

CITATION: *Phillip Parker v Minister for Planning and Lands* NT LMT 101

PARTIES: PHILLIP PARKER
v
MINISTER FOR PLANNING AND LANDS

TITLE OF COURT LANDS, PLANNING AND MINING
TRIBUNAL

JURISDICTION: LANDS, PLANNING AND MINING
TRIBUNAL ACT

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DECISION OF: Dr John LOWNDES, CHAIRPERSON

CATCHWORDS:

PLANNING APPEAL – NATURE OF THE APPEAL – ONUS OF PROOF –
DEVELOPMENT CONTRARY TO A PLANNING SCHEME PROVISION –
STATUTORY FACTORS RELEVANT TO DEVELOPMENT APPROVAL –
THE GENERAL NATURE OF DISCRETION – SPECIAL CIRCUMSTANCES
JUSTIFYING DEVELOPMENT APPROVAL – THE ROLE OF A PLANNING
APPEALS TRIBUNAL

Lands, Planning and Mining Tribunal Act NT ss 11, 14, 16

Planning Act NT ss 3, 5, 7, 8, 9, 44, 51, 52(2), 53(c), 108, 109, 113, 115, 128, 129,
130

Darwin Rural Area Plan (DRAP) 1983 Clause 9

Mandorah Land Use Concept Plan 1990

Cox Peninsula Land Use Structure Plan 1990

Northern Territory Planning Scheme Clauses 11.1.1 and 2.5

Coal and Allied Operations Pty Ltd v AIRC (2000) 203 CLR 194 applied

Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 applied

Nevistic v Minister for Immigration and Ethnic Affairs (1981) 34 ALR 639 applied

Phelps v Development Consent Authority NT LPMT 98-2006 considered

Allesch v Maunz (2000) 203 CLR 172 applied

No 2 Pitt Street Pty Ltd v Wodonga Rural City Council [1999] VSC 133 considered

Holpitt Pty Ltd v Vraimu Pty Ltd v Bridgelands Securities Ltd (1992) 110 ALR 685 considered

Murphyores Inc Pty Ltd v Cth (1996) 136 CLR 1 applied

Shrimptom v Cth (1945) 59 CLR 613 applied

Auckland CC v Minister of Transport [1990] 1 NZLR 264 applied

Hickinbothan Blue Gum Pty Ltd v Campbelltown CC (1981) 29 SASR 93 applied

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Gifford DJ and KH Gifford *Town Planning Law and Practice Vol 2*

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

No. LMT-101-2006-P (20624251)

BETWEEN:

PHILLIP PARKER

Appellant

AND:

**MINISTER FOR PLANNING AND
LANDS**

Respondent

DECISION

(Delivered 23 October 2007)

Dr John LOWNDES, CHAIRPERSON

THE NATURE OF THE PROCEEDINGS

1. The appellant is appealing the determination of the Minister refusing to issue a development permit in relation to land described in the development application as follows:

Town/Hundred/Locality: Wagait Beach/Hundred of Bray/Mandorah

Parcel Number(s) and /or Unit Number: Lot 5

LTO Plan: 81/35

Number and Street Name: 135 Wagait Tower Road

Zone: RL2

2. The proposed development is described in the application as follows:

To subdivide existing Lot 5 (1.0 Ha lot) into two sections – one at 0.4 Ha and one at 0.6 Ha

3. On 16 August 2006 the Minister for Planning and Lands determined under Section 53 (c) of the *Planning Act* to refuse to consent to the proposed development of the land for the purpose of a 2 lot subdivision. The reasons for the determination, as set out in the Notice of Refusal dated 16 August 2006, were as follows:

1. In the opinion of the consent authority the proposed development is contrary to the planning scheme provisions referred to in s 9(1) (b) of the *Planning Act*, such that under s 52(2) of the Act I cannot consent to the development. Specifically the proposal is not consistent with the requirements of Clause 9 (Lot size) of the Darwin Rural Area Plan 1983. The minimum lot size in the RL 2 zone is 8 hectares, which is consistent with the lack of services in the area. The proposed subdivision is a 92.5% (Lot1) and a 95% (lot 2) reduction in the minimum lot size requirement. The suggestion that the small sizes of other lots in the locality demonstrates merit through precedent is dismissed as these lots were created prior to the introduction of planning controls into the area.

2. In considering the application, I must pursuant to s 51(p) of the *Planning Act* consider the public interest of the proposal. It is not in the public interest to approve the development while the facilities available to the Wagait Beach area are not capable of supporting higher density development. Reticulated water services are not available in the area with existing residents relying on a community bore for water supply. Therefore, until facilities to the area are upgraded to support further development and the land can be shown to be capable of supporting the proposed use (s 51(j) of the *Planning Act*) it is in the public interest to postpone increased residential development.

It is notable that the Power & Water Corporation who manage the community water supply do not support the application and describe the water source as “fragile”.

4. In his grounds of appeal, the appellant complains that he was not accorded procedural fairness during the determination process, and claims that the Minister made a number of errors in arriving at his decision. The appellant

alleges that the Minister reached the wrong decision for the following reasons:

- The Consent Authority – in this instance the Minister – had a discretion pursuant to Clause 9 of the DRAP to approve the proposed development, which discretion miscarried. The Minister was not precluded by section 52(2) of the *Planning Act* from approving the proposed development.
- The minimum lot size requirements of Clause 9 of the DRAP are absurd given that all (almost 400) of the lots in the locality are significantly smaller. Furthermore, at least one subdivision of a one hectare lot into two lots – immediately opposite the proposed development - has been approved since the operation of the DRAP. The appellant relies on this precedent as demonstrating the merits of the proposed development.
- The Minister’s refusal to approve the proposal development on the basis that approval of the proposed use would not be in the public interest because water services and facilities available to the locality are not capable of supporting the proposed development is not supported by the evidence.
- In terms of the public interest, not a single objection was raised by a member of the public or the Cox Peninsula Community Council.
- The proposed development, if approved, would only result in a change of 0.25% of gross lot numbers and each of the proposed two lots would be equal to, or larger than, the size of the vast majority of lots in the locality. The development, if approved, would not change the amenities of the locality nor would it place a significant demand on the local infrastructure.

THE NATURE OF THE APPEAL

5. The Lands Planning and Mining Tribunal is established under the *Lands Planning and Mining Act*.¹ The jurisdiction of the Tribunal is prescribed by s 5 of the Act. In addition to exercising jurisdiction under the *Lands Acquisition Act* and other statutes of the Northern Territory, the Tribunal performs other functions conferred on it by other laws of the Territory.² Section 5(j) of the *Planning Act* triggers the operation of various provisions

¹ See s 4 of the Act.

² See s 5(j) of the Act.

of the *Planning Act*, which, in conjunction with the *Lands Planning and Mining Act*, throws light on the nature of the present appeal.

6. Section 108 of the *Planning Act* establishes an Appeals Tribunal for the purposes of that Act. The Lands Planning and Mining Tribunal, established under the *Lands Planning and Mining Act*, is designated as the Appeals Tribunal.

7. Section 111(1) of the *Planning Act*, which deals with appeals against a refusal to issue a development permit, provides as follows:

A person who made a development application under section 46 may appeal to the Appeals Tribunal against a determination of the consent authority under section 53 (c) refusing to consent to the development proposed in the application.

8. The present appeal was commenced pursuant to that very provision.

9. There is constant interaction between the *Lands Planning and Mining Act* and the *Planning Act*. A prime example is s 11 of the *Lands Planning and Mining Act* - a key procedural provision:

(1) A proceeding is to be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matter before the Tribunal permits.

(2) The Tribunal is bound by the rules of natural justice.

(3) Subject to this Part and any other Act, the practice and procedure of the Tribunal is to be –

(a) as prescribed by the rules; or

(b) if no practice or procedure is prescribed by the rules – as determined by the Tribunal.

10. Section 11(3) brings into play various procedural provisions of the *Planning Act*, such as ss 129 and 130, both of which are referred to below.

11. In reciprocal fashion, s 109 of the *Planning Act* provides for the application

of various provisions of the *Lands Planning and Mining Act* to the Appeals Tribunal:

The provisions of the *Lands Planning and Mining Tribunal Act*, other than –

(a) sections 14(2) and (4A), 17(1)(d)(ii) and (2) and Divisions 2 and 3 of Part 3; and

(a) sections 36,37 and 38,

apply in relation to the Appeals Tribunal in relation to an appeal under this Part.

12. The effect of s 109 of the *Planning Act* is that the Tribunal is not bound by the rules of evidence and may inform itself of any matter as it considers fit.³ The Tribunal may also take evidence on oath or affirmation.⁴ In addition, it may engage consultants with appropriate expertise to assist in relation to proceedings.⁵ Such consultants may assist the Tribunal by appearing in a proceeding.⁶
13. Returning to the *Planning Act*, ss 129(1) and (2) of that statute provide as follows:
 - (1) Subject to subsection (2), the Appeals Tribunal is to determine an appeal in the absence of the parties and having regard only to –
 - (a) the information before the consent authority or the service authority, as the case may be, at the time it made the determination to which the appeal relates;
 - (b) in the case of an appeal, other than an appeal under section 113 or 115 – the matters specified in section 51; and
 - (c) submissions made to it under section 128.

³ See s 14(1) of the *Lands Planning and Mining Act*. Although the Tribunal is not bound by the rules of evidence, it is still subject to the principle of rationality: see Forbes *Justice in Tribunals* 2nd ed Federation Press 2006 at [2.4], p 9.

⁴ See s 14(3) of the *Lands Planning and Mining Act*.

⁵ See s 16(1) of the *Lands Planning and Mining Act*.

⁶ See s 16(2) of the *Lands Planning and Mining Act*.

(2) The Appeals Tribunal may, if it thinks fit, require –

- (a) a person who is a party;
- (b) a person who made a submission under section 49 or gave evidence or information under section 50; or
- (c) any other person,

to appear before it and answer questions put to him or her by the Appeals Tribunal.

14. Section 128 of the *Planning Act* provides for the making of written submissions by the parties. Subsection (4) provides as follows:

A written submission for the purposes of this section may not introduce material or evidence not before the consent authority or the service authority, as the case may be, when it made the determination to which the appeal relates.

15. Mirroring section 16(1) of the *Lands Planning and Mining Act*, s 129(6) of the *Planning Act* provides that the Appeals Tribunal may engage one or more consultants with expertise in planning or development to assist it to determine an appeal.

16. The interaction between the provisions of the *Lands and Mining Tribunal Act*⁷ and the provisions of the *Planning Act* was the subject of submissions made on behalf of the Tribunal in respect of a appeal lodged by the Development Consent Authority against a Tribunal decision in matter number LA20 of 2005 (20508828).⁸ The essential argument advanced by those submissions was as follows:

10.13 The combined effect of the *Lands and Mining Tribunal Act* and the *Planning Act* is that:

- (a) The parties to an appeal to the Tribunal are limited to making written submissions on material or evidence that was before the Authority when it made its decision [s 128(4) *Planning Act*].

⁷ The *Lands Planning and Mining Act* was formerly known as the *Lands and Mining Act*.

- (b) The Tribunal must assess the information in the Development Consent Authority file at the time the decision under appeal was made [s129(1) *Planning Act*].
- (c) The Tribunal may inform itself as it thinks appropriate, including seeking expert consultants to assist it to have regard to matters specified in s 51 [Sections 14(1) and 16(1) *Lands and Mining Tribunal Act* read with s 129(1)(b) *Planning Act*].
- (d) If the Tribunal wishes a person to appear before it and give evidence by way of answering questions put by the Tribunal, then such questions and answers must be given in the presence of the parties [s 129(2) and (3) *Planning Act*].
- (e) If the Tribunal does not require a person to attend before it, the Tribunal is to determine the appeal in the absence of the parties [s129(1) *Planning Act*].

- 17. I respectfully agree with and adopt those submissions as to the combined effect of the legislative provisions.
- 18. Section 130 of the *Planning Act* also throws light on the nature of the present appeal.

Subsection (4) provides:

The Appeals Tribunal must, in writing, determine an appeal against a determination of a consent authority by taking one of the following actions –

- (a) confirming the determination of the consent authority;
- (b) in respect of an appeal under section 114 or 117 only – revoking the determination set out in the notice served under section 53A or 53B, substituting the determination of the Appeals Tribunal and ordering the consent authority to issue a development permit subject to any conditions the Appeals Tribunal thinks fit;

⁸ Those submissions were referred to, and unequivocally adopted, by the Tribunal in the matter of *Phelps v Development Consent Authority* NT LPMT 98-2006 – P (20621279).

- (b) ordering the consent authority to issue or vary a development permit subject to any conditions the Appeals Tribunal thinks fit.

Subsection (6) provides:

To avoid doubt, a determination of an appeal by the Appeals Tribunal is a review of the determination of the consent authority or service authority on its merits.

19. The energetic interaction between the legislative provisions of the *Lands Planning and Mining Act* and the *Planning Act* results in an appeal before the Tribunal brought under Part 9 of the *Planning Act* being in the nature of a rehearing, by way of contrast to a hearing de novo or an appeal stricto sensu.⁹ That the present appeal is in the nature of a rehearing is indicated by the following observations made by the High Court in *Coal and Allied Operations Pty Ltd v AIRC* (2000) CLR 194 per Gleeson CJ, Gaudron and Hayne JJ:

[12] It is common and often convenient to describe an appeal to a court or tribunal whose function is simply to determine whether the decision in question was right or wrong on the evidence and the law as it stood when that decision was given as an appeal in the strict sense... In the case of an appeal in the strict sense, an appellate court or tribunal cannot receive further evidence and its powers are limited to setting aside the decision under appeal and, if it be appropriate, to substituting the decision that should have been made at the first instance.

[13] If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at the first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing.

⁹ This conclusion accords with the submission made at p 1 of the written submissions made on behalf of the Minister dated 17 August 2007.

[14] Ordinarily, if there has been no further evidence admitted and there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was an error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.¹⁰

20. Although the provisions of s 129(1) of the *Planning Act* point to the appeal being an appeal in the strict sense, ss 109, 129(2), 129(6) 130(4) and 130(6) of the Act read conjunction with ss 14(1) and s 16 of the *Lands Planning and Mining Act* make it clear that the appeal is in the nature of a rehearing. The Tribunal can receive and consider fresh evidence by way of ss 129(2) and 129 (6) of the *Planning Act* and ss 14(1), 14(3) and 16(1) and (2) of the *Lands Planning and Mining Act*. Furthermore, by reason of s130(4)(c) of the *Planning Act* the powers of the Tribunal on appeal are not restricted to making the decision that should have been made at first instance. Most significantly, s 130(6) of the *Planning Act* makes it patently clear that an appeal to the Tribunal is a “review on the merits”.
21. “Merits review” is a process by which an appellate body reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. The process involves the appellate body “stepping into the shoes” of the original decision-maker, exercising all the powers and discretions available to that person - not confining itself to the material and evidence that was before that person - and affirming or varying the original decision. This is entirely consistent with the statutory regime governing the present appeal.

¹⁰ (2000) 203 CLR 194. See also *Wilson v Lowery* (1993) 4 NTLR 79.

22. The task that an appellate body must perform when reviewing a decision on the merits was explained in *Drake v Minister for Immigration and Ethnic Affairs*:

The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.¹¹

23. Although merits review is usually associated with a re-hearing de novo,¹² there is no logical reason why that process cannot also apply to an appeal in the nature of a re-hearing – a process which allows for additional material and evidence to be put before the appellate tribunal. The fullest kind of merits review is an appeal by way of rehearing de novo. However, a merits review may also assume the form of a rehearing – a form of appeal falling midway between an appeal stricto sensu and a rehearing de novo. Indeed, that is what is contemplated by s 130(6) of the *Planning Act*.
24. Merits review is immediately distinguishable from an appeal stricto sensu which is concerned merely with a judicial review of the original decision. The essence of a merits review is that it is concerned with examining the merits of the matter in dispute, and not with whether the decision under appeal was wrong in law or whether the decision maker did not act according to law. The merits of a decision include not only the facts of the case but also any policy which has been applied or which ought to be applied to the facts in reaching the decision : *Re Becker* (1977) 15 ALR 696 at 700 per Brennan J. In an appeal by way of rehearing the Appeals Tribunal may substitute its own decision for that of the primary decision maker,

¹¹ (1999) 24 ALR 577 at 589. However, the observation made by the High Court in *Drake* (supra) at [14] needs to be read subject to the ensuing discussion regarding a “review on the merits”. See also *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 per Brennan J:

...the question for the determination of the Tribunal is whether the decision was the correct or preferable one on the material before the Tribunal.

¹² Indeed, the appeals in *Drake v Minister for Immigration and Ethnic Affairs* and *Nevistic v Minister for Immigration and Ethnic Affairs* were by way of a re-hearing de novo, as are most administrative appeals.

based on the facts and law as they stand at the date of the hearing.¹³ In fact, the Tribunal is obliged “to decide the rights of the parties, in accordance with the law as it exists at the time of hearing the appeal”.¹⁴

25. So as to leave no doubt as to the nature of the present appeal, one cannot discern from the statutory regime a legislative intent for an appeal to the Tribunal to proceed by way of a re-hearing de novo. Although an appeal assumes the form of a merits review, it is clear that the capacity of the Tribunal to receive and consider fresh evidence and material is limited. The parties do not have the right to present new material and evidence. It is only on its own initiative that new material and evidence can be put to the Tribunal for the purposes of determining an appeal.

