Victorian Civil & Administrative Tribunal
Planning and Environment Division
Planning and Environment List

VCAT Reference No: P505/2020

140 HIGH STREET PTY LTD

Applicant

MANSFIELD SHIRE COUNCIL

Responsible Authority

KEEP MANSFIELD HEALTHY INC

Objector

OUTLINE OF SUBMISSIONS OF THE OBJECTOR

1. On 21 January 2021, the Objector filed an application and statement of grounds setting out an objection to the proposal, viz;

> *The Application is for a drive-through Convenience Restaurant. I object to the use of the development as described in the Application because of the negative social effects this will have on the current Mansfield community.*
> *The proposed development is close to the Mansfield Primary School, and will have adverse health outcomes for our children.*
> *The potential benefits of the development identified by the permit applicant will not outweigh the negative aspects/adverse impacts of the proposal so as to result in a net community benefit.*

(**objection**).

2. The permit applicant submits that the objection:

   (a) properly relates to the use of the land as a convenience restaurant, which is not a relevant planning consideration for this appeal; and

   (b) is irrelevant for the purposes of considering the development impacts of a convenience restaurant on the land.

3. The Objector's submission in reply appears below.

4. The development of land for a convenience restaurant requires a permit under the commercial 1 zone (**CUZ1**).

5. Clause 72.06 of the Mansfield Planning Scheme (**scheme**) provides that as the CUZ1 allows the use of the land at 2-4 and 8-10 Station Street Mansfield (**land**) for a convenience restaurant, it may be developed for that use provided all requirements of the scheme are met.

6. The requirements of the scheme are:

   (a) the objectives and decision guidelines set out in the CUZ1;

   (b) the considerations set out in clause 65;

   (c) the objectives of planning set out in section 4 of the *Planning and Environment Act* 1987 (**Act**); and

   (d) the considerations set out in section 60 of the Act.

7. Additionally, the Tribunal is required to consider all objections made in respect of the proposal.

8. The basis of the objection is that if a permit is granted, the development of the land for a convenience restaurant will have a significant social impact on the health of the primary aged school children (5-12 years old) residing in the Mansfield area affected by the scheme (**children**).

9. It is submitted that the objection ought not be summarily dismissed, but rather, must be considered by the Tribunal for the following reasons:

   (a) the fact that only development approval is required does not diminish the requirement that, by virtue of the operation of section 60(1)(f) of the Act, the Tribunal must have regard to evidence of any significant social effects of the proposal;

   (b) the impact of the convenience restaurant, once developed, on the children living in the Mansfield council area is identified in the objection and supported by appropriately qualified expert opinion.

10. The cases relied upon by the permit applicant are not binding upon the Tribunal in this hearing. They must be assessed having regard to the following:

    (a) the now mandatory requirement to consider significant social effects arising from the development of the land; and

(b) the factual and other grounds of the cases that can be distinguished from the circumstances of this case.

11. The Objector submits that the objection should be admitted by the Tribunal subject to weight, as part of the balancing process of all planning considerations required by this hearing.

12. Now is not the time to strike out the objection. The Objector should be afforded the opportunity to develop the objection fully, as part of its case. It should be heard by the Tribunal and considered in that light.

13. Additionally, the Objector should be afforded the opportunity to present its full argument including leading evidence and, if appropriate, cross examining any relevant expert or other witnesses.

Dismissing or striking out the Objection

14. The Tribunal's power to prevent the Objector from relying upon its expert evidence is governed by section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**VCAT Act**). Relevantly, the VCAT Act provides the Tribunal with the following powers:

> *"(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion –*
>
> *(a) is frivolous, vexatious, misconceived or lacking in substance; or*
>
> *(b) is otherwise an abuse of process.*
>
> *…*
>
> *(5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law."*

15. The Tribunal's power to dismiss or strike out the expert evidence is a serious matter that will deprive the Objector of the opportunity to have its objection heard in the ordinary course. The Tribunal should exercise great caution before making any such order.

