
Citation:	R Archer and N Tubb v Northern Midlands Council and C Dixon [2022] TASCAT 32
Division:	General
Stream:	Resource & Planning
Parties:	Richard Archer and Neil Tubb (Appellants) Northern Midlands Council (First Respondent) Carlton Dixon (Second Respondent)
Hearing Date(s):	2 March 2022
Hearing Location:	Hobart
Date of Orders:	29 March 2022
Date Reasons Issued:	29 March 2022
Panel:	R Grueber, Senior Member D Masters, Ordinary Member
Orders Made:	a) That the decision of the Northern Midlands Council to grant a permit for application PLN21-0062 subject to conditions is affirmed; and b) The Tribunal will entertain any application for an order for costs if made to the Tribunal in writing with supporting submissions within the next 21 days. If no such application is made, the order of the Tribunal is that each party bear its own costs.
Catchwords:	Planning Appeal – Low Density Residential Zone of the Northern Midlands Interim Planning Scheme 2013 - subdivision – character of surrounding development – streetscape where not defined by the planning scheme - relevance of non-compliance with local area objectives.
Legislation Cited:	<i>Tasmanian Civil & Administrative Tribunal Act 2020, Land Use Planning & Approvals Act 1993</i>
Cases Cited:	<i>Boland v Clarence City Council</i> [2021] TASFC 5; <i>Independent Commission against Corruption v Cunneen</i> [2015] HCA 14; <i>L Costanzo and Ors v Break O’Day Council and L Wilton and Anor</i> [2021] TASRMPAT 13; <i>R v Klamo</i> [2008] VSCA 75; <i>Gamble v Kingborough Council</i> [2020] TASFC 7; <i>Von Witt v Hobart City Council & Ors</i> [1995] TASSC 12
Representation:	<i>Appellants:</i> Self-represented

First Respondent:
Second Respondent:

N Street / R Holbrook, Simmons Wolfhagen
N Billett, Billett Legal

File No: I50/21S

Publication Restriction: Nil

REASONS FOR DECISION

Background

1. On 5 August 2021, the Second Respondent, Carlton Dixon, lodged a subdivision application PLN21-062 with the First Respondent, the Northern Midlands Council (the Council). On 15 November 2021, the Council approved the application, and a permit was issued on 22 November 2021. An amended permit issued on 23 November 2021 to correct the identification of a TasWater Submission to Planning Authority Notice in the conditions of the permit.
2. On 6 December 2021, the Appellants, Richard Archer and Neil Tubb, filed a notice of appeal.

The subdivision proposal

3. The Second Respondent's application seeks approval for a 44 lot subdivision at 145, 153, and 173 Marlborough Street in Longford, together with demolition of existing structures at 145 Marlborough Street and associated works. The existing structures at 145 Marlborough Street are horse stables and outbuildings.
4. The proposed lots range in size from 1,200m² to 1,508m². The proposal would create three internal roads on the site, each of which would be a cul-de-sac. The lots would have frontages to either the cul-de-sacs or existing made roads. The site has a total area of 6.2534ha.
5. The site is located within the Low Density Residential Zone of the Northern Midlands Interim Planning Scheme 2013 (the Scheme). The northern boundary of the site adjoins a General Residential Zone with developed single dwellings. The eastern boundary of the site adjoins the Longford Race Course which is zoned Recreation. The south west corner of the site is adjacent to a General Industrial Zone containing a brickworks. The remaining boundaries adjoin other land within the Low Density Residential Zone.

