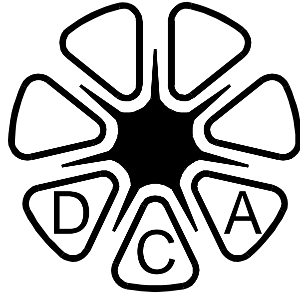

DEVELOPMENT CONSENT AUTHORITY

DARWIN DIVISION

MINUTES

MEETING No. 365 – FRIDAY 23 OCTOBER 2020

BROLGA ROOM
NOVOTEL DARWIN CBD
100 THE ESPLANADE
DARWIN CITY

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

APOLOGIES: Nil

LEAVE OF ABSENCE: Nil

OFFICERS PRESENT: Margaret Macintyre (Secretary), Ann-Marie Reynolds, Julie Hillier and Amit Magotra (Development Assessment Services)

COUNCIL REPRESENTATIVE: Apology

Meeting opened at 10.15 am and closed at 1.00 pm

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

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

Kevin Dodd (Earl James and Associates), Brad Cunnington (Northern Planning Consultants) and Darron Lyons (The Red Shed) attended.

Mr Dodd tabled a site plan, landscaping plan, ground floor plan, elevations and coloured perspective of proposed residence on the lot.

RESOLVED 180/20

That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to 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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the *Planning Act 1999* require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12139 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are 326m^2 and 303m^2 respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

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1. 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
2. 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.

In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred, this time at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a 'lot' in the context of the NTPS refers to individual 'allotments' under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 and relates to residential subdivision of land not UTS subdivisions. Mr Cunnington stated that the UTS subdivision application cannot be considered in isolation as it forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from the UTS subdivision.

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During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS "conflicts with the design philosophy of SD23", Mr Cunnington maintained that the proposal does not compromise the 'breezeway' model for allotment layouts, nor does it alter the streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

The public submission raised concerns around density and this is not impacted by the UTS application as there is no change to residential density. Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal. The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone. Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than 450m^2. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than 450m^2 which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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. It is therefore considered that the Authority does not have any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

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In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows: –

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'*For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot"*.'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

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f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1, requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term 'lot' as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a "lot" for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

2. Pursuant to section 51(e) of the *Planning Act 1999*, the consent authority must take into consideration any submissions made under section 49, and any evidence or information received under section 50, in relation to the development application.

One public submission was received under section 49 of the *Planning Act 1999*. The objection primarily related to the location of the proposed driveways and the potential impact on on-street parking. The authority noted that driveway positions and on-street parking are matters for the City of Darwin to consider. Nevertheless, further development of the subject site including the built form will require consent in consultation with City of Darwin.

3. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin's tropical climate and lifestyle attributes and to achieve this outcome

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establishes a minimum lot size of 450m². The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Refusal

ITEM 2
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

Kevin Dodd (Earl James and Associates) Brad Cunnington (Northern Planning Consultants and Darron Lyons (The Red Shed) attended.

RESOLVED 181/20 That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to the application to develop Lot 12104 (5) 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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the *Planning Act 1999* require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12104 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are 315m² and 313m² respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

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This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

1. 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);
2. 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; and
3. 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.

In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. The applicant also clarified that previous approval which created Lot 12104 had a building envelope setback of 7.5m from the Stanley Street boundary. The applicant confirmed that the Development Consent Authority previously considered a change to the Stanley Street setback for this property and subsequently approved a 6m setback when it issued DP19/0109, thereby addressing the third deferral point.

In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a ‘lot’ in the context of the NTPS refers to individual ‘allotments’ under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 does not apply to UTS subdivisions. Mr Cunnington stated that this UTS subdivision application forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

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Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from the UTS subdivision. Therefore it is not appropriate to transpose the definition of a unit from the *Land Title Act 2000* to a 'lot' in the NTPS.

During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS "conflicts with the design philosophy of SD23", Mr Cunnington maintained that the proposal does not compromise the 'breezeway' model for allotment layouts, nor does it alter the streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal.

The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone.

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Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than 450m^2. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than 450m^2 which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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. It is therefore considered that the Authority does not have any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows:

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot".'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The

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Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1 requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term ‘lot’ as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a “lot” for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

2. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

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The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin's tropical climate and lifestyle attributes and to achieve this outcome establishes a minimum lot size of 450m^2. The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5	**AGAINST: 0**	**ABSTAIN: 0**
ACTION:	Notice of Refusal	

ITEM 3

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

Kevin Dodd (Earl James and Associates) Brad Cunnington (Northern Planning Consultants and Darron Lyons (The Red Shed) attended.

RESOLVED 182/20

That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to 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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the *Planning Act 1999* require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12075 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are 468m^2 and 336m^2 respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

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This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

1. 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
2. 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.

In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a ‘lot’ in the context of the NTPS refers to individual ‘allotments’ under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 does not apply to UTS subdivisions. Mr Cunnington stated that this UTS subdivision application forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

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Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from the UTS subdivision. Therefore it is not appropriate to transpose the definition of a unit from the *Land Title Act 2000* to a 'lot' in the NTPS.

During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS "conflicts with the design philosophy of SD23", Mr Cunnington maintained that the proposal does not compromise the 'breezeway' model for allotment layouts, nor does it alter the streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal.

The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone. Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than 450m^2. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than 450m^2 which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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

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consent to a use or development of land that does not comply with a requirement of a specific use zone. It is therefore considered that the Authority does not have any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows :

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot".'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject

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to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1 requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term 'lot' as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a "lot" for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

2. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin's tropical climate and lifestyle attributes and to achieve this outcome establishes a minimum lot size of 450m^2. The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**
ACTION: Notice of Refusal

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ITEM 4

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

Kevin Dodd (Earl James and Associates) Brad Cunnington (Northern Planning Consultants and Darron Lyons (The Red Shed) attended.

RESOLVED 183/20 That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to the application to develop Lot 12135 (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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the Planning Act 1999 require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12135 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are $338m^2$ and $398m^2$ respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

1. 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
2. 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.

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In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a ‘lot’ in the context of the NTPS refers to individual ‘allotments’ under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 does not apply to UTS subdivisions. Mr Cunnington stated that this UTS subdivision application forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from the UTS subdivision. Therefore it is not appropriate to transpose the definition of a unit from the *Land Title Act 2000* to a ‘lot’ in the NTPS.

During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS “conflicts with the design philosophy of SD23”, Mr Cunnington maintained that the proposal does not compromise the ‘breezeway’ model for allotment layouts, nor does it alter the

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streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal.

The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone. Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than $450m^2$. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than $450m^2$ which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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. It is therefore considered that the Authority does not have any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows -:

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply

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subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot".'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1 requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied

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as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term 'lot' as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a "lot" for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

2. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin's tropical climate and lifestyle attributes and to achieve this outcome establishes a minimum lot size of 450m^2. The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Refusal

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

Kevin Dodd (Earl James and Associates) Brad Cunnington (Northern Planning Consultants and Darron Lyons (The Red Shed) attended.

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RESOLVED 184/20

That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to 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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the *Planning Act 1999* require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12103 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are 309m^2 and 316m^2 respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

1. 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);
2. 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; and
3. 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.

In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and

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on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. The applicant also clarified that previous approval which created Lot 12103 had a building envelope setback of 7.5m from the Stanley Street boundary. The applicant confirmed that the Development Consent Authority previously considered a change to the Stanley Street setback for this property and subsequently approved a 6m setback when it issued DP19/0109, thereby addressing the third deferral point.

In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a 'lot' in the context of the NTPS refers to individual 'allotments' under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 does not apply to UTS subdivisions. Mr Cunnington stated that this UTS subdivision application forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from

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the UTS subdivision. Therefore it is not appropriate to transpose the definition of a unit from the *Land Title Act 2000* to a 'lot' in the NTPS.

During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS "conflicts with the design philosophy of SD23", Mr Cunnington maintained that the proposal does not compromise the 'breezeway' model for allotment layouts, nor does it alter the streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal.

The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone. Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than $450m^2$. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than $450m^2$ which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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. It is therefore considered that the Authority does not have

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any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows :

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot".'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size

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for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1 requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term ‘lot’ as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a “lot” for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

1. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin’s tropical climate and lifestyle attributes and to achieve this outcome establishes a minimum lot size of 450m^2. The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Refusal

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ITEM 6
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

Kevin Dodd (Earl James and Associates) Brad Cunnington (Northern Planning Consultants and Darron Lyons (The Red Shed) attended.