OTHER LEGISLATIVE PROVISIONS RELEVANT TO THE DETERMINATION OF THE APPEAL

26. Various provisions of the *Planning Act* confine and structure the scope of the present appeal.
27. Section 130(2) of the *Planning Act* provides that in determining an appeal, except an appeal under section 113 or 115 of the Act, the Appeals Tribunal must take into account the matters specified in section 51 of the Act.

¹³ See [9], p 3 of the written submissions filed on behalf of the Minister dated 17 August 2007. See also *Allesch v Maunz* (2000) 203 CLR 172 cited in those submissions in support of the stated proposition.

However, it should be noted that in that case the High Court stated:

...the critical difference between an appeal by way of re-hearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error. At least that is so unless, in the case of an appeal by way of re-hearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance.

The provisions of s 130(6) of the *Planning Act* evince a legislative intent that the appellate powers of the Tribunal may be exercised “whether or not there was error at first instance”. Accordingly, the general principles relating to a rehearing enunciated in *Allesch v Maunz* (supra) are to be read subject to s 130(6) in the manner observed by the High Court.

¹⁴ See [9], p 3 of the written submissions filed on behalf of the Minister dated 17 August 2007. See also *Western Australia v Ward* (2002) 213 CLR 1 at [70], which is referred to in those submissions.

28. Section 51 provides as follows:

A consent authority must, in considering a development application, take into account the following:

- (a) any planning scheme that applies to the land to which the application relates;
- (b) any proposed amendments to such a planning scheme –
 - (i) that have been or are on exhibition under Part 2, Division 3;
 - (ii) in respect of which a decision has not been made under Part 2, Division 5; and
 - (iii) that are relevant to the development proposed in the development application;
- (c) an interim development control order, if any, in respect of the land to which the application relates;
- (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;
- (e) any submissions made under section 49 in relation to the development application;
- (f) a matter that the Minister has, under section 85, directed it to consider in relation to development applications generally;
- (g) if a public environmental report, or an environmental impact statement, has been prepared or is required under the *Environmental Assessment Act* in relation to the proposed development – the report or statement and the results of any assessment of the report or statement under the Act by the Minister administering that Act;
- (h) the merits of the proposed development as demonstrated in the application;
- (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;
- (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 the land suitable for public recreation, to be

provided by the developer;

- (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;
- (n) the potential impact on the existing and future amenity of the area to which the land is situated;
- (p) the public interest, including (if relevant) how the following matters are provided for in the application:
 - (i) community safety through crime prevention principles in design;
 - (ii) water safety;
 - (iii) access for persons with disabilities;
- (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;
- (r) any potential impact on natural, social, cultural or heritage values;
- (s) any beneficial uses, quality standards, criteria, or objectives that are declared under section 73 of the *Water Act*;
- (t) other matters it thinks fit.

29. It is clear from the interaction between s130(2) and s 51 of the *Planning Act* that both the consent authority and the Appeals Tribunal are obliged to take into account the matters specified in section 51. In that regard, the Tribunal stands in the shoes of the primary decision maker – the consent authority.

30. According to s130(3) of the *Planning Act*:

The Appeals Tribunal must not determine an appeal to permit a proposed development if –

- (a) in its opinion, the development would be contrary to a provision of an applicable planning scheme referred to in section 9(1)(a);

- (b) the development would be contrary to a provision of an applicable planning scheme referred to in section 9(1)(b).¹⁵

ONUS OF PROOF

31. As raised by Gifford and Gifford, there is an important question in planning appeals whether there is any onus of proof and, if so, upon whom it lies.¹⁶
32. After concluding that the principles of ordinary litigation – including the allocation of the onus of proof – do not apply to planning appeals due to their unique character, the authors set out the applicable law as follows:

...there is a factor present in the case of a planning appeal that is not present in ordinary litigation, namely the public interest. It is a factor which, it is submitted, removes any onus. 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. ...In Australia and New Zealand... the legal position appears to be established that there is no onus of proof.¹⁷

33. Although that observation is usually made in light of the fact that planning appeals assume the form of a re-hearing de novo, it, in my view, applies with equal force to the present appeal, which is in the nature of a merits review conducted by way of a rehearing.

THE STATUTORY CONTEXT IN WHICH THE MINISTER MADE HIS DETERMINATION

34. As the Tribunal stands in the shoes of the Minister in determining an appeal it is useful to refer to the statutory context in which he made his determination.

¹⁵ Sections 9(1)(a) and (b) are discussed below, p 17

¹⁶ Gifford DJ and Gifford KH *Town Planning Law and Practice* Vol 2 [64.57].

¹⁷ Gifford and Gifford, n 16 at [64.57]. A similar analysis of planning appeals is to be found in the Australasian Council of Tribunals' *Practice Manual for Tribunals* at 6.1.6:

However, in many proceedings before tribunals it is not appropriate to view the matter on the basis of burdens of proof. The question may simply be whether the tribunal is satisfied that a matter is established.

35. Section 7 of the *Planning Act* provides:

(1) There is a Northern Territory Planning Scheme that applies in relation to the whole of the Territory except any area of land –

(a) in relation to which another planning scheme applies; or

(b) specified in the NT Planning Scheme as being excluded from the application of that Scheme.

(2) The NT Planning Scheme may refer to an area of land by describing the land or referring to a map or plan of the land.

36. Section 8 of the Act reads:

(1) The Minister may, on the Minister's own initiative or following a request by a person or body, make a specific planning scheme that applies to the area or areas of land described in the planning scheme or in a map to which the planning scheme refers.

(2) The Minister may, on the Minister's own initiative or following a request by a person or body, repeal a specific planning scheme.

(3) Divisions 2, 3, 4 and 5 apply in relation to the making or repeal of a specific planning scheme as if a reference in those Divisions to an amendment of a planning scheme were a reference to the making or repeal of a specific planning scheme.

(4) If the Minister makes or repeals a specific planning scheme on his or her own initiative, Divisions 3, 4 and 5 apply (with necessary changes) in relation to that action as if the Minister had received a request for the specific planning scheme to be made or repealed.

37. Section 9 of the Act prescribes the contents of a planning scheme:

(1) A planning scheme may include any of the following:

(a) provisions that include statements of policy in respect of the use or development of land;

(b) provisions that permit, prohibit, restrict or impose conditions on a use or development of land;

(c) provisions that provide instructions, guidelines or assessment criteria to assist the consent authority in assessing development applications;

(d) other provisions in connection with planning for or control of the use or development of land;

- (e) other provisions that are necessary or convenient for giving effect to the planning scheme;
- (f) maps, plans, designs and diagrams.

(2) A provision of a planning scheme may apply in relation to all the land to which the planning scheme applies or may apply to a specified part of that land.

(3) A planning scheme may refer to, adopt or incorporate (with or without modification) a specified document, as in force at a particular time or as in force from time to time.

38. For the purposes of interpreting the *Planning Act*, “NT Planning Scheme” means “the Northern Territory Planning Scheme referred to in section 7” and “planning scheme” includes “the NT Planning Scheme and any specific planning scheme referred to in section 8”.¹⁸
39. For the purposes of Part 5 of the Act, which deals with development permits, the Development Consent Authority and the Minister may be the “Consent Authority”. By virtue of s 4(1) of the Act, the Minister was designated as the Consent Authority with respect to the subject development application.
40. Section 44(b) of the *Planning Act* provides that a development permit is required if the proposed development is the subdivision or consolidation of land.
41. As mentioned above, s 51 of the *Planning Act* requires the consent authority (which includes the Minister) to take into account the matters specified therein in considering a development application.
42. Sections 52(1)(a) and (b) of the Act, which constrain the Development Consent Authority’s powers to consent to a proposed development,¹⁹ had no application in relation to the subject development application because the

¹⁸ See s 3(1) of the *Planning Act*.

¹⁹ Section 52 provides:

(1) The Development Consent Authority must not consent to a proposed development under section 53 if –
(a) in its opinion, the proposed development is contrary to a planning scheme provision referred to in section 9(1)(a); or (b) the proposed development is contrary to a planning scheme provision referred to in section 9(1)(b) or an interim development control order.

determination was made by the Minister, as the designated Consent Authority.

43. In those circumstances, the Minister's powers to consent to development permits, in his role as the Development Consent Authority, was constrained by s 52(2) of the Act:

The Minister must not consent to a proposed development under section 53 if the proposed development is contrary to a planning scheme provision referred to in section 9(1)(b) or an interim development control order.

44. At the time the Minister considered the appellant's development application, the relevant planning scheme provision for the purposes of section 52(2) of the Act was Clause 9 of the *Darwin Rural Area Plan (DRAP) 1983* – a statutory zoning document administered by the Northern Territory Planning Authority. Clause 9, which dealt with minimum lot sizes, placed restrictions – if not a qualified prohibition - on the use or development of land within the area covered by the planning scheme:

A person shall not develop land within Zones RL 1 and RL 2 so that lots are created which are –

- (a) in Zone RL 1 – less than 2 hectares ; and
- (b) in Zone RL 2 – less than 8 hectares

without the consent of the consent authority.

45. As the land to which the subject development application related was zoned “RL 2” the prescribed minimum lot size was 8 hectares.
46. For the purposes of section 51 (a) of the *Planning Act* the relevant planning scheme comprised the *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990* along with the DRAP (in particular clause 9). The *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Concept Plan 1990* are broad, policy orientated planning documents concerned with land use objectives and land use concept plans, as described in s 9(1)(a) of the *Planning Act*. Those two

documents contain “provisions that include statements of policy in respect of the use or development of land”.

47. The *Mandorah Land Use Concept Plan* states:

The Mandorah Land Use Concept Plan 1990 specifically addresses land use planning to provide for both short and long term development on the north-eastern corner of Cox Peninsula.²⁰

48. The “objectives” of the Plan are stated thus:

The primary purpose in publishing this plan is the identification, endorsement and dissemination of Government planning and development objectives for Mandorah. More specifically, this plan has been produced to establish a land use concept that identifies the range and scale of land uses likely to locate at Mandorah and their relationship to each other. By publishing the land use concept as endorsed Government policy, the rationale for projected land use is recorded with text, diagrams and plans. This plan establishes the basis for outline development plans and amendment of the statutory plan and provides public and private sector developers with some guidance.²¹

49. As to its operation the Plan states:

The land included in this plan is subject to the Darwin Rural Area Plan 1983, a statutory (zoning) document administered by the Northern Territory Planning authority. The land is zoned Rural Living 2 which permits a wide variety of uses, some subject to consent.²²

50. This statement establishes the connection between the DRAP and the *Mandorah Land Use Concept Plan*, which along with the *Cox Peninsula Land Use Structure Plan*, collectively constitute the relevant planning scheme, each forming an integral part of that scheme.

51. As to its status, the Plan states:

The Mandorah Land Use Concept Plan 1990 has been published by the Minister for Lands and Housing under the provisions of section 66A(1) of the *Planning Act*. It is therefore a statement of Government policy relevant to the whole community.

²⁰ See p 5 of the Plan.

²¹ See p 5 of the Plan.

²² See p 5 of the Plan

As the Darwin Rural Area Plan 1983 provides statutory control over the use and development of land, this land use concept plan does not imply any right to use or develop land.²³

52. This statement again indicates the interrelationship between the DRAP and the Concept Plan.
53. The Plan contains the following policy statement:

The Mandorah Land Use Concept Plan 1990...establishes the basis for future development in that locality. This includes:

- continued development in the short term of semi-rural lots, utilising the existing limited services;
- recognition of long term potential for redevelopment in association with full reticulation of services;...²⁴

54. The Plan is replete with references to the existing limited services and the absence of full reticulation of services.²⁵
55. At the time the Minister considered the appellant's development application the consolidated Draft NT Planning scheme had been exhibited for a 2 month period, ending 21 April 2006. In accordance with the proposed scheme the proposed zoning maps for the Darwin Rural Area (Cox Peninsula) identified the subject site as Rural Living (RL). The key provisions of the Draft Plan were as follows:

- **Clause 11.1.1**

1. The purpose of this clause is to ensure that unzoned land and lots in zones SD, MD, MR, HR, RR, RL, R, LI, GI, DV, FD, RD, H, WM and T will be of a size capable of accommodating potential future uses.

2. Land to which this clause applies may be subdivided only in accordance with the minimum lot size and requirements specified in the table to this clause.²⁶

²³ See p 5 of the Plan.

²⁴ See p 17 of the Plan.

²⁵ See pp 7, 12, 13,15, 16 and 17 of the Plan

²⁶ According to the table the minimum lot size and requirements is designated as "2ha with a minimum of 1ha of unconstrained land".

3. Subject to clause 11.1.2 the consent authority must not consent to a subdivision in zones SD, MD,MR, HR,RR or RL that reduces a lot size by an area greater than 5% of the minimum specified in the table to this clause.²⁷

- **Clause 2.5**

1. In considering an application for consent for a proposed use or development, the consent authority must consider the proposed use or development in its entirety except in relation to:

(a) an application to alter or vary a development permit pursuant to sections 43A, 46 or 57 of the Act; or

(b) access to a main road.

2. Parts 4 and 5 set out the standards that apply to the development of land, subject to sub-clauses 3 and 4.

3. The consent authority may consent to the development of land that does not meet the standard set out in Parts 4 and 5 only if it is satisfied that special circumstances justify the giving of consent.

4. When consenting to a development of land, the consent authority may impose a condition requiring a higher standard of development than is set out in a provision of Parts 4 or 5 if it considers it necessary to do so.

THE REASONING OF THE MINISTER

56. The Minister's reasons for refusing consent to the development application are set out in the Notice of Refusal dated 16 August 2006, which has already been referred to.²⁸

57. Although the present appeal is in the nature of a review on the merits and not concerned with either the validity or propriety of the determination of the Minister, it is helpful for the purposes of conducting the review to identify the bases of the Minister's decision to refuse consent to the proposed development.

²⁷ Clause 11.1.2 relates to the requirements for integrated residential development.

²⁸ See above, p 3.

58. The Minister gave three reasons for refusing consent, namely:
- The proposed development is grossly inconsistent with Clause 9 of the DRAP in that the proposed two lots are dramatically smaller in size than the prescribed minimum lot size. Due to that marked departure from the prescribed standard, the proposed development is contrary to a planning scheme provision referred to in s 9(1)(b) of the *Planning Act*. Accordingly, the Minister is, by reason of s 52(2) of the Act, precluded from giving consent to the proposed development.
 - The applicant's argument that the small size of other lots in the locality demonstrated merit through precedent should be rejected as those lots were created prior to the introduction of planning controls in the area.
 - In considering the provisions of s 51 (j) and (p) of the *Planning Act* it had not been demonstrated that the subject land was capable of supporting the proposed development, given the community water supply and lack of reticulated water services in the area, and it would not be in the public interest to consent to the proposed subdivision while the available facilities are not capable of supporting higher density development.
59. It will be seen from the primary reason given by the Minister that the proposed development was considered to be contrary to a relevant planning scheme solely on the basis that the size of the proposed lots of the proposed subdivision represented a gross departure from the prescribed minimum standard. The criterion applied by the Minister related to the degree of departure from a prescribed standard.
60. It is apparent from the Minister's reasons for decision that he considered that he was bound by s 52(2) of the *Planning Act* to withhold consent because the proposed subdivision did not meet the minimum lot size, despite the fact that Clause 9 of the DRAP clearly confers a discretion on the consent authority to give consent even though the minimum standard is not met.
61. The Minister appears to have implicitly recognised the potential for precedent in planning matters to affect the merits of a proposed

development, though in the present case found the precedent argument to be without merit.

62. By marrying the considerations referred to in s 51(j) and (p), the Minister appears to have appreciated the potential for the various statutory considerations in s 51 to interact during the process of considering and balancing the pros and cons of a development application.
63. For the purposes of the present review it is apt to make some further observations in relation to the decision making process undertaken by the Minister.
64. In his reasons for refusing consent the Minister failed to address the proposed amendments to the applicable planning scheme, which he was obliged to take into account by s 51 of the *Planning Act*. No reference at all was made to the planning controls established by the Draft Northern Territory Planning scheme, nor to the merits of the proposed application in light of the proposed planning regime.

THE MATERIAL THAT WAS BEFORE THE MINISTER WHEN THE DETERMINATION WAS MADE

65. As stated earlier,²⁹ s 129(1) of the *Planning Act* requires the Tribunal, subject to certain statutory exceptions, to have regard only to the information before the Minister at the time he made his determination.
66. It is proposed to identify and describe the material that was before the Minister, and to attribute to each item of information an exhibit number for ease of reference and for record purposes.
67. The following material was before the Minister for Planning and Lands when he made the determination, which is the subject of the present appeal:
 - The application for development permit, including Statement of Effect

²⁹ See above, p 6.

of Development Proposal – Exhibit 1.

