ACT CIVIL & ADMINISTRATIVE TRIBUNAL

GLASS v ACT PLANNING AND LAND AUTHORITY & ANOR (Administrative Review) [2016] ACAT 147

AT 94/2015

Catchwords: **ADMINISTRATIVE REVIEW –** planning and land development – land in the community facility zone (CFZ) – proposal to build 124 bed residential aged care facility and 154 independent living units in 5 further buildings – whether development is consistent with the zone objectives for the CFZ – whether development is consistent with rules and criteria under CFZ Development Code – amendment of the development application to achieve compliance with criterion 7a of the CFZ Development Code – re-opening the proceeding consequent upon a failure to give procedural fairness

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* s 48
Planning and Development Act 2007 ss 144, 145, 146

Subordinate Legislation cited: Community Facility Zone Development Code

Cases cited: *Eastman v Besanko* (2010) 244 FLR 262
Eastman v Director of Public Prosecutions (ACT) (2003) 214 CLR 318
Glass v ACT Planning and Land Authority and Anor [2016] ACAT 21
Glass v ACT Planning and Land Authority and Anor [2016] ACAT 96
The Legal Practitioner v Council of the Law Society of the ACT [2016] ACTCA 35
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Tribunal: Presidential Member G McCarthy
Senior Member R Pegrum

Date of Orders: 21 October 2016
Date of Reasons for Decision: 15 December 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 94/2015

BETWEEN:

ERIC GLASS
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

AND:

GOODWIN AGED CARE SERVICES LTD
Party Joined

TRIBUNAL: President G McCarthy
Senior Member R Pegrum

DATE: 21 October 2016

ORDER

The Tribunal orders that:

1. Where the Tribunal is satisfied that the development will be substantially the same as the development applied for originally if amendments were made to Buildings B, D and E as proposed in the amended plans tendered in the proceeding as Exhibit PJ4 and that the assessment track will not change, development application 201527916 is amended under section 144 of the *Planning and Development Act 2007* in accordance with the amended plans tendered in the proceeding and marked as exhibit PJ4.

2. Where the Tribunal is satisfied that no one other than the party joined will be adversely affected by the amendment to development application 201527916 made under order 1 and that no environmental impact will be caused by approval of the amendment, the Tribunal waives the requirement under section 146(2) of the *Planning and Development Act 2007* to publicly notify the amended application.

3. The decision under review dated 18 November 2015 is varied as follows:

   (a) On page 1, second dot point, the words "consisting of 124 bed residential aged care facility; 154 independent living units" are substituted with the words: "consisting of 119 bed residential aged care facility; 150 independent living units".

   (b) On page 1, the words "to be constructed in stages and in accordance with the plans, drawings and other documents and items submitted with the application for approval and endorsed as forming part of this approval" are substituted with the words:

   "to be constructed in stages and in accordance with:

   (i) the amended plans tendered in the proceeding and marked as exhibit PJ4, save that the amended plans shall be revised to depict the recessed glass section in Building E facing west as vertical rather than canted such glass to be anti-reflective; and

   (ii) other drawings, documents and items submitted with the application for approval, subject to any changes necessary to achieve consistency with the amended plans described in subparagraph (i)"

   (c) On page 2, condition A2 (headed "FURTHER INFORMATION") is substituted with the following condition A2:

   "A2 COURTYARD WALLS AND TREES

   - Courtyard walls of all independent living units (Buildings A, B, C, D and F) must not exceed 1.8m from ground level in height.

   - Wherever practicable, all new trees to be planted on the subject block must be advanced stock."

4. The applicant's application for costs is dismissed.

.....*Signed*.....
Presidential Member G McCarthy
for and on behalf of the Tribunal

REASONS FOR DECISION

1. This matter concerned an application to the Tribunal for review of a decision by the respondent, the ACT Planning and Land Authority (**Planning Authority**), to approve the redevelopment of a nursing and aged care accommodation facility on Block 10 Section 7 Farrer.

2. The Tribunal first recounts that on 12 February 2016 the applicant, Mr Glass, brought an interim application seeking an order that the Planning Authority re-open the process of public notification under division 7.3.4 of the *Planning and Development Act* 2007 (**the P&D Act**) on the grounds that the Planning Authority's public notification of the proposed development given in July 2015 was inaccurate. On 23 February 2016, the Tribunal ordered that the interim application be dismissed. On 21 March 2016, the Tribunal published its reasons.[1]

3. On 19 August 2016 the Tribunal ordered that the decision under review be set aside and published its reasons.[2]

4. In its reasons, the Tribunal explained why it was satisfied that buildings A, C and F in the development application, as approved by the Planning Authority, were complaint with the Territory Plan and that the decision to approve those buildings should therefore be confirmed.