RESOLVED 185/20 That, pursuant to section 53(c) of the *Planning Act 1999*, the Development Consent Authority refuse to consent to 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, for the following reasons:

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 2007 (NTPS) applies to the land. Although that Scheme has been repealed, and replaced by the Northern Territory Planning Scheme 2020 (NTPS 2020) which took effect on 31 July 2020, transitional provisions contained in Section 215 of the Planning Act 1999 require that a development application relating to a specific use zone, is to be determined in accordance with the Act in force and the elements of the planning scheme applicable immediately before the 31st July 2020.

Lot 12067 Town of Nightcliff 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 zone contains specific development requirements and a plan endorsed by the consent authority designates those sites within the zone to be developed for multiple dwellings.

The application proposes a unit title schemes (UTS) subdivision to create two units and common property over vacant land. The area within Unit 1 and Unit 2 are $351m^2$ and $420m^2$ respectively. The proposal is intended to facilitate the sale of an existing vacant block of land identified for multiple dwellings in two units and common property. The application also proposes a setback plan to establish a setback distance of 3m between future structures such that each unit will contain a detached dwelling.

This application was first considered by the Authority at its meeting on 22 May 2020. The application was subsequently deferred to enable the applicant to provide additional information that the Authority considered necessary in order to enable proper consideration of the application, including:

1. 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
2. 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.

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In response to the Notice of Deferral, the applicant, Mr Kevin Dodd (Earl James and Associates), provided a written response to address the points of deferral and on that basis, the application was reconsidered at the Development Consent Authority meeting dated 18 September 2020.

The information included a revised building setback plan which demonstrated compliance with Clause 7.3.2 (Distance between Residential Buildings on One Site) thereby removing the need to provide special circumstances in response to reducing the setback. In considering the application of Zone SD23, the consent authority again raised concerns regarding inconsistencies between the provisions of Zone SD23 and the requirements of Part 5 of the NTPS as it relates to vacant land proposed to be developed for the purpose of a UTS subdivision. The application was again deferred at the request of the applicant to enable further information to be provided in relation to the application of Zone SD23 and the requirements of Part 5.

In relation to the second Notice of Deferral, Mr Brad Cunnington (Northern Planning Consultants) provided a response on behalf of the applicant to address the deferral and subsequently, the application was reconsidered at the Development Consent Authority meeting dated 23 October 2020.

At the meeting, Mr Cunnington spoke to his submission stating that a ‘lot’ in the context of the NTPS refers to individual ‘allotments’ under the *Land Title Act 2000* and paragraph 4(b) of Zone SD23 does not apply to UTS subdivisions. Mr Cunnington stated that this UTS subdivision application forms part of the development of the site for multiple dwelling purposes, which infers development of the subject land should be developed in a manner consistent with Zone MD (Multiple Dwelling Residential) as per paragraph 7 of Zone SD23.

Mr Cunnington noted sub-clause 7 of Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme) requires that the land area of individual units should be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas) and stated that despite the DAS recommendation and the information outlined in the original application, and previous deferral, in his opinion, neither Clause 11.1.1 nor Clause 11.1.2 could be applied as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

Mr Cunnington noted that the NTPS deals with land subdivisions differently than UTS subdivision i.e. the requirements for the subdivision of allotments differs from the UTS subdivision. Therefore it is not appropriate to transpose the definition of a unit from the *Land Title Act 2000* to a ‘lot’ in the NTPS.

During the meeting, the Authority queried the means in which the land would be marketed in the future, as house and land packages, and in practical terms how this differentiated from a subdivision of land. Mr Cunnington acknowledged that the lots would be sold as vacant land but in the form of a UTS subdivision, while they could be perceived as two individual lots, the underlying tenure remains a unit title subdivision which will include common connections and common property.

In response to the question of whether the proposed UTS “conflicts with the design philosophy of SD23”, Mr Cunnington maintained that the proposal does not compromise the ‘breezeway’ model for allotment layouts, nor does it alter the

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streetscape and landscaping outcomes (relative to the development of the site for multiple dwellings) or prevent built form outcomes as anticipated in the zone.

Mr Dodd (Earl James and Associates) reiterated that the public concern during consultation on the overall Muirhead development related to density and the UTS subdivision application does not change this.

Mr Cunnington tabled a drawing illustrating the type of development which could be developed on the lots. The authority noted that while the information tabled demonstrated compliance with relevant provisions for the NTPS, it would not prevent future landowners from seeking alternative design approvals. If the lots were sold as house and land packages, it would not guarantee future development of the lots would be sympathetic to one another.

The Authority notes the abovementioned comments and the further information in support of the proposal.

The land use plan identifies the intended use of the subject land for multiple dwellings. When considering a UTS subdivision of land that will be vacant at the time titles issue, sub-clause 7 of clause 11.1.5 requires that the land area of individual units should be consistent with clause 11.1.1 and clause 11.1.2.

The Authority considered that clause 11.1.1 and clause 11.1.2 do not apply to the UTS subdivision application given clause 11.1.1 does not provide a minimum lot size for land in Zone SD23 and the endorsed masterplan identifies the land for the purpose of multiple dwellings.

Clause 11.1.5 differentiates between UTS subdivision for vacant land and other UTS subdivisions and denotes when considering a UTS subdivision for vacant land that a minimum lot size will apply for allotments as determined by the zone. Paragraph 4(b) of Zone SD23 specifies the minimum lot size for zone not include any lot with an area of less than $450m^2$. The Authority considered that the proposed arrangement will result in the creation of multiple vacant unit lots less than $450m^2$ which conflicts with the design philosophy of Zone SD23 and the specific lot size requirement in paragraph 4(b) of the zone.

The Authority also noted that the NTCAT decision in Bradley v Development Consent Authority & Kalhmera 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. It is therefore considered that the Authority does not have any discretionary powers to consent to the subdivision that is not in accordance with paragraph 4(b) of the Zone SD23.

In summary, the Authority, having considered the application in light of the *Planning Act 1999* and Planning Scheme in effect prior to 31st July 2020 and the various submissions made to it by the applicant and Mr Cunnington on the applicant's behalf, determined as follows:

a) The clear intent of the application for a UTS of the vacant Lot was to enable the resulting units to be marketed and sold as house and land packages, containing a land component of substantially less than the 450 square metres prescribed in Sub-clause 4(b) of SD23 as the minimum size for Lots in that Specific Use Zone. It is also clear that it would be impossible to make an application to simply

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subdivide the Lot into 2 parcels of vacant land because of the minimum lot requirements contained in SD23.

b) Neither the *Planning Act 1999* nor the NTPS contain a definition of "lot". The *Land Title Act 2000*, section 4 defines a "lot" as a separate, distinct parcel of land and specifically includes a unit or common property under the Unit Title Schemes Act 2009. On the face of it, the prohibition on Lots under 450 square metres contained in SD23 appears to prevent a UTS creating units with areas of less than that. Such an outcome would render a number of standard UTSs within SD23, whereby multiple dwellings ae constructed and then the Lot, including the building(s), are subject to a UTS subdivision, as non-compliant under the Planning Act 1999. The Authority considered that there is an ambiguity or uncertainty in relation to the interpretation of the requirements of SD23 and that a determination in relation to its meaning in the context of UTS of vacant land is required.

c) The applicant relied upon a side note accompanying Sub-clause 11.1.5 of the NTPS, which deals specifically with "Subdivision for the Purposes of a Unit Title Scheme", and argued that the requirement of a minimum lot size in SD23 should not be applied to UTS units. While acknowledging the definition in the *Land Title Act 2000*, that note further provides:
'For the avoidance of confusion, the Surveyor General uses the term "unit" for a parcel of land or building unit or common property created under the Unit Title Schemes Act and described on a UTS plan and "lot" for a parcel of land created under the Land Title Act 2000 and described on an LTO plan as a "lot".'

d) Sub-clause 7 of 11.1.5 deals specifically with vacant lot UTSs, acknowledging that they are different from the standard UTS, in requiring that, generally, they meet the minimum Lot size and requirements prescribed in 11.1.1 and 11.1.2 which deals with Lots intended for Zone SD in Greenfield areas. The Authority considers that those provisions are intended to ensure that vacant land UTSs are not used to avoid minimum lot requirements of the Planning Scheme.

e) The applicant originally argued that the effect of Sub-clause 7 was that the land area of the individual units should be consistent with clause 11.1.1 and, whilst the subject land is zoned SD23 under the NTPS, it is identified as a Multiple Dwelling lot on the plans endorsed as part of DP16/0052B. As each of the proposed vacant units has an area in excess of the 300m2 specified for MD lots in the table to Clause 11.1.1, they were compliant. Clause 7 of SD23 specifically provides that development of a lot for the purpose of multiple dwellings is subject to all the relevant clauses of the NTPS that would apply were the land within Zone MD. The Authority notes that at the time SD23 was created, the minimum lot size for MD lots was 800 square metres and it was not within contemplation that MD lots of 300 square metres could be created.