16. As the application raises a question of law, it must be determined by a legal member of the Tribunal.

17. The Objector submits that the following considerations are relevant, viz:[1]

(a) it must be 'very clear indeed' that the application is 'absolutely hopeless'; or

(b) the application must be 'so clearly untenable that it cannot possibly succeed.

(c) the strike out power may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the Objector may fail to adduce evidence substantiating an essential element of the application; and

(d) the Permit Applicant has the onus of showing 'that the complaint is undoubtedly hopeless'.

18. For a strike out application to be successful, the proceeding must:[2]

> *"... must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution."*

19. In *Fancourt v Mercantile Credits Pty Ltd* (**Fancourt**), the High Court held that:[3]

> *"... the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."*

20. In *Lay v Alliswell Pty Ltd*,[4] Balmford J accepted that the High Court's observations in Fancourt are applicable to applications under s 75 of the VCAT Act.[5] The same principle was also adopted by Kyrou J in *Towie v Victoria*.[6]

21. In an application under s 75 of the VCAT Act, it is appropriate to assume that the applicant will be able to prove each fact alleged in the claim in question.[7] A proceeding should not be dismissed or struck out under s 75 if the ultimate fate of

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1 *Owners Corporation No 1 PS537642N v Hickory Group Pty Ltd* [2015] VCAT 1683 (Hickory) at [6] – [12], relying upon *Forrester v AIMS Corporation* [2004] VSC 506.
2 Hickory at [9], relying upon *Ausecon Development Pty Ltd v Kamil* [2015] VCAT 1474 at [19] per Davis J.
3 [1983] HCA 25 at [99].
4 [2001] VSC 385.
5 At [4].
6 [2008] VSC 177 at [30].
7 *Noonan v Owners Corporation No. 2 PS409115E* [2011] VCAT 1934 at [17].

the proceeding depends upon contested questions of fact that could be established or eliminated by cross-examination.[8]

22. For the reasons stated below, the Objector submits that its objection is not 'undoubtedly hopeless' and that it should be entitled to rely upon its proposed expert evidence. The objection should be admitted subject to weight.

Development vs use

23. In section 3 of the Act, development is defined as including, relevantly, the construction or carrying out of works.

24. Section 3 of the Act defines use as follows:

> *"use in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed"*

25. In *Mrocki v Port Phillip City Council*, the Tribunal noted the distinction between use and development as follows:[9]

> *"The development of land for a future purpose amounts to already using the land for that purpose ([2004] VCAT 1838 at para 5). That observation simply flows from the statutory definition of "use" itself - i.e., "use" includes use or proposed use for the purpose for which the land is being or may be developed. What this means simply is that, once a development has commenced, the purpose for which the land is proposed to be used as a consequence of the development is also deemed to have commenced even though the actual use might not physically commence until the development is completed. There is nothing in this observation or in the definition of "use" to suggest that development actually forms part of a use (or vice-versa)."*

26. The argument by the permit applicant is that by reason of the above, the objection attaches properly to the use of the building once constructed on the land as a convenience restaurant (which is not the subject of the present appeal).

27. The Objector submits that in this case, the relevance of the objection to the development application, derives from the process that the Tribunal is obliged to follow when considering the application.

28. In that regard, clause 72.06 of the scheme provides that:

> *Land may be used or developed only in accordance with this scheme.*

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8 *Evans v Douglas* [2003] VCAT 377 at [9].
9 [2007] VCAT 1719 at [14]–[18].

> *Land must not be developed unless the land as developed can be used in accordance with this scheme.*
> *If this scheme allows a particular use of land, it may be developed for that use provided all requirements of the scheme are met.*

29. In *1045 Bourke Road Pty Ltd v Boroondara City Council* (**Bourke Rd**), a case where a heritage overlay was the only permit trigger, the Tribunal hearing the application decided that "… *the Tribunal's discretion is confined to heritage considerations*".[10]

30. However, on appeal, the Court of Appeal stated:[11]

> *"The correct statement of the position is that in deciding whether a permit should be issued under the Heritage Overlay control, the decision-maker is required to take into account all of the considerations directed by the Act and the Scheme to be taken into account for an application under that control. These are not confined to heritage considerations as is apparent from ss 4, 60, and 84B of the Act, and cls 15, 20, 21, 22, 43 and 65 of the Scheme." (emphasis added)*