5. The Tribunal also explained why it considered that buildings B, D and E did not comply with criterion 7a of the Community Facilities Zone Development Code (**the CFZ Code**) that forms part of the Territory Plan and why, therefore, the approval of those buildings should not be confirmed.

6. Criterion 7a requires that buildings achieve "consistency with the *desired character*", where *desired character* is defined for the purposes of Element 2 of the CFZ Code as follows:

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[1] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 21
[2] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 96

> *Desired character means the form of development in terms of siting, building bulk and scale, and the nature of the resulting streetscape that is consistent with the relevant zone objectives*

7. At paragraphs 242 and 243 of its decision, the Tribunal explained why it thought the preferable order was to set aside the decision under review:

> *242. The Tribunal has concluded that the proposed development complies with the Territory Plan in every respect, save that Buildings B, D and E need to be reconfigured or redesigned in a manner that achieves compliance with rule 7 or criterion 7(a) of the CFZ Development Code. There are many options or means by which this could be done. They are matters for Goodwin Homes to consider. The Tribunal expects it could be done by amendment to the development application pursuant to section 144 of the P&D Act.*
>
> *243. In these circumstances, and where the decision under review does not deal separately with any of the proposed buildings, the Tribunal has concluded that the preferable course is to set aside the decision and remit it to the Planning Authority for it to reconsider the proposed development having regard to any amendments to the development application that the applicant proposes in order to address the existing non-compliance with criterion 7(a) of the CFZ Development Code. The Tribunal will therefore so order.*

8. On 5 September 2016 the party joined brought an interim application asking for the matter to be relisted for argument about whether the orders that were made on that occasion arose from the reasons for decision. It also wanted to be heard as to the appropriate orders that should be made arising from the Tribunal's reasons.

9. On 22 September 2016 the Tribunal heard the application. The Tribunal was persuaded that procedural fairness had not been given to the parties in relation to the appropriate relief arising from the reasons for decision.

10. The Tribunal reached that conclusion, having regard to the decision of the ACT Court of Appeal in *The Legal Practitioner v Council of the Law Society of the ACT*.[3] In that matter, the Court considered a circumstance where the Tribunal failed to afford a legal practitioner procedural fairness when it purported to impose a penalty and overlooked an agreement with the parties that there should be a separate hearing on penalty if the alleged complaints were upheld. The

[3] [2016] ACTCA 35

Tribunal sought to remedy the defect by reopening the proceedings, setting aside the orders and conducting a further hearing on penalty. The issue before the Court of Appeal was whether the Tribunal was able to proceed in that way, or whether it was *functus officio.*

11. By a majority, the Court determined with reliance on the High Court's decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[4] that the Tribunal was entitled to revisit the question of penalty. The Court noted the conclusion of Gleeson CJ in *Bhardwaj* that the principle of *functus officio* should not be strictly applied if a Tribunal has failed to discharge its statutory function,[5] part of which is to provide the parties with procedural fairness. At paragraph 79, the Court of Appeal said:

> *... In our opinion, the ACAT was entitled to revisit the question of penalty as it did, but for different reasons than those which it articulated. In our opinion the circumstances in the present case are closely analogous to those in Bhardwaj; as part of the mandatory procedures the ACAT must apply in exercising its functions, it must "observe natural justice and procedural fairness": s 7(b) of the ACAT Act. This requirement is consistent with the objects of the ACAT Act, as set out in s 6, which emphasises that the decisions of the ACAT are to be fair, and that the object of the ACAT is to achieve justice. Whilst efficiency and cost effectiveness are also objects of the ACAT Act, it is clear from the terms of ss 6 and 7 that the objectives of providing a fair hearing and a just outcome are as important, if not more so, than objectives of efficiency. The ACAT was obliged to determine the issues which were before it by virtue of the application lodged by the Society and in exercising that jurisdiction, it was required to observe the rules of natural justice and fairness, including allowing the practitioner an opportunity to present evidence and argument on the question of penalty, just as the IRT was obliged to give Mr Bhardwaj an opportunity to present evidence and argument. It is difficult to imagine a more profound breach of procedural fairness than occurred in this case, where the ACAT purported to decide to recommend that the practitioner's name be removed from the roll without giving him the opportunity to present evidence or argument concerning penalty. In our opinion, in proceeding in the way in which it did, the ACAT failed to perform its statutory function, with the consequence that, subject to the provisions of the ACAT Act, the original decision on penalty handed down on 24 January 2013 was a nullity.*

