



DEVELOPMENT CONSENT AUTHORITY

DARWIN DIVISION

MINUTES

MEETING No. 355 – FRIDAY 22 MAY 2020

TELECONFERENCE

MEMBERS PRESENT: Suzanne Philip (Chair), Mark Blackburn, Marion Guppy, Simon Niblock and Peter Pangquee

APOLOGIES: Nil

OFFICERS PRESENT: Margaret Macintyre (Secretary), Amit Magotra, Julie Hillier (Items 2-7) and Stuart Harris (Item 1 only) (Development Assessment Services)

COUNCIL REPRESENTATIVE: Conneil Brown and Brian Sellers (Item 2 only)

Meeting opened at 9.30 am and closed at 12 noon

THE MINUTES RECORD OF THE EVIDENTIARY STAGE AND THE DELIBERATIVE STAGE ARE RECORDED SEPARATELY. THESE MINUTES RECORD THE DELIBERATIVE STAGE. THE TWO STAGES ARE GENERALLY HELD AT DIFFERENT TIMES DURING THE MEETING AND INVITEES ARE PRESENT FOR THE EVIDENTIARY STAGE ONLY.

ITEM 1

PA2019/0043 VARIATION – TO ALLOW ALTERNATE TREE SPECIES TO SCREEN THE STRUCTURE AND RETAINING THE STRUCTURE FOR A FURTHER PERIOD OF TWO YEARS

LOT 4011 (14) HUDSON COURT, PARAP, TOWN OF DARWIN

APPLICANT/S One Planning Consult

Mr Israel Kgosiemang (One Planning Consult) and Ms Irene Tatikos attended.

**RESOLVED
88/20**

That, pursuant to section 57(3) of the *Planning Act 1999*, the Development Consent Authority consent to the proposed application to vary conditions 4 and 10 of DP19/0100 to allow alternate tree species to provide screening to the structure and retaining the structure for a further period of two years, subject to the following conditions:

CONDITIONS PRECEDENT

1. Prior to the endorsement of plans and within one month of the date of this permit, amended plans to the satisfaction of the consent authority must be submitted to and approved by the consent authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions, and must generally be in accordance with the plans submitted with the application but modified to show:
 - a. An accurate floor plan and elevation of the structure existing on site;
 - b. The maximum overall height of the structure existing on the site measured from the ground level; and
 - c. The location of the existing pool pump shed located along the front boundary and an elevation plan the pool pump shed. (Note the height of the pool pump shed must be below the block wall fence line of the boundary along Hudson Court).

THIS CONDITION HAS BEEN CLEARED.

2. Prior to the endorsement of plans and within one month of the date of this permit, a landscape plan to the satisfaction of the consent authority must be submitted to and approved by the consent authority. When approved, the plan will be endorsed and will then form part of the permit. The landscaping plan must generally be in accordance with the amended landscape plan provided in the application except that the plan must show:
 - a. A planting schedule of all proposed trees, including botanical names, common names, size at planting (height), size at maturity (height), and quantities of each plant. The species of plants selected must be capable of screening the approved structure from the street; and
 - b. The location of the pool pump shed in relation to the proposed landscaping.

All species selected must be to the satisfaction of the consent authority and must provide screening of the approved structure from the street.

THIS CONDITION HAS BEEN CLEARED.

3. Prior to the endorsement of plans and within three months of the date of this permit, a schematic plan demonstrating the on-site collection of stormwater and its discharge into the local stormwater drainage system shall be submitted to and approved by the City of Darwin, to the satisfaction of the consent authority. The plan shall include details of surface flow direction, downpipe direction and any connection to Council connection points.
THIS CONDITION HAS BEEN CLEARED.