31. A Trial Judge of the Supreme Court hearing the initial appeal in Bourke Rd also observed that:[12]

> *Land-use is a matter of public interest, society having various needs and expectations in relation to the use and development of land which planning aims to meet, and land-use decisions are to be made having regard to the pleasant, efficient and safe living, working and recreational environment to which all Victorians are entitled. The scope of relevant considerations in decision-making in a planning context is therefore not to be artificially constrained. (emphasis added)*

32. The Trial Judge also noted that:[13]

> *Planning authorities and responsible authorities should endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefits and sustainable development for the benefit of present and future generations.*

33. Applying the Court's reasoning, the test is not whether the objection is connected to the use or development, but rather, is the objection a relevant consideration for the Tribunal in this case.

34. The Objector submits that the objection is relevant to the development of the land for the following reasons.

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10 [2013] VCAT 1108 at [24].
11 *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27 at [134].
12 *Boroondara City Council v 1045 Burke Road Pty Ltd* [2014] VSC 127 [35].
13 As above, at [36].

Convenience restaurant – permit triggers

35. A "retail premises" is a section 1, "as of right" use.[14] A "convenience restaurant" falls within the definition of "retail premises".[15] A convenience restaurant is defined as :

> *Land used to prepare and sell food and drink for immediate consumption, where substantial provision is made for consumption both on and off the premises.*

36. Under clause 34.01-4 of the scheme, a permit is required to construct a building or construct or carry out works, that is to say, development of the land for a convenience restaurant.

Considerations under clause 65

37. Clause 65 of the scheme provides that merely because a permit can be granted does not imply that it should or will be granted. The Tribunal is tasked with deciding whether the proposal will produce acceptable outcomes in terms of the decision guidelines of clause 65.01 that include the following:[16]

    (a) the matters set out in section 60 of the Act;

    (b) the Municipal Planning Strategy (**MPS**) and the Planning Policy Framework (**PPF**);

    (c) the purpose of the commercial 1 zone;

    (d) any matter required to be considered in the commercial 1 zone;

    (e) the orderly planning of the area; and

    (f) the effect on the amenity of the area.

38. The purposes of the commercial 1 zone, include relevantly, the following:

    (a) to implement the MPS and the PPF; and

    (b) to create vibrant mixed use commercial centres for retail, office, business, entertainment and community uses.

Section 60 of the Act

39. Section 60(1) of the *Planning and Environment Act* (**Act**), includes the following:

> *"(1) Before deciding on an application, the Responsible Authority must consider –*

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14 See clause 34.01-1.

15 The nested definition of retail premises in clause 73.03 of the scheme includes the definition of food and drink premises that includes the definition of convenience restaurant.

16 See clauses 65 and 65.01.

> *(a) the relevant planning scheme;*
> *(b) the objectives of planning in Victoria*
> *(c) all objections and other submissions which it has received …*
> *…*
> *(f) any significant social effects and economic effects which the responsible authority considers the use or development may have.*
> *…*
> *(1B) For the purposes of subsection (1)(f), the responsible authority must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect. …" (emphasis added)*

40. Section 60(1)(f) was inserted into the Act on 28 October 2013.[17] Before this amendment was made, the Tribunal was given discretion to consider significant social and economic effects "where the circumstances appear to so require".[18] Section 60(1B) was inserted into the Act on 12 October 2015.

41. The former wording of section 60(1)(f) was considered by the Tribunal in *Tabcorp Holdings Ltd v Moreland CC*, viz:[19]

> *"... [it] must be applied in the context of the particular planning controls pursuant to which a permit is sought.*
>
> *When it comes to exercising powers pursuant to the Planning and Environment Act in relation to social effects, I do not believe that it is appropriate to simply apply philosophical or moral or religious values".*
>
> *Rather it is necessary to make such decisions on the basis of a true empirical understanding of the facts of the situation".*

42. The Objector does not rely upon philosophical, moral or religious values when making its objection. The objection is made on medical grounds.