f) There is a clear conflict or inconsistency between the provisions of clause 11.1.1 requiring minimum lot sizes in MD zoned land and the requirements of Sub-clause 4(b) of SD23 for a minimum lot size of 450 square metres. The Authority notes the effect of Clause 2.4 of the NTPS (Specific Use Zones) which applies Part 5 of the Scheme to such zones, except where it conflicts with any conditions specified, in the present case, to SD23. As previously noted Mr Cunnington, on behalf of the applicant, considered that while sub-clause 7 of Clause 11.1.5 requires that the land area of individual units be consistent with clause 11.1.1 (Minimum Lot Sizes and Requirements) and clause 11.1.2 (Lots intended for Zone SD in Greenfield areas), his view is that neither of those Clauses could be applied

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as a minimum lot size for Zone SD23 is not listed and the land is not intended for Zone SD (Single Dwelling Residential).

g) The Authority considers that the term 'lot' as used in SD23 must be understood in the light of the overall applicable Planning Scheme. The specific clause dealing with Unit Title Subdivision is Clause 11.1.5 and it contains a note next to sub-clause 11.1.2 which draws a distinction between a unit created under the Unit Title Schemes Act and a "lot" for a parcel of land created under the Land Title Act. However, Sub-clause 7 of the same provision draws a further distinction between a vacant land UTS and other UTSs, requiring that such subdivisions essentially meet the minimum lot sizes and other requirements which clause 11.1.1 imposes. SD 23 is not listed in the table accompanying that sub-clause and the only applicable minimum Lot requirement is that which appears in SD 23 itself. The Authority considers that the intent of Clause 11.1.5 is to ensure that vacant lot UTSs are to comply with the appropriate minimum lot size for the applicable zone. The Authority further considers that the relevant standard to be applied in SD 23 for the minimum lot size in a vacant lot UTS, as opposed to a standard UTS, is 450 square metres.

2. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The applicant proposal intended the unit titles to be marketed as a house and land package and Mr Cunnington acknowledged the appearance of the land under a UTS subdivision would not differ to land divided through the *Land Titles Act,* however administratively the UTS development is governed, under relevant legislation and policies, including the requirement to provide common property.

The Authority noted that the Development Design Philosophy for Zone SD23 is that any subdivision and future development is expected to be designed to respond to Darwin's tropical climate and lifestyle attributes and to achieve this outcome establishes a minimum lot size of 450m^2. The creation of unit entitlements which facilitate a development that is to be marketed as a house and land package could be perceived as small lots contrary to the zone requirements established to support the Development Design Philosophy.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Refusal

ITEM 7
PA2020/0197 **RECONSIDERATION: UNIT TITLE SCHEMES SUBDIVISION TO CREATE FIVE UNITS AND COMMON PROPERTY**
LOT 1131 (14) FRANCIS STREET, MILLNER, TOWN OF NIGHTCLIFF
APPLICANT Northern Aboriginal Cultural & Educational Association Ltd

Samir Raut (Northern Aboriginal Cultural & Education Association Ltd), Dr Jai Singh (landowner) and Brad Cunnington (Northern Planning Consultants) attended.

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RESOLVED 186/20

That, pursuant to section 53(a) of the *Planning Act 1999*, the Development Consent Authority consent to the application to develop 1131 (14) Francis Street, Town of Nightcliff for the purpose of unit title schemes subdivision to create five units and common property, subject to the following conditions:

CONDITIONS PRECEDENT

1. Prior to the endorsement of plans and prior to commencement of works (including site preparation), 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) A screen fence to a minimum height of 1.8m (along the eastern boundary) to provide a visual barrier to the private open space area associated with units 1 and 2 from the adjoining dwellings;

(b) BBQ facilities within the communal open space area.

2. Prior to the endorsement of plans and prior to the commencement of works (including site preparation), a ‘Schedule of Upgrades’ is to be prepared by the proponent, to the satisfaction of the consent authority. When approved, the ‘Schedule of Upgrades’ will be endorsed and will then form part of the permit. The ‘Schedule of Upgrades’ should include the following details of the works to be undertaken by the proponent:

- re-sealing and line marking of the existing driveways and car parking areas;
- removal of the window/wall air conditioning units and replacement with louvers;
- upgrading of the windows louver screens located on the eastern side of the site;
- screening of the air-conditioning units;
- screening of all pipes, fixtures, fittings and vents servicing the existing buildings.

3. Prior to the endorsement of plans and prior to the commencement of works (including site preparation), 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 landscape concept plan and must include:

(a) a planting schedule of all existing and proposed trees, shrubs and ground covers, including botanical names, common names, sizes at maturity, and quantities of each plant; and

(b) provision of an in-ground irrigation system to all landscaped areas.

All species selected must be to the satisfaction of the consent authority

GENERAL CONDITIONS

4. The works carried out under this permit shall be in accordance with the drawings endorsed as forming part of this permit.

5. All existing and proposed easements and sites for existing and required utility services must be vested in the relevant authority for which the easement or

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site is to be created on the plan of subdivision submitted for approval by the Surveyor General.

6. Any developments on or adjacent to any easements on site shall be carried out to the requirements and satisfaction of the relevant service authority at no cost to the relevant service authority.

7. 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.

8. The area(s) set-aside for the parking of vehicles and access lanes as shown on the endorsed plans must be:
(a) constructed;
(b) properly formed to such levels that they can be used in accordance with the plans;
(c) surfaced with an all-weather-seal coat;
(d) drained;
(e) line marked to indicate each car space and all access lanes; and
(f) clearly marked to show the direction of traffic along access lanes and driveways

to the satisfaction of the consent authority.

Car spaces, access lanes and driveways must be kept available for these purposes at all times.

9. All air conditioning condensers (including any condenser units required to be added or replaced in the future) are to be appropriately screened from public view, located so as to minimise thermal and acoustic impacts on neighbouring properties and condensate disposed of to ground level in a controlled manner to the satisfaction of the consent authority.

10. All pipes, fixtures, fittings and vents servicing any building on the site must be concealed in service ducts or otherwise hidden from view to the satisfaction of the consent authority.

11. Before the use/occupation of the development starts, the landscaping works shown on the endorsed plans must be carried out and completed to the satisfaction of the consent authority.

12. 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.

13. Prior to new titles being issued for the units shown on the endorsed drawings, a Scheme Statement meeting the requirements of the Unit Title Scheme Act (as confirmed by the Land Titles Office) shall be submitted for endorsement by the consent authority.

14. Prior to new titles being issued for the units shown on the endorsed drawings, confirmation shall be provided to Development Assessment Services (in the form of an email addressed to the Power and Water Corporation) demonstrating that the Power and Water Corporation has been provided with a copy of the survey plan with the new lot numbers. This is for the purpose

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of ensuring the relevant Power and Water Information and Billing System is updated. Please provide a copy of an email addressed to both landdevelopmentnorth@powerwater.com.au and powerconnections@powerwater.com.au.

15. Prior to new titles being issued for the units shown on the endorsed drawings, confirmation shall be provided to Development Assessment Services (in the form of an email addressed to the Power and Water Corporation) from a suitable qualified professional confirming that all new number labels have been correctly installed at the Customer's Metering Panel(s) and water meters (where applicable). Please provide a copy of an email addressed to both landdevelopmentnorth@powerwater.com.au and powerconnections@powerwater.com.au.

16. Prior to new titles being issued, it shall be confirmed by the consent authority that all areas shown on the plan endorsed by the consent authority through this permit as service authority easements, communal open space, shared driveways, or areas set aside for the communal storage and collection of garbage or other solid waste, or other shared amenities are shown on the survey plan as Common Property.

17. Prior to new titles being issued for the units shown on the endorsed drawings written confirmation from a building certifier confirming that the rectification works referred to in the statement prepared by Mr Dehne Tynan of WSP dated 24 June 2020 have been completed, and that the buildings comply with any requirements prescribed by regulation in relation to the building (including, for example, requirements about the structural integrity and fire safety of the building), must be provided to the satisfaction of the consent authority.

18. Part V Clearance for subdivision into units under the *Unit Titles Scheme Act 2009* will not be granted until the site has been inspected by the consent authority and the development layout is generally in accordance with plans endorsed as forming part of this permit, including that all necessary upgrades have been completed.

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. As part of any subdivision, the parcel numbers for addressing should comply with the Australian Standard (AS/NZS 4819:2011). For more information contact Survey and Land Records surveylandrecords@nt.gov.au 08 89955354. The numbers shown on the plans endorsed as forming part of this permit are indicative only and are not for addressing purposes.

