TASCAT
TASMANIAN CIVIL & ADMINISTRATIVE TRIBUNAL

Citation:	Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Others [2021] TASCAT 23	
Division:	General	
Stream:	Resource & Planning	
Parties:	Appellant:	Mount Wellington Cableway Company Pty Ltd
	First Respondent:	Hobart City Council
	First Party Joined:	Tasmania Water and Sewerage Corporation Pty Ltd
	Second Party Joined:	Tasmanian Aboriginal Corporation
	Third Party Joined:	Residents Opposed to the Cable Car Incorporated
	Fourth Party Joined:	Bob Brown Foundation
	Fifth Party Joined:	Bird Life Tasmania
	Sixth Party Joined:	G Law
	Seventh Party Joined:	South Hobart Progress Association Incorporated
	Eighth Party Joined:	P K Rollings
	Ninth Party Joined:	G Murray
	Tenth Party Joined:	Tasmanian Conservation Trust
Hearing Date:	Submissions were made and responded to in writing	
Hearing Location:	Hobart	
Date of Orders:	24 December 2021	
Date Reasons Issued:	24 December 2021	
Panel:	M Duvnjak, Deputy President	
Orders Made:	The orders sought by the Appellant's application made pursuant to s22(3) of the *Resource Management & Planning Appeal Tribunal Act* 1993 are granted.	

Catchwords:	Planning Appeal - 100 Pinnacle Road, Mouth Wellington & 30 McRobies Road, South Hobart and adjacent road reserve	
Legislation Cited:	*Tasmanian Civil & Administrative Tribunal Act* 2020; *Resource Management & Planning Appeal Tribunal Act* 1993; *Land Use Planning & Approvals Act* 1993	
Cases Cited:	*Lenna Motor-Inn Pty Ltd v Hobart City Council and Ors* [2021] TASRMPAT 5; *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2007] 16 TASR 169; *A & J De Cesare v Clarence City Council* [2010] TASRMPAT 50; *Wyminga v Glamorgan Spring Bay Council and Spring Bay (Tasmania) Pty Ltd* [2021] TASRMPAT 74B;	
Representation:	*Appellant:*	Billett Legal
	Respondent:	Shaun McElwaine and Associates
	First Party Joined:	Self-represented
	Second - Fourth Parties Joined:	FitzGerald & Browne
	Fifth Party Joined:	Self-represented
	Sixth Party Joined:	Self-represented
	Seventh Party Joined:	Self-represented
	Eighth Party Joined:	Self-represented
	Ninth Party Joined:	Self-represented
	Tenth Party Joined:	Self-represented
File No:	102/21P	

REASONS FOR DECISION

Introduction

1. This appeal relates to a proposal for the use and development of buildings and infrastructure to facilitate the operation of a cable car transport system, the subject of development application PLN 19-345 at 100 Pinnacle Road, Mouth Wellington and 30 McRobies Road, South Hobart and the adjacent road reserve (the Property). All of the Property is owned by the Hobart City Council (the Council). The development application was refused by Council on a number of grounds, Council was acting in its capacity as the planning authority.

2. By the appeal, the Appellant seeks to challenge Council's refusal to grant a permit with respect to the proposal.

3. Following the filing of the Appellant's appeal, ten parties applied to be joined as parties to the appeal. Nine of those parties have been joined in reliance on their representations made pursuant to s57(5) of the *Land Use Planning and Approvals Act* 1993 (the LUPA Act) and are collectively referred to as the Parties Joined. TasWater is also a party joined to the proceedings.

4. The consolidated grounds of refusal are annexed hereto and marked "A".

5. The Appellant now makes an application to amend the development application and seeks orders to substitute new plans for a number of those plans that form part of the original development application. The orders sought are in the following terms:

> *"That PLN 19-345 is amended by substituting the following plans:*
>
> *(a) Architectural Plans for the Pinnacle Centre: file reference "1782_MWCC Pinnacle Centre DA REV01 (Architectural Plans – DA)' removed and replaced with file reference '1782_MWCC Pinnacle Centre DA REV04 Architectural Plans – Amendment)"; and*
>
> *(b) Engineering Plans: file reference "13.0041 20200803 H (Engineering Plans – DA)" removed and replaced with file reference "13.0041 20211112 H (Engineering Plans Amendment)"."*

6. S152 of the *Tasmanian Civil & Administrative Tribunal Act* 2020 (the TASCAT Act) applies to this appeal as the appeal was instituted before 5 November 2021 and was not finally determined before 5 November 2021.

7. Pursuant to s152 of the TASCAT Act this appeal is to be heard and determined sitting as the Tasmanian Civil & Administrative Tribunal (the Tribunal) established under the TASCAT Act.

8. Pursuant to s152(4)(a) and (b), the provisions of the *Resource Management & Planning Appeal Tribunal Act* 1993 (the RMPAT Act) continue to apply and the Tribunal may perform and exercise all the functions of the Resource Management & Planning Appeal Tribunal with respect to this appeal.

9. The application to amend the development application is, therefore, made pursuant to s22(3) of the RMPAT Act. S22(3) provides:

> *(3) Where a person appeals to the Appeal Tribunal and it appears to the Appeal Tribunal that –*
>
> *(a) the appeal relates to an application made by one party to the appeal to another party to the appeal; and*

(b) the appeal could be resolved in a manner that is fair to all parties if certain modifications to the application were made; and

(c) it would be conducive to the expeditious administration of justice if the powers conferred by this subsection were exercised –

the Appeal Tribunal may, by order, amend the application accordingly.

The Original Development Application

10. The proposed use and development, as identified by the Appellant, includes the following elements:

a) An access road connecting McRobies Road to the proposed Base Station. The access road extends a length of approximately 2.3km from McRobies Road to the boundary of Wellington Park and then a further 100m to a point where it intersects with the proposed Base Station.

b) The Base Station. It is proposed as a new building with 3 levels. It is proposed to be partially excavated into the slope. The Base Station provides the motor room for the operation of the cableway and is the departure point for access by the cableway to the Pinnacle. There are 52 carparking spaces all with electric vehicle charging ports, six minibus spaces, three bus/coach spaces, five motorcycle spaces, and 20 bicycle spaces.

c) Three towers of varying heights (45m, 55m and 36m respectively) to support the cableway. Tower 1 is located 180m uphill from the Base Station and Tower 2 is located a further 100m beyond this. Tower 3 is located approximately 70m below the proposed Pinnacle Centre building.

d) The Cableway comprises 6 cables/ropes and spans a distance of 2.4km.

e) 2 cable cars or cabins, each with an approximate area of 27m^2 and dimensions of 6.8m by 3.9m. Each cabin has a maximum capacity of 80 people with an average occupancy of 23 people per trip. Trip duration is proposed as 15 minutes when transporting passengers. The maximum operating speed enables the journey to be undertaken in 5.7 minutes.

f) The Pinnacle Centre. This was proposed as a new building in 2 parts of wings, having a total floor area of 3,147m^2 (including service and plant rooms) and includes:

(i) Rooftop garden and lookouts – 1,170m^2;

(ii) Café – 427m^2;

(iii) Restaurant and Function space – 393m^2;

(iv) Internal viewing spaces including a southern viewing room described as the Sanctum – 128m^2;

(v) A walkway bridge connecting the 2 wings;

(vi) Ramped access to the Pinnacle car park and connecting steps providing alternate route;

(vii) Development at the Pinnacle also includes the partial demolition of the existing observation shelter, with the slab and part of the stonewall to be retained.

g) The Cableway is proposed to operate between 8 am and 10 pm and the application includes shorter operating times for the winter period. The café is proposed to operate between 8 am

and 5 pm. The restaurant is proposed to operate through to 10 pm with access to be limited to patrons holding cableway tickets after 6 pm.