The Appeal

6. The original grounds of appeal were in narrative form and were subsequently reduced to the following:

The Issue	Grounds of Appeal	Further Information
The development lot sizes are considerably smaller than the 1ha which is the acceptable in the Low Density Zone in the Northern Midlands Interim Planning Scheme 2013.	Cl.13.4.3.1 A1.1(a) states "each lot must have a minimum lot size of 1ha" and the performance criteria cl.12.4.3.1 P1.1(e) is not met, and the development will adversely affect the amenity of the surrounding low density lots and streetscape. Another consequence of the size of some of the narrow lots is that side setbacks cl.12.4.1.4 "side setbacks must be a minimum of 7.5 metres"	There appears to be no mention in the permit of approval for a reduction in side setbacks, only clause 9 of the planning permit states that there will be "a final plan of the subdivision showing the building area for each lot."

	reduce the width of the building envelope to 5 metres.	
Failure of the development to meet the Local Area Objective.	cl.12.1.2 Local Area Objective has been used to justify the lot densification when this is not the true meaning, which relates to an expansion in the Low Density Zone.	Devon Hills is mentioned in this clause and there is to be no densification of lot sizes at Devon Hills cl.12.4.3.1 P1.2. The proponents have used this clause to justify their development and I seek a Tribunal ruling on the legal standing of cl12.1.2.

7. For convenience, the ground relating to Clause 12.4.3.1 will be referred to as Ground 1 and the ground relating to Clause 12.1.2 will be referred to as Ground 2.

Planning Controls

8. Ground 1 brings into issue Clause 12.4.3.1 A1.1 and P1.1 of the Scheme:

Objective:	
<p>To ensure:</p> <ul style="list-style-type: none"> a) the area and dimensions of lots are appropriate for the zone; and b) the conservation of natural values, vegetation and faunal habitats; and c) the design of subdivision protects adjoining subdivision from adverse impacts; and d) each lot has road, access, and utility services appropriate for the zone 	
Acceptable Solution	Performance Criteria
<p>A1.1 Each lot must:</p> <ul style="list-style-type: none"> a) have a minimum area of 1ha; and b) have new boundaries aligned from buildings that satisfy the relevant acceptable solutions for setbacks; or c) be required for public use by the Crown, an agency, or a corporation all the shares of which are held by Councils or a municipality; or d) be for the provision of public utilities; or e) for the consolidation of a lot with another lot with no additional titles created; or f) to align existing titles with zone boundaries and no additional lots are created. 	<p>P1.1 Each lot for residential use must provide sufficient useable area and dimensions to allow for:</p> <ul style="list-style-type: none"> a) a dwelling to be erected in a convenient and hazard free location; and b) on-site parking and manoeuvrability; and c) adequate private open space; and d) reasonable vehicular access from the carriageway of the road to a building area on the lot, if any; and e) development that would not adversely affect the amenity of, or be out of character with, surrounding development and the streetscape.

A1.2 Subdivision at Devon Hills will not result in any new lots.	PI.2 Land in Devon Hills must not be further subdivided
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9. Ground 2 raises Clause 12.1.2 of the Scheme, which is contained within the Local Area Objectives in the Zone Purpose Statement for Clause 12.1:

12.1 Zone Purpose

12.1.1 Zone Purpose Statements

12.1.1.1 To provide for residential use or development on larger lots in residential areas where there are infrastructure or environmental constraints that limit development.

12.1.1.2 To provide for non-residential uses that are compatible with residential amenity.

12.1.1.3 To ensure that development respects the natural and conservation values of the land and is designed to mitigate any visual impacts of development on public views.

12.1.2 Local Area Objectives:

To make provision for any additional future needs in low-density residential development at Avoca, Campbell Town, Cressy, Devon Hills and Longford by the incremental expansion of those areas already established for the purpose.

12.1.3 Desired Future Character Statements:

There are no desired future character statements.

Ground 1

10. Clause 12.4.3.1 of the Scheme deals with lot area, building envelopes and frontage. The acceptable solution A1.1 is not satisfied as each lot of the proposal does not have a minimum area of 1ha as required by A1.1(a). The development therefore falls to be assessed against the performance criteria PI.1.¹ The only clause in PI.1 raised by the ground is PI.1(e). The consideration then is whether each lot for residential use provides a sufficient useable area and dimension to allow for development that would not adversely affect the amenity of, or be out of character with, surrounding development and the streetscape.