3. Land Surveys division has advised that there may be survey marks within the area. If any of these become disturbed please advise Survey Land

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Records at surveylandrecords@nt.gov.au.

4. This subdivision permit is not an approval to undertake building work. You are advised to contact a Northern Territory registered building certifier to seek a building permit as required by the *Northern Territory Building Act 1993* before commencing any demolition or construction works.

REASONS FOR THE DECISION

1. An amendment to the *Planning Act 1999* took effect on 31 July 2020. The amendment to the *Planning Act 1999* includes transitional provisions in section 167(2) which states - any application or proposal that was not determined before the commencement is to proceed and be determined:

   (a) in accordance with this Act applicable at the time the determination is made; and

   (b) in relation to the elements of the planning scheme applicable at the time the determination is made.

   Subsequent to the subject application being submitted (lodged on 25 June 2020), the Northern Territory Planning Scheme (NTPS 2007) was repealed, and the Northern Territory Planning Scheme 2020 (NTPS 2020) took effect on 31 July 2020.

   It is noted that at the time the application was submitted, the Northern Territory Planning Scheme (2007) was in effect, and was addressed by the applicant in the Statement of Effect.

   Because the application was not heard before the commencement of the amendment to the *Planning Act 1999*, and to satisfy the requirements of Section 51 of the *Planning Act 1999*, the application is required to be assessed against NTPS 2020. This assessment has been undertaken by Development Assessment Services (DAS) having regard to the applicant's Statement of Effect and how this relates to the current provisions of NTPS 2020 and amended *Planning Act 1999*.

2. Pursuant to section 51(1)(a) of the *Planning Act 1999*, in considering a development application, the Development Consent Authority must take into account the planning scheme that applies to the land to which the application relates.

   Consent is sought to subdivide the existing development comprising of four dwellings-multiple and a detached dwelling-single under the *Unit Title Schemes Act 2009* to create five units and common property. The common property comprises of car parking, communal open space and staircases and corridor in front of upper-level units. The subject Lot is zoned Low Density Residential (LR). The current use for dwellings-multiple would be prohibited and not available for the proposed subdivision unless it falls within the protection for existing uses afforded by Part 4 of the *Planning Act 1999.*

   The existing structures were constructed prior to the introduction of the Darwin Town Plan 1978. "Dwellings-multiple" are prohibited in Zone LR (Low Density Residential) under the current NT Planning Scheme

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(NTPS 2020). The determination of the application requires firstly, the consideration of whether or not the building was lawfully constructed in 1969, and secondly if it was lawfully constructed, whether or not existing use rights of the existing development is protected under section 34 of the Act.

In relation to the first matter, the site is developed with 4 dwellings-multiple and a detached dwelling constructed prior to the introduction of the Darwin Town Plan 1978. "Dwellings-multiple" are prohibited in Zone LR (Low Density Residential) under the current NT Planning Scheme (NTPS 2020). The assessment notes that the existing development was lawfully constructed in 1969. As there is no evidence that the existing use has discontinued for a continuous period of not less than 12 months, the Authority is satisfied that existing use rights under section 34 of the Act apply to the existing development.

The Authority initially deferred consideration of the application to enable the applicant to provide further information by way of advice from a suitably qualified professional that addresses the effect of the proposed subdivision on the protection of the existing use rights that apply to the existing development pursuant to section 34 of the Planning Act 1999.

In response to the Notice of Deferral, the applicant provided a response from a town planning consultant which states that the UTS subdivision does not affect on the protection of the existing use rights that apply to the existing development pursuant to section 34 of the *Planning Act 1999*. The response states that the matter of intensity in the NTPS 2020 is referred to in the context of the use of the land or development requirements provided under Part 5 of the NTPS2020. In this instance, the use of the site is not altered through UTS subdivision, and the development specific requirements remain as per the original approval. The existing development was approved for residential use and will remain as residential use following any UTS subdivision approval. Furthermore, the definition of the dwelling-multiple includes dwelling on a unit property.

Mr Brad Cunnington (Northern Planning Consultants Pty Ltd), Mr Samir Raut (Northern Aboriginal Cultural & Education Association Ltd) and Dr Jai Singh (landowner) spoke further to the application and points of deferral. Mr Cunnington addressed the interpretation of Section 34 of the *Planning Act 1999* in relation to the definition of existing use and the manner in which the existing use will be ongoing, noting that the existing use of the site is for dwellings-single and dwelling-multiple and will not be altered by the UTS subdivision. In relation to the intensity, Mr Cunnington restated that the intensity of a use, in the NTPS 2020, is defined by development specific requirements which relate to built form and occupational arrangements. In this instance the intensity is not altered as the number of dwellings existing on site are not altered through the UTS subdivision and the use of the site will continue as dwellings-single and dwellings-multiple. Mr Cunnington stressed that the NTPS 2020 does not provide any guidance on the use of intensity parameters based on the ownership arrangements.

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Mr Cunnington told the Authority that the upgrades proposed in the application do not result in increasing the intensity or the existing development, rather they are required to meet the built form requirements in the current planning scheme.

The Authority notes the abovementioned comments and response provided by Mr Cunnington for the deferral. The Authority was satisfied that the UTS subdivision of the existing development will not contravene the existing use rights that apply to the existing development pursuant to Section 34 of the *Planning Act 1999*.

3. Under section *51(3) when considering a development application under subsection 51(1), the consent authority must apply the relevant considerations to only those components of the development that triggered the requirement for consent under the planning scheme.*

In this instance, the requirement for consent is that under the NTPS 2020, Clause 1.8.1(b)(iii) classifies unit title scheme subdivision of a previously approved development as a 'Merit Assessable' discretionary use.

Under Clause 1.10.3 (Exercise of Discretion) by the Consent Authority) *"In considering an application for consent for a use or development identified as Merit Assessable the consent authority must take into account all of the following:*

a. *the relevant requirements, including the purpose of the requirements, as set out in Parts 5 or 6;*
b. *any Overlays and associated requirements in Part 3 that apply to the land;*
c. *the guidance provided by the relevant zone purpose and outcomes in Part 4 relevant to a variation of requirements in Parts 5 or 6; and*
d. *if an Area Plan in Part 2 applies to the land, any component relevant to a variation of requirements in Parts 5 or 6".*

The assessment notes that there are no Overlays within Part 3 relevant to this proposal. The Darwin Mid Suburbs Area Plan 2016 (DMSAP 2016) is an applicable Area Plan under Part 2 of the NTPS 2020 and identifies the site as part of Suburban Residential which requires the development is to be in accordance with the provisions of Zone Low Density Residential (LR). While "dwelling-multiple" is a prohibited use in Zone LR, the development of the site is protected by "existing use rights" under sections 34 and 35 of the Act.

Part 4 - <u>Clause 6.6.1 (Subdivision for the Purposes of a Unit Title Scheme)</u>

The purpose of this clause is to: "Ensure that:

(a) the new ownership arrangements resulting from a subdivision to create a unit title scheme allow each element of the development to continue to be available to the occupants of the development and where appropriate to visitors;

(b) older developments are upgraded; and

(c) development will not have a detrimental environmental effect on the land or result in a loss of amenity within the

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locality."

The application seeks consent to subdivide an existing development into five units for separate occupation. The car parking spaces associated with each unit and communal area are provided in the common property. As discussed previously, the existing single storey house and four residential units were lawfully constructed in 1969, and existing use and development of the site is protected by "existing use rights" under sections 34 of the Act. The application proposes to carry out upgrades to the existing development to meet the requirements of the *Building Act 1993* and Part 5 requirements of the NTPS 2020. The proposed subdivision will not have detrimental environmental effects as land is not subject to any 'Overlays' identified under Part 3 of the NTPS 2020. The amenity within the locality will not be impacted as the development has been in existence in an LR Zoned land for a number of years. In summary (full discussion provided below) the Authority determined that the upgrades required to be carried out under the permit to the existing building will improve the amenity of the building in the locality.

Under Clause 6.6.1.1:

- *a lawfully established development on a lot may be subdivided to create a unit title scheme only if the development has been upgraded to meet the development requirements within Part 5 of the planning scheme that apply to the development of the land; and*
- *if it is not possible to meet the requirements the consent authority must be satisfied that the proposed upgrading is the only practicable design solution*.

The site is zoned LR and "dwelling-multiple" is a prohibited use in Zone LR under the NTPS 2020. To determine the compliance with the Part 5 requirements of the existing dwelling-multiple, Zone LMR (Low-Medium Density Residential) is considered most appropriate as dwelling-multiple is Merit Assessable in this zone. The assessment notes that the existing development complies with Clauses 5.4.2 (Residential Height Limitations), 5.4.2.1 (Parking Requirements), 5.4.3 (Building Setbacks of Residential Buildings and Ancillary Structures), 5.4.3.2 (Distance Between Residential Buildings on one Site), 5.2.6 (Landscaping) and 5.4.8 (Building Design for Dwelling-Multiple…). However, non-compliance exist with clauses 5.4.1 (Residential Density Limitations), 5.2.4.4 (Parking Layout) and 5.4.6 (Private Open Space).

