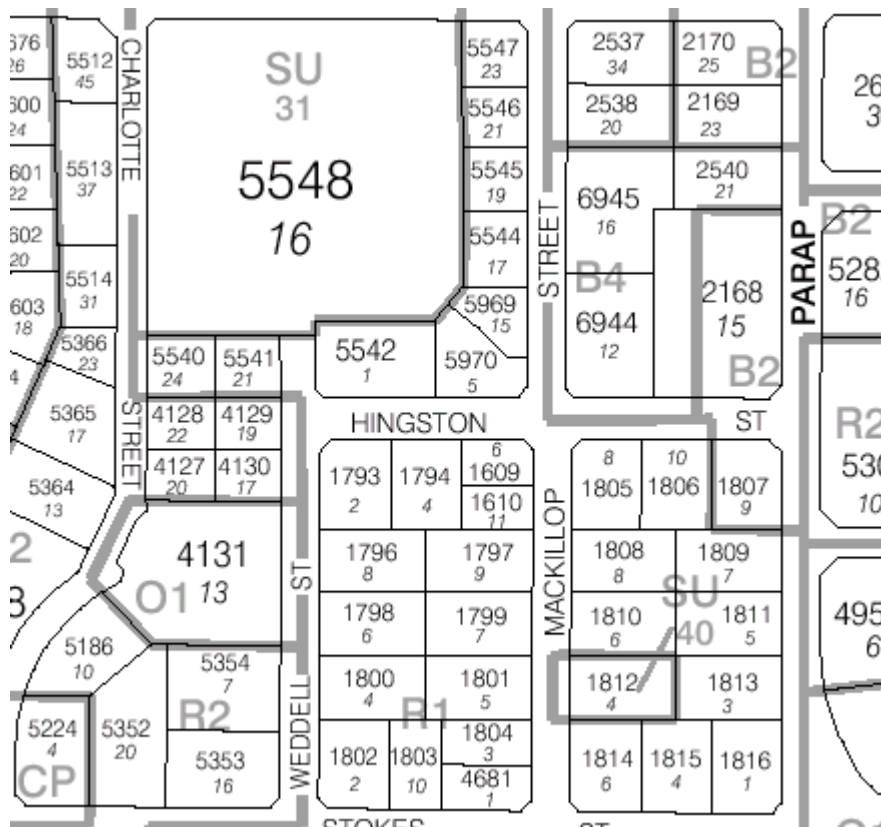
Concepts and Land Use Objectives 2002;

(b) copies of Development Permits and a Notice of Refusal for subdivision of land in Parap with lots less than 800 m²;

(c) a list of objectors and a map showing where they live in relation to the site;

(d) a subdivisional plan of the original OTC subdivision which reflects the existence of a public road adjoining or intersecting with Weddell Street and being contiguous with the western-most proposed subdivisional boundary.

24. The Tribunal also obtained from the Information Services Division of Department of Infrastructure, Planning and Environment a map extract showing the relevant area. That extract is set out below:



25. The following relevant matters arising from the view are recorded since they play some part in the Tribunal's decision:-

(a) Between the proposed Subdivision-3 and Lot 5970 owned by the objectors, Mr Coates and Ms Gustin ("the Coates property"), there is proposed in conformity with the relevant objectives and building by-laws a distance between the eastern wall of the dwelling it is proposed to erect on subdivision-3 and the boundary of the Coates' property a distance of 1.5 metres. It was pointed out that in respect of the Coates property the Coates' dwelling was some 5 to 6 metres at least east of the existing boundary and that the dividing boundary was the repository for quite high groups of dense vegetation, mainly palms and stacked palm fronds.

(b) Apart from a peculiarity occasioned by the public road situated on the western side of the proposed parent block, and then only at the southern end, the 3 proposed subdivisions were of a uniform width of 19 metres and a uniform depth of 37 metres.

(c) It was also revealed that in the block of land that is the block of land bounded by Hingston Street, Weddell Street, Stokes Street and Mackillop Street, and apparent from the map extract shown in this decision at paragraph 24, there had been 5 applications to allow subdivision of land less than 800 m² in extent and all being subdivisions in the R1 zone, namely:-

- Lot 1794 (4 Hingston Street) into 2 lots of 715 m², consent being provided 21 May 2002, which subdivision is literally over the road from the land the subject of this appeal. The Statement of Reasons for determination are:-

1. The size and shape of the proposed lots are considered to be suitable for residential purposes.

2. A variation to clause 16.1 (Minimum Lot Size in Zone R1) of the Darwin town Plan 1990 (as amended) is granted because the proposal is not considered likely to alter the present character of the locality, which is characterised by lawful non-conforming uses and mixed zonings of R1 (Residential 1), R2 (Residential 2) and B4 (Business).

It is noteworthy that no comment was made on the fact that the subdivisions would be 85 m² less than the 800 m² applicable unless consent be given pursuant to clause 16.1 of the development controls referred to hereafter. It is also significant to note particularly the 2nd reason which is an acceptance of the fact that this area may be technically specified as R1, but as a matter of reality is an area comprising very mixed zonings and or activities.

- Lot 1795 (6 Hingston Street) to the east but contiguous with the above Lot, was for subdivision into 2 lots. One lot was 712 m² and the other 707 m², self-evidently in each case substantially less than 800 m², and in fact the smallest area of the subdivisions permitted by the Respondent in respect of such application. In respect of that application granted 23 December 1998, the Reasons for allowing the subdivision are as follows:

- 1. The proposed subdivision is considered to meet all the objectives of the R1 zone.*
- 2. The proposal is not considered likely to have an adverse impact on the present or future amenity of the surrounding area.*
- 3. The proposed subdivision is identical to one previously approved by the Authority on the same lot.*

Presumably the reason for applying for a fresh development permit was the fact that its validity had expired. The Tribunal infers that the reasons given for the earlier, but not acted upon subdivision, were also identical to the reasons given in relation to this proposal. Again it is noteworthy that there is no comment on the size of the allotment and again, positively, it is considered unlikely to have an adverse impact on “*the present or future amenity of the surrounding area*”.