- Memorandum from the Executive Director of Lands and Planning to the Minister dated 16 August 2006 – Exhibit 2.
- Report to the Minister for Lands and Planning – Exhibit 3.
- Letter from Cox Peninsula Community Government Council to the Chairman of the Development Consent Authority dated 19 May 2006 – Exhibit 4.
- Letter from Power & Water to Development Assessment Services dated 29 May 2006 – Exhibit 5.
- Facsimile from Power & Water to Development Assessment Services dated 30 May 2006 - Exhibit 6.
- Letter from Dept of Natural Resources, Environment and the Arts to Dept of Planning and Infrastructure dated 29 May 2006 – Exhibit 7.
- Letter from Phillip Parker to the Development Assessment Services dated 25 June 2006 – Exhibit 8.

68. In Exhibit 1 the applicant, inter alia, relied upon the following:

- In relation to s 46(3) (a) of the *Planning Act* the Wagait Beach township is predominantly a 0.4 hectares development, with RL2 zoning, comprising approximately 250 lots of 0.4 of a hectare, 12 lots of 1 hectare and 20 lots of 2 hectares. The proposed two lots will remain as RL2. The proposed development complies with the existing DRAP in respect of land use and lot/section size;
- As regards s 46(3)(d) of the Act, the proposed development will allow for one additional residential property in the Wagait Beach area. Despite the steady growth in the number of permanent residents in the township in recent years, services in the area are underutilised at present, and further growth can only improve the efficiency of services presently provided to Wagait Beach;
- With respect to s 46(3)(e), the proposed development is wholly contained within an existing rural living environment and is well suited to its surrounds;
- In relation to s 46(3)(f) the township is well endowed with public spaces and the proposed development is minor in scope and does not include the development of additional public space;
- As regards s 46(3)(g), the proposed development requires no additions to public utilities or infrastructure. There is existing low voltage power at the proposed new section/lot frontage. Water in the locality is usually collected in rainwater tanks, and supplemented through a town bore/tank. The water supply is projected by the Power and Water Authority to meet the needs of

the full development of existing approved lot/sections (approx 300) as well as a further 100 lots/sections. Sewerage is provided by landowners through the use of septic tanks;

- With respect to s 46(3)(h), the proposed development will have no significant effect on the existing or future amenity of the area.

69. In relation to Exhibit 2, the following information was provided to the Minister:

The development, as proposed, is not in accordance with the *Mandorah and Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990*, which identifies the site for “semi- rural” development due to lack of services.

The facilities available to the Wagait Beach area are not capable of supporting high density development. Reticulated water services are not available in the area with existing residents relying upon a community bore for water supply. Therefore, until facilities to the area are upgraded to support further development, it is considered that it is in the public interest to postpone increased residential development until that time.

The proposal is not in accordance with the requirements for land zoned RL 2, *Darwin Rural Area Plan 1983* (minimum lot size eight hectares) being the relevant development provisions of the NT Planning Scheme.

70. Exhibit 2 went on to state:

The proposal to create lots of 0.4 hectares and 0.6 hectares cannot be supported due to lack of services in the Wagait Beach area. The existing lot sizes of 0.4 hectares to one hectare in the locality are an aberration of the RL2 zoning of the land. The small lots were approved in 1981 prior to the introduction of planning controls in the area.

The existing zoning of RL2 (eight hectares) reflects the service constraints (reticulated water and sewerage not available).

71. Exhibit 2 then outlined the two options available to the Minister:

The following options are:

Option 1 - approve the proposed subdivision. This is not the recommended option as the proposed development is not consistent with the relevant provisions and requirements of the NT Planning scheme.

Option 2 - refuse the proposed subdivision. This is the recommended option for the reasons discussed in the assessment report at Attachment B.³⁰

72. Exhibit 3 concluded that the application should be refused on the following grounds:

The development, as proposed, is not in accordance with the *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990* which identifies the site for “semi-rural” development in the short term due to a lack of services.

The proposal is not in accordance with the requirements for land zoned RL2 – *Darwin Rural Plan 1983* (minimum lot size 8ha) being the relevant development provisions of the NT Planning Scheme.

73. The report then proceeded to deal with the s 51 matters that must be taken into account when considering a development application:

- **Section 51 (a) - any planning scheme that applies to the land to which the application relates**

The Report points out that the *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990* are the current land use objectives for the locality and the subject site is designated as “semi-rural” for short term development due to a lack of services. According to the Report both Plans identify potential for some further development of unsubdivided freehold, dependant on the capacity of the limited water supply available at the time.

The Report concludes that the proposed subdivision does not comply with Clause 9 due to the proposed lot sizes. While the Report acknowledges that there have been previous subdivision approvals creating smaller lots, it states that the zone intention is to limit further development or redevelopment in accordance with the limited capacity of services, particularly water supply. The Report therefore concludes that the proposed development does not comply with the NT Planning Scheme.

- **Section 51(b) - any proposed amendments to the planning scheme**

The Report states that although the proposed development generally complies with the provisions of the proposed planning scheme – the Draft NT Planning Scheme, which has been on exhibition for a two month period - it fails to meet the minimum lot size requirements of that

³⁰ Attachment “B” is the Report to the Minister which is Exhibit 3.

scheme. The proposed scheme reduces the minimum lot size to 2 hectares instead of the current 8 hectares minimum lot size. The scheme states that “subject to clause 11.1.2 the consent authority must not consent to a subdivision in zones SD, MD, MR, HR, RR or RL that reduces a lot size by an area greater than 5% of the minimum specified”. The Report concludes that as the proposed two lot subdivision would result in a 70% reduction of the minimum lot size in relation to lot 1 and a 80% reduction in relation to lot 2, the proposed development does not comply with the proposed amendments to the planning scheme.

- **Section 51 (c) - an interim development control order in respect of the subject land**

The Report states that no such orders are in existence.

- **Section 51(d) - an environment protection objective within the meaning of the *Waste Management and Pollution Control Act* relevant to the subject land**

The Report states there are no such statutory objectives in existence.

- **Section 51 (e) – any submissions made under section 49 in relation to the development application**

The Report states that no such public submissions were received.

- **Section 51(f) – a matter that the Minister has, under section 85, directed the consent authority to consider in relation to development applications generally**

The Report states that no such direction has been given.

- **Section 51(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**

According to the Report the proposed development does not require the preparation of any environmental reports or impact statements.

- **Section 51(h) – the merits of the proposed development as demonstrated in the application**

The Report states as follows:

The applicant states that the proposal is consistent with current development in the locality. The subdivision will allow for an additional residential property in Wagait Beach. The subject site is serviced by a sealed road, power and telephone lines.

- **Section 51(j) - the capability of the subject land to support the proposed development and the effect of the development on the land and other land, the physical characteristics of which may be affected by the development**

The Report makes reference to the *Mandorah Land Use Concept 1990*, which indicates that the subject site has moderate constraints due to the lack of good quality fresh water, drainage problems and the risk of flooding and storm surge.

According to the Report the subject site is not considered to be capable of supporting the proposed subdivision because the subject land is not serviced by reticulated services and the water available to the land must be sourced from a communal bore managed by Power & Water. Power & Water describe the source of water as “fragile” and incapable of coping with intense development of land within the locality.

- **Section 51(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 Report states that no such facilities or space is required to be provided.

- **Section 51(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**

According to the Report, various bodies – Cox Peninsula Community Government Council, Power & Water, Department of Natural Resources, Environment and the Arts and Department of Planning and Infrastructure – were advised of the proposed development and expressed their attitude to the proposed subdivision.

Cox Peninsula Council raised no objection to the proposed subdivision.

However, Power & Water advised that “the existing low voltage reticulation along the newly created frontage does not imply that there is a capacity available”. Power & Water went on to say that “if the subdivision is allowed to proceed a charge for the proposed subdivision will be advised after a detailed investigation on the impact of voltage drop of the proposed additional lot on the existing network is carried out”.

Power & Water stated that it was unable to support the proposed development as it believed it would create a precedent:

This could lead to further subdivision applications that would result in excessive demand on the fragile water supply to the area. While the water supply facility has been upgraded in the area, it is in terms of reliability of supply not increased supply. Power and Water cannot guarantee the quantity or availability of the water supply at any given time.

The Report noted that in answer to Power & Water's concerns the applicant had offered to install, prior to occupation of the excised 0.4 hectare block, a minimum of 50,000 litre capacity water storage facility, which would rely on rain water collected on the site. The Report went on to note the applicant's opinion that approval of the proposed development would not create a precedent.

The Department of Natural Resources, Environment and the Arts did not take issue with the proposed development.

No formal comment was received from the Department of Planning and Infrastructure (Planning branch).

- **Section 51(n) - the potential impact on the existing and future amenity of the area in which the land is situated**

The Report states that while the proposed development is not expected to adversely impact on the existing and future amenity of the subdivision due to its consistency with development in the locality the main concern was that if the application were approved it would set a precedent for other owners of land in the locality to make applications to subdivide their acreage. The Report also registered concerns as to the ability of the current water and power services to support further development in the locality.

In relation to the matters required to be taken into account by section 51(n) the Report concluded:

The current proposal should only be considered within the context of the capacity of the water supply to provide for additional development, and that approval of this application which would demonstrably be inconsistent with the Planning Scheme will set a precedence (sic).

- **Section 51(p) - the public interest**

The Report notes the applicant's argument that the public interest is addressed through the creation of additional lots to a developing area, and while it accepts that the existing service may be able to support the

proposed development, the concern is the precedent that the development application, if approved, would set. The Report considers that approval of the proposed development may create an expectation in the minds of other landowners that they have the same development rights.

The Report repeats the concern that the water facilities available to the locality are not capable of supporting high density development. It is considered to be in the public interest to postpone increased residential development until such time as water services are upgraded.

- **Section 51(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**

According to the Report no breach of the Act would result from the proposed development being approved.

- **Section 51(r) - any potential impact on natural, social, cultural or heritage values**

The Report states that “the proposed development is not expected to adversely impact on the natural, social, cultural or heritage values of the site”.

- **Section 51(s) – any beneficial values, quality standards, criteria, or objectives, that are declared under section 73 of the *Water Act***

The Report states that “Darwin Harbour has declared beneficial uses for the Aquatic Ecosystem Protection and recreational Water Quality and Aesthetics”.

74. The Report recommended that the Minister refuse to consent to the proposed development on the following grounds:

1. The proposed development is contrary to the planning scheme provisions referred to in Section 9(1)(b) of the *Planning Act*, such that under Section 52(2) of that Act it cannot be approved. Specifically the proposal is not consistent with the requirements of Clause 9 (Lot Size). The minimum lot size in the RL2 zone is 8 hectares, which is consistent with the lack of services in the area. The proposed subdivision is a 92.5% (Lot 1) and a 85% (lot2) reduction in the minimum lot size requirement.
2. In considering the application, under section 51(p) of the *Planning Act* you are required to consider the public interest of the proposal. It is not in the public interest to approve the development application

while the facilities available to the Wagait Beach area are not capable of supporting higher density development. Reticulated water services are not available in the area with existing residents relying on a community bore for water supply. Therefore, until facilities to the area are upgraded to support further development that is when the land can be shown to be capable of supporting the proposed use (Section 51(j)), it is considered that it is in the public interest to postpone increased residential development until that time.

It is notable that the Power & Water who manage the community water supply do not support the application and describe the water source as “fragile”.

3. The proposal is not in accordance with the requirements for land zoned RL 2 – *Darwin Rural Area Plan 1983* (minimum lot size 8ha) being the relevant development provisions of the NT Planning Scheme. The previous subdivision of the land which resulted in lot sizes significantly below the current minimum of 8ha was approved prior to the introduction of planning controls into the area. Zoning the land RL2 and limiting the creation of smaller lots is intended to limit further development or redevelopment in accordance with the limited capacity of services particularly water supply.
4. The Consent Authority must, pursuant to section 51(a) of the *Planning Act*, take into account the Planning Scheme as it applies to the land. The development, as proposed, is not in accordance with the *Mandorah Land Use Concept Plan 1990* & the *Cox Peninsula Land Use Structure Plan 1990*, which identifies the site for “semi-rural” development in the short-term due to lack of services.

75. When considering the development application, the Minister also had before him correspondence from the Cox Peninsula Community Government Council (Exhibit 4) advising that it had not received any objections to the proposed development nor any representations from members of the public in relation to the matter.
76. The Minister had the benefit of correspondence from Power & Water (Exhibit 5) in relation to the supply of electricity to the proposed subdivision. That correspondence pointed out that the developer would be responsible for the costs of designing and installing adequate electricity reticulation to the newly created lot in accordance with Power & Water’s Design and Construction of Network Assets Guidelines. The correspondence also advised that the existing low voltage reticulation along the newly

created lot frontage did not necessarily imply that there was a capacity available. It went on to say that if the proposed subdivision were to be approved, a charge for the subdivision would be advised after a detailed investigation in relation to the impact of voltage drop of the proposed additional lot on the existing network is carried out.

77. The Minister was also provided with further correspondence from Power & Water (Exhibit 6) which conveyed that corporation's attitude as to the proposed subdivision. The salient parts of that communication are as follows:

Reticulated water services are currently unavailable in the area...

The water supply facility at Mandorah is for the use of Power and Water customers. While the facility has been upgraded it is in terms of reliability of supply not increased supply. Power and Water cannot guarantee the quantity or availability of the water supply at any given time...

Power and Water are unable to support the proposed application for a subdivision to create 2 lots – lots 5 LTO 81/035 Wagait Tower Road, Hundred of Bray, as it is considered that would result in an excessive demand on the fragile water supply to the area.

78. The Minister had the benefit of correspondence from the Department of Natural Resources, Environment and the Arts (Exhibit 7) advising that it had no issues associated with the proposed development.
79. The final document that was put before the Minister was the applicant's letter dated 25 June 2006 (Exhibit 8), which attempted to answer concerns regarding the proposed development. The salient parts of that correspondence are as follows:

In respect of water - I undertake to install a minimum of 50,000 litre capacity water storage facility, which will rely on rainwater collected on site, prior to any occupation of the excised 0.4 ha block. I am willing to provide PAWA with a surety, or accept a covenant on the property in this regard. Further, the reliability of supply is an issue for nearly all of rural, and most of urban Australia. Mandorah is better endowed with water than most municipalities, and development has not stopped elsewhere. PAWA's

own estimates of the bore field capacity to supply and replenish indicate that this proposal will not result in excessive demand.

In respect of possible precedence (sic) there are 396 rateable blocks in Wagait, 13 of which are 1 ha and only two of which are on corners and capable of sub-division. One already has been (now Sec 53 and 54) and my application mirrors it. The narrow frontages of remaining 1 ha indicate that it would be doubtful that they could be subdivided. In any event, “there are no precedents” in respect Development Planning.

I accept that the development may attract a charge for any changes required to the low voltage reticulation system, and will meet any such charges.

In light of the above, PAWA’s concerns regarding water seem a little overstated. This proposal will not have any perceivable impact on the overall amenity of Wagait Beach, or future water demands. Even with the minimum of 50KL on site, demand on the present town system would not exceed 50KL per anum.

ADDITIONAL MATERIAL PROVIDED TO THE TRIBUNAL

80. At the request of the previous Chairperson the Tribunal was provided with the following documents:

- *Darwin Rural Area Plan 1983* – Exhibit 9.
- The Notice of Determination to subdivide Lot 4 LTO 81/035. The notice was issued under delegation by the Deputy Chairman of the NT Planning Authority in 1986 – Exhibit 10.
- *Mandorah Land Use Concept Plan 1990* – Exhibit 11.
- *Cox Peninsula Land Use Structure Plan 1990* – Exhibit 12
- A plan of the Wagait Beach Township with lot areas – Exhibit 13.
- Extracts of the zoning map, zone description and relevant clauses from the Draft NT Planning scheme – Exhibit 14.

81. It appears that through some oversight the Tribunal did not provide appellants with copies of the above documents. However, prior to the publication of these reasons the Tribunal offered to provide him with copies of the documents. However, he advised the Tribunal that he did not need to

be supplied with the documents as he had sighted most of the documentation during the course of preparing his development application.

82. The *Darwin Rural Area Plan 1983* (Exhibit 9), the *Mandorah Land Use Concept Plan 1990* (Exhibit 11) and the *Cox Peninsula Land Use Structure Plan 1990* (Exhibit 12) have previously been referred to.
83. The Notice of Determination to subdivide LTO 81/035 (Exhibit 10) – more formally referred to as Instrument of Determination s 1459- reads as follows:

Subdivision application lodged pursuant to section 86 of the Planning Act by the Commonwealth of Australia of GPO Box 927, Darwin NT 5794 on 9 October 1986 for consent to subdivide Lot 4 LTO 81/35 Hundred of Bray to create two (2) lots, being an area of 3480m² for the purpose of an automatic telephone exchange for the Commonwealth of Australia and the other lot for rural living.

I Grant Ernest Tambling, by virtue of a delegation from the Northern Territory Planning Authority, determine the application pursuant to section 94 (1)(A) of the Planning Act by granting consent to the application to subdivide lot 4, LTO 81/35, Hundred of Bray, to create two (2) lots, one being an area of 3480m² for the purpose of an automatic telephone exchange for the Commonwealth of Australia and the other lot for rural living in accordance with drawing number c.508, received on 10 October 1986, endorsed by me and subject to the following conditions:

1. Electrical reticulation to each lot shall be provided at the applicant's expense to the satisfaction of the Chairman, Northern Territory Electricity Commission.