12. Returning to the present matter, the Tribunal was persuaded that procedural fairness as to appropriate relief had not been provided to the parties. The

[4] (2002) 209 CLR 597

[5] *The Legal Practitioner v Council of the Law Society of the ACT* [2016] ACTCA 35 at [69]

Tribunal recognised that "there were many options or means by which [compliance with criterion 7a] could be done", yet did not give the parties (particularly the party joined) an opportunity to make submissions as to how that could or should be done. The Tribunal therefore determined that its order made on 19 August 2016 setting aside the decision under review was a nullity, and that it should hear from the parties as to the appropriate manner in which it should proceed or the orders that should be made.

13. In that context, the Tribunal was persuaded that in an attempt to arrive at a correct or preferable decision in relation to the application for development approval, as often occurs in applications to the Tribunal for review of planning decisions,[6] the party joined should be given an opportunity to propose amendments to buildings B, D and E that may achieve compliance with criterion 7a of the CFZ Code.

14. To that end, the Tribunal set a timetable for the provision of draft amended plans and submissions as to whether (with those amended plans) buildings B, D and E would comply with criterion 7a of the CFZ Code, together with submissions as to whether those amended plans could be approved having regard to the limitations in section 144 of the P&D Act and whether public notification of those amendments ought be given under section 146 of the P&D Act.

15. The Tribunal received amended plans from the party joined and submissions from all the parties in accordance with the timetable. The Tribunal acknowledges the parties' significant efforts in producing those documents in the time frame provided.

16. On 21 October 2016, the Tribunal conducted a further hearing to consider whether the draft amended plans for buildings B, D and E achieved compliance with criterion 7a of the CFZ Code; whether those amended plans could be approved having regard to the limitations in section 144 of the P&D Act; and whether public notification of those amended plans ought be given under

[6] *Walkington & Ors v ACT Planning and Land Authority* [2010] ACAT 81 at [18] and [31] – [32]

section 146 of the P&D Act. At the conclusion of the hearing, the Tribunal determined that the amendments to the development application were permissible under section 144 of the P&D Act; that public notification of those amendments under section 146 of the P&D Act could and should be waived; and that the development application, as amended, complied with the Territory Plan and therefore should be approved. Orders in those terms were made that day.

17. I gave lengthy *ex tempore* oral reasons for the Tribunal's decision and stated that written reasons would be published in due course. These are those reasons.

Amendment of the development application

18. The first question was whether the Tribunal could consider the amended plans. In that regard, it needed to take into account[7] the limitations set out in section 144(2) of the P&D Act which provides:

> ***144 Amending development applications***
>
> *(1) The planning and land authority may, if asked by the applicant, amend a development application.*
>
> *(2) However, the planning and land authority must not amend the development application unless—*
>
> *(a) the authority is satisfied that—*
>
> *(i) the development applied for after the amendment will be substantially the same as the development applied for originally; and*
>
> *(ii) the assessment track for the application will not change if the application is amended; and*
>
> *(b) for land under a land sublease—*
>
> *(i) if the applicant is not the sublessee—the sublessee consents, in writing, to the amendment; and*
>
> *(ii) if the applicant is not the Crown lessee—the Crown lessee consents, in writing, to the amendment.*

19. The assessment track with the amended plans had not changed and section 144(2)(b) was not applicable, so the only question was whether the proposed amended development would be substantially the same as that applied for originally. The Tribunal concluded that when one has regard to the entire development the amended development will be substantially the same as that

[7] *Walkington & Ors v ACT Planning and Land Authority* [2010] ACAT 81 at [31]

originally applied for. There will still be six separate buildings in the same places on the subject block. Building E will still be an RACF, and buildings A-D and F will still be five separate buildings containing independent living units. The amendments proposed changes only to reduce the height and impact of buildings B, D and E in comparison to the original design. Mr Glass agreed that building E, as redesigned, will be a "better building".