- Lot 1797 (9 Mackillop Street) being for subdivision into 2 lots, each having an area of 766 m². In relation to this application granted 19 February 2002, the Reasons for allowing the subdivision are as follows:

- 1. The variation of less than 5% to the minimum lot size requirements of the Darwin Town Plan is considered to be acceptable.*
- 2. The proposed parcels are considered capable of accommodating a detached dwelling and comply with the objective of the R1 zone, to accommodate primarily detached dwelling at low densities o individual allotments.*

From this Statement of Reasons obviously it is possible to infer that variation of less than 5% is acceptable to the Respondent. What is “not acceptable” is a live issue in relation to the current appeal.

- Lot 1802 (2 Weddell Street) is an application in respect of the corner property on the corner of Weddell and Stokes Street. It abuts at its rear the Para Vista Motel and on its northern side a block of flats. Both of the above uses were previous non-conforming usages. On the southern side of Stokes Street is a Masonic Temple. To the western side of Weddell Street is land which is zoned R2. This application was refused on 28 April 1999. The Reason given is:-

- 1. The proposal does not comply with the minimum lot sizes for R1 blocks.*

That, one might have thought, was painfully evident. The application being for the consent of the Authority to a reduction below the 800 m² prescribed as the minimum size without consent of the Authority. Mr Meldrum advised that there was no appeal lodged in respect of this decision.

26. In relation to subdivisions of less than 800 m², there is precedent in the sense of allowing 3 such subdivisions at set out above. In respect of Lot 1802 which was disallowed, it is this Tribunal’s observation that allowing that subdivision would have constituted the least possible infringement of any amenity. It would seem to have been most

readily amenable to being granted by way of exception. In the event, though, the reason given does not lend itself to any useful criterion and nothing of any benefit either adversely or otherwise is capable of being derived from the so-called reason. There was no appeal and the fact remains it was refused.

27. There are said to be some 17 “submissions received” in opposition to the subdivision of the application and the Tribunal is indebted to Mr Meldrum for transposing onto a subdivisional plan provided to the Tribunal the location of those objectors. Five of those objectors are residents who live on residential properties to the north of Gregory Street and in one instance abutting Lampe Street. Apart from philosophical views, the actual development being allowed or otherwise would not impact upon any of those owners. There is an objector residing in the property on the corner of Leichhardt Crescent and Gregory Street in the same category.
28. There are 8 objectors who occupy residential properties more closely adjoining the block bordered by Hingston, Mackillop, Weddell and Stokes Streets, but in fact there are only 4 whose residences are either contiguous to or separated from the proposal by residential blocks, the latter being actually bordering on Hingston Street but not being objectors at all.
29. The Tribunal also received and expresses its thanks to the Respondent for supplying same, a subdivisional plan of the OTC subdivision of which the current block is the subject of this appeal. As suspected by the Tribunal, the land immediately to the west of the existing Lot 5542 is in fact a public road, although it does not seem to bear a name. The creation of that road was part of the permitted subdivision which allowed the then registered owners, Overseas Telecommunications Commission, to create Lots from some part of

the property owned by it. That is an important revelation because what it does it give to the most easterly of the proposed subdivisions is road frontage for approximately 25 metres in extent.

30. Although advised that no comment was required at the view, it is notable to record that Mr Elix on behalf of the Respondent stated, prior to being interrupted by the Tribunal for reason of lack of conformity with the philosophies governing a view, that it had been the decision of the Respondent that the size of the proposed subdivisional allotments attracted the Respondent's refusal because each of them was "*too small*". At the view, the Chairperson asked Mr Elix what consideration had been given to the Objectives as set in Clause 16.1 of the Darwin Town Plan. Mr Elix stated that he had no knowledge of the content of the objective criteria referred to.

TRIBUNAL'S COMMENTS AND FINDINGS

31. It seems consensual that the only objectively relevant provision of the Darwin Town Plan having application in this matter is Clause 16.1 and for reason of convenience the Tribunal sets out in its entirety that clause:-

DIVISION 1 - MINIMUM ALLOTMENT SIZES

16.0 DEVELOPMENT CONTROLS

16.1 Minimum Lot Size in Zone R1

The objective of this clause is to ensure that allotments created primarily for **detached dwellings** will be of a size capable of affording proper orientation of the building having regard to climatic considerations, to provide suitable setbacks to adjoining allotments and afford opportunities to create adequate private open space.

Except with the consent of the Authority, land within zone R1 shall not be subdivided into allotments having an area of less than 800 square metres.

32. For the sake of completeness in this decision, however, the provisions of Clause 15.1 of the Darwin Town Plan are also set out:-

15.1 ZONE R1 (RESIDENTIAL)

Objective: To accommodate primarily **detached dwellings** at low densities on individual allotments.

Policy: Non-residential activities should be limited to those the predominant function of which is to service the local neighbourhood, if the activity will have no detrimental effect.

NOTE: The provisions of clause 16.1 refer to subdivision allotment sizes in this zone.

33. The only inference to be drawn from the Respondent's Reasons for the constructive refusal of the application is that there is no failure on the part of the Appellant to meet the objectives set out in Clause 16.1. That is it must have considered that the proposed subdivisions would each **be of a size** [Tribunal's emphasis]:-
- capable of affording proper orientation of the building having regard to climatic considerations
 - to provide suitable set backs to adjoining allotments
 - to afford opportunities to create adequate private open space.
34. From the Minutes of the Respondent's meeting on 4 December 2002, it is apparent that although that Ms D'Rozario, for the applicant, and Mrs van Den Neuwhenof, for the Parap Residents Association, made several statements at the meeting, there is no record in the Minutes that at any stage the Respondent or any of its constituent officers suggested that the proposed subdivision of the allotment was too small; that the DAS recommendation was to be ignored for some stated reason; that special justification was necessary to be established for favourable consideration; that there was an onus on the appellant to establish special merit; or, finally, an indication of what was considered reasonable by way of area for a proposed subdivision that in all respects met the criteria, i.e. the objective criteria of Clause 16.1 referred to above.