43. In *Backman & Company Pty Ltd v Boroondara CC*,[20] in the context of section 60(1B) of the Act and a proposal for a three-storey apartment building that only required development approval, the Tribunal made the following findings:

    (a) the fact that a permit was needed for development did not prevent the consideration by the Tribunal of any significant social effects;[21]

17 See section 76(2) *Planning and Environment Amendment (General) Act* 2013.
18 See now repealed section 60(1A)(1) of the Act, which prior to 23 May 2004 was found in section 60(2(b)(i) of the Act.
19 [2004] VCAT 693 at [12] and [13].
20 [2015] VCAT 1836.
21 At [15] – [16].

(b) concerns raised regarding the impact on local services were considered relevant where the permit trigger related to the number of dwellings on the land and where the concerns were supported by evidence;[22]

(c) the onus is on those alleging the significant social effect to provide appropriate evidence to the Tribunal;[23] and

(d) the nature of the evidence required is set out in *Rutherford, v Hume CC*, details of which are set out at paragraph 51, below.[24]

Considerations under the MPS

44. Under the MPS, the following policies form part of the scheme:

(a) planning is to recognise the need for, and as far as practicable contribute towards the following, amongst other things:[25]

(i) health, wellbeing and safety;

(ii) diversity of choice;

(iii) economic viability; and

(iv) a high standard of urban design and amenity.

(b) it is an objective of the land use compatibility policy:[26]

> *"To protect community amenity, human health and safety while facilitating appropriate commercial, industrial, infrastructure or other uses with potential adverse off-site impacts."*

(c) one strategy to support that objective includes ensuring that use or development of land is compatible with adjoining and nearby land uses.[27]

(d) it is an objective of the urban design policy:[28]

> *"To create urban environments that are safe, healthy, functional and enjoyable and that contribute to a sense of place and cultural identity."*

(e) strategies to support that objective include the following:

22 At [21].
23 At [25].
24 At [25].
25 Clause 11 of the scheme.
26 Objective of clause 13.07-1S of the scheme.
27 Strategies of clause 1
28 Clause 15.01-1S of the scheme.

(i) require development to respond to its context in terms of character, cultural identify, natural features, surrounding landscape and climate;

(ii) ensure development contributes to community and cultural life by improving the quality of living and working environments, facilitating accessibility and providing for inclusiveness;

(iii) ensure that development minimises detrimental impacts on amenity and on the natural and built environment.

(f) it is an objective of the healthy neighbourhood's policy:[29]

"To achieve neighbourhoods that foster healthy and active living and community wellbeing."

PPF

45. In the settlement and housing clause of the PPF, it is noted that:[30]

"The Council Plan 2013-2017 is committed to the following:
…
- *Acknowledging the community view expressed in a petition received in summer (2013/14), Council will investigate the planning options available to mitigate against the proven health/obesity rate impacts of ultra-processed food outlets. …"*

46. The Council has noted that part of its further strategic work is to:[31]

"Develop a planning response to ultra-processed food outlets which reflects community concerns."

47. It ought to be noted that the Council has not yet developed any response consistent with the above. Council's decision must be assessed in light of this fact.

Considerations under the commercial 1 zone

48. Under clause 34.01-8, before deciding on the proposal, in addition to clause 65 of the scheme, the Tribunal must consider generally, as appropriate:

(a) the Municipal Planning Strategy (**MPS**) and the Planning Policy Framework (**PPF**); and

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29 Clause 15.01-4S of the scheme.
30 Clause 21.03 of the scheme. The Council Plan 2013-2017 is not an incorporated document under section 6(2)(j) of the Act, having regard to the table of incorporated documents found at clause 72.04 of the scheme.
31 Clause 21.03-5 of the scheme.

(b) the interface with adjoining zones, especially the relationship with residential areas.