In relation to clause 5.4.1 (Residential Density Limitations), the assessment notes that the Zone LMR allows for a maximum density of 3 dwellings on site (1 dwelling per 300m^2), and 5 dwellings exists on site at a density of 1 per 190m^2.

The assessment notes that despite the non-compliance with this clause, the development achieves the level of compliance with the building setbacks, car parking numbers, overall site landscaping and communal space requirements. In addition, the site is not identified as being within a projected storm surge area or on flood affected land, is not close to any high noise sources (highways, airports, etc.) and no

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other site constraints have been identified that would render the land incapable of accommodating the existing density. Furthermore, the two storey design enables more efficient use of the land and reduced building footprints compared to the development of similar density limited to a single storey. The Authority noted that the design and layout of the dwellings clearly restrict the use to two bedroom dwellings only and are not functional or adaptable for more than one dwelling (i.e. there are no study rooms or 'nooks' able to adapt as bedrooms). The existing dwellings have been occupied for a long time and no changes are proposed to the existing arrangements which could result in increased density. The Authority noted that the service authorities have not raised any concerns with the proposed development. The Authority considers that the density of the development is appropriate having regard to the purpose of the Clause 5.4.1.

In relation to clause 5.2.4.3 (Parking Layout), the assessment notes that the car parking area is of a suitable gradient, provides separate access to every car parking space and will allow for vehicles to enter and exit the site in a forward gear using the existing concrete pavement to initiate a two-point turn and exit onto Lewis Place. A site inspection revealed that the car parking area is sealed and slopes towards the Council road reserve. Conditions are recommended on the permit to line mark and re-sealing of car parking area. The non-compliance identified for car parking spaces 5 and 6 with clause 5.2.4.3(g) will have a negligible impact as the existing fencing and 2m high letterbox wall along the Lewis Place frontage adequately mitigates the visual impact of the car parking.

In relation to the non-compliances identified with 5.4.6 (Private Open Space) associated with units located in a 2 storey building on the eastern side of the site the assessment notes that the existing scenario is the only practicable design solution considering the existing site constraints and impracticality to achieve compliance with the requirements of this clause. A condition is recommended to provide a screen fence to a minimum height of 1.8m (along the eastern boundary) to provide a visual barrier to the private open space area associated with units 1 and 2 from adjoining dwellings.

Conditions are recommended to provide details of existing and proposed landscape species and schedule of upgrades related to screening of air conditioning units, concealment of service ducts, upgrading louvers, and provision of BBQ facilities in the common area these details were not confirmed on the submitted plans.

1.10 (6) Exercise of Discretion by the Consent Authority
When consenting to the use or development of land, the consent authority may impose a condition requiring a higher standard of development than is set out in a requirement of Parts 3, 5 or 6 if it considers it necessary to the achievement of the Strategic Framework, the purpose of the overlay or the zone, or it considers it is otherwise necessary to do so.

While the Authority determined that the upgrades proposed in the application are the only practicable design solutions to meet the

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development requirements of Clause 5.2.6 (Landscaping), Clause 5.4.6 (Private Open Space), Clause 5.4.7 (Communal Open Space), of the NTPS 2020, the Authority considered that additional upgrades are also required to improve the built form of the building and to meet the intent of the requirement of Clause 6.1.1 which provides that development has been upgraded to meet the development requirements within Part 5 of the planning scheme that apply to the development of the land . The Authority questioned the applicant on the possibility of providing additional upgrades to the building like re-surfacing the car parking area and façade upgrades, including removal of window air conditioning units and screening of air-conditioning ducts and drainage pipes.

Dr. Jai Singh (landowner) at the hearing told the Authority that the façade of the building had been painted recently. The landowner agreed to remove the window air-conditioning units and carry out façade upgrades and was amenable to the inclusion of a condition to this effect.

4. Pursuant to section 51(j) of the *Planning Act 1999*, in considering a development application the Development Consent Authority is required to take into account the capability of the land to which the proposed development relates to support the proposed development and the effect of the development on the land and on other land, the physical characteristics of which may be affected by the development.

   The site is serviced with reticulated water, power and sewerage and is currently developed with 5 dwellings. The development is not identified as being located within a primary or secondary storm surge area, and there are no other known physical characteristics that would render the site unsuitable for unit titling of existing development.

5. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

   The existing development on site has been developed under pre-dated planning controls and therefore presents non-compliance with some requirements of the current NTPS 2020. The applicant proposes a number of upgrades to the existing development, which will improve the amenity of the development within the locality. This includes the provision of additional landscaping and seating area in the communal open space area. A condition of approval will require that these works are carried out prior to the issue of Part 5 clearance. While the existing development does not align with the purpose of Zone LR, it is noted that the height of the development is compatible with the streetscape and surrounding developments.

6. Pursuant to section 51(q) of the *Planning Act 1999*, the consent authority must take into for a proposed subdivision of land on which a building is or will be, situated – whether the building complies, or will comply, with any requirements prescribed by regulation in relation to the building (including, for example, requirements about the structural integrity and fire safety of the building).

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The application proposes a number of building rectification works to make the development compliant with the requirements of *Building Act 1999*. A condition is recommended to provide a confirmation from a building certifier that the rectification works have been completed, prior to the issue of Part 5 clearance for the subdivision.

FOR: 5 **AGAINST: 0** **ABSTAIN:0**

ACTION: Notice of Consent and Development Permit

ITEM 8
PA2020/0289 **SUBDIVISION TO CREATE 11 LOTS AND A BUILDING ENVELOPE PLAN SECTION 7349 MAKAGON ROAD, BERRIMAH, HUNDRED OF BAGOT**
APPLICANT June D'Rozario & Associates Pty Ltd

June D'Rozario (June D'Rozario & Associates), Regan Anderson (General Manager – Developments, Halikos Group) and Tamara Keane attended.

Ms D'Rozario tabled the following information:

- A diagram showing subdivision stages within 50-100 dwellings per hectare zone in the Berrimah Farm Planning Principles and Area Plan.
- A table showing dwelling yield and dwelling density achieved across the area identified for 50-100 dwellings per hectare in the Berrimah Farm Planning Principles and Area Plan.

RESOLVED 187/20 That, the Development Consent Authority vary the requirements of Clause 5.2.4.5 (Vehicle Access and On-site Parking for Dwellings-Single on Lots Less than 600m^2 but not less than 300m^2) of the Northern Territory Planning Scheme 2020, and pursuant to section 53(a) of the *Planning Act 1999*, consent to the application to develop Section 7349, Makagon Road, Hundred of Bagot for the purpose of subdivision to create 11 lots, subject to the following conditions:

Note that for the purpose of this permit:

(a) Any reference to the Land Development Unit, means that Division of the Department of Infrastructure, Planning and Logistics (DIPL), and any reference to the Transport and Civil Services, means that Division of the Department of Infrastructure, Planning and Logistics (DIPL).
(b) Transport and Civil Services Division (TCS) of DIPL is the relevant service authority for road reserves and associated road pavement, stormwater drainage, street lighting vehicular access, pedestrian/cycle paths, verge landscaping and streetscape.
(c) Land Development Unit (LDU) of DIPL is the relevant service authority for open space and stormwater drainage external to the road reserve and any infrastructure external to road reserve on surrounding networks.

CONDITIONS PRECEDENT

1. Prior to the endorsement of plans and prior to the commencement of works (including site preparation), a site stormwater drainage 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 LDU and/or TCS as the case may be, to the satisfaction of the consent

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authority. The plan shall indicate how stormwater will be collected on site and discharged to the relevant authorities' drainage system.

2. Prior to the commencement of construction works for the following components in each stage:
   (a) roads (TCS);
   (b) stormwater drainage (TCS and LDU);
   (c) street lighting (TCS);
   (d) vehicular accesses (TCS);
   (e) pedestrian/cycle paths (TCS);
   (f) landscaping to verges (TCS);
   (g) establishment irrigation to verges (TCS);
   (h) park areas (LDU); and
   (i) streetscaping (TCS);

   the Developer shall submit detailed design documentation (engineering design, design report and specifications) for all such proposed works and achieve Permission to Use from the TCS and/or LDU. All designs that relate to future TCS and/ or LDU infrastructure and residential subdivision open space under the NT Planning Scheme are to be in accordance with the 'Berrimah Farm Subdivision Guidelines', to the satisfaction of the TCS and/or LDU and must be prepared and certified by suitably qualified persons.