Consent Use

35. Although dealt with in other Tribunal decisions, the Tribunal wishes to ensure that the issue of the Respondent's consent is a matter which is properly addressed. For that reason it is in the Tribunal's finding appropriate to refer to its decision in the matter of *David v DCA* NT LMT-54-2002-P, 18 July 2002 ("*David v DCA*"). Paragraph 51 of that decision is set out below:-

51. A vitally important aspect of this matter is to categorise what philosophically a "consent use" entails. The Tribunal concurs with and adopts the submission set out at paragraph 2.8 to 2.10 of the appellants' 128(3) submissions and specifically to the authorities that are quoted.

For ease of comprehension, paragraphs 2.8 to 2.10 of the appellants' 128(3) submissions referred to in that paragraph are also set out:-

2.1 It is evident that the Authority characterises the proposed development as an industrial use - see, for example, p 3 - first two dot points; p 6 last paragraph under Development Provisions, in the Authority's submission.

2.2 This characterisation has then lead the Authority to the conclusion, without further analysis, that the proposal will have an adverse effect on rural residential amenity. This reasoning is summarised in the statement at p 6 last paragraph under Development Provisions : "However, a tropical fruit winery is an industrial land use, *and as such* (Appellants' emphasis) will have an adverse impact on the rural residential amenity of the surrounding area. As one of the objectives for the RL1 zone is to maintain rural residential amenity, the development does not comply with the development provisions....".

2.3 The Authority has decided that the proposed development is an industrial use, that industrial uses necessarily and invariably have an adverse impact on amenity, and therefore the proposed development does not comply with the development provisions.

2.4 This approach is illogical. The proposed development is rural industry, as that term is defined in the Litchfield Area Plan. That much is conceded by the Authority. Rural industry is the only type of defined industry that is permissible in the RL1 zone. Light industry, general industry, extractive industry, and offensive or hazardous industry are all specifically defined in the Litchfield Area Plan, and all these are prohibited in the RL1 zone.

2,5 It is reasonable to conclude that rural industry is a specific subclass of "industry", a term which is also defined in the Plan, and that the purpose of the specific definition is to enable the activities comprehended in it to be treated differently from other types of industry. If it were otherwise, rural industry would be included in one of the other definitions.

2.6 Rural industry is a consent use in the RL1 zone, and all other defined types of industry are prohibited. So, it is reasonable to conclude that rural industry is acceptable in the RL1 zone in certain circumstances, but all other types of industry are deemed to be incompatible with rural residential development.

2.7 The comments at p 6 of the Authority's submission give rise to an impression that the Authority is quick to characterise the proposal as an industrial use to support its contention that adverse impact on amenity necessarily flows from an industrial use.

2.8 The Appellants say that this is tantamount to regarding the proposed development as primarily prohibited, and that there is a presumption against the proposal. The Appellants say that the appropriate approach is that described by the courts in Kouflidis and ors v City of Salisbury 49 LGRA 17 and Hickinbotham Blue Gum v City of Campbelltown 46 LGRA 268.

2.9 In Kouflidis the Supreme Court of South Australia said at 21 : "*It is an error, in my opinion, to approach the question whether consent should be given upon the basis that there is a presumption against the consent use. An application for consent should be considered, without the burden of presumption either way, having regard to all relevant matters in the light of the specific planning criteria indicated in s 27(6) of the Act.*".

2.10 In Hickinbotham the Supreme Court of South Australia said at 278 : "*[W]ithin a particular zone, some uses are clearly permitted and some are clearly prohibited. In between, there is a whole range of uses which are thought not to be capable of such clear cut demarcation. It is therefore left to the appropriate planning authority to determine in each particular case whether such a use will, or will not, be permitted. That calls upon the planning authority to examine each application upon its merits, and to apply the relevant planning criteria in the exercise of its judgment and discretion.*"

36. The *David v DCA* decision continues:

52. Further, the matter or the issue of consent use was considered in the matter of the City of Mitcham v Freckman & Ors No SCGRG-98-1399 Judgment No S234 [1999] SASC 234 (20 July 1999). This was a decision of the Full Court of the Supreme Court of South Australia, comprised of Doyle CJ, Duggan and Debelle JJ. In that matter converse to the attitude of the respondent in this matter, the relevant planning authority commenced its reasoning from the point of presuming in favour of the proposal which related to a parking of a truck in a residential area. Their Honours said:-

As already mentioned, the ERD Court was wrong to make a presumption in favour of the proposal. It is also wrong to frame the question whether to grant or refuse development consent as one which requires a determination whether the proposal conflicts to a material degree with relevant provisions of the

Development Plan. The question whether the proposal conflicts with provisions of the Development Plan is part of the process of determining whether development consent should be granted or refused. But, if it is not possible to identify an express provision with which the proposal conflicts, it does not necessarily follow that the proposed development should be permitted to proceed. There might be factors which are implicit in the Plan which require a planning judgment to be made to refuse consent. For the reasons which follow, the proper approach is to consider the application on its merits, weigh the benefits and detriments by reference to the Development Plan, and then make a judgment whether to grant or refuse development consent. [Tribunal's underlining]

53. The respondent has not employed that exercise in reaching its decision. It has simply identified provisions of planning instruments which it then contends conflict with the proposal as indeed any rural industrial use must in that exercise do. That is an improper exercise in this Tribunal's perception.

54. Their Honours further state:-

Given that it is manifestly impossible to make provision in the Development Plan for every kind of development, the ultimate criterion by which a proposal might have to be judged is whether it is conducive to the desired character and amenity of the zone. The less conducive it is, the less likely that it might merit planning approval.

55. Their Honours then adopt the remarks of Jacobs J in District Council of Munno Para v Remove-All Rubbish Co Pty Ltd (1985) 41 SASR 188 at 201:

...where the Development Plan neither permits nor prohibits a particular development, the task of the planning authority is to weigh up the "pros" and "cons" with due regard to the guidance afforded by such of the general planning precepts and policies in the Plan as may be relevant. But to suppose that the "pros" and "cons" are in watertight compartments, or that they do not overlap, is to ignore the complexity of the subject matter and the competing elements which have to be weighed in deciding where the planning balance lies.

56. And their Honours stated further:-

It will be relatively easy in some cases to decide that the proposal is quite compatible with the amenity of the locality. In other cases, that test will be more difficult. It will be a question of fact and degree in every case, after weighing all relevant considerations, whether the proposed development should be approved. [Tribunal's underlining]

57. Their Honours adopt descriptions in other cases, that

the ultimate judgment as an exercise of an unfettered discretion by the planning authority to grant or refuse consent to the proposed development.