GENERAL CONDITIONS

4. The works carried out under this permit shall be in accordance with drawings endorsed as forming part of this permit.
5. The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, sewerage and electricity facilities to the development shown on the endorsed plan in accordance with the authorities' requirements and relevant legislation at the time.
6. Any developments on or adjacent to any easements on site shall be carried out to the requirements of the relevant service authority to the satisfaction of the consent authority.
7. Stormwater is to be collected and discharged into the drainage network to the technical standards of and at no cost to the City of Darwin, to the satisfaction of the consent authority.
8. Within three months of the date of this permit, the landscaping works shown on the endorsed plans must be carried out and completed to the satisfaction of the consent authority.
9. The landscaping shown on the endorsed plans must be maintained to the satisfaction of the consent authority, including that any dead, diseased or damaged plants are to be replaced.
10. The use of the land for the purpose of alterations and additions to an existing single dwelling as approved through this permit must cease 24 months from the date of issue of this permit and the structure must be immediately removed from the site.

NOTES:

1. The Power and Water Corporation advises that the Water and Sewer Services Development Section (landdevelopmentnorth@powerwater.com.au) and Power Network Engineering Section (powerconnections@powerwater.com.au) should be contacted via email a minimum of 1 month prior to construction works commencing in order to determine the Corporation's servicing requirements, and the need for upgrading of on-site and/or surrounding infrastructure.
2. The Northern Territory Environment Protection Authority (NTEPA) advises that construction work should be conducted in accordance with the Agency's Noise Guidelines for Development Sites. The guidelines specify that on-site construction activities are restricted to between 7 am and 7 pm Monday to Saturday and 9 am to 6 pm Sunday and Public Holidays. For construction activities outside these hours refer to the guidelines for further information.

3. The City of Darwin advises that designs and specifications for landscaping of the road verge adjacent to the property shall be submitted for approval by the General Manager Infrastructure, City of Darwin and all approved works shall be constructed at the applicant's expense, to the requirements of the City of Darwin.
4. The City of Darwin advises that any proposed works on/over City of Darwin property shall be subject to separate application to the City of Darwin and shall be carried out to the requirements and satisfaction of the City of Darwin.
5. The applicant is advised to obtain a Certificate of Compliance for Development Permit DP19/0100 under Section 65 of the *Planning Act 1999*.

REASONS FOR THE DECISION

1. Development Permit DP19/0100, issued in April 2019, granted a retrospective approval for a bedroom, with attached toilet and shower, addition to an existing single dwelling within the primary street front setback. The bedroom addition is in the form of a transport container, which is substantially prefabricated, to be used as an extension to an existing dwelling. Condition 4 of DP19/0100 requires that the works to be carried out in accordance with the endorsed plans and condition 10 requires the additions to the existing single dwelling (bedroom addition) must cease 12 months from the date of issue of the permit.

Pursuant to section 57(3) of the Planning Act 1999 (the Act), the consent authority may, in writing, vary a condition of a development permit if:

- a. *the proposed variation will not alter a measurable aspect of the development by a margin greater than 5% and, in the opinion of the consent authority, will not materially affect the amenity of adjoining or nearby land or premises; or*
- b. *in the opinion of the consent authority, the alteration resulting from the proposed variation is not conveniently measurable and the proposed variation will not materially affect the amenity of adjoining or nearby land or premises.*

The applicant requested to vary conditions 4 and 10 of DP19/0100 to allow for alternate tree species to that previously approved and, for the bedroom extension to remain in place for an additional 24 months.

The Authority considers that the test to a measurable aspect of the development, as stated in section 57(3) of the Act, apply only to the performance criteria of the NTPS, i.e. aspects such as building heights, setbacks, parking requirements etc. The time limit granted to the bedroom addition is not a matter covered by the NTPS so is not considered a measurable aspect under section 57(3) of the Act.

The Authority notes the assessment of Development Assessment Services (DAS) which concludes that the variation is consistent with the performance criteria of the NTPS as no change to the building heights, setbacks, parking requirements previously approved under DP19/0100 is proposed in the variation application.

In relation to the changes to the landscaping plan approved under DP19/0100, apart from changes to the trees species, the Authority noted that the overall compliance and similarity with the previous endorsed plan. It is noted from the reasons of DP19/0100 that the condition requiring landscaping was included to screen the structure from the street and provide a softer edge to the existing streetscape. The Authority considers that the new tree species (*Radermachera*) will also provide similar outcomes in providing screening to the development.