3. Prior to the commencement of works, a Construction Traffic Management Plan (CTMP) and/or an Operational Traffic Management Plan (OTMP) is to be submitted to and approved by the TCS, to the satisfaction of the consent authority.
   The CTMP and/or OTMP should specifically address the following:
   i. Details regarding all appropriate site management measures and access routes;
   ii. Traffic Control;
   iii. Haulage routes and vehicles types;
   iv. Stormwater drainage;
   v. Public assets; and
   vi. Risk assessment.

4. Prior to the commencement of works, the applicant is to prepare a dilapidation report covering existing infrastructure condition within the road reserve to the requirements of the TCS, to the satisfaction of the consent authority.

5. Prior to the commencement of works, a **Type 2** Erosion and Sediment Control Plan (ESCP) must be developed in accordance with the Department of Environment Parks and Wide Security ESCP Standard Requirements 2019 available at https://nt.gov.au/environment/soil-land-vegetation. The ESCP must be developed and/or certified by a Certified Professional in Erosion and Sediment Control (CPESC) to the satisfaction of the consent authority. The ESCP should be submitted for acceptance prior to the commencement of any earth disturbing activities (including clearing and early works) to Development Assessment Services via email: das.ntg@nt.gov.au.

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GENERAL CONDITIONS

6. Works carried out under this permit shall be in accordance with the drawings endorsed as forming part of this permit.

7. All works relating to this permit must be undertaken in accordance with the endorsed **Type 2** Erosion and Sediment Control Plan (ESCP) to the requirements of the consent authority. Should the endorsed **Type 2** Erosion and Sediment Control Plan (ESCP) need to be amended, the revised ESCP must be developed and/or certified by a Certified Professional in Erosion and Sediment Control (CEPSC) to the satisfaction of the consent authority. The revised ESCP should be submitted for acceptance to Development Assessment Services via email: das.ntg@nt.gov.au

8. All reasonable and practicable measures must be undertaken to prevent: erosion occurring onsite, sediment leaving the site, and runoff from the site causing erosion offsite. Appropriate erosion and sediment control measures must be effectively implemented throughout the construction phase of the development (including clearing and early works) and all disturbed soil surfaces must be satisfactorily stabilised against erosion at completion of works, to the satisfaction of the consent authority. For further information refer to **Note 1** below. At completion of works, clearance should be sought from the Department of Environment Parks and Water Security (DEPWS) regarding satisfactory implementation of permanent erosion and sediment control measures and site stabilisation. To arrange a clearance site inspection, email the Land Development Coordination Branch at: DevelopmentAssessment.DEWPS@nt.gov.au.

9. Stormwater drainage shall be appropriately discharged into a local or trunk stormwater system to the standards and approval of the TCS and/or LDU as the case may be, to the satisfaction of the consent authority.

10. All works are to be constructed in accordance with the design documentation provided with 'Permission to Use' by the LDU and/or TCSD, excepting as varied with the approval of the LDU and/or TCSD.

11. All existing and proposed easements and sites for existing and required utility services must be vested in the relevant authority for which the easement or site is to be created on the plan of subdivision submitted for approval by the Surveyor General.

12. 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.

13. The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, sewerage facilities, electricity services and telecommunication services to the land shown on the endorsed plan in accordance with the authorities' requirements and relevant legislation at the time.

14. All proposed work (including the provision of services) within, or impacting upon existing and proposed NT Government controlled road reserves, and non-residual property works shall be designed, supervised and certified on completion by a practicing and registered Civil Engineer, and shall be in

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accordance with the 'Berrimah Farm Subdivision Guidelines'. Design documents must be submitted to the Director Corridor Management, Transport and Civil Services Division for Road Agency Approval, irrespective of approvals granted by other Authorities e.g. Power & Water Corporation. No works within, or impacting upon road reserves controlled or to be controlled by the NT Government are to commence prior to gaining Road Agency Approval.

15. The loads of all trucks entering and leaving the site of works are to be constrained in such a manner as to prevent the dropping or tracking of materials onto streets. This includes ensuring that all wheels, tracks and body surfaces are free of mud and other contaminants before entering onto the sealed road network. The use of shaker screens/ rubble pads to remove loose material from trucks prior to entering the road network is a requirement. Where tracked material on the road pavement becomes a potential safety issue, the Developer will be obliged to sweep and clean material off the road.

16. Upon completion of any works within or impacting upon existing or proposed road reserves, the road reserves shall be rehabilitated to the standards and requirements of the TCS and returned to the condition as documented in the dilapidation report. Dryland grassing shall be established on the existing or proposed road reserves inside the Northcrest subdivision verge(s) fronting the development and shall be undertaken to the Department's standards and requirements.

17. The installation or relocation of any services or service connections within the site on completed works requires, in addition to service authority approvals, the approval of the LDU and/or TCS.

18. Before the issue of Titles, the developer is to provide written confirmation (in the form of plans or drawings) demonstrating that all lots less than 600m2 for dwelling-single allow for future vehicle access via a single driveway unrestricted by street infrastructure (including any power, water, sewer, or stormwater infrastructure) which demonstrates that a 3.5m driveway can be located on each lot whilst ensuring that each lot's street frontage has a minimum continuous length of 6.5m, to the satisfaction of the consent authority.
[Note: Except for Lot 283].

NOTES:

1. Information regarding erosion and sediment control can be obtained from the IECA Best Practice Erosion and Sediment Control 2008 books available at www.austieca.com.au and the Department of Environment Parks and Water Security Erosion and Sediment Control Standard Requirements 2019 and Land Management Factsheets available at https://nt.gov.au/environment/soil-land-vegetation. For further advice, contact the Land Development Coordination Branch: (08) 8999 4446.

2. The Power and Water Corporation advises that the Water and Sewer Services Development Section (waterdevelopment@powerwater.com.au) and Power Network Engineering Section (powerdevelopment@powerwater.com.au) should be contacted via email a minimum of 1 month prior to construction works commencing in order to

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determine the Corporation's servicing requirements, and the need for upgrading of on-site and/or surrounding infrastructure.

3. If you choose nbn to service your development, you will need to enter into a development agreement with nbn. The first step is to register the development via http://www.nbnco.com.au/develop-or-plan-with-the-nbn/new-developments.html once registered nbn will be in contact to discuss the specific requirements for the development. Nbn requires you to apply at least 3 months before any civil works commence. All telecommunications infrastructure should be built to nbn guidelines found at http://www.nbnco.com.au/develop-or-plan-with-the-nbn/new-developments/builders-designers.html.

4. Any proposed works which fall within the scope of the Construction Industry Long Service Leave and Benefits Act 2005 must be notified to NT Build by lodgement of the required Project Notification Form. Payment of any levy must be made prior to the commencement of any construction activity. NT Build should be contacted via email (info@ntbuild.com.au) or by phone on 08 89364070 to determine if the proposed works are subject to the Act.

5. As part of any subdivision, the parcel numbers for addressing should comply with the Australian Standard (AS/NZS 4819:2011). For more information contact Survey and Land Records surveylandrecords@nt.gov.au 08 8995 5354. The numbers shown on the plans endorsed as forming part of this permit are indicative only and are not for addressing purposes.

6. All new roads, including alterations and extensions to existing roads, are required to be named under the *Place Names Act 1967*. You should immediately make application to the Place Names Committee to commence the road naming process. Contact the Place Names Unit on 8995 5333 or place.names@nt.gov.au. Further information can be found at www.placenames.nt.gov.au

7. The technical design and construction standards of the Land Development Unit are as provided within the Berrimah Farm Subdivision Guidelines.

8. No temporary access for construction purposes shall be permitted from the Stuart Highway road reserve without approval. Construction and delivery vehicles shall not be parked on the Stuart Highway road reserve.

9. A "Permit to Work Within a Road Reserve" may be required from the Transport Civil Services Division of the Department of Infrastructure, Planning and Logistics before commencement of any work within the road reserve.

10. The Transport Civil Services Division of the Department of Infrastructure, Planning and Logistics has advised that access to Stage 3D shall be from Kilpatrick Street and Reuben Avenue only. No additional access/egress shall be permitted from the Panquee Boulevard.

11. The Survey Land Records has advised that there may be survey marks within the area, if any of these become disturbed the proponent should contact Survey Land Records immediately.