58. And adopt another decision by Jacobs J in Town of Walkerville v Adelaide Clinic Holdings Pty Ltd (1985) 38 SASR 161 at 173:

To say that the authority's discretion remains "unfettered" does not mean that the authority, having looked at and considered the Plan, can simply put it to one side and ignore it. The discretion is unfettered only in the sense that there is nothing in the Plan which is mandatory or necessarily compulsive; ultimately every planning decision rests upon a planning judgment on the particular case. But the discretion, though unfettered in that sense, must nevertheless - in accordance with well-established principle - be exercised not at large, but within the ambit, scope and purpose of the Act which confers it.

Ironically in that decision the criticism of the ERD Court was that it had simply ignored the objectors of the zone. In this particular matter it is this Tribunal's perception that the respondent has adopted the exact opposite approach and over-emphasised the objectives of the zone so as to ultimately contend the proposal to be unacceptable for reason that in itself it conflicts with those objectives and therefore should not be allowed for that reason.

37. The exercise to be embarked upon and constituting the valid exercise of the powers comprising the exception vesting in the Respondent and set out in Clause 16.1 of the Darwin Town Plan, is an exercise which in this Tribunal's finding must be conducted in precisely the same way as it behoves a decision making body to deal with a consent usage.
38. In the instant matter, to refuse to permit the subdivisions sought because to do so "*is beyond that considered reasonable by the Authority*" is a failure to adhere to the principles referred to above and, as in *David v DCA*, and in itself constitutes an improper exercise of the Respondent's discretion in the Tribunal's perception.

Breach of the rules of natural justice (procedural fairness)

39. The Tribunal abides by the Appellant's recitation of paragraph 18 of the *David v DCA* decision, referred to in the Appellant's submissions in reply. It is indeed in this Tribunal's finding a breach of the rules of natural justice to fail to provide reasoned decision in relation to an application submitted to it. Leaving aside further authority along the same lines, it is this Tribunal's position that a decision in

contravention of the rules of natural justice (procedural fairness) is a decision so tainted as to be invalid for that reason alone. In the interests of expedition and because the concluded reason is the assumption relating to lot size, the Tribunal will however proceed on the basis that its assumption is correct, notwithstanding the invalidity which probably attaches to the Respondent's Reasons for Decision as stated.

The submissions of the parties

40. Whether as contended in the Appellant's submissions, the Respondent has sought surreptitiously to introduce some unannounced unofficial policy justifying its actions, or whether for the first time it construes town planning prescriptions as mandatory (even though there is prescribed by such instruments a power to grant exception from the primary indicator), in either instance adoption of such criteria respectively is totally impermissible, arbitrary and unjustified.
41. The DAS report set out at paragraph 35 of the Appellant's submissions and thereafter, is particularly significant in relation to the Appellant's contentions.
42. Clearly in respect of every one of the objective criteria set out in Clause 16.1 of the Darwin Town Plan, the proposed development would comply. The said DAS report, apart from chronicling the compliance with a number of requirements and regulations concludes, as is set out in the said submissions:

the proposed subdivision is not expected to have a negative effect on the amenity of the area. The proposed allotments will have little impact on the overall allotment configuration and pattern of development in the area.
43. It is contended in the said submissions that the report prepared on the basis of some arithmetical error in area would not be affected by

the later discovered error. That is also the conclusion of this Tribunal. That view is reinforced by the fact that the plans were not in error in any way.

44. Furthermore, as previously held in *Robinson v DCA*, following upon the authority cited in paragraph 43 of the Appellant's submissions, the Respondent is obliged to give reasons as why positive recommendations by its own officers are to be rejected, which the Respondent has failed to do.
45. In the Respondent's submissions, it firstly adopts as some relevant criteria the provision of Zone Objectives relating to Zone RO. That is an incompetent exercise rejected by this Tribunal.
46. The Respondent contends in answer to the first ground of appeal, to allow subdivisions of less than 800 m² is not appropriate or permissible "*unless the proposal has particular merits*". That is rejected. It is the finding of this tribunal that is not incumbent on any applicant and certainly not the Appellant to "*advance particular merit*" prior to it being appropriate for the Respondent to allow departure from the minimum prescribed 800 m². It is in any event a breach of the rules of natural justice not to have made the claim, spurious as it is, that the application would fail unless there was demonstrated "particular merit".
47. The Tribunal also rejects the contention that the objectives can be accommodated "*on an allotment of any useable size*". Furthermore it is of no avail to suggest that a two lot subdivision is consistent with the specified objectives and requirements. So much is trite. Providing the objectives are met it would not have been possible for the Respondent to reject an application for a two lot subdivision. Such an application was never made.

48. In relation to the second ground of appeal, the Respondent contends that before there can be the granting of consent “*there should be some substantial argument as to why there is merit to such a variation [a lesser area than 800 m²]*”. That is an invalid contention and is found to be so by this Tribunal. The issue is not whether the statement of a minimum lot size has relevance, but upon what basis it is appropriate for the Respondent to provide its consent. There is no other issue. The same comment as set out in the last sentence to paragraph 41 is of application to this contention of “substantial argument”.
49. In the Respondent’s submissions, in its response to Ground of Appeal 3, the recitation of the Respondent’s assessment of what propriety, procedure, procedural fairness and the law dictates should be ventilated at the statutory hearing is alarming. The suggestion that the Respondent has some passive role and is not obliged to question the parties or reveal its concerns is disconcerting. The purpose of the Respondent’s hearing is to allow all parties concerned in the matter to be informed. If the Respondent has contentions or concerns which render the proposal either nugatory or non-conforming, it is incumbent upon the Respondent to ventilate those issues. It is incumbent on the Respondent to say why a positive DAS report is to be rejected. The notion that there is some power reposing in the Respondent to remain tightlipped and to fail to reveal reasons for rejecting an applicant which have never seen the light of day is not only spurious, but of great concern. As is also the case with the need to advance “particular merit” or “substantial argument” or “justification”. If in fact there is some contravention of a perception of size such that the proposed subdivisions are “too small” such an observation should be ventilated to allow comment.