The Authority is satisfied that the variations to conditions 4 and 10 of DP19/0100 do not alter a measurable aspect of the development by a margin greater than 5%.

The second threshold requirement provided by Section 57(3)(a), is that the Consent Authority must consider that the proposed variation “will not materially affect the amenity of adjoining or nearby land or premises.”

[The definition of ‘amenity’ in relation to a locality or building as provided by the Northern Territory Planning Scheme (NTPS), means any quality, condition or factor that makes or contributes to making the locality or building harmonious, pleasant or enjoyable.]

Condition 10 of DP19/0100 provided:

“The use of the land for the purpose of alterations and additions to an existing single dwelling as approved through this permit must cease 12 months from the date of issue of this permit and the structure must be immediately removed from the site.”

The application seeks to extend the 12 month time limit imposed through DP19/0100 and proposes to keep the structure on site for a further period of two years.

At the hearing, Mr Israel Kgosiemang (One Planning Consult) and Ms Irene Tatikos (landowner) gave an overview of the request for the extension of time. The Authority was addressed in length by Ms Tatikos, who detailed her Mother’s existing medical condition and highlighted her requirements for intensive family home care. Ms Tatikos stated that the structure is purpose built to provide reasonable amenities for her mother. The Authority questioned Ms Tatikos on why the existing dwelling could not be modified to accommodate their needs, to which she responded that there is insufficient room available within the existing dwelling and to undertake the modifications necessary to accommodate her Mother would require a significant financial outlay. In response to the Authority’s question to grant an extension for a period of 12 months, Ms Tatikos stated that a longer extension of time (24 months) is more desirable considering the current situation, but does not rule out the possibility of removing the structure in the future should circumstances change.

Mr Kgosiemang also explained to the Authority that the proponent has since adhered to conditions precedent of the permit by lowering the pool pump roof cover, removing the garden shed and providing

vegetation in order to create a visual screening to the structure as the plants mature.

The Authority carefully considered the circumstances announced by the landowner and took into consideration her ongoing social condition in making its decision. The Authority noted from the reasons for the decision of DP19/0100 that the imposed timeframes were considered critical to the approval of the proposal as without them it was considered no special circumstances existed to support the variation to Clause 7.3 (Building Setbacks of Residential Buildings and Ancillary Structures). The Authority noted that the siting of the structure created an unacceptable interference with the amenity of the area and was only prepared to exercise its discretion to allow the structure to continue in its present position if it is for a strictly short-term period so as to minimise disruption to such amenity.

After careful deliberation on the matter, the Authority determined to grant a 24 month extension. The Authority considers that in this instance, the special circumstances could be found beyond the numerical requirements of the Clause in the unique social situation that presented itself and the temporary nature of the use. The Authority is mindful that the structure remains a temporary on-site addition, and, while the Authority determined to grant the requested 24 months extension on this occasion, it was unanimous in warning that any future time extensions are unlikely to exceed 12 months.

The Authority while acknowledging the proponent's compliance with the conditions precedent of DP19/0100 notes that a Certificate of Compliance has never been sought for DP19/0100 (noting that obtaining one is not mandatory under the *Planning Act 1999*). The Authority encourage the landowner to obtain a certificate of compliance as this will be useful to determine compliance with the full set of conditions related to DP19/0100.

ACTION: Variation Permit with covering email to include that the Authority were unanimous in determining that any future time extensions will not exceed 12 months.

ITEM 2

**PA2020/0115 UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN
LOT 12139 (2) DAVID STREET, MUIRHEAD, TOWN OF NIGHTCLIFF**
APPLICANT/S Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended.

Submitter Ms Vicky Porter attended.

RESOLVED That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development
89/20 Consent Authority defer consideration of the application to develop Lot 12139 (2) David Street, Town of Nightcliff for the purpose of a unit title schemes subdivision

to create two units and common property and a building envelope plan, to require the applicant to provide the following additional information that the Authority considers necessary to enable proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.