20. Section 145(1) - (3) of the P&D Act provide that if a development application has been amended under section 144, and before it was amended the application had been referred to an entity under section 127A, 147A or 148, the Planning Authority must refer the development application as amended to that entity with a brief description of how the application has been amended since the entity last saw it. However, under section 145(4), the Planning Authority does not need to refer a proposed amendment to an entity if satisfied that the proposed amendment of the development application does not affect any part of the application in relation to which the entity to which the applications was referred made a comment. In this case, the Tribunal was satisfied that the amended plans did not make any change to the landscaping plan about which entity comment had been provided, and so was satisfied that there was no obligation under section 145(2) to refer the amended plans to an entity before they could be approved.

Public notification

21. The second issue was whether the amended plans ought to be publicly notified in order for persons who may be adversely affected by the amendments to comment on the amendments prior to their approval. Section 146 of the P&D Act provides:

> ***146 Notice of amended development applications***
>
> *(1) This section applies if—*
>
> *(a) the planning and land authority amends a development application; and*
>
> *(b) the making of the application has been publicly notified.*
>
> *(2) The planning and land authority must publicly notify the amended application under division 7.3.4 (Public notification of development applications and representations).*

> *(3) However, the planning and land authority may waive the requirement to publicly notify the amended application for development approval if satisfied that—*
>
> *(a) no-one other than the applicant will be adversely affected by the amendment; and*
>
> *(b) the environmental impact caused by the approval of the amendment will do no more than minimally increase the environmental impact of the development.*

22. In *Walkington and Ors v ACT Planning and Land Authority*[8] the Tribunal commented that sections 144 to 146 provide a framework within which the Tribunal must consider whether an amendment to a development application is of such significance that public notification must be contemplated.

23. Mr Glass submitted that there was an adverse impact arising from three issues. First, he said that the perception of length of building E had increased. Secondly, he said that the plant room on the roof of building E was now more prominent than it was previously, and third he said that that there were significant differences between the redesign of building E and the design as originally put forward so that it was "not improbable that further objections could arise from the changed appearance."

24. In relation to the perception of the length of building E, for the reasons discussed below, the Tribunal reached the view that the perception of length will be decreased, not increased, and so rejected the submission that perception of length arising from the redesign will have an adverse impact on anyone.

25. In relation to the plant room, the Tribunal concluded that it is necessary to consider the changes to the roof line of building E as a whole, and the appearance of the plant room as part of that roof line in comparison to what was originally proposed. The amendments to the roof line involve incorporation of the plant room into the top section of the roof and articulation of the roof line for the whole of building E to present a more attractive roof line than in the previous design which provided for the plant room to be placed on top of a long flat roof. For these reasons, the Tribunal was not persuaded that the plant room creates an adverse effect on anyone.

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[8] [2014] ACAT 81 at [31]

26. In relation to the design changes generally, Mr Glass acknowledged that the changes had produced a better design. The need for public notification, he said, did not arise from an adverse effect but rather because the differences between what was approved and what was now put forward in the amended plans are so significant that the public notification should proceed in any event. In other words, the discretion to waive public notification under section 146(3) should not be exercised.

27. The Tribunal was of the view that, notwithstanding the differences, the discretion to waive public notification should be exercised. We came to that conclusion for two reasons.

28. First, as Mr Glass acknowledged, building E as amended is a much improved design. The Tribunal concluded that the changes to reduce perceptions of height, bulk and scale and in that way achieve a building that is more consistent with the "desired character" (as defined for the purposes of Element 2 of the CFZ Code as discussed below) could only be welcomed. The Tribunal struggled to understand why public notification should occur for consideration of changes which everyone agreed had produced a better outcome.

29. The second matter that persuaded the Tribunal that public notification should be waived was the importance of expedition and finality regarding review of planning decisions. Waiver of public notification under section 146(3) can occur where the Planning Authority is satisfied of the circumstances described in section 146(3)(a) and (b). In our view, where those circumstances exist, the discretion to waive public notification should ordinarily be exercised. In this case, where the Tribunal was satisfied of the circumstances described in section 146(3)(a) and (b) and where the amendments will produce a better building and where there was no reason or exceptional circumstance that warranted public notification, the Tribunal determined that approval of the amended development could occur without further public notification.