50. The Respondent convenes to consider each application at a public meeting of those parties who are concerned. The concluding sentence of paragraph 3 of the Respondent's submissions is demonstrative, in the opinion of the Tribunal of misinterpretation or misconception on the part of the Respondent. First of all the phrase "*in camera*", a legal concept, seems to have been used with inaccurate knowledge of what that phrase in fact comprises. The phrase is, or its application is, in relation to curial proceedings. In the Northern Territory, section 61 of the *Justices Act* governs this provision. The Court may order the public to "*go and remain outside and beyond the hearing of the Court until required to give evidence*". It is not a philosophy or a legal concept which finds an application at all in relation to the consideration of a decision whether by a curial or an administrative body. To contend, as the Respondent does, that it is justified in having concealed disagreement with the DAS report, and concealed issues relating to "particular merit", "substantial argument", or "onus"; its lack of satisfaction with the matters elicited at the hearing or otherwise, on the basis that it was justified in so doing because its decision was a decision to be made "*in camera*" must be incorrect.
51. In relation to the section **Matters to be taken into Account** in the Respondent's submissions, quite properly it considers the Proposed Darwin South Suburbs Planning Concepts and Land Use Objectives 2002. However, having contemplated those provisions, they had to be weighed into the equation.
52. The Respondent's submissions in dealing with "any proposed amendments to the Planning Scheme" refer to the specified Planning Concepts and Land Use Objectives. Under the heading **Planning Concepts** there is reference to Figure 4 relating to the general area. A perusal of Figure 4 does not in the Tribunal's perception reveal any

comment being made in respect of the OTC at all. At page 5 of the Planning Concepts and Land Use Objectives, under the heading **Planning Context and Evaluation** and the sub-heading thereafter **Residential Development** the following comment appears:-

Initial community consultation identified the Overseas Telecommunication site (OTC) land in Gregory Street, Parap, as a possible redevelopment opportunity. However, the OTC land has not been included, as there is no suggestion that this site will become available for development.

53. This Tribunal was unable to ascertain where there is any identification of the OTC site in Parap being developed for “low to medium-high rise medium density residential accommodation”. Of course it is possible that the Tribunal has overlooked the location of such phrase although it seems unlikely in view of the quote. If it is the case that the Tribunal has correctly identified the lack of the existence of such alleged content of the said Land Use Objectives, it is more than unfortunate that such an error is recited on the occasion of the appeal.
54. As is now obvious, they have in any event been prospectively superseded by further changes. They must however be considered because of the provisions of section 51 PA and because they were relevant to consideration on the date of the hearing.

The objections

55. In relation to the recitation of the submissions made under section 49 PA as set out in the Respondent’s submissions, the Tribunal’s first comment is the 9 identical proforma objection submissions obviously ought be vested with less weight, for reason that they are the philosophies of the draftsman and were adopted but not conceived by the signatories.

56. The objections have been summarised by the Respondent in the Respondent's Submissions into "bullet points". Dealing with the bullet points seriatim:

- *the subdivision will increase the density well beyond that permitted by the current R1 zone and the minimum lot size should be preserved*: This overlooks the fact that there is express power to depart from the minimum lot size
- *potential adverse impacts on the amenity of the locality by increased traffic, noise and rubbish*; The DAS report concludes there will be no effective effect on the amenity of the area. With that view this Tribunal concurs.
- *the proposed lots are inappropriately orientated allotments for the hot humid climate*; This statement has no backing and is contrary to the qualified findings of the DAS report. It lacks merit.
- *there is no foreseeable benefit to existing residents from the subdivision*; There is no requirement of establishing benefit to existing residents and the ground of objection must be rejected.
- *lack of safeguards that would be expected from an integrated housing estate*; The same comments apply.
- *the proposal represents "ad hoc suburban densification" which is contrary to advice from the Department of Infrastructure, Planning and Environment on the development potential for the Darwin Southern Suburbs under the current zoning*; The objection is not capable of sensible comprehension and has no merit for that reason alone.

- clarification should be sought from the Lands and Mining Appeals Tribunal on the definitions of “new development” and “subdivision” to clarify the developer’s responsibility in contributing to the upgrade of services such as power, water, sewage and stormwater drainage; The objection is lacking in any obtainable or objective sense.
- *the subdivision goes against the “Old Darwin” feel of Parap;* The objection is not comprehensible.

57. Comments attributed to the staff of the Planning Branch of the Department of Infrastructure, Planning and Environment are irrelevant.
58. The Darwin City Council’s requests, as set out in the Respondents submissions, are not vested with the force of law.
59. It is surprising in this Tribunal’s perception to focus on a recitation which seems to be accurate under section (n) of the Respondent’s submissions, in relation to the section 51 criteria. The recitation of the surrounding area, blatantly in this Tribunal’s view, portrays an area which belies any true representation to be attributed to a typical R1 zoning. The area is an area in respect of which there are mixed usages and certainly many usages of a non-residential housing categorisation. The Billara Apartments and the businesses described are all very rarely found in R1 zonings, and if they are, generally, as is the case here, they are found on the periphery. This area also contains portions of R2 zoning, the Para Vista Motel and flats in Weddell Street, the last two of which represent prior nonconforming usages and a Masonic Temple; all of which developments do not classically occur in an R1 zoning. The Respondent’s conclusion that follows on the recitation of the makeup of the area is that it will *“have a negative effect on the amenity of the area* [against the positive

finding by DAS services] *by creating a residential allotment smaller than those in the area*". For reason of the mixed nature of actual area, the Tribunal would not entertain such an assertion as having any validity. It also conveniently overlooks that there is already allowed 3 subdivisions in the immediate area in respect of which the subdivisional allotments are smaller than the 800 m² area.