REASONS FOR THE DECISION

1. Pursuant to section 51(a) of the *Planning Act 1999*, the consent authority must take into consideration the planning scheme that applies to the land to which the application relates.

The Northern Territory Planning Scheme (NTPS) applies to the land. The land is within Zone SD23 (Specific Use Zone Darwin No. 23) of the NTPS. The purpose of Zone SD23 is to facilitate the subdivision, use and development of the land as a residential estate that provides for housing choice through a range of lot sizes and housing types.

The subject lot was created through grant of DP16/0052 and variation permit DP16/0052B issued in December 2016 which endorses the current building setback plan and land use plan. The land use plan identifies the subject lot for multiple dwellings and the setback plan identifies specific building setback requirement for the future development on this lot.

The application proposes a subdivision of Lot 12139 Town of Nightcliff for the purpose of a Unit Title Scheme (UTS) subdivision to create two units and minimal common property. The proposed UTS subdivision will facilitate new ownership arrangements by means of the sale of an existing vacant block of land in two units. The application also proposes a setback plan which establishes a setback distance between the two future dwellings of 1.8m (0.9m setback from the building to the unit title boundary, as amended by the applicant).

As per Section 44(b) of the *Planning Act 1999*, a development permit is required, 'if the proposed development is the subdivision or consolidation of land.' therefore planning consent is required for the proposed subdivision.

Of particular relevance to this application is paragraph 4(b) of Zone SD23, which requires that the subdivision design should not include any lot with an area less than 450m². There is no definition of "lot" in either the *Planning Act 1999* or NTPS. Under the *Land Titles Act 2000*, the definition of a "lot" includes a unit and common property within the meaning of the *Unit Title Schemes Act 2009*. Therefore, the Authority considers that determination of the present application requires, firstly, the consideration of the meaning of "lot" as used in paragraph 4(b) of

Zone SD23 in light of the definition of “lot” under the *Land Titles Act 2000* and, secondly, if unit title subdivision as proposed meets the requirements of SD23 for lot size, appraisal of whether there are special circumstances which allow the Authority to exercise its discretion to vary compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site)

Turning to the first matter, as the application proposes a UTS subdivision of the lot to create two units and common property, the Authority considered that the threshold question is to determine the meaning of “lot” as used in SD23 in order to decide whether the proposed UTS subdivision can meet both the design philosophy and specific requirements of Zone SD23. The Authority notes that the NTCAT decision in *Bradley v Development Consent Authority & Kalthmera Pty Ltd [2017] NTCAT 922* found that clause 2.5(4) of the NTPS does not expressly or impliedly empower a consent authority to give consent to a use or development of land that does not comply with a requirement of a specific use zone.

The Authority also considers that the future development on the proposed unit lots will affect the range of housing types in Zone SD23 as there is a change from potential duplex dwellings developments to stand-alone detached single dwelling development on proposed unit lots and requires the applicant to address that issue.

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended the meeting and spoke further to the application. Mr Dodd gave an overview and noted the merits of the proposed UTS subdivision. Mr Dodd explained that the proposed UTS subdivision would allow creation an affordable product which suits the existing market conditions. Mr Dodd further explained that each of the potential unit lots would have servicing arrangements similar to a duplex development on any vacant lot.

The Authority; however, notes the design philosophy of Zone SD23 and requires clarification from the applicant as to how the proposed UTS subdivision does not undermine that philosophy by creating lots, within the range of 300m² – 400m² and why minimum lot size of 450m² should not be applied in this UTS subdivision. In response to the question Mr Grimm explained that the provision of affordable housing in Zone SD23 is met by the lots allocated for multiple dwelling development in the subdivision. Mr Grimm further added that once the duplexes are built on these lots they are unit titled under the *Unit Title Schemes Act 2009* to create unit lots less than 450m². The Authority, while acknowledging the response of Mr Grimm, considered that the subdivision proposed in the current application is different as it involves unit subdivision to create vacant unit lots which could potentially be developed to create single dwelling type development similar to a land and house package. The Applicant confirmed that the intention was to market these unit-titled lots as “house and land packages”.