49. In respect of building and works, clause 34.01-8 mandates consideration of various matters.

Objectives of planning

50. As has been noted in relation to the objectives of planning set out in section 4 of the Act:[32]

> *"It is clear … that use and development of land must be balanced against the need to protect land and other parts of the environment from harm. Present needs are also to be balanced against those within the foreseeable future.*
>
> *Although the purpose of the Planning and Environment Act as stated in s.1 [5000] is to protect "land", other parts of the Act, including the objectives, make it clear that the subject of protection is to be wider than that of land. What is to be protected is the land, people, other animals and plants on the land (the environment). Environment has the general meaning given to it in the Environment Effects Act 1978. This is a less technical meaning than that in the Environment Protection Act 1970.*
>
> *All these components of the environment are part of a complex system consisting of "people and their various life-supporting, economic and social systems superimposed on the natural systems of the region": see Brotchie, Sharpe and Ahern, Further Reading."*

Significant social effect

51. In *Rutherford v Hume CC* [33] the Tribunal considered what constitutes a significant social effect, viz:

> *"First, that the effects to be considered are those that the responsible authority (or the Tribunal on review) considers to be significant, rather than those that may simply be contended as significant by one party or another. This should be objectively ascertained through the decision-maker's expertise and/or the material before it. It is therefore important that we indicate what we consider to be any relevant significant social effect.*
>
> *Secondly, the significant social and economic effects must have a causal connection to the use or development proposed in the permit application under consideration, and having regard to the purposes of the legislation within which the requirement arises — i.e., the broader objectives of planning under the Planning and*

[32] Planning and Environment Victoria at [430,500].
[33] [2014] VCAT 786 at [50]–[56].

Environment Act 1987. As we have earlier indicated, planning decision-making is not the mechanism for addressing all issues of social or community concern, or resolving all issues of human emotion or behaviour.

Thirdly, from a town planning perspective, significant social and economic effects have traditionally been recognised as those that affect the community at large, or an identifiable section of the community, rather than affecting an individual or a small group of individuals.

Fourthly, a consideration of social effects pursuant to the Planning and Environment Act 1987 should be based on a proper evidentiary basis or empirical analysis, preferably through a formal social impact or socio-economic assessment. There must be objective, specific, concrete, observable and likely consequences of the proposed use or development. A consideration of social effects should not be based on philosophical or moral or religious values. Nor is mere opposition by a section of the public, or a large number of objections, of itself, evidence of social effect.

Fifthly, the social or economic effect must be sufficiently probable to be significant. This will depend on the probability of the effect occurring, the consequences of the effect if it occurs, and the utility of the use and development giving rise to the effect. Both the positive and adverse effects must be considered.

Sixthly, a significant adverse social effect, if there is one, must be considered by the decision-maker. That does not mean that it will necessarily be determinative in itself and lead to the refusal of the permit. It must still be balanced with any other significant social and economic effects. Again, this should commonly and preferably occur through a formal and independent social impact or socio-economic assessment. Moreover, the social effect must still be balanced alongside all other relevant planning considerations, as part of an overall assessment of the proposed use or development in deciding whether or not to grant a permit.

Some of these factors clearly overlap. Support for the principles that underscore these factors can be found in many planning decisions of courts and tribunals cited to us, including (but by no means limited to) New Century Developments Pty Limited v Baulkham Hills Shire Council, Johnson v Greater Shepparton City Council, Tabcorp Holdings Pty Ltd v Moreland City Council, and Stonnington City Council v Lend Lease Apartments (Armadale) Pty Ltd, and cases referred to in those decisions. We do not consider it necessary to analyse these cases in detail."

52. The expert evidence is sufficient to demonstrate that there is a probable and significant social effect, that is to say higher rates of obesity in children in the Mansfield area that is not offset by social benefits.

53. The social effect is directly related to the purpose for which the planning permit in this case is required, that is to say, the development of the land as a purpose-built convenience restaurant. The development of the land for that purpose will cause the significant social effect complained of.