60. In any event it was never a stated reason for refusal that there would be a negative effect on the amenity of the area and for that reason alone it is not to stand as a reason for refusal. It is then perhaps mere size that is contended to constitute the negative effect on the amenity. That cannot be and is not in the finding of this Tribunal a sustainable conclusion. In any event there is no ground of stated refusal relating to any interference with any aspect of amenity and therefore for the purposes of deciding this appeal, the whole issue is utterly irrelevant.
61. An analysis of comparable (for reason of being less than 800 m² applications referred to and set out under the heading **The View** in this decision) applications granted by the Respondent, of which the decision in relation to Lot 1797 is perhaps the least cogent, represents recognition of the mixed area and of the lack of intrusion into amenity.
62. The "Reason" given in the relation to the Refusal to Lot 1802 is not worthy of any further comment, nor as a matter of reality is the "Reason" to be graced with that classification in any sense of the word.
63. In the event as a matter of logic and indeed arithmetic:-
 - 713 m² comprises 89.125% of the minimum lot size of 800 m²;
 - 703 m² is 87.875% of that size;

- 707 m² is 88.3% of that size;
 - The smallest of the proposed lots represents 86.25% of the said minimum lot size.
64. From an arithmetical and logical point of view the differences are so minimal in the perception of this Tribunal as to be irrelevant.
65. In relation to the section (p) of the Respondent's submissions, this simply poses the question. What does the Respondent regard as a reasonable variation? Is it 50 m² less than the prescribed minimum? Is it some other area? Where is the definition of what constitutes a reasonable variation to be found? It is possible to construe what has already been allowed by arithmetical computation. That indeed as analysed by the Appellant probably represents the true reason for the rejection (construed) of the application. It is untenable to maintain that contention. There is no statutory restriction as to what a reasonable variation is. The Respondent is vested with the power to except compliance. There are no stated criteria upon which such an exercise is to be completed. There is no stated policy. If there was a stated policy it could not be a justification for inflexibility for reason the policy must give way to the legislated criteria.
66. The Tribunal of course gains some comfort from the 2 most comparable decisions allowing subdivision of less than 800 m² – namely Lot 1794 and Lot 1795. If those permitted usages are indicative of what is considered reasonable then how does the infinitesimally lesser size of the subdivisions sought in the matter on appeal come to be classed as “beyond reasonable”.
67. Much more significant are the contentions under section (t) of the Respondent's submissions.

- The subdivision of Lot 1795 was to allow subdivision into 2 lots, 712 m² and 707 m², lots comparable with those that are sought in the instant application. Self-evidently as set out the subdivision it met all the objectives of the R1 zone; it was not considered likely to have an adverse impact on the amenity and apparently was identical to a previously approved application. Is it contended by the Respondent that the difference between the area of the proposed lots 2 and 3 in the instant application, namely 703 m², is so vastly different from 707 m² that all of the reasons for the decision in relation to Lot 1795 are to be completely disregarded as having any application in relation to the instant matter? Hardly a logical deduction. It warrants a negative answer.
- Quite what the previously allowed “identical” subdivision was which was utilised as precedent, this Tribunal is mystified to ascertain. Lot 1797 concerned Lots of 766 m². Hardly identical.
- In respect of Lot 1794 the area of the subdivisions allowed is 715 m². The size difference in area could hardly be justification for refusing the instant application. In that application it was because the size and shape of the proposed Lots were suitable that it was allowed as a first ground. The second ground is the one which most cogently, in this Tribunal’s finding, ought to have been a paramount if not the paramount consideration in relation to the instant matter. It is the very mixed nature of the area which does not justify it being treated as a typically R1 zoned area devoid of any form of commercial, townhouse or flat development.

- Lot 1802 Weddell Street was refused on a basis which in this Tribunal's perception is inappropriate. Anyone would have been aware that 713 m² was less than the minimum size. That ought not in logic or in law ought ever have been a sustained or allowable ground of rejection. Presumably there was no appeal but whether that is so or not, the reason given is simply not valid.
- Lot 3913 Nudl Street if anything would seem to provide cogent reason demonstrating the artificiality and lack of validity for the reason given in the instant application. The conclusion does not bear consideration.

68. Although the summary of the objections contained in the Respondent's submissions has been traversed, it is important in this Tribunal's perception to try and remove a seemingly universally misconstrued perception. There may have been an argument that subdivision of less than 800 m² should not be permitted. That may also have general community consensus. The fact of the matter is that the remedy in relation to the matter lies with the appropriate authorities. It is otherwise the case that consent must be given or refused in accordance with the philosophies set out under the heading **Consent Use**, previously in this decision.
69. There is power reposing in the Respondent and therefore this Tribunal to allow subdivision of less than the prescribed minimum size. There are no specified criteria and consequently the discretion is untrammelled.
70. It is not permissible for the Respondent to uphold or to perpetuate or encourage the belief that there is a prohibition of a creation of subdivisional allotments of less than 800 m². That is not the case. Providing the proposed size of the block otherwise allows conformity

with all proper planning considerations, and providing that the proposal at large does not in fact infringe or contravene established planning philosophies, the consent should not be withheld. Even if on retrospective consideration, it may have contravened some unstated reason for refusal (i.e. a statement fictionally made upon refusal of the application), it cannot now be the subject of refuge as justification for the respondent's decision to refuse the application.

71. It is not in the power of the Respondent to be capricious in this respect. It is not in the power of the Respondent, no matter how fervent or impassioned the entreaties might be, to treat Clause 16.1 of the Darwin Town Plan as a prohibitory clause.
72. It is certainly not a power reposing in this Tribunal to define or clarify the distinction between "a subdivision" as opposed to "a new development" .
73. The Parap Residents Association would be more effectively engaged in lobbying those who have the power to change that which, whilst unchanged, must be the arbiter of what is to be allowed. It is not a power reposing in the Respondent or this Tribunal to ignore the specified legislative requirements which are in place to govern the exercise of each of the respective bodies in their powers relating to planning considerations.
74. With the application for the development permit on 24 October 2002 the Appellant submitted Ground and Site Plans which reflect quite clearly the envisaged construction to take place in the event of the subdivisional application into 3 lots being allowed. The purpose of mentioning this particular feature of the application is because of the objection by Pelican Design, which is subscribed by two qualified architects. By virtue of professional qualifications, it is surprising that they in keeping with many lay people who have objected seem to have

over-looked the fact that there is express provision for compromising on minimum lot sizes. That of course cannot be ignored as already stated. More pertinently given the designs of the proposed structures, it is at least unfortunate that specificity is not resorted to in the objection formulated by Pelican Design, but dealing nevertheless with the unqualified comments contained in the objection:

1. Breezes blocked by adjacent dwellings:

This lacks validity entirely;

2. Limited space to orientate buildings to provide minimum sun penetration and maximum breezes:

Given the development as set out it is not a matter for conjecture. It is a matter of concern that such an allegation is made without qualifying it in relation to the designs that form part of the application. From an unqualified perspective, the contention by the objector has no validity;

3. Garden space is inadequate to allow planting of trees that will provide shade to buildings:

That is manifestly untenable;

4. Noise:

The comment is both cryptic, unqualified and incapable of response.