In response to a question raised by the Authority on variation to Clause 7.3.2 (Distance between Residential Buildings on One Site), Mr Lyons explained that the existing setbacks to the boundary of the lot are

proposed to remain as per the setback plan endorsed under DP16/0052B, and the setback distance between the two dwellings meet the requirement of the *Building Act 1994*. Mr Lyons further added that the proposed building envelope could accommodate a 3-bedroom dwelling and a garage with two car parking spaces on each lot.

The Authority notes the abovementioned comments; however, is not satisfied with the applicant's response regarding that the proposed UTS subdivision to create two vacant unit lots in the range of 300m² - 400m². The Authority, while acknowledging that the application is for UTS subdivision (under Clause 11.1.5 of the NTPS), which will create two units, a nominal amount of common property and a Body Corporate (formed by registering a scheme statement), the proposed UTS subdivision, being of vacant land, is effectively a broad acre subdivision and is intrinsically linked to the paragraph 4(b) of Zone SD23. The applicant in its statement of merits for the UTS states that "the division of the subject land as a conventional subdivision, as opposed to unit titling, would create conventional lots with areas that conflict with the SD23 zone". Nevertheless, the applicant acknowledged to the Authority that the vacant unit lots, upon subdivision through a UTS, will be marketed and sold as house and land packages.

The Authority considers that the proposed arrangement may result in the creation of multiple vacant unit lots less than 450m² which conflicts with both the design philosophy of Zone SD23 and the specific requirement in paragraph 4(b) of that Zone and seeks clarification from the applicant as to why the specific requirement of paragraph 4(b) of Zone SD23 should not apply to this application for subdivision.

Turning to the second matter, if the proposed unit title subdivision meets the requirements of SD23 for lot size, Clause 7.3.2 (Distance between Residential Buildings on One Site) requires that where more than one building comprising one or two storey residential buildings is located on a site, the distance between the buildings is to be calculated in accordance with Table A to Clause 7.3 as if there was a boundary between the buildings. By virtue of this clause, the minimum distance between dwellings is required to be 3m. The building envelope plan proposes that the future dwellings will be separated by 1.8m rather than 3m.

The purpose of Clause 7.3.2 is to ensure residential buildings are located:

- a. so they are compatible with the streetscape and surrounding development including residential buildings on the same site;
- b. to minimise any adverse effects of building massing when viewed from adjoining residential buildings, associated private open space and the street; and
- c. to avoid undue overlooking of adjoining residential buildings and associated private open space.

The Authority considers that, in the current form, the application lacks a statement addressing special circumstances to support a reduced separation distance between the two future dwellings. Special circumstances were considered in *Bradley v Development Consent*

Authority & Kalthmera Pty Ltd [2017] NTCAT 922 and the Tribunal in that case stated that such circumstances require demonstration of

“something about a proposed development that means that requirements of the NTPS that would otherwise apply can appropriately be relaxed. Consideration of that issue will normally involve attention to aspects of the proposed development which set it apart from developments on other, similarly zoned, land] The question is whether there is anything 'unusual, exceptional, out of the ordinary and not to be expected' about the proposed development that justifies a departure from the requirements of the planning scheme.”

The Authority considers that the proposal fails to explain the special circumstances justifying a variation to this clause or what safeguards can be put in place to justify the variation to Clause 7.3.2.

The submitter, Ms Vicky Porter, also attended the hearing and spoke about her concerns regarding on street car parking, vehicle cross overs and the impact of the proposed development on the bus movement on at Thorne Street. The applicant responded to the submitter's comments and explained that the land use plan already identifies the site for multiple dwellings and on-site parking for two cars per dwelling is a requirement that will be satisfied at the time of the future development of the dwellings. Furthermore, a vehicle crossover will be required from Thorne Street for unit 2; however, the location of a vehicle crossover will be a matter for the City of Darwin to consider. The Authority notes that the City of Darwin did not raise any concerns with the location of the proposed driveway.