11. The Appellant also advised:

    a) The proposed access road is located partially within the Utilities Zone and partially within the Environmental Management Zone under the Scheme. Where it is within the boundaries of Wellington Park, and therefore subject to the Specific Area Plan and Management Plan, the access road is within the Recreation Zone under the Management Plan.

    b) The Base Station is within the Environmental Management Zone under the Scheme and the Recreation Zone under the Management Plan.

    c) Towers 1 and 2 are within the Environmental Management Zone under the Scheme and the Recreation Zone under the Management Plan.

    d) Tower 3 is within the Environmental Management Zone under the Scheme and the Natural Zone under the Management Plan.

    e) The Pinnacle Centre is within the Environmental Management Zone under the Scheme and the Pinnacle Specific Area under the Management Plan.

12. No party took issue with the description advanced by the Appellant.

The Scheme Controls

13. The land the subject of the proposal is located within the planning area governed by the Hobart Interim Planning Scheme 2015 (the Scheme) and lies within the Utilities and Environmental Management Zones. (The area of Wellington Park, within the planning area is subject to a Specific Area Plan.) Any use or development of land in Wellington Park must be undertaken in accordance with the provisions of the Wellington Park Management Plan (the Management Plan). The Management Plan divides Wellington Park into a series of zones and specific areas. The Recreation Zone, Natural Zone and Pinnacle Specific Area are relevant to the application.

14. Chapter 8B of the Management Plan refers to the Pinnacle Specific Area which encompasses the entirety of the building amendments now sought in the proposed plans. The Pinnacle Specific Area Map S4 is reproduced below:

The Proposed Amendments

15. The Appellant asserts that the proposed amendments set out in the revised plans are a response to the consolidated reasons for refusal.

16. The revised plans depict:

    a) That the northern wing and connecting walkway together with the southern viewing room/sanctum and associated plant room are removed;

    b) That the restaurant use located in the southern building is removed with the café instead proposed to be relocated to this space; and

    c) That the ramped access to the Pinnacle Centre is extended in place of the southern building wing.

17. The reduction in the size of the Pinnacle Centre is identified by the Appellant in the following table:

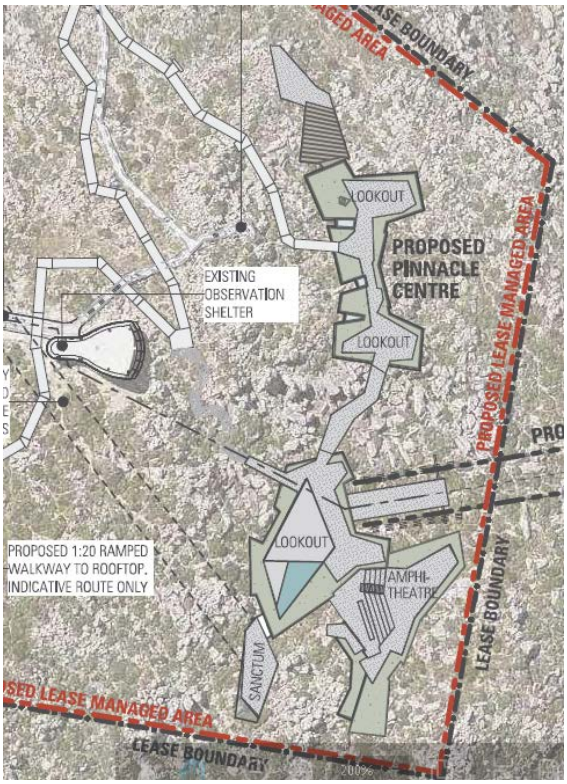
Area	**Was**	**Proposed**
Floor space	3,147m^2	2,256m^2

Combined Food Services Space (café/restaurant/lounge)	820m^2	393m^2
Rooftop garden and lookouts	1,170m^2	704m^2
Sanctum/southern viewing room	128m^2	Removed

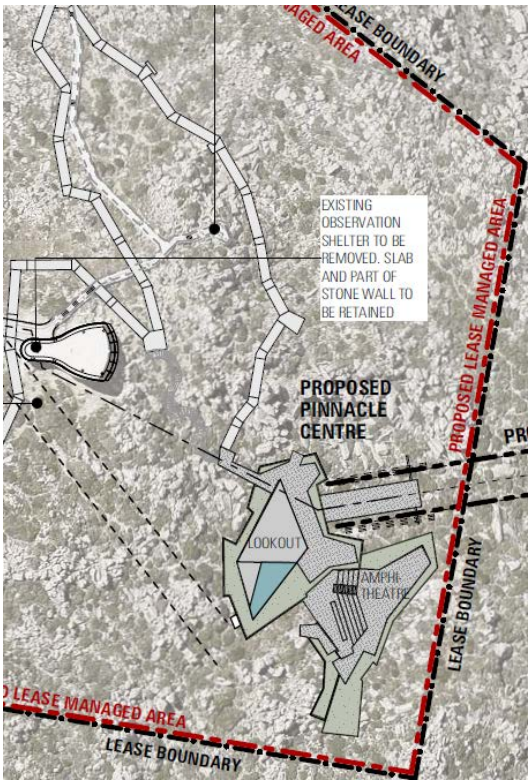
18. The building changes sought in this application are mainly limited to the building identified as the 'proposed Pinnacle Centre' which is located on the upper part of Mount Wellington/kunanyi – within the Pinnacle Specific Area in map S4 of the Wellington Park Management Plan.

19. The Pinnacle Centre is made up of two wings. The southern wing contains core elements of the proposal including the cable station, platform, plant area and control room. Other proposed areas include a restaurant, bar, function centre, amphitheatre, viewing areas, roof garden, an interpretation area and a 'sanctum'. This wing is to be retained under the s22 application, save for the area identified as the 'sanctum', which is to be deleted, and the restaurant area which is to be abandoned and reused as a "café", which is currently proposed in the northern wing.