The evidence

11. The Appellants did not call any expert evidence. They relied on a brief statement by Mr Archer and a response statement to the other parties' expert witness statements, which is largely commentary, submission or argument. The initial statement by Mr Archer included an analysis of the housing density of the surrounding land and of the structure density for the race course on a per hectare basis. He notes that the proposed development has a ratio of 1 house per .12ha. He says that the character of Brickendon Street would change dramatically by reason of the density of the development. He provided an aerial photo which he says shows the rural nature of the area and the dominance of pasture and trees. He observed that the development would result in views from all surrounding streets being predominately houses and new streets. The evidentiary components that

¹ PI.2 is not invoked as the development is not in Devon Hills.

can be distilled from the second statement are that Elwick and Mowbray race courses are not training venues that require stables nearby, that an image of 10 Anstey Street included in Mr Boardman's evidence as showing a dwelling within the streetscape was well setback and on a large title and that the smallest title on the area of land west of the race course zoned Low Density Residential is 0.71ha.

12. The Council called evidence from Mr Evan Boardman, an expert planner. Although he focussed on the criterion brought into issue in the appeal, Mr Boardman also noted that in his opinion, because all the proposed lots are at least 1,200m² in area, paragraphs (a) to (d) inclusive of PI.1 were satisfied in terms of providing sufficient useable area and dimensions to satisfy the criteria in those paragraphs.
13. In considering amenity for the purposes of PI.1, Mr Boardman said that the proposal would provide for future residential use and development of single residential dwellings, which are permitted uses within the Low Density Residential Zone. The only other permitted use in the Zone is utilities. He considered that providing for future permitted use and development would not adversely affect amenity as it is precisely that use and development for which the land is zoned. He considered that the subdivision provided for an incremental future residential expansion from the General Residential Zone to the north and that that is the best and most appropriate use of the land in accordance with the Zone Purpose and Local Area Objectives. He considered whether the size of the lots would be out of character with the surrounding area but said that his assessment would not change by reference to surrounding development rather than surrounding area. He considered that the development of vacant lots with residential dwellings at a greater density than presently existing would alter but not, adversely affect amenity. He considered that even if the properties were development by a subdivision satisfying the minimum lot size to comply with the acceptable solution in A1, the current use of the land for vacant land and horse training would not continue. He considered that residents would likely experience greater levels of amenity resulting from greater economies of scale from an increase in population driving an increase in the provision of services and facilities but noted that race horse owners who agist their animals on properties may suffer adverse impacts as they would no longer have such easy access to the race course. He considered that the amenity of the locality was particularly influenced by the race course but that the proposal would not adversely impact the amenity of the race course, noting that adjacent land to the north and north west was already developed for general residential use.
14. In respect to streetscape, he noted that the term is not defined in the Scheme. He adopted a common definition found in other interim planning schemes, which is set out later in these reasons. He had regard to those elements within 100m of the site, which is also a common approach in other schemes. He noted that virtually all of the properties within the surrounding development and streetscape were developed for single residential dwellings. He considered that the lot sizes were similar in area to existing residential lots and would form a transition between the higher density residential development to the north and the low density residential development to the south. Noting the reference to side setbacks in the ground of appeal, he said that the position of a dwelling on a lot, be it closer or further away from boundaries, would not impact upon the character of the area or the streetscape.
15. Mr Boardman considered that the proposal satisfies the criterion PI.1(e). He assessed that clause on the basis that it has two separate disjunctive sections, being that the development would not adversely affect the amenity of surrounding development and streetscape and that development would not be out of character with surrounding development and streetscape. He considered that the clause would be met if either of those elements were satisfied. That is not the correct interpretation of the provision, as the elements are clearly cumulative. However, he considered that both elements were satisfied such that the criterion as correctly applied is satisfied.