Reason: To supply an essential service to each lot.

2. Culvert crossovers and stormwater drainage to the newly created lot shall be constructed at the applicant's expense in accordance with plans and specifications submitted to and approved by the Director, Roads Division, Department of Transport and Works.

Reason: To ensure adequate all weather access to the land and that road drainage is unimpaired.

84. At the request of the current Chairperson the Tribunal was provided with the following material:
- Email from Steve Popple dated 15 October 2007 providing information regarding the Northern Territory Planning Scheme – Exhibit 15.³¹
 - Letter from Jim O’Neill, Acting Executive Director of Lands and Planning dated 16 October 2007 providing information in relation to the Draft Northern Territory Planning Scheme and the new Northern Territory Planning Scheme – Exhibit 16.³²
85. Exhibit 15 advised that the *Cox Peninsula Land Structure Plan 1990* and the *Mandorah Land Use Concept Plan 1990* had been superseded by the Northern Territory Planning Scheme which commenced operation on 1 February 2007.
86. Exhibit 16 advised that Clause 11.1.1 (3) of the new Northern Territory Planning Scheme relates to land in Alice Springs and adjacent zoned area only and that Wagait Beach is not included in the clause.
87. The letter went on to provide the further information:

In relation to the Tribunal’s request to clarify if the Draft Northern Territory Planning Scheme included “special circumstances”. A copy of the draft Northern Territory Planning Scheme as exhibited is attached for the Tribunal’s information and clause 2.5 (Exercise of Discretion by the Consent Authority) page 4 includes reference to “special circumstances”.

In relation to the Tribunal’s request for documentation to support the reference in the “Report to the Minister for Planning and Lands” at 6(b) page 2 previously supplied to the Tribunal, a copy of the Draft Northern Territory Planning Scheme is attached. The Tribunal is referred to clause 11.1.3 (Minimum Lot Sizes and Requirements) page 122 states:

Subject to clause 11.1.2, the consent authority must not consent to a subdivision in zones SD,MD,MR,HR,RR,RL that reduces a lot size by an area greater than 5% of the minimum specified in the table to this clause.

The Minister for Planning and Lands at the conclusion of the public exhibition and consultation process for the Northern Territory Planning Scheme made a number of minor amendments in accordance with section

³¹ The appellant was provided with a copy of this exhibit but elected not to respond to it.

³² Having been provided with a copy of this exhibit the appellant elected not to respond to it.

25(2) (c) of the *Planning Act* and amended the planning scheme in accordance with the altered proposal. One of the minor amendments was to revise the restriction of the discretion available to the consent authority to reduce lot sizes to no more than 5% only in Alice Springs and adjoining zoned areas only. The discretion was reinstated in the final version for all other areas of the Territory.

THE VIEW

88. A view of the subject site was conducted on 31 May 2007 for the purposes of better understanding the evidence and material that was before the Minister and which was subsequently presented to the Tribunal. Both parties were present at the view in order to ensure the independence of the Chairperson and the appellate process.

THE SUBMISSIONS

89. The Tribunal received the following written submissions in accordance with section 128 of the *Planning Act*:
- The appellant's submissions dated 1 December 2006 – Exhibit 17.
 - Appeal Report of the respondent dated 12 December 2006 – Exhibit 18.
 - The appellant's submissions in reply undated received 29 December 2006 – Exhibit 19.
 - Appeal Report of the respondent dated 5 January 2007 – Exhibit 20.
 - Letter and submissions from Kirrily Chambers, the Acting Director of Development Assessment Services dated 11 July 2007 – Exhibit 21.
 - Further written submissions from Jim O'Neill, the Senior Director of Development Assessment Services and Planning dated 17 August 2007 – Exhibit 22.
 - Letter from Jim O'Neill, Acting Executive Director of Lands and Planning dated 1 October 2007 – Exhibit 23.
 - Letter from Jim O'Neill, Acting Executive Director of Lands and Planning dated 5 October 2007 – Exhibit 24.
 - Letter from Jim O'Neill, Acting Executive Director of Lands and Planning dated 17 October 2007 – Exhibit 25.

90. The appellant was provided with copies of Exhibits 21 – 25 inclusive, but elected not to respond to those submissions.

The appellant’s submissions dated 1 December 2006 – Exhibit 17

91. Consistent with the grounds of appeal, the appellant submits that “procedural fairness did not occur in this case”. However, on close analysis the appellant does not appear to be alleging that he was denied “procedural fairness” in the sense that he was not given a fair opportunity to present his case or to be heard, or that the decision maker was not disinterested or biased. He appears to be simply asserting that the Minister reached the wrong decision after making a number of “errors of fact”.
92. The appellant’s submissions can be summarised as follows:
- The Minister was not precluded by section 52(2) of the *Planning Act* from approving the proposed development because clause 9 of the DRAP 1983 gives the Consent Authority a clear discretion to approve lot sizes of less than 8 hectares. The creation of two lots from the subdivision of lot 4 (LTO 81/035) adjacent to the proposed development is pointed out as demonstrating the existence of the discretion;
 - In relation to section 51(p) of the Act, the assertion by Power & Water that the water supply is “fragile” is not supported by the evidence. Specifically, in its Fact Sheet/Press (attachment E to the submissions) Power & Water described the water supply as “good and secure” and such as to “ensure that the community has adequate supply in the years to come”. Furthermore, the NT Government Report 9/2004D Cox Peninsula Water Supply Investigation (attachment F to the submissions) states that the Charles Point resource is capable of producing 600 ml a year, a figure that the report states represents some 29% of the determined minimum annual recharge. In addition, Power & Water’s water manager stated at a public meeting at Wagait Beach that while the 20% harvesting of the Charles Point recharge was a very conservative approach, it would guarantee a long term water supply for Wagait/Mandorah. Finally, according to the Cox Peninsula Community Council records, the exact amount of water used from the header tanks in the 12 months ending 06/09/2006 was “a miserly 14.5 ml”;
 - The lack of reticulated water services in the locality do not place the community in any worse position than other rural communities;

- In relation to section 51(p) and (j), the proposed subdivision was not objected to by either members of the public or Cox Peninsula Community Council. The contention that it would not be in the public interest to approve the proposed development is completely without merit: it is “palpably untrue to say ‘the facilities available to the Wagait Beach area are not capable of supporting higher density development’”. The position taken by the Minister is contradictory. Both the *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990* identify scope for some limited further development and yet the subject site is not considered capable of further subdivision. Furthermore, the proposed subdivision will not change the amenity of Wagait Beach nor place an excessive demand on the local infrastructure. If approved, the proposed subdivision would result in a change of 0.25% of gross lot numbers, and the size of each developed lot would be equal to, or greater than, the vast majority of lots in the locality;
- The “high density development” concerns are an overstatement given that the potential to create further lots (of less than the current 0.4 hectare size) within the area are limited;
- The concern over creating a precedent is specious. If approved, the proposed development would not necessarily influence the determination of subsequent applications for subdivision as each would have to be considered on their individual merits.

The respondent’s submissions dated 12 December 2006 – Exhibit 18

93. To put the development application in context, the respondent states that the Wagait Beach subdivision (including the subject site) was undertaken prior to the introduction of the NT Planning Scheme. Dealing with the statistics, there are 384 lots in the Wagait beach community, 35 of which are a hectare or more in size; and of that number residences have been constructed on 164 (45%) of the existing lots.
94. In answer to the appellant’s submissions regarding the matter of consent to the proposed development, the respondent says that the phrase “ without the consent of the consent authority, as appears in Clause 9 of the DRAP 1983, is “an oxymoron as all subdivision requires the consent of the consent authority by virtue of section 44(b) of the *Planning Act* .” It is submitted that the intent of Clause 9 is to restrict subdivision densities: “the policy decision of government to include the subdivision within a zone with a

minimum lot size significantly greater than those of the subdivision can be viewed as an indication to prevent second generation subdivision into even smaller lots”. The respondent submits that the proposed subdivision is “manifestly contrary to the provisions of the planning scheme as Clause 9 specifies a minimum lot size of 8 ha for land zoned RL 2”.

95. The respondent concedes that Clause 9 contemplates circumstances where the subdivision of RL 2 land could be considered for lots less than 8 hectares in size. For example, “this could be supported in instances where the land is fully serviced by appropriate infrastructure and the subdivision was in the public interest”.
96. The respondent submits that it was entirely proper to reject the development application given that the proposed lots represent “a massive reduction in the minimum lot size prescribed by the planning scheme with no obvious merit to support the reduction”. The proposed lot sizes of 0.4 and 0.6 hectares are “clearly smaller than the intended minimum lot size in the RL1 zone”.
97. It is submitted that a review of the permissible and consent uses available in the RL 2 zone supports the restrictions on subdivision densities and hence the minimum lot size. The permitted uses which include agriculture, detached dwelling, flora and fauna sanctuary, forestry, lot feeding, nursery, retail agricultural stall, sports and recreation and veterinary clinic are said to contemplate usage which is of a non-urban character and which involves lots of a significant size. It is submitted that “lots of the sizes proposed by the appellant cannot accommodate these uses which frustrate the intent of the RL2 zone provisions”.
98. In response to the appellant’s reliance upon the approved subdivision of Lot 81/035 as setting a precedent, the respondent makes the following

submission:

The subdivision of section 4 was approved in 1986 to excise 3480 sq.m. for the purpose of an automatic exchange for Telecom, a use which does not increase the demand for services and which is in the public interest. No other subdivisions of lots in the Wagait Beach of 1 ha or less area have occurred since the introduction of planning controls in 1983.

99. In relation to section 51(b) of the *Planning Act* the following submissions were made on behalf of the respondent:

The consent authority is obliged under section 51(b) of the *Planning Act* to consider any proposed amendments to the planning scheme that has been on public exhibition. Clearly the consent authority must make its determination in the context that, while an amendment may have been exhibited there is no guarantee that the amendment will proceed at all or as exhibited. Notwithstanding, the Act contemplates circumstances where the nature of the amendment is germane to the consent authority's deliberations in particular where a proposed development would, upon commencement of the amendment, become prohibited. This present matter is just such an instance.

100. The submissions refer to the consolidated Planning Scheme due to commence in February 2007.³³ It is submitted that the proposed subdivision will, for all intents and purposes, be prohibited by the proposed Planning Scheme:

- Clause 11.1 states that the minimum subdivision lot size is 2 ha;
- Clause 11.4.2 states that subdivision should provide for connection to reticulated services where practicable;
- Clause 11.4.3 states that lots must be of a size and configuration suited for the intended purpose, that subdivision does not pose unsustainable demands on groundwater and to ensure lots are of a size that does not prejudice the economic viability of the proposed use; and
- Clause 2.5(3) states that the consent authority may consent to a development of land that does not meet the standard set out in Parts 4, 5 only if it is satisfied that special circumstances justify the giving of consent.

³³ The Northern Territory Planning Scheme (NTPS), in fact, commenced on 1 February 2007.

101. It is submitted that the proposed subdivision fails to meet the above criteria and that “no special circumstances to warrant variance of the minimum lot size has been demonstrated by the applicant”. It is further submitted that the consent authority “weighted the proposed scheme appropriately in its decision making as it was required to do by the Act”.
102. The submissions also draw the Tribunal’s attention to the provisions of s130(3) of the *Planning Act*, which obliges the Tribunal to not make a determination that would permit a proposed development if it would be contrary to a provision of a planning scheme.
103. By way of response to the appellant’s contention that the water services and supply to the Wagait Beach area are adequate to support the proposed subdivision, the respondent submitted that the material or evidence - the Power & Water fact sheet, the Northern Territory Government Report and Council records – sought to be relied upon by the appellant could not be put before the Tribunal, and therefore could not be relied upon by him in the prosecution of the appeal, because of the prohibition imposed by section 128(4) of the *Planning Act*.
104. The respondent submits as follows:
- The information relied upon in this instance, and indeed provided to the Tribunal as part of the Grounds of Appeal, was not relied upon by the appellant nor presented to the consent authority when the determination was made.
105. Notwithstanding the prohibition imposed by section 128(2), the respondent made the following submissions in relation to the issue of available water services:
- The appellant has failed to consider the real issue. The issue is not “related to the small increase in population and commensurate increase in water demand, but rather the number of lots capable of also being subdivided in the greater Wagait Beach area should this application be approved”. The capability of the land to support the intended use and the impacts of the proposal on other lands must be considered pursuant to section 51(j) of the *Planning Act*;

- The 2004 Power & Water fact sheet or media release should not be treated as evidence of a capacity to support additional residential development. It should be treated only as an assurance to residents in the area that a secure water source has been located and that restrictions have been removed. In any event, the fact sheet is dated and generic in nature. It should not be relied upon “in place of the informed comment provided by the agency in response to a specific development application”;
- In relation to the Northern Territory Government Report sought to be relied upon by the appellant:

The Report’s estimate of 600ml is prefaced by: “a water supply bore field may potentially be developed to the allocated limit, notionally said to be 20% of recharge equating to about 600ml/y. However, the capture of this volume is highly dependent on the bore field configuration, currently limited to an easement of 100m width running parallel to the Charles Point Road” The bore field has not been developed at this time to anywhere near the extent envisioned in this calculation. Only 3 production bores are currently used to supply water to the Cox Peninsula Community. The NTG report calculations were based on the entire bore field.

Using the report’s estimate of peak water supply, 329 ml/y would be required to support the number of existing lots when developed. This figure does not incorporate the existing freehold land that exists in the Wagait Beach locality which is also zoned RL2 which if subdivided to the density proposed by the appellant would raise this demand 3 fold or to around 1000ml. The subdivision into lots of 0.4-0.6 ha rather than the 8 ha envisioned by the RL 2 zone represents a 16 times increase in residential density (Attachment A – tenure map).

- In response to the appellant’s submission that the facilities are capable of supporting the proposed development, the following submissions were made:

The consent authority agrees with the appellant in their (sic) estimate that the proposed development will only result in a minor (less than 1%) increase in gross lot numbers. However, Attachment B is a zoning map of the Wagait Beach area which shows the entire peninsula is zoned RL 2. If the Crown land and lease lands are excluded, and only freehold titles are considered, then the minimum potential for increased residential density (at similar sizes to those proposed) is for a 3 fold increase. The available water supply is simply unable to support increased development at the density proposed.

106. Submissions were also made in relation to the various matters required to be considered pursuant to section 51 of the *Planning Act*.

107. In relation to the applicable planning scheme, the Tribunal’s attention was drawn to the *Mandorah Land Use Concept Plan 1990* and the *Cox Peninsula Land Use Structure Plan 1990*, being the current land use objectives for the locality. It is pointed out that the subject site is designated as “semi-rural” for short term development due to a lack of services. It is submitted that the concepts “identify potential for some further development of unsubdivided freehold land dependant on the capacity of the limited water supply available at the time”.
108. It was brought to the Tribunal’s attention that the *Mandorah Land Use Concept Plan 1990* is part of the planning scheme that applies to the land being “provisions that include statements of policy in respect of the use or development of land (section 9(1)(a) of the Act)”. The submission then referred to relevant policy statements set out in the Plan.
109. The Tribunal’s attention was drawn to Clause 9 of the DRAP, also being part of the planning scheme that applies to the land being “provisions that permit, prohibit, restrict or impose conditions on a use or development of land (section 9(1)(b) of the Act). It was submitted that the proposed subdivision did not comply with clause 9 of the DRAP as proposed lot 1 was to have an area of 0.6 hectares and proposed lot 2 was to be 0.4 hectares in area. It was submitted that “the zone intention is to limit further subdivision in accordance with the limited capacity of services particularly water supply”. The respondent submitted that for those reasons the proposal did not comply with the NT Planning Scheme.
110. With respect to any proposed amendments to the Planning Scheme, the Tribunal’s attention was drawn to the Consolidated NT Planning Scheme due to commence on 1 February 2007. According to that Scheme the subject site is to be zoned “RL”. Although the minimum lot size requirement is reduced to 2 hectares, the proposed subdivision entails a 70% reduction of the minimum lot size requirement under the new Scheme in relation to

proposed lot 1 and a 80% reduction in relation to proposed lot 2. It is submitted that the proposed subdivision does not comply with the new NT Planning Scheme.

111. As to the merits of the proposed development, the following submission was made:

The proposal demonstrates no merit in planning terms as the proposal provides for lots that are too small to cater for the permissible uses in the zone (either from an amenity or fiscal viewpoint) and the increased density may place an unsustainable burden on water supplies.

112. In relation to the capability of the subject land to support the proposed development, the respondent repeats its earlier submissions:

Mandorah Land Use Concept Plan 1990 land unit information indicates that the land has moderate constraints due to the lack of good quality fresh water, drainage problems and the risk of flooding and storm surge.

The subject site is not considered capable of supporting further subdivision. The land is not serviced by reticulated services, rather the water available to the land must be sourced from a communal bore managed by Power & Water. Power & Water describe the water source as “fragile” and unable to cope with intense development.

113. With respect to section 51(m) of the *Planning Act* reliance is placed on the advice received from Power & Water.

114. As regards the potential impact on the existing and future amenity of the locality, it was submitted as follows:

The proposed subdivision to create lots that are of a similar size to other lots in the Wagait Beach area is, in itself, not expected to adversely impact on existing or future amenity. However this neglects the potential impacts of the potential for a bad precedent to be set. If a precedent is set the available water cannot support the increase in residents and the available community services are insufficient to support the potential population increase.