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REASONS FOR THE DECISION

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

   The NT Planning Scheme 2020 (Scheme) applies to the land and subdivision of land requires consent pursuant to Clause 1.8 (When Development Consent is Required). It is identified as *Impact Assessable* under Clause 1.8(1)(c)(ii), and therefore Part-2 (Strategic Framework) (Part 2 of the Scheme, including the Darwin Regional Land Use Plan 2016 and the Berrimah Farm Planning Principles and Area Plan) which are relevant to this application), Overlays (Part 3 of the Scheme including 3.2 CNV (Clearing of Native Vegetation) and 3.5 LPA (Land in Proximity to Airports)), zone purpose and outcomes of:

- Clause 4.27 – Zone FD (Future Development);
- Clause 5.2.4.5 (Vehicle Access and On-site Parking for Dwellings-Single on Less than 600m^2 but not less than 300m^2)
- Clause 6.2.1 (Lot Size and Configuration for Subdivision in Zones LR, LMR, MR and HR);
- Clause 6.2.2 (Lots Less Than 600m^2 for Dwellings-Single);
- Clause 6.2.3 (Site Characteristics for Subdivision in Zones LR, LMR, MR and HR);
- Clause 6.2.4 (Infrastructure and Community Facilities for Subdivision in Zones LR, LMR, MR and HR); and
- Clause 6.5.1 (Subdivision in Zone FD);

need to be considered.

<u>*Part 2 (Strategic Framework)*</u>

<u>Darwin Regional Land Use Plan</u>
The Authority noted that the proposed subdivision is consistent with the key objective outlined in the Darwin Regional Land Use Plan (DRLUP) as it is located close to the proposed mixed-use Secondary Activity Centre (near the Stuart Highway end of the site), developed in stages as part of the Berrimah Farm ‘Northcrest’ residential development. The Authority noted that Berrimah Farm is identified as a site with potential for infill residential development in the land use plan.

<u>Berrimah Farm Planning Principles and Area Plan</u>
The Area Plan principles seek to promote a safe and diverse urban residential environment that: (i) is structured around a Secondary Activity Centre; (ii) is developed in the order of six storeys in height around the Secondary Activity Centre and reduces in height and density with distance from the centre; (iii) comprises a variety of lot sizes and housing types; (iv) provides high quality adaptable public spaces and open space areas that are usable for both passive and active recreation; and (v) has an interconnected local road network that distributes the anticipated traffic flow within site and integrates with the surrounding road network through appropriate intersection design.

The proposal is generally consistent with the Area Plan and planning principles as the proposal provides for a safe and diverse urban

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residential environment with a lot sizes ranging from 400m^2 – 450m^2. The proposed subdivision is interconnected with the local road network developed as part of Stage 1 subdivision, to distribute the anticipated traffic flow within Northcrest subdivision.

The Area Plan shows the land is to be developed for residential purposes at a density of 50-100 dwellings per hectare. Dwelling types for this density band are described as dwellings-single (terrace/villas), and dwellings-multiple to a maximum height of 6 storeys. The Authority noted that the Area Plan dwelling density is intended to be met across the whole of the area shown with the same density band. The Authority also noted that the 50-100 dwellings per hectare band in the Area Plan comprise of Stage 1, Stage 3C, Stage 3D and Stage 6 of Northcrest subdivision Furthermore, Stage 1 has been subdivided under DP17/0057 and include 3 lots zoned MR (Medium Density Residential).

The Development Assessment Services (DAS) assessment notes that the density achieved in the proposed subdivision is 23 dwellings per hectare as against 50-100 dwellings per hectare required in the Area Plan. The application provided the following to demonstrate that the required density of 50-100 dwellings per hectare in the Berrimah Farm Planning Principles and Area Plan will be maintained across the area identified for 50-100 dwellings:

- *The dwelling yield applies to the whole of the area included in the 50-100 dwellings/ha in the Area Plan. It is also the intention to zone the area in Stage 6 as HR, as it adjoins the Secondary Activity Centre and the permissible building height will be six storeys. Zone MR specifies a maximum of 4 storeys, so it is logical for the area in Stage 6 to be zoned to comply with the building height in Zone HR.*
- *Using the site area per dwelling applicable to a 6-storey building in Zone HR, and a 4- bedroom unit, the dwelling yield which will result across the whole area in the 50-100 dwellings/ha band is calculated as 65 dwellings/ha. This is in the required range.*
- *It will be extremely unusual for buildings comprising only 3 and 4 bedrooms to be offered. At most, only a proportion of 3 and 4 bedrooms will normally be included in the unit size mix, and the majority of units will be 2-bedroom units. Although the larger site area per dwelling has been used to demonstrate compliance with the Area Plan density, density is very likely to be higher than 65 dwellings/ha because of buyer preference for 2-bedroom units."*

The applicant clarified that taking together the dwelling yield in the proposed subdivision, Stage 1 MR Zoned lots and future subdivision of Stage 3D and Stage 6 the dwelling density achieved across the whole area, in the 50-100 dwellings per hectare band, is 65 dwellings per hectare. The DAS assessment notes that the analysis provided by the applicant is based on the site area of Stages 3D and 6. As any subdivision will have a road network, the developable area of future stages would be less than the site area. DAS calculate the dwelling density, based on the developable area, across the whole of the area shown within the density band of 50-100 is 45 dwelling per hectare.

At the hearing, Ms June D'Rozario, June D'Rozario & Associates (the applicant), gave an overview of the proposed subdivision and tabled a

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diagram showing subdivision stages within 50-100 dwellings per hectare zone in the Berrimah Farm Planning Principles and Area Plan and dwelling density achieved within the zone. Ms D'Rozario explained to the Authority the 'Northcrest' residential development is occurring in accordance with a Master Plan prepared for the whole of the land. The Master Plan is prepared by Halikos Developments Pty Ltd (proponent) and is based on the Area Plan. Ms D'Rozario further added that the proposed Panquee Boulevard splits the 50-100 dwellings per hectare zone into two parts. The western side of the Panquee Boulevard including; Stages 1, 3C (proposed subdivision) and 3D are proposed to be developed as low to medium density development, and the eastern side of the Panquee Boulevard is envisaged as high density development to a maximum height of 6 storeys. Ms D'Rozario restated that the required density of 50-100 dwellings per hectare is to be achieved across the whole of the area shown with the same density band. Ms D'Rozario stated that the dwelling density achieved across the whole area, in the 50-100 dwellings per hectare band, is 65 dwellings per hectare and confirmed to the Authority that the dwelling density is calculated based on the developable area of Stage 3D and Stage 6. Ms D'Rozario further added that the dwelling density is calculated based on the permissible highest dwelling area/ lot area within the proposed zoning of future subdivisions of Stage 3D and Stage 6.

The Authority taking into account the application material and applicant's comments provided at the hearing is satisfied that the proposed subdivision will not frustrate the achievement of the required density of 50-100 dwellings per hectare across the area identified for 50-100 dwellings per hectare band within the Area Plan.

Part 3 Overlays

Clearing of Native Vegetation (CNV) and Land in Proximity to Airports (LPA) listed under Part 3 of the Scheme apply to the site. In relation to CNV the Authority noted that no clearing is proposed as part of subdivision works. In relation to LPA overlay, the Authority noted that the proposed subdivision area is situated outside ANEF-20 contour line and therefore not impacted by this overlay.

In relation to Part 5 and 6 of the Scheme, it is found that the proposal complies with the relevant requirements except for Clause 5.2.4.5 (Vehicle Access and On-site Parking for Dwellings-Single on Less than 600m^2 but not less than 300m^2).

2. Pursuant to Clause 1.10 (Exercise of Discretion by the Consent Authority), subclause 5 of the NT Planning Scheme 2020, the consent authority may consent to a proposed development which is not in accordance with a requirement set out in Parts 3, 5 or 6 only if it is satisfied that the variation is appropriate having regard to:

(a) The purpose and administration clauses of the requirement; and

(b) The considerations listed under Clause 1.10(3) or 1.10(4).

Part 5 - 5.2.4.5 Vehicle Access and On-Site Parking for Dwelling-Single on Less than 600m^2 but not less than 300m^2

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The building envelopes plan indicates that vehicle access to the lots can be via a 3.5m wide single driveway servicing a double garage. The plans provided in support of the application indicate that a minimum of 6.5m can be achieved for all lots (except for Lot 283) on the road exclusive or any onsite car parking and driveway requirements. Cross overs will need to be a minimum of 3.5m to achieve compliance of this clause. All proposed vehicle accesses comply with this requirement. A condition is included on the permit to ensure compliance with the requirements of this clause.

The assessment notes that the Lot 283 in the proposed subdivision does not comply with the requirement of this clause due to the location of the proposed access for Stage 3D adjacent to the lot, and curved alignment of the road in front of the lot.