20. Currently, the northern wing contains no core cableway elements. It includes an area for outdoor seating, a café, lookout, viewing areas and a plant room. It is connected to the southern wing by a bridge. The proposed amendments seek to delete the entire northern wing of the proposal. A pedestrian walkway is proposed in this area to connect the car park with the new Pinnacle Centre building (the old southern wing). Other changes are the removal of the existing lookout areas as well as the existing observation shelter. The plans reproduced below show the original and amended Pinnacle Centre:



Original Pinnacle Centre



Amended Pinnacle Centre

21. The s22 application also includes an 'Operational Statement' which clarifies/establishes proposed operations. A summary of the amendments/operational detail is as follows:

    a. The northern wing of the Pinnacle Centre is deleted and replaced by a pedestrian walkway from the car park to the new Pinnacle Centre building (old southern wing);

    b. Original 'sanctum' area in the southern wing is deleted along with the associated plant room;

    c. Original restaurant and function centre area in the southern wing is to be replaced by the café and lounge areas previously proposed in the northern wing;

    d. The hours of operation are to be reduced to:

        - AEST weekdays 9 am till 5 pm;
        - AEST weekends 8 am till 5 pm;
        - ADST weekdays 9 am till 9 pm; and
        - ADST weekends 8 am till 9 pm.

    e. The maximum number of patrons per cable car/cabin per journey is 40; and

    f. The maximum occupancy of the café and lounge area is 393 people.

Should the application be heard orally?

22. An application was made by the Second, Third and Fourth Joined Parties that the s22(3) application should be heard orally. The Tribunal does not ordinarily convene oral hearings to hear and determine these applications. Such applications are determined on the papers, after all parties have been provided with an opportunity to file submissions responding to the application.

23. A number of the other Joined Parties supported the application but made no submissions of significance in support. The Second, Third and Fourth Joined Parties submitted that an oral hearing was necessary for a number of reasons. A copy of those submissions is annexed hereto and marked "B". The Tribunal is not persuaded that an oral hearing is necessary for the reasons asserted.

24. Leaving aside the issue of what weight should be afforded to the matters to which Mr Bayley has deposed in his affidavit, no party has sought to cross-examine Mr Bayley. With respect to the issue of weight, that is a matter that either has or should have been addressed in legal submissions.

25. All of the matters set out in paragraph 1(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) are matters with respect to which written submissions either have, or could have, been made.

26. With respect to paragraph 2 of the Second, Third and Fourth Joined Parties' submissions in support of an oral hearing, all the Joined Parties have been provided with an opportunity to be heard with respect to the Appellant's application. All have filed submissions. Procedural fairness and natural justice have been afforded to the parties.

27. With respect to paragraph 3 of Second, Third and Fourth Joined Parties' submissions in support of an oral hearing, the Tribunal refers to paragraphs [5] to [7] hereof.

28. No oral hearing is necessary or warranted. It will incur unnecessary costs for the parties and will likely delay the hearing and determination of the matter. The Tribunal will proceed to determine the application on the papers.

Appellant's submissions

29. The Appellant submits that the Tribunal can be satisfied that the requirements of s22(3) of the RMPAT Act are met.

30. The Tribunal is satisfied that the appeal relates to an application by one party to the appeal to another party to the appeal and therefore s22(3)(a) is met.

31. It was submitted that s22(3)(c) is satisfied as the proposed amendments address the reasons for refusal, that they are likely to reduce the issues in dispute and have the effect of bringing the development into greater conformity with the Scheme. It is the Appellant's position that the proposed amendments reduce the scale and intensity of the proposed use and development. It reduces the built form of the proposal and, consequently, the associated visual impact of the Pinnacle Centre, made relevant under Grounds 16, 18, 19, 25 and 26. The Tribunal accepts that the grounds identified relate to the issue of visual impacts due to the scale of the proposal.

32. Further, it was submitted that the proposed reduction in the intensity of both the Food Services and Transport Depot and Distribution uses are matters relevant to Grounds 1 and 2 of the Consolidated Grounds of Refusal. The Tribunal accepts that they are.

33. The Appellant adopts the analysis provided as to the interpretation of operation of the statutory power under s22(3) as set out in *Lenna Motor-Inn Pty Ltd v Hobart City Council and Ors*[1] *(Lenna)*. In that decision, the Tribunal determined that whether a change amounts to a modification as contemplated by s22(3)(b) of the RMPAT Act requires a consideration of whether the amendment results in a significantly different proposal to the proposal applied for.[2] In *Lenna*, the Tribunal said:

> *"12. For the purposes of whether a change amounts to a modification as contemplated by s22(3)(b) of the RMPAT Act requires a consideration of whether the amendment results in a significantly different proposal to the proposal applied for. It is not a substitute for the making of a fresh application which would bypass the required statutory procedures, including the requirement for public exhibition and receipt of representations.*
>
> *13. The Tribunal was referred by Council and the Appellant to the decision of the Full Court of the Supreme Court in St Helen's Area Landcare & Coast Care Group Inc. v Break O'Day Council (St Helens Landcare). That decision related to an appeal from a decision of the Tribunal varying permits appealed against, the effect of which was it allow development on only part of land proposed to be developed. The Appellant appealed to the Supreme Court and the appeal was dismissed. The Appellant then appealed to the Full Court of the Supreme Court. One of the grounds raised by the Appellant required the Court to consider whether the permit granted by the Tribunal for the development was significantly different from the development that was the subject of the development approved by the Tribunal's determination. It is this aspect of the decision that is relevant to this application.*
>
> *14. Crawford J said at paragraph 17:*

[1] [2021] TASRMPAT 5.
[2] Ibid [12] as per *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2007] 16 TASR 169.

"Whether differences are significant will depend on the circumstances of the particular case. Differences may be significant for several reasons. One concerns the interests of the developer, a second concerns the interests of the appellant or of some other party and a third concerns the interests of the public. No other basis comes to my mind for this case and it was not raised by the parties."

15. With respect to the interest of the public, Crawford J said at paragraph 19:

"It was submitted for the Appellant that the central objective of public notification representation would be undermined if approval was to be given for a development that was significantly different from that which had been publically notified. No doubt this submissions is sound, it is the significance of the difference in light of the central objective, which is the issue. A significant difference will not be one that is merely a substantial difference. It will be a difference which, in light of the provisions for public notification and representations, and as a matter of judgment, is of such substance, consequence or significance as to call for fresh notification."

16. It is in circumstances where the modifications are significant, as identified by Crawford J, that the interests of the public are likely to be detrimentally affected."

34. The Tribunal accepts the approach of the Tribunal in *Lenna* is correct and that the amendments may be many, without necessarily being significant. It is the qualitative nature of the change that determines significance. The Tribunal also accepts that significance may be informed where the proposed changes give rise to a new discretion.

35. The position of the Appellant is that the proposed amendments do not trigger any new or additional discretion, nor can the changes be characterised as resulting in a significant or substantial difference with the amended proposal remaining an application for the use and development of a cableway and associated infrastructure connecting the Base Station accessed via McRobies Road to the Pinnacle Centre. It is submitted that revised plans for the associated operational changes are appropriately described as a modification.