The current proposal should only be considered within the context of the capacity of the water supply to provide for additional development, and that approval of this application which would demonstrably be inconsistent with the Planning Scheme will set a precedence (sic).

115. In relation to public interest – section 51(p) – the following submission was made:

The applicant states that the public interest is addressed through the creation of additional lots to a developing area. The existing services available may be able to support the one proposed subdivision, but the concern is for the precedence (sic) it sets for other landowners to have the same expectation of development rights. The issue of precedence (sic) is addressed later in this submission.

The facilities available to the Wagait Beach area are not capable of supporting high density development. Reticulated water services are not available in the area with existing residents relying upon a community bore for water supply. Therefore, until facilities to the area are upgraded to support further development in the area, it is considered that it is in the public interest to postpone increased residential development until that time.

116. In relation to precedent concern, the following detailed submissions were made on behalf of the respondent:

The total area of the lots less than 1 hectare in size is 185 hectares. The remainder of freehold land in the Wagait area is an additional 301 hectares (Attachment C). If this subdivision was approved, and assuming land capability is not a factor, this has the potential for an additional 753 0.4 hectare lots to be created in the Wagait Beach area alone. There is some doubt about the potential capability of the ground water aquifer and existing water infrastructure to support such development.

Regarding the issue of planning precedence(sic) in *Vic Roads & Port Phillip CC v Stonnington CC* [2002] VCAT 999 (12 July 2002) Tonia Komesaroff, Presiding Member and John Bennett, Member, found the following:

59 Vic Roads raised the issue that the current proposal is the first of its kind in Victoria and that if the proposal is allowed it will set a precedent for similar proposals on tram poles elsewhere in Melbourne. Vic Roads drew the Tribunal's attention to *Zerbe & Starks v City of Doncaster and Templestowe* (1984) 2 PABR 101 at 116 where it was noted that:

There is no doubt that, as a matter of principle the Board should have regard to whether its decision would create an undesirable precedent as previous planning decisions are clearly relevant in the exercise of discretion. However for a precedent to be created in any particular case there must be scope for this to occur. Moreover for the Board to decide against a development through a fear of creating a precedent the Board must also find that the subsequent development would be undesirable. In other words it is not enough to demonstrate that a

particular decision will create a precedent. It must also be shown that it will be a bad precedent.

60 While the current proposal must be assessed on its individual merits, we are concerned that it is the first of its kind in Victoria. Although it can be argued that the site (or at least the Queen's Way part of it) is distinctly different to anywhere else in Melbourne because it is a cutting without any direct access to adjoining properties, it is possible to imagine other sites (say with business or industrial zone frontages) also being subject to similar applications based on their uniqueness or lack of amenity impact on residential areas. Because we are concerned with the preservation and safety of human life and limb, we do not wish to permit a land use that Roads Corporation is concerned will be a detriment to traffic safety. We do not wish to permit something that may indeed be a bad precedent.

In the opinion of the consent authority this matter will also create a bad precedent if overturned by the Tribunal. There are significant areas of land which may be able to be subdivided in a similar manner if this application were approved. In fact the adjoining lots to the north, south and east of the subject site have features of the subject site and the same status under the NT Planning Scheme. The impact of such and the ability of the land to be serviced with water and community services is a critical planning issue that must be considered in determining this matter.

117. Finally, it was submitted that the development application did not demonstrate "any special merit to warrant consent at variance with the minimum standard" (prescribed by Clause 9 of the DRAP 1983).
118. In conclusion, it was submitted that the appellant had "failed to demonstrate that the consent authority did not properly consider the proposed development in accordance with the requirements of the *Planning Act*". It was submitted that "the consent authority has properly considered the proposed subdivision in terms of section 51 of the *Planning Act* and considers that its decision to refuse the subdivision was consistent with its obligations under section 51 and 52 of the *Planning Act*".

The Appellant's submissions in reply received 29 December 2006 – Exhibit 19

119. By way of reply, the appellant submitted that lot size at Wagait Beach is generally 0.4 hectares and all privately owned lots in Wagait Beach are residential. The appellant submitted that the land is "unsuited to most of the

permitted uses and is obviously most suited to low density residential given the actual size of these lots”.

120. The appellant made the following submission:

The arbitrary nature of the zoning is reflected in the proposed Consolidated Planning Scheme, as discussed in this paragraph in respect of reducing the lot size to 2 ha, which will commence in February 2007. If a change is to be implemented this begs the questions “why reduce the planning controls to 2 ha, if the infrastructure controls are so critical”; and “if change is contemplated, why not reflect the current situation in Wagait Beach eg a 0.4 ha subdivision”.

121. The appellant submitted that the Tribunal should take into account the Cox Peninsula Water Supply Investigation Report and the usage reports for the following reasons:

The issue of water has been pivotal in the Planning and Lands advice to the Minister. The “Cox Peninsula Water Supply Investigation Report” and the usage reports and are (sic) both Power and Water Corporation reports are understood by the appellant to be the only quantified data available on the issue of water. If these are not the basis of the Planning and Lands advice on water supply, then what was the basis of such advice? I respectfully request that this information not be found in breach, as it indicates that the basis of my appeal is soundly based – how can procedural fairness occur if the Minister is given incorrect advice.

122. Taking that submission further, the appellant said that he was not aware of the grounds upon which his development application was rejected until he was notified that it had been refused. Therefore, it was “hardly likely” that he would have used the subject information in support of his application.

123. In response to the respondent’s submission that approval of the application would result in an unsustainable increase in residential density, the appellant submitted as follows:

The claim of a 16 times increase in residential density is preposterous. This proposition assumes all lots are 8ha, and all will be subdivided. Reality is that most are already 0.4ha, and of the few greater than this size, even fewer are likely to be subdivided. An increase of 10 per cent is a more realistic scenario, even then this might only occur over many years.

124. The appellant disagreed with the respondent's submission that if the application were approved it would create a potential for all RL 2 land to be subdivided into the size of the Wagait Beach lots:

The appellant's proposal seeks a minor two-lot subdivision, which is entirely within the township, and which in turn is almost entirely composed of small 0.4 ha lots. Lands and Planning should be capable of zoning Wagait Beach township to reflect the actual size and the actual use of this successful lifestyle subdivision. In the context of this township, a 0.4 subdivision creates a more efficient use of existing infrastructure, and available land, than would larger lots.

125. As to the water supply issue, it was submitted as follows:

On current annual usage figures the population would have to grow 37 times to reach the conservative recharge figure of 600 ml a year. At present Wagait Beach comprises less than 400 persons. Time, and many other constraints, would certainly ensure that Wagait Beach would not exceed the available water supply, or PWC capacity to supply infrastructure, within reasonable planning horizons.

The respondent's further submissions in reply dated 5 January 2006 – Exhibit 20

126. By way of response to the appellant's further submissions, it was submitted on behalf of the respondent that the amendment to the zoning of the area to be introduced on 1 February 2007 "will introduce the 'Rural Living' (RL) zone into the local Wagait Beach area only". The submission proceeded as follows:

The RL zone has a minimum lot size of 2 ha and is being introduced in an effort to introduce contemporary and appropriate land use controls into the Wagait community. The "Rural" zone with its 8 ha minimum lot size remains over the greater Cox Peninsula area. The applicant's suggestion that the "RR" zone and its 0.4 ha lot size could be used is clearly not possible under the Planning Scheme. To conform to the basic requirements (see clause 11.4.5) "Each lot in a rural residential subdivision is to be connected to reticulated water". As has previously been detailed by the authority (on the advice of Power & Water) no such service is available on the Cox Peninsula.

127. As to the appellant's submission that he was not aware that the issue of water would form a basis for the refusal of the application, the respondent

says that following receipt of the Power & Water comment and contact from the Department of Planning and Infrastructure in relation to the water issue, the appellant responded in writing to the Department on 25 June 2006, undertaking to install a minimum of 50,000 litre capacity water storage facility. Accordingly, it was submitted that the appellant was fully aware of the water issue.

128. It was further submitted that the appellant has provided no evidence to support the conclusion that an increase of only 10% density is likely if further 0.4hectare subdivisions are approved in the area. The respondent relied upon area calculations and land title information to support its contention.
129. The respondent took issue with the appellant's submission that a 0.4hectare subdivision creates a more efficient use of existing infrastructure and land and that on current usage figures the population would have to grow 37 times to reach the conservative recharge figure of 600ml a year:

...the argument for subdivision for efficient use of infrastructure appears to be "drawing a long bow" in the context of the Wagait community as no water and sewerage infrastructure is available.

The Authority has provided detailed commentary on the water and recharge figures relied upon by the applicant in its previous submission...

Further information and submissions provided on behalf of the respondent dated 11 July 2007 – Exhibit 21

130. Exhibit 21 reiterated that the relevant planning scheme provision referred to by section 9(1)(b) of the *Planning Act* is the DRAP 1983.
131. With respect to the grounds for refusing consent, it was submitted as follows:

...the lot sizes proposed by the application are well below that which a decision maker could reasonably be expected to approve. Whilst it is accepted that discretion exists to approve an application to subdivide land into lots smaller than 8 hectares, the consent authority submits that, to

approve a lot so far below the recommended minimum would require a departure from the requirements of the Darwin Rural Area Plan, resulting in an approval that is contrary to the planning scheme. The consent authority therefore maintains that the appellant's application is contrary to a planning scheme provision referred to in section 9(1)(b) of the Act.

132. As to comparable subdivisions in the Wagait Beach area, the following information was provided:

Telecom lot: Attachment A to this letter sets out a copy of Instrument of Determination S1459 issued on 14 November 2006 which clearly outlines that the subdivision approved was to allow the creation of a 3480m² parcel for the specific purpose of an automatic telephone exchange for the Commonwealth of Australia.³⁴ As the provision of telecommunication services is considered a service in the public interest, it is implicit in the approval that consent was granted having regard to the need for public infrastructure and services within the locality;

Use of second lot: Instrument of Determination S1459 further states that the second lot is to be utilised for the purpose of rural living.

Other subdivision: The consent authority is unclear as to the reasons behind the Tribunal's request for information on other approved subdivisions that did not conform to the minimum lot size requirements of clause 9 of the Darwin Rural Area Plan. The Appeal Report states that no other subdivision of lots in Wagait Beach of 1 hectare or less have occurred since the introduction of planning controls in 1983.

Unfortunately it is not possible to run a simple report on whether subdivision applications granting a variation to clause 9 of the Darwin Rural Area Plan have been approved and further research in this regard would require a staff member to individually research each parcel that has existed in the area since 1983 to which the Darwin Rural Area Plan related. This would take considerable time and resources and, given that the subdivision pattern and lot numbering in the Wagait locality is largely consequential, there are no obvious approvals that are considered relevant.

If the Tribunal requires further information and would like the consent authority to carry out the individual searches referred to above, the consent authority requests that an extension be given.

133. In light of the emphasis on the expeditious determination of planning appeals and the unlikelihood that further investigations would advance the matter, no request was made to provide further information.

³⁴ Attachment A is Exhibit 10 in this appeal.

The further submission on behalf of the respondent dated 17 August 2007 - Exhibit 22

134. After dealing with the nature of an appeal before the Tribunal and the jurisdiction of the Tribunal on an appeal, the following submissions were made in Exhibit 22 in relation to the operation of relevant sections of the *Planning Act*:

The provisions of the Planning Act are such that, by section 51, the Consent Authority is obliged to take into account, amongst other things; the relevant planning scheme, which at the time of the decision under appeal was the Darwin Rural Area Plan; any proposed amendments to same; the merits of the proposed development; the effect of the development on other land; the public utilities and infrastructure in the area on which the land is situated; and, the public interest.

For the purposes of Part 5 of the Planning Act, the Development Consent Authority and the Minister may be the “Consent Authority” In the circumstances of the subject application, the Minister was designated as the Consent Authority by virtue of section 4(1) of the Planning Act.

Sections 52(1)(a) and 52(1)(b) are concerned with limitations on the Development Consent Authority’s power to consent to development permits, in its role as Consent Authority, whereas section 52(2) constrains the Minister’s powers to consent to development permits, in his role as the Consent Authority.

Section 52(2) provides that a Minister must not consent to a proposed development, if the development is contrary to a planning scheme provision referred to in section 9(1)(b), or an interim development control order.

Historically, sections 52(1)(b) and 52(2) were concerned with decisions in relation to “development provisions” or “interim development control orders” which both refer back to aspects of planning schemes dealing with requirements for things such as the control of the height of buildings or the size of a building relative to the block of land, rather than subdivisions. The introduction of amendments by the Planning Amendment Act 2005 appears to have dropped this distinction and created a distinction by reference to the matters referred to in sections 9(1)(a) and (1)(b). Section 9 provides, inter alia:

- (1) A Planning scheme may include the following:
 - (a) provisions that include statements of policy in respect of the use or development of land;

(b) provisions that permit, prohibit, restrict or impose conditions on a use or development of land....

Thus, section 52(1)(a) grants to the Development Consent Authority a discretion (“in its opinion”) in relation to applications to which a planning scheme which incorporates statements of policy in respect of use or development of land applies. If such a statement exists and if “in the opinion” of the Development Consent Authority the proposed development is not contrary to that statement of policy, the Development Consent Authority is not bound to withhold consent. That is not to say that the Development Consent Authority may not elect to refuse consent on some other basis set out in section 51.

Sections 52(1)(b) and 52(2) appear however to impose a mandatory obligation on the Development Consent Authority and the Minister to withhold consent in circumstances where the proposed development is contrary to planning scheme provisions that permit, prohibit, restrict or impose conditions on a use or development of land.

135. As to the currently applicable planning scheme, the Tribunal was informed that “none of the relevant provisions of the *Planning Act* have been amended since the decision of the Minister under appeal; however the DRAP has since been overtaken by the introduction of the Northern Territory Planning Scheme (NTPS) on 1 February 2007”.

136. As to the new scheme, it was submitted as follows:

Under the NTPS the appellant’s land is zoned “RL”; Rural Living. Clause 5.19 of the NTPS states that the primary purpose of this zone is to provide low density living and a range of rural uses including agriculture and horticulture.³⁵

Clause 11.1.1 provides that land zoned “RL” should be subdivided to no less than 2ha of which 1 ha must be unconstrained land. The purpose of the restriction on subdivision size is stated to be to ensure that land within the zone will be of a size capable of accommodating potential future uses.

Clause 2.5(3) provides that:

The Consent Authority may consent to the development of land that does not meet the standard set out in Parts 4 or 5 only if it is satisfied that special circumstances justify the giving of consent.

³⁵ It was submitted that the stated purpose is relevant to sections 9(1)(a) and 130 of the *Planning Act*.

137. The submissions of 17 August 2007 (Exhibit 22) originally included a submission regarding the relationship between the discretion to relax minimum lot sizes and ss 52(2) and 9(1)(b) of the *Planning Act* in light of the decision of former Chairperson Loadman SM in *Phelps v Development Consent Authority*.³⁶ That part of the submissions has been withdrawn by the respondent for the reasons that follow.
138. The decision in *Phelps* went on appeal and the appeal was allowed by the Supreme Court on 12 September 2007. The appeal was allowed by consent and remitted to the Tribunal to be reheard. However, the basis for allowing the appeal was not disclosed.
139. Subsequently the Tribunal sought clarification of the basis upon which the appeal in *Phelps* was allowed. The Tribunal was informed of the basis upon which the appeal was allowed so as to avoid the Tribunal falling into error by relying on the respondent's submissions, in the present matter, in relation to the *Phelps* matter.
140. On 16 October 2007 Jim O'Neill, Acting Executive Director of Lands and Planning wrote to the Chairperson of the Lands Planning and Mining Tribunal in the following terms:

I would like to take the opportunity to clarify the issue of the current circumstances as they relate to Mr Parker's matter and Mrs Phelps's matter. As the Tribunal is aware the two matters in question were decided by two different consent authorities under the Planning Act. The Minister for Planning and Lands is the consent authority for Mr Parker's matter and the Litchfield Division of the Development Consent Authority (DCA) is the consent authority for Mrs Phelps's matter. I have canvassed the views of the Chairman of the DCA as he is concerned that issues still in dispute in relation to Mrs Phelps's matter could be negatively affected by considerations of the Tribunal in deciding Mr Parker's matter.

As a result of the remittal of Mrs Phelps's matter to the Tribunal the references to the Tribunal's decision (in relation to the Phelps) of 10 January 2007 in the submissions of 17 August 2007 by the consent authority in Mr Parker's matter have been affected, Clearly there is no

³⁶ NT LPMT 98-2006 – P (20621279).

longer a formal decision upon which these submissions can rely. If it would assist the Tribunal the consent authority for Mr Parker's matter can resubmit the submissions of 17 August 2007 to remove reference to the decision of 10 January 2007.