16. The Second Respondent called evidence from Ms Jo-Ann Oliver, a town planner. Ms Oliver considered each of the criteria in PI.1(a) to (d) inclusive and considered they were satisfied. In respect to criterion (e), she took a broader view of surrounding development than Mr Boardman, to include the race course, an area of the General Residential Zone comprising single dwellings, the brick manufacturing facility in the General Industrial Zone and single dwellings and vacant residential lots and horse stabling, veterinary and training facilities in the Low Density Residential Zone. She noted that that area contained a diverse range of developments. She undertook an assessment of those developments, the topography and the separation of the developments. She concluded that the character of the area is evolving due to it being designated for development and considered that it does not have a single prevailing character of development. She noted that the Scheme does not include any Desired Future Character Statements. She observed that the Low Density Residential Zone area is designated for additional development and densification and cannot achieve that and at the same time maintain the character that proceeds such development absolutely. In short, an area cannot develop and not change. She observed that residential development in the Low Density Residential Zone, by its very nature, cannot be consistent with the character of the race course situated within the Recreation Zone and brick manufacturing facility within the General Industrial Zone. She noted that there were two existing dwellings establishing a residential development character at the interface of the Low Density Residential Zone and that the lots closest to the race course would have greater depth, allowing greater distance between the frontage and dwellings which would be consistent with the developed residential character to the north and not out of character with the existing interface between the General Residential Zone and the race course.
17. Like Mr Boardman, Ms Oliver noted that streetscape is not defined in the Scheme. She utilised the Macquarie Dictionary definition of 'streetscape' as an environment of streets and 'street' as a way or road, together with adjacent buildings. She took a broader approach geographically to streetscape than Mr Boardman. She utilised the streetscapes of Marlborough Street, Brickendon Street and Anstey Street. In respect to each of those streets she formed the same conclusions. She noted that the evolving character of the currently undeveloped land would necessarily involve a change in the appearance of the land, but that the proposed lots would have sufficient area and dimensions to allow for siting of buildings that would be reasonably consistent with the frontage treatment and range of existing building setbacks.
18. Ms Oliver considered that each proposed lot in the subdivision would provide sufficient useable area and dimensions to allow for development that would not adversely affect the amenity of, or be out of character with, the surrounding development and the streetscape. The character and amenity of the surrounding development varies and has no uniform pattern. Recent development in the Low Density Residential Zone indicates that the Zone is presently in transition. Undeveloped land has been subdivided into smaller lots, with new dwellings established and with some larger lots remaining. The proposed lots in the subdivision provide sufficient useable area and dimension to enable the development of future dwellings with appropriate surrounding space for gardens and open yards. The specific design response that any future dwelling adopts will be a matter relevant to future applications, but each lot would have sufficient useable area and dimensions to allow for future development that would not adversely affect the amenity of the surrounding development and the streetscape and would not be out of character with the surrounding residential development and the streetscape. Ms Oliver reached the same conclusion as Mr Boardman, that the proposal satisfies PI.1(e).

Consideration of Ground 1

19. The lots in the proposed subdivision are significantly smaller than the 1ha minimum area in the acceptable solution A1.1. However, while the accepted standard can provide context in respect to assessments, it does not establish a benchmark against which the performance criteria should be

assessed.² The acceptable solution is intended to provide a certain and quantifiable way of complying with the relevant standard while the performance criteria will prescribe a qualitative test requiring an evaluative judgment.³

20. PI.1(e) requires that each lot have sufficient useable area and dimensions to allow for development that would not adversely affect the amenity of the surrounding development and the streetscape. 'Adversely' is not defined in the Scheme. The term 'adversely affect' is a protean expression.⁴ Clause 4.1.1 provides that terms in the Scheme have their ordinary meaning unless defined. The Macquarie Dictionary definition of 'adverse' is *antagonistic in purpose or effect*. 'Streetscape' is also not defined in the Scheme. It is commonly defined in interim planning schemes in Tasmania as:

"the visual quality of the street depicted by road width, street plantings, characteristics and features, public utilities constructed within the road reserve, the setbacks of buildings and structures from the lot boundaries, the quality, scale, bulk and design of buildings and structures fronting the road reserve."