Council's submissions

36. The application is opposed by Council and the majority of the Joined Parties, including TasWater.

37. The position of Council is that the application cannot be determined in its current form until the Appellant clarifies with further evidence, how each of the proposed amendments will impact upon the various reports that comprise the original proposal. Council identified a number of reports / documents that formed part of the development application which are potentially affected by the proposed amendment. Council provided, as an example, the Traffic Impact Assessment. It was submitted that the proposed reduction of the total floor area is significant and must have an impact upon the number of patrons who are likely to use the cableway and Pinnacle Centre, as amended, which in turn must impact upon the traffic likely to be generated by the proposal. It was submitted that to determine the impact, it would be necessary for Council to engage a traffic engineer to undertake such an assessment afresh as there is no analysis available from the Appellant to review. It was submitted that:

"The onus of determining what, if any, consequential impacts flow in consequence of the amendments that are proposed should not be cast upon the planning authority nor any of the persons who are joined as parties to this appeal. It is not satisfactory for the appellant to contend that consequential impacts will be dealt with as part of the preparation of evidence for the purposes of this appeal. Sometimes, in less complex appeals to the Tribunal, it is practicable for

the effect of amendments to be considered and dealt with in an efficient and cost-effective manner by experts who are engaged to prepare witness statements for the purposes of an appeal. That convenient procedure cannot be applied to this very complex development application which has raised multiple grounds of appeal."

38. While the Tribunal generally accepts Council's submission that issues of unfairness may arise if the Council and the Joined Parties' application is granted, the Tribunal does not accept that to grant the application would be contrary to s22(3)(b) on the grounds that it is not *"fair to all parties."* While procedural fairness must be afforded to all of the parties in any event, the requirements for 'fairness' in s22(3)(b) relates to the resolution of the appeal, not the resolution of the application. The issue of unfairness identified by Council can be cured by the Tribunal directing that the terms of the usual timetable with respect to the filing of evidence[3] does not apply to this appeal. Although not strictly a matter called up by this application, the Tribunal accepts that procedural fairness dictates that an approval of this application would necessitate directions to be made requiring the Appellant to file any expert evidence which addresses the proposed amendments, prior to any requirement that Council and the Parties Joined file evidence upon which they seek to rely in response. Given the complexity of the appeal and the sheer volume of issues raised by the Consolidated Grounds of Refusal, this would ensure fairness to all the parties as well as potentially a more expedited hearing and determination of the matters.

Submissions of the Seventh Party Joined – South Hobart Progress Association Inc. (SHPA)

39. The submissions of SHPA are similar to those of Council. It was submitted that the Appellant has not provided evidence that the application resolves any of the Consolidated Grounds of Refusal. While not specifically identified, those submissions clearly go to whether s22(3)(b) of the RMPAT Act is met. No evidence of actual resolution of any of the grounds of refusal is required before the Tribunal can exercise its discretion to amend the development application as applied for. Pursuant to s22(3)(b), the Tribunal needs only to be satisfied that the appeal **could** be resolved [emphasis added]. As correctly noted in *A & J De Cesare v Clarence City Council*[4] *(De Cesare):*

> *"Section 22 of the Act performs a remedial function in the context of contested applications for development approval. It is intended to introduce a measure of flexibility enabling parties to modify an application with a view to addressing particular issues arising on appeal. The intention is that through the grant of a permission to make changes to a development application the prospects of a resolution of the dispute are enhanced. As a remedial provision the Tribunal takes the view that the language of the provision should be given as much opportunity to fulfil that purpose as a fair reading will permit."*

Submissions of the Eighth Party Joined – PK Rollings

40. Mr Rollings in his submissions accepted that the granting of the s22 amendment does not require that a modification will resolve grounds of appeal but submitted that *"in order to grant a s22 amendment, the Tribunal must be satisfied that there is a prima facie case that the proposed modifications are reasonably likely to expedite the resolution of the appeal in a manner which is fair to the parties and the public."*

41. While the Tribunal prefers the language adopted in *De Cesare,* that is, that it is sufficient that the Tribunal is satisfied that the prospects of resolution will be enhanced in a manner that is fair to the parties if a s22 order is made, in the Tribunal's view, little turns on which form of words is adopted.

[3] Practice Direction 8.4.
[4] [2010] TASRMPAT 50 at [17].

42. The Tribunal does not accept that what is fair to the '*public*' at large is relevant to its consideration of the application. S22(3)(b) only calls up consideration of '*the parties*'.

43. Again, for the reasons already set out, s22 does not require that the proposed amendments '*significantly*' reduces the number of issues in dispute or the time associated with the hearing.

The submissions of the Ninth Party Joined – G Murray

44. Mr Murray's submissions were in support of the making of the orders sought. The Tribunal has considered those submissions but will not refer to them specifically.

Submissions of Fifth Party Joined – Birdlife Tasmania (BT)

45. The submission of BT principally rely upon the failure of the amended proposal to resolve the appeal and, in particular, those grounds that reflect the interests of BT.[5]

46. Again, the Tribunal's observations in *De Cesare* are apposite.

Submissions of the First Party Joined - TasWater

47. TasWater joined with Council in its opposition to the application. It also referred the Tribunal to its decision in *Wyminga v Glamorgan Spring Bay Council and Spring Bay (Tasmania) Pty Ltd*[6]. For the reasons set out in the Appellant's response submissions[7], this decision is of no assistance in the determination of this application. That decision related to an assertion that new discretions were raised by the proposed amendments.

Submissions of the Sixth Party Joined – Geoff Law

48. Mr Law adopted the position and submissions of the Second, Third, Fourth, Fifth, Eighth and Ninth Parties Joined.

Submissions of the Tenth Party Joined – Tasmanian Conservation Trust Inc. (TCT)

49. The TCT adopted the position and submissions of First, Second, Third, Fourth, and Fifth Parties Joined. Similar to the position of Council, it was submitted that, as the impact of the proposed changes had not been presented to the Tribunal, and that it was unfair that Council and the Parties Joined would be required to undertake a primary assessment of the impacts of the proposed changes.

Submissions of the Second, Third and Fourth Parties Joined – Tasmanian Aboriginal Corporation, Residents Opposed to Cablecar Inc., and the Bob Browne Foundation Inc.

50. The Second, Third and Fourth Parties Joined, by their submissions, seek to rely upon an affidavit of Michael Bayley, affirmed on 25 November 2021. That affidavit is a combination of evidence and submissions. A large component of the evidence is opinion evidence.

51. Mr Bayley's affidavit deposes as to various matters discussed and stated at Council meetings, at which the Original Proposal was discussed, and includes quotations from Mr Chris Oldfield, who is described as the chair of the '*Appellant*'. It also sets out responses that Mr Oldfield gave to questions put to him at a radio interview.[8]

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5 Grounds 9, 10, 23 and 24.
6 [2021] TASRMPAT 74B.
7 At paragraph [82], page 13 dated 1 December 2021.
8 Paragraphs [4] to [12] of Mr Bayley's affidavit.