141. All things considered, the Tribunal was content with the proposed course. On 17 October 2007 the submissions of 17 August 2007 were resubmitted with references to the *Phelps* matter deleted.³⁷ The appellant was informed of the course of events and provided with a copy of the substituted submissions. The appellant again elected not to respond.
142. In the respondent's submissions dated 17 August 2007 (Exhibit 22), the following submissions were made as to the meaning of the phrase "contrary to a planning scheme provision":

The term "contrary to" is not defined in the Planning Act or the Acts Interpretation Act, although, the latter Act defines, in section 17, the meaning of "contravenes" to include a "failure to comply with".

Despite extensive searches, no judicial consideration of the meaning of the words "contrary to" has been located. Whilst many cases refer to matters "contrary to" a legislative provision, an examination of the level of departure from a standard, that is required to interpret same as being "contrary to" that standard, has not been located.

The lack of judicial or statutory interpretation of the subject words suggests that the words should be interpreted in accordance with their ordinary and current meaning.³⁸

The Australian Oxford Dictionary 2nd ed defines "contrary" followed by "to" as an adverb meaning "in opposition or contrast".

It is submitted that, in terms of the interpretation of section 52 of the Planning Act, "contrary to" should be interpreted as meaning that the Consent Authority must not consent to a subdivision which does not meet the minimum standard set. Any departure from the minimum must necessarily have the effect of contrasting with the standard. This interpretation does not depend on a matter of degree of departure from the minimum standard.³⁹

³⁷ The resubmitted submissions are referred to below, pp 56-57.

³⁸ The submission cites Pearce and Geddes, *Statutory Interpretation* 6 ed at [4.8].

³⁹ For instance, the submission refers to Clause 11.1.1(3) of the NTPS which prohibits the giving of consent in circumstances where the reduction would be greater than 5% of the minimum standard.

143. The meaning of “special circumstances”, as appears in Clause 2.5(3) of the NTPS, was also originally addressed in the further submissions prepared on behalf of the respondent dated 17 August 2007. However, as those submissions relied heavily upon the decision in the *Phelps* matter, those submissions were also withdrawn under the circumstances referred to above.
144. In relation to comparable subdivisions in the Wagait Beach area, the following submissions were made in the submission dated 17 August 2007:

The Department has completed a search of subdivisions in the Wagait Beach area and subdivision approvals since the introduction of the Darwin Rural Area Plan 1983.

Of the 368 lots less than 1a in the Wagait Beach Locality only one as previously advised has been subdivided since the introduction of the Darwin Rural Area Plan (the Telecom lot).

One other determination for subdivision dated 14 January 1984 (attached) exists however it is for the realignment of lots previously approved by determination S0454 dated the 7/10/1980 which was for subdivision to create 0.4 ha lots prior to the commencement of the Darwin Rural Area Plan 1983.

145. In conclusion the respondent made these submissions:

- The Tribunal is obliged to consider the appellant’s appeal by reference to the law as it currently stands.
- As such, the Tribunal is obliged, by operation of sections 52(2) (or 52(1)(b)) and 9(1)(b) to have regard to the provisions of the NTPS. The NTPS provides for a minimum lot size of 2ha where land, in the zone under appeal, is proposed to be developed.
- The NTPS also provides a mechanism for the Consent Authority to consent to a variation of lot sizes below the minimum standard however that mechanism places an onus upon the appellant to satisfy the Consent Authority not only of the existence of special circumstances but that those circumstances justify a departure from the minimum lot size standard.
- The mechanism is also permissive, that is, it provides the Consent Authority with a discretion, such that, even if the applicant does discharge the onus upon him, the Consent Authority is not obliged to grant consent.

- The existence of such a discretion in the planning scheme arguably surmounts what would otherwise be a mandatory provision imposed by the provisions of the *Planning Act* in section 52(2) (or section 52(1)(b)).
- Implicit in the ordinary and current meaning of “contrary to”, any departure which would have the effect of reducing a lot size to less than the minimum standard, would offend against section 52(2).
- The Tribunal is under the same obligation as the Consent Authority described in [39] above.
- The appellant’s application for subdivision does not meet the minimum standard for lot sizes of subdivision as imposed by the NTPS.
- To obtain the consent of the Consent Authority to deviate from the standard, or in the present circumstances, to succeed before the Tribunal, the appellant must satisfy the Tribunal that special circumstances exist which would justify a departure from the minimum standard.
- Given past submissions as to “merit” the respondent anticipates that the appellant will seek to rely upon, amongst other things, the existence of numerous lot sizes in the area of his property which do not meet the minimum lot size. The respondent submits that such a submission should be rejected.
- In any event, if the Tribunal is minded to have regard to such a submission, the granting of a development permit is not automatic. A discretion remains and the Tribunal is also obliged to have regard to other matters specified in section 51 of the *Planning Act*.

146. Finally, the respondent submitted that the Tribunal should make an order pursuant to section 130(4)(a) of the *Planning Act*, confirming the determination of the Minister, sitting as the Consent Authority.

Resubmissions on behalf of the respondent dated 17 October 2007 – Exhibit 25

147. Exhibit 25 was a resubmission of the submissions dated 17 August 2007 (Exhibit 22) with all references to the *Phelps* matter having been deleted. However, exhibit 25 contained the following additional submissions.

148. In relation to how the existence of a discretion within the planning scheme to relax minimum lot sizes fits with ss 52(2) (or 52(1)(b)) and

9(1)(b) of the *Planning Act* the following was submitted:

Section 9(1)(b) read together with section 52(1)(b) places a mandatory obligation upon the Consent Authority to not depart from restrictive clauses as to lot size. In our submission the reasoning applies equally to the provision in section 52(2) which contains essentially the same wording as section 52(1)(b).

To so depart from restrictive clauses as to lot size, would be “contrary to” the planning scheme.

149. With respect to the meaning of “special circumstances” it was submitted as follows:

For the purpose of the present submissions the Respondent submits that special circumstances must be circumstances which go “beyond the ordinary”.

THE REASONING AND DETERMINATION OF THE TRIBUNAL

150. As this appeal is in the nature of a merits review, it is to be determined according to the law as it presently stands. That means that the appeal is to be determined according to the current applicable planning scheme which is the Northern Territory Planning Scheme (the NTPS). That scheme came into effect on 1 February 2007 and superseded the DRAP which was the applicable planning scheme at the time the Minister considered and ultimately refused the appellant’s development application. By reason of the introduction of the NTPS, the *Cox Peninsula Land Use Structure Plan 1990* and the *Mandorah Land Use Concept Plan 1990* are no longer operative and enjoy no status under the NTPS.
151. However, in the event that I have erred in characterising the present appeal as a merits review, or erred in applying the NTPS in the determination of the appeal, I propose to also consider the appeal in light of the relevant planning scheme as it stood at the time the Minister considered and refused the development application.

The NTPS as the applicable planning scheme for the purposes of this review

152. The Northern Territory Planning Scheme applies to the whole of the Territory other than for areas that are subject to a specific planning scheme in accordance with section 8 of the *Planning Act*. The NTPS applies to the subject land and the proposed subdivision.
153. Under the NTPS, the subject land is zoned “RL”- Rural Living. Pursuant to clause 5.19 of that Scheme the primary purpose of the zoning is “to provide low density rural living and a range of rural land uses including agriculture and horticulture”.
154. Clause 11.1.1 of the NTPS, which appears at the beginning of Part 5 of the NTPS, imposes minimum lot sizes and requirements in relation to subdivisions. The clause provides:

1. The purpose of this clause is to ensure that unzoned land and lots in zones SD,MD,MR,HR,RR,RL,R,LI,GI,DV,FD,RD,H,WM and T will be of a size capable of accommodating potential future uses.

2. Land to which this clause applies should be subdivided in accordance with the minimum lot size and requirements specified in the table to this clause.

3. The consent authority must not consent to a subdivision:

(a) in zones SD,MD,MR,RR or RL in Alice Springs and adjacent zoned areas; or

(b) in zone SD otherwise than described in (a);

that reduces a lot size by an area greater than 5% of the minimum specified in the table to this clause.

The relevant minimum lot size and requirements for land zoned “RL” is “2ha with a minimum of 1ha of unconstrained land”.⁴⁰

⁴⁰ See Table to Clause 11.1.1. The table indicates that, as the subject subdivision relates to rural land, it is also regulated by Clauses 11.4.1 to 11.4.6 of the NTPS.

155. The prohibition imposed by Clause 11.1.1(3) does not apply to the subdivision which is the subject of the present appeal because it does not fall within the parameters of either subclauses (a) or (b).
156. Clause 2.5 of the NTPS, which is concerned with the exercise of discretion by the Consent Authority, provides:
1. In considering an application for consent for a proposed use or development, the consent authority must consider the proposed use or development in its entirety except in relation to
 - (a) an application to alter or vary a development permit pursuant to sections 43A, 46 or 57 of the Act;⁴¹ or
 - (b) access to a main road.
 2. Parts 4 and 5 set out the standards that apply to the development of land, subject to sub-clauses 3 and 4.
 3. The consent authority may consent to the development of land that does not meet the standard set out in Parts 4 or 5 only if it is satisfied that special circumstances justify the giving of consent.
 4. When consenting to a development of land, the consent authority may impose a condition requiring a higher standard of development than is set out in a provision of Parts 4 or 5 if it considers it necessary to do so.
157. Applying clauses 2.5(2) and (3) to the proposed subdivision, three things follow. First, the Tribunal, standing in the shoes of the consent authority (in this case the Minister), must consider the proposed subdivision in its entirety. Secondly, the standard to which clause 2.5(2) refers is the minimum lot size and requirements established by Clause 11.1.1(2). Although the word “standard” may vary in accordance with the context in which it is used, “the primary idea which the word expresses is that of a measure of quantity or quality fixed or approved by some authority, eg standard foot, standard pound, standard of behaviour”.⁴² The prescribed minimum lot size and requirements conform to the concept of a “standard”. Thirdly, the Tribunal is not bound to withhold consent to the proposed

⁴¹ ‘Act’ means the *Planning Act*.

⁴² See *R v Galvin, ex parte Metal Trades Employers’ Association* (1949) 77 CLR 432 at 444.

development if the subdivision does not meet the prescribed standard. It has a discretion notwithstanding the proposed subdivision fails to meet the applicable standard. However, that discretion is constrained and is exercisable only within a limited compass. The Tribunal may only consent to the subdivision if it satisfied that there are special circumstances justifying the giving of such consent.

158. Clause 11.1.1(2) establishes the general rule governing the approval of subdivisions under the NTPS. The phrase “should be subdivided in accordance with the minimum lot size and requirements“ expresses a sense of obligation or duty and indicates an expectation that a proposed development will comply with those minimum requirements. Clauses 2.5 (2) and (3) create the exception to the general rule and allow for a relaxation of those requirements if there are special circumstances justifying the giving of consent to the proposed development.
159. It now remains to consider the relationship between the relevant clauses of the NTPS and s 130(3) of the *Planning Act* which imposes constraints on the Tribunal’s exercise of its appellate function.
160. As noted earlier,⁴³ the Tribunal is precluded by s 130(3)(b) of the *Planning Act* from determining an appeal so as to permit a proposed development if the development would be contrary to a provision of an applicable planning scheme referred to in s 9(1)(b) of the Act.
161. By imposing a minimum lot size and requirements for land zoned “RL”, Clause 11.1.1(2) of the NTPS clearly falls within the ambit of a provision of a planning scheme referred to in s 9(1)(b) of the *Planning Act* . However, the provision does not stand alone and must be read in conjunction with Clause 2.5 (2) and (3). Therefore, Clauses 2.5 (2) and (3) must be treated as part of the planning controls created by Clause 11.1.1(2) and accordingly as

⁴³ See above, pp 14-15.

part of a provision of a planning scheme referred to in s 9(1)(b). The implications of that analysis is that the Tribunal is prohibited from permitting a proposed development if the development would be contrary to the regulatory scheme established by the combined operation of Clauses 11.1.1(2) and 2.5 (2) and (3). Accordingly, in the present case where the proposed subdivision clearly does not meet the minimum standard, the Tribunal could only give consent to the proposed subdivision if it were satisfied that there are special circumstances that justify the giving of such consent. If the Tribunal were to give consent to the proposed subdivision in the absence of special circumstances, then the giving of such consent would be contrary to a provision of a planning scheme provision referred to in s 9(1)(b) of the *Planning Act*, and hence contrary to section 130(3)(b) of the *Planning Act*.

162. The former Chairperson, Mr Loadman SM, appears to have reached a like view in *Phelps v Consent Development Authority* NT LPMT 98-2006 – P (20621279)⁴⁴ in relation to a similar planning regime established under the *Litchfield Area Plan 2004* (LAP 2004):

It has to be borne in mind that, but for permissive power in clause 2.2 LAP 2004 to reduce lot size by virtue of a power to allow “development at variance with those standards”, that which is the subject of the application and appeal would amount, unquestionably in this Tribunal’s finding, to a situation requiring the invocation of sections 9(1)(a) and or (b) and section 130(3) PA...⁴⁵

163. A possible argument against my construction of Clauses 11.1.1(2) and 2.5 (2) and (3) is that the use of the word “should” in clause 11.1.1(2) imports a sense of advisability rather than a sense of obligation or necessity, and therefore neither Clause 11.1.1(2) nor the combination of that clause with Clauses 2.5 (2) and (3) amounts to a provision that prohibits, restricts or imposes conditions on a development of land within the meaning of

⁴⁴ This matter has been remitted to the Tribunal for rehearing following a successful appeal to the Supreme Court of the Northern Territory.

⁴⁵ *Denise Phelps v Development Consent Authority* NT LPMT 98-2006 –P (20621279) at [41].

paragraph 9(1)(b) of the *Planning Act*.⁴⁶ The corollary of that argument is that clause 11.1.1 (2) is to be regarded as a provision of the type referred to in s 9(1)(c),(d) or (e)⁴⁷ rather than as a provision within the meaning of s 9(1)(b); and consequently no question arises as to the application of either s 52(2) or 130(3)(b) of the Act.⁴⁸

164. I reject this argument on the basis that it misconstrues the true character of Clause 11.1.1(2). Viewing the NTPS as a whole, I consider that Clause 11.1.1(2) is a prescriptive, rather than advisory, provision establishing a standard for subdivisions which must generally be complied with in order to be approved, and any departure from that standard will only be sanctioned in special circumstances.
165. An alternate counter argument is that any prohibition or restrictions imposed by Clause 11.1.1(2) is moderated by the ability of the consent authority to consent to the proposed development, pursuant to, and in accordance with Clause 2.5(3). Accordingly, neither s 52(2) nor 130(3)(b) of the *Planning Act* apply to the proposed subdivision, as the proposed development can be approved or consented to in accordance with, and not contrary to, Clause 2.5(3), provided that there are “special circumstances” that justify the giving of consent.⁴⁹ This argument is as unsustainable as the first counter argument. The argument overlooks the fact that Clause 2.5(3) forms an integral part of the prescriptive provisions of Clause 11.1.1(2) – it is the exception to the general rule. It is implicit that the consent authority – and indeed the Tribunal – cannot give consent to a proposed subdivision that does not comply with the minimum lot size and requirements unless there are found

⁴⁶ A similar argument was advanced in *Phelps* (supra) in relation to a similar planning regime established under the *Litchfield Area Plan 2004*, but apparently rejected by the Tribunal.

⁴⁷ Subsection (c) relates to “provisions that provide instructions, guidelines or assessment criteria to assist the consent authority in assessing development applications”. Subsection (d) is concerned with “other provisions in connection with planning for or control of the use or development of land”. Subsection (e) relates to “other provisions that are necessary or convenient for giving effect to the planning scheme”.

⁴⁸ This extended argument was also advanced in *Phelps* (supra), but again apparently rejected by the Tribunal.

⁴⁹ A similar argument was advanced in *Phelps*, but again apparently rejected by the Tribunal.

to be “special circumstances”. The counter argument is based on mere semantics and not substance.

166. In light of the statutory constraints imposed on the Tribunal by s 130(3)(b) of the *Planning Act* the meaning of the words “contrary to”, as appear in that provision, are of critical importance to the determination of this appeal.
167. As pointed out in the written submissions from John O’Neill, Senior Director of Development Assessment Services and Planning (Exhibit 22) the words “contrary to” are not defined in the *Planning Act* or the *Acts Interpretation Act*.⁵⁰
168. In the absence of any case law construing the meaning of those words in either the present or a similar context, the words “contrary to” are to be interpreted in accordance with their ordinary and current meaning.⁵¹ There is nothing in either the *Planning Act* or the subject provision indicating that the words in question should be accorded a meaning other than their ordinary and current meaning – that is a technical or specialised meaning.⁵²
169. As submitted by the respondent the words “contrary to” import a state of affairs – namely that of “being in opposition or contrast to”.⁵³ Such a state of affairs implies that something is opposed, in character or purpose, to something else. Alternatively, it implies something having qualities noticeably different from the qualities of something else. Therefore, in order for a proposed development to be contrary to a planning scheme provision it must be opposed to, in terms of character or purpose, to that provision; or must be in contrast to that provision - that is qualitatively different to that which is contemplated by the provision.

⁵⁰ See [31], p 5 of those submissions.

⁵¹ See [33], p 6 of the respondent’s written submissions dated 17 August 2007. See also Pearce and Geddes *Statutory Interpretation* 6th edition p 120 at [4.8] which is referred to in the respondent’s submissions.