The Authority notes the comments of the service authorities and considers that all requirements can be addressed through the inclusion of conditions and notes on any permit issued for the subdivision.

ACTION: Notice of Deferral

ITEM 3

PA2020/0113

**UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN
LOT 12067 (5) ALBERT STREET, MUIRHEAD, TOWN OF NIGHTCLIFF**

APPLICANT/S

Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA) and Mr Darron Lyons (The Red Shed) attended.

Interested Party - Ms Vicky Porter attended.

**RESOLVED
90/20**

That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development Consent Authority defer consideration of the application to develop Lot 12067 (5) Albert Street, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property and a building envelope plan to require the applicant to provide the following additional information that the Authority considers necessary in order to enable the proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.

ITEM 4

PA2020/0109

**UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN
LOT 12104 (5) STANLEY STREET, MUIRHEAD, TOWN OF NIGHTCLIFF**

APPLICANT/S

Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended.

Interested Party - Ms Vicky Porter attended.

**RESOLVED
91/20**

That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development Consent Authority defer consideration of the application to develop Lot 12104 (5) Stanley Street, Muirhead, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property and a building envelope plan to require the applicant to provide the following additional information that the Authority considers necessary in order to enable the proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.
- amended plans generally in accordance with the plans submitted with the application but modified to show greater compliance with the minimum setback requirement along the street frontages required under setback plan endorsed under DP16/0052B. Further justification for any continued non-compliance should be provided and presented in the context of special circumstances which justify the giving of consent.

ITEM 5

PA2020/0112 UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN LOT 12103 (7) STANLEY STREET, MUIRHEAD, TOWN OF NIGHTCLIFF
APPLICANT/S Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended.

Interested Party - Ms Vicky Porter attended.

**RESOLVED
92/20**

That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development Consent Authority defer consideration of the application to develop Lot 12103 (7) Stanley Street, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property and a building envelope plan, to require the applicant to provide the following additional information that the Authority considers necessary to enable proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.
- amended plans generally in accordance with the plans submitted with the application but modified to show greater compliance with the minimum setback requirement along the street frontages required under setback plan endorsed under DP16/0052B. Further justification for any continued non-compliance should be provided and presented in the context of special circumstances which justify the giving of consent.

ITEM 6

PA2020/0111 UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN LOT 12135 (13) SAUNDERS STREET, MUIRHEAD, TOWN OF NIGHTCLIFF
APPLICANT/S Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended.

Interested Party - Ms Vicky Porter attended.

**RESOLVED
93/20**

That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development Consent Authority defer consideration of the application to develop Lot 12153 (13) Saunders Street, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property and a building envelope plan, to require the applicant to provide the following additional information that the Authority considers necessary to enable proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.

ITEM 7

PA2020/0110

**UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY AND A BUILDING ENVELOPE PLAN
LOT 12075 (18) PATRICK STREET, MUIRHEAD, TOWN OF NIGHTCLIFF**

APPLICANT/S

Earl James and Associates

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended.

Interested Party - Ms Vicky Porter attended.

**RESOLVED
94/20**

That, pursuant to section 46(4)(b) of the *Planning Act 1999*, the Development Consent Authority defer consideration of the application to develop Lot 12075 (18) Patrick Street, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property and a building envelope plan, to require the applicant to provide the following additional information that the Authority considers necessary to enable proper consideration of the application:

- a written statement considering the application of Zone SD23 (Specific Use Zone Darwin No. 23) of the Northern Territory Planning Scheme to the present proposal specifically addressing paragraph 1, 2, 3(a)(ii) and 4(b); and
- special circumstances that apply to consider the proposed reduced setback between buildings on the site from 3m to 1.8m, as required under Clause 7.3.2 (Distance between Residential Buildings on One Site) for the future development of dwellings.

REASONS FOR THE DECISION (ITEMS 3 to 7)

1. Pursuant to section 51(a) of the *Planning Act 1999*, the consent authority must take into consideration the planning scheme that applies to the land to which the application relates.