30. A question arose, which Mr Glass urged upon us, as to whether the Tribunal should at least notify those who previously objected to the proposed

development for the reasons set out in *Walkington*.[9] The Tribunal was satisfied that there was no reason for that to occur because the changes are only improvements on the previously approved design and are not significant in the context of the entire development proposal. If the changes had been, for example, joining three of the proposed buildings or eliminating a building or moving building E (the RACF) so that it faced Beasley Street or Marshall Street Street or changes of that degree, kind or substance, the statutory framework under sections 144-146 may have precluded the Tribunal from considering the amended developments or proceeding without public notification. That is not this case. All that occurred under the proposed amended plans was to address the Tribunal's concerns regarding non-compliance of buildings B, D and E with criterion 7a of the CFZ Code. In those circumstances, we saw no reason to notify those who previously objected to the proposed development before the amendments were considered.

31. For these reasons, the Tribunal was satisfied that public notification could be waived because no one will be adversely affected by the amendments other than the party joined. The question then was whether buildings B, D and E, as redesigned, complied with criterion 7a of the CFZ Code.

Compliance with the CFZ Code

32. The redesign of buildings B and D involved two key differences. The first was a reduction in height from five floors to four where the buildings faced Marshall Street but retaining five floors to the rear where the land sloped down. The second change was to introduce what was described as a three storey element to the front of these two buildings where they faced Marshall Street.

33. Mr MacCallum, the architect, described these changes in paragraphs 13 and 14 of his statement[10] as follows:

> *In response to the concerns of the tribunal regarding the heights and to better achieve consistency with desired characters the buildings were reduced to four storeys facing Marshall Street which, due to the slope of the site, results in five storeys facing the interior site.*

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[9] *Walkington & Ors v ACT Planning and Land Authority* [2010] ACAT 81 at [38]
[10] Exhibit PJ1

> *Secondly, to compensate for the loss of the independent living units of that fifth floor, as well as to create a more articulated façade, a new three storey element has been added to the front eastern façade of each of the two buildings.*

34. In relation to those changes, the party joined submitted that buildings B and D were now compliant with criterion 7a of the CFZ Code. The Planning Authority agreed.

35. The question was whether the redesign met the discretionary or qualitative issues arising under criterion 7a. Mr Glass was equivocal about whether the buildings as amended were compliant with criterion 7a, but accepted that there was a "reasonable case for compliance."

36. The Tribunal was satisfied that with the changes, buildings B and D complied with criterion 7a. It came to that conclusion for several reasons.

37. First, the Tribunal considered Mr Glass' submission that the buildings as originally designed were too wide to be consistent with the "desired character", and that the redesign had not reduced the width. Nothing in the CFZ Code directly limits width. The Tribunal concluded that concerns about width needed to be understood in the context of the buildings as a whole. By reducing their height and introducing significant articulation to the front facades, the Tribunal's concerns about width were sufficiently ameliorated.

38. The second reason was that each building will now be four storeys facing Marshall Street. This will reduce their impact to a point where they will appear to be compliant with rule 7 of the CFZ Code. The Tribunal was of the view, as it said in its reasons published on 19 August 2016, that when making an assessment about compliance with a criterion the corresponding rule needs to be taken into account. Where buildings B and D will now present to the street as four storey buildings, and having regard to rule 7, the Tribunal was satisfied that the qualitative criterion 7a could be met, notwithstanding the fifth storey to the rear made possible by the slope of the site.

39. The Tribunal also took into account the fact that the three storey element to the front, even though forward of the previous building line, will still be

approximately 30 metres from the residential blocks on the other side of Marshall Street.

40. For those reasons, the Tribunal was satisfied that there was compliance with criterion 7a and that the amended plans for buildings B and D should be approved.

41. Regarding building E, the party joined provided amended plans which significantly adjusted the articulation, angulation and in some respects the height of the building. There were numerous features of the building which the Tribunal took into account when determining that the redesign of building E complied with criterion 7a.

42. First, the Tribunal noted the recessed wings on the building, where previously they were forward wrapped wings, and that they had been reduced to four storeys.

43. Second, the Tribunal took into account that the two forward cells or "cottages", as they were described by the party joined, would now each be 28 metres wide and separated by a significant glass façade which would be recessed into the connecting area between the two cottages.

44. The Tribunal noted there was no objection to this facade, and the Tribunal was satisfied that it was a change for the better. The Tribunal noted that the words "non-reflective glass" in the amended plans will be changed to "anti-reflective glass", noting that the effects of reflection can be ameliorated but not eliminated.