⁵² See Geddes and Pearce, n 51 at [4.8].

⁵³ See [35], p 6 of the respondent’s written submissions dated 17 August 2007.

170. The issue to be determined by the Tribunal is whether the proposed subdivision is contrary, in either of the two senses discussed above, to the applicable provisions.
171. Clearly the proposed subdivision does not meet the prescribed standard. The size of the two proposed lots – 0.6 hectares (lot1) and 0.4 hectares (lot 2) – are considerably smaller than the prescribed minimum lot size of 2 hectares. To that extent the proposed development is contrary to Clause 11.1.1(2). But that is not the end of the matter, for it remains to consider whether there are special circumstances that would justify consent being given to the proposed subdivision, despite the fact that the proposed lots do not meet the prescribed minimum.
172. At the outset, it is necessary to determine what is meant by “special circumstances” in the context of clause 2.5(3) of the NTPS. Having determined what amounts to “special circumstances”, it is then necessary to determine what, if any, onus the appellant bears in establishing those circumstances.
173. In *No 2 Pitt Street Pty Ltd v Wodonga Rural City Council* [1999] VSC 133 the Supreme Court of Victoria (Valuation Compensation and Planning List) considered the meaning of “special circumstances” in s 52 of the Victorian Civil and Administrative Tribunal Act 1998 (VCAT).
174. That provision limited the jurisdiction of the Supreme Court in planning matters. Subsection (1) provided that the Supreme Court does not have jurisdiction to hear and determine a matter in which a power under a planning enactment (ie the *Planning and Environment Act 1987*) is at issue. However, subsection (2) provided that the Supreme Court may direct that subsection (1) does not apply if the Court is of the opinion that there are special circumstances that justify the Court hearing such a matter.

175. The Court considered the meaning of “special circumstances” in the context of s 52(2) of VCAT as follows at [18] – [24]:

The expression “special circumstances” is frequently used in legislation, and its meaning must in each case be considered in the context in which it appears....

In *Re Norman* (1886) 16 QBD 673 at 677, the English Court of Appeal was concerned with a provision to the effect that a bill of costs was not to be taxed when twelve months had elapsed since its delivery “except under special circumstances”. That expression is effectively the same as the phrase “in special circumstances” which is in question here. Lopes LJ said at 677:

The statute uses the words “special circumstances”. Those are wide, comprehensive, and flexible words, and I think that the legislature intended them to be so, and that no Court can or ought to lay down any exhaustive definition of them. Charges which in one case would be special circumstances, in another would not be such. It is for the discretion of the judge to say what are special circumstances in a particular case.⁵⁴

That passage from *Re Norman* was relied on by FB Adams J in the Supreme Court of New Zealand in *Re Hunter, Ex Parte Exclusive English Imports Ltd (in liquidation)* [1954] NZLR 746 at 752, considering whether there were “special circumstances” within the meaning of s 100(9) of the Bankruptcy Act 1908 (NZ) to justify delay in lodging a proof of debt. The Court went on to say:

There is also the view expressed by Lord Goddard LCJ in *Vines v Hersom* [1951] 1 KB 682; 688 [1951] 2 ALL ER 650, 653 to the effect that “special circumstances” are those which are not of general application. I respectfully adopt the test suggested by these passages, and do not think it is possible to go further by way of definition. I think it is impossible to regard circumstances as “special” if they are characteristic of the common run of cases. For this reason it will, in general, be impossible to admit proofs under s 100(9) in cases where failure to prove has arisen from those circumstances, or combinations of circumstances, which commonly lead to and explain a failure to prove in time. There is thus a wide field in which the Court has no discretion.

I would, with respect, although with reservations (as appears from para 24 below) as to the use of the word “exceptional” in the passage from *In re Boycott*, adopt that view of the correct approach to the expression “in special circumstances” in s 52(2). It is consistent with the view of the Commonwealth Administrative Appeals Tribunal...in *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, in the context of

⁵⁴ The breadth of the concept of “special circumstances” was recognised in *Secretary Department of Social Security v Hales* (1998) 153 ALR 259 at 267.

s 102(1) of the then Social Security Act, which provided that a claim for family allowance must be lodged within 6 months of eligibility arising or “in special circumstances within such longer period as the Director-General allows”. The Tribunal said at 3:

An expression such as “special circumstances’ is by its very nature incapable of precise or exhaustive definition. The qualifying adjective looks to circumstances that are unusual, uncommon or exceptional. Whether circumstances answer any of these descriptions must depend upon the context in which they occur. For it is the context which allows one to say that the circumstances in one case are markedly different from the usual run of cases. This is not to say that the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.

An appeal from that decision (*Beadle v Director –General of Social Security* (1985) 60 ALR 225) was dismissed by the Full Court of the Federal Court ...who said at 228:

The phrase “special circumstances”, although lacking precision, is sufficiently understood in our view not to require judicial gloss.

I must, with reluctance, disagree with the inclusion of the words “exceptional” and “extraordinary” in the statement by Beach J in *Denysenko v Dessau* [1996] 1 VR 221 at 224...that:

“Special” in this connection ...must mean something unusual, uncommon, exceptional or extraordinary.

“Exceptional circumstances”, in my view, must be more extreme, further from the ordinary, than “special circumstances”, and “extraordinary circumstances” is used, for example, in s 109(5)(a) of the Magistrates’ Court Act 1989 in the context of the power to extend time for an appeal. Having said that, I would regard the use of the word “extraordinary” in *Denysenko v Dessau* as obiter, given the decision which His Honour came to in that case.

176. In *Holpitt Pty Ltd v Vraimu Pty Ltd* (1991) 103 ALR 684 at 686 Burchett J said:

As far as the expression “special circumstances” is concerned, it is an expression which is liable to be misunderstood unless care is taken to ask and answer the question, special in relation to what? “Special” is one of those words which derive almost all their meaning from the context.⁵⁵

⁵⁵ This explanation of “special circumstances” was approved of in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 110 ALR 685 at 693.

177. The effect of the authorities cited above is that it is not necessary nor desirable to define “special circumstances” What constitutes “special circumstances is very much context dependent, and it is at the discretion of the decision maker to determine what constitutes “special circumstances” in a particular case. Having said that, the tenor of the various authorities is that in order for circumstances to amount to “special circumstances” the circumstances would have to go beyond the ordinary run of cases (circumstances) and be unusual or uncommon.
178. As noted earlier in these reasons for decision,⁵⁶ there is no onus of proof to speak of in planning matters. However, does the “special circumstances” discretion contained in clause 2.5(3) of the NTPS give rise to any onus of proof? Does the applicant or appellant carry a burden of demonstrating “special circumstances” that justify the giving of consent?
179. In exercising the discretion the consent authority – indeed the Tribunal – must be satisfied that there are special circumstances that justify the giving of consent. In my opinion, the phrase “if it is satisfied” does not cast a burden of proof on either an applicant or appellant. The phrase simply means “if the consent authority makes up its mind”: see *Blyth v Blyth* [1966] 1 ALL ER 524 at 536 per Lord Denning. The phrase has nothing to say about the conduct of the applicant or the appellant. He or she does not have to satisfy the consent authority about anything. The words “if it is satisfied” focus squarely on the mind of the court – it is the mind of the court that has to be satisfied: see *Robertson v Police* [1957] NZLR 1193 at 1195, per FB Adams J.
180. However, having said that the consent authority can only “make up its mind” – that is reach a conclusion about “special circumstances” - on the material before it. In practical terms, if an applicant or appellant wishes the consent authority to consider exercising its discretion pursuant to clause 2.5(3), then

⁵⁶ See above, p 15.

it should draw the consent authority's attention to what he or she contends constitutes "special circumstances". The party should identify the "special circumstances" that justify the giving of consent. That may entail an applicant or appellant putting forward material relating to "special circumstances" for the consideration of the consent authority. However, an applicant or appellant carries no greater burden than that.

181. A difficulty with the present appeal is that the appellant has not clearly identified those circumstances that may qualify as "special circumstances", despite the issue having been drawn to his attention and in respect of which he was afforded an opportunity to make submissions.⁵⁷
182. A similar situation obtained in relation to the development application. When considering the application the Minister was required to take into account the Draft NTPS, which included the "special circumstances" discretion. The applicant did not specifically address the discretion in his application. Nor did the Minister in his consideration of the application.
183. In those circumstances, in fairness to the appellant who is not legally represented, the Tribunal should examine all of the evidence before it and to consider whether any of that material gives rise to special circumstances that justify consent being given to the proposed development pursuant to clause 2.5 (3) of the NTPS.
184. In my view, there is nothing in either the Statement of Effect of Development Proposal accompanying the development application or the appellant's submissions to the Tribunal that indicates the existence of "special circumstances" justifying the giving of consent to the proposed development, which clearly does not meet the minimum standard prescribed by Clause 11.1.1(2) of the NTPS.

⁵⁷ See above, p 37.

185. In the Statement of Effect the applicant/appellant relies heavily upon the circumstance – or state of affairs – that the Wagait Beach township is predominantly a 0.4 hectares development, comprising approximately 250 lots of 0.4 of a hectare, 12 lots of 1 hectare and 20 lots of 2 hectares.
186. In his written submissions dated 1 December 2006 (Exhibit 17) the appellant relied upon the creation of two lots from the subdivision of lot 4 (LTO 81/035) adjacent to the proposed development, since the introduction of the DRAP 1983, as demonstrating the merits of the proposed subdivision.
187. Conflicting material and submissions were provided on behalf of the respondent.
188. According to the respondent, the relevant statistics are that there are 384 lots in the Wagait Beach community, 35 of which are hectare or more in size.⁵⁸ In its submissions dated 12 December 2006 (Exhibit 18) the respondent pointed out two things. First, the Wagait Beach subdivision (including the subject lot) was undertaken prior to the introduction of the NT Planning scheme – that is the Scheme that was operative at the time the development application was made and considered. Secondly, the approved subdivision of Lot 81/035 occurred in 1986, and is immediately distinguishable from the proposed development in that it was for the purpose of “an automatic exchange for Telecom, a use which does not increase the demand for services and which is in the public interest”.⁵⁹ Furthermore, it is clear that the approval was given under the previous planning scheme and not the NTPS, which commenced operation on 1 February this year.
189. By way of the respondent’s written submissions dated 17 August 2007(Exhibit 22) the Tribunal was informed that a search of subdivisions in the Wagait Beach area and subdivision approvals since the introduction of

⁵⁸ See the respondent’s written submissions dated 12 December 2007(Exhibit 18). See also the plan of the Wagait Beach township with lot areas (Exhibit 13).

⁵⁹ The approved subdivision (Exhibit 10) was amongst the material before the Minister.

the DRAP 1983 had been undertaken. It emerged from that search that of the 368 lots less than 1 hectare in the Wagait Beach only one subdivision had been approved since the introduction of the Darwin Rural Area Plan – namely the Telecom lot referred to above. The submissions went on to say that one other determination for subdivision dated 14 January 1984 exists; however, it is for the realignment of lots previously approved by determination S0454 dated 7 October 1984, which was a subdivision to create 0.4 hectare lots prior to the commencement of the DRAP 1983.

190. There is some disparity between the information provided by the appellant and the respondent. There are also some internal inconsistencies in the material provided to the Tribunal on behalf of the respondent. However, it is not necessary to resolve those discrepancies in order to properly deal with the merits of the present appeal. What is clear on the material provided to the Tribunal is that a very high percentage of lots in the Wagait Beach area are less than 1 hectare in size, and a very small percentage of lots are more than 1 hectare in area. That is common ground between the appellant and the respondent. As pointed out by the appellant the Wagait Beach area is predominantly a 0.4 development. Equally clear is the fact that since the introduction of the DRAP 1983 only one subdivision resulting in the creation of lots less than 1 hectare had been approved – that is the Telecom lot, and one further determination for subdivision had been approved for the purpose of realigning lots previously approved before the introduction of the DRAP 1983. There is no other evidence of instances of approval of lots less than 1 hectare in area since the commencement of the DRAP 1983 or the NTPS 2007.
191. The question that arises is whether the circumstances referred to above give rise to “special circumstances” justifying consent being given to the proposed subdivision.

192. I am not satisfied that the above facts or circumstances constitute “special circumstances” within the meaning of Clause 2.5(3) of the NTPS for the following reasons:

- the mere fact that the Wagait Beach township is a predominantly 0.4 hectare development and the proposed subdivision is consistent with that developmental pattern does not by itself amount to “special circumstances”;
- apart from the two exceptions referred to above, that developmental pattern has not been the result of any decision making by a planning authority since the introduction of planning controls in 1983 – either under the previous planning scheme or under the new NTPS. Had that been the case, then those circumstances may have gone to the merits of the proposed application, and possibly also to the existence of “special circumstances”;
- the two exceptions since the introduction of the DRAP 1983 involved applications so vastly different from the present application. They are in no way comparable. In any event, the two approvals in question occurred under the repealed planning scheme which imposed planning controls different from those operative under the new NTPS. Most significantly, the old scheme did not contain a “special circumstances” discretion of the type conferred by clause 2.5(3) of the NTPS;
- there is nothing beyond the ordinary run of circumstances – nothing unusual or uncommon about the circumstances – to justify consent being given to the proposed subdivision.

193. In my opinion, there is no other evidence or material before the Tribunal which would amount to special circumstances justifying consent being given to the proposed development.

194. In the absence of special circumstances, the proposed subdivision - considered in its entirety - is contrary to the applicable planning provision which is constituted by Clauses 11.1.1(2) and Clauses 2.5(2) and (3). In such circumstances the Tribunal is precluded from permitting the proposed development. It follows that the appeal must be dismissed and the Tribunal is bound to confirm the Minister’s determination refusing consent to the proposed subdivision.

195. However, if I have erred in characterising Clauses 11.1.1(2) and 2.5 (2) and (3) as provisions of the type referred to in s 9(1)(b) of the *Planning Act*, such that it would have been open to the Tribunal to give consent to the proposed development after taking into account the matters specified in s 51 of the Act and weighing and balancing the pros and cons of the development application, I would have still come to the same conclusion and confirmed the Minister’s original decision. I propose to give short reasons for coming to that conclusion.
196. If either of the counter arguments discussed above are accepted,⁶⁰ then the “special circumstances” discretion must be assigned a role in determining whether the proposed development should be permitted by the Tribunal. A possible approach would be to ascribe no critical importance to special circumstances and to treat “special circumstances” as only one of the many factors required to be taken into account in accordance with s 51 of the *Planning Act*; and to give such circumstances real significance, in the exercise of the Tribunal’s general discretion, only if the pros and cons of the development application were finely balanced.⁶¹
197. In my opinion the pros and cons of the present application are not finely balanced.⁶² The balance clearly lies in favour of consent being refused. Furthermore, there are no “special circumstances” that might have weighed in favour of consent being given to the proposed development.

The DRAP and Sections 51, 52(2) and 130(3) of the Planning Act

198. Even if the present appeal was to be conducted in light of the planning scheme that applied at the time the development application was considered by the Minister, I would have still reached the same conclusion and confirmed the determination of the Minister. I hope this provides the

⁶⁰ See above, pp 61-63.

⁶¹ This very argument was advanced in *Phelps*, but again apparently rejected by the Tribunal.

⁶² The pros and cons of the development application are dealt with below, pp 73-83.

appellant with some solace, bearing in mind his obvious dissatisfaction with the Minister's determination, made in light of the previous – now repealed – planning regime.

199. Although it is clear from the terms of Clause 9 of the DRAP that there is not an absolute prohibition on the creation of lots less than the prescribed minimum size, and the consent authority has a discretion to approve of the subdivision of land into lots less than the prescribed size, that discretion must be exercised properly. In exercising that discretion the consent authority must consider all relevant considerations or matters and disregard those which are irrelevant. The discretion must be exercised “according to the rules of reason and justice, not according to private opinion; according to law and not humour”.⁶³ The consent authority must also exercise the discretion with regard to the merits of the case. However, most importantly, the discretion must be exercised “in good faith to achieve the objects within which the purposes of the discretion is conferred”.⁶⁴

200. As stated by Gifford and Gifford:

The consideration of the application must be on the basis of “the object which Parliament must have intended to achieve in enacting [the planning legislation]” and “not to act in such a way as would frustrate that object”.⁶⁵

201. The discretion must be “exercised in a way consistent with the policy of the Act”⁶⁶ or with the policy of any relevant planning provision in an Act or planning instrument.

202. In addition to those fundamental constraints on the exercise of the discretion conferred by Clause 9 of the DRAP, the Minister is also subject to the statutory fetter imposed by section 52(2) of the *Planning Act*, according to which the Minister must not consent to a proposed development if the

⁶³ *Murphyores Inc Pty Ltd v Cth* (1966) 136 CLR 1 at 17-18.

⁶⁴ *Shrimpton v Cth* (1945) 59 CLR 613 at 620 per Latham CJ.

⁶⁵ D.J Gifford and K.H Gifford n 16 at [62-3].

⁶⁶ *Auckland CC v Minister of Transport* [1990] 1 NZLR 264.

proposed development is contrary to a planning scheme provision referred to in section 9(1)(b) of the Act. The Tribunal is similarly constrained by s130(3)(b) of the Act from permitting a proposed development if it is contrary to a planning scheme provision referred to in s 9(1)(b) of the Act.