The Administration of the clause enables the consent authority to consent the development that is not in accordance with of sub-clauses 2 and 3 of the clause if it is satisfied that non-compliance will not:

(a) result in adverse impacts on the local road network; and
(b) unreasonably impact on the amenity of the surrounding locality; and
(c) the authority responsible for the local road network approves the alteration

A variation to the clause is granted as the lot is located on the curved alignment of the public road and providing 6.5m wide continuous length for kerbside vehicle parking could potentially create traffic issues. Furthermore, the Transport and Civil Services Division (authority responsible for the local road network) has not raised any concerns.

3. Pursuant to section 51(j) of the *Planning Act 1999*, in considering a development application the consent Authority must take into account the capability of the land to which the proposed development relates to support the proposed development and the effect of the development on the land and on other land, the physical characteristics of which may be affected by the development.
Subject to storm water drainage, erosion control and vehicle access arrangements to the subdivision being addressed, the physical characteristics of the land are considered suitable for the proposed subdivision. The subdivision area is not affected by either storm surge or riverine flooding.

   The applicant advised that the area proposed for the subdivision has received a Statement of Audit, which confirms that the area is considered suitable for mixed residential and commercial use and open space and that no additional work is required to assess its suitability. Provided the development proceeds in accordance with the conditions included on the permit, the land is considered capable of supporting the proposed subdivision.

4. Pursuant to section 51(k) of the *Planning Act 1999*, in considering a development application the consent Authority must take into account the public facilities or public open space available in the area in which the land is situated and the requirement, if any, for the facilities, or land suitable for public recreation, to be provided by the developer.

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Sub-clause (7) of clause 6.2.4 (Infrastructure and Community Facilities in Residential Subdivision) states that the residential subdivision design should provide a minimum of 10% of the subdivision area as public open space. The area of the proposed subdivision is 4650m^2(0.46ha) which generates a requirement of 465m^2 of the area under public open space.

No public open space lot is provided in the proposed subdivision. As the development of Berrimah Farm subdivision will occur in stages, it is expected that, upon completion of future stages, the 'Northcrest' locality will achieve 10% of the site as public open space, as required by the NTPS 2020. The Authority noted that 2 open space lots (with respective areas of 964m^2 and 1.61ha) have already been approved under Stage1.

5. Pursuant to section 51(m) of the *Planning Act 1999*, the consent authority must take into account the public utilities or infrastructure provided in the area in which the land is situated, the requirement for public facilities and services to be connected to the land and the requirement, if any, for those facilities, infrastructure or land to be provided by the developer for that purpose.

The precedent and general conditions of approval are intended to assist in ensuring:

- Service authority interests are duly recognised in terms of storm water drainage and telecommunications, vehicle access, electricity, sewerage and water services that apply to the subdivision of the land; and
- The NTPS 2020 objectives and subdivision performance criteria relating to the provision of services/infrastructure will be complied with.

Comments received from the Transport and Civil Services Division (TCS) of the Department of Infrastructure Planning and Logistics has indicated any access to the future subdivision of Stage 3D would be from Kilpatrick Street and Reuben Avenue only and no access shall be granted from Panquee Boulevard.

Ms D'Rozario at the hearing clarified that the application includes a diagram which shows access points to Stage 3D (one each from Kilpatrick Street and Reuben Avenue). Ms D'Rozario stated that application documents also include a confirmation from the TCSD for the proposed access points from Kilpatrick Street and Reuben Avenue and stressed that the proposed subdivision would not impact upon the access to the future subdivision of Stage 3D. Ms D'Rozario added that any access to the future development on Stage 3D could either be achieved by creating a Unit Title Scheme or by creating an access easement for the future development in Stage 3D subdivision.

The Authority has taken all comments into account and carefully considered the comments received from the TCSD. The Authority notes that the Scheme and relevant Area Plan does not provide any guidance for road widths in residential subdivisions as it is typically to the requirements of the relevant service authority (Transport and Civil

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Services Division of the Department of Infrastructure, Planning and Logistics in this instance) and provided the access arrangements for the future subdivision of Stage 3D complies with the requirements of the relevant service authority, the future subdivision of Stage 3D is sufficient to satisfy the purpose of the Area Plan. The Authority noted that the TCSD had raised no concerns with proposed access points from Kilpatrick Street and Reuben Avenue for Stage 3D subdivision. The Authority determined that the permit should reflect the requirements of the TCSD and a note is included on the permit.

6. Pursuant to section 51(n) of the *Planning Act 1999*, in considering a development application the consent authority must take into account the potential impact on the existing and future amenity of the area in which the land is situated.

   The site is within Zone FD (Future Development) and subject to Berrimah Farm Planning Principles and Area Plan under Part 2 of the Scheme. The proposal generally accords with the layout depicted within the Area Plan and is considered unlikely to adversely impact on the area or alter community expectations for the site. The relevant Area Plan, zoning provisions and the application all seek to promote the best amenity outcomes for the future residents of the estate. Provided pedestrian and cycle corridors are established in appropriate locations and in a timely manner and provided that site levels and associated stormwater drainage is appropriately managed, the proposed subdivision can achieve appropriate levels of residential amenity.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Consent and Development Permit

RESOLVED 188/20

That, the Development Consent Authority vary the requirements of Clause 5.4.3 (Building Setbacks of Residential Buildings and Ancillary Structures) of the Northern Territory Planning Scheme (NTPS 2020), and pursuant to section 53(a) of the *Planning Act 1999*, consent to the application to develop Section 7349, Makagon Road, Hundred of Bagot for the purpose of a building envelope plan subject to the following conditions:

CONDITIONS PRECEDENT

1. Prior to the endorsement of plans and prior to the commencement of works, 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 either two copies must be provided, or they must be submitted electronically. The plans must generally be in accordance with the plans submitted with the application but modified as follows:

(a) changes to drawing no. 20/9492/51B (Stage 3C - Setbacks) to ensure that:
   (i) the requirements of Clause 5.4.3.3 (4) of the Northern Territory Planning Scheme 2020 (NTPS 2020) are adequately reflected for all 'Lot' types proposed within this subdivision.

(b) any other revisions that may be necessary as a result of changes to the subdivision plans

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The building envelope plans will not be endorsed until such time as the subdivision plans have been endorsed to the satisfaction of the consent authority.

GENERAL CONDITIONS

2. The works carried out under this permit shall be in accordance with the drawings endorsed as forming part of this permit.

3. The owner/developer must provide a copy of the endorsed building setback plan to land purchasers prior to or at the time they purchase the land.

REASONS FOR THE DECISION

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

Clause 5.4.3 (Building Setbacks of Residential Buildings and Ancillary Structures)

The setbacks plan proposes a front setback 4.5 m (to the building) and 6.0 (to the garage) for dwelling-single. This contrasts with the setbacks for dwellings-single under the clause, where external walls of the dwellings are required to be set back 6.0m from the street, and carports are permitted with a setback of 4.5m.

"Sub-clause (4) of Clause 5.4.3.3 (Reduced Setbacks for Dwelling-Single on Lots less than 600m2 but not less than 300m2) states that *"Despite Table A to clause 5.4.3, a single dwelling on a lot subject to this clause may, in accordance with the table to this clause, have a reduced front setback to habitable rooms only, providing:*

(a) the area of the reduction is to allow an equal increase to the minimum provision of compliant private open space in accordance with clause 7.5;

(b) that any outbuilding, such as a garage or carport, shall have a front setback no less than 6m; and

(c) a landscaped area is included along the front boundary that will provide visual amenity to the public road."

The table to clause 5.4.3.3 allows for 0m setback to no more than one side boundary of the lo and 3m to the primary street frontage for lots 300m^2 to less than 600m^2."

The front setback of 4.5m to the building and 6m to the garage wall is consistent with the table to clause 5.4.3.3 of the NTPS 2020. Conditions are included to ensure that the requirements of Clause 5.4.3.3 (4) of the NTPS 2020.

A variation to Clause 5.4.3 (Building Setbacks of Residential Buildings and Ancillary Structures) to allow a side setback reduction from 1.0m to 0.9m for dwellings - single for the length of the garage is granted in this instance because the proposal meets the purpose of Clause 5.4.3 in that:

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- The effects of building massing from adjoining land will be minimal, given the small amount of reduced side setback.
- The variation is allowed to one side boundary only having garage structure, which is not a habitable structure. As such, no undue overlooking of adjoining properties is foreseen.
- The proposed setback of 0.9m which further increases to 1.5m can provide breeze penetration through and between buildings.

2. The Authority noted that the setback plan is consistent with the setbacks plans approved for adjoining residential development in Stages 2, 3A, 4A approved under DP18/0089A, and in effect, the proposed setbacks will establish a streetscape that will create the character and level of amenity in a Greenfield subdivision.

FOR: 5 **AGAINST: 0** **ABSTAIN: 0**

ACTION: Notice of Consent and Development Permit

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

SUZANNE PHILIP
Chair
03 November 2020

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