45. The tribunal noted that the amended plans show the glass facade to be canted (meaning sloped). The Planning Authority was agreeable to the glass being vertical or canted. Mr Glass preferred for the glass to remain canted. The Tribunal took the view that the party joined's wish on the issue should prevail, given that the party joined is the Crown lessee of the site and that the choice did not affect compliance of building E with criterion 7a. The Tribunal was therefore satisfied that a further amendment should be made in order for the glass to be vertical, rather than canted.

46. The Tribunal noted that if the glass were vertical rather than canted, the glass would be less recessed at the higher points by approximately one metre, but concluded that this adjoining area would still be sufficiently recessed into the building to achieve the desired effect of reducing the perception of length.

47. Third, the Tribunal took into account the fact that to a large extent building E would now present to the west as having five separate elements, where previously it presented primarily as one long building. The Tribunal concluded that these separate elements sufficiently addressed the adverse perceptions of height, bulk and length that were the Tribunal's principal concern with the previous design.

48. The next issue was the plant room. Mr Glass submitted that under the amended plans the plant room will be much more prominent than it was previously. Mr MacCallum properly acknowledged that the plant room will be more prominent due to the increased articulation of the silhouette of the building.

49. As discussed above in relation to whether the amended plans affecting the plant room would have an adverse effect, the tribunal concluded that the articulation of the roof was an improvement on the large flat roof surface proposed in the previous design. The Tribunal also concluded that the balance lay in favour of having a plant room incorporated into the roof line of the central section of the building, rather than a 'stand alone' placement on top of the building which would be allowed because a plant room is not measured as an additional floor.

50. Where the central issue was to achieve a building that is consistent with the desired character of the area, the Tribunal concluded that to articulate the roof as now proposed was a preferable outcome.

51. Mr Glass urged upon us that despite the improvements, building E was still unacceptable, having regard to objective (f) of the Community Facility Zone objectives, which is incorporated into criterion 7a by reference to the definition of "desired character" quoted above. Objective (f) provides:

> *To safeguard the amenity surrounding residential areas against unacceptable adverse impacts including from traffic, parking, noise or loss of privacy.*

52. The Tribunal concluded that the articulation of the roof and the incorporation of the plant room into that roof was not a sufficient basis to conclude that objection (f) was not met. Even if there was an adverse impact, as occurs with many developments from the viewpoint of others, it was not ‘unacceptable’.

53. In reaching that conclusion, the Tribunal took into account that the proposed development is in a community facility zone, not a residential zone particularly not in an RZ1 zone, and that significantly higher developments are permissible in a community facility zone than in an adjoining RZ1 zone.

54. Mr Glass also submitted that building E under the amended design was now 11 per cent longer, albeit at the hearing he acknowledged that that was a question of perception arising from the changed design of the wings. He accepted Mr MacCallum's position that the building was, in fact, the same length as it was previously.

55. Mr Glass submitted that the length was (or remained) unacceptable for two reasons.

56. First, he said that the perception of length and bulk had increased from the previous design because the wings were now ‘squared off’, where previously they were tapered. Dr Jarvis for the Planning Authority submitted that the Tribunal should have regard to the objective fact that the length had not changed and that assessments about perception will vary from person to person.

57. It is true that the Tribunal was concerned in its previous decision about perception, but questions of perception arise from objective facts. When assessing the amended design of building E, the Tribunal took into account that the building’s wings have been lowered at each end to four storeys and recessed; that the middle element of the building has been recessed; and that there is now a breaking up of the façade with angulation between the two 28 metre long buildings to the left and right of the glass section. The Tribunal concluded that to a significant degree the building will now present as five defined elements, rather than a long single building as was previously the case.

58. We rejected the submission that the perception of length has increased.

59. Second, Mr Glass said that if the Tribunal was satisfied that the changes had reduced the perception of length, they had not done so to such an extent that the building now complied with criterion 7a, notwithstanding his acceptance that the building will be "a much better building than was previously the case."

60. The Tribunal gave considerable consideration to that issue and concluded, on balance, that the nature and degree to which building E had been broken up into clearly defined elements meant that criterion 7a was met.

61. The Tribunal also had regard to the fact that Block 10 Section 7 is a single block of a very significant size, substantially larger than any of the surrounding RZ1 blocks, and that such a large block contemplates larger buildings consistent with the purpose of the CFZ Zone. By breaking up building E into five separate elements, sufficient regard is given for the desired character of the entire area, notwithstanding the length of the building, and in a manner that addresses the complaints about the previous design.