52. Paragraphs [13] to [19] of Mr Bayley's affidavit are principally submissions rather than evidence. They take issue with the delay in the lodgment of the s22 application. The majority of the balance of the affidavit does not comprise evidence, but rather constitutes submissions which address the proposal's amendments.

53. Paragraph [32] speculates that the s22 amended proposal is the first of a two stage development proposal. There is nothing before the Tribunal that a staged process of development is proposed. The opinion evidence[9] in Mr Bayley's affidavit relates to what are principally planning matters. These matters are likely to remain issues to be finally determined on the substantive hearing of the appeal. Mr Bayley does not depose as to any expertise in planning or indeed any other relevant discipline. The affidavit is made in his capacity as 'volunteer spokesperson' for Residents Opposed to Cablecar Inc.

54. While the Appellant objected to the tendering of the affidavit, the Tribunal shall have regard to the contents of the affidavit for the purposes of determining the s22(3) application. However, the Tribunal places little weight on any part of the affidavit that comprises evidence for the following reasons:

    a) Firstly, what Mr Oldfield may have said at a Council meeting or in a media interview is not relevant to the Tribunal's consideration of the s22(3) application.

    b) To the extent that it is asserted that the material discloses a delay in the making of the application, no prejudice of significance has been asserted or identified by the Parties Joined as a result of any such delay. There is no requirement set out in s22(3) that such an application must be made prior to mediation, or indeed prior to the hearing of an appeal.

    c) While the Tribunal notes that the Appellant accepts, to the extent that the affidavit states matters of fact, those may be accepted as reasonably accurate, most of those matters identified by Mr Bayley, even if accepted as accurate, either do not provide assistance to the Tribunal in its determination of the application and / or be relevant to the Tribunal's assessment, or do not identify any.

    d) With respect to Mr Bayley's opinion evidence, it is given without any expertise identified and should therefore be afforded little weight.

55. The Second, Third and Fourth Parties Joined submitted that the Appellant could have, but did not, lead any evidence in support of the assertion that the proposed amendments reduced the scale and intensity of the proposal but do not result in a significant or substantially different development. That the scale and intensity of the proposal is reduced by the proposed amendments is self-evident on a comparison of the original and proposed plans. Whether the amendments proposed result in a different proposal which should be the subject of a fresh application is a matter required to be determined by the Tribunal on a consideration of those amendments as against the original plans. For the reasons that follow, the Tribunal, having regard to the test as set out in *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2007] TASSC 15, the Tribunal is satisfied that the proposed amendments do not result in a substantially different proposal than the Original Proposal.

56. The Second, Third and Fourth Parties Joined submitted that as there had been such delay in the making of the application to amend the proposal, that absent any explanation for the delay, a refusal of the application is warranted.

[9] In particular paragraphs [34] to [53].

57. The delays were identified as follows:

> *"a. The s22 application was made more than 2 years after the appellant submitted the Development Application to the planning authority;*
>
> *b. The s22 Application was made more than 3 and a half months after the appellant received Hobart City Council's decision;*
>
> *c. The s22 application was made approximately 3 months after the:*
>
> *i. appellant commenced this proceeding; and*
>
> *ii. Timetable was set with the express consent of the appellant;*
>
> *d. The s22 application was made after mediation was completed;*
>
> *e. The s22 application was made more than 2 months after Revision 02 of the architectural drawings by Jaws Architect included in s22 Application were prepared; and*
>
> *f. The s22 application was made just over 3 months before the hearing."*

58. It was further submitted that the application was further deficient as it did not explain what effect such an application and the granting of it would have on the Appellant's and other parties' obligations under the existing timetable imposed by the Tribunal for the delivery of evidence.

59. The Tribunal has already addressed the issue of delay. The Tribunal is not satisfied that any delay identified would, in any event, adversely impact upon the exercise of the discretion under s22(3) of the RMPAT Act.

60. With respect to the impact on the current timetable for delivery of evidence, if the granting of the application would result in the Appellant or Parties Joined requiring additional time to file evidence and / or any submissions, applications for variations of the timetable can be made and, if proper and appropriate, a variation can be ordered. Again, the Second, Third and Fourth Parties Joined do not identify any material prejudice that would arise with respect to any extension or alteration to the current timetable.

61. The Second, Third and Fourth Parties Joined submitted that amending the development application will not resolve the appeal and, therefore, the discretion in s22(3) is not enlivened. The Tribunal does not agree. This issue has already been addressed.

62. It was further submitted that s22(3)(c) is not met as:

> *"24. Amending the Development Application at this time is not conducive to the expeditious administration of justice for the following reasons:*
>
> *a. There is a real risk that amending specific drawings only (while leaving the other documents comprising the Development Application "unamended") will cause unnecessary and costly confusion and duplication in both the written evidence and at the hearing;*
>
> *b. There is a real prospect that amending the Development Application only 3 months before the hearing – which period includes the Christmas break - will necessitate the wholesale revision of the Timetable which was consented to by all parties, including the loss of the hearing dates, causing:*

i. prejudice to the joined parties (who have already retained counsel to appear at the hearing on the dates in the Timetable); and

ii. inconvenience of the Tribunal;

c. Amending the Development Application (and the other documents comprising the application) will result in the joined parties and its advisers incurring the further time and costs of having to review and consider the application a second time;

d. The risks of a revision of the Timetable (including the loss of the hearing dates) outweigh the minimal hearing time and costs savings (if any) which may result from what the appellant itself describes as the minor reduction in the scale and intensity of the proposed development;

e. The Development Application was controversial and attracted significant community interest as is reflected in the fact that more than 16,500 representations were received in opposition to the development during the statutory advertising period.

While not all submitters have been joined as parties to this proceeding, any impact on those submitters is part of the administration of justice which needs to be considered.

This is all the more important because (i) the changes involve reductions in the publicly accessible spaces (which were not part of the statutory advertising nor assessed by the Council) and (ii) the appellant appears to have a two-stage development strategy which could see aspects of the proposal which are changed by the s22 application later re-introduced."

63. Addressing the reasons relied upon in turn:

(i). With respect to a), b) c) and d), as noted in [38], the timetable for the delivery of expert proofs should be amended to allow for the Appellant to deliver expert evidence with respect to those amendments to the Original Proposal sought to be made before Council and the Parties Joined. This will address any confusion, duplication, or the incurring of unnecessary costs. This should also address any arguments with respect to prejudice and / or denial of procedural fairness. What prejudice would arise to the Parties Joined, if the hearing date for the appeal is required to be altered or deferred is not necessarily evident on the material before the Tribunal. In that respect, Tribunal notes that it is asserted that the grounds of refusal will be maintained by the Parties Joined. No evidence has been filed by any of the parties. The first day of the hearing remains currently listed for 28 February 2022. To date, the parties have jointly sought a deferral of that date for a week. As to the availability of counsel, where operationally possible, the availability of counsel may be accommodated with respect to any new listing proposed. The prejudice asserted is speculative at best.