That meaning was applied by Mr Boardman. Ms Oliver applied a simpler and perhaps broader definition as being an environment of streets. It is not necessary to choose between their approaches. They both reach the same conclusions.

'Amenity' is defined in Clause 4.1.3 of the Scheme as:

"in relation to a locality, place or building, any quality, condition or factor that makes or contributes to making the locality, place or building harmonious, pleasant or enjoyable."

'Compatibility with character' has been considered in a number of Tribunal decisions as requiring a proposal to be in harmony or broad correspondence with a character.⁵ In this case the relevant character is that of the surrounding development and the streetscape. Once again, the area for assessment was differently identified by Mr Boardman and Ms Oliver, but they came to the same conclusions.

21. The approaches of Ms Oliver and Mr Boardman were consistent with the meaning of the performance criterion, notwithstanding their differences in geographic extent and different definition of streetscape. They were not challenged by any expert opinion to the contrary. Their opinions were properly grounded by thorough assessments and analysis of the proposal, the surrounding development and streetscape. Their conclusions were effectively unanimous. This is not a case where the facts underlying their opinions were not proved, their process of reasoning is apparently unsound or where there are any other factors which cast doubt on the validity of their opinions such as to warrant rejecting their expert opinions.⁶ The Tribunal accepts the evidence of Ms Oliver and Mr Boardman. The proposal will not adversely affect the amenity of, or be out of character with, surrounding development and the streetscape and so meets the performance criteria PI.1(e).
22. Ground 1 is dismissed.

Ground 2

23. Ground 2 asserts that the proposed development fails to meet the Local Area Objective in Clause 12.1.2.

² *Boland v Clarence City Council* [2021] TASFC 5 at [22].

³ *Boland v Clarence City Council* at [20].

⁴ *Independent Commission against Corruption v Cunneen* [2015] HCA 14 at [2].

⁵ For example, *L Costanzo and Ors v Break O'Day Council and L Wilton and Anor* [2021] TASRMPAT 13 at [18].

⁶ See *R v Klamo* [2008] VSCA 75 at [44] to [50].

24. The Local Area Objectives are not expressly invoked by the terms of PI.1. The Second Respondent points out that, while Clause 8.10.2 of the Scheme requires that the planning authority have regard to any relevant Local Area Objectives for the applicable zone when determining an application for a discretionary use, there is no equivalent requirement in relation to development as opposed to use. Development and use are separate concepts.⁷ Even if regard was required to be had to the Local Area Objectives, they are not raised to the status of a standard. In *Von Witt v Hobart City Council & Ors*⁸, Wright J said, at [13]:

“The Scheme must be read as a whole and the generalized statements of principles, objectives and desired future character cannot be relied upon to the exclusion of subsequent specific provisions contained in any Schedule, except where this is provided for by the Scheme itself.”

25. The proposal is not required to demonstrate compliance with the Local Area Objectives, and failure to comply with them is not a basis upon which a permit can be refused. It is not necessary to proceed to consider whether the proposal complies with Clause 12.1.2.
26. Ground 2 is dismissed.

Determination

27. The grounds of appeal are not made out and the appeal is dismissed.
28. The orders of the Tribunal are:
- a) That the decision of the Northern Midlands Council to grant a permit for application PLN21-0062 subject to conditions is affirmed.
 - b) The Tribunal will entertain any application for an order for costs if made to the Tribunal in writing with supporting submissions within the next 21 days. If no such application is made, the order of the Tribunal is that each party bear its own costs.

If requested, the Tribunal may reconvene to hear any evidence of any matter bearing upon an order for costs.