The Northern Territory Planning Scheme (NTPS) applies to the land. The land is within Zone SD23 (Specific Use Zone Darwin No. 23) of the NTPS. The purpose of Zone SD23 is to facilitate the subdivision, use and development of the land as a residential estate that provides for housing choice through a range of lot sizes and housing types.

The subject lot was created through grant of DP16/0052 and variation permit DP16/0052B issued in December 2016 which endorses the current building setback plan and land use plan. The land use plan identifies the subject lot for multiple dwellings and the setback plan

identifies specific building setback requirement for the future development on this lot.

The application proposes a subdivision of Lot 12139 Town of Nightcliff for the purpose of a Unit Title Scheme (UTS) subdivision to create two units and minimal common property. The proposed UTS subdivision will facilitate new ownership arrangements by means of the sale of an existing vacant block of land in two units. The application also proposes a setback plan which establishes a setback distance between the two future dwellings of 1.8m (0.9m setback from the building to the unit title boundary, as amended by the applicant).

As per Section 44(b) of the Planning Act 1999, a development permit is required, 'if the proposed development is the subdivision or consolidation of land.' therefore planning consent is required for the proposed subdivision.

Of particular relevance to this application is paragraph 4(b) of Zone SD23, which requires that the subdivision design should not include any lot with an area less than 450m². There is no definition of "lot" in either the *Planning Act 1999* or NTPS. Under the Land Titles Act 2000, the definition of a "lot" includes a unit and common property within the meaning of the *Unit Title Schemes Act 2009*. Therefore, the Authority considers that determination of the present application requires, firstly, the consideration of the meaning of "lot" as used in paragraph 4(b) of Zone SD23 in light of the definition of "lot" under the Land Titles Act 2000 and, secondly, if unit title subdivision as proposed meets the requirements of SD23 for lot size, appraisal of whether there are special circumstances which allow the Authority to exercise its discretion to vary compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site)

Turning to the first matter, as the application proposes a UTS subdivision of the lot to create two units and common property, the Authority considered that the threshold question is to determine the meaning of "lot" as used in SD23 in order to decide whether the proposed UTS subdivision can meet both the design philosophy and specific requirements of Zone SD23. The Authority notes that the NTCAT decision in *Bradley v Development Consent Authority & Kalthmera Pty Ltd* [2017] NTCAT 922 found that clause 2.5(4) of the NTPS does not expressly or impliedly empower a consent authority to give consent to a use or development of land that does not comply with a requirement of a specific use zone.

The Authority also considers that the future development on the proposed unit lots will affect the range of housing types in Zone SD23 as there is a change from potential duplex dwellings developments to stand-alone detached single dwelling development on proposed unit lots and requires the applicant to address that issue.

Mr Kevin Dodd (Earl James and Associates), Mr Chris Grimm (Senior Development Manager, DHA Australia) and Mr Darron Lyons (The Red Shed) attended the meeting and spoke further to the application. Mr Dodd gave an overview and noted the merits of the proposed UTS subdivision. Mr Dodd explained that the proposed UTS subdivision would

allow creation an affordable product which suits the existing market conditions. Mr Dodd further explained that each of the potential unit lots would have servicing arrangements similar to a duplex development on any vacant lot.

The Authority; however, notes the design philosophy of Zone SD23 and requires clarification from the applicant as to how the proposed UTS subdivision does not undermine that philosophy by creating lots, within the range of 300m² – 400m² and why minimum lot size of 450m² should not be applied in this UTS subdivision. In response to the question Mr Grimm explained that the provision of affordable housing in Zone SD23 is met by the lots allocated for multiple dwelling development in the subdivision. Mr Grimm further added that once the duplexes are built on these lots they are unit titled under the Unit Title Schemes Act 2009 to create unit lots less than 450m². The Authority, while acknowledging the response of Mr Grimm, considered that the subdivision proposed in the current application is different as it involves unit subdivision to create vacant unit lots which could potentially be developed to create single dwelling type development similar to a land and house package. The Applicant confirmed that the intention was to market these unit-titled lots as “house and land packages”.