Cases relied upon by the Permit Applicant

54. The Permit Applicant relies on *McDonalds Australia Pty Ltd v Yarra Ranges SC* (**Tecoma case**) and particularly the following passage:[34]

> *"The objections and submissions raised many concerns that we cannot consider as they relate to the use of the land, which does not require our permission. These included the health effects of 'fast food', economic competition between the existing and the proposed food outlets, and the balance of trade between businesses serving the local community and tourists."*

55. The Permit Applicant further relies upon *Hunt Club Pty Ltd v Casey CC* (**Hunt Club**).[35]

56. The Permit Applicant's submission does not address the following observations made by the Tribunal in the Tecoma case:[36]

> *"A large number of submissions opposing a development do not constitute evidence of adverse social or economic impacts. Such impacts would need to be identified through independent empirical study(s) using credible social scientific methodologies. They would need to identify adverse impacts on particular groups in the community and show that the impacts clearly arise from the development. It would need to demonstrate that the impacts would arise only if the development proceeds, and that the impacts would be significant. Such material would need to be presented to a hearing as evidence from an expert and therefore be subject to cross-examination by all parties. No such evidence was presented to us. We therefore acknowledge the community concerns, but cannot agree with propositions that the number of objections is sufficient demonstration that this proposal would have adverse social or economic impacts. …"*

57. In relation to Hunt Club, the Tribunal noted that:[37]

> *"Section 60 of the Planning and Environment Act 1987 also requires that, before considering an application, a responsible*

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34 [2012] VCAT 1539 at [19].
35 [2013] VCAT 725 at [15] – [16].
36 At [27] – [29].
37 At [9] – [11].

> *authority (and, on review, this Tribunal) must consider certain matters, and may consider others. At present, s 60(1) includes significant environmental effects as a mandatory consideration, whereas s 60(1A) requires that a responsible authority "if the circumstances appear to so require" may consider "any significant social and economic effects of the use or development for which the application is made".*
>
> *Section 60 has recently been amended to make the consideration of significant social effects and economic effects mandatory, although the amending provision has not yet commenced operation. It is suggested that this is intended to give equal weight to environmental, social and economic impacts, to better accord with the objectives of the planning framework in s 4 of the Planning and Environment Act 1987, and to better reflect clause 10 of the State Planning Policy Framework in all planning schemes.*
>
> *The potential implications of this amendment to the Planning and Environment Act 1987 are as yet untested. For the purpose of answering the question of law before me, the combination of the existing discretionary consideration in s 60(1A) to consider significant social effects if the circumstances appear to so require, combined with the existing objectives of the planning framework in s 4 of the Act, and clause 10 of the State Planning Policy Framework, provide a sufficient basis for considering a significant social effect of a planning decision in appropriate circumstances." (emphasis added)*

58. As can be seen from the preceding passages and the provisions of the Act which the Tribunal must now consider, different consideration now apply from the test that was set out in the Hunt Club.

Submissions

59. The Objector submits that if a permit is granted, the development of the land for a convenience restaurant will have a significant social impact on the health of the children residing in the Mansfield area affected by the scheme.

60. Further, the objection must be considered by the Tribunal for the following reasons:

    (a) the fact that only development approval is required does not diminish the requirement that, by virtue of the operation of section 60(1)(f) of the Act,

the Tribunal must have regard to evidence of any significant social effects of the proposal;

(b) the impact of the convenience restaurant, once developed, on the children is identified in the objection and supported by expert opinion;

(c) the expert opinion relied upon by the Objector satisfies the requirements of the Act for that purpose and must therefore be considered by the Tribunal.

61. The cases relied upon by the permit applicant are not binding upon the Tribunal in this hearing and they must be assessed having regard to the following:

(a) the now mandatory requirement to consider significant social effects arising from the development of the land; and

(b) the factual and other grounds of the cases that can be distinguished from the circumstances of this case.

62. The Objector submits that the objection should be admitted by the Tribunal subject to weight as part of the balancing process of all planning considerations required by this hearing.

63. Now is not the time to strike out the objection. The Objector should be afforded the opportunity to fully develop the objection as part of its case. It should be heard by the Tribunal and considered in that light.

64. The Objector should be afforded the opportunity to present its full argument including leading evidence and, if appropriate cross examining any relevant expert or other witnesses.

15 February 2021

T S Pikusa
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Liability limited by a scheme approved under Professional Standards Legislation