(ii). With respect to e), it is unclear what the parties are submitting. If the thrust of the Second, Third and Fourth Parties Joined's submission is that all those persons who made a representation with respect to the original proposal, pursuant to s57(5) of the LUPA Act,[10] should be entitled to consider any proposed amendment in order to satisfy the requirements of s22(3), the Tribunal does not agree.

S22(3) only contemplates the involvement of the parties to the appeal. It is common for development applications to be the subject of a large number of representations. The

[10] Asserted to be more 16,500 representations.

existence of those representations, whether they number 1 or 1,000, will not be relevant to a consideration of whether a proposed amendment is consistent with the requirements of s22(3).

If the Second, Third and Fourth Parties Joined's submission is made on the basis of the requirement under s22(3)(c), it is difficult to understand how a consideration of the potential impacts of the proposed amendments upon those 16,500 representors, is relevant to whether "*it would be conducive to the expeditious administration of justice if the powers conferred by s22(3) were exercised"*.

(iii). As to the significance of any reduction in the publically accessible spaces, as asserted by the Second, Third and Fourth Parties Joined, the Tribunal accepts the submission of the Appellant that, *"the ability to access lookouts at night (the proposed hours of operation are aligned to daylight hours across the seasons), is not a relevant consideration that informs a relevant discretion under the Scheme."*

Conclusion

64. Having considered the application and all of the submissions of the parties, the Tribunal is satisfied that the requirements of s22(3) of the RMPAT Act are met and that the Tribunal should accordingly exercise its discretion to grant the orders sought by the application.

65. Regarding s22(3)(b), the Tribunal accepts that the proposed amendments depict a proposal that is a reduction in the scale and intensity when compared to the Original Proposal. No party has asserted that any new discretions under the Scheme are called up for consideration as a result of the proposed amendments. None are ascertainable by the Tribunal. While it is unlikely that the changes would result in a resolution of the Appeal, the Tribunal is satisfied that the changes may address some of the grounds of appeal and may narrow the issues in dispute between the parties. In the Tribunal's view, an approval of the amendments proposed by the application results in a somewhat simpler development which could result in a more focused and abbreviated hearing.

66. The s22 seeks only to delete floor space and to relocate some existing uses. No new floor space area or uses are proposed. Operational details are clarified. The Tribunal is satisfied that the proposed changes do not produce a development so substantially different from the original application so as to constitute a new development. Although the amendments proposed may be numerous, the proposal remains centred around a cableway and ancillary activities.

Orders

67. Accordingly, the Tribunal makes the following orders:

a) That PLN-19-345 is amended by substituting the following plans:

i) Architectural Plans for the Pinnacle Centre: File reference "1782_MWCC Pinnacle Centre DA REV01 (Architectural Plans – DA)" removed and replaced with file reference "1782_MWCC Pinnacle Centre DA REV04 (Architectural Plans – Amendment)"

ii) Engineering Plans: File reference "13.004120200803 H (Engineering Plans – DA)" removed and replaced with file reference "13.004120200803 H (Engineering Plans Amendment)".

b) The matter is referred to the Acting Principal Registrar with respect to the making of directions for the filing and serving of evidence in accordance with paragraph [38] of this decision.

Annexure "A"

CONSOLIDATED GROUNDS OF REFUSAL

IN THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Tribunal reference number:	**102/21P**
Appellant:	**Mount Wellington Cableway Company Pty Ltd**
Respondent:	**Hobart City Council**
Parties Joined:	**Tasmanian Water and Sewerage Corporation Pty Ltd, Tasmanian Conservation Trust, Residents Opposed to the Cable Car Inc, Bob Brown Foundation Inc, South Hobart Progress Association Incorporated, BirdLife Tasmania, The Tasmanian Aboriginal Corporation Trading as the Tasmanian Aboriginal Centre, Peter Karl Rollings, Geoffrey Law and Graham Anthony Murray**
Address of Site:	**100 Pinnacle Road, Mount Wellington & 30 McRobies Road, South Hobart & Adjacent Road Reserve Description of Proposal: Cableway and Associated Facilities, Infrastructure and Works**

Hobart City Council

1. The proposed Transport Depot and Distribution use (the cableway) is not consistent with the values of Wellington Park identified in section 8.2 and section S2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) in that it will diminish the Park's tourism, recreational, cultural and landscape values as a result of its scale, mechanisation and emissions.

2. The proposed Food Services use is not consistent with the values of Wellington Park identified in section 8.2 and section S2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) in that it will diminish the Park's tourism, recreational and landscape values as a result of its scale, nature and intensity.

3. The proposal does not meet the acceptable solution or performance criterion with respect to clause 28.3.1, A1 or P1 of the Hobart Interim Planning Scheme 2015 as the proposed hours of operation will have an unreasonable impact on the residential amenity of land in the residential zones as a result of noise and other emissions.

4. The proposal does not meet the acceptable solution or performance criterion with respect to clause 28.3.2, A1 or P1 of the Hobart Interim Planning Scheme 2015 as the proposed noise emissions have the potential to cause environmental harm within the Environmental Living and General Residential zones on McRobies Road.

5. The proposal does not meet the acceptable solution or performance criterion with respect to clause E5.6.4, A1 or P1 of the Hobart Interim Planning Scheme 2015 as the proposed sight distances for the access road on to McRobies Road is inadequate and does not ensure safe movement of vehicles entering the existing roundabout.

6. The proposal does not meet the acceptable solution with respect to clause E7.7.1 A3 as the stormwater from the pinnacle centre will be primarily drained to ground and in a storm event the flows will be greater than pre-existing runoff and there is no corresponding performance criterion.

7. The proposal does not meet the acceptable solution or performance criteria with respect to clause E10.7.1, A1 or P1 of the Hobart Interim Planning Scheme 2015 as the proposed access road from McRobies Road to the boundary of Wellington Park involves the removal of high priority biodiversity values and the mitigation strategies and management measures to retain and improve the remaining high priority biodiversity values are not sufficient as required by subclause (c)(iii).

8. The proposal does not meet the acceptable solution or performance criteria with respect to clause E10.7.1, A1 or P1 of the Hobart Interim Planning Scheme 2015 as the proposed access road from McRobies Road to the boundary of Wellington Park involves the removal of high priority biodiversity values and special circumstances have not been demonstrated as required by subclause (c)(iv).

9. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal, due to the clearance associated with the base station, associated bushfire hazard areas and towers 1 and 2, does not avoid or sufficiently remedy the loss of swift parrot habitat values and therefore results in a long-term impact on vegetation values.

10. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal, due to the clearance associated with the base station, associated bushfire hazard areas and towers 1 and 2, does not avoid or sufficiently remedy the loss of swift parrot habitat values and therefore results in a long-term impact on vegetation values.

11. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 2, P2.3 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not avoid or sufficiently remedy adverse impacts on the geoheritage values of geoconservation sites: Organ Pipes Columnar Jointing and Wellington Range Periglacial Terrain as listed under the Tasmanian Geoconservation Database.

12. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 5, P5.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal is not designed and sited to minimise or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed cableway (including towers).

13. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 5, P5.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not harmonise with the visual landscape and natural qualities of the site in terms of appearance and proportions.

14. The proposal does not meet the acceptable solution or performance criteria with respect to section 8.5.7, Issue 6, P6.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal will generate noise emissions that will have an adverse effect on the quiet enjoyment of the natural and cultural values of kunanyi/Mount Wellington and which are insufficiently remedied.

15. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 2, P2.3 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not avoid or sufficiently remedy adverse impacts on the geoheritage values of geoconservation sites: Organ Pipes Columnar Jointing and Wellington Range Periglacial Terrain as listed under the Tasmanian Geoconservation Database.

16. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 5, P5.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal does not sufficiently mitigate or remedy the loss of visual values and impacts on visual character of the affected area that arise from the proposed pinnacle centre.

17. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 6, P6.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal is not supported by a geotechnical land instability report that sufficiently considers all risks to life and property that will be triggered by the development of the pinnacle centre.

18. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 9, P9.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will visually intrude into the landscape in relation to local and natural features and views from the Pinnacle area and elsewhere in the Park.

19. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 9, P9.2 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will cause visual intrusion.

20. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 10, P10.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the pinnacle centre will diminish the values of the site and has not been designed or sited sufficiently to remedy or mitigate the loss of visual values.

21. The proposal does not meet the acceptable solution or performance criteria with respect to section S2.6, Issue 11, P11.1 of the Wellington Park Management Plan 2013 (as amended October 2015) as the proposal will generate noise emissions that will have an adverse effect on the quiet enjoyment of the natural and cultural values of kunanyi/Mount Wellington and which are insufficiently remedied.

Residents Opposed to the Cable Car Inc.

22. The proposed use is properly classified as Tourist Operation under Table 3 of the Wellington Park Management Plan 2013 (as amended October 2015) (WPMP) and Table 8.2 of the Hobart Interim Planning Scheme 2015 (HIPS).

    The proposed Tourist Operation use is prohibited by Table 3 of the WPMP in areas which are a Recreation Zone, a Natural Zone, a Remote Zone and a Drinking Water Catchment Zone. The proposed Tourist Operation use is prohibited in the Utilities Zone under Table 28.2 of the HIPS.

    If the proposed use is properly classified as Transport Distribution and Depot (which is denied), that use is prohibited in the Environmental Management Zone under Table 29.2 of the HIPS.

23. The proposed new buildings and use must, but do not, comply with WPMP Table 5 Standards for Use and Development (1) Acceptable Solution A2.1 (Native Vegetation) or (2) Performance Criteria P2.1 (Native Vegetation).

    Particulars

    The proposal involves the clearance of identified Swift Parrot and Masked Owl nesting habitat. It has not been demonstrated that the proposal avoids or sufficiently remedies the loss of Swift Parrot AND Masked Owl habitat and will therefore result in long term impact on vegetation values.

24. The proposed new buildings and use must, but do not, comply with WPMP Table 5 Standards for Use and Development (1) Acceptable Solution A2.2 (Threatened Species) or (2) Performance Criteria P2.2 (Threatened Species).

Particulars

The proposal involves the clearance of identified Swift Parrot and Masked Owl nesting habitat. It will impact upon both species which are listed under the Tasmanian Threatened Species Act 1995 and the Environment Protection and Biodiversity Conservation Act 1999.

The proposal will have an adverse effect on native vegetation and habitat values (Swift Parrot and Masked Owl). It has not been demonstrated that the proposal avoids or sufficiently remedies the loss of Swift Parrot AND Masked Owl habitat and will therefore result in long term impact on vegetation values.

25. The proposed use and development must, but does not, comply with WPMP Pinnacle Specific Area Plan (1) Acceptable Solution A9.1 or (2) Performance Criteria P9.1.

Particulars

The Pinnacle centre building, which is greater than 3.5m in height, will visually intrude into the landscape in relation to views from settled areas of Hobart and suburbs.

26. The proposed use and development must, but does not, comply with WPMP Pinnacle Specific Area Plan (1) Acceptable Solution A9.2 and (2) Performance Criteria P9.2

Particulars

The Pinnacle centre building has more than 100m2 in floor area and will be a dominant element in the landscape.

27. The proposed facilities for the treatment and disposal of sewerage must, but do not, comply with WPMP Pinnacle Specific Area Plan (1) Acceptable Solution A7.7 and (2) Performance Criteria P7.7

Particulars

Acceptable Solution A7.7 is not met as the use and development require sewerage facilities. Performance Criteria P7.7 (b) and (c) are not met because as concluded by Robert Casimaty in his independent assessment:

(i) odour mitigation downstream of the pinnacle centre has not been adequately addressed;

(ii) odour mitigation during abnormal events at the pinnacle centre have not been addressed; and

(iii) noise mitigation while loading, transporting sewage and unloading sewage has not been addressed."

Karl Rollings

28. The application fails to demonstrate compliance with P7.7 clauses (a) of Clause S1.6 of the Wellington Park Management Plan 2013.

South Hobart Progress Association Inc

29. The proposal must but does not meet the acceptable solution or performance criteria at clause E5.5.1, A3 or P3 of the Hobart Interim Planning Scheme relating to areas subject to a speed limit of 60km/h or less.

Particulars

Acceptable Solution A3 is not satisfied at the junctions of Cascade Road and McRobies Road; McRobies Road Roundabout, McRobies Road and Degraves Street; Degraves Street and Apsley Street; Apsley Street and Cascade Road because traffic at each of them will be increased by more than 20% and by more 40 vehicle movements per day.

Performance Criteria P3 are not satisfied because the increase in traffic at the junctions of Cascade Road and McRobies Road; McRobies Road Roundabout, McRobies Road and Degraves Street; Degraves Street and Apsley Street; Apsley Street and Cascade Road will be unsafe and/or unreasonably impact on the efficiency of the road having regard to factors such as the nature of the junctions and the increase in traffic.

30. The proposed use at the Base Station is properly classified as Tourist Operation under Table 8.2 of the Hobart Interim Planning Scheme.

    The proposed use at the Pinnacle Centre is properly classified as Tourist Operation and Food Services under Table 8.2 of the Hobart Interim Planning Scheme.

    The Base Station and Pinnacle Centre are properly classified as a single development. If classified as a single development, the proposal must but does not meet the acceptable solution at clause E6.6.1, A1 of the Hobart Interim Planning Scheme.

    If the acceptable solution is not met, the proposal must but does not meet the performance criteria at clause E6.6.1, P1 of the Hobart Interim Planning Scheme.