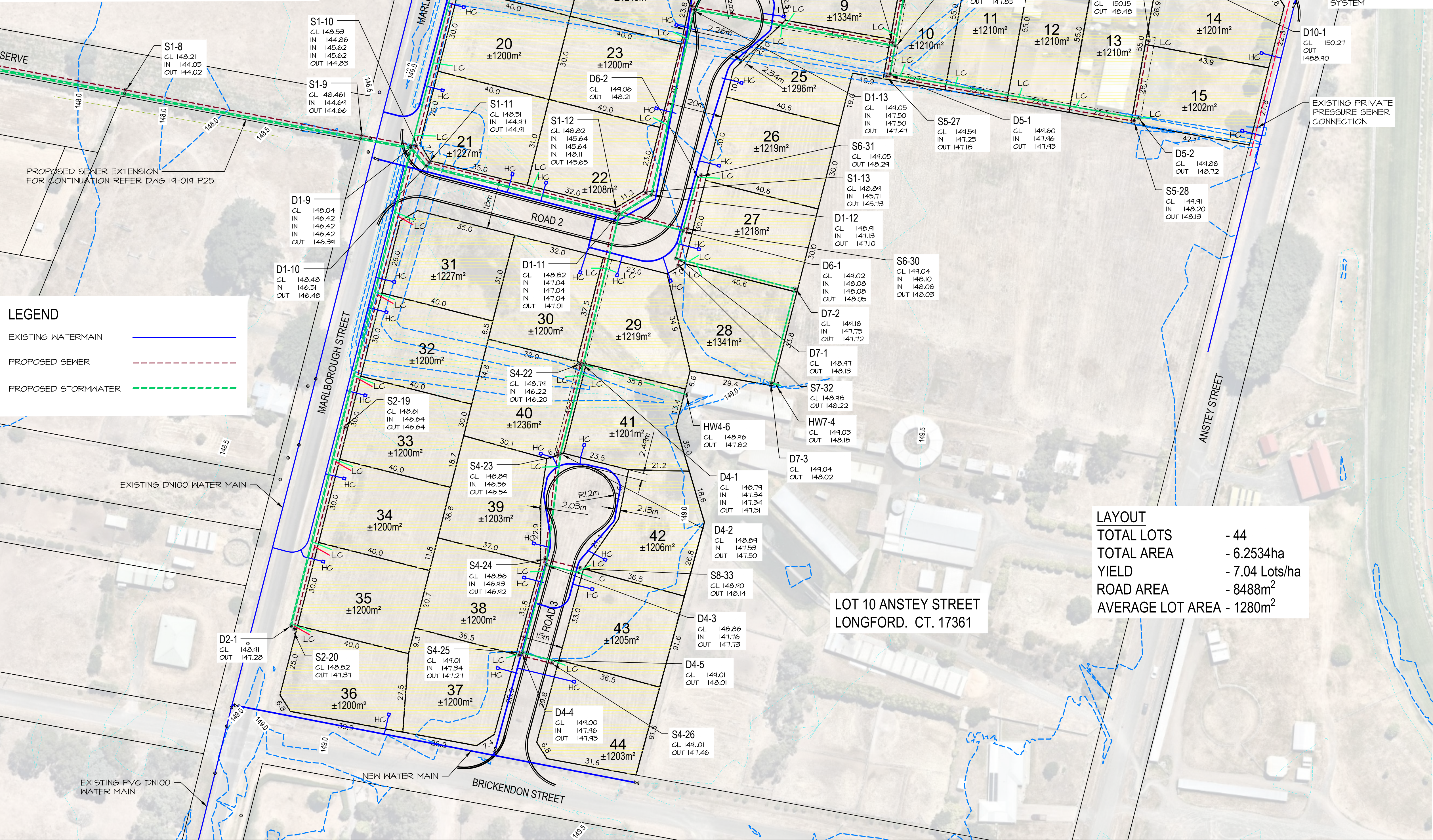
⁷ See s3 of the *Land Use Planning & Approvals Act 1993* and *Gamble v Kingborough Council* [2020] TASFC 7 at [18].