75. Presumably the first sentence that follows on the 4th numbered objection viz: *“Providing houses that are able to be opened up for use without artificial cooling would not be suitable because of these problems”*. omits a negative. Again, given that the actual contemplated development is specified the comment or objection is beyond remarkable.

76. If the objection is a contention that only elevated tropical type homes should be allowed to avoid generation of greenhouse gas, the contention is risible.
77. It is palpably untenable to suggest that because a proposed subdivisional area is approximately 100 m² less than the prescribed minimum, that alone causes the manifestation of a multiplicity of problems that would not exist if the subdivisional area was 800 m².

Authorities cited

78. In relation to the traversing of the residents' submissions, the Tribunal highlights and adopts the essence of the Planning Appeals Tribunal in *Jarver v NT Planning Authority PAT27* ("*Jarver*"). This was an appeal against a refusal of the relevant authority to consent to subdivision into 2 lots of 653 m² and 657 m² respectively.
79. The relevant prescribed lot size was 800 m². The Authority in *Jarver* rejected the application on the grounds that "*the proposed subdivision would result in allotments less than 800 m², the minimum lot size as specified in the Darwin Town Plan, and is inconsistent with lot sizes in the surrounding area*".

There was much correspondence which for the purposes of this decision does not require recitation. A subsequent application was refused on the following grounds:

"(i) the size of the resultant allotments will be 18% below that required for R1 allotments; and
(ii) approval of the subdivision will create inappropriate lot sizes in the area."

They appealed.

80. The thrust of the Appellant's case on appeal in *Jarver* was that the objectives, not the lot size provisions, were the most important if not the paramount criteria to test whether the subdivision met the objectives of the lot size provisions. It was argued further that the specification of the lot size in Clause 16.1 of the Darwin Town Plan was nothing more than a guideline. It is interesting to note in passing that consideration of the RO zone in any way to guide the decision of the Authority was rejected as invalid. That is also the stated view of this Tribunal. The Planning Appeals Tribunal held *"the positive attributes of the Subject Application overwhelmingly outweigh its negative attributes; and ... in particular the subject application is consistent with the stated objective of Clause 16.1 of the R1 zone under Town Plan."* That is also the view of this Tribunal.

81. In relation to any "onus of proof" in *Jarver*, as they had in another appeal (*Morelli*) the Tribunal found there was no onus of proof borne by the Appellant. Support was derived from a passage from *Gifford* (*Gifford & Gifford, Town Planning Law & Practice*), a portion of which is in the following terms:

The planning appeal body, it is submitted, must arrive at its decision taking into account all relevant matters but doing so on the basis of the public interest involved rather than on an application of any onus of proof. There is a strong line of judicial decisions holding that that is indeed the position in point of law.

82. This Tribunal believes that the statement of the law in relation to onus is of equal application to the decision of the primary body namely the Respondent in this matter. Neither at that time nor now does the Appellant bear any onus such as contended to establish special merit or justification.

83. In *City Developments Pty Ltd v Northern Territory Planning Authority* No 1 of 1993, PAC 206 21 December 1993, ("*CDPL*"), the issue was an appeal against a refusal to allow subdivision of Lot 1905 Westralia

Street Town of Darwin to create 2 subdivisions. The stated Reason for the Refusal of the application by the Authority in that matter was “*the proposed subdivision would result in allotments less than 800 m², the minimum lot size as specified in the Darwin town Plan, and is inconsistent with lot sizes in the surrounding area*”. The land in CDPL was in zone R1 and the applicable clause was 16.1 of the Darwin Town Plan. The Northern Territory Planning Appeals Committee (“PAC”) recited that in *Makrylos v Northern Territory Planning Authority* PAC No 1 of 1992, it had been there decided that: “*the overriding consideration is the planning objective – in this instance the planning objective as contained in paragraph 1 of the clause 16.1 of the plan ...*
The benchmark area – in this instance 800m² – is of secondary importance” [this Tribunal’s underlining]. The PAC in fact found, as is indeed the case with the instant appeal, that in relation to meeting the objectives the proposal in that case met each of the objectives.

84. If there was a code or a policy which of course is not asserted by the respondents in this appeal, to the effect that a reasonable size was some unknown figure below which there would not be subdivision allowed even if the objective criteria was met, it could not prevail over the Clause. Even so the existence of such a code or policy as is apparent from *Bascombe Holdings Pty Ltd v Northern Territory Planning Authority*, 16 February 1998 does not entitle the decision maker to treat the code or policy as binding. No further mention is made of *Bascombe*’s case because the fact of the matter is that if there is a policy the existence of such a policy is unknown and indeed denied by the Respondent in this matter.
85. The decision of *Markey Home Company Pty Ltd and anor v City of Waverley*, Victorian Planning Appeals Board, 21 March 1983 is authority for a similar proposition.

The Submissions in reply

86. The Tribunal will confine its comments on the submissions in reply filed by the Appellant and the Respondent to matters upon which it has not already commented or raised in earlier submissions or *mero motu* by the Tribunal.
87. The Tribunal embraces and adopts the submission number 9 in the Appellant's submissions in reply.
88. Although dealt with as a matter of completeness it is inescapably the position of the Tribunal correctly stated in paragraph 18 of the Appellant's submissions in reply that there is no power of the Respondent in an appeal to start trying to justify a Refusal by resorting to grounds that were never so stated. Unequivocally it is the case that where matters raised by the Respondent were never part of its Grounds of Refusal they cannot be considered and will not be considered as grounds to disallow the appeal ultimately, although there may be commentary upon them.
89. It is in this Tribunal's finding a very cogent argument that the previous subdivisions allowed in the area are, if anything, a justification for consenting rather than for refusing the application.
90. It is simply not open to the Respondent to base a decision on "*a preference for the minimum lot size specified by the Scheme*". The Respondent is required to exercise its discretion and perform in accordance with precedent, commonsense and good planning principles, as set out at in this decision under the heading **Consent Use**.
91. Again the Tribunal states it rejects out of hand the contention that there is any obligation on an applicant to establish "*particular merits*" prior to there being permitted a departure from the 800 m²

subdivisional prescription nor is it incumbent on the Appellant to establish “*justification for a reduction in the minimum lot size*”.