In response to a question raised by the Authority on variation to Clause 7.3.2 (Distance between Residential Buildings on One Site), Mr Lyons explained that the existing setbacks to the boundary of the lot are proposed to remain as per the setback plan endorsed under DP16/0052B, and the setback distance between the two dwellings meet the requirement of the Building Act 1994. Mr Lyons further added that the proposed building envelope could accommodate a 3-bedroom dwelling and a garage with two car parking spaces on each lot.

The Authority notes the abovementioned comments; however, is not satisfied with the applicant’s response regarding that the proposed UTS subdivision to create two vacant unit lots in the rage of 300m² - 400m². The Authority, while acknowledging that the application is for UTS subdivision (under Clause 11.1.5 of the NTPS), which will create two units, a nominal amount of common property and a Body Corporate (formed by registering a scheme statement), the proposed UTS subdivision, being of vacant land, is effectively a broad acre subdivision and is intrinsically linked to the paragraph 4(b) of Zone SD23. The applicant in its statement of merits for the UTS states that “the division of the subject land as a conventional subdivision, as opposed to unit titling, would create conventional lots with areas that conflict with the SD23 zone”. Nevertheless, the applicant acknowledged to the Authority that the vacant unit lots, upon subdivision through a UTS, will be marketed and sold as house and land packages.

The Authority considers that the proposed arrangement may result in the creation of multiple vacant unit lots less than 450m² which conflicts with both the design philosophy of Zone SD23 and the specific requirement in paragraph 4(b) of that Zone and seeks clarification from the applicant as to why the specific requirement of paragraph 4(b) of Zone SD23 should not apply to this application for subdivision.

Turning to the second matter, if the proposed unit title subdivision meets the requirements of SD23 for lot size, Clause 7.3.2 (Distance between Residential Buildings on One Site) requires that where more than one building comprising one or two storey residential buildings is located on a site, the distance between the buildings is to be calculated in accordance with Table A to Clause 7.3 as if there was a boundary between the buildings. By virtue of this clause, the minimum distance between dwellings is required to be 3m. The building envelope plan proposes that the future dwellings will be separated by 1.8m rather than 3m.

The purpose of Clause 7.3.2 is to ensure residential buildings are located:

- a. so they are compatible with the streetscape and surrounding development including residential buildings on the same site;
- b. to minimise any adverse effects of building massing when viewed from adjoining residential buildings, associated private open space and the street; and
- c. to avoid undue overlooking of adjoining residential buildings and associated private open space.

The Authority considers that, in the current form, the application lacks a statement addressing special circumstances to support a reduced separation distance between the two future dwellings. Special circumstances were considered in *Bradley v Development Consent Authority & Kalhmera Pty Ltd [2017] NTCAT 922* and the Tribunal in that case stated that such circumstances require demonstration of

“something about a proposed development that means that requirements of the NTPS that would otherwise apply can appropriately be relaxed. Consideration of that issue will normally involve attention to aspects of the proposed development which set it apart from developments on other, similarly zoned, land] The question is whether there is anything ‘unusual, exceptional, out of the ordinary and not to be expected’ about the proposed development that justifies a departure from the requirements of the planning scheme.”

The Authority considers that the proposal fails to explain the special circumstances justifying a variation to this clause or what safeguards can be put in place to justify the variation to Clause 7.3.2.

The Authority notes the comments of the service authorities and considers that all requirements can be addressed through the inclusion of conditions and notes on any permit issued for the subdivision.

ACTION: Notice of Deferral

RATIFIED AS A RECORD OF ATTENDANCE AND DETERMINATIONS MADE AT THE MEETING

SUZANNE PHILIP
Chair

29 May 2020

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These minutes record persons in attendance at the meeting and the resolutions of the Development Consent Authority on applications before it.
Reliance on these minutes should be limited to exclude uses of an evidentiary nature.