    Particulars

    The proposed number of car parking spaces does not comply with A1 for Tourist Operation and Food Services by reference to Table E6.1 when the indoor floor areas and outdoor areas of, and associated with, the Pinnacle Centre are included in the calculation. Further particulars to be provided when the appellant discloses the assessable size of the proposed Pinnacle Centre

    The proposed number of car parking spaces does not comply with P1 because there will be insufficient spaces to meet the reasonable needs of users, including users of the Pinnacle Centre. The parking accumulation at the base station at peak periods will require parking for over 90 vehicles. Further particulars to be provided when the appellant discloses the size of the proposed Pinnacle Centre and the details of their traffic survey.

26 October 2021

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:6632

2 December 2021

The A/P Registrar
TASCAT
GPO Box 2036
HOBART TAS 7001

Dear A/P Registrar,

MOUNT WELLINGTON CABLE CAR COMPANY V. HOBART CITY COUNCIL
102/21P

I refer to:

(a) the appellant's s22 application (**s22 Application**);

(b) the directions given on 8 November 2021 (as recorded in the Tribunal's letter dated 9 November 21) (**s22 Application Directions**);

(c) the Joined Parties' submission on the s22 application headed "RESPONSE OF RESIDENTS OPPOSED TO THE CABLE CAR INC (ROCC), TASMANIAN ABORIGINAL CORPORATION LTD (TAC) AND BOB BROWN FOUNDATION INC (BBF) TO THE APPELLANT'S APPLICATION DATED 12 NOVEMBEREMBER 2021 UNDER SECTION 22 OF THE RMPAT ACT 1993" dated 25 November 21 (**Joined Parties' Response**);

(d) the affidavit of Michael Bayley affirmed 25 November 2021 (**Bayley Affidavit**);

(e) the appellant's submission headed "Submission in Response to the Respondent" dated 1 December 2020 (**Appellant's Submission in Response**);

(f) my email to the Tribunal dated 25 November 21 requesting an oral hearing; and

(g) an email from the Acting Principal Registrar of the TASCAT dated 26 November 2021 requesting that I set out the basis as to why an oral hearing is required such that the Tribunal departs from its usual practice of determining applications under Section 22 on the papers; and

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(h) my email to the Tribunal dated 30 November 2021 requesting 48 hours to respond.

As foreshadowed in my email to the Tribunal dated 30 November 2021, I set out below why an oral hearing is required notwithstanding RMPAT's usual practice of determining applications under Section 22 on the papers.

An oral hearing is necessary for the following reasons:

1. Having regard to the documents filed in relation to the s22 Application, listed below are some of the disputes between the appellant and the Joined Parties in relation to the s22 Application that need to be determined by the Tribunal in order to determine the s22 Application:

    a. Are the proposed changes only a reduction to the proposed use and development and/or a reduction in the built form and the intensity of the proposal (as submitted by the appellant[1]) or are they broader changes, including a reduction in "publicly accessible space" and amenities (as submitted by the Joined Parties- see para [87-90] of the Appellant's Submission in Response)? The existence of this dispute is acknowledged by para [9] of the Appellant's Submission in Response.

    b. Do the proposed changes, by reducing the scale of the use and development, bring the proposal into greater conformity with the planning scheme (as asserted by the appellant at para [58] and [80])?

    c. Has the appellant delayed in filing the s22 Application (the existence of this dispute is acknowledged by para [84]-[85] of the Appellant's Submission in Response)?

    d. In particular, has the appellant delayed in filing the s22 Application until after the mediation?

    e. Will the granting of the s22 Application cause a delay to the progress of the appeal (the existence of this dispute is acknowledged by para [86] of the Appellant's Submission in Response)?

    f. Having regard to the proper construction of s22 of the RMPAT Act, what is the correct legal test to be applied by the Tribunal when determining the s22 Application?

[1] For example, para [4(a)] and [56]

g. Having regard to the proper construction of s22 of the RMPAT Act, is the Tribunal's discretion only enlivened when s22(3)(b) is satisfied?[2]

h. What constitutes the "appeal" on the proper construction of s22(3)(b) of the RMPAT Act?

i. Having regard to the proper construction of s22(3)(b) of the RMPAT Act, is s22(3)(b) satisfied when:

    i. the "appeal" will not be resolved?
    ii. none of the appellant's grounds of appeal will be resolved?
    iii. not all of the appellant's grounds of appeal will be resolved?
    iv. making a s22 order will merely "facilitate the resolution of the appeal by enabling the parties to prepare for the hearing with certainty as to the use and development that is applied for" (as asserted by para [96] of the Appellant's Submission in Response).

j. Having regard to the proper construction of s22 of the RMPAT Act should the Tribunal follow *Decesare v Clarence City Council* [2010] TASRMPAT 50?

k. Having regard to the proper construction of s22 of the RMPAT Act, is the power to amend an application under s.22 "akin to the power to amend an application by granting the permit subject to a condition that alters the use or development applied for" (as asserted by the appellant at para [62] of the Appellant's Submission in Response)?

l. What comprised the appellant's "application" to the planning authority?

m. Were the "supporting reports" (as the appellant characterizes the various reports) part of the appellant's "application" to the planning authority or did the "supporting reports" merely provide information or evidence (as asserted by the appellant, for example at paras [44], [47] and [50] of the Appellant's Submission in Response)?

n. Were the "supporting reports" (as the appellant characterizes the various reports) part of the application that was:

    i. advertised; and
    ii. the subject of representations.

[2] The appellant asserts at para [56] of the Appellant's Submission in Response that "The amendment does not need to result in the resolution of the appeal or even the resolution of the issues in question"

o. Will the "supporting reports" be properly put before the Tribunal (see para [76] of the Appellant's Submission in Response)?

p. In light of the appellant's objection to Mr Bayley's Affidavit being tendered in evidence (para [28] of the Appellant's Submission in Response), should Mr Bayley's Affidavit be accepted as evidence and taken into consideration by the Tribunal in whole or in part?

q. Is Mr Bayley's Affidavit a mix of alleged facts, opinions and submissions (as asserted by the appellant in para [27] of the Appellant's Submission in Response)?

r. Does Mr Bayley's Affidavit contain a great deal of information that is irrelevant to the test under s22 (as asserted by the appellant in para [27] of the Appellant's Submission in Response)?

s. Is Mr Bayley's Affidavit of "no probative value to the Tribunal" (as asserted by the appellant in para [28] of the Appellant's Submission in Response)?

t. If Mr Bayley's Affidavit is accepted as evidence and taken into consideration by the Tribunal, what weight should the Tribunal give to the sworn evidence in Mr Bayley's Affidavit?

2. As the Joined Parties have not yet had any opportunity to address the Tribunal on many the disputes set out above, an oral hearing:

   a. is necessary to ensure procedural fairness and natural justice is accorded to the Joined Parties;

   b. is the most efficient way to the resolve the disputes;

   c. will allow the parties to assist the Tribunal with submissions on the disputes.

3. Section 81 of the TASCAT Act now requires a public hearing (though subject to s82(2)). The prima facie position is now the holding of an oral (public) hearing.

Yours faithfully,
FITZGERALD AND BROWNE

Roland Browne
E:rolandb@fablawyers.net.au
Cc: all parties