62. For this reason, the Tribunal rejected Mr Glass' submission, referenced to paragraph 166 of our previous reasons for decision, that concerns about length, height, bulk and location had not been addressed. The Tribunal concluded that its concerns about height, length and bulk have been ameliorated to such an extent that criterion 7a is met having regard to zone objective (f).

63. Mr Glass raised concerns about the fifth floor in terms of overshadowing of the open space between the subject block and the blocks to the west. He raised concerns that the overshadowing would prolong ice on the footpath of that urban open space. The Tribunal, for two reasons, rejected those submissions. Firstly, the issue of overshadowing was dealt with in the Tribunal's earlier reasons for decision and rejected as a reason not to approve building E.[11] We see no reason why the issue should be revisited, however, to the extent that some of these concerns, for example possible ice on the footpath, had not been expressly dealt with in the reasons, the Tribunal is satisfied that that risk is not a sufficient basis to eliminate the fifth floor of building E.

[11] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 96 at [176]

64. For these reasons, the Tribunal concluded that buildings B, D and E, as amended in the amended plans, comply with criterion 7a of the CFZ Code and should be approved subject to amendments of those plans to require the glass facade in the vertical section of building E to be vertical.

Additional matters

65. Mr Glass, in his written submissions, raised many other issues which, he said, should oblige the Tribunal to reject the development or partially reject it. None of those had any connection or only incidental connection with whether buildings B, D and E complied with criterion 7a, about which the Tribunal gave leave for amended plans to be submitted and submissions to be made.

66. The Tribunal notes that as a general rule concerning litigation in courts, and in our view also in the Tribunal, written submissions should not be filed or provided to the court (and in this case the Tribunal) after a matter is concluded unless leave is given.[12]

67. Mr Glass acknowledged that leave needed to be given to consider other issues. In the case of some issues, he pressed for leave. Others he elected not to pursue.

68. Mr Glass sought leave to submit that the construction period for the development be reduced from five years to two years. The party joined maintained that a five year period was necessary. Where that issue had been raised by Mr Glass in his original objection to the proposed development, as submitted to the Planning Authority on 3 August 2015, but was not among his contentions in this proceeding, the Tribunal was not persuaded that leave ought be given for him to raise that issue, and leave was therefore refused.

69. Mr Glass also raised the question of whether lease variation fees should be paid consequent upon removal of a gross floor area restriction in the previous lease. Mr Glass had previously made a further submission on that topic without leave. The Tribunal explained in its previous reasons for decision why it upheld the objection of the other parties to Mr Glass having leave to file the further submission and why it would have rejected the submission even if leave had

[12] *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; *Eastman v Besanko* (2010) 244 FLR 262

been granted.[13] The Tribunal saw no reason to revisit the issue yet again: its position remains the same. The Tribunal's role was to review the Planning Authority's decision to approve a development application, not the question whether any lease variation charges arise from the terms of the Crown lease.

Costs

70. Mr Glass applied under section 48 of the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**) for an order that the other parties pay the filing fee and other fees he incurred for the purpose of making his application. The Tribunal is not persuaded that it can or should order anybody to pay Mr Glass those fees.

71. The Tribunal may, under section 48(2)(a) of the ACAT, order a party to pay an applicant the filing fee and any other fee incurred by the applicant that the Tribunal considers was necessary for the application if it decides an application in favour of the applicant. The Tribunal was not satisfied that it decided the application in Mr Glass's favour where approval of three of the six buildings was confirmed from the outset and the whole development has, with amendments, been approved.

Conclusion

72. For these reasons, the Tribunal determined that the decision under review should be amended, as reflected in the order made on 21 October 2016.

……..
Presidential Member G McCarthy

[13] *Glass v ACT Planning and Land Authority and Anor* [2016] ACAT 96 at [238] – [241]

HEARING DETAILS

FILE NUMBER:	AT 94/2015
PARTIES, APPLICANT:	Eric Glass
PARTIES, RESPONDENT:	ACT Planning and Land Authority
PARTY JOINED	Goodwin Aged Care Services
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	Dr D Jarvis
COUNSEL APPEARING, PARTY JOINED	Ms K Katavic
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
SOLICITORS FOR PARTY JOINED	Meyer Vandenberg Lawyers
TRIBUNAL MEMBERS:	President G McCarthy, Senior Member R Pegrum
DATES OF HEARING:	21 October 2016