92. In relation to the OTC site, in respect of its mention in all submissions, it is only open in respect of decisions relating to town planning to all parties to deal with the situation in accordance with known criteria. Whatever the future of the OTC site may or may not be, currently it is an SU zone and comprises open space and must be dealt with as such.

Planning Concepts and Land Use Objectives

93. In accordance with the Tribunal’s request at the view, the Planning Concepts and Land Use Objectives, although in draft form and although now superseded, were supplied and must in terms of section 51 be taken into account.
94. Indeed in the document at page 5 it is stated “*However, the OCT land has not been included, as there is no suggestion that this site will become available for development*”.
95. It is also appropriate to highlight **Land Use Objective** appearing at page under **3.2.1 Residential**

“To protect existing residential amenity, whilst recognising that opportunities continue to exist for the development of medium density housing on appropriate zoned land in established residential areas”.

[Tribunal’s underlining]

96. In paragraph 4 **Planning Context and Evaluation** it is also recognized, particularly at 4.2 under the heading **Residential Development**, that the days of the elevated house on blocks of 1,000 square metres are under pressure and there is a move towards a

higher density of development. That it seems to the Tribunal is inescapable. Such is the trend in urban areas all over Australia.

SUMMARY OF CONCLUDED REASONS

97. 1. According to the laws of natural justice and procedural fairness, the decided authority of this Tribunal in this and other matters as supported by authorities already cited, require the Respondent in consideration of matters at the public hearing to;
- (i) state explicitly that it intends to depart from the DAS Report and state in what respects it intends to depart and give its reasons for doing so;
 - (ii) express concerns about the failure of the application to address any criteria which have not been addressed. This is the case in respect of “special merit” and “justification” even though had they been expressed this Tribunal would have found such criteria do not exist;
2. Where a ground is advanced in support of refusal in response to an appeal that has never been stated as a ground of refusal for the permit in the first place, such ground will not constitute a valid ground to be considered by this Tribunal on appeal;
3. The exercise of the power to consent to an exception requested to the size provisions of Clause 16.1 of the Darwin Town Plan requires to be treated in the same way as consent usages are to be treated by the Respondent and as set out in this decision;
4. The Objectives set out in Clause 16.1 are paramount in deciding whether there ought be a relaxation of the 800 m² minimum size; that is in accordance with this Tribunal’s consideration and with the stated prior decisions of the Tribunal or its predecessor;
5. In refusing an application for a permit proper reasons supported by intelligible argument are required to conform with the requirement of natural justice and or procedural fairness;

6. If there is going to be an ignoring of precedent in respect of like applications, there must be at least some justification expressed for ignoring such precedent;
7. The applicant for a permit does not in relation to the circumstances of this appeal bear any onus of any nature at all and particularly bears no onus to establish that the application is an application of “special merit” or “justification”;
8. The Darwin Southern Suburbs Planning Concepts and Land Use Objectives do not prescribe future use of OTC site for a low to medium rise medium density residential accommodation. It is zoned Special Use and is to be treated as such;
9. The Town Planning provisions of RO zone are not to form any guidance in relation to the decision required in respect of this application, the subject of the appeal;
10. To suggest that although the objective criteria are met by the proposed improvement on the proposed subdivisions by the design submitted they may be circumvented in some way, is nonsense;
11. Although not a relevant issue, since it never formed the basis of a ground of refusal, there is in this Tribunal’s finding no intrusion into the amenity of the area of the proposed development;
12. “The road” shown on the subdivisional plan and being the road designated on the subdivision of the OTC site as it originally was is a public road. The western boundary of the western-most proposed subdivision in respect of this application therefore has road frontage along that public road;
13. The notion that the decision of the Respondent is a decision taken “in camera” is a failure to comprehend the meaning of the phrase and is incorrect, inappropriate and invalid;
14. Whilst the area in which the subdivision is proposed is an area where immediately contiguous properties are zoned R1, as is the

subject of the appeal, a proper analysis of the makeup of the area warrants a different treatment from that which would apply to a property zoned R1 in an area where as a matter of fact it was purely residential as opposed to mixed;

15. If there is a policy which determines “reasonable size” it is a policy which warrants having been announced at the hearing. If there is such a policy, which in any event is denied by the Respondent, it is not capable of being a binding policy or one which over-rides the statutory constraints.

TRIBUNAL ORDERS

98. The appeal is upheld. The Tribunal orders that the Development Consent Authority issue a development permit consenting to the subdivision in accordance with Drawing No. 869/2002/S, as amended to correct the areas of proposed Lots 2 and 3, subject to the following conditions :
- Any easements or reserves required for the purposes of electricity, sewers, water supply, stormwater drainage, or for any other purpose, shall be made available free of cost to the Northern Territory of Australia, the Commonwealth of Australia and, if applicable, to the Darwin City Council.
 - Engineering design and specifications for stormwater drainage shall be submitted for approval by the Technical Services Manager, Darwin City Council and all approved works shall be constructed at the developer's expense.
 - Electrical reticulation to the subdivided sites shall be provided to the requirements and satisfaction of Power and Water Corporation at no cost to the Corporation.
 - Water reticulation and sewage disposal for the subdivided lots shall be provided to the requirements and satisfaction of Power and Water Corporation at no cost to the Corporation.

- The developer shall contact Telstra prior to any works being carried out and negotiate the provision of telecommunication services in accordance with accepted Austel practice.
- Disused crossovers shall be removed, and public footpaths and nature strips shall be reinstated, and nature strips shall be landscaped to the requirements and satisfaction of the Technical Services Manager, Darwin City Council.

Dated: 28 April 2003

DAVID LOADMAN

CHAIRPERSON