203. Clause 9 of the DRAP is clearly a planning scheme provision of the type referred to in s 9(1)(b) of the *Planning Act*. Although the interaction between Clause 9 of the DRAP and s 52(2) of the *Planning Act* gives rise to a degree of circularity, the combined effect of Clause 9 of the DRAP and s 52(2) of the *Planning Act* is that the Minister must not consent to a proposed development, which after considering it in its entirety and taking into account all relevant considerations or matters – is contrary to the terms of Clause 9 including the proper exercise of the discretion contained therein. The Tribunal is similarly bound by the provisions of s 130(3)(b) of the *Planning Act*.
204. In order to determine whether the proposed subdivision is contrary to Clause 9 of the DRAP, it is important to determine the objects of Clause 9 of the DRAP and to identify any policy or policies – latent or manifest – underlying that planning provision. That task is of critical importance to the exercise of the discretion because the discretion must be exercised in a manner that is consistent with the underlying policy or policies and which does not frustrate the objects of the planning provision.
205. Although the DRAP was not vocal as the new NTPS in articulating its objects and underlying policies, one can readily glean from the substantive terms of clause 9 of the DRAP that its object was to control the size of lots in rural areas designated as “RL 1” and “RL 2”. Rural lots are usually of greater size than urban lots, and it is self evident that the purpose of Clause 9 was to preserve the rural character of lots in the controlled area and to ensure the orderly development of land use in that area. That intent is reinforced by the permitted uses.

206. However, it is important to bear in mind that the DRAP did not exist in a vacuum. It was part of an overall planning scheme which also included the *Cox Peninsula Land Use Structure Plan 1990* and the *Mandorah Land Use Concept Plan 1990*, which as pointed out earlier contained statements of policy.⁶⁷ The interrelationship between the DRAP and the *Mandorah Land Use Concept Plan* has previously been discussed.⁶⁸ Most significantly, the latter states that the subject land is regulated by the DRAP.⁶⁹ As also observed earlier, the Plan and the DRAP each form an integral part of the relevant planning scheme and collectively constitute that scheme.⁷⁰ It follows that it is permissible for the consent authority (including the Minister) and the Tribunal to have regard to the land use and development objectives of the Plan and its underlying policies when considering the objects of Clause 9 of the DRAP, in the exercise of the discretion conferred by that planning enactment.
207. It should be made clear that this approach does not blur the distinction between the provisions referred to in s 9(1)(a) and (b) of the *Planning Act* . It maintains that distinction, which is important for present purposes. Section 52(1) of the Act did not bind the Minister when he made his determination. In conducting this review, the Tribunal is not bound by the provisions of s130(3)(a) of the Act. When the Minister made his determination he was bound by the provisions of s 52(2) of the Act. In conducting this review the Tribunal is constrained by the provisions of s 130(3)(b) of the Act. Accordingly, the Tribunal – as was the Minister- is precluded from giving consent to a proposed development if it is contrary to a planning scheme provision of the type referred to in s 9(1)(b) of the Act.

⁶⁷ See above, pp 18-19.

⁶⁸ See above, p 19.

⁶⁹ See above, p 20.

⁷⁰ See above, p 20.

208. As previously noted, the subject site is designated as “semi-rural” for short term development due to a lack of services.⁷¹ Furthermore, the *Mandorah Land Use Concept Plan* establishes the basis for future development in the locality which is to include (1) continued development in the short term of semi-rural lots, utilising the existing limited services and (2) recognition of long term potential for redevelopment in association with full reticulation of services.⁷²
209. By prescribing minimum lot sizes, Clause 9 of the DRAP establishes a standard for the subdivision of rural land. The proposed subdivision – in terms of proposed lot sizes – represents a gross departure from that standard. As stated in the Notice of Refusal, the proposed subdivision entails a 92.5% reduction in the minimum lot size in relation to proposed lot 1 and a 95% reduction in relation to lot 2. The departure from the standard is so significant that the proposed subdivision, in terms of its characteristics, stands in stark contrast to subdivisions of the type contemplated and generally required by Clause 9.
210. However, the gross departure from the prescribed standard raises more substantive concerns. When one has regard to the latent or manifest policy or policies underpinning Clause 9 it is obvious that the proposed subdivision is opposed, in character or purpose, to that planning scheme provision in the following three respects:
1. it conflicts with the self evident purpose of that provision, which is to preserve the rural character of lots in the controlled area and to ensure the orderly development of land use in that area;
 2. it conflicts with the objectives and policies of the *Mandorah Land Use Concept Plan 1990* which form part of the relevant planning scheme provision;
 3. it is inconsistent with the underlying policy of developing

⁷¹ See above, p 20.

⁷² See above, p 20.

semi- rural lots in the controlled area, utilising existing limited services - in particular the absence of water reticulation services.⁷³

211. If the minimum lot size prescribed by clause 9 of the DRAP were relaxed so as to permit the proposed subdivision then, in my opinion, such a massive relaxation of the prescribed standard would substantially undermine – if not frustrate - the objectives of the requirement and its underlying policies. Most significantly, it would have the result of substantially changing the requirement and rendering it ineffective.
212. Following on from that aspect, there is a real concern that if the proposed development were permitted it would create a bad precedent. The creation of an undesirable precedent is clearly a relevant consideration for the purposes of exercising the discretion under Clause 9.
213. Precedent remains a relevant consideration in planning matters, including appeals, although it is well established, as a matter of principle, that precedent is not to be treated as a stand alone argument: *Aspen Pty Ltd and State Planning Commission* (unreported, Appeal No 13 of 1988; 21 October 1988. The relevance of precedent was explained in *Mazzardis and Western Australian Planning Commission* [2007] WASAT 87 at [38]:

This is because to simply ignore precedent increases the risk of progressively undermining the planning objectives for a zone or a locality. This is particularly the case when a proposal cannot be distinguished from other later subdivision proposals of general rural land. That is, a subdivision of general rural land would be objectionable in the face of a policy presumption against subdivision without something more to make it distinguishable from later subdivisions of similarly zoned land: *Sumner Nominees Pty Ltd and Swan River Trust* [2006] WASAT 168 [51-52].

⁷³ In relation to the limited water supply and services see pp 7, 12, 13, 15 and 16 of the *Mandorah Land Use Concept Plan 1990*. This issue is dealt with above, pp 80-81.

214. As noted above, the role of precedent was also discussed in *Sumner Nominees Pty Ltd and Swan River Trust* [2006] WASAT 168:

Precedent was considered in an analysis of authorities, including *Aspen Pty Ltd v State Planning Commission* [2005] WASAT 40 at [71-75]. It is not proposed to repeat the analysis here, other than to say that Mr Parry respectfully adopted as consistent with Western Australian authority, including *Aspen Pty Ltd v State Planning Commission*:

...criteria stated by Lloyd J in *Goldin v Minister for Transport* as to the circumstances in which precedent is a relevant consideration in a planning assessment, namely:

(1) that the proposed development or subdivision is not in itself unobjectionable; and

(2) that there is more than a mere chance or possibility that there may be later undistinguishable applications.

215. The part played by precedent in planning matters was further discussed in *Bingwa and Western Australian Planning Commission* [2007] and *Nicholls and Western Australia Planning Commission* [2005] WASAT 40, both of which cases adopted the same approach to the role of precedent in planning assessments.

216. It is well-established law that the decisions of planning authorities are not precedents binding upon them in other applications.⁷⁴ Each application has to be considered on its own merits.⁷⁵ However, “the existence of other grants of planning permission on land in the locality is a relevant factor to be taken into account when considering planning permission applications”.⁷⁶ Planning authorities should proceed with caution:⁷⁷

Planning authorities must also bear in mind that the granting of a particular application may make it more difficult for them as a matter of practical politics to refuse other similar applications, and it could certainly engender such applications. Planning permission has in fact repeatedly been refused because of the risk of constituting a precedent...

⁷⁴ D.J Gifford and K.H Gifford n 16 at [58-128].

⁷⁵ D.J Gifford and K.H Gifford n 16 at [58-128].

⁷⁶ D.J Gifford and K.H Gifford n 16 at [58-128].

⁷⁷ D.J Gifford and K.H Gifford n 16 at [58-128].

As Else –Mitchell J has pointed out:

The grant of development consent for a building which is out of character with existing development will give rise to pressures and generate a demand for further consents to similar development, often to a point where the responsible authority is powerless to call a halt to the erosion of the amenity of the neighbourhood until it has been entirely destroyed.⁷⁸

217. Furthermore, “the granting of a particular application may make it more difficult for the planning authority to maintain its position upon a planning appeal in respect of other development”.⁷⁹
218. It is clear from the submissions made by the appellant and respondent in the present appeal that there is disagreement as to the prospect of there being later undistinguishable development applications, which the consent authority may find difficult to resist. In that regard, I prefer the submission made on behalf of the respondent, given the better – informed basis of the Minister’s opinion. Accordingly, there is a real possibility that there may be later indistinguishable applications, and given the objectionable nature of the proposed subdivision, the risk of creating a bad precedent weighs against the exercise of the discretion in favour of permitting the proposed development.
219. As stated above,⁸⁰ the exercise of the discretion conferred by Clause 9 of the DRAP must take into account all relevant considerations, including the merits of the proposed development. The Minister – as well as the Tribunal – is required to take into account the matters specified in s 51 of the *Planning Act*. Applying those considerations to the exercise of the discretion conferred by Clause 9 of the DRAP I make the following observations and draw the following conclusions.

⁷⁸ *Austin Construction Co (Aust) Pty Ltd v North Sydney MC* (1967) 14 LGRA 154 at 162-3.

⁷⁹ D.J Gifford and K.H Gifford n 16 at[58-128].

⁸⁰ See pp 77-78.

220. The applicable planning scheme (s51 (a)) has already been discussed and nothing further needs to be said.
221. It is clear that the proposed subdivision did not comply with the proposed amendments to the planning scheme (s 51(b)). Although the minimum lot size was substantially reduced by Clause 11.1.1(3) of the Draft NTPS, the size of the proposed lots in the proposed subdivision still represent a very considerable departure from the prescribed minimum standard. Furthermore, there are no “special circumstances” that would justify the giving of consent to the proposed subdivision in accordance with Clause 2.5 (3). Non – compliance with the proposed amendments to the planning scheme is a matter that weighs against the exercise of the discretion in favour of permitting the proposed development.
222. It is acknowledged that the appellant sought to rely on evidence indicating that the water supply and services in the Wagait Beach area were not “fragile” and were in fact capable of supporting the proposed development. The appellant also relied upon that evidence to debunk the Minister’s claim that it would not be in the public interest to permit the proposed development while the facilities are not capable of supporting higher density development.
223. Although the provisions of s 129 (4) of the *Planning Act* prevent the appellant from introducing into his submission material or evidence not before the Minister, and the respondent quite properly objected to the appellant relying upon the Power & Water fact sheet and the NT Government Report, I consider that there is scope for flexibility in planning appeals under the *Planning Act*. Significantly, the Tribunal can receive additional evidence and inform itself as it sees fit.
224. The Tribunal is prepared to take into account the additional material that was not before the Minister under the umbrella of its general capacity to look beyond the material that was before the Minister when he made his

determination. However, that concession is made on the basis that the Tribunal is entitled to consider the submissions made by the respondent with respect to the cogency and probative value of the additional material and evidence.

225. Although I would not necessarily describe the water supply as “fragile”, it is clear that the existing water supply is limited and there is an absence of reticulation of services. The clear conclusion is that the present water supply is simply unable to support increased development at the density proposed. The evidence relied upon by the appellant is not sufficiently cogent to contradict or undermine that conclusion. The appellant’s undertaking to install a minimum of 50,000 litre capacity water storage facility presents as a tacit acknowledgement of the limited water supply available to the Wagait Beach area. In the final analysis, I prefer the informed comment provided by Power & Water in response to the proposed development.
226. Due to existing limited water supply and services and the absence of reticulated water services the subject land does not appear to be capable of supporting the proposed use (s 51(j) and it is not in the public interest to approve the proposed development while the facilities available to the Wagait Beach area are not capable of supporting higher density development (s 51(p). These conclusions weigh against the proposed development being approved in the exercise of the discretion permitted by Clause 9 of the DRAP.
227. As regards the merits of the proposed development, they are as set out in the Statement of Effect (Exhibit1) which accompanied the development application.
228. The applicant/appellant asserts that the proposed subdivision is consistent with current development in the locality, and the subdivision will allow for an additional residential property in the Wagait Beach area. He, in effect,

argues that the small size of other lots in the area demonstrate merit through precedent.

229. The precedent argument has already been dealt with and lacks merit.⁸¹ As articulated on behalf of the respondent the proposed development lacks merit as the proposed lots are too small to accommodate the permissible uses in the zone, and the increased density may impose an unsustainable burden on water supply.⁸²
230. In my opinion the proposed development has no discernible merit. However, should that observation be incorrect, then such merit as the proposed development possesses is not sufficient to tilt the exercise of discretion in favour of permitting the proposed subdivision.
231. Section 51(t) of the *Planning Act* empowers the Tribunal to take into account “other matters it thinks fit”. In my opinion, that subsection entitles the Tribunal to take into account any concern that it might have in creating a bad precedent if the proposed development were approved. The risk of creating an undesirable precedent has already been addressed.⁸³
232. After considering the proposed subdivision in its entirety and taking into account all relevant considerations and matters, I have concluded that the proposed development is contrary to Clause 9 of the DRAP. Therefore, on the basis that the present appeal should be determined according to the planning scheme applicable (including proposed amendments) as at the date of refusal of the application, I would have dismissed the appeal and confirmed the Minister’s refusal of consent to the proposed subdivision.
233. However, in the event I have erred in concluding that Clause 9 is a planning provision of the type referred to in s 9(1)(b) of the *Planning Act*, or have misunderstood the relationship between Clause 9 and ss 52(2) and 130(3)(b)

⁸¹ See above, pp 77-79.

⁸² See above, p 45.

⁸³ See above, p 79.

of the *Planning Act* – and the Tribunal should have assessed the pros and cons of the proposed subdivision after taking into account the matters specified in s 51 of the Act – I would have reached the same conclusion.

234. The role of a planning appeals tribunal was explained in *Hickinbotham Blue Gum Pty Ltd v Campbelltown CC* (1981) 29 SASR 93 at 101; 46 LGRA 268 at 275; [1982] TPG par 1215 (SA SC). There the Court held:

...the duty of the Planning Appeal Board [is] to look at the proposal as a whole, to consider all the evidence, including the opinion of expert planners, in support of the proposal as a desirable and sensible form of land use and development, to weigh the legitimate objections and criticisms, with due regard to the public interest but not ignoring private interests if both such interests can be satisfactorily reconciled, and to determine in the end where the balance lies in favour of granting or refusing approval.

235. The duty of the planning authority upon any such application is

To weigh up the competing considerations and to strike a balance which will serve economic and social needs of a community. This, of course, as has often pointed out by judges of this Court [the NSW Land and Valuation Court], entails the exercise of qualities of judgment and is not to be performed by any mechanical or rule of thumb process.⁸⁴

236. A planning authority can “grant or refuse planning permission ‘only after due consideration of the matters and things specified in’ the Act and planning controls, and of the merits of the individual case”.⁸⁵

237. Adopting that approach, and after weighing the pros and cons of the proposed development, the Tribunal would have concluded that the balance rested in favour of refusing consent to the proposed subdivision.

THE PROCEDURAL FAIRNESS ISSUE

238. As noted earlier, the appellant complained of being denied procedural fairness.⁸⁶ However, his real complaint was not that he had been denied an

⁸⁴ See for example *Rio Pioneer Gravel Co Pty Ltd v Warringah SC* (1969) 17 LGRA 153 at 162-163.

⁸⁵ D.J Gifford and K.H Gifford n 16 at [62-3].

opportunity to be heard in relation to his development application or the Minister displayed bias in dealing with the application, but that the Minister had simply reached the wrong decision on the evidence.⁸⁷ As pointed out earlier,⁸⁸ the present appeal is in the nature of a merits review by way of rehearing. Although it is not the function of the Tribunal to identify and correct error on the part of the primary decision maker, the review process has indirectly cured any error that might have been made by the Minister in deciding to refuse consent to the proposed subdivision.

239. If however the appellant's complaint is that he was denied procedural fairness in terms of not being afforded an opportunity to be heard or there being bias on the part of the decision maker, then it is outside the province of this Tribunal to conduct a judicial review and to make a declaration establishing a denial of procedural fairness. However, the determination of the present appeal does not debar the appellant from obtaining such a declaration from a superior court.⁸⁹

THE DECISION OF THE TRIBUNAL

240. Pursuant to s 130 (4)(a) of the *Planning Act* I determine the present appeal by confirming the determination of the Minister made on 16 August 2006 refusing to consent to the proposed development.

241. Liberty is given to either party to apply for any ancillary orders.

Dated this 23 day of October 2007

.....
Dr John Allan Lowndes

Chairperson of the Lands Planning and Mining Tribunal

⁸⁶ See above, pp 3 and 37. .

⁸⁷ See above, p 37.

⁸⁸ See above, pp 10-12.

⁸⁹ See Gifford and Gifford n 16 at [62] –[78].