⁸ [1995] TASSC 12.

PLEASE NOTE

1. INTENDED USE OF PLAN
THIS PLAN WAS PREPARED TO ACCOMPANY A DEVELOPMENT APPLICATION TO COUNCIL AND SHOULD NOT BE USED FOR ANY OTHER PURPOSE. DETAILS ARE SUBJECT TO CHANGE AND IN PARTICULAR NO RELIANCE SHOULD BE PLACED ON THE INFORMATION ON THIS PLAN FOR ANY FINANCIAL DEALINGS INVOLVING THIS LAND.
2. LAYOUT MEASUREMENTS
ALL MEASUREMENTS, AREAS AND LOTS SHOWN ARE INDICATIVE ONLY AND SUBJECT TO CHANGE DUE TO FINAL FIELD SURVEY, DETAILED DESIGN AND CONSTRUCTION
3. SERVICES
ALL SERVICES SHOWN ARE APPROXIMATE ONLY. NO GUARANTEE CAN BE GIVEN THAT ALL RELEVANT SERVICES ARE SHOWN
4. DETAILED DESIGN APPROVALS
ROAD, DRIVEWAYS, FOOTPATHS, SEWER, STORMWATER, WATER AND LANDSCAPING SHOWN IS PRELIMINARY ONLY AND SUBJECT TO CHANGE. ALL CHANGES DURING DETAILED DESIGN AND CONSTRUCTION ARE SUBJECT TO THE APPROVALS OF THE RELEVANT SERVICE AUTHORITIES

THIS NOTE IS AN INTEGRAL PART OF THIS PLAN



LEGEND

- EXISTING WATERMAIN
- PROPOSED SEWER
- PROPOSED STORMWATER

LAYOUT
TOTAL LOTS - 44
TOTAL AREA - 6.2534ha
YIELD - 7.04 Lots/ha
ROAD AREA - 8488m²
AVERAGE LOT AREA - 1280m²

LOT 10 ANSTHEY STREET
LONGFORD. CT. 17361

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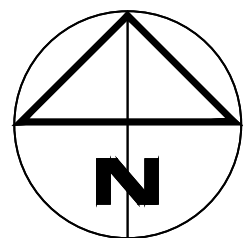
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ABN 27 014 609 900

Architectural
ABP No. CC4874f
Structural / Civil
ABP No. CC1633i



PLANNING DOCUMENT

ISSUE	DATE	ISSUED FOR	REV.
01	05.07.21	PLANNING APPROVAL	-
02	27.07.21	PLANNING APPROVAL	A
03	05.10.21	PLANNING APPROVAL	B
04	19.10.21	PLANNING APPROVAL	C
05	02.11.21	PLANNING APPROVAL	D



DIMENSIONS ARE IN MILLIMETRES. DO NOT SCALE. CHECK AND VERIFY ALL DIMENSIONS ON SITE. REFER DISCREPANCIES TO THE SUPERINTENDENT. ALL WORK SHALL BE CARRIED OUT IN ACCORDANCE WITH: BUILDING CODE OF AUSTRALIA, APPLICABLE AUSTRALIAN STANDARDS & LOCAL AUTHORITY REQUIREMENTS.

PROJECT: 44 LOT SUBDIVISION

ADDRESS: 145-172 MARLBOROUGH STREET
LONGFORD, TAS
FOR: C.DIXON

DRAWING: PROPOSAL PLAN
SHEET - 1 OF 2

DESIGNED: M.C.V. DRAWN: H.B. CHECKED: P.M.W.

SCALES: 1:750 AT A1 SIZE DRAWING SHEET

PROJECT No. 19.019 DRAWING No